

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

THE ADVOCATE-GENERAL OF BOMBAY (PLAINTIFF) v. JIMBABAI
AND OTHERS (DEFENDANTS).

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Cutchi Memons—Custom—Onus of proof—Expert evidence in proof of custom—Opinions of practising lawyers, not relevant—Opinion and beliefs of leading members of community influenced by judicial and professional prepossessions, not relevant—Custom must be established by deliberate acts of volition—The Indian Evidence Act (I of 1872), sections 32, cl. (3), and 48—Extent to which Cutchi Memons are governed by Hindu Law—Cutchi Memons governed by the Hindu Law of succession and inheritance as applying to an intestate separated Hindu possessed of self acquired property—The Hindu Law of joint family not applicable to Cutchi Memons—No distinction between ancestral property, joint family property and self-acquired property—Cutchi Memons may will away entire property—Cutchi Memons' wills to be interpreted according to Mahomedan and not Hindu Law—Bequests in connection with 'Khairat', i.e., charity work not void for vagueness—Alternative bequests in favour of charity not void as gifts conditioned in futuro—The Indian Limitation Act (IX of 1908), Art. 127—Costs.

A Cutchi Memon disposed of the whole of his property by will, part in favour of the next of kin and part in favour of charity. The provisions in favour of charity were as under: "I direct my executors and trustees as follows:—They shall out of my 'punji' set apart Rs. 3,00,000 (namely, three lacs) and shall therewith purchase Government Promissory Loan Notes or Port Trust Bonds, or they shall invest the said moneys for a short time in any of the other securities written (mentioned) in the twentieth section of the Indian Trusts Act..... My executors and trustees shall spend according to law the said sum or certain portions thereof in connection with some good works or charity in such manner as they may think just and proper, such as Hospita', Sanitarium, Suvavadhkhana (lying-in-hospital), Musafarkhana (resting house for travellers), Madressas (schools), Scholarships, Dharamshalas, Medical Dispensaries, &c., (i.e.) in connection with any such 'Khairat' that is, 'charity' work, that is, in connection with such different works of charity. But the said sum shall not be expended in any other way or my heirs or the residuary legatee whom I have appointed in this my will shall not have any right to the same. I give full authority to my executors and trustees in that behalf."..... "Should no son be born to me agreeably to what is written above, or should (one) be born and should he die without leaving a son or heirs (daughters are not included amongst heirs), then as regards my whatever 'punji' that there

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may be left, I give the whole thereof to my executors and trustees and direct them as follows :—They shall utilize the whole of the said 'punji' or portions thereof in such manner as they in their discretion think proper in connection with the above mentioned or any other good works of Khairat (charity) and I give full authority to my executors and trustees in that behalf." It was contended *inter alia*, that the testator could not validly dispose of more than one-third of his property by will and that the above dispositions in favour of charity were void on two grounds (1) that they were bad for uncertainty, (2) that they were bad because they were conditional:

Held (1) that Cutchi Memons had acquired by custom the power of disposing of the whole of their property by will ;

(2) that it was not proved in this case and never had been proved affirmatively that the Cutchi Memons had ever adopted as part of their customary law the Hindu law of the joint family, as a whole, or the distinction existing in that law between ancestral family, and joint family and self-acquired property ;

(3) that Cutchi Memons were subject by custom to the Hindu Law of succession and inheritance as it would apply to the case of an intestate separated Hindu possessed of self-acquired property and no more ;

(4) that the will challenged in this suit was a good and valid will in all respects, and that the bequests to charity were neither void for uncertainty nor bad under the Mahomedan Law as offending against the radical principle that a gift must be made *in proesenti* and not conditioned *in futuro*.

The Kojahs and Memons' case, ⁽¹⁾ considered ; *Mahomed Sidick v. Haji Ahmed*, ⁽²⁾ dissented from ; *Jan Mahomed v. Datu Jaffer*, ⁽³⁾ followed and the judgment therein incorporated.

Abraham v. Abraham ; ⁽⁴⁾ *Ahmedbhoy Hubibbhoy v. Cassumbhoy Ahmedbhoy* ; ⁽⁵⁾ *Shivji Hasam v. Datu Marji Khoja* ; ⁽⁶⁾ *Hirbai v. Gorbai* ⁽⁷⁾ and *Gangabai v. Thavar Mulla*, ⁽⁸⁾ referred to.

Jainabai v. R. D. Sethna ⁽⁹⁾ and *Chunilal Parvatisankar v. Bai Samrath*, ⁽¹⁰⁾ referred to and distinguished.

ADMINISTRATION Suit :

One Mahomed Haji Sabu Sidick, a Cutchi Memon of Bombay, died at Bombay on the 29th of September 1908,

⁽¹⁾(1847) Perry O. C. 110.

⁽²⁾(1885) 10 Bom. 1.

⁽³⁾(1915) 38 Bom. 449.

⁽⁴⁾(1863) 9 Moo. I. A. 195.

⁽⁵⁾(1889) 13 Bom. 534.

⁽⁶⁾(1874) 12 Bom. H. C. R. 281.

⁽⁷⁾(1875) 12 Bom. H. C. R. 294.

⁽⁸⁾(1863) 1 Bom. H. C. R. 71.

⁽⁹⁾(1910) 34 Bom. 604.

⁽¹⁰⁾(1914) 38 Bom. 399.

leaving a will dated the 4th of April 1908, in the Gujarati language and character. The testator appointed his mother Jimbabei, the 1st defendant, and one Hormasjee Nasserwanjee Vakeel, an attorney of this Honourable Court, the 2nd defendant, as executrix and executor, respectively, and as trustees of the said will, who duly obtained probate on 30th of August 1909. The testator died childless. He left him surviving as his next of kin, his widow Fatmabai, the 7th defendant, his mother Jimbabei the 1st defendant and two sisters Khatizabai and Rakhiabai, the 3rd and 5th defendants, respectively. Khatizabai had a minor daughter Fatmabai, the 4th defendant, and Rakhiabai had a minor son Abdul Kadir, the 6th defendant.

The testator left considerable properties both moveable and immoveable, practically all of which was in Bombay. The net value of the testator's estate was estimated in the petition for probate at Rs. 16,12,973, but it was alleged that the actual value was in fact much greater. The bulk of the property was inherited by the testator from his own father.

The testator made the following bequests to his surviving relations:—(i) a bequest of a house at Chas Mohalla, Bombay, to his mother with liberty to her to give the same by will or deed to any of her children after her death, (ii) a bequest of Rs. 2,75,000 expressed to be for the benefit of the 5th and 6th defendants, (iii) a bequest of Rs. 2,75,000 expressed to be for the benefit of the 3rd and 4th defendants and of other children of the 3rd defendant, (iv) a bequest of the income of a good property to be purchased with a sum of Rs. 50,000 in favour of his widow, the 7th defendant during her lifetime so long as she should remain faithful to his memory, (v) a bequest of Rs. 500 per month to his mother for life, (vi) a bequest of Rs. 50,000 out of which a good property was to be purchased for the

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benefit of the 5th and 6th defendants, and (vii) a bequest of Rs. 50,000 out of which a good property was to be purchased for the benefit of the 3rd and 4th defendants.

