

establish the breach of covenant and consequent right to possession. That however is not the case here.

The plaintiff apparently recognized that his claim for rent and his claim for possession arose out of one and the same cause of action but though in his plaint in the earlier suit he stated that he reserved his right to claim rent, he omitted to obtain the assent of the Court to the reservation. He is therefore barred by the express provisions of Order II, Rule 2, from now suing for the relief so omitted. We affirm the decree of the lower Court and dismiss the appeal with costs.

Decree affirmed.

G. B. R.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

JAN MAHOMED ABDULLA DATU AND ANOTHER, PLAINTIFFS v. DATU
JAFFER AND OTHERS, DEFENDANTS.*

1913.
August 28.

Khojas—Hindu law, how far applicable to Khojas—Joint family—Presumption as to membership of joint family—Mahomedan law—Spes successionis, transfer of—Family arrangement in the nature of a partition, reasonableness of—Limitation Act (IX of 1908), Articles 91 and 127.

In the year 1879 one D a Khoja was living at Malad in the Thana District, where he carried on a small business, together with *intër alia* his mother and unmarried daughter, his sons A and I and A's wife and A's son J. In that year it was agreed that A should separate from the rest of the family and should receive what was considered to be his share in the family property. The family property was valued at Rs. 4,500 and Rs. 900 or the fifth part of it was made over to A or the members of his family as his share, namely Rs. 400 in cash given to A, ornaments of the value of Rs. 200 given to A's wife and a house of the value of Rs. 300 settled on J. The terms of this transaction were contained in a deed of release dated the 13th of February 1879, by which deed A released all claims of himself and his wife and son against the family and family property.

* Suit No. 1021 of 1912.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

Subsequently I by himself or assisted by his father D continued to carry on business and acquired a considerable amount of property. After the release A lived in the house given by the release to his son J and some 12 or 13 years after the release another son was born to A, namely X. J and X at times lived with their grandfather D and their uncle I and received assistance from them in various ways, in particular their marriage and other ceremonies being performed from D's house and at his expense. J and X were at times also employed by D and I in their business for wages. In the year 1902 D made a gift to I of his property at Malad reserving about Rs. 7,000 to himself.

J and X filed the present suit. In their plaint they stated that the release of the 13th of February 1879 was not valid or binding as having been obtained by fraud, undue influence, etc., and also because it had not been acted upon. They prayed *inter alia* for a declaration that the abovementioned business and properties were the properties and business of an undivided family, that the rights of the plaintiffs and defendants therein might be ascertained and declared, that the properties might be partitioned between the plaintiffs and defendants in accordance with their interests so ascertained and declared, that all necessary accounts might be taken, that a receiver might be appointed, that D and I might be restrained by injunction from alienating the properties, that it might be declared that the release of the 13th of February 1879 was not valid and binding on the plaintiffs and A and that it might be declared that the deed of gift of the 8th of October 1902 was void and of no effect as against the interests of the plaintiffs and other members of the joint family.

D and I filed written statements denying the allegations as to fraud, etc., and asserting that the release of the 13th of February 1879 had been acted on. It was assumed in the pleadings that the parties were governed by the Hindu law of the joint family.

Held that, as to the law governing Khojas the proper way to approach the question was as follows :—

1. Where Mahomedans were concerned the invariable and general presumption was that they were governed by the Mahomedan law and usage and that it lay on a party setting up a custom in derogation of that law to prove it strictly.

2. But that in matters of simple succession and inheritance it was to be taken as established that succession and inheritance among Khojas and Memons were governed by Hindu law "as applied to separate and self-acquired property".

Held, accordingly, that the plaint disclosed no cause of action at all unless the plaintiffs had alleged and were prepared to prove two or three salient features of the Hindu law of the joint family as customs adopted by the Khojas of Bombay as the question involved in the suit did not really arise on

a plea of simple succession and inheritance and that there had been no allegation of custom and no attempt had been made to prove a custom and in any case many of the prayers in the plaint were on the face of them bad as the plaintiffs could not have the declaration asked for as to the nature of the property and their rights therein nor sue for partition.

Held, further, that assuming this to have been a joint family under Hindu law when A passed the release of the 13th of February 1879 he went out of the family and purported to take out of it his wife and infant son, that the plaintiffs could not dispose of the release as void under Mahomedan law as the mere transfer of a *spes successionis* as under Mahomedan law the plaintiffs had no cause of action and that X, having been born after his father A had gone out of the family, from the point of view of members of the joint family did not exist.

Held, further, that it could not be inferred from the facts that their grandfather and uncle had kept the plaintiffs, educated them and got them married, etc., that the plaintiffs thus became members of a joint family, that what was to be looked at in estimating the reasonableness of such family arrangements as the release of the 13th of February 1879 (under Hindu law) was not the state of the family fortune on the day it was called in question but at the time it was made and that if there was then an adequate motive the Court would not scrutinize too closely the adequateness of the consideration.

Ramdas v. Chabildas⁽¹⁾, applied.

Semble, where the existence of a document if valid and binding on a party would defeat his suit to recover possession of any property, he must sue under Article 91 of the Limitation Act for the cancellation of the document and that if he does not take steps in time to remove what else will be a bar to the success of his suit he cannot surmount that bar during the trial by exactly the attack he ought to have made on it directly and within the shorter period allowed by the law of limitation.

Semble, Article 127 of the Limitation Act does not apply to Mahomedans as such or to Khojas and Memons except where the property is shown to have gone through one unimpaired descent and thereafter to have been held by the survivors as joint family property.

Wasantrao v. Anandrao⁽²⁾, considered.

Semble, also, since no Khoja son can enforce a partition it follows that he cannot be a co-sharer.

Ahmedbhoy Hubibbhoy v. Cassumbhoy Ahmedbhoy⁽³⁾ and *Rani Sartaj Kuari v. Rani Deoraj Kuari*⁽⁴⁾, considered.

(1) (1910) 12 Bom. L. R. 621.

(2) (1904) 6 Bom. L. R. 925

(3) (1889) 13 Bom. 534.

(4) (1888) L. R. 15 I. A. 51.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

THE facts of this case and the contentions of the parties are sufficiently set forth in the judgment of the Court.

Bhandarkar and *Vaidya* for the plaintiffs.

Mirza and *Khan* for 1st defendant.

Wadia, with him *Strangman*, for 2nd defendant.

B. Wadia and *Modi* for 3rd defendant.

C. A. v.

BEAMAN, J.:—In this suit the plaintiffs, who are the sons of Abdulla Datu, a Khoja, pray that it be declared that the properties mentioned in the plaint and the business referred to therein are the properties and business of a joint and undivided family. That the rights of the plaintiffs and the other defendants therein be ascertained and declared. That the said properties be partitioned between the plaintiffs and the defendants, in accordance with their interests so ascertained and declared. That for these purposes all necessary directions be given, enquiries made, and accounts taken. That in the meantime a receiver be appointed. That the defendants 1 and 2 be restrained by an order and injunction of this Court from alienating or otherwise disposing of the same. That it may be declared that the release referred to in the plaint is not valid and binding on the plaintiffs and defendant 3, or in the events that have happened it is inoperative against the plaintiffs and defendant 3. That the deed of gift dated 8th October 1902, in favour of the defendant 2, is void and of no effect as against the interests of the plaintiffs and the other members of the said joint family. And other, for the present immaterial, prayers.

The written statement of the defendant 1 sets up limitation, want of jurisdiction, and without prejudice to those defences pleads on the merits, adopting the written statement of the defendant 2, that the release was not

obtained by fraud, etc., but that it was a perfectly fair and valid transaction and has been acted on ever since. The defendant 2 in his written statement says that in or about 1878 the defendant 3 and plaintiff 1, who was then his only son, separated from the joint family. The separation was recorded in the release Exhibit 1 in this case. At that time the joint family only owned a small shop wherein groceries and cloth were retailed. In or about 1887 this defendant began to deal in those commodities on his own account. The properties mentioned in Schedule A were all bought after the aforesaid partition, except a small house at Malad which came to the share of the defendant 1 on the partition, while the only other immoveable property of the family was allotted to the 1st plaintiff on the same. Most of the said properties belong exclusively to this defendant. Denies that since the death of Jaffer and the partition in 1878 the defendant 3 or the plaintiff 1 lived with the 1st defendant or himself as members of a joint and undivided family or as such acquired any immoveable property or carried on any business. At the date of the said partition this defendant was a minor, and the family then owned no immoveable property in Bombay. Denies fraud, undue influence, etc. Denies that the plaintiffs and their mother Ratanbai were maintained out of the joint family property or continued to live as members of the joint family after the release. Admits the performance of certain ceremonies but denies that the expenses were defrayed out of joint family funds. The release was acted upon and the defendant 3 is still living in the house given under it to the plaintiff 1. Denies that this defendant induced the defendant 1 to execute the deed of gift of 1902. Says that the defendant 3 and the plaintiff 1 have been living separate from the joint family ever since the release and have had nothing to do with the Bombay business and denies that the properties claimed were acquired by him for the joint

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

1913.

JAN.
MAHOMED
v.
DATU
JAFFER.

family as *benamidar* but were his own self-acquisitions. Says that he employed the plaintiff 2 in his shop but had to get rid of him as he was useless. The plaintiffs then set on foot rumours that they were interested in the properties now claimed in consequence of which these defendants had to file the suit in the Thana Court. This defendant separated in estate from the defendant 1 in 1885 but has continued to live with him. Sets out his self-acquisitions. Pleads limitation. And want of jurisdiction.

A perusal of these pleadings is instructive as showing how deeply this community has, under the pressure of judicial decisions, become tinged with the peculiar notions of the Hindu law of the joint family. In order to understand at the outset what is substantially in controversy it may be well to state one or two of the salient facts.

For the purposes of this case the family may be taken to have consisted of the father Jaffer, his only son Datu, and his two sons, Abdulla defendant 3 and Ismail defendant 2.

Abdulla had one son plaintiff 1 Jan Mahomed at the date of the release dated 13th February 1879.

Some twelve or thirteen years later the 2nd plaintiff Aziz, said to be now about twenty, was born.

There can be no doubt, indeed this is not denied, that during the life-time of Jaffer there was a small nucleus of "joint family property" which on his death was taken jointly by the survivors. The amount of this nucleus is disputed, the defendant 3 swearing that it was about Rs. 10,000, while the defendants 1 and 2 would reduce it to something inconsiderable. But at the highest I do not think it could fairly be taken to have exceeded Rs. 4,500, the figure alleged to have been made the basis of the partition effected by the release of 13th

February 1879. The whole of that property was at Malad beyond the local limits of this Court's jurisdiction. But between 1880 and the date of the suit Ismail the defendant 2 either by himself or assisted by his father Datu, the defendant 1, has acquired a great deal of valuable property in Bombay. I was told in the course of the trial that this property was now probably worth a lac of rupees. It cannot be pretended, and it has hardly been seriously argued, that either of the plaintiffs or their father contributed in any way to this enlargement of the family fortunes. True the plaintiff 1 has vehemently contended that he worked from a very early age in his grandfather's business, but there is no reason to suppose that if he did his services were of any value. He is a feeble diseased man, who, according to his own letters, was never able to earn a penny when left to himself. Abdulla, the defendant 3, has been a confirmed drunkard and loafer since his early youth. He has sworn that he took to drink at the age of seven and admits he has never done any work at all since the partition or release. He has lived in the house given by that release to his eldest son, the plaintiff 1, upon a pittance of eight annas a day allowed him (I suppose for drink) by Datu and four annas a day given him by his mother, with daily rations of food. The 2nd plaintiff is only now about twenty years of age and certainly could not have been of the least service to the family as a producer. Such being the facts, it is clear, that apart from the special features of the law of the Hindu joint family, these plaintiffs have no shadow of moral right to share in the life's earnings or acquisitions of their uncle Ismail. Datu, the grandfather, is a very old man, stating his age to be eighty-six. In 1902 he made a gift of all his Malad property to his son Ismail, who was then the efficient representative of the family. By this deed of gift he appears to have reserved to himself some Rs. 7,000 and it has been argued that he

1913.

 JAN
 MAHOMED
 v.
 DATU
 JAFFER

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

did this designedly to provide adequate shares in the joint family estate, as he believed it to stand, for his son Abdulla and his grandsons the two plaintiffs. Assuming that that were so, though I do not believe that it was, it would indicate that Datu himself laid no claim at all to the valuable properties which Ismail claims to have acquired for himself in Bombay. Nevertheless if the doctrine of nucleus is to be applied, I think it would be extremely difficult for the defendant 2, in the face of his own pleadings, to escape its legal consequences.

Succinctly stated, that doctrine, originating in our Courts in the old case usually called the *Peshwa's case* appearing to have been decided by Mount Stuart Elphinstone, is that where there has been a nucleus of joint ancestral family property; all subsequent additions and acquisitions by any member of the family while still living in union with the rest immediately take the imprint of the nucleus, and are joint family property liable to be divided on a partition between all the then existing members of the joint family. In the present case, for example, since it is admitted that the family was joint (*vide* written statements) and that there was a nucleus of joint property, which became, on the death of Jaffer, ancestral joint family property, it follows that as Ismail has never separated from Datu, all his later earnings and acquisitions would be traced theoretically to the fund from which they grew, and would be joint family property liable to be divided between every member of the joint family now alive. It would be open to Ismail to prove, if he could, that notwithstanding the original nucleus his own acquisitions were made independently of it, and were therefore true self-acquisitions not liable to partition between the members of the joint family. But this is always difficult. Indeed where the person claiming to have made such self-acquisitions has nevertheless remained in all other respects a member of the joint family, living in

union or, as the phrase goes, joint in food, worship and estate, it becomes, I think, virtually impossible for him to prove that he has acquired personal and separate wealth for himself not traceable to the "nucleus" root. The stock phrase just quoted appears peculiarly inappropriate to Mahomedans. A family may very well be joint in food, that is, the head of the family may keep an open table and give board and lodging not only to his sons and grandsons, which in accordance with oriental custom and the calls of natural affection every Mahomedan would probably do if he could afford it without the remotest intention of thereby giving any colour to claims which those who had thus enjoyed his hospitality might afterwards put forward to strip him of his wealth. But what could be meant by joint in worship? All Mahomedans are joint in worship, if they are good Mahomedans in a religious sense, although, as among members professing other great religions, there are to be found minor sects, and slight divergencies of ritual and dogma. Joint in estate begs the whole question. Mahomedans under their own law are never joint in estate, whether they live together or whether they do not. It is only when certain Mahomedan communities have been declared to be governed by the Hindu law, that the terms have any meaning. Living jointly in estate, then means no more than that if once they have formed a joint family, the members have not separated and partitioned the property, or possibly in the case of a single member desirous of withdrawing from the joint family without effecting a complete partition, he has not given a valid release of all his claims upon any share of the joint property. And I hope to show presently that judicial decisions have laid down sweeping propositions, which have had an extremely disastrous influence upon the flourishing and wealthy Khoja and Memon sects, and have gone far beyond any needed or hitherto known

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

application of the rule that a proved special custom may override the general law. This case raises many interesting questions of far reaching importance. It would be easy to answer them all in the usual way by citing this or that authority; but I have felt in the course of the elaborate arguments addressed to me, particularly, after a careful study of all these authorities, that it is time, and this may be a fitting opportunity, to resume from the beginning the course of judicial decisions; to examine those decisions critically and ascertain, if possible, what is the precise law today governing Khojas, Memons and less important classes of Mahomedans, who by one or another judicial decision have been subjected to their own serious prejudice and detriment, in my opinion, to the Hindu law of the joint family. I want to follow closely, if I can, not only the decisions but the reasoning upon which they are based, which, commencing in 1847 and proceeding with variations to the present day, are supposed in this Court to have established the proposition that the law of the Hindu joint family in its entirety governs the Khojas and Memons of this Presidency. I feel the imperative need of some such complete and exhaustive critical analysis of the case law, first, because I am convinced that under existing conditions the strict application of the law of the Hindu joint family, with all its legal incidents (none of which as far as I can see can logically be discarded) to the commercial fortunes of these peoples, is a very great and ever growing hardship; second, because I doubt very much whether in spite of the glib manner in which cases involving such grave consequences are cited, and accepted as final, the learned Judges responsible for most of the important decisions have really given or meant to give the complete law of the Hindu joint family operation over the Khojas and Memons of Bombay. If it can be shown

that certain propositions to be found in these judgments are really obiter, and have been much too broadly stated, the way will be prepared, if no more, to a reconsideration of the whole subject. That this is eminently desirable no one acquainted with the recurring litigation, rapidly increasing in volume attributable to this single cause, will be disposed to doubt. If, after all, the case law should be found to be inexpugnable, the Legislature must very soon step in to relieve these trading communities from the oppression of a system of law which does not properly belong to them, which was imposed upon them under totally different social conditions, and is utterly repugnant not only to their secular interests, but to their own law and religion. And here I will take the opportunity of quoting a passage from a judgment of my own in *Karsondas Dharamsey v. Gangabai*⁽¹⁾.

“The fundamental principle of the Hindu joint-family is the tie of sapindaship. Without that it is impossible to form a joint Hindu family. With it, as long as a family is living together, it is almost impossible not to form a joint Hindu family. It is the family relation, the sapinda relation, which distinguishes the joint family, and is of its very essence. The object of the early Hindu lawyers in clothing this family relation with special legal sanctions and far reaching consequences, was quite clearly to preserve the continuity of the family and seems to harmonize completely with so much else that is peculiarly characteristic of the Hindu law, and sentiment, similarly exemplified in caste restrictions, and indicative of the deep interpenetration of law by religion. The first care of the Hindu law-giver was to perpetuate religious observances, to perpetuate therefore the family, as a permanent unit, of which each succeeding generation was under sacred obligations to perform religious obsequies for the benefit of ancestors. Obviously connected with this is the need of worldly provision, and hence the legal attributes of joint-family property. There can be no alienation or delegation of spiritual duties. If the father could deprive his sons of the whole family property, he might render them incapable of duly discharging his appointed obsequies; so that where a father and sons held property together, the sons, along with religious duties, acquired civil rights, and in the same manner their sons and sons and sons, to the uttermost limit of the sapinda tie. That is the theory of the joint Hindu

1913.

 JAN
 MAHOMED
 v.
 DATU
 JAFFER.

⁽¹⁾ (1908) 32 Bom. 479 at p. 493.

1913.

JAN
MAHOMEDv.
DATU
JAFFER.

family, and I have no doubt that until English lawyers took it in hand, introducing English notions often on an imperfect acquaintance with the Hindu system, that it was almost uniformly and consistently worked. I do not deny that there were probably always exceptions in favour of special self-acquisitions, but these were exceptions, and the general rule was that where father and sons had lived in "commensality" with property applied to the common uses, whether that property had or had not in the first instance been acquired by the father, it received the impress of joint-family property and fell under the law regulating its descent."

I quote that passage because I am still of opinion that it rightly states the theory of the Hindu joint family in its connexion with the law and points clearly to its essentially religious origin. But surely had that been not only fully realized but kept prominently in sight, it might have given pause to any Court about to decide, as upon a mere custom in a particular case, that this quite unique branch of the Hindu law, rooted in, and inseparably bound up with Hindu religion, could in its entirety be transferred to large bodies who were not Hindus, but had a law and a religion of their own, of a totally different and on the whole antagonistic character. It is true that this momentous change was brought about in the first place with special reference to the origin of the Khojas and Memons. These were originally Hindus, who were converted to Mahomedanism about five hundred years ago by the Pir Sadrudin. And Sir Erskine Perry, whose judgment I am about to deal with, was satisfied that notwithstanding the lapse of time since their conversion, these peoples had adhered to the Hindu law of the joint family. But I doubt whether this makes allowance enough for the intimate and inseparable interpenetration at all points of law and religion among Hindus and Mahomedans. It is possible, but *prima facie* unlikely, that whole bodies of Mahomedans, neglecting the commands of their own law and the influence of their own religion, should adopt merely by way of custom, the entire complicated

and technical law of the Hindu joint family; but doing so could hardly be due, as Sir Erskine Perry appears to think, to inherited traditions, and a kind of religious atavism, nor after such adoption could any cogent reason be found to sustain the system. On the contrary, as time went on and these Mahomedans gradually lost sight of their ancestry before conversion, the imperative-ness of their own law and religion would certainly tend to dissipate rather than encourage any belated inclinations towards the old faith with its resultant laws that might have survived. Much more likely of course is the explanation that this assimilation is to be attributed to the pressure of surrounding Hinduism. But that is quite a distinct cause from that sought in these converts having been made from Hinduism. Any effects of that cause might reasonably be expected to have expended themselves and disappeared in, say, a century. It is, however, true that the preponderance of Hinduism, numerically at least, and its continuous pressure on other relatively small bodies enveloped by it, has shown itself to be more than once a *vera causa* of these later embedded alien elements assuming more or less completely, the general colour and character of the surrounding mass. There can be no doubt, for instance, but that during the years of their weakness and dependence for very existence upon the tolerance of the larger peoples surrounding them, the Parsis became something very like a Hindu caste. On the other hand, in estimating the pressure of such forces it should not be forgotten that never has the tension and vigour of the Moslem faith as a whole been so relaxed or spent, in Asia at any rate, as to allow its adherent to succumb to the mere dead weight of surrounding numbers. And it certainly does seem antecedently improbable that converts, who are usually most zealous for their new faith, should, a^t a time when

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

1913.

 JAN
 MAHOMED
 v.
 DATU
 JAFFER.

Mahomedanism was still aggressively predominant in India, have quietly lapsed back under the mere dead weight of Hindu environment, into, so far as all the practical side of life and business was concerned, their former Hinduism. Borrowing a custom from a neighbouring society is one thing; but the absorption of a complete group of legal notions in all their rigidity, rooted in and indissolubly bound up with an alien religion, and thus absorbed, regulating the largest part of life on its social and economic side, is surely quite another. There would be nothing very surprising in the Khojas and Memons having adopted the custom from Hinduism of allowing daughters on an intestacy no more than maintenance or dower; but it need not follow from that, even be the custom proved, that because that custom is consonant with the notions of the Hindu joint family and directly opposed to the Mahomedan law of succession, that those who had adopted it had at the same time voluntarily and consciously adopted along with it, every other legal incident of the Hindu joint family. And it may now be very confidently asserted that whether or not the Khojas and Memons of this Presidency had in 1847 adopted customs based on the law of the Hindu joint family, had those customs not been rather hastily, as I cannot help thinking, stereotyped by judicial decisions, they would long before this, with the expanding commercial prosperity and industrial enterprise of these peoples, have been utterly repudiated and abandoned. But a course of decisions beginning with *The Khojas and Memons' case*⁽¹⁾, which I shall now examine, soon rivetted the fetters of the law of the Hindu joint family upon these and later other Mahomedan groups in this Presidency; so that it now remains to be seen whether it is possible to undo what has been done, and so relieve these progressive

(1) (1847) Perry O. C. 110.

and wealthy communities from what I believe is generally coming to be felt an intolerable burden. Take this comparatively small case as an example. But for the extension or supposed extension of the Hindu law to Khojas in all matters of property, succession and inheritance, no litigation of this kind would have been possible, nor would an energetic trader like the defendant 2, Ismail, have been put to the risk of being obliged to share his property, undoubtedly in fact whatever fanciful theories of law may be woven about it, the result of his own skill and industry, with a brother and nephews who can have no remotely conceivable moral or equitable right to a penny of it.

What Sir Erskine Perry had to try in *Hirbae v. Sonabae*⁽¹⁾ was a narrow question of an asserted custom amongst these sectaries. The plaintiffs claimed under the Mahomedan law (the authority of the *Quran*) their share of their father's estate. The defendant set up a custom of the Khojas by which daughters were entitled to no more than maintenance and dower. Exactly the same point was in controversy in the connected case. But it will be seen from the judgment that at that time the Memons occupied a better social position than the Khojas, and were already recognized as a flourishing and progressive community. Part of the reasoning then, contained in the first part of the judgment, is to be restricted entirely to the Khojas as they then presented themselves to the learned Chief Justice. Although the Khojas were described as generally poor, illiterate and ignorant of their own law and religion, a considerable sum must have been directly or indirectly at stake. The estate of Hādhibhai Mir Ali is stated to have been about three lacs of rupees. A custom, as yet *res integra*, was to be proved; yet it appears that all the evidence was recorded in two days. In that short

(1) (1847) Perry O. C. 110.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

time the learned Chief Justice says that a great deal of oral evidence fairly representing the views of the entire sect was taken. What a contrast between those days and these? Were such a suit to come up for trial in this High Court today it is safe to say that it would occupy months. And it certainly does seem surprising that within the compass of two days the Court should have been able to get evidence enough to satisfy itself upon so large and vital a question as that which was then determined. It is significant too that the learned Chief Justice very plainly thought that by affirming the alleged custom he was conferring a benefit upon the Khojas and Memons, and giving legal sanction to a venerated and highly prized usage. This is clear, I think, from that part of the judgment in which the question of how far the *lex loci* should be applied is elaborately and learnedly discussed. It is part of Fate's grim irony that what was meant to be so great a boon should have with the lapse of time turned out to be a grievous burden. In 1847 the Khojas collectively were a scattered ignorant sect, residing principally in Cutch, Kathiawar and Bombay; whose commercial activities had not extended much beyond retail business on a very small scale, and many of them dressed like the Hindus, one of whose customs they were interested at this time in upholding. But today the Khojas like the Memons are far from being illiterate, have made great strides in social and commercial development, and for their numbers are probably as rich and thriving an industrial community as any to be found in the Empire. There is probably not an intelligent leader, or fairly representative man in the whole sect, who would not be pleased to be relieved of this nightmare of the Hindu law of the joint family hanging over all his business activities. The case was different even then with the Memons, and Sir Erskine Perry notes that having

regard to the great amount indirectly at any rate involved in this decision it is likely that the decision of the Privy Council will be invited. It would not therefore be fair to criticize this judgment from a point of view suggested by the first part of it alone, or to doubt that it would have been or might have been different had the state of both Khojas and Memons in 1847 been what it is today. But I cannot too strongly insist upon the extremely restricted scope of the enquiry. It was restricted to one alleged custom and that alone, namely the custom of excluding females from any share in a paternal estate. As far as I can see, and I have read the whole judgment very carefully, and I may say with interest and admiration, the learned Chief Justice never meant to decide or supposed himself to be deciding anything more. It was a custom which all that was influential and likely to be audible in the sect, was interested in affirming; those who pleaded against it for their rights under their own law were young defenceless women. Even today the Khojas and Memons would probably not object to the continuance of that custom standing alone. But parts of the learned Chief Justice's judgment, which are really no more than obiter, appear to pre-suppose as the ground of his decision a view that the Khojas and Memons had adopted not only this custom but the whole of the Hindu law to which it owes its origin. If the judgment be strictly analysed it will be found to go no further than this.

- (1) That a reasonable custom alleged and proved to have existed among a class, and not opposed to the written law of the ruling power (meaning here the English Statute Law), may be sanctioned by the Court.
- (2) That the words in the Charter of the Supreme Court "Law and usages of the Mahomedans" did not preclude a custom being legally recognized although it might conflict with the Divine law of the *Quran*.

1913.

 JAN
 MAHOMED
 v.
 DATU
 JAFFER.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

(3) That this particular custom was proved to exist among both Memons and Khojas. (4) That for the purposes of that case, the *lex loci* must be subordinated to the personal law of the litigants and that old well established usage, not conflicting with any written law of the ruling power, was part of that personal law and ought to be enforced by the English Courts. I hope I may be permitted to say that Sir Erskine Perry's judgment in this case is one of which this High Court may well be proud. But it certainly does not go the length or anywhere near the length to which it appears to have been carried later.

The next case in chronological order is *Gangbai v. Thavar Mulla*⁽¹⁾. This was a suit or petition by Gangbai (who must, I think, have been the same Gangbai, plaintiff *v.* Sonabai in the Khoja case just discussed) to have a charitable bequest contained in the will of Rahimatbai widow of Sajan Mir Ali set aside and to have her whole one-fourth of the residuary estate so bequeathed in charity, as the sole heir of Sajan Mir Ali. It is pretty clear from the form of the petition that whatever Sir Erskine Perry had decided or meant to decide in the *Kojahs and Memons' case*⁽²⁾, neither the petitioner here, nor her legal advisers, nor the Court, understood that decision to have made the entire Hindu law of the joint family applicable to these Khojas. Else of course there could have been no question of the widow making a will at all. The point actually decided is quite unimportant but the case is interesting because it illustrates the almost hopeless confusion of thought, which prevailed at that time in the Court, over questions of Hindu and Mahomedan law. The judgment was delivered by Sir Matthew Sausse, who says: "It appears that Rahimatbai was a female of the Khoja caste, which, although Muhamadan in

⁽¹⁾ (1863) 1 Bom. H. C. R. 71.

⁽²⁾ (1847) Perry O. C. 110.

religion, has been held to have adopted, and to be governed by, Hindu customs and laws of inheritance." I pause here to observe first that the Khojas are not a caste. Sir Erskine Perry is careful to call them sectaries. The use of the word "caste" implies that they were rather Hindu than Mahomedan and goes a long way towards begging the crucial question. But what follows illustrates still better the extremely loose way in which law is made by judicial decisions. It certainly was not held, as I have just pointed out, that the Khojas and Memons had adopted Hindu customs and laws of inheritance generally. Not a word, I believe, will be found in Sir Erskine Perry's judgment to support the proposition that he held that the Khojas had adopted the Hindu law or laws of inheritance. What he did find was that a single particular custom, which belongs rather to the Hindu than the Mahomedan law, was proved to exist among Khojas and Memons. Later the learned Chief Justice says: "Now represents the rights of the Khoja or Hindu heir-at-law." Again it is assumed without any evidence that Khoja and Hindu are interchangeable terms when prefixed to the words "heir-at-law", an assumption, it is submitted with respect, for which there is absolutely no foundation.

In 1866 *In the Goods of Mulbai*⁽¹⁾ was decided. It was held by Couch, C. J., that by the custom of Khojas, when a widow dies intestate and without issue, property acquired by her from her deceased husband does not descend to her blood relations but to the relations of her deceased husband. Here we come *in limine* upon another instance of that confusion of thought or loose use of language which hangs like a pall over this branch of the law. The actual point decided was that there was a custom proved amongst the Khojas (by the

1913.

 JAN
 MAHOMED
 v.
 DATU
 JAFFER

(1) (1866) 2 Bom. H. C. R. 276 (2nd Edn.).

1913.

JAN
 MAHOMED
 v.
 DATU
 JAFFER.

evidence of three witnesses only as far as I can see) which entitled the husband's relatives to succeed to his widow's estate, if she died intestate, in preference to her own kin. What is remarkable is that it appears to have been taken for granted in the statements of the witnesses quoted that a Khoja widow could will away the whole of her husband's estate, which is as inconsistent with the Hindu as with the Mahomedan law. The learned Chief Justice says (page 284) : " 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." All the comment which such a passage requires is that it appears to assume that in the first instance Khojas would be governed by the Hindu rather than the Mahomedan law, and that it would lie on any Khoja so alleging to prove that the Hindu law had been modified by some Khoja custom. With great submission, that inverts the order of procedure. For surely in every case, except those in which a custom has already been legalized, it is to be presumed that the Khojas being Mahomedans are governed by the Mahomedan law until a contrary custom has been established.

In 1874 *Shirji Hasam v. Datu Marji Khoja*⁽¹⁾ was decided, and it is from this time onward that the law becomes more definitely stereotyped. The case is commonly summarized thus : " In the absence of sufficient evidence of usage to the contrary, the Hindu law is applicable in matters relating to property, inheritance, and succession among Khoja Muhammadans." It will be noted that if this correctly represents the

(1) (1874) 12 Bom. H. C. R. 281.

decision a great step has been made. Now, it is to be presumed that Khojas, although Mahomedans, are governed by the Hindu law in all matters relating to "property" as well as succession and inheritance. It, therefore, becomes necessary to examine this judgment with some closeness. In the first part of the judgment devoted to the question, whether the property of the deceased had vested in the District Court, all that I need notice is that the learned Chief Justice Sir Michael Westropp speaks of Shivji as a "coparcener" and again as the manager of an undivided Hindu family. So far it appears to be taken for granted that the Khojas are governed by the Hindu law of the joint family, a proposition for which until this judgment there is absolutely no authority, I believe, to be found anywhere. The learned Chief Justice proceeds next to consider the contention that Khojas are not necessarily governed by the Hindu law of the Mitakshara. He refers to the *cause celebre* of *The Advocate General ex relatione Daya Muhammad v. Muhammad Husen Huseni*⁽¹⁾ decided in 1866 by Sir Joseph Arnould, but does not appear to deduce anything from it. He then goes on thus (page 291): "But in matters relating to property, succession, and inheritance, the Khojas appear to have retained to a considerable extent the Hindu law. In *Hirbae v. Sonabae*⁽²⁾ they succeeded in showing that the Koran did not govern the order of succession amongst them.....(Then after setting forth the facts of that case and merely inferring from those facts that Sir Erskine Perry's decision went much further than in fact it did, he goes on—). 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

1913.

JAN
MAHOMED
v.
DATU
- JAFFER.

(1) (1866) 12 Bom. H. C. R. 323 (note).

(2) (1847) Perry O. C. 110.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

property, succession, and inheritance the Hindu law as administered in this Presidency. Accordingly, in *Gangbai v. Thavar Mulla*⁽¹⁾, we find Sir Matthew Sausse, C. J., saying 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." I pause here to repeat that, while undoubtedly Sir Matthew Sausse does say that, it is apparently a mistake, since I am unable to find any case in which anything nearly as wide as that ever was decided. "*In the Goods of Mulbai*"⁽²⁾, already mentioned, it was held that when a Khoja widow dies intestate and without issue, property acquired by her from her deceased husband descends to his relations, and not to those of the widow." I pause again to point out that my critical examination of that case shows that it does not pretend even to decide more than the narrow question before it, namely, which is first in succession to a Khoja widow holding her husband's property, her own or her husband's kin? and expressly leaves it in doubt, to what extent the Khojas are governed by the Hindu law in other matters of property, succession and inheritance. The learned Chief Justice goes on: "In a contest for administration in a case of intestacy, which has lately arisen between the mother and widow of a Khoja at the Ecclesiastical Side of the High Court, and, after occupying Sir Charles Sargent many days in hearing, now stands for judgment, the Ecclesiastical Registrar has collected several precedents at that side, —some being cases disposed of by the Court and others by the Ecclesiastical Registrar. In all, the Hindu law, as indicating the person entitled to succeed to the property, would seem to have been taken as the guide in granting letters of administration, except in one or two instances, in which the person so entitled expressly

(1) (1863) 1 Bom. H. C. R. 71. (2) (1866) 2 Bom. H. C. R. 276 (2nd Edn.).

consented to the grant to another." This I take to be the real foundation of the decision for, as I have shown, the other cases cited so far certainly do not support it. But what is this ground? It is so vague that it can hardly be examined. But put at the highest it seems to be no more than this, that in intestacies on the Ecclesiastical Side, the Hindu law is followed in choosing the heir. Whether that practice be warranted or not, it is surely insufficient to be the basis of so wide a proposition as that the Khojas are governed by the Hindu law in all matters relating to "property, succession and inheritance".

The learned Chief Justice then cites the case of *In the Goods of Vallu Musani*, decided in 1855, where administration was granted by the Court to an undivided brother of the deceased in preference to his widow. I am unable to find that case, but I do not think it would throw much light on the problem I am trying to solve. For here again the entire question is begged when the brother is described as the "undivided" brother of the deceased. Upon these materials the learned Chief Justice concludes: "We think that we must consider it as the settled rule in Bombay that, in the absence of sufficient evidence of usage to the contrary, the Hindu law is applicable in matters relating to property, inheritance, and succession amongst Khoja Muhammadans. There has not been any evidence that, in such a case as the present, there is in Bombay any usage amongst Khojas opposed to the Hindu law. And 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 this way the conclusion is very summarily reached, a conclusion fraught with disastrous consequences to the Khoja community, that

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

the Khojas are subject to the Hindu law in all matters relating to property, succession and inheritance. I have traced the process *step by step* from its innocent beginning to its completion in this judgment. No one who reads the cases critically can help admitting that from the first the learned Judges, responsible for these far reaching decisions, have enlarged Sir Erskine Perry's decision *per saltum*. It is easy to say that this or that has "been held" or that the "traditionary doctrine of the Supreme Court and the High Court" has been this or that. But examination shows that what is thus declared in general terms to have been held, never has in fact been held, and that the "traditionary doctrine of the Supreme Court and the High Court" is a very unsound foundation for the large conclusion based upon it.

In the Goods of Rahimbhai : Hirbai v. Gorbai⁽¹⁾ was decided by Sir Charles Sargent in 1875. It was here held that a mother was entitled, by the custom of the Khojas, to the management of the estate, and therefore to letters of administration in preference to a wife or sister. Here for the first time since 1847 we find in the opening passages of Sargent, J.'s judgment an accurate statement of what really was decided in *The Kojahs and Memons' case*⁽²⁾ by Sir Erskine Perry. The learned Judge goes on (page 300) : "But it was said that in any case, since the judgment of Sir Erskine Perry, an uniform practice has prevailed in this Court in the exercise of its ecclesiastical jurisdiction, both in its contentious and non-contentious business, of administering the Hindu law of inheritance in the absence of proof of any special custom to the contrary. Now an examination of the records of the Ecclesiastical Side of the Supreme Court (during the interval of sixteen years which elapsed between the date of Sir Erskine Perry's

⁽¹⁾ (1875) 12 Bom. H. C. R. 294.

⁽²⁾ (1847) Perry O. C. 110.

decision and 1863) shows that there were as many as ten applications for letters of administration to Khoja estates, seven of which were disposed of by the Registrar as non-contentious business and three by the Court itself." (The learned Judge then deals with the instances.) The learned Judge then proceeds: "It is to be remarked that in all these cases, with the exception of two, the widow either applied for administration or entered a caveat, and that in all administration was either given to the widow, or, if not, it was with her consent, or under special circumstances, analogous to those of an undivided Hindu family, as in the case of *Vallu Musani*. It may be said that it would be unsafe to draw any positive conclusion from these scanty materials as to what the practice of the Court really was, although they undoubtedly point to such a practice as I have stated, and are difficult to explain on any other supposition." The learned Judge then finds strong corroboration elsewhere, and cites the case of *Gangbai v. Thavar Mulla*⁽¹⁾. The learned Judge also notices the case of *In the Goods of Mulbai*⁽²⁾. He concludes: "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 Matthew Sausse in *Gangbai v. Thavar Mulla*⁽¹⁾, satisfactorily shows, I think, that the Khojas have, for the last twenty-five years at least, been regarded by the Court, in all questions of inheritance, as converted Hindus who originally retained their Hindu law of inheritance, which has since been modified by special customs, and that an 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." Now assuming that the conclusion reached by the

1913.

 JAN
 MAHOMED
 v.
 DATU
 JAFFER.

(1) (1863) 1 Bom. H. C. R. 71. (2) (1866) 2 Bom. H. C. R. 276 (2nd Edn.).

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

learned Judge upon a careful examination of all the materials then available be correct, it ought not to be illegitimately extended. What Sargent, J., held was that in matters of succession the Khojas were governed by the Hindu law. But in the particular case he found a practice utterly opposed to the Hindu law, proved. The concluding part of his reasoning quoted above suggests this comment. Admitting that the Khojas were Hindus before their conversion it would not necessarily follow that they "originally" took over with them into their new faith, the whole of their old law founded on their old religion, and that it is only by gradual modifications that they have departed from it. The contrary is much more likely to be true. For converts, as previously observed, are usually zealots, and in the flush of conversion would be most unlikely to retain anything which in a peculiar degree linked them with the faith they had deserted. What probably happened was that as the fervour of their Mahomedanism cooled, and they felt more and more the surrounding pressure of Hinduism, they insensibly re-adopted many of the customs and notions belonging to Hindu law and religion. It is historically probable that the numerous Catholic converts to Christianity of the western coast of India, who can now hardly be distinguished from their Hindu neighbours, were at the time of their conversion very zealous and orthodox Christians. The point is of no practical importance. For adopting Sir Charles Sargent's conclusion, it goes only this length that in matters of succession it lies upon Khojas, who assert a custom opposed to the Hindu law, to prove it. That is a much more cautious statement of the real state of the law, and based on much more solid material, than the wide proposition that until the contrary be proved Khojas must be taken to be governed by the Hindu law in all matters relating to property, succession and inheritance.