The testator further made the following provisions in favour of charity, namely :—

24. I direct my executors and trustees as follows :—They shall out of my "Punji" set apart Rs. 3,00,000 (namely three lacs), and shall therewith purchase Government Promissory (loan) Notes or Port Trust Bonds or they shall invest the said moneys for a short time in any of the other securities written (mentioned) in the twentieth section of the Indian Trusts Act. And should I hereafter make a codicil to this my will and should I myself state in writing therein as to what use is to be made of the said sum, my executors and trustees shall act in accordance therewith; otherwise my "Executors" and "Trustees" shall spend according to law the said sum or certain portions thereof in connection with some good works of charity in such manner as they may think just and proper, such as Hospital, Sanitarium, Suvavadhana (lying-in-hospital), Musafarkhana (resting house for travellers), Madressas (schools), Scholarships, Dharamshalas, Medical dispensaries, &c. (i.e.) in connection with any such "Khairat" that is "charity" work, that is in connection with such different works (of charity). But the said sum shall not be expended in any other way or my heirs or the "Residuary Legatee" whom I have appointed in this (my) will shall not have any right to the same. I give an authority to my "Executors" and "Trustees" in that behalf.

25. I have now no issue whatever as written above. But should hereafter by the Grace of God any children be born of the womb of my present wife or should I hereafter publicly marry another lady of my caste and creed according to the custom of my caste and creed and should any children be born of her womb hereafter and should daughters be (so) born (to me), I direct as follows:—My "Executors" and "Trustees" shall set apart a sum of Rs. 1,00,000 for each of my daughters and they shall purchase therewith some good property, and out of the net income thereof they shall make necessary outlays for the maintenance, education, &c. of (my) said daughter. And they shall get her betrothed and married in some good house (family). In connection with the said betrothal and marriage an outlay of Rs. 15,000 in all shall be made. The outlay for clothes and ornaments, &c., shall be considered to be included therein. And when the said daughter shall attain the age of eighteen years then as regards the balance which may remain over out of the said sum of Rs. 1,00,000 one trust (deed) shall be got made in respect thereof on the following conditions. As long as each of

my said daughters may live and exist, so long she shall get the income thereof. And after her life-time (decease) the said remaining sum or property shall be received by such of her children to whom (and) in such shares as she may desire the same to be given by a 'trust deed' or 'will' or by (any) other document. But her husband shall not have any right to or authority over the same nor shall he interfere therein.

26. Should any son or sons be born to me agreeably to what is written above by the womb of my present wife or by the womb of any other lady of my caste and creed with whom I may publicly marry according to the usage of my caste and creed, then after paying, setting apart, and expending whatever I have written (directed) to be paid, to be set apart and to be expended agreeably to what is written above, as regards whatever "Punji" belonging to me there may remain over, my said son alone shall become the owner thereof, should I have (only) one son or my (said) sons shall become the owners thereof in equal shares, should I have more sons than one. And I direct my Executors and Trustees as follows:—When my son or the youngest (of my) sons attains the age of eighteen years, they shall make over my "Punji" to him (? or them) or they shall divide the same amongst my said sons equally. And until the said son or sons attains (or attain) the age of eighteen years, my "Executors" and "Trustees" shall out of the income of my "Punji" give a proper sum to (his or) their guardian for (his or) their maintenance, wearing apparel, and clothes, education and for other expenses in connection with (their) weal and woe. And as regards whatever remaining income there may be left, the same shall be included in (i.e., added to) my "Punji" from time to time. In the same manner should "Vivah" or marriage of any sons of mine take place before he shall have attained the age of eighteen years, my "Executors" and "Trustees" shall out of his share make an outlay of Rs. 25,000 including everything in connection with the said "Vivah" and marriage, that is to say, including clothes and ornaments, after each of (my said) sons. But should any son whatever of mine die without (leaving) a child after his marriage, but before attaining the age of eighteen years, his brother or his brothers shall become his heir (heirs). And should he die leaving a daughter, (a sum of) Rs. one lac shall be set apart for (his) said daughter. And the said sum shall be utilized in the same way in which I have directed (the sum) for my own daughter (to be utilized). And just as I have directed (a sum) to be set apart for the maintenance of my wife, in the same manner a sum of Rs. 50,000 shall be set apart for his wife's maintenance. And his remaining share shall be received by his brother or brothers. But should such deceased son have no brothers then under the circumstances first mentioned the whole share of the deceased or under the circumstances secondly mentioned his remaining share shall be included in (i.e. added to) my

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remaining "Punji" and the same shall be utilized in "Khairat" (charity) in accordance with what I have hereinafter written.

27. Should no son be born to me agreeably to what is written above or should (one) be born (and) should (he) die without leaving a son or heir (daughters are not included amongst heirs) then as regards my whatever "Punji" there may be left I give the whole thereof to my "Executors" and "Trustees" and direct them as follows:—They shall utilize the whole of the said "Punji" or portions thereof in such manner as they in their discretion think proper in connection with the abovementioned or any other good works of "Khairat" (charity) and I give full authority to my "Executors" and "Trustees" in that behalf.

In the years 1911 and 1912, suits had been filed on behalf of the several beneficiaries interested in the specific bequests under the will, and defendants Nos. 1 and 2 were directed to pay the amounts due under the said bequests and to set apart funds, where it was so necessary under the will. Payments were not however fully made, nor funds set apart as directed by the decrees in the said suits, as differences had arisen between the 1st and 2nd defendants. Owing to the said differences the administration of the testator's estate was practically at a dead-lock, the only charity established by the 1st and 2nd defendants being a Mussa-farkhana in Bombay upon which a sum of Rs. 3,50,000 was expended. In order to discharge the liabilities of the said estate and to provide for legacies it was necessary to sell some of the immoveable properties. It was alleged that the 1st defendant wanted the 2nd defendant to consent to her being paid Rs. 2,000 per month instead of Rs. 500 per month as provided by the said will. The second defendant refused to give his consent to the said proposal and as a result the first defendant refused to join in selling any of the immoveable properties. One of the immoveable properties belonging to the said estate was a large house at Malabar Hill fitted with costly furniture. The said house remained as an unproductive asset for a long time after the death of the testator. Owing to the dead-lock above

referred to there was no likelihood that the 1st and 2nd defendants would agree upon any further charity being established as under the said will.

In the events that had happened, the Advocate-General of Bombay as representing the charities filed the present suit on 23rd September 1913; praying *inter alia*, that the estate of the testator may be administered by and under the direction of this Honourable Court, that the 1st and 2nd defendants may be directed to account for their management of the said estate, that the shares and interest in the said estate of the charities referred to in the said will may be ascertained, that a scheme may be framed for the establishment of the charities not yet carried out and fit and proper trustees may be appointed by this Honourable Court, and that all such directions may be given, accounts taken and enquiries held as to this Honourable Court may seem just.

Defendants Nos. 1 and 2 had no objection to the administration of the property by the Court.

Defendants Nos. 3, 4 and 5 submitted to the "determination of the Court whether the bequest of the residuary estate of Mahomed Haji Sabu Sidick in the events that have happened is valid and operative according to law."

Defendant No. 7 (the widow of the testator) contended that the testator could not dispose of more than one-third of his estate and further submitted to this Court "what law governs the succession to the said two-thirds of his estate over which it is contended he had no disposing power." She further submitted that "on the true construction of the said will the devises and bequests claimed by the plaintiff to be good charitable devises and bequests are not valid and ought not to be given effect to and in any case that such devises and bequests are

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to be postponed until this defendant's rights and interests in the said estate are secured for her benefit."

On behalf of defendants Nos. 3 and 4 the following issue was raised :—

8. Whether on the true construction of the will the devises and bequests to charity are valid ?

On behalf of the defendant No. 7 the following among other issues were raised :—

9. Whether Mahomed Haji Sabu Sidick being a Cutchi Mahomedan could validly dispose of by will more than one-third of his property ?

11. Whether the bequests in Clauses 24, 27 of the will of the said Mahomed or either of them is a valid bequest in favour of charity ?