This case went up on appeal and Westropp, C. J., in delivering judgment said (page 321): "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." ... "Now it is manifest that such a state of the law must greatly encourage litigation, and we cannot help thinking that it would be most desirable that the Government should take steps, as was done in the case of the Parsis, to ascertain the views of the majority of the community on the subject of succession, and should then pass an enactment, giving effect to those views."

I emphatically indorse those observations of the learned Chief Justice though I doubt whether if what really had been decided in every case as yet noticed, except *Shivji Hasam v. Datu Mavji Khoja*⁽¹⁾, had been clearly realized the mischief to which Westropp, C. J., adverts, need have been so serious, as it has since undoubtedly become. If the Khojas had been left under the Mahomedan law in all matters except those of intestate succession proper, that is to say, cases arising upon an intestacy, some of the heaviest cases which have since taken up the time of the Courts and exhausted the moneys of the litigants, need never have been heard. The present is a case in point. Even so I think the decisions have gone much too far. For the analysis I have bestowed on the cases, reveals the truth, that only two true customs were set up before the decision of Sargent, J., in *Gorbai's case*⁽²⁾, namely, the custom of excluding daughters from the share they would ordinarily have been entitled to under the Mahomedan law, and the custom of preferring the husband's male relatives to the widow's kin in succession to property received by a

1913.

 JAN
 MAHOMED
 v.
 DATU
 JAFFER.

(1) (1874) 12 Bom. H. C. R. 281.

(2) (1875) 12 Bom. H. C. R. 294.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

Khoja widow from her deceased husband. *Gorbai's case*⁽¹⁾ adds a third custom which is neither consistent with Hindu nor Mahomedan law, namely, that the mother is entitled to administration before the widow. The root of all the mischief, that is really dangerous, is to be found in the assumption made by the Court ever since *Gangabai v. Thavar Mulla*⁽²⁾, that the Khojas were to be presumed to be governed by the Hindu law in all matters of succession, inheritance and (since *Shivji's case*⁽³⁾ till once more modified by *Ahmedbhoy Hubibbhoy v. Cassumbhoy Ahmedbhoy*⁽⁴⁾) "property". This presumption suddenly makes its appearance springing from nowhere, rooted in nothing but "the traditional practice" of the Supreme and High Court and one or two *obiter dicta* of Sausse, C. J., in *Gangabai v. Thavar Mulla*⁽²⁾. I say *obiter dicta* for the point which had to be decided, and was in fact decided, was this and this only, whether a certain bequest to charity was bad for uncertainty. The decision turned upon the use of the English word "charity" in an English will, and it appears to me that it was entirely unaffected by the rather strained, I should be inclined to say, irrelevant argument out of which those observations of the learned Chief Justice arose. It seems to have been contended that because the Khojas were a "Hindu caste" in the eye of the law, the use of the word "charity" in the will of a Khoja woman must be a translation of the Hindu word "Dharam". Gifts to "Dharam" have been held void for uncertainty, therefore this gift must be void. Sausse, C. J., while seeming to accept the premiss that the Khojas were a Hindu caste for all purposes of succession and inheritance (which was going much further than any case decided up to that time), held that as the will was in English drawn under English advice, "charity" was not to be

(1) (1875) 12 Bom. H. C. R. 294.

(3) (1874) 12 Bom. H. C. R. 281.

(2) (1863) 1 Bom. H. C. R. 71.

(4) (1889) 13 Bom. 534.

read as a mere translation of "Dharam", but in its English legal sense, and so the gift was good. I am unable to agree with the later opinion that these *dicta* of Sausse, C. J., were more than *obiter*.

And as to the other root of this presumption what is to be said for the "traditionary practice" extending over a period of twenty-five years? It turns out to consist of ten cases in the sixteen years following on Sir Erskine Perry's judgment and of these seven were non-contentious. In the next nine years there were very few cases, and it would probably be within the truth to say that this traditionary practice rests upon less than half a dozen contentious cases disposed of, on the Ecclesiastical Side of the Court. It might be argued that the form of the petitions even in the non-contentious cases shows clearly that the parties interested launched their petitions on the understanding that the Hindu law governed them. But I attach little or no importance to any such consideration. For the form of pleadings is pretty sure to be moulded by the views of practitioners, and it is clear that the profession jumped early to the conclusion that the Khojas were only Mahomedan in name, while in fact and in the eye of the law, they were a "Hindu caste". The truth is that the origin of the series, Sir Erskine Perry's decision, does not raise any such presumption at all, but the exact contrary. That learned Chief Justice appears to have thrown, and very rightly, the onus of proving a custom opposed, *not* to the Hindu but to the Mahomedan law, upon any Khoja alleging it. And it is very difficult to account rationally, except upon the supposition of sheer misunderstanding, for the sudden inversion of this process which so soon came into vogue and appears to have met with the approval of the Court. Up to this point then, the point from which it is generally thought by the profession, the law became settled to this effect,

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

that in all matters relating to property, succession and inheritance the Khojas were to be presumed to be governed by the Hindu law, until a custom to the contrary was proved, I hope I have shown that if so settled at all the law was settled on the most insecure basis. I have paused here because the decision in *Shivji Hasam v. Datu Mavji Khoja*⁽¹⁾ is commonly cited as having finally laid down this rule, which has subsequently undergone at least one most material modification, and partly because I want to point out that what had to be decided and was in fact decided in *Shivji's case*⁽¹⁾ had nothing whatever to do with either succession or inheritance, but grafted on the law of the Khojas a dominant feature of the Hindu law of the joint family.

I do not think it can seriously be contended, when all the available materials have been thoroughly examined, that there was any warrant either in the case law or the traditional practice of the Court, then extant, for such an extension of all previous decisions.

The case in question came before the Court as a special appeal; it appears to have been treated in the lower Courts as though it were an ordinary case under the Hindu law; I do not think any special custom either in derogation of the general Mahomedan or Hindu law was set up or proved. But the learned Judges appear to have proceeded *per saltum* from the premiss that the Khojas before conversion were Hindus, one or two decisions showing that in matters of succession customs analogous to the Hindu law of the joint family had been proved, and a practice on the Ecclesiastical Side of the Court presuming that in matters of succession the Khojas were governed by Hindu and not by Mahomedan law, to the very much wider conclusion that in *all* matters relating to property, succession and inherit-

(1) (1874) 12 Bom. H. C. R. 281.

ance, they were presumed to be so governed till they could prove a local custom to the contrary.

Next follows in 1877 the case of *Rahimatbai v. Hirbai*⁽¹⁾ which was decided in the first Court by Sargent, J., and on appeal by Westropp, C. J., and Green, J. This was a sequel to the case of *Hirbai v. Gorbai*⁽²⁾. Gorbai having died made a will in favour of Rahimatbai. Hirbai the widow claimed her deceased husband's estate. All that is important in the judgment of the first Court for my present purpose is the seventh issue and the manner in which it was disposed of. That issue was whether in matters of inheritance the Khojas were not governed by the Hindu law, unless a custom to the contrary were proved; and Sargent, J., decided that they were, merely on the strength of his own decision, confirmed in appeal in the previous case of *Hirbai v. Gorbai*⁽²⁾. Westropp, C. J., in giving judgment said (page 39): "Both of these propositions are contrary to Hindu law; and 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." Thus we see in what a sudden summary manner the law became "settled". Sargent, J., and Westropp, C. J., were responsible for the previous judgments in *Shivji Hasam v. Datu Mavji Khoja*⁽³⁾ and *Hirbai v. Gorbai*⁽²⁾, respectively, so that it is not surprising that they should have regarded those decisions as final. But I have pointed out above, after tracing the history of this doctrine from its origin to this stage, what were the real and the only grounds for the statement henceforward, for a time at least universally accepted, that this

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

(1) (1877) 3 Bom. 34.

(2) (1874) 12 Bom. H. C. R. 294.

(3) (1874) 12 Bom. H. C. R. 281.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

far reaching question was settled. This case adds nothing whatever to the reasoning of the previous cases ; it is instructive because it shows how easily case law is supposed to be settled. In none of the intermediate cases, the steps by which this conclusion was reached with the single exception of Sargent, J.'s judgment in *Hirbai v. Gorbai*⁽¹⁾, was any real attempt made to analyze the contents of the preceding judgments, to state them accurately and define their true scope. I have shown that every time something was assumed to have been held, which never had been held, or that an inference was drawn from materials in themselves quite insufficient to sustain that inference. But in a small Court, where the leading practitioners remain for years, have themselves probably been engaged in most of the cases and so contributed by their arguments to the decisions, and are afterwards called on to advise on each fresh litigation, it is only natural that they should advise the use of terms appropriate to what they believe to be the law applicable. That is why in all these suits we now find the pleadings couched in terms taken from the Hindu law of the joint family.

In 1880 *In re Haji Ismail Haji Abdula*⁽²⁾ was decided. This was a probate case, and it was held that Cutchi Memons were not Hindus within the meaning of section 2 of the Hindu Wills Act, and therefore probate to take effect throughout India cannot be granted in the case of a Cutchi Memon testator. Cutchi Memons are Mahomedans to whom Mahomedan law is to be applied except when an ancient and invariable special custom to the contrary is established. Westropp, C. J., in delivering the judgment of the Court said (page 460) : " We know of no difference between Cutchi Memons and any other Mahomedans, except that in one point connected with succession it was proved to Sir Erskine

⁽¹⁾ (1875) 12 Bom. H. C. R. 294.

⁽²⁾ (1880) 6 Bom. 452.

Perry's satisfaction that they observed a Hindu usage which is not in accordance with Mahomedan law Under these circumstances we must hold them to be Mahomedans to whom Mahomedan law is to be applied, except when an ancient and invariable special custom to the contrary is established." It is a pity that the same view was not consistently held from 1847 about Khojas. Both sects were on virtually the same footing before Sir Erskine Perry. But in the case of the Khojas the major premiss almost immediately became inverted, while even in the case of asserted customs a relaxation of the general rule was permitted and carried great lengths ; apparently because the Courts were uncertain whether they really were Mahomedans or Hindus.

Here we find the effect of Sir Erskine Perry's judgment so far as it touches Cutchi Memons accurately repeated, and the correct legal consequences attached to it. Yet in all modern arguments at this bar, which I have heard, and I have heard a great many from the leaders of the profession, it has always been taken for granted that Cutchi Memons and Khojas stand in the same relation to the Hindu law, and no distinction has ever been made between them.

The next case of importance is again a Cutchi Memon case, *Mahomed Sidick v. Haji Ahmed*⁽¹⁾, decided by Scott, J. A Cutchi Memon had made a will. It was challenged on the ground that the property disposed of was "ancestral family property" and the will was held invalid on the ground that Cutchi Memons like Hindus had no power to dispose by will of ancestral family property.

It will be convenient to quote the more material passages from the judgment as they occur. The learned Judge says (page 9) : "The property disposed of by the

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

⁽¹⁾ (1886) 10 Bom. 1.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

wills (I should note that two wills were in dispute) consists entirely of profits made in a business started by the four brothers, Ismail, Abdsatar, Hassan and Ahmed, in 1845, under the partnership name of Haji Abdula Nur Mahomed, their father. It is now contended that the wills deal with joint family property, and are consequently invalid, and ought to be set aside . . . that the estates of the two deceased brothers, respectively, should be divided amongst the two families in accordance with the rules of Hindu law . . . First comes the general question,—the parties are Cutchi Memons—what is the law applicable to that community with respect to inheritance? Is it Hindu law? Is it Mahomedan law? Or have the Cutchi Memons created for themselves by their conduct, since their conversion, a special customary law which differs from Hindu law, inasmuch as it recognizes no distinction between ancestral and self-acquired property; and from the Mahomedan law, inasmuch as it gives a man unlimited power of disposing of all his property by will? . . . The intimate connection between law and religion in the Mahomedan faith justifies the presumption that converts to that faith, apart from any evidence of customs which the community may since their conversion have voluntarily imposed upon themselves, would be governed by Mahomedan law. This presumption has received the sanction of the Privy Council, where their Lordships say ‘but the written law of India had prescribed broadly that in questions of succession and inheritance the Hindu law is to be applied to Hindus and the Mahomedan law to Mahomedans,’ and in the judgment delivered by Lord Kingsdown in *Abraham v. Abraham*⁽¹⁾ it is said that ‘this rule must be understood to refer to Hindus and Mahomedans, not by birth merely but by religion also.’ But at the same time it

(1) (1863) 9 Moo. I. A. 195 at p. 243.

is quite clear that, where the natives of India are concerned, usage must override the presumptions of general law in matters of inheritance amongst converts to a new religion, just as much as in other matters The principles applicable to this case, therefore, may be stated as follows :—The general presumption is that the Mahomedan law would govern converts from the Hindu religion to Mahomedanism. But a well-established custom in the case of such converts to follow their old Hindu law of inheritance would override that general presumption.” I pause here to point out what has often occurred to me, namely, that a custom needs to be proved in each case as a custom, and that so large a custom as that of incorporating a complete widely ramifying and highly technical branch of law bodily from another religion and law, seems to me wider than any custom which has ever been proved in any Court. “And a usage establishing a special rule of inheritance as regards a special kind of property would be given the force of law even though it be at variance with both Hindu and Mahomedan law.” I am in entire agreement with the learned Judge so far. Condensed, what he starts with is this. The Mahomedan law must be presumed to govern the Cutchi Memons and by a parity of reasoning the Khojas ; but anyone alleging a special custom in derogation of it may prove it if he can, and well proved the Court will support it. Now let us see how the learned Judge applies his principle. “Have the Cutchi Memons by their conduct shown that they retained the Hindu law of inheritance as the customary law of their community ?” (I note on that again that the proposition appears to me much too wide. To make out such custom by conduct would require literally a thousand well established instances of every feature of the Hindu law of the joint family adopted by the Memons. Not only would they have to prove parti-

1913.

 JAN
 MAHOMED
 v.
 DATU
 JAFFER.

1913.

JAN
 MAHOMED
 v.
 DATU
 JAFFER.

cular rules of succession upon intestacies, but also the rights of the manager, rights of enforcing partition as between members (see later *Ahmedbhoy Hubibbhoy v. Cassumbhoy Ahmedbhoy*⁽¹⁾) and to these might be added many others, each one of which would need separate and elaborate proof.) "That question has been decided in the affirmative by a series of decisions in this Court." (These are the decisions I have already criticized and with great respect I submit that they have not decided anything of the kind.) "Cutchi Memons appeared as litigants in 1847... it was there held by Sir Erskine Perry that as regards Cutchi-Memon females, the Hindu order of succession applies, although it is opposed to that prescribed by the Koran." (I have shown that what Sir Erskine Perry did hold was that a single custom excluding daughters from inheritance was proved. That happened to be in accordance with the principles of Hindu, and opposed to the principles of Mahomedan, law; and that is all.) The learned Judge then proceeds to discuss the materials available on the Ecclesiastical Side of the Court, which are much richer in the case of Memons than Khojas, and concludes from these that the Hindu law has long been recognized in this Court as governing both Memons and Khojas. Upon that I need say no more than that very few of these were contentious cases, and doubtless in large measure owing to the opinion of the profession, it was taken almost for granted that in these matters of succession the Hindu law did apply. But in none of these cases was any custom set up in derogation of the Mahomedan law and duly proved as required by the learned Judge's own principle.

But the learned Judge concludes this part of his judgment: "The general principle is, therefore, that Cutchi

⁽¹⁾ (1889) 13 Bom. 534.

Memoirs are governed by the Hindu law of inheritance in the absence of proof of special custom."

It is not necessary to quote verbatim from what follows. It is, however, of great interest as exhibiting the attitude of a very learned Judge towards the question he had to try. In the first place he throws the onus of proving a custom repugnant, not to the Mahomedan but to the Hindu law, on the Mahomedans who claimed the application of their own law. This is opposed to his own principle, and can only be attributable to the belief that the general presumption had been shifted by the former decisions, as well as particular customs established by them. There is little doubt but that had the onus been placed on the party desirous of proving a custom repugnant to the Mahomedan but consonant with the Hindu law, great difficulty would have been found in discharging it. In his criticism of the evidence Scott, J., quotes witnesses who say that the Memoirs are governed by the Hindu law. True, but since when? Since Sir Erskine Perry's judgment. The emphatic witness who declares three times over that the community is now under the Hindu law which Sir Erskine Perry made for them "Hindu, Hindu, Hindu law" was probably so vehement because he was so indignant. It is enough to repeat that Sir Erskine Perry never did decide that the Hindu law governed these people. He found in favour of a particular custom, a very limited custom, which no one in the community except daughters, was at all likely to wish displaced. This is in all probability why Sir Erskine Perry's decision was not taken up on appeal to the Privy Council. But Scott, J., certainly thought that the evidence laid before him afforded confirmation of the view founded on the decisions I have criticized, that the Hindu law of the joint family governed these people. He next proceeds to discuss the question whether, if

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

that were so, the wills in suit were valid. He says "their validity, therefore, very much depends on the further question whether the property was ancestral or self-acquired." In the view taken so far by the learned Judge it might be thought that the validity of the wills depended entirely, not "very much" upon the property being self-acquired. The learned Judge then proceeded to apply the doctrine of nucleus and holds that the property bequeathed was ancestral family property and therefore that the wills were invalid.

It will be observed that this imports virtually the whole of the Hindu law of the joint family into the law of the Cutchi Memons, and is a great enlargement of any former decision. It is interesting to note that the evidence which the learned Judge heard impressed him with the idea that the community were anxious once more to be placed under their own law. He attributes this to a recent change of opinion. He believes that they acquiesced willingly in the decision of Sir Erskine Perry and for many years thereafter were quite content to be under the Hindu law of the joint family. I submit with respect that there is absolutely no ground for any such inference. They could hardly have anticipated that what was decided in 1847 would be stretched, as it has since been, so as not only to establish a very innocuous custom but to bring in gradually the entire complicated and to an enterprising commercial community intensely irksome Hindu law of the joint family. It is quite likely that they were impressed by the decision of Sir Erskine Perry and for many years did believe that the Courts had made a new law for them; but with increasing intelligence and prosperity it is incredible that they should have cheerfully acquiesced in the introduction of so radical and far-reaching a change. They might have resigned themselves without much apprehension to all that was ever actually decided

against them up to the judgment in *Shivji Hasam v. Datu Marji Khoja*⁽¹⁾. That, however, was a mofussil case, and is hardly likely to have attracted much notice among lay Khojas and Memons, although in the narrow circle of the profession it was taken to have finally introduced if not the whole, very nearly the whole, of the law of the Hindu joint family into the law governing Khojas and Memons. I have dwelt at some length upon this case, not only because the opening portion of the judgment is theoretically interesting in tracing the progress of this wide legal change by means of a series of judgments, but because it is the first, and, I believe, the only case yet decided, in which the principle or supposed principle of the earlier decisions has been carried the length of invalidating a will made by Memons or Khojas on the ground that it purported to dispose of ancestral joint family property, and by implication grafted on the law of Khojas and Memons the most dangerous and injurious of all the features of the Hindu law of the joint family, the doctrine of nucleus.

I should have mentioned, keeping strict chronological order, the case of *Ashabai v. Haji Tyeb Haji Rahimtulla*⁽²⁾, decided by Sargent, J. The learned Judge says (page 120): "The first question of importance which presents itself for decision in this case is as to the law of inheritance applicable to Cutchi Memons, to which caste the parties interested belong. The ecclesiastical records of this Court show that Khojas and Cutchi Memons have ever since the decree in the case of the 'Khojas and Memons' before Sir Erskine Perry . . . been regarded in the Supreme Court and subsequently in this Court as Hindus who had been converted to Mahomedanism whilst retaining their Hindu law of inheritance; and, so far as Khojas are concerned, the

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

⁽¹⁾ (1874) 12 Bom. H. C. R. 281.