15. Whether the said devises and bequests in Clauses 24, 27 of the said will be held to be valid they should not be postponed until the rights of the defendant No. 7 in the estate of the said Mahomed be secured ?

On behalf of the plaintiff the following two issues were raised :—

16. Whether the testamentary capacity of a Cutchi Memon is not that of a Hindu ?

17. Whether the law of wills is not part of the law of inheritance ?

Bahadurji (Acting Advocate-General) and *Tara-porewala*, for the plaintiff.

Wadia and *Mulla*, for defendant No. 1.

Inverarity and *Kanga*, for defendant No. 2.

Bahadurji and *Davar*, for defendants Nos. 3 and 4.

Jinnah and *Campbell*, for defendant No. 5.

Defendant No. 6 was unrepresented and did not appear.

Setalvad and *Desai*, for defendant No. 7.

BEAMAN, J.:—The substantial questions to be answered here are: (1) whether a Cutchi Memon is entitled to dispose of more than one-third of his property by will; (2) whether certain bequests to charity in this will are void or are good and valid bequests. Implied in these questions is a consideration of the long-standing

controversy as to the precise extent to which the sect of Cutchi Memons is governed not by the Mahomedan but by the Hindu law.

When the case came on for trial it was hoped that it might be made a test case for the settlement of several points upon which a difference of opinion still exists in the mixed law administered by this High Court to the two sects of Khojas and Cutchi Memons; and it was with that object in view that all the learned counsel concerned spared no efforts to collect and bring before the Court all available material and directed their arguments to an extensive and searching survey of this entire field of law.

Ever since Sir Erskine Perry's famous judgment delivered in the year 1847 in what is commonly known as the *Kojahs and Memons' case*⁽¹⁾ it had become almost customary in this Court to treat these two sects as though they were on precisely the same footing and must necessarily be governed to the same extent by the mixed law declared by one decision after another to be applicable to them. In the course of the trial it became clear that however the questions directly in issue be approached, evidence confined to practices and customs of the Khojas could not really be relevant. Assuming that the Court had to enquire here into an alleged custom of the Cutchi Memon sect, its decision will have to be given upon evidence that such a custom had universally prevailed and been long established not amongst the Khojas but amongst the Cutchi Memons. Nor could the mere fact that evidence was forthcoming to show that a similar custom has been adopted by the Khoja Community make that evidence relevant in this case. It is perhaps unfortunate that the expectations, with which the trial was entered

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upon, have so far been frustrated that the judgment can declare no more than what is shown to be the law governing the powers of Cutchi Memons to dispose of their property by will. It is further to be noted that notwithstanding the habit of regarding the Khojas and Cutchi Memons as in all respects identical for the purposes of such a discussion, they are really distinguishable upon broad theoretical grounds which might have, if they have not had, practical consequences. While there are many peculiar features in the sectarianism of the Khojas, strongly marking them off from orthodox Mahomedanism, the Cutchi Memons except for the alleged historical fact that they were originally Hindoos, and were converted four hundred or five hundred years ago to Mahomedanism, are, at the present day, strict and good Moslems. In a recent case of *Jan Mahomed v. Datu Jaffer*⁽¹⁾ I examined the whole case law touching both the Khojas and the Cutchi Memons critically and, I think, exhaustively. It was a great satisfaction to me to find that Macleod J. is in entire agreement with the conclusions then reached. In the very recent case of *Mangaldas v. Abdul Razak*⁽²⁾ that learned Judge had to deal with a cognate point indirectly arising out of the general proposition which must be said to have been established by the decisions of this Court that the Khojas and Cutchi Memons are governed by the Hindu law in all matters of simple succession and inheritance. I think that Macleod J.'s judgment in that case is theoretically correct and draws more than one very necessary distinction. The very same questions indirectly arise here, as, I think, they always must, until this Court has decided much more clearly than it ever yet has done within what limits the practical application of the proposition I have just cited must be confined ; for

(1) (1913) 38 Bom. 449.

(2) (1914) 16 Bom. L. R. 224.

it is obvious that in considering the testamentary capacity of a Cutchi Memon the Court will almost necessarily be brought at once into contact with the legal notions peculiar to the law of the joint Hindu family. I think it will be convenient to incorporate the whole of my judgment in the case of *Jan Mahomed v. Datu Jaffer*⁽¹⁾ by reference here. It would be mere idle waste of time and vain repetition to cover the ground again; and such criticism as has been directed against parts of that judgment in the present argument has only confirmed me in the conviction that it is substantially accurately reasoned and lays down correct conclusions. In minor points it might require modification here and there in the light of the fuller information given me during this trial regarding the procedure and details of the cases tried before Sir Erskine Perry in 1847 and Scott, J. in 1885. But as a *critique raisonne* of the manner in which the legal doctrine grew in this High Court and came to be accepted by succeeding Judges and the profession generally, I still entirely adhere to it. It has been a source of great satisfaction to me that in the course of his able and interesting argument, the oldest, greatest and by far the most experienced Advocate of this High Court at the present time more than once admitted the general correctness of my reasoning throughout my judgment in the case of *Jan Mahomed v. Datu Jaffer*.⁽²⁾ He said that it had been his own view as far back as 1885 when he advanced it tentatively before Scott J. in the case of *Mahomed Sidick v. Haji Ahmed*.⁽³⁾ But he thought it was now much too late to undo what had already been done and had enured through these years into a settled doctrine of the Court and the accepted rule of practice with the profession. To that extent I am prepared to agree with Mr. Inverarity.

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Speaking broadly, in dealing with any case of this kind arising amongst the Khojas or Cutchi Memons, I feel myself bound to start from the proposition that these sects are governed by the Hindu law of simple succession and inheritance, but looking to, what I still cannot help thinking, the very loose and often very inaccurate manner in which that doctrine came to be established, I should insist on confining it within the narrowest permissible limits. Take, for example, the case tried by Scott, J. in 1885. There, as here, the question was as to the extent of the testamentary capacity of a Cutchi Memon. The learned Judge appears to have started actually with what I conceive to be the correct general proposition that Mahomedans must, in the first instance, be presumed to be governed by the Mahomedan law ; but, as he proceeded, as far as I can see, not upon evidence, but upon the case-law, to substitute the presumption that in all matters of succession and inheritance they were governed by the Hindu law, the first presumption was in the case he actually had to try merely nugatory and need not have been stated. Enlarging his second proposition to an extent, which I have endeavoured to show is not logically legitimate, he also presumed the existence amongst the Cutchi Memons of a very special feature of the law of the joint Hindu family ; and he appears to have thrown on the party, alleging that a Cutchi Memon had a right to dispose of his property by will, the burden of proving that that right included ancestral as well as self-acquired property. But the power of disposition by will, as a general legal notion, can have nothing whatever to do with the very special notion of ancestral property as an integral part of the law of the joint Hindu family. The question really was not whether a Cutchi Memon could prove as special custom that he had the right of disposing by

will of joint ancestral family property but a totally different question, viz., whether the Hindu concept of the joint Hindu family had been adopted as a custom amongst the Cutchi Memons. The onus of proof, had the question been rightly stated, would then have been on the party alleging that the Cutchi Memons had adopted, as a custom, the whole law of the joint Hindu family. Nothing of that kind has ever been admitted. Nor does it follow from the proposition that the Cutchi Memons are governed by the Hindu law of simple succession and inheritance, that they are also governed by the whole law of the joint Hindu family. As I pointed out in my judgment in *Jan Mahomed v. Datu Jaffer*⁽¹⁾ it is extremely difficult, if indeed not impossible, to disentangle parts of the concept of the joint Hindu family from what might otherwise be called the Hindu law of simple succession and inheritance. It may be doubted whether the making of a will is, in strictness, part of the law of simple succession and inheritance. It has been strongly contended in this case that it must be so; and while I am prepared to accede, subject to reservations, to that contention, I should still insist upon imposing upon it very definitive limitations. In the first place, as I stated in summarising my analysis of the case-law in my judgment in *Jan Mahomed v. Datu Jaffer*,⁽¹⁾ I think that logically the very loose general proposition should be thus qualified, that the Khojas and Cutchi Memons are governed by the Hindu law of simple succession and inheritance as in the case of a separated Hindu disposing of his self-acquired property. Subject to that qualification the rule would not be open to any very serious theoretical and to no practical objection at all. But as soon as it is supposed to imply other Hindu notions peculiar to the law of the joint Hindu

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family, it is open to both theoretical and practical objections of the most serious kind: theoretical, because the rule can only be said to rest upon proved customs, and no custom of this kind has ever been alleged, let alone proved; practical, because no Cutchi Memon or Khoja could ever then dispose of his property without the risk of having his will attacked on the ground that the property disposed of was joint family property or joint ancestral family property. The nucleus doctrine would come into play and the door would be opened to interminable inquiries as to the remote origin of the testator's wealth. I have said that, rigorously analysed, the power of disposing by will of a man's property can have no logical connection whatever with the Hindu law of the joint family. Just as in the case of a gift *inter vivos*, so a man can only dispose by will of that which is his own. According to the very special and artificial concept of the joint Hindu family, no member of it can say that any part of his common wealth is his own. There can never, therefore, be any question of disposing of the joint family property either by will or by gift *inter vivos*. But in the case of Mahomedans who may have adopted from the Hindus the custom of disposing of their property by will, it does not follow that any such difficulties need arise. Eliminate the notion of the joint Hindu family, and all the property which has come to a man from his father, although he might have children of his own, would, under the Mahomedan law or any other than the Hindu law, be his own to dispose of as he chose. Before, then, the power of disposition by will could be controlled by the law of the joint Hindu family, it would be essential to prove that the testator had adopted the custom of the joint Hindu family and if it were found that he had disposed of the property which, under that law, would be joint family.

property, the result would be that his will was *pro tanto* bad, simply because he had given away what was not his own. Observe further that as long as a joint Hindu family is in existence, there can, strictly speaking, be no question of succession or inheritance at all. If then the result of the long series of cases in this High Court were no more than to establish a custom amongst the Khojas and Cutchi Memons in virtue of which they can be said to be governed by the Hindu law of simple succession and inheritance, that custom *ex vi terminorum* must lie wholly outside the law of the Hindu joint family. Under the strict Mahomedan law power to dispose of the property by will is restricted to one-third. Mahomedans claiming to have adopted the custom giving them larger powers of disposition from the Hindu law might well prove that they had in consonance so far with that law customarily disposed of their whole property; and yet may also prove, attempt or desire to prove, that in any other respects they had not adopted the law of the Hindu joint family. In fact, as I have just said, so far from the latter being a necessary 'corollary to the former, it is, when closely scrutinised, properly antithetical to it.

Looking back over the cases decided by Sir Erskine Perry and Scott J., I think it must be admitted now that the evidence in the former case went far beyond the scope of the question which alone fell to be determined. Taking the case of the daughters, for example, I believe, Sir Erskine Perry really meant to find that a custom had been proved showing that the parties had virtually adopted the whole Hindu law; or perhaps it will be more correct to say that he believed the evidence to prove that in spite of their conversion they had always substantially retained that law, and the special custom with which alone he was

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concerned was proved rather in derogation of the Hindu than of the Mahomedan law ; for, unless he had also meant to find in the case before him that all the parties concerned constituted a joint Hindu family, the exclusion of the daughters would have been as repugnant to the Hindu as to the Mahomedan law. In the case before Scott J., nearly forty years later, the trial again appears to me to have proceeded on the presumption that many of the characteristic features of the law of the Hindu joint family had been adopted by the Cutchi Memons and very likely had those trials been more rigorously (I mean more rigorously in the logical sense) conducted, some such result might have been obtained. But in view of what was actually in controversy, I cannot help thinking that the results were unsatisfactory. I think it still remains impossible to say that in any single case reported in our law-books up to the present day has it been alleged that either the Khojas or the Cutchi Memons have adopted by special custom the whole law of the joint Hindu family. Doubtless it has always run through the minds of the numerous eminent and learned Judges, who had to try this question in various forms, that these two sects of the Khojas and Cutchi Memons were originally Hindus. They, therefore, appeared to have found it a very easy inference that in spite of their conversion to Mahomedanism they should have preserved their whole original personal law. But while such an inference might be used as *lightening the burden of proof*, it could not properly, in my opinion, be made the ground for such large conclusions as have been drawn from it. On conversion to Mahomedanism, converts, no matter what their previous religion may have been, must be taken at that moment to have renounced all their former religious and personal law in so far as the latter flowed from and was inextricably bound up with their religion,

and to have substituted for it the religion of Mahomed with so much of the personal law as necessarily flows from that religion. Thus, when the Khojas and the Cutchi Memons were converted, I take it to be an universally true proposition that, in the eye of the law, they then became subject, in every respect, to the Mahomedan and not to the Hindu law. Whatever may have happened later, there was at the time a break, a new starting point, from which all their legal relations must be readjusted. Remembering that these two sects were surrounded by their former Hindu co-religionists and were living frequently in a Hindu Raj with access only to Courts presided over and administered by Hindu Judges, it is extremely probable, apart from all other considerations that they should gradually have readopted much of their old law, not indeed as law but in the form of custom. It is quite possible that that process went very far, probably two or three centuries ago, when these people were few and, for the most part, poor. It cannot, however, be denied that in the case of both the sects, their adherence to Mahomedanism has withstood anything like a complete reincorporation with their former Hindu co-religionists. I have pointed out in my judgment in *Jan Mahomed v. Datu Jaffer*⁽¹⁾ how intimately connected the whole theory of the joint Hindu family is with radical religious concepts, and for that reason if the Mahomedanism of these people was at any time a real religion, something more than an empty name, I do not see how it is possible that they could have reverted completely to the old Hindu family system. Many features they may have adopted, and probably did adopt from it. This, I think, is quite evident from the depositions of the witnesses examined in the earlier cases. But the later tendency has been, I think, in the direction of

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stricter adhesion to the Mahomedan and completer severance from the Hindu law. In this connection it must never be forgotten, what was tersely stated by their Lordships of the Privy Council in the case of *Abraham v. Abraham*,⁽¹⁾ that inasmuch as the adoption of a custom is by the volition of the parties adopting, so it is equally in their volition to abandon any such custom and once again place themselves strictly under their proper unmodified law. If that is the correct legal view, it will follow that in the case before me I have to consider whether the Cutchi Memons have proved a custom authorising them to make wills, and, if so, what are the limits of that custom. Along with this question will have to be considered the further, though quite distinct, question whether they have also been proved to have adopted the law of the joint Hindu family. For, if the last question be answered in the affirmative, then the quantum of the property of which they might dispose by will might be very different in any given case.