⁽²⁾ (1882) 9 Bom. 115.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

decision of the Court of Appeal in the case of *Hirbai v. Gorbai*⁽¹⁾ 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. The above records are even richer in instances of the application of Hindu law of inheritance to the estates of Memons than to those of Khojas, and establish a non-contentious practice extending over many years. I think, therefore, that in the absence of any special ground of distinction, and none was suggested, no sufficient reason exists for placing Memons on any different footing from Khojas as regards the application of the Hindu law of inheritance in the absence of proof of any special custom, although undoubtedly it leaves the law, as pointed out by the Chief Justice in the above case of *Hirbai v. Gorbai*⁽¹⁾, in an incomplete state, which can only be satisfactorily dealt with by express legislation." And proceeds to apply the Hindu law, texts and all, to the facts of this family, found in the case. Now I note first the use of the word "caste" again as though the Memons really were Hindus. Next, it scarcely needs to be pointed out that this judgment is difficult to reconcile with that of Westropp, C. J., in *In re Haji Ismail Haji Abdula*⁽²⁾, decided five years previously. There the learned Chief Justice was clearly indisposed to assent to the proposition that the Memons were so far shown to be under any other law than the ordinary Mahomedan law with the single exception of the custom proved in derogation of that law in 1847. Nothing, as far as I can ascertain, had occurred in the interval to warrant any departure from or modification of the opinion then expressed by Sir Michael Westropp. Yet both in this case and in that of *Mahomed Sidick v. Haji Ahmed*⁽³⁾ it appears to have been neglected. And

(1) (1875) 12 Bom. H. C. R. 294.

(2) (1880) 6 Bom. 452.

(3) (1885) 10 Bom. 1.

once more, as regards the Memons, the sweeping conclusion, that they are in all matters of inheritance governed by the Hindu law of the joint-family, is chiefly based upon non-contentious matters coming before the Registrar of the Ecclesiastical Side of the Court, and partly upon the fact that the Supreme Court and after it the High Court had ever since 1847 regarded Memons and Khojas as converted Hindus who had retained the whole of the Hindu law of succession, and apparently along with that, that of the joint family. For here Sargent, J., goes back to the time, when the grandfather was living with his son who predeceased him, and speaks of them as constituting a joint undivided family. He refers also to a projected partition which fell through and cites the *Mayukha* as governing the resultant rights of property of the members of the family. As far as I can gather from the report the main claim of the women plaintiffs was utterly inconsistent with the Hindu law but it is not necessary to pursue that further.

I come next to the case of *Ahmedbhoy Hubibbhoy v. Cassumbhoy Ahmedbhoy*⁽¹⁾ decided on appeal by Sargent, C. J., and Bayley, J. This suit was instituted by Cassimbhoy, the son of Ahmedbhoy Habibbhoy, for partition. The first Court decreed it. This decision was reversed on appeal, and I will deal critically with that very important judgment. First, let me note that the trial Judge threw the onus of proving a custom in derogation of the Hindu law of the joint family upon the defendant. This was very natural in the light of the decisions I have just been dealing with, particularly *Ashabai's case*. Sargent, C. J., says (page 540): "Now it is to be remarked that the rule of this Court, to which Sir M. R. Westropp refers in the last case, *Hirbai v. Gorbai*⁽²⁾, is based on a dictum of Sir Matthew Sausse in *Gangbai v.*

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

(1) (1889) 13 Bom. 534.

(2) (1875) 12 Bom. H. C. R. 294

1913.

JAN
 MAHOMED
 v.
 DATU
 JAFFER.

Thavar Mulla⁽¹⁾, and the practice which had prevailed during the previous twenty-five years in granting letters of administration to the estates of deceased Khojas which is particularly referred to in the judgment of the Division Court in *Hirbai v. Gorbai*⁽²⁾. The dictum of Sir Matthew Sausse, that 'the Khoja caste had been held to be governed by Hindu customs and laws of inheritance,' must have been based on the practice of granting letters of administration to Khojas prior to 1863, when *Gangbai v. Thavar Mulla*⁽¹⁾ was decided; for besides the case before Sir Erskine Perry in 1847, which certainly did not lay down any such rule, the question would appear to have never arisen except on the ecclesiastical side of the Court. So far, therefore, as the rule is confined to the simple question of inheritance and succession, as to which the law-books present no difficulty, it would appear to be based on a long-established practice of the Court of applying Hindu law in the absence of proof of custom to the contrary, which might well justify the *onus* being thrown on the party alleging such custom, of proving it." Surely this indicates a marked backward swing of the pendulum from the same very learned Judge's attitude revealed in the case of *Ashabai v. Haji Tyeb Haji Rahimtulla*⁽³⁾ decided four years earlier. It may be conjectured, with all proper respect, that Sir Charles Sargent, now Chief Justice, who almost alone had never once misconceived or permitted any extension of what really was decided in *The Kojahs and Memons' case*⁽⁴⁾, began to doubt whether the subsequent series had not carried the law much too far. At the same time, as I shall have to show when I have done with the cases, it is extremely difficult, if not impossible, to dissociate the Hindu law of "succession" from

(1) (1863) 1 Bom. H. C. R. 71.

(3) (1882) 9 Bom. 115.

(2) (1875) 12 Bom. H. C. R. 294.

(4) (1847) Perry O. C. 110.

all that is inextricably bound up with it, by way of antecedent, in the general Hindu law of the joint family. I doubt myself whether it is possible or whether the distinction sought to be made in the case now under discussion between "simple" succession and such points as were dealt with by Scott, J., and for the matter of that by Sargent, J., himself in *Asha's case*⁽¹⁾ can be practically maintained.

The ground of this distinction taken by the learned Chief Justice is however very clear. Briefly it is this: The right of the son, under the Hindu law, to demand a partition of joint family property during his father's life-time, particularly when the bulk of that property is moveable, has always been uncertain and much debated among Jurists, right up to the decision in *Jugmohandas Mangaldas v. Sir Mangaldas Nathubhoy*⁽²⁾. It is extremely unlikely that in or about A. D. 1400 the Hindus, who were converted and became Khojas, had any definite ideas about it. It cannot, therefore, be presumed that they carried that feature of the present Hindu law with them into their new faith, and it lies on the party alleging, that it is the custom of the Khojas that a son has the right to demand partition from his father, to prove it. This was held in fact not to be a question relating to succession or inheritance at all. Further on in his judgment the learned Chief Justice says (page 543): "It is true that the witnesses go even so far as to say that there is no distinction between ancestral and self-acquired property as regards alienation by the father, but without being able to cite any instance of a Khoja alienating ancestral property, by will or otherwise, away from his sons; but, however that may be, the right of the sons to object to alienation by their father is quite

1913.

 JAN
 MAHOMED
 v.
 DATU
 JAFFER.

⁽¹⁾ (1882) 9 Bom. 115.

⁽²⁾ (1886) 10 Bom. 528.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

consistent with their having no right to demand partition of ancestral property during his life, which is the only point now for consideration, and which affords the only reasonable explanation of their submitting to be turned out without any share." With great submission it may be doubted whether such a right as is here hinted at, and which is almost certain to give rise to much litigation, is not inconsistent with the absence of any right to demand partition. It is clear that the latter is opposed to the Hindu law; while the former could only be upheld on the supposition that the Hindu law applied. The one is indeed a complementary right of the other. It is because according to the principle of the Hindu joint family every son takes an interest at birth that he is entitled as against his father to demand partition, and similarly to prevent his father independently alienating any part of the joint family property in which *ex hypothesi* the son has his own right. It would be strange indeed on the supposition of conscious selection, which has to be here introduced in place of the older theory that as Hindus they unconsciously, so to speak, carried the whole of their former law with them, these communities should have adopted the right of the son to prevent his father alienating any part of the joint family property but should have rejected the right of the son to demand partition of it. Sargent, C. J., proceeds "Nor, indeed, is it to be wondered at that the custom should be different in Bombay from what it is stated to have always been in Kathiawar and Cutch. Since the Khojas have settled in Bombay, which is said to have been for the last hundred years, they have engaged in commerce, and greatly increased in wealth. From being cultivators of the land with very limited personal property, they have become active and energetic merchants, contractors, and men of business, and it was only to be expected that, under these circumstances,

such a custom as is stated to have existed in Kathiawar would in course of time undergo modification. Such would naturally be the wish of the leading men of the community who had accumulated capital, and would gradually under their influence permeate the lower strata of the body corporate until the old usage would gradually fall into desuetude, and the strict right of the son, if it ever existed, be lost, with the approval of the general community." I submit again that all this applies with at least equal force to the possible right of a son to prohibit his father's alienations, and with much greater force to the introduction of the devastating doctrine of nucleus. I am not surprised that the witnesses in this case refused to recognize any distinction among Khojas between ancestral and self-acquired property. Yet in *Mahomed Sidick v. Haji Ahmed*⁽¹⁾ the burden of proving this as a special custom was thrown upon the party so alleging, and the Court held that he had failed to discharge it. As I said before, had the burden been placed upon the other party, what occurred in this case only a few years later fully bears out my anticipation that it in turn would not have been discharged. What can be more continually oppressive, harassing and vexatious to a prosperous business-man than the reflection that he will not be permitted to dispose of his life's earnings by will because in his childhood he was nurtured and trained for business in his father's home and little village shop. Yet that is the effect of the decision in *Mahomed Sidick v. Haji Ahmed*⁽¹⁾.

In *Abraham v. Abraham*⁽²⁾ the Privy Council pointed out that usages are not independent of volition, and may, unless their continuance be enjoined by law, as they were adopted voluntarily, be also changed or lost by desuetude. Now in the case of these Khojas

⁽¹⁾ (1885) 10 Bom. 1.

⁽²⁾ (1863) 9 Moo. I. A. 195.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

and Memons so far from the customs already legally enforced by our Courts, and of which further extension in every direction is always being attempted, being enjoined by, they are directly opposed to, their law. And it is certain, as appears clearly enough from the dicta of most of the eminent Judges whom I have been quoting, that as far back as 1880 it was generally felt that if the will of these communities could be consulted, they would throw off all connexion with the Hindu law. Unfortunately for them, the Court took the matter out of their hands, and stereotyped a custom here and there, while giving colour to the very much larger proposition, that the Hindu law was to be presumed to apply, not this or that custom, be it reiterated, but the whole Hindu law, in matters of succession and inheritance. But for the decisions following upon *The Khojahs and Memons' case*⁽¹⁾ of 1847 no one, who has any knowledge of the subject or the sentiments of the leaders and representatives of these sects, could doubt that nothing would be heard today of any custom tending to bring them collectively under the bondage of the law of the Hindu joint family. Sir Charles Sargent's comments on the contemplated legislation of 1878 are strikingly suggestive, indeed, I think conclusive on this point. The Court, having held that the plaintiff had no right to insist upon a partition, went on to consider whether the defendant's wealth was traceable to a "nucleus", thus again by implication importing that special feature of the law of the Hindu joint family into that of the Khojahs. These *obiter dicta*, very unfortunate *obiter dicta*, I cannot help thinking, together with the other *obiter* I have cited ante, suggesting that a Khoja son had a right to prohibit his father alienating the joint property, bore their natural fruit. In the case of

⁽¹⁾ (1847) Perry O. C. 110

Ahmedbhoy Habibbhoy v. Sir Dinsha M. Petit⁽¹⁾, which I tried, although the actual prayer was for specific performance of a contract for sale, the plaintiff made the most desperate attempts to get a side decision from the Court that his property was his own, and that his sons had no right to it on the footing of a Hindu joint family. That question could not properly be decided in that suit. Shortly after another indirect attempt was made by way of a summary suit under the Specific Relief Act to get the same question answered. But it is still open and will inevitably give rise to enormously expensive and protracted litigation.

In an insolvency matter, *In the matter of Haroon Mahomed*⁽²⁾, decided by Sargent, C. J., and Scott, J., the parties were Cutchi Memons. The question was whether one alleged member of a partnership was to be adjudged insolvent. The firm as a firm had been so adjudged and none of the other parties objected. The matter seems to have been tried on affidavits. Sargent, C. J., said (page 193): "As Cutchi Memons, the rules of Hindu law and custom apply to them, and the position of the appellant with regard to the family property must be determined by the same considerations as would apply in the case of a member of a joint and undivided Hindu family." This once more brings the Cutchi Memons under the entire law of the Hindu joint family and appears to me, with respect, irreconcilable with what the same learned Chief Justice had laid down in *Ahmedbhoy Hubibbhoy v. Cassumbhoy Ahmedbhoy*⁽³⁾, where the presumption was carefully restricted to matters of succession and inheritance. True that was a Khoja case, but looking to the whole current of decisions if any distinction can be made at all it would, I think, rather be in the direction of exempting the Memons to a greater extent

1913.

 JAN
 MAHOMED
 v.
 DATU
 JAFFER.

(1) (1909) 11 Bom. L. R. 545.

(2) (1890) 14 Bom. 189.

(3) (1889) 13 Bom. 534.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

than the Khojas from the law of the Hindu joint family. The Chief Justice goes on: "The firm then was a family firm, and was the property of a family subject to Hindu law."

But it is certainly astonishing to find the learned Chief Justice who had so very recently set himself to strike out "property" from the rule that Khojas and Memons are subject to the Hindu law in all matters "relating to property, succession and inheritance" now laying down the law more broadly and in more unqualified terms, I think, than ever before in the opposite direction.

I may conclude this review of the case law by referring very briefly to the decisions of Ranade, J., which have the effect of bringing two more groups of Mahomedans, under the Hindu law, whether partially or completely I will not stop to enquire. In *Bai Baiji v. Bai Santok*⁽¹⁾, it was held that the Sunni Borahs of Dhandhuka were governed by the Hindu law in all matters of succession and inheritance. Ranade, J., said:—

"The following principles may now be regarded as settled: (1) Mahomedan law generally governs converts to that faith from Hinduism; but (2) a well established custom of such converts following the Hindu law of inheritance would override the general presumption. (3) This custom should be confined strictly to cases of succession and inheritance. (4) If any particular custom of succession be alleged which is at variance with the general law applicable to these communities, the burden of proof lies on the party alleging such special custom."

The decision in *In the matter of Haroon Mahomed*⁽²⁾ shows how very much further the Courts have actually gone in practice than this cautious statement of principle would have warranted. Ranade, J., says (page 56):—

"The appellant's counsel very properly urged that the burden of proving that a community of people professing the Mahomedan faith were not

(1) (1894) 20 Bom. 53.

(2) (1890) 14 Bom. 189.

governed by the Mahomedan law of succession, but by the usages and customs of the old Hindu faith to which their ancestors belonged, rested on the defendant. At the same time we do not think he was right in maintaining that this usage or custom should be proved in regard to the particular relationship which the parties to the present suit bear to one another. If the evidence is clear on the point of the general prevalence of the Hindu rules of succession in preference to the rules of Mahomedan law, the burden of proof will be discharged, and it will then be for the appellant to show that this particular relationship was excluded from the sphere of the proved general usage of the community."

This brings out very clearly a point taken in an earlier part of this judgment; and I submit that the dictum of the learned Judge is open to question. I do not see why any distinction should be drawn in these cases merely because the parties happen to belong to a particular religion and be under a particular law, where it is said that a custom drawn from another religion and law obtains among them between the proof of that and any other custom. A custom is set up in derogation of the general law, and, in my opinion, it is that custom which the party alleging it is bound to prove. I think that the enquiry ought to be restricted to the proof of that custom and not opened upon so wide a ground as the proof of the adoption of a whole body of alien law, which really never is proved or attempted to be proved, and always starts from general premises reasoning from which may or may not include the particular custom alleged. It is due to this method of dealing with the cases, that bodies of Mahomedans have so facilely been adjudged to be generally governed by the Hindu law of succession, inheritance and the joint family, chiefly upon the undisputed fact that before conversion they too were Hindus. All the facts which are usually put first in this process of proof and are usually taken to warrant the conclusion by inference upon the particular point to be determined, a custom of which in this method of treatment

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

no proof at all need be given, ought, in my opinion, to be merely adduced as ancillary to and corroborative of what other direct evidence proving the alleged custom may be forthcoming. Had that method been followed, it is doubtful, whether the conclusions which have been arrived at in some cases would ever have been reached.

The learned Judge then proceeds to enumerate all the cases I have dealt with, without critically examining any of them, but as a result he draws the principles which I have quoted above. These I have shown to be very different from what in practice has been assumed to be the result of the cases, as they developed, I think I might correctly say evolved, the one out of the other. The learned Judge then goes on to state that the question which had to be answered first was whether this group of Mahomedans occupied the same position and status as the Khojas and Memons. It is to be noted that this was a claim by a daughter under the Mahomedan law, and that the oral evidence alone, taken with the long list of decrees mentioned by the learned Judge, would have been amply sufficient to establish the custom relied on by the defendant, that among these Mahomedans a daughter was excluded without any necessity of going further and laying it down generally that this community had adopted the whole Hindu law of succession. It is extremely probable that in the case of daughters such a custom (which was exactly the same as that upheld in *The Khojas and Memons' case*⁽¹⁾) has grown up and long been observed among the Mahomedans of that part of the Presidency.

Another judgment in the same volume, *Maharana Shri Fatesangji Jasvatsangji v. Kuwar Harisangji*

⁽¹⁾ (1847) Perry O. C. 110.

Fatesangji⁽¹⁾, similarly extends the Hindu law of succession and inheritance to the Molesalam Girassias of Gujarat. This suit comes from Broach; it was decided by Ranade, J., shortly after the case last noted, and many of the materials were the same; the parties were originally Rajputs. The plaintiff raised a very simple narrow point, namely, whether the plaintiff was entitled to *khoralaki poshaki* (food, dress and maintenance). That is a custom not, with submission, any more a part of the general Hindu than of the general Mahomedan law. And it would have been enough to put the party alleging it to the proof of it. This would have been in strict accordance with the learned Judge's own principles deduced in *Bai Baiji v. Bai Santok*⁽²⁾ from all the preceding decisions. But the course followed was the common course. First, it was proved to the satisfaction of the Court that the parties, although Mahomedans, had adopted the entire Hindu law of succession, etc., then the onus of proving a custom inconsistent with or opposed to the Hindu law was thrown on the defendant. *Jiwai, khoralaki poshaki*, etc., are all incidents of State tenure where the Raj itself is impartible. I should hesitate to say myself that they are any more opposed to the Mahomedan than the Hindu law. Mahomedan States throughout Kathiawar and Rajputana, I believe, observe these customs. But the learned Judges in this appeal were of opinion that these appanages were part of the Hindu law, as modified in cases of impartible estates, and therefore threw the burden of proof on the defendant. Again I say the decision was reached by what, it is respectfully submitted, was a wrong path, and goes far beyond the scope of the actual controversy, deciding much more than was needed to dispose of the particular claim.

1913.

 JAN
 MAHOMED
 v.
 DATU
 JAFFER.

(1) (1894) 20 Bom. 181.