It will be observed that the sixteenth issue has been designedly worded in rather curious form, inviting the Court to decide whether the testamentary powers of a Cutchi Memon are not those of a Hindu ; that is to say, impliedly, whether a Cutchi Memon is liable to certain disabilities in disposing of his wealth which attach to a Hindu under the law of the joint Hindu family. And it is the implication, I think, rather than what is expressed in the issue that the parties to this case feel to be of primary importance. Let me then consider a little more closely in what sense and how far making wills can be said to be a part of the Hindu law of simple succession and inheritance. Looking to our own Succession Act which is largely concerned with

(1) (1863) 9 Moo. I. A. 195.

devises, it cannot be doubted that, speaking loosely, at any rate, wills in the contemplation of lawyers belong to the law of succession and inheritance. Is there then any distinction between succession and inheritance? At the present day probably none of practical importance. Viewed historically, succession was a term probably confined to moveables; and inheritance to immoveable property; and under the old law of England different persons would succeed or inherit, respectively. It is difficult, however, to find any ground for such a distinction in this country. There is no common law of India in the same sense in which there is a common law of England. In dealing with Hindus and Mahomedans, where they are not expressly governed by Statutes, the business of the Courts is to apply to them, as far as possible, their own law. It is only where their own law does not apply and they are not under Statute, the Courts turn to the common law of England, or govern their decisions by what is very generally termed, the principles of equity and good conscience. Admitting that wills belong more properly to the law of succession and inheritance than to any quite distinct law of their own, the question is not yet completely answered. In the first place, the power of disposing of property by will is no more peculiar to the Hindu than to the Mahomedan law. On the contrary, it is in the latter system that we find more positive restrictions placed upon the disposing power, and apparently, more definite ideas formulated in legal rules. For the purposes of the present enquiry what has to be considered is: (1) the Mahomedan rule prohibiting a man from disposing of more than one-third of his property by will; (2) the limitation imposed upon the disposing power of individuals under the Hindu law arising out of the legal conception of the estate of a Hindu joint family. I am not now

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concerned with further technical qualifications and conditions to be found in the Mahomedan law of wills. I have stated the main distinction in the most general terms. And, so stated, this at least becomes apparent, that what is in controversy really has nothing to do with the making of wills, *qua* wills, but with what under the Hindu system defines the property which is a man's own and, therefore, capable of being devised by him. This is what is really meant by the plaintiff in this suit, who wishes to prove that the disposing power of a Cutchi Memon is in all respects that of a Hindu. But before such a proposition can be established, those contending for it must prove that the Cutchi Memons have adopted the law which embodies the concept of joint family property. And here I should like to add a few observations upon what I have stated a little more generally in the opening part of this judgment. When I said that no such custom as that of having adopted the entire law of the joint Hindu family had ever been alleged, much less proved, in our Courts, I am not to be supposed to have overlooked what appears to have been in controversy, the procedure adopted and the conclusions reached in such cases as those of *Mahomed Sidick v. Haji Ahmed*⁽¹⁾ and *Ahmedbhoy Hubibbhoy v. Cassumbhoy Ahmedbhoy*.⁽²⁾ The latter is a Khoja case. In the latter case a son sued his father for partition. Both the parties appear to have gone to trial upon the footing that the law of the joint Hindu family had been accepted as part of the customary law of the sect to which they belonged. In the first Court, the trial was, therefore, principally directed to ascertaining whether the property in suit was ancestral or self-acquired. On appeal, however, the case was decided on a narrower ground suggesting a reversion to an earlier stage of the law, in which it still

⁽¹⁾ (1885) 10 Bom. 1.

⁽²⁾ (1889) 13 Bom. 534.

lay upon Mahomedans alleging themselves to have adopted any peculiar feature of the Hindu law to prove it. Merely expressing *obiter* an opinion as to the character of the property in suit, the appeal Court held that the parties had not proved that their sect had adopted so much of the Hindu law of the joint family as would entitle a son to demand partition of his father. I am not here concerned with the reasoning by which that conclusion was reached. The only comment I need make upon it is that it involves much of that large process of inference, unsupported by direct proof, which has characterised the whole long course of litigation affecting in this respect the Khoja and Cutchi Memon sects. Further, if the Khojas had really, as appears to have been taken for granted, adopted the rest of the law of the Hindu joint family, while they had not adopted that part of it which gives the son a right to enforce partition against his father, it is obvious that the resultant system amongst them must be radically different from the recognised system prevailing among the Hindus under the Hindu law of the joint family. It is an essential feature of that law that every member of the joint Hindu family takes an interest in the joint family property at birth; and it is a correlate of that proposition that a member invested with such rights can, if at the head of his stirps, enforce it by partition. The broad principle, perfectly clear and intelligible in itself, became obscured in the controversy arising upon the right of a son to enforce partition between his father and his uncles. Partition in a Hindu joint family being always *per stirpes*, such a right would conflict with the fundamental principles upon which the whole system rests. And it appears to me that there is very little relevance in introducing the divergent opinions of Judges upon such a point into a consideration of a much wider and simpler proposition.

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I do not know that in this Presidency any doubt exists as to the right of a son to enforce partition of joint family property against his father; and as I pointed out in my judgment in *Jan Mahomed v. Datu Jaffer*,⁽¹⁾ the Privy Council have emphatically insisted upon the correlation of the two rights, that is to say, acquiring an interest by birth, and enforcing it by partition as being inseparable from, and complementary of, each other making up the basic principle of this part of the law of the joint family. By introducing such a variant as that the son amongst the Khojas has not the right to enforce partition during his father's lifetime, the radical difference between any such law of the Hindu joint family as the Khojas may really have adopted, and that law, as it exists, in its complete form amongst the Hindus, has been established. Nor is it always possible to say that the customary law of these people in respect of the legal concept of the joint family is the same as the Hindu law. The point is of capital importance because it indicates that similar radical divergences might be, and probably would be, found, had the question ever been specifically raised, between the customary law of the Khojas and Memons, and the Hindu law regarding the distinctions drawn in the latter between joint ancestral, joint family and self-acquired property. And what I was insisting upon in my general observations was that neither amongst the Khojas nor the Cutchi Memons is any reported case to be found in which a party has expressly alleged that the Hindu law of the joint family, containing the peculiar legal concept of the joint ancestral or joint family property, has ever been adopted by these sects. On the contrary, in the two cases I have mentioned it has been assumed, and assumed merely inferentially from the

(1) (1913) 38 Bom. 449.

earlier decisions, that such wholesale adoption of the complicated Hindu law of the joint family had been made by both the Cutchi Memons and the Khojas. In the case before Scott, J. the question again turned directly upon the character of the property alleged to have been disposed of by the impugned will; and again it was taken for granted that if it was ancestral the burden of proving that the testator had power of disposing of it lay upon the party so alleging. Now, it is obvious that the same kind of enquiry might as well be entered into in the case of any English will, once a presupposition is made that if the property disposed of complies with certain requirements it also gains a peculiar legal character. An enormous percentage of property disposed of by English wills in England might be shown to be ancestral family property in the sense that it has come into the hands of the testator under conditions which in Hindu law would imprint that character upon it; but it would be absurd to say that, unless it could also be shown that the English law had adopted the concept of the Hindu joint family, the resulting corresponding legal consequences from the facts proved, arose. That is a point which I wish to emphasize. If it had not been virtually assumed by the Courts that amongst the Khojas and Cutchi Memons, property falling within the definition of ancestral family property or joint family property in the Hindu law also acquired the peculiar characteristics given to it under the especial law of the joint Hindu family, there would have been no point at all in the enquiries made by the Courts in the two cases I have mentined. To this the answer would naturally be that unless the parties themselves had been fully aware that their sects had adopted the whole Hindu law of the joint family, they would never have gone to trial on the issues raised in these cases. That answer is plausible but, in

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my opinion, not conclusive. As regards the particular contestants their admissions might suffice but the admissions of parties in any given case would hardly be an adequate equivalent for that strict and elaborate proof which the law requires when such special custom is set up and disputed in derogation of the general law governing litigants. I have also pointed out in my previous judgment that forty years after Sir Erskine Perry's decision in the *Kojahs and Memons' Case*⁽¹⁾ it would have been virtually impossible for any member of these sects to obtain legal advice at this Bar except upon the footing that they were, to all intents and purposes, Hindus and not Mahomedans. That opinion had struck deep roots and no doubt gathered some support from the nature of the evidence recorded before Sir Erskine Perry, confirmed by the long and virtually settled practice on the Ecclesiastical Side of the Court, and it is indisputable that long before 1885 the Courts and the whole profession here had settled down to the unshakeable belief that the decisions of the Court had firmly established the rule that the Khojas and Cutchi Memons were, in respect of their entire family system, Hindus and not Mahomedans. I have already criticised the value of the long established practice on the Ecclesiastical Side of the Court and it would be waste of time to repeat that criticism here. I still think that far too much importance was attached to those materials in every case in which they were referred to. It probably is true that when such questions first came before this High Court a very large number of Khojas and Cutchi Memons were saturated with Hindu notions regarding the law of the joint family. They would be predisposed to accept the decisions of the Courts as interpreted by the profession

⁽¹⁾ (1847) Perry O. C. 110.

generally and so gradually habituate themselves to the belief that in law, at any rate, rather owing to the decisions of the Court than any volitions of their own, they were subject to the whole law of the joint Hindu family. In the course of the argument here it has frequently been said that my former judgment insisted too much upon this law having been forced upon the reluctant sects of the Khojas and Cutchi Memons by the Judges and the profession. In 1847, I do not think that either sect would have thought it a very serious hardship had the Courts decided that in the eye of the law they were Hindus and not Mahomedans. The Courts never did decide anything of the kind; but I concede that, on the evidence before him, Sir Erskine Perry probably thought that the Khojas and Cutchi Memons had virtually retained the whole of their domestic and personal law as distinct from religion. No one could then have foreseen the length to which the judgments in those cases would afterwards be carried. And it is no doubt true, to some extent, as contended by Mr. Inverarity in this case, that the most serious grievance which the Khojas and Cutchi Memons now have is not that they have been placed definitely under the Hindu law but that they are perpetually being called upon to prove this or that custom in derogation both of the Mahomedan and of the Hindu law. They stand now in the unfortunate position of being governed in many most important relations in life neither by the Hindu nor by the Mahomedan law. Legally their condition is one more or less of chaos and that undoubtedly has been brought about by the loose and often inaccurate reasoning and wide inferential processes upon which I have commented in my criticism of the case-law. Had that law been constructed step by step as each case came before the Courts by strict logical process, always starting from

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the first presumption that, as Mahomedans, these people were governed by the Mahomedan law, and any alleged custom in derogation of it must be proved, the result might have been, and I think it would probably have been, very different. In a sense then I do think that this law has been forced upon the Khojas and Cutchi Memons by the Courts and the profession, although it is arguable whether, during the process, at any rate in its earlier stages, the bulk of the communities realized what was going on, or took any strong objection to it. As they increased in wealth and intelligence, however, indications are not wanting of some resentment at being thus compelled to appear in the Courts as Hindus rather than Mahomedans. The Cutchi Memons, with whom I am presently concerned, are undoubtedly good Moslems and feel deeply the imputations cast upon them by their co-religionists on account of the length they have gone, or are supposed to have gone, in substituting the Hindu law of the joint family for the laws of the Quran. Speaking of the Quran, I may note in passing that the restrictions imposed upon the power of a Mahomedan to bequeath more than one-third of his property by will are not to be found in the Quran at all. Yet this has been so long an integral part of their own Mahomedan law and is supposed to be based upon a view of family obligation and duty approved by the Prophet, that any departure from it now can hardly be altogether dissociated from the profoundly religious sentiment which forms the basis of and interpenetrates the whole of the systems of the Mahomedan and the Hindu law respectively. In this connection another point also arises. Assuming that the Cutchi Memons have adopted and proved the custom of making wills at present of their whole property, are such wills to be interpreted by the Mahomedan or the Hindu law?

Upon this point, I believe, no considered judgment is to be found in our Courts. I was told in the course of the argument that in a very recent case Macleod J. had held that a Khoja will must be construed by reference to the Mahomedan law. I am strongly inclined to the same opinion. I see no solid ground for holding that even if a larger power of disposition had been acquired by the Khojas or the Cutchi Memons than they would ordinarily have under the Mahomedan law, that law, nevertheless, should not govern all the dispositions they make in exercise of that enlarged power. Assuming, for a moment, that, apart from the question of joint family property, which, as I said, lies outside the scope of the law of wills altogether, different constructions and different effects would have to be put upon and given to bequests under the Hindu and Mahomedan law, then in the absence of proof of custom in each particular case, I should still hold that Memons' wills must be interpreted and construed under the Mahomedan and not the Hindu Law. And I think that the Courts would be slow to encourage attempts to prove interminable variant customs of this kind even where the Khojas and Cutchi Memons are themselves desirous of setting them up. I entertain some doubt whether the point really has much practical importance. It is true that the Courts appear to have conceded much more liberal powers for creating various estates by will to Hindus than Mahomedans. But I am not aware that the distinction rests upon any solid theoretical ground. Bequests by will are after all only gifts to take effect upon the death of the donor, and as such originally belonged to the law of gift. The Mahomedan law is much more precise in detail in dealing with gifts than the Hindu law. And that is probably why the Courts have regarded a Mahomedan's testamentary power more jealously than that of a Hindu. But in every civilized

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society which has attained the point of recognizing general principles of law, however crude and elementary these may now appear, the theory of gift is originally much the same. As social relations become more complicated and require a more complex system of law, various elaborate and artificial enlargements of the simple power of gift make their appearance. I think, however, that it would be untrue to say that anything in the least corresponding with such highly evolved and extended powers as are to be found at the present day in the English law can be discovered in the authoritative legal writings either of the Hindus or of the Mahomedans. Trusts, for example, are, as I have had occasion to say in more than one judgment, utterly unknown to the Mahomedan law. So, too, is the power of creating a succession of life estates. My own conviction is that such powers were equally unknown to the early Hindu law-givers. All these, in effect, have been the creations of the English Courts, and the fact that they have been more loosely and widely extended to Hindus than to Mahomedans is probably due, as I have just said, not to any inherent difference of principle to be found in the pronouncements of the early law-givers as in the fact that the Mahomedans were much more precise and fuller in enunciating limitations upon the power of gift. If, however, there is any valid legal distinction to which effect ought to be given between the powers of Mahomedans and Hindus in regard to the creation of artificial estates by will, I should say unhesitatingly that no matter what other Hindu customs the Cutchi Memons may or may not have adopted, every will they make must be interpreted, for the purposes of ascertaining the validity or otherwise of bequests therein contained, according to the Mahomedan and not the Hindu law.