(2) (1894) 20 Bom. 53.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

This review of the case law is necessary in order to come to a decision upon the question how far the Hindu law of the joint family governs Khojas in this Presidency. For it is obvious that if it does not govern them the plaintiffs in this suit have no cause of action. Every one of the reliefs sought is founded directly or indirectly in the Hindu law of the joint family. And the difficulty which always confronts a Judge of this Court in such cases, a difficulty which is daily growing, is to draw a line, if possible, between "succession and inheritance" and the complete Hindu law of the joint family. The late Mr. Justice Russell is credited with the witty epigram that under the existing law of this Presidency, Khojas and Memons are to all intents and purposes live Mahomedans but dead Hindus. If that correctly represented the effect of the decisions it would be very easy to administer the law, and its administration on those restricted lines would not give rise to much just complaint. Unfortunately there has been a steady tendency, clearly marked in the most recent cases, to substitute the general presumption that the Hindu law, for the natural and older presumption that the Mahomedan law, governs these groups of Mahomedans, and to make that presumption the starting point of each enquiry. I think I have conclusively demonstrated that the principles which the later cases purport to enforce cannot, really, be found, apart from rather sweeping generalizations, in the cases from which they are said to be derived. So far as the Khojas and Memons are concerned three customs have been held proved, two in agreement with, and one opposed to, the Hindu law, and all these customs belong properly to intestate succession; these are: (1) That daughters do not inherit as they would under the Mahomedan law. (2) That the brothers of a deceased

person or his kindred (reversioners ?) are to be preferred to the widow—this may be taken to be in accordance with the Hindu law if it be assumed further that the family was joint in the sense of a Hindu joint family but not otherwise. (3) That a mother is to be preferred to a widow for purposes of administration. Leaving aside the Broach and Dhandhuka cases decided, within a few months of each other, by Ranade, J., where in both cases the point actually in dispute was really decided upon proof (or supposed proof) that the groups concerned had adopted the whole Hindu law of the joint family, these are the only customs which have been held proved amongst Mahomedans in this Presidency as far as I know, certainly the only customs proved amongst Khojas and Memons in derogation of the Mahomedan law. And from the first case to the last, when the learned Judges turn back to first principles, we find a reiteration of the proposition that where Mahomedans are concerned the Courts are to start with the presumption that the Mahomedan law governs them. So that, but for the constant references to the “traditional doctrines” of the Supreme and High Court on its Ecclesiastical Side, which is supposed to have established the further proposition that Khojas and Memons are governed by the Hindu law (not by any particular feature of it, adopted as a custom) in all matters of succession and inheritance, it would appear that there was scant ground indeed and that but treacherous, for the superstructure of case law and resultant concensus of professional opinion, which today combine to render it a doctrine accepted and hardly even challenged that to this extent these groups of Mahomedans have renounced their own, in favour of the Hindu law. But the decisions go much further. For while I do not think that in any case which is regarded as an authority, and so made a fresh starting point, is there

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

to be found as a statement of recognized and settled principle, more than this, that in succession and inheritance (I omit the word "property" only found in Sir Michael Westropp's judgment in *Shivji Hasam v. Datu Mavji Khoja*⁽¹⁾) the actual decisions cover almost the whole field of complicated law, which is the Hindu law of the joint family. Thus it has been decided that a Cutchi Memon cannot dispose by will of "ancestral joint family property", although it is clear that at the time the will was made, no question of succession and inheritance had been opened, nor can the quality of the property really come in question, during the life-time of a Mahomedan under his own law, as necessarily referable to two opposed categories, ancestral or self-acquired. It is true that the learned Judge who decided that case took evidence (but after, as is now submitted with all deference, throwing the onus on the wrong party) of a custom amongst Memons under which no distinction is made between ancestral and self-acquired property. But if the learned Judge had kept his own stated principles in sight, and I think it ought to be presumed that he did, he could only have taken that course upon the supposition that the distinction between ancestral joint family property and self-acquired property was included under the terms "succession and inheritance". The whole Hindu law of the manager was introduced, without any evidence of custom, by the judgment in *Shivji Hasam v. Datu Mavji Khoja*⁽¹⁾ presumably because at that time the learned Chief Justice believed it to have been already established, and so to have become a part of the law of the Presidency, that the Hindu law of joint family property must in each case now be presumed in the absence of custom to the contrary to govern Khojas and Memons. In the

(1) (1874) 12 Bom. H. C. R. 281.

concluding part of the judgment of Sargent, C. J., in *Ahmedbhoy Hubibbhoy v. Cassumbhoy Ahmedbhoy*⁽¹⁾, in spite of having declined to admit so broad a proposition without qualification, and after having refused to apply the Hindu law in one very important point to these Khojas, we find the whole argument proceeding upon the assumption that the Hindu law of the joint family is applicable. The nucleus doctrine is taken for granted as having been engrafted with the rest of the Hindu law of succession and inheritance upon the law of Khojas and Memons. And at last in *Haroon's case*⁽²⁾, we find Sargent, C. J., himself giving judgment upon the basis of the parties being governed by the Hindu law of the joint family, in an insolvency matter, which viewed in any light could hardly fall within the principle so frequently and carefully enunciated by that very learned Judge himself in previous cases, that the presumption went no further than matters of inheritance and succession. Here a firm carried on by four Cutchi Memon brothers was treated exactly as though they were a joint and undivided Hindu family and the firm a joint family asset. Never has such a custom in derogation of the Mahomedan law been set up, as far as I know, much less proved; and it can only be upon the assumption that an entire system of law can be adopted as a "custom" and that the entire Hindu law, not only of succession and inheritance, had been so adopted and proved to have been adopted by Khojas and Memons, that the judgment in this case is intelligible. In the last case decided by Sir Michael Westropp, however, that most eminent Judge, so far as Cutchi Memons are concerned, went right back to the original (and I submit with great respect the correct and only correct) starting point. He refused to recognize any established general distinc-

1913.

 JAN
 MAHOMED.
 v.
 DATU
 JAFFER.

(1) (1889) 13 Bom. 534.

(2) (1890) 14 Bom. 189.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

tions between these and other Mahomedans and, excepting the single custom proved up to that time, the exclusion of daughters from the inheritance in 1847 declared emphatically that any other custom alleged in derogation of the general Mahomedan law must be proved strictly by the person alleging it. I cannot help thinking it much to be regretted that the learned Judge, who decided *Mahomed Sidick v. Haji Ahmed*⁽¹⁾ a few years later, did not guide the proceedings by the principles thus emphatically laid down by Sir Michael Westropp.

At the same time I own that I find it very difficult to say precisely where the Hindu law of succession and inheritance can be separated from the rest of the Hindu law of the joint family. At present the Memons and Khojas, taking them together, are in this peculiar and most undesirable position. They are presumed to be governed by the Hindu law in all matters of succession and inheritance; but in all other respects they are presumed to be governed by the Mahomedan law. It has been definitely decided (1) that among them daughters are excluded from the inheritance and are entitled to no more than maintenance and dower. (2) That the relatives of the deceased husband take in preference to the widow (this leaves a wide door open for further complicated and expensive litigation, and is utterly inconsistent with what appears to have been often taken for granted in the arguments and criticism of the evidence that a widow can dispose of her husband's property by will). (3) That a mother is entitled to administer before a widow, referable to no known principle and resting upon a proved custom only. (4) That a son cannot enforce partition against his father (consonant with no known law), but (obiter) that he may prohibit his father alienating the joint family property, again a wide door opened to the most pro-

(1) (1885) 10 Bom. 1.

tracted and expensive litigation. (5) (More or less obiter) That the nucleus doctrine of the Hindu joint family governs Khojas and Memons, which is I think the most disastrous feature in any of the decisions, not referable certainly to the "established principle" that the Hindu law of succession and inheritance governs these people. (6) That the law of the manager in a joint family, under the Hindu law, governs Khojas and Memons. (7) That in every respect the law of the Hindu joint family governs Khojas and Memons where members of a family are found to be living and trading together (*Haroon's case*⁽¹⁾). No wonder these communities are growing restive and dissatisfied. The whole law needs the most careful revision, and should, in my opinion, wherever possible, and it has shown a tendency to extend the operation of the Hindu law of the joint family to these groups of Mahomedans, be once more confined within the narrowest limits the cases allow. Can it be said that the radical distinction made by the Hindu law of the joint family between joint family and self-acquired property can be wholly separated and kept apart from what Sir Charles Sargent called a simple law of succession and inheritance? If it can, and if so long as the head of the family is alive he can, under the Mahomedan law, dispose of the whole of the property by gift *inter vivos* or by will to the extent of one-third, some part at least of the hardship, which has been inflicted upon these groups of Mahomedans by case law, might be remedied. But it would not be the greatest part. For in every case of an intestacy the question, now to be answered with reference to the Hindu law, would surely be raised, whether the property was joint family or self-acquired, involved in which would be the endless quest after the original nucleus. Again there is a probability, to say no

1913.

JAN.
MAHOMED
v.
DATU
JAFFER.

(1) (1890) 14 Bom. 189.

1913.

JAN
MAHOMED

v.

DATU
JAFFER.

more, of masses of litigation to prevent Khoja and Memon fathers dealing with their wealth as they please. As the law stands, no one dare buy real estate from a Khoja or Memon unless all his children join in the conveyance, for it is impossible to say what, if any, title the father has to give. Similarly, on a minor point trouble has already arisen and is likely to increase until this branch of the law is brought into something like consistency and definiteness, made referable to some plain principle of universal applicability, and not as at present left in something very like legal chaos. I mean alienations by an adult member of a Khoja or Memon family, not himself the head for the time being of that family. Under the Mahomedan law such a case would present no difficulty, but under the law governing these peoples at present it is virtually impossible to say what may happen. Such a case actually came before my brother Macleod a short time ago. The alienee long after the alienation brought a suit for "partition" and claimed to have the "share" of his alienor made over to him. As a Mahomedan, the assignor would have sold not more than a *spes successionis*, and the transfer would have been invalid. But it is very different under the Hindu law. A member of a joint undivided Hindu family may alienate his "share" and the Courts appear to have held that the alienation operates in law as a severance of the joint tenancy. This curious doctrine is, I suppose, imported bodily from the English law of joint tenancy, to which except in the employment of the term "joint" the Hindu law of the joint family offers no single point of correspondence, is indeed diametrically opposed to it. This I have laboured to demonstrate on more than one occasion since I have been in this Court. Logically, I contend (and with great respect to the current of authority against me, shall always feel convinced) the alienation by a member

of a joint undivided Hindu family passes nothing until the alienee effects a partition by suit. I see no objection to his being allowed to do this, provided he does it during the life of his alienor, for so long he is entitled to all the legal rights of the alienor including the right to partition. But as soon as the alienor is dead I am unable to see upon what principle of law or reason the alienee has anything left to sue for. For, *ex hypothesi*, the share which was alienated has ceased to exist, has gone over by survivorship to others who do not take through the alienor and are not answerable for his debts. I mean in the case of any three Hindu brothers holding joint family property one alienates his share. The alienee does nothing. In a year the alienor dies. Next year the alienee sues for his share and the law well settled in this country is that he is entitled to revive the dead man and take his share by partition from the other two brothers who have received no part of the consideration. This I repeat appears to me with great submission neither good law nor good reason. Still for the present it is the law and results in most complicated problems. The alienor might at the time of the alienation have been entitled on partition to, say, a third, but by the time the alienee sues, he may be entitled on partition to no more than a sixteenth; what has the alienee taken in law? The case before Macleod, J., presented difficulties of that kind, but was settled by consent. Its importance lies in this, that no one in the course of the argument for any of the numerous parties interested, nor the learned Judge himself, ever appears to have doubted but that the Hindu law applied and governed the case. But does it? Is this in reality a case of succession and inheritance at all? It is nothing short of a case of the complete Hindu law of the joint family in one of its most perplexing forms. And if the course taken at that trial be correct and the consent-

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

decree correct (which I take leave with respect to doubt) what becomes of *Cassumbhoy's case*⁽¹⁾? For here any Khoja by merely alienating his "share" in the estate can bring about an immediate partition at the instance of the alienee. But Sargent, C. J., declared that the son had no right to a partition in his father's life-time. No case has as yet occurred I believe in which the right of Khojas and Memons to insist upon a partition *inter se*, I mean in the case of, say, six brothers, has yet arisen. And this points very plainly to some radical difference between their understanding of their own law and the large assumption which the Courts have made for them, that in all matters of succession, etc., they are governed by the Hindu law. If left to themselves, and admitting that they would not adhere strictly to the Mahomedan law, they would probably in every such case divide the patrimony between the surviving sons, who would not regard themselves as constituting a joint family in the Hindu sense. *Haroon's case*⁽²⁾ decides that they are a joint Hindu family whatever they may think to the contrary, but that case goes much further than any other, and it is plain from Haroon's own petition that he at least did not much believe in the applicability of the whole law of the Hindu joint family to himself and his brothers. I will say for myself, upon a long experience particularly in those districts whence most of the evidence, when a custom was alleged, has been drawn as well as from a study of that evidence so far as it appears in the reported cases, that I do not believe that the modern Khojas and Memons have ever formed among themselves "joint families" in the Hindu sense.

I am pretty confident that there is not a family of importance to be found among these sects in Bombay, which, could a complete examination be made, would not soon show marked and radical divergences from the

(1) (1889) 13 Bom. 534.

(2) (1890) 14 Bom. 189.

Hindu theory. Those divergences would be less marked no doubt among the poorer classes, living chiefly by agriculture in Guzerat and Kathiawar, but I do not doubt they would still be easily traceable. The custom of giving a son "his share" and letting him go need have nothing to do with the rigid Hindu law of the joint family. The notion that a son is entitled to a portion is common amongst almost all peoples and is a very different notion from the vested equal right taken at birth by every male born into a joint Hindu family. But what I would most emphatically protest against is the application of that part of the Hindu law of the joint family which deals with self-acquisitions and distinguishes them from joint family property. The nucleus doctrine is, I believe, inseparable from that part of the Hindu law, notwithstanding the very great lengths it has sometimes been carried. For it is strictly logical; if regarded in a practical light, extremely unreasonable and unjust. And amongst progressive Hindus, who are likely or think themselves likely to make fortunes of their own, I am sure the feeling would be as strong against it, but for the veneration in which they hold their law because it is rooted in their religion, as amongst Mahomedans who have no such reason for, I will not say venerating but, tolerating it. Such Hindus would, I expect, be found to have taken steps comparatively early in life to protect themselves and their earnings against the application of this paralyzing doctrine by effective partitions or releases. But the Khojas and Memons, who really do not know whether, as the law stands, they are exposed to this peril or not, cannot so protect themselves. Under their own law, which may for all they know govern them here, the releases would be waste paper. Of course they could effect partitions, but where the father knows perfectly well that starting on an inherited capital, say a nucleus of Rs. 500, he has entirely by his own unaided

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

skill and exertions accumulated a fortune of twenty lacs before any of his sons were of an age to give him any assistance or be more than a cause of expense to him, it is not surprising that he should be reluctant to invite the equality of sharing, implied in every partition under the Hindu law of the joint family. Neither can he make a will with any confidence that it will not be set aside, as in *Mahomed's case*⁽¹⁾, on the ground that the whole of his fortune is traceable to its "nucleus" and must therefore be regarded as joint ancestral family property. It is hardly to be expected that in the prime of life he will give away the whole of his property, seemingly the only means by which he can assert his individual ownership at all effectively. So things are allowed to drift until on the father's death a bounteous harvest of litigation is reaped. That this state of affairs is indefensible and calls aloud for remedy, no one who is competent and acquainted with the subject is likely to deny. Both Sir Michael Westropp and Sir Charles Sargent are quite sensible of the inconveniences, to use no stronger term, to which the case law has exposed these industrious, energetic and successful people. But nothing is done, and nothing seems ever likely to be done, as long as each case follows (and usually enlarges the scope of) those which have gone before. The most eminent Judges have advocated legislation. Why? Because they know and feel that in the existing state of the law it imposes limitations and real hardships on the sects so brought under it which grow more and more intolerable. My examination of the case law however shows that rightly understood and analysed, it need never have gone the length to which here and there it has been thought to be driven. But I am not hopeful at this late hour of getting undone by judicial decision what has so effectually been done by means of the same

(1) (1885) 10 Bom. 1.

instrumentality over the last three quarters of a century. But I see no reason why an evil, now generally recognized as such and seen to bulk larger and larger over the commercial activities of these sects, should not be at any rate very substantially reduced and henceforward kept strictly within bounds until legislation comes to our aid, without really transgressing any of the principles established by judicial decisions. Doubtless it would be necessary to neglect the dicta even the decisions in some later cases but inasmuch as those dicta and the decisions which flow from them are professedly based on what has preceded, if it can be shown that they are to some extent ill founded and go far beyond what they aim at enforcing, I do not think it would be any violation of the respect due to the decisions of eminent Judges, and the venerable maxim *stare decisis* to neglect them in future.

And yet it needs but little alteration, or addition, to convert the law as now generally understood to govern Khojas and Memons, so that it would be robbed of its most objectionable and questionable features, and would probably be acceptable to the intelligent portion of those communities. And I believe that this can be done without violating any principle to be found in any of the decisions. I would suggest that the proper way to approach every question of the kind is this :—

1. Where Mahomedans are concerned, the invariable and general presumption is that they are governed by the Mahomedan law and usage. It lies on a party setting up a custom in derogation of that law to prove it strictly.

2. But in matters of simple succession and inheritance it is to be taken as established that succession and inheritance among Khojas and Memons are governed by the Hindu law "as applied to separate and self-acquired property".

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

1913.

JAN.
MAHOMED
v.
DATU
JAFFER.

The words between inverted commas would take the whole sting out of the case law and effectually prevent its further extension in all directions upon the basis of the Hindu law of the joint family having been established to be the law of Khojas and Memons. It is indisputable that that never has been established as a custom adopted by these sects; no attempt indeed to prove it collectively as a custom has ever been made, nor, I should imagine, could be made in a given case, without a disproportionate expenditure of time and money. The mischief, I feel so deeply and have attempted to bring into clear relief, is attributable to the sudden inversion of the major premiss, where any point proper to a Hindu joint family has been directly or indirectly in controversy. The decisions have not proceeded step by step as upon every statement of principle in every one of them they were bound to do, thus proving gradually the adoption as a custom of this or that point of the law of the Hindu joint family. The process has been reversed, and from the proof of two customs supposed to be drawn from that large and complex law, the Courts went *per saltum* to the conclusion, that the whole law with all its legal incidents and consequences had been proved as a custom to govern Khojas and Memons. I have endeavoured by a logical analysis to expose the viciousness of this process of reasoning. And I hope that I have succeeded. If I am right the result at the present day would be this—that no question at all could be made of nucleus or joint family property or the illegality of disposing by will of ancestral property, unless the person alleging any or all these points was prepared to prove that they had been adopted as a part of the customary law of the Khojas and Memons. And it is, I believe, certain that any attempt of that kind made today would be foredoomed to failure. Whatever may or may not be the customary law of rural Khojas

and Memons in Cutch, Kathiawar and Guzerat, few indeed of those wealthy trading communities in the town and island of Bombay would be ready to support any such customs. And admitting for the sake of argument that a century ago, when for the most part the Khojas and Memons in Bombay were petty hucksters, they had brought with them from their seats in the remoter parts of the Presidency, customs of that kind, those customs must long since have fallen into desuetude with the growing accumulation of personal wealth. *Abraham v. Abraham*⁽¹⁾ is an authority, were any needed, for the right of individuals or groups thus to abandon as well as to adopt customs, when in the former case those customs were found to be detrimental to their individual or social welfare. If this Court were to accept this view for the future the administration of the law would be immensely simplified, reduced from chaos to order, and a stop put to a great volume of the most protracted and expensive litigation. Applying my principles to the present case, for example, it will be seen at once that the plaint discloses no cause of action at all, unless the plaintiff alleges and is prepared to prove two or three salient features of the Hindu law of the joint family as customs adopted by the Khojas of Bombay. Even as it is, many of his prayers are, on the face of them, bad. He cannot for instances have the declaration he asks as to the nature of the property and his rights therein; he cannot sue for partition; he might possibly ask to have the gift by Datu in 1902 to his son Ismail annulled on the analogy of Article 126 of the Schedule to the Limitation Act and the general principle of the Hindu law prohibiting alienations of joint family property by the father. But even there it appears to me that the question does not really arise upon any plea of simple succession and inheritance, and is, there-

1913.

 JAN
 MAHOMED
 v.
 DATU
 JAFFER.

⁽¹⁾ (1863) 9 Moo. I A. 195.

1913.