In this case, for the first time, an attempt has been made to prove that the Cutchi Memons have adopted the Hindu law of the joint family virtually in its entirety; that is to say, that they recognize the peculiar quality given to joint family property by the Hindu lawyers. Further, it is sought to prove that they have adopted, as a custom, the power of disposing of the whole of their own property by will. The burden of proving both these points, notwithstanding the previous decisions of the Courts, clearly still lies, in my opinion upon the parties so alleging. I am, therefore, now to consider the evidence laid before me with the object of ascertaining whether it discharges all the requirements imposed by the highest judicial authority upon parties setting up special family, tribal, or local custom in derogation of their general law. The evidence naturally breaks up into three main groups: (1) the wills, Exhibits B, B 1 to B 101; (2) the oral testimony of the leading Cutchi Memons; (3) the opinions of the so-called experts. As to the latter, Mr. F. E. Dinshah and Mr. Inverarity, for example, I entertain considerable doubt whether it is relevant at all under section 48 of the Indian Evidence Act. Certainly, in the case of Mr. Dinshah, even if it be relevant, it can be of little or no value. Doubtless, in questions of this kind, the Courts in England have always given respectful attention to the long established practice of the profession and the opinion of eminent counsel, as, for example, upon points of conveyancing. But where it is, as here a question of sects of Mahomedans having adopted special customs of the Hindu law, I feel very great doubt whether it can logically be said that even so eminent and experienced a counsel as Mr. Inverarity is likely to know of the existence of such rights or customs. It is said that counsel learn from their clients in the course of advising professionally of the existence or

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otherwise of such a right or custom as was in controversy. But I doubt very much whether that was intended by the framers of section 48. In truth, what has actually happened probably is that Mr. Inverarity's advice throughout of the long period of his professional activities has done much more than any volitional act of the community themselves to imprint upon them the belief that, at any rate, for all purposes of litigation, they must accept the position of Hindus, governed by the law of the joint Hindu family. Speaking for myself, I do not think that the opinion of the Bar collectively or any member of it, is of any real value upon such a point. We all know what the opinion of the Bar has been, and I have endeavoured to show how it has grown up. In the course of his long and interesting argument Mr. Inverarity, notwithstanding his repeated admissions that he inclines strongly to accept the correctness of my own reasoning in the case of *Jan Mahomed v. Datu Jaffer*,⁽¹⁾ yet strove strenuously to prove that the various cases I have criticized were quite rightly decided. It needs, however, only to study the cases themselves to discover the many flaws and fallacies in the reasoning more or less commonly accepted throughout the series, which gave rise to conclusions, thereafter whole-heartedly and unquestioningly adopted by the profession. But had the case no other importance, it would obtain a peculiar interest from the evidence given by Mr. Inverarity in which the Court has had the benefit of much intimate and personal opinion growing out of his exceptionally long, distinguished and honourable practice at this Bar. If I seem not to attach as much weight to that evidence as its authorship might deserve, it is simply because I doubt whether it is the kind of evidence which the law

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requires, certainly not because I undervalue Mr. Inverarity's great personal qualities and reputation.

I will now consider the proof afforded by the wills. These are 105 in number (five of these, viz., B 8, B 14, B 60, B 65 and B 80 were afterwards withdrawn) B, B 1 to B 101 and F, J and K. They commenced from the year 1845, Exhibit B, two years before Sir Erskine Perry's judgment. And here I may incidentally note that the practice of making wills is not very ancient even amongst the Hindus. It may be doubted whether any true Hindu will dates back more than one hundred years; and we have here a Mahomedan will seventy years old. It is not, therefore, a case of the Mahomedans borrowing the custom from some ancient and well-established branch of the Hindu law, but rather, as it would appear, small sects of Mahomedans, living under Hindu rule and surrounded by Hindus, adopting almost contemporaneously with their Hindu co-religionists an entirely new practice. This body of wills has been carefully analysed by learned counsel engaged on both sides, and minutely criticized in detail. The broad lines of attack and defence were: (a) that this long, consistent series of wills disposing of the whole property proved conclusively that the Cutchi Memons had entirely abandoned the Mahomedan law of wills; (b) on the other hand, that an analysis of these wills will show that they are hardly, if at all, inconsistent with the principles of the Mahomedan law, and that a very large percentage of them might have been made consistently under that law. It is pointed out by the plaintiff relying on these wills that they not only dispose of the whole property but also contain many allusions to self-acquired and joint ancestral family property. Further, that they create many estates opposed to the fundamental principles of the Mahomedan law (and supposedly permissible under the Hindu law). Neither of these lines of attack or

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defence appears to me to be very forcible. I shall, however, have to deal with this material a little more in detail.

Mr. Setalvad, on the other hand, tendered eighteen, but put in five, wills, said to have been made by orthodox Mahomedans. None of these wills has been proved. When they were tendered, it was agreed, in order to shorten the proceedings and lessen the costs, that they should be examined by the counsel on the other side and, if necessary, admitted. At the close of the case, Mr. Taraporewalla said that he was not prepared to admit that some of the makers of these wills might not belong to the classes of Mahomedans declared to be amenable to the Hindu law by Mr. Justice Ranade in the case of *Bai Baiji v. Bai Santok*.⁽¹⁾ Subject to that the wills were allowed in, Exhibit No. 7. The suggestion is that even orthodox Mahomedans sometimes make wills in contravention of the Mahomedan law, although, it cannot be; and never has been, inferred from that fact alone that they were in that or in any other respect subject to the Hindu law of the joint family. The effect of the wills put in by the plaintiff is, I think, to prove conclusively that the Cutchi Memons have adopted the custom of disposing of the whole of their property by will. The series covers a long period and it appears to be practically uniform and consistent. To that extent, these wills alone would, I think, be sufficient to prove the existence of the custom in derogation of the strict principles of the Mahomedan law. The further question remains to be answered, how far, if at all, these wills prove anything more; as for instance, that by custom the Cutchi Memons have not actually discarded the Mahomedan law of wills but have adopted the Hindu law of the joint family. This will not be established merely by the fact that the

⁽¹⁾ (1894) 20 Bom. 53.

wills dispose of the testator's property in a manner inconsistent with the Mahomedan law, for we have already reached the conclusion that the practice has grown up in the form of a custom in derogation of the Mahomedan law. That being so, it is not to be expected that the societies or communities who have intentionally abandoned so far the principle of the Mahomedan law, feel constrained to rehabilitate it in detail by conforming, notwithstanding the practice, strictly to its precepts. This really disposes of by far the greater part of Mr. Setalvad's elaborate criticism on this part of the case. He endeavoured to show by attacking these wills that if in form inconsistent with the general principle of the Mahomedan law, there was nothing in the testators' dispositions which could be taken as deliberate recognition of the whole Hindu law. The point, however, is that every one of these wills purports to dispose of all the disposable property of the testator. The same line of argument used by the plaintiff is equally infirm for his purposes. Nothing appears to me to be gained by showing that a great number of these wills create series of successive estates in opposition to the principles of the Mahomedan law of gift. Once it is conceded that the custom of disposing of the whole of the testator's property by will has been adopted by the Cutchi Memon sect, it is idle to scrutinize too closely the manner in which such dispositions have been made, or to draw inferences from the closeness with which they sometimes correspond with or the wideness with which they sometimes diverge from the recognized principles of the Mahomedan law. It is, however, significant to note that seven of these wills bequeath one-third of the property specifically and the remaining two-thirds to the testator's heirs according to the Mahomedan law. The first of these is B 29, dated the 7th July 1886, and the last is B 88, dated the 26th

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January 1911. By 1886, just after Scott J.'s judgment in the case of *Mahomed Sidick v. Haji Ahmed*,⁽¹⁾ there can be little doubt but that a strong revulsion of feeling had set in amongst the better class of Cutchi Memons and that many of them much regretted the length the Courts had gone in subjecting them to the Hindu law of succession and inheritance and so giving cause of offence to the faithful and estranging them from their more orthodox co-religionists. The wills I have just mentioned exhibit a strong regard for the strictest Mahomedan law, and the reason why the testators adopt the peculiar form found in these wills doubtless was a desire to give practical effect to what they believe to be the injunctions of their religion. Nothing could well be more anomalous than their position as it was then understood in respect of this power of making wills. It was by no means certain in the opinion of lawyers whether the Cutchi Memons could dispose of more than one-third of their property by will. Those amongst them who were strict Mahomedans probably did not desire to do so; but they were in this dilemma: if they left two-thirds of their property undisposed of as the Mahomedan law compelled them to do, in order that it might be distributed amongst those whom the Quran considered to have the best right to share it, the result brought about by the case-law up to that period was that the undisposed of two-thirds would be taken not by the heirs designated by the Mohamedan religion and morality but by the heirs ascertained in accordance with the principles of the Hindu law. It is not strange then to find some pious Cutchi Memons availing themselves of the powers of full disposition which they appear to have been in a fair way of acquiring by custom at that period in order to comply practically, at any rate, with the commandments