JAN
MAHOMEDv.
DATU
JAFFER.

fore, beyond the true scope of the cases. So that here again we would have to allege and prove the special custom. But there is no allegation of custom and no attempt has been made to prove a custom. Under the Mahomedan law he would have no right, I apprehend, to sue for cancellation of the release of 1879. Nor under the Hindu law properly restricted to matters of succession and inheritance. Indeed under the Hindu law it is extremely doubtful whether he could sue directly for any relief under Article 91 in respect of the release. He might contend on the authority of *Wasant-rao v. Anandrao*⁽¹⁾ that his interests and rights were not affected by it. But if they are, a very nice question of limitation arises which I shall presently consider. Here I will sum up the result of the foregoing part of this judgment thus—in my opinion, after an exhaustive examination of the whole law on the subject, this plaint discloses no cause of action and ought to be dismissed. But I can hardly hope that what will be thought by many to be so sudden and revolutionary a decision will be allowed to stand. Scott, J., in *Mahomed's case*⁽²⁾, while evidently doubting the suitability of the law he felt bound to apply, supports the need of continuity in judicial decisions by the usual argument, that many valuable rights must have vested already under the decisions of the Courts prior to 1886 and that more mischief would be done by disturbing them than by any attempt to put the law on a new, correct logical basis. I believe with respect that the balance of expediency (though that is a consideration with which Judges have nothing to do) would be heavily the other way. But my real point is that the law never has been settled as in 1886 Scott, J., believed that it had. Thenceforward the cases are shown not to have affirmed a settled principle but enormously to have extended in

⁽¹⁾ (1904) 6 Bom. L. R. 925.⁽²⁾ (1885) 10 Bom. 1.

practice, what never was, but was believed to be, a settled principle.

I will next deal with the plea of limitation. Various arguments may be used and need to be considered under this head. The admitted fact being that in 1879 Abdulla passed the release in virtue of which, assuming this to have been a joint family under the Hindu law, he went out of it and purported to take his wife and infant son, the 1st plaintiff, with him. It is clear that on any view of the law, whether we apply the Hindu law *in toto* or not, neither Abdulla nor his afterborn son Aziz are entitled to any of the reliefs claimed in the plaint. For the plaintiffs cannot have it both ways. They cannot contend that for the purpose of disposing of this release they will invoke the Mahomedan law, but for all other purposes of the suit they will invoke the Hindu law. If, to get rid of the release, they contend that such a release is under Mahomedan law no more than the transfer of a *spes successiois* (vide the case of *Sumsuddin v. Abdul Husein*⁽¹⁾ decided by the late Sir Lawrence Jenkins and myself) then, also under the Mahomedan law the suit discloses no cause of action in the plaintiffs. Abdulla might have sued to have the release set aside under Article 91 for fraud, failure of consideration, etc., but that he must have done within three years or not at all. No son under the Mahomedan law takes any vested interest at birth so that the plaintiffs would have no right to sue independently to have their father's release set aside, and under Article 91 read with section 7 the plaintiffs (even assuming that they had any such right) would clearly be time-barred. This, I believe, is what Tyabji, J., meant in his judgment in *Wasantrao v. Anandrao*⁽²⁾ and with great respect I doubt whether the force of his point was fully apprehended by the

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

⁽¹⁾ (1906) 31 Bom. 165.

⁽²⁾ (1904) 6 Bom. L. R. 925.

1913.

JAN
 MAHOMED
 v.
 DATU
 JAFFER.

learned Judges of appeal. But that was a case of Hindus under the Hindu law and considerations applied which could not apply under the Mahomedan law. So that for the purpose of this argument I must suppose that the legal rights of the plaintiff in this respect are governed by the Hindu law of the joint family. (I will here say once and for all that although in the rest of this judgment I shall be obliged to speak as though I accepted the rule that every right put in controversy by these pleadings was governed by the Hindu law of the joint family, I do not accept that rule, for the reasons already given at length.)

The close resemblance between this and *Wasantrao's case*⁽¹⁾ is at once apparent. The plaintiff's contention is that it is governed by and cannot be distinguished from that case. For my present purpose it is enough to say, though I shall be obliged to go further into the case of *Wasantrao v. Anandrao*⁽¹⁾, that the learned Judges of appeal, whose decision was confirmed by the Privy Council, were of opinion that because Anandrao took a vested interest at birth in the joint family property, he did not claim through his father, was not bound by his father Madhavrao's release of 1889 and need not have sued within three years, or at all to have it set aside. But for that opinion, I cannot see how the conclusion reached by Tyabji, J., that reading section 8 of the old Limitation Act (now section 7) with Article 91 the plaintiff's claim was time-barred, could be avoided. For taking the release to have been a partition so far as Madhavrao was concerned (and this appears to have been the view adopted by Jenkins, C. J.) it is hard to say that Madhavrao, in a suit to have that partition set aside on behalf of himself and his minor son, could not have given a valid discharge without the concurrence of the latter. In all matters of that sort a Hindu

⁽¹⁾ (1904) 6 Bom. L. R. 925.

father fully represents his minor son, and with the utmost respect, I do gravely doubt whether the question being whether a partition effected by the father for himself and his stirps ought to be set aside for any reason, the father might not bring the suit and in respect of its result give a valid discharge both for himself and his minor son without the concurrence of the latter. If that be a correct view then time began to run against Anandrao as well as Madhavrao from the date of the release. In the view taken by the Appeal Court, however, the Article which applied was Article 127. And it is contended here, that that Article applies and that the plaintiffs, not having been excluded to their knowledge from the joint family property more than twelve years before suit, are in time.

I wish to make a few observations upon the case law which has grown up in this Presidency about Article 127. Formerly that article was restricted to "Hindus" but in the Act of 1877 "person" is substituted for "Hindu". I do not remember a single case in our books in which the very obvious reason for that change has been noticed. Generally the Judges have read the changed word as expressing the intention of the legislature that any person whether Hindu, Mahomedan, Christian, Parsi or Jew might have the benefit of the Article. And so of course he might, provided its other requirements were complied with. But surely a curious process of reasoning is exhibited in the general statements to be found in some of the earlier cases, that the Article now applies to Mahomedans as well as Hindus, without a pause upon the essential requirement of the whole Article, namely that the property in respect of which relief under it is sought must be "joint family property". And outside the Hindu law "joint family property" is unknown. The change, I submit, must have been rendered necessary by the case law I have been

1913.

JAN
MAHOMED
v.
DATU
JAFFER

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

examining, and was designed to include Khojas and Memons, who although not "Hindus" might under the decisions in certain circumstances hold "joint family property" in the Hindu sense. There is no other possible case in which anyone but a Hindu could hold "joint family property" at least none that I know of; and if there are any, they, like the cases of the Khojas and Memons (and later the Molesalami Girassias of Broach and Sunni Bohras of Dhandhuka), must have been proved as special customs. Thus the application of Article 127 is really not extended, as our Court has frequently seemed to think, to Mahomedans generally, or to any other class generally, irrespective of the possibility of such Mahomedans or members of that other class, holding "joint family property". Where can any such persons be found? As the decisions relating to Khojas and Memons were understood, it is plain that upon an unimpaired descent from father to sons, the latter might (in the common opinion, would) hold the property as members of a Hindu joint family, and property so held would be "joint family property" within the meaning of the Article; but no other. The point is really of considerable importance in view of the current of decisions in this High Court, with which (and for obvious reasons) no other High Court in India agrees.

I will take the latest case with which I am acquainted, first, *Fatma Boo v. Ghisan Boo*⁽¹⁾ decided by the present learned Chief Justice and Batchelor, J. The head-note is: "A suit by the daughter of a deceased Mahomedan to recover her share in his property is governed by Article 127 of the Limitation Act, 1908." This clearly could not be a Khoja or Memon case, since the leading case in 1847 decided that under a special custom of those sects a daughter was excluded from the

⁽¹⁾ (1909) 11 Bom. L. R. 1083.

inheritance. So that if what I have just said above be rightly reasoned, there could have been no question of "joint family property" in the case. The learned Chief Justice says: "The question in this case is whether the Article 127 of the Limitation Act can apply to a suit by the daughter of a deceased Mahomedan to recover her share in his property. It was decided under the Act of 1877 by an Appellate Bench of this Court in 1885 (by Sargent, C. J., and Birdwood, J.) that it can so apply, and that decision, so far as we are aware, has been followed in Bombay for the last twenty-three years. It is a decision which is binding upon us; and we, therefore, hold that the suit falls within Article 127." Now it is clear that this decision need not be taken as expressing the considered opinions of the learned Chief Justice and Batchelor, J., but as attributable to the maxim *stare decisis*. It is founded expressly on the decision of Sargent, C. J., and Birdwood, J. (not I believe reported, but to be found in the Printed Judgments of 1885)⁽¹⁾. Although Judges would always desire to treat everything falling from so eminent and learned a Judge as Sargent, C. J., with the utmost respect, it is permissible in a theoretical discussion of the law to examine that decision critically. Sargent, C. J., said: "It remains only to consider whether the claim of Gulam Hussein, as a residuary to one-ninth of the compensation awarded in respect of lots A, C, E and G, and the claim of Najib-un-nissa as one of the legal sharers, to one-sixth of such compensation, are barred by time." I pause to point out that from this statement it is clear that the Hindu law was not being applied, in matters of succession and inheritance, to the parties to this suit. One of the claimants was a woman, and she claimed as a sharer. The case was then being dealt with under the Mahomedan law, and that law knows absolutely nothing of "joint family property". The learned Chief

1913

 JAN
 MAHOMED
 v.
 DATU
 JAFFER.

⁽¹⁾ *Sayad Gulam Hussein v. Bibi Anwarissa* (1885) P. J. p. 170.

1913.

JAN
 MAHOMED
 v.
 DATU
 JAFFER.

Justice proceeds: "The property left by Bakar Ali became divisible, on his death, among those members of his family, who were entitled to shares, according to the Mahomedan law or were residuaries. Till it was divided it was, we think, 'joint family property' within the meaning of Article 127 of Schedule II of the Limitation Act of 1877." And after noting the changed language: "It is not necessary, therefore, to restrict Article 127 of the present Limitation Act to suits by Hindus. And the question . . . is, whether, before the institution of proceedings under Act X of 1870, the claimants Gulam Hussein and Najib-un-nissa had been excluded, to their own knowledge, from lots A, C, E and G for a period of twelve years."

The material sentence in the judgment is: "Till it was divided we think it was 'joint family property' within the meaning of Article 127." I submit with great respect that that opinion is untenable upon any view of the Mahomedan law. It could not even be argued that the heirs, sharers and residuaries took over each other by survivorship, which is the crucial test of "joint family property". On the death of a Mahomedan intestate, his estate could not in any conceivable circumstances, unless it is by a special custom supposed to be governed by the Hindu law, be "joint family property". It is what it always was an undistributed estate, to be taken in severalty by the heirs, sharers and residuaries.

The view taken by the Bombay High Court, which is based on this decision of 1885, has not been accepted by the other High Courts: *Amme Raham v. Zia Ahmad*⁽¹⁾; *Patcha v. Mohidin*⁽²⁾; *Mahomed Akram Shaha v. Anarbi Chowdhurani*⁽³⁾. Probably in those parts of India no groups of Mahomedans have been brought under

(1) (1890) 13 All. 282.

(2) (1891) 15 Mad. 57.

(3) (1895) 22 Cal. 954.

the Hindu law of the joint family, and the Courts therefore very naturally declined to hold that property held under the Mahomedan law could be "joint family property" or that Article 127 could apply in the case of any relief sought in respect of it.

The two cases cited by Sargent, C. J., viz., *Musst. Khyroonissa v. Salehoonissa Khatoon*⁽¹⁾ and *Achina Bibee v. Ajejoonissa Bibee*⁽²⁾ were both decided under the Act of 1859. The words of the section are different from those of Article 127 of the present Act, although no doubt the suits contemplated were suits for movable or immovable property on the ground that it was joint family property. But the point upon which I rest my conclusion does not appear to have presented itself to the minds of the Judges in either of those cases. Thus in *Khyroonissa's case*⁽¹⁾ the Court says: "The words used in the clause are 'joint family property' and 'property alleged to be joint', which are the usual terms with reference to joint Hindu families. But we see no exception as to Mahomedan families, or why their respective rights by inheritance should not come under limitations prescribed generally against parties not trustees as well as trustees." It is submitted that no exception was necessary for the simple reason that no joint family property exists among Mahomedans. *Achina Bibee's case*⁽²⁾ appears to have been decided on the ground that the party against whom limitation was pleaded was proved to have been in "joint possession" within the statutory period. That might as well have been decided under Article 144 as Article 127 of the present Act. All that bears on the present argument is this passage:—

"In special appeal it is urged that this suit is barred by the provisions of clause 13, section 1, of Act XIV of 1859, inasmuch as the plaintiffs have failed to show any act of possession by any payment on the part of Gholam

(1) (1866) 5 W. R. 238 (Civ.). (2) (1869) 11 W. R. 45 (Civ.).

1913.

JAN
MAHOMED

v.

DATU
JAFFER.

Ahmed . . . but the inference he has drawn from the fact of these ladies living with Gholam Ahmed, and being supported by him from the proceeds of the property, is a proper and correct one. It would be difficult to know what other evidence could be given of joint possession by women in the position of the plaintiff's mother in this case, living as she was with Gholam Ahmed, who, as the sole male representative of the family, had the sole charge and management of the property."

In *Abdul Kadar v. Bapubhai*⁽¹⁾ Parsons, J., said :—

"The reason assigned for the refusal by the Subordinate Judge is that the Court-fee paid is only sufficient to cover plaintiffs' one-third share in the property. No more, however, is ever paid in any suit for partition, and we think that it was quite in the power of the Judge to have ordered the defendant to pay the necessary Court-fee on his share as a condition precedent to his obtaining his share. The District Judge refused because this was not a suit for partition of joint family property as known to the Hindu law, but a suit by Musalmans for their share of an inheritance. In this Presidency, however, a suit for partition of an inheritance by Musalmans is hardly distinguishable from a partition suit by Hindus."

The learned Judge goes on to say that the plaintiff was at any rate entitled to the relief by way of ordinary administration suit, and there I entirely agree with him. It is the last sentence I have quoted which with respect I think to be far too broadly stated. I was told in the course of the argument that that passage was frequently cited, and always seemed to pass unchallenged, and with approval. Sweeping dicta of that sort, for which it might be difficult to find any solid basis, tend to add to the confusion in which the precise extent of the applicability of a part of the Hindu law to particular groups of Mahomedans in this Presidency is involved. In *Bavasha v. Masumsha*⁽²⁾, Parsons and Candy, JJ., purporting to follow *Sayad Gulam Hussein v. Bibi Anwarnisa*⁽³⁾ said : "The First Class Subordinate Judge, A. P., erred in holding that Article 127 of the Limitation Act, 1877, applied only to

⁽¹⁾ (1898) 23 Bom. 188.

⁽²⁾ (1889) 14 Bom. 70,

⁽³⁾ (1885) P. J. 170.

Hindus, and so did not govern this suit" (I note that this is a *non sequitur*. The Article may apply to others than Hindus and yet need not apply to all who are not Hindus, a curious logical fallacy which seems to run through most of the decisions), "which is one by a Mahomedan to enforce his right to a share in the property left by his father and to recover that share by partition. The case of *Sayad Gulam Hussein v. Bibi Anvarnisa*⁽¹⁾ is a distinct authority that 'joint family property includes property left by a deceased Mahomedan and divisible among his heirs until it is divided.'" (Surely such property is not "joint family property"; but all sharers are until division tenants-in-common?) But where there is a tenancy-in-common it may very well be, as was held on the facts of this case, that no tenant-in-common has been excluded so as to start limitation against him, under Article 142 or 144. The whole of the law was very elaborately dealt with by Batty, J., in *Abdul Kadir v. Mahomed*⁽²⁾, and that learned Judge appears to me, speaking with all respect to what may be thought the contrary opinions of other learned Judges, to have laid down the true criteria. But succinctly my submission is that, because Article 127 is not restricted in terms to Hindus, it does not follow that it necessarily extends to everyone who is not a Hindu. The criterion of its applicability is the character of the property. That property must be "joint family property" and no such property is known to the law outside the special Hindu law of the joint family. Some who are not Hindus may hold property under that special branch of the Hindu law, but before Article 127 can be applied, it must be shown that they do. Here, however, it must be admitted that according to the general acceptance the parties to this suit belong to a class who are governed by the Hindu law of the

1913.

 JAN
 MAHOMED
 v.
 DATU
 JAFFER.

(1) (1885) P. J. 170.

(2) (1903) 5 Bom. L. R. 355.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

joint family, so that, apart from other considerations, no difficulty need be felt in applying Article 127 if that be necessary to save limitation. But it is also urged that inasmuch as the release of 1879 binds not only the maker but his children, this suit must fail as long as that release stands. To this the plaintiffs have two answers. First, they contend that they are not bound by the release. Having it set aside, therefore, so far as it may affect them is merely incidental and subservient to the substantial relief they claim. Next, that they only became aware of the existence of the release within three years of suit. The second contention may be summarily dismissed. On the evidence I hold it established that Jan Mahomed knew of the release many years ago, certainly before he went to Rangoon in 1902. And as to Aziz, I fail to see what interest he can have in the suit, or in what right he is entitled to ask to have the release set aside. It must be held binding on his father Abdulla, who, though he now alleges fraud, undue influence, etc., has never taken any steps to have the release set aside. But if binding on him, then, looked at in the light of the Hindu law, such a release would surely take him out of the family from the date of its execution. Aziz was not born till about 1893 thirteen or fourteen years after his father had gone out of the family, and become, as Jenkins, C. J., put it in *Wasantrao's case*⁽¹⁾, "dead". Now a dead man cannot have any more children, so that from the point of view of the members of this "joint family" in the Hindu sense, Aziz simply does not exist.

The first line of argument raises difficulties, which are to be found in numerous analogous cases in the books. I give, merely as an example, *Abdul Rahim v. Kirparam Daji*⁽²⁾, where it was held by Birdwood and Parsons, JJ., that Articles 91, 92 and 93 and section 2 of

(1) (1904) 6 Bom. L. R. 925.

(2) (1891) 16 Bom. 186 at p. 189.

the Limitation Act apply only to suits brought expressly to cancel, set aside or declare the forgery of an instrument but they do not apply to suits where substantial relief is prayed, and where the cancellation or declaration is merely ancillary and not necessary to the granting of such relief. In the case the documents impeached were all executed by a deceased woman by way of gift, etc., and therefore the case does not illustrate as clearly, as some, the principle I wish to arrive at. The general statement in the head-note is unexceptionable, but it leaves in doubt the fundamental question when the cancellation of a document is necessary, and when it is not necessary but, to quote the usual terms only incidental, ancillary or subservient to the substantial relief claimed. Where the instrument is executed by the plaintiff himself and would, if allowed to stand against him, effectively defeat his claim, it becomes a little difficult to maintain, that although the claim is for substantial relief, the prior cancellation of the instrument is only ancillary or subservient to that relief. And the inclusion of such Articles as 93 and 94 in the schedule may be thought surprising. Ordinarily a person is not bound to take notice of forgeries, or to ask the Court to be relieved against them. As these Articles are there, however, it would always be open to argue that a plaintiff who happened to know that a document had been forged, but took no steps to have it declared a forgery within the term prescribed, would be barred in a suit after that period had expired from disputing the genuineness and binding effect of the document. Suppose, for example, that A knew that a conveyance of part of his property to X had been forged in 1910 but took no steps to have the conveyance declared a forgery. In 1914, let us suppose, X gets into possession of the property so conveyed. A brings a suit in 1915 to recover his property and is confronted with the forged conveyance of 1910. What is the

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

position? If the conveyance be genuine and binding upon him he has no case; if he tries to show that it is a forgery he is told that he is time-barred.

I will now give an example of paramount authority, the case of *Petherpermal Chetty v. Muniandy Servai*⁽¹⁾. As to the point raised on the Indian Limitation Act, 1877, "their Lordships are of opinion that the conveyance of the 11th June 1895, being an inoperative instrument, as, in effect, it has been found to be, does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims." And the plaintiff was allowed to bring his suit under Article 144. Pushed to its logical conclusion that decision of the Supreme Court wipes Article 91 out of the schedule, for there is no conceivable case in which a plaintiff could obtain the relief contemplated by that Article, unless to that extent at least the instrument were found to be "inoperative" against him. In the particular case their Lordships were dealing with, the plaintiff had sold *benami* in 1895 to defraud a creditor. It was found that the creditor had not in fact been defrauded, so that the maxim "let the estate lie where it falls" did not apply. But it is equally clear that so long as the sale of 1895 stood unchallenged it would be an effective bar to the plaintiff's claim to recover the property conveyed. In a suit under Article 91 brought within three years of the sale, the plaintiff might have been allowed to show its true character and so have declared in 1898 what was finally upon trial found in 1908 that the instrument was "inoperative" against him and therefore should be cancelled. Not having done so, but for this decision, it might have been thought that he would have been precluded from averring "inoperative-

(1) (1908) 35 Cal. 551.

ness" on any ground at all against the sale of 1895 after the expiration of the period of limitation prescribed by law on that behalf. It is extremely difficult to reconcile a decision of this kind in principle with such a decision as that where there has been an adoption which if made and valid would defeat a claim, and that adoption has not been challenged within the statutory period, it is an effective answer to a suit brought under, say, Article 144 for possession. I submit with great respect that the true rule which is also of universal applicability is this; where the existence of a document if valid and binding on a party would defeat his suit to recover possession of any property, he must sue under Article 91 for the cancellation of that document within three years. (I am not concerned with cases of forgery provided for in Articles 92 and 93, and of course the rule I have thrown into very general words might be more precisely laid down, but it serves to express my meaning.)

For it appears to me that if Article 91 is to have any effect at all, that effect would be that documents not impeached under it will not be open to impeachment generally in a suit to recover possession of property. In applying the rule practically, obvious distinctions might be drawn between documents made by the party suing himself or his representative in interest, and others. The latter was the case before Birdwood and Parsons, JJ., and though I think they laid down the law much too broadly in their judgment, no exception need be taken to the decision confined to the facts of the case. Here then the question would be whether the release of 1879 is binding on the plaintiff? In other words, whether having it set aside or cancelled is necessary to the success of the further substantial relief he seeks, or merely ancillary and subservient to it? Upon the authority of *Anandrao's case*, which I will now briefly consider, the plaintiff may fairly contend that he is not

1913.

 JAN
 MAHOMED
 v.
 DATU
 JAFFER.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

bound by the release, and that it is immaterial to his present claim whether it be cancelled or not. If he is right there, it would be unnecessary to consider one of his prayers, which is for a declaration that he is not bound by the release, and therefore that as far as he is concerned it may be cancelled. The plaintiffs here chiefly rely on the case of *Wasantrao v. Anandrao*⁽¹⁾. The material facts may be summarized thus : Kashinath the first bequeathed all his property held to have been joint ancestral family property by will to his grandson Vithoba, to the exclusion of another grandson Bajirao. Vithoba gave the entire property to Kashinath the second, who at that time had two sons Ganpat and Madhavrao. Kashinath the second willed away this property. In 1889 Madhavrao who had a son, Wasantrao, executed a release in favour of his father Kashinath for Rs. 5,000. The plaint in the suit was sworn on the 5th December 1901 and came on for trial before Tyabji, J., who held the claim barred by limitation and dismissed the suit. On appeal before Jenkins, C. J., and Batehelbr, J., it was held (1) that the property notwithstanding the wills and gifts was joint ancestral family property in the hands of Kashinath the second, at the time Madhavrao executed the release. (2) That inasmuch as Wasantrao took a vested interest at birth in the whole joint ancestral family property, he could not be bound by his father's release, for which the consideration paid was wholly inadequate. (3) That the suit was not barred by limitation as neither Article 126 nor Article 127 read with section 8 nor Article 91 read with section 8 could bar the plaintiff's suit. Article 127 was held to apply, and it was found that the plaintiff was not excluded to his knowledge from sharing in the joint family property for more than twelve years before suit, so that he was entitled to his share which (as I understand the

(1) (1904) 6 Bom. L. R. 925.

judgment) was held to be one half. This decree was confirmed on appeal to the Privy Council. Upon it two questions arise. 1. How far can it be carried beyond its own facts: even where it is sought to be applied as a principle to cases arising between Hindus? 2. How far if at all is it applicable to the cases of Khojas and Memons? I should at the very outset note, what never appears to have engaged much attention since, namely that Madhavrao's release in this case could not possibly be interpreted as a partition. I have sent for the paper book and read that release, and it is perfectly clear that Madhavrao was convinced, or professed at the time to be convinced, that the property in his father's hands was not joint family property at all, and that he had no right in it. This was not unnatural in view of the admitted facts that it had once been bequeathed by will (apparently without any protest on the part of the disinherited grandson) to Vithoba, one of two grandsons, who, had the property been joint ancestral family property as now held, would have been entitled to equal shares in it. And that subsequently the whole of it had again been given by Vithoba to his only son Kashinath, although it appears that at that time Kashinath had male issue, who again if the property were joint ancestral family property, would have acquired an interest in it at birth. The history of the property is quite inconsistent with its having been joint family property, and no wonder Madhavrao was convinced that he had no interest in it, and so accepted a relatively small sum as the price of undertaking on behalf of himself, his heirs, executors and assigns not to put forward any claims to it. In the light of other decisions it is highly important to bear in mind what the real character of the release was. I will only observe on the argument used by the learned Chief Justice upon Article 126 that he appears to have overlooked what I suppose was in the

1913

 JAN
 MAHOMED
 v.
 DATU
 JAFFER.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

mind of the learned trial Judge. The gift by Vithoba to Kashinath was an alienation in the strictest technical sense, or purported to be, of the rights of Ganpat and Madhavrao both alive at the time. If in fact Kashinath had held adversely to them under this deed of gift it is hard to see why Article 126 should not have applied to the cases of Ganpat and Madhavrao, and later why, read with section 8, it should not have barred Wasantrao. The learned Chief Justice asks who was to sue to have this alienation set aside, the donee? Certainly not; but those members of the family who were injuriously affected by it, namely the two grandsons Ganpat and Madhavrao. Suppose it had been a valid gift, its effect would have been to leave Kashinath the second free to dispose of the entire property, irrespective of the vested interests of his sons. So viewed, it is not easy to distinguish this from any other alienation. It is true that Article 126 is restricted in terms to an alienation by a Hindu father, whereas the only persons who could here be aggrieved were grandsons. But I do not think that the learned Chief Justice meant to make that the ground of repudiating the applicability of that Article to the case.

As to the binding effect of the release on the plaintiff Wasantrao the learned Chief Justice says (page 943): "To the first my answer is that the release does not bind Wasantrao; he was born at the time and I cannot find in the transaction those conditions which would make the release effective against and operate on the independent interest acquired by Wasantrao at his birth." I note that here it is very clearly implied that such conditions might exist, so that it is necessary always to keep this judgment very strictly to its own facts. And in dealing with the third of Tyabji, J.'s points, the Chief Justice again grounds his decision on the independent right of the plaintiff. In the end

Wasantrao was decreed half the joint family property, as though Madhavrao by his act of 1889 had, so far as the joint family was concerned, ceased to exist. As, however, Kashinath had paid according to the release Rs. 5,000 for Madhavrao's share, and Madhavrao was held bound by that release, the logical result, it is submitted, should have been that Wasantrao took at most only one quarter, the other quarter which would have gone to Madhavrao having been bought by Kashinath the second. But a careful consideration of the case, as a whole, shows that it by no means concludes the defence here. It does not go the length, as is sometimes supposed, of holding that a disadvantageous partition by a father will not bind his sons, although the only ground of the decision actually stated might be pushed as far as that. For suppose that in this case the release of 1889 had in effect been a partition, then either the plaintiff Wasantrao would have been bound by it, or no minor could ever be held bound by a partition effected by his father. There must be numerous cases where at the time of the partition the property may be worth say Rs. 3,000 and the partition being between three brothers each of whom has minor children, the share of each would be worth Rs. 1,000. By the time the minors have attained majority it may be that two out of the three shares made many years before have increased in value to a lac. But the minor son or sons of the third partitioning member could hardly be heard to say, on that account, that they were no parties to the partition, that they had acquired an independent interest by birth, and therefore called for a fresh partition now that parts of the original joint family property had increased so much in value. The truth is that while the judgment in *Anandrao v. Wasantrao*⁽¹⁾ rests almost exclusively upon the theory

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

(1) (1907) 9 Bom. L. R. 595.

1913.

JAN
 MAHOMED
 v.
 DATU
 JAFFER.

that every member of a joint family acquires a vested interest in the entire property at birth, it makes no mention of the equally important principle of the Hindu law, that for purposes of partition, etc., minor members are fully represented by the head of the stirps to which they belong. Thus, but for special considerations which the learned Chief Justice plainly had in mind, he might have held that the release of 1889 amounted *pro tanto* to a partition, and had he come to that conclusion there can be little doubt that he would also have held that Wasantrao as well as Madhavrao was bound by it. This was the principle of later decisions such as that in *Chabildas's case*⁽¹⁾ (although the release was referred rather to the category of family arrangements than to actual partition); *Umed Babar v. Khushalbai*⁽²⁾ where though *Wasantrao's case*⁽³⁾ was referred to in the argument it was not noticed in the judgment of the Court. The latter is an instructive example of the principle applicable to *quasi-partitions* if I may call them so. The learned Judge, Chandavarkar, J., says (page 401):—

“What is called by the parties a relinquishment by the 2nd defendant's father was in substance a partition of the family property between him and his coparceners, and it is none the less a partition within the meaning of that term in Hindu law though instead of receiving his share of the property as it existed then, the 2nd defendant's father received the money value of it. It is urged that that partition is not binding on the 2nd defendant because the latter was a minor then and the deed, Exhibit 38, contains no express words to show that his father and his coparceners intended to include the 2nd defendant's share in his father's share. But the rule of Hindu law is that at a partition among the members of a joint family, each member is presumed to represent not only himself but also his sons and the son takes his share through his father as being included in the share allotted to his father.”

And to much the same effect is *Chabildas's case*⁽⁴⁾, decided on appeal by the same learned Judge, thus:—

“Then comes the question whether his two sons (the 2nd and the 3rd appellants) and the son of his deceased brother, Cursundas, are also equally

⁽¹⁾ (1909) 11 Bom. L. R. 606. ⁽³⁾ (1904) 6 Bom. L. R. 925.

⁽²⁾ (1909) 11 Bom. L. R. 396. ⁽⁴⁾ (1910) 12 Bom. L. R. 621 at p. 626.

bound by it. It is argued that they are not, on the authority of the judgment of this Court in *Wasantrao v. Anandrao*⁽¹⁾ confirmed by the judgment of the Judicial Committee of the Privy Council in *Anandrao v. Wasantrao*⁽²⁾. These judgments do not lay down the broad proposition that in no case in a joint Hindu family, consisting of a grandfather, son, and grandson, the last can be bound by a release of his right to a share in the ancestral estate executed by the son. No doubt in the concluding part of their judgment the Privy Council point, as the ground of their decision, to the rule of Hindu law that the grandson has a right to the estate independent of the father; but they go on also to remark that the late Chief Justice of this Court, who delivered its judgment, has rightly applied the principles of Hindu law to the facts of the case. We must, therefore, turn to the latter judgment to see how the rule of Hindu law in question was applied by this Court to the facts before it in *Wasantrao v. Anandrao*⁽¹⁾. The Chief Justice holds the grandson not bound by his father's release because of the circumstances of the transaction. In each case, where the question arises, it must be decided on its own facts. It is true that a son takes a vested interest by birth in ancestral estate; but it is not true that because he has that independent existence, he is absolutely independent of his father, where the two are joint and where the son is a minor. The father has the right in certain cases and under certain conditions to alienate the estate and bind his son by the alienation; in a partition among the members of a joint family, of which the father and the son are coparceners, the father represents both himself and his sons; and in all transactions the father has power to act on behalf of the son as well as on his own, especially where the son is a minor."

I conceive that the true principles of the Hindu law which are required for the decision of this case, assuming the Hindu law to apply, are here correctly stated. And again I repeat that the release in *Wasantrao's case*⁽¹⁾ could not in any view be regarded as a partition or even quasi-partition, since the ground of it was that the releasor did not believe that the property released belonged to a joint family of which he was a member. It was therefore no more than a personal undertaking, not even in the nature of a family arrangement, stretching those words to the utmost; and as such it could hardly be held binding upon the independent interest of minor children. It is true that Madhavrao purports

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

⁽¹⁾ (1904) 6 Bom. L. R. 925. ⁽²⁾ (1907) 9 Bom. L. R. 595.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

to covenant on behalf of himself, his heirs and executors and assigns, but having regard to the nature of the covenant and the expressed reason for it, no principle of the Hindu law of the joint family need be invoked either for its interpretation, or to attach to it its legal consequences. To bind a minor by such a covenant it surely would be necessary to show that he claimed through his father, which the minor in that case did not. Nor in such an act was the father representing, and so binding his son as he would in a partition or quasi-partition, or reasonable family arrangement. On the other hand it will not do to carry that decision the length of saying that minor sons never can be bound by a father's release, if in the nature of a partition, quasi-partition, or reasonable family arrangement. So that if the Hindu law is to be applied to the parties here in determining the effect of the release of February 1871 it will have to be applied as indicated in the two decisions last cited and not with any special reference to *Wasantrao's case*⁽¹⁾. Having thus far attempted to open the way to a clear view and grasp of principles, it remains to apply those principles to the facts of this case.

But I must cite one more decision which has a direct bearing on the *obiter dictum* of Sargent, C. J., in *Ahmedbhoy Hubibbhoy v. Cassumbhoy*⁽²⁾ that although among Khojas a son cannot enforce partition during his father's life-time, he may without inconsistency restrain his father from alienating any part of the joint family property. I commented on that while criticizing the whole judgment but had not this case in my mind; I have since found it. In *Rani Sartaj Kuari v. Rani Deoraj Kuari*⁽³⁾ the Judicial Committee of the Privy Council lay it down, that "In such a raj the son is not a co-sharer with his father. Property in

⁽¹⁾ (1904) 6 Bom. L. R. 925.

⁽²⁾ (1889) 13 Bom. 534.

⁽³⁾ (1888) L. R. 15 I. A. 51.

ancestral estate acquired by birth under the Mitakshara law is so connected with the right to partition that it does not exist independently of such right." That is to say that because the raj was impartible, the son was not a "co-sharer" in the sense in which every member of a joint Hindu family is a co-sharer. Applying this emphatic pronouncement to the case of the Khojas what is the result? Since no Khoja son can enforce a partition, it follows that he cannot be a co-sharer. And if that be so, the plaintiffs could not have any of the reliefs prayed for in this suit. That is strong corroboration of the views I expressed in summing up my review of the case law, which has step by step applied the Hindu law of the joint family to Khojas and Memons.

As to the gift by Datu to Ismail in 1902, no question of limitation arises. As to the release of 1879, I am, owing to the state of the authorities, in some doubt whether I ought to give effect to my own opinion, an opinion I have held unshaken for many years, that in this and all similar cases a party, who does not take steps in time to remove what else would be a bar to the success of his suit, cannot surmount that bar during the trial, by exactly the attack he ought to have made on it directly and within the shorter time allowed by the law of limitation. But this case is not as clear as I should like a case to be, in which I thus applied the law. For it is doubtful in the first place whether the release, in the light of Mahomedan law, has any effect at all so far as the plaintiff I is concerned; while it is also very doubtful whether the Hindu law governs Khojas on a point of this kind. So that I shall not decide the case on the ground of limitation.

But I must note one argument which was frequently used. Mr. Bhandarkar for the plaintiffs contended that even were this a release, it was never acted upon,

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

I confess I hardly know what this means, though there are *dicta* in some of the cases which might suggest that some legal doctrine does underlie it. A release by way of quasi-partition must operate or not. If it operates, then it does so from the date of its completion and execution, and I do not see how there can be any question of its having been acted upon or not. What is really meant by the argument is, I think, that the subsequent conduct of the parties shows that there was no intention to extend the operation of the release beyond its executant. Here Abdulla purports to take his son and wife out of the family. But it is said, the evidence shows, that both his son and wife for that matter continued to live with and be maintained by the family, so that neither Datu nor Ismail could really have intended to exclude them under the release. But the operation of a release, as means of partition, is rather legal than practical. It is perfectly consistent with that legal operation that the members of the family should continue to extend hospitality and assistance to those who under the release had lost all rights, as members of a joint family, to the joint family estate. Once the release had taken effect, and so worked a partition, it could only be by intentional re-union that the former members excluded under it could once again become members of a joint family. And this could never be effected without intention, merely by extending towards them such natural kindness, as their relationship would call for. In the present case all the evidence about Jan Mahomed, his mother Ratanbai, his younger brother Aziz having lived and been maintained, the children educated, married and so forth, at the expense of Datu and Ismail, is, in my opinion, if not wholly irrelevant, of little value. That there could hardly have been any deliberate intention to re-unite is clear from the age of the two plaintiffs. Datu and Ismail had nothing

whatever to gain from them. Jan, it is true, was of an age to do business since, say, 1875, but his services could not have been valuable and as I shall presently show from his own letters it is demonstrably certain that as late as 1903 he himself certainly did not believe that he was a member of the joint family consisting of Datu and Ismail, or had any claim whatever on the joint family property. Aziz was a mere child up to 1905. It appears that for the last ten years Jan Mahomed has been living away from Datu and Ismail. As soon as Aziz was old enough to be employed Ismail gave him work to do in the shop, but was careful to pay him wages, and his name is entered in the attendance book among the other employees. There is nothing in all this to indicate any intention on the part of Datu and Ismail to re-unite. While as far as Abdulla is concerned, he has always remained what he was before the release of 1879, a sodden useless drunkard. As the release was probably due to his intemperate and violent habits, it is not likely that once rid of him, Datu and Ismail would have wished to take him back into the family.

As most of the evidence for the plaintiffs has been directed to proving that as regards Jan and Aziz the release was "never acted on", I have thought it convenient to dispose of that argument in this place.

On the same evidence the Court has been asked to infer from the facts that their grandfather and uncle kept these boys, paid for certain ceremonies, educated them and got them married, that they thus became members of the joint family entitled merely as the recipients of much kindness in the past, to insist upon despoiling their benefactors of a great portion of their wealth. This has always seemed to me an absurd proposition, although it frequently makes its appearance in argument. If the joint family relationship is not

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

fastened on Datu and Ismail by law, I certainly, would not infer that it had been voluntarily undertaken merely because these men showed great natural kindness to their grandsons and nephews, while the latter were helpless children and in need of protection. I will now deal with the release in this suit. There can, I think, be no doubt, looking to its wording, but that the parties to it were under the belief that it ought to be shaped to meet the Hindu law of the joint family. Yet it is not an ordinary partition, as it was certainly meant to be. While it displays clearly enough the belief that the requirements of the Hindu law had to be met, it displays with equal clearness the ignorance of the parties to it of that law. It is easy to understand why, in the vicinity of Bombay, these Khojas should believe, however unpalatable that belief may be, that they are governed by the Hindu law. But, since in all probability except for purely legal purposes they never have fully assimilated many of the features of the Hindu law of the joint family it is as easy to understand the peculiarities of an instrument like this release. We have the evidence of Datu to explain how it came about. He says that he went in fear of Abdulla's violence, and was therefore anxious to be free from him. Apparently Abdulla himself wanted his "portion", so it was agreed that he should separate from his father and younger brother Ismail. A panch was convened, and the first draft release appears to have been made at the end of 1878 on this basis. The entire joint family property was valued at Rs. 4,500, and Datu made five lots of it one for Abdulla, his wife and son, worth Rs. 900, one for himself, one for Ismail, one for his unmarried daughter and one for his mother. Had the partition really been made under the Hindu law, had these people any real understanding of the simplest principles of the Hindu law of the joint

family, they would have made three lots, of which Datu would have taken one, Ismail one and Abdulla one. But it is clear that there was no complete partition, nor was it the wish of Datu to separate from Ismail, who appears to have been a good son. The "release" then goes on to divide the 'nine hundred rupees' share of Abdulla thus: Rs. 400 in cash to Abdulla, Rs. 200 worth of ornaments to his wife, and a house valued at Rs. 300 to the plaintiff, then an infant. Now although such a partition does not conform with the ordinary requirements of the Hindu law, there is nothing objectionable, unfair or unreasonable about it, if the total property owned by the family at that time was not worth more than Rs. 4,500 in all. It was very right to take the precaution of settling something on Jan, seeing what kind of man his father was. That house still belongs to the plaintiff, Jan Mahomed; and Abdulla his father has resided in it ever since. Why should it then not be binding on the plaintiff 1, Jan Mahomed? Suppose that the family fortunes of Datu and Ismail instead of increasing had decreased; suppose that this house had turned out a very valuable piece of property, does anyone doubt but that the plaintiff 1 would have insisted as vehemently upon the validity of this release, partition, family arrangement, call it what you will, as he now repudiates it? What is to be looked at in estimating the reasonableness of such family arrangements (under the Hindu law) is not the state of the family fortune at the day it is called in question but at the time it was made. If there was then an adequate motive, and if on the whole it was a reasonable and fair arrangement, the Court will not scrutinize too closely the adequacy of the consideration (vide judgment of Chandavarkar, J., in *Chabildas's case*⁽¹⁾). And though as I have said, I am not sure

1913.

 JAN
 MAHOMED
 v.
 DATU
 JAFFER.

(1) (1910) 12 Bom. L. R. 621.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

whether such a family arrangement could be upheld under the Mahomedan law, I am treating the case here, as though the parties were governed by the Hindu law. It is conceded that doing so affords the plaintiff the best chance of success, since under the Mahomedan law they have no case at all. I attach no importance at all to Abdulla's evidence that the joint family property at the time of the release was worth at least Rs. 10,000, any more than I do to his many other wild and reckless statements. The wonder is that the man is alive and able to talk coherently at all. I accept the valuation put on the property by Datu, as well as his account of the entire transaction. Viewed in that light, I am not disposed to say that it was not a perfectly fair family arrangement made for a sufficient motive, and as such clearly within the rule in *Chabildas's case*⁽¹⁾.

The evidence in the case proves beyond all reasonable doubt that Jan the plaintiff 1 never believed himself to be a member of a joint family in the Hindu sense, or entitled as such to share in the joint family property. We need go no further than his five letters from Rangoon for convincing proof of that. In the witness-box he impudently pretended that he had been sent to Rangoon as a member of the joint family to open up rice business there. But look at the facts. He was given Rs. 140 debited to him (vide Exhibit 16) and immediately afterwards Rs. 5. The latter item is in the current household account as are all Ismail's expenses. Then see Exhibit 22, the account-books of Jan's separate shop. He has admitted that he was carrying on a separate business. The business was in his name and the books in his handwriting. Exhibits 23 and 24 are quarrying contracts in the name of Jan. Exhibit 21 is a licence to keep explosives in

⁽¹⁾ (1910) 12 Bom. L. R. 621.

his own name. Then there is a sale of immovable property in Malad. Ismail was the vendor, the purchaser was an outsider, and Jan himself was the broker. His explanation of this is simply absurd as is his explanation of so many passages in his letters from Burma (Exhibit 12) which prove conclusively, that whether in fact he was or was not a member of the joint family at that time he did not believe himself to be so (see Exhibit 6). In 1881 Ratanbai sold her anklets to Datu (Exhibit 14). Of course had she been a member of the joint family it is hardly likely that any such sale would have taken place. There was no dispute at that time. In 1884 we find Abdulla selling a cart and bullocks to Datu, Exhibit 5. There can be no doubt that he at any rate was separated. On 25th December 1885 Abdulla passed a rent-note to Datu, see Exhibit 30.

Going back to Exhibit 16, which was just before Jan went to Rangoon, the entry shows that the money was meant to be a loan. There were no disputes at that time. Then follow the letters from Rangoon between July and September 1903 in which Jan begs for a loan and offers to pay interest. There is no mention in any one of these letters of what Jan has sworn here that he was sent to Rangoon on joint family business. Datu Raghu's rice shop in Bombay had been closed at a loss in 1902. In one place Jan asks, "what is my share in the Jaoli business I did in partnership with you (Ismail)?" (See Exhibit 13 of the 29th July 1903.) There was a partnership in Jaoli business and Jan's share was ascertained and paid to his wife Fatma. But this is utterly inconsistent with his evidence that he was all the time a member of the joint family. And see Jan's evidence about these letters. Most of the specially damaging passages were put to him, and he had but one answer, that whenever he said "my" he

1913.

 JAN
 MAHOMED.
 v.
 DATU
 JAFFER.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

meant the joint family shop or business. Finally he declares his intention of remaining in Rangoon and never returning to Datu or Ismail. As to Aziz he was employed in the shop for the first time in 1907 and was paid wages, vide Exhibit 8. These entries are in his own handwriting, Exhibit 9. Only two witnesses were called for the defendants, Datu and Ismail, but they both appeared to me, particularly Ismail, good. These are the defendants themselves and were only called to prove the release after which the burden of proof shifted to the plaintiffs. The evidence adduced on behalf of the plaintiffs is of the worst kind. Instead of leading off, the plaintiffs reserved themselves and their father to the last, in order, as was suggested, that they might hear what sort of case their witnesses could make for them. And that I think is at least probable. This evidence was directed to proving on what terms Jan and Aziz lived with Datu and Ismail. I have already stated that in my opinion that evidence is useless for that purpose. Conceding all that the witnesses say to be true, I still do not think that this would be enough to prove re-union, or such contributions to the family fortunes as might set up a new joint family, independent of that which had been formed before the release. Much of the evidence about the extent to which Jan and Aziz helped Datu and Ismail in their business is simply ridiculous, notably for example Narayen Kamu.

The plaintiffs relied exclusively on the law. In his last address to the Court Mr. Bhandarkar did not touch the evidence, such as it is, that has been adduced on behalf of the plaintiffs. The oral evidence, leaving aside that of the two plaintiffs themselves and their father defendant 3 Abdulla, is, in my opinion, utterly worthless. I have been over the documentary evidence and I do not find in it anything that calls for special comment.

I will now therefore draw together the various threads of reasoning contained in the judgment so far, and apply the results to the actual decision.

1. I have said that in my opinion the law does not warrant the application of the whole law of the Hindu joint family to Khojas and Memons for any of the purposes of this suit. What in effect the plaintiffs are suing for is a declaration of their rights as members of a joint family under the Hindu law. That I think goes far beyond the reach of any of the authorities. So that upon that ground I should, were the subject less complicated, be prepared to dismiss the plaintiff's whole suit. But having regard to one or two of the decisions I do not think that it would be safe to do so, without dealing with some of the questions raised upon the footing of the Hindu law of the joint family.

2. Assuming that these people do for the purposes of this suit constitute a joint family governed by the whole Hindu law on that subject, it is first to be noted that one great exception to that law has been established. No Khoja son can sue for partition during his father's life-time. Incidentally I must point out that upon the authority of the Privy Council case cited, *Rani Sartaj Kuari v. Rani Deoraj Kuari*⁽¹⁾, this takes the Khojas at least clean out of the law of the Hindu joint family. But if the plaintiffs cannot sue for a partition, it is premature to sue for a declaration of what their rights are at present on the footing of being members of a Hindu joint family. No object is to be gained by such a declaration, nor can any consequential relief be given upon it. It might well be that before a partition could be effected both plaintiffs might be dead, and the whole proceedings thus turn out to be infructuous. If this view be correct,

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

⁽¹⁾ (1888) L. R. 15 I. A. 51.

1913.

JAN
 MAHOMED
 v.
 DATU
 JAFFER.

the only reliefs to which the plaintiffs could at present be entitled are, the cancellation of the release of 1879 against the plaintiff 1 and setting aside the deed of gift of 1902 by Datu to his son Ismail ; possibly, though I do not think the time is yet ripe for this, setting aside Datu's will. As to that the only use, which has been made of it in this case, has been in argument, to show that Datu himself still regarded his family as joint. But I think the point has no importance.

3. Now assuming once more that the Hindu law of the joint family governs this part of the case, is the plaintiff 1 entitled to a declaration that the release of 1879 is not binding upon him, and as far as he is concerned must be cancelled? If it is binding upon him then unless he can get it cancelled it would be an effective bar to the whole of his present claim. Therefore following the rule I have indicated, it appears to me that he was bound to sue within three years of becoming aware of it, to have it set aside. And not having done so (for I hold on the evidence that he was well aware of it before he went to Rangoon) he would be time-barred. There would be no need to call in aid section 7 of the Limitation Act. But if it *were* binding upon him, it is hardly likely that he would have been able to obtain its cancellation on the ground of fraud (no details given in the pleadings as by law required) or inadequacy of consideration (vide Chandavarkar, J.'s judgment in *Chabildas's case*⁽¹⁾) or any other sufficient reason. The release clearly binds Abdulla, and adopting the Hindu law, its effect would have been to take him out of the joint family from the date of its execution. In that event it is equally clear that Aziz could have no case at all in this suit. For it is beyond reason to suppose that he has been re-admitted into the joint family and has by his exertions contributed to its wealth.

(1) (1910) 12 Bom. L. R. 621.

All that could be said for him is, that Datu his grandfather and Ismail his uncle undertook his maintenance, upbringing and education, and defrayed the expenses of such ceremonies as the law required to be performed. But this, in my opinion, affords no ground at all, much less a decisive ground for the inference, that he thus became, what he was not by birth, a member of the joint family. It is only, therefore, the case of the plaintiff 1 that needs any consideration. For he was born at the date of the release of 1879 and on the theory of the Hindu law of the joint family would have thus acquired an independent interest in all the family property, which might survive a release by his father purporting to take himself and his minor son out of the joint family. Here the plaintiff relies solely on the principle of *Wasantrao's case*⁽¹⁾. I have pointed out that the facts there were special. There was no semblance of a partition, because the releasor did not believe that the property was joint family property at all. Here the case is widely different. Ordinarily a release by one member of a Hindu coparcenary does operate as a partition, at any rate as far as he is concerned. It may not be in the strict legal sense a partition, since it may not necessitate a complete partition between all the members of the coparcenary. But if its effect is to take the releasing member out of the joint family, it would likewise, on general principle, as pointed out by Chandavakar, J., take his whole stirps out with him. Nor can I see any distinction in theory between a quasi-partition thus effected and a regular partition.

It surely cannot make any real difference whether one of, say, three coparceners takes his third of the whole property valued at Rs. 1,000 or Rs. 1,000 in cash. The mode of carrying out a partition over large tracts

1913.

 JAN
 MAHOMED
 v.
 DATU
 JAFFER

⁽¹⁾ (1904) 6 Bom. L. R. 925.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

of the country, inhabited by the poorer rural classes, is to make up the whole property into lots; the members entitled then draw the lots. This is quite a common practice, as I believe, anyone with mofussil experience, will admit. Or it certainly used to be thirty years ago, and I see no reason to doubt that it still persists. Now in such a case suppose there are three brothers A, B, C, partitioning a small estate. Three lots are made, B who has two minor children draws one; A and C offer him its money value and he accepts. A and C thereupon do not carry the partition further. In strict theory they re-unite, but in practice nothing need be done at all. What is the result? Surely that B and his two sons have now ceased to be members of that coparcenary. Would any Court be inclined ten years later, at the suit of these minors to rip open that partition and declare them still entitled, as though their father were dead, to take his share? What then has become of the consideration paid by the other two members of the coparcenary? This is what in fact was done in *Wasantrao's case*⁽¹⁾, and this feature of it has given rise, I believe, to much discussion and criticism among Hindu lawyers. The opinion expressed in this Court, more than once since the decision of that case, has been that it must be very strictly confined to its own facts. This is the more necessary because, while those facts are very special and peculiar, there are indications in the judgment of the learned Chief Justice, that he was quite ready to recognize a release, under other conditions, as operating to separate the releasor and his branch from the rest of the family. The only ground assigned directly in the judgment, namely, the independent acquisition of a right at birth by every child, could not be used generally. For it would apply equally in the

(1) (1904) 6 Bom. L. R. 925.

case of every partition in which one or more of the stirps contained minors. And that is a proposition which I do not think anyone would be found to argue seriously. In this connection I refer to the well established law that an alienation by one of two or more coparceners to a stranger, operates as a partition of the estate. The alienee can come in on the strength of the alienation and insist upon having a partition made. It is true that we here come in sight of another and quite unique feature, hardly belonging to the Hindu law proper, but engrafted on it by the decisions of the Courts, namely that while such an alienation works a partition, it goes no further than the alienor's share. That is to say that the alienee comes in exactly in the shoes of the alienor, and is liable to be called upon to divide again with all the members of his stirps claiming under him; in other words, that two partitions are worked out at one and the same time. But my point is that so far as the minors under the alienor are concerned they have no right at all to protest against the partition. Now suppose such an alienation were made at a time when the entire estate was worth no more than three thousand rupees, and that the alienee of a third lay by for a year or so, and then enforced his rights. First let us suppose that he had allowed a long time to elapse, and that the value of the joint family property had increased by 100 per cent. and in the meantime three sons had been born to the alienor. To what would the alienee be entitled? That is one view of this difficult doctrine; another more germane to my purpose is this. Suppose the alienee enforces his rights (as in my opinion he ought to do at once) before the conditions have changed. His alienor has four minor children. The property is partitioned into three lots, worth Rs. 1,000 each. The alienee takes one of them and has to divide it with the minor children each of whom gets

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

Rs. 200. The other two brothers either do not separate, or immediately re-unite, and by the time the minors are of age, their share of the property is worth three lacs. On the principle of *Wasantrao's case*⁽¹⁾ the minors might now come in and contend that they were no parties to their father's alienation which had turned out so badly for them, that they were not bound by it, as each had acquired a vested interest at birth, and were therefore entitled to a re-partition of the estate in the hands of the other former coparceners. No such case has yet arisen I believe in any of our Courts, but I see no reason why it should not. But the broad rule of the Hindu law is that fathers effecting a partition, whether directly or indirectly, carry their children with them. The principle of representation here overrides the principle of the vested interest at birth, and if the Courts are satisfied that the "partition" whether direct or indirect by way of release or family arrangement was fair and reasonable, the minor children of the releasor or maker of the arrangement for them will not be allowed to set it aside on attaining majority. And that is the principle I would apply in the present case.

Thus assuming that if there were no such principle, or if the release were of the kind dealt with in *Wasantrao's case*⁽¹⁾, the minor children would not be bound by it, then no bar of limitation would exist against plaintiff 1 in this case. But as there is such a principle and the release here is very different from the release in *Wasantrao's case*⁽¹⁾, it appears to me that the bar of limitation does exist, and has not been surmounted. In my opinion the plaintiff 1 is time-barred. Further even assuming that there is no bar of limitation and that the suit is governed by Article 127 so far as the

(1) (1904) 6 Bom. L. R. 925.

Limitation Act reaches, we have still to see whether the release is not a good family arrangement binding upon the plaintiff. As to Article 127 I have shown, with some elaborateness, that I do not think it ever can apply to Mahomedans merely qua Mahomedans, and I doubt very much whether it can apply even to these Khojas and Memons except in proper cases, where the property is shown to have gone through one unimpaired descent and thereafter to have been held by the survivors as joint family property. Such a case uncomplicated by a release or other form of partition might very well occur, and then Article 127 certainly would apply. But this is not such a case, because those claiming are not in a position to sue for partition, and therefore not in a position to claim any share of the joint family property. Further this case is complicated by a release. Under the Hindu law, as laid down in *Chabildas's case*⁽¹⁾, I think that that release was a perfectly good family arrangement, having regard to all the circumstances then existing. The property was not then very large. Abdulla was a useless and objectionable member of the family. He wanted to go out of it, and the other members wanted to be rid of him. They gave him a fair share, and so divided it that the interests of his only minor child were protected. Upon a right understanding of the Hindu law if the total value of the joint family property had then been, as I hold it was, Rs. 4,500, Abdulla got a good deal less than he was entitled to, and so did the plaintiff. But we cannot go back thirty years to examine all those details. According to the understanding of the parties a fair distribution was made. Abdulla accepted it for himself and his minor child. I do not see why the Court should now interfere, merely because since that time Ismail has by his own personal skill and industry acquir-

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

(1) (1910) 12 Bom. L. R. 621.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

ed very valuable properties, to a share in which the plaintiff I can have no conceivable moral or equitable right. It is indeed only by applying the nucleus doctrine that he could ask to investigate the steps by which Ismail has made his fortune, and I see no ground in any of the authorities for applying that doctrine to Khojas and Memons, while there are cogent reasons for excluding it. Speaking for myself I would not extend the Hindu law of the joint family one inch further than the authorities actually compel me. I have shown that they do not yet compel the Courts to extend it very far, certainly not the length I think of introducing the nucleus theory into the system of law by which these sects are governed. On the other hand I have pointed out the great practical difficulty of drawing the line, so long as succession is understood to include succession modified by the Hindu law of the joint family, to undivided ancestral family property. In the first place there *is not* and can never be any succession in the ordinary sense of the word where the property is of that character. And that is a consideration to which sufficient attention has not, I venture to submit, yet been paid. In the next place if succession and inheritance are terms which in this special connection are meant to be applied only to the mode of regulating shares in property undisposed of by will, the character of the property, where that mode is to be sought for in the Hindu law, cannot be neglected. And that would open the door in every case to the usual interminable enquiries as to the manner in which the property had been acquired from the remotest period at which the family ancestry could be found. And again it is worth noting that if the property be really ancestral or joint family property in the true Hindu sense, no will could ever be made. So that succession would then always be confined to cases of intestacy,

and if the property were found to be joint family property, to cases in which succession proper does not exist at all. But this again opens up another large question the fringe of which was touched in *Mahomed's case*⁽¹⁾, where Scott, J., held that because the property was ancestral joint family property, a will in fact made was invalid. How far the extension of the Hindu law of "simple succession and inheritance" precludes Khojas and Memons from making a will under their own law, is a question which will have to be settled very definitely and very soon.

But in this case it is quite clear that no question of succession or inheritance arises at all. It may in the future but it has not yet arisen. The most that the plaintiff I can say is that the release might operate to bar his claim when the time shall be ripe for bringing it. But if it does I say he is already time-barred in that respect, and can obtain no relief of that limited kind in this suit. Further I am very clearly of opinion that he never will be entitled to any relief on the general ground, as a member of a joint undivided Hindu family. For I hold that the release of 1879 was a perfectly good family arrangement under which Abdulla and his stirps went out of the family (if they were ever in it), and therefore that even were this a case of "succession or inheritance" within the meaning of the authorities, this plaintiff could not succeed.

There can be no question on the evidence, what the understanding of the parties themselves has all along been. I think I have shown in my brief examination of the documentary evidence for the defendants, that it all points one way. It is only consistent with all parties concerned having fully accepted the release as a partition, and having acted upon that understanding

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

(1) (1885) 10 Bom. 1.

1913.

JAN
MAHOMED
v.
DATU
JAFFER.

for thirty years. That being so I find no ground upon which any part of the plaintiff's claim could be awarded. I hold that it entirely fails and must now be dismissed with costs.

Attorneys for the plaintiff: *Messrs. Mansukhlal, Jamsetji and Hiralal.*

Attorneys for the defendants: *Messrs. Mirza, Mirza and Mangaldas; Mulji, Khambata and Thakoredas; Nadirshaw and Darasha.*

Suit dismissed.

H. S. C.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1913.

August 26.

SORABJI HORMUSJI BATLIVALA (DEFENDANT), APPELLANT, v.
JAMSHEDJI MERWANJI WADIA (PLAINTIFF), RESPONDENT.*

Negligence—Driving motor-car at excessive speed—Injury to bare licensee being driven in car—Liability of car owner—Quantum of damages.

The defendant was driving a party of relatives and friends (including the plaintiff) in his motor-car from Deolali to Igatpuri. The road at one point turned somewhat abruptly to the left and crossed the lines of the Great Indian Peninsula Railway by means of a level crossing; after the level crossing the road turned abruptly to the right. The defendant who was driving his car at an excessive speed drove over the crossing at the time that a train was there due. Though it got over the crossing safely the car failed to take the abrupt turning to the right and jumping an embankment rushed into a paddy field below. The occupants of the car, with the exception of the defendant, were thrown out with much violence and the plaintiff received such grave injuries as would render him a cripple for the rest of his life. The plaintiff sued to recover damages caused to him by the defendant's negligence.

Held, that putting the skill and caution exigible from the defendant at the very lowest, he was grossly and culpably negligent, that he was liable in damages to the plaintiff and that in assessing damages the same principles

* O. C. J. Appeal No. 6 of 1913; Suit No. 684 of 1911.