(1) (1885) 10 Bom. 1.

of their religion. Bearing in mind the large part which volition must always play in bringing a custom into existence or allowing to fall into disuse, indications of this kind, just at the time when the case-law on the subject seemed likely to expand most dangerously and inimically to Mahomedan religious sentiment, are of no little value. On the other hand, the plaintiff, who relies upon these wills to prove that the Cutchi Memon community had adopted in its entirety the Hindu law of the joint family, points to many passages in them, in which express allusion is made to self-acquired, as opposed to ancestral, family property. Thus, in B 17, dated the 26th February 1878, the testator says that the "whole is my self-acquired property." So also B 31, B 37, B 47, B 50, B 53, B 58, B 68 and B 73. Reading these nine wills, covering a period from 1878 to 1903, it certainly appears that the testators, whether of their own initiative or under legal advice, were keeping in view the peculiar attributes of joint ancestral as distinguished from self-acquired property under the Hindu law. It is noteworthy that the first will in which any allusion of the kind is to be found is thirty-years after the date of Sir Erskine Perry's judgment when the doctrine of the Courts was supposed to be settled and the opinion of the Bar had long been uniformly in favour of the proposition that Cutchi Memons were, for the purposes of this argument, to all intents and purposes, Hindus. Whether such indications ought to be taken as conclusive of the fact suggested is quite another question. I think, it must be admitted, that the Cutchi Memons generally were fairly alive to what was implied in the term "joint ancestral family property" as forming part of the Hindu law of the joint family. This was only natural in view of their origin and later environment. It is quite possible that in a confused and general way they have re-adopted notions peculiar to the Hindu law from which

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at the time of their conversion and immediately thereafter they had never completely and intelligibly freed themselves. That this was done by deliberate act of volition, I gravely doubt. To whatever extent the old Hindu law of the joint family regained currency and application amongst the Cutchi Memons, it must be attributed, I should prefer to think, rather to unconscious reabsorption under pressure of the predominant Hindu environment, notions and habits, long familiar, than to any conscious preference for and substitution of those notions and habits for the laws commanded by their new religion. It may indeed be doubted that either the Khojas or the Cutchi Memons were, for centuries, after their conversion, thoroughly conversant with the whole of the Mahomedan law. In the infancy of their existence they were probably not in a position to discriminate between some of the moral precepts of their new and their old religion, particularly when such were required to be practically applied in some of the most intimate relations of ordinary life. At that period too their material condition, if we may be permitted to conjecture, was probably one of almost universal poverty and insignificance. In such circumstances they might easily and unconsciously have fallen back into the old grooves of Hinduism in regulating their family life and petty personal affairs. It is quite likely that just as Mahomedans do to this day, the members of the same family lived together making no nice distinctions between the quantum of the earnings of each, and not caring to separate the personal acquisitions, such as they might have been, of every member of the family from the fund upon which they all lived. Living under such conditions they would naturally find no difficulty in believing that they were still regulated by the principles of the Hindu law of the joint family which would seem to be peculiarly appropriate. Nevertheless, inasmuch as they have not only retained but

accentuated and heightened their religious divergence from their original co-religionists, I find it difficult to believe that they could synchronously have consented to merge so much that is essential to the Mahomedan law, in a conscious reabsorption of the Hindu law of the joint family. By the year 1878, any Cutchi Memon making a will must have been fully alive to the necessity of explaining that the property he purported to dispose of was his own. In view of the strong line taken by the Courts he could not have been ignorant of the danger attending the disposition of the whole of his property on the analogy of the Hindu law. Still, so far approving of it as to desire an equal liberty of full disposition of his own property he probably knew himself and, if he did not, would certainly have been advised, that if any property so disposed of had fulfilled the definition of ancestral family property in the Hindu sense, his will purporting to dispose of it would have been *pro tanto* invalid. It is true that the use of such expressions would appear superfluous in the case of any one except a Hindu, subject to the law of the joint Hindu family. Even in the latter case they could be merely declaratory not carrying with them, strictly speaking, any legal consequences. The difference between a Hindu and any other person disposing of the property which had come to him from his father would be in the former case that the property was not his own to dispose of, while in the latter case it ordinarily would be. And the fact that we find in these Cutchi Memons' wills declaratory emphasis laid on the fact that the property was not ancestral but self-acquired, certainly proves that in and after 1878, at any rate, the sect was fully aware that it was in danger of finding itself under the entire law of the joint Hindu family. That it in fact was so is conclusively proved by the course of litigation in 1885 and amongst the Khojas in 1887. I may further give by way of illustration a very

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recent case of *Ahmedbhoy Habibbhoy v. Sir Dinshaw M. Petit*,⁽¹⁾ in which the same question was sought to be reargued indirectly. The suit was nominally for specific performance of a contract to buy certain property belonging to the plaintiff. Indirectly the plaintiff sought to obtain a judicial decision that the said property was his self-acquired property and that his sons had no interest in it as members of a joint undivided Hindu family. I tried that case and I refused to go into the question thus indirectly raised. But the fact that it was raised, elaborately argued, and a great deal of evidence given on it as late as 1909, shows to what extent members of the Khoja and Cutchi Memon sects are, at the present time, involved in grave uncertainties as to their legal position in the present state of the case law. It is no exaggeration to say that the accepted notions, never clearly explicated, developed as time went on into something like chaos as regards many incidents peculiar to the Hindu law of the joint Hindu family, which may or may not be incorporated in the customary law, real or supposed, of these sects. Thus, for instance, this is the first case, nearly seventy years after Sir Erskine Perry's judgment, in which the competency of Cutchi Memons to dispose of the whole of their property by will has ever been put directly in issue. Furthermore, it is the first case in which the much more important question, whether or not merely by implication both Khojas and Cutchi Memons are subject to the complete law of the joint Hindu family, has invited express decision. It is obviously, therefore, high time that these questions of such vital importance to the two sects, who are constantly growing in intelligence and importance, were definitely answered and their legal position clearly defined. At the present day no Khoja or Memon, and

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

many of them have accumulated great fortunes, knows how far his property is his own, or what, if any, limits are imposed upon his power of disposing of it by will. If it be a fact, as suggested by the five wills put in by the other side, that orthodox Mahomedans, who have nothing whatever to do with the law of the joint Hindu family, have also been in the habit of disposing of their entire property by will, then the inference which I am asked to draw from these 105 wills, namely, that the mere fact of disposing of the whole property of Memons by will connotes the adoption of the whole law of the Hindu joint family, is immediately destroyed. It is not, however, on that ground only, or, indeed, chiefly that I should refuse to accede to so much of the plaintiff's arguments. In the absence of any previous case-law on the subject, and treating the matter before me as *res integra*, I should not feel even pressed by the production of these wills to the conclusion that they prove not only a custom in the matter of making wills opposed to the stricter Mahomedan law but that they prove much more, namely, that the makers had also adopted the whole law of the joint Hindu family. Nothing in them, except the language of the seven wills I specially noted, points to any such conclusion, and that language can, I think, be easily explained by reference to the historical origin of the sect, to circumstances in which the first centuries of their existence were passed, and, lastly, the attitude of the Courts for forty years preceding the first of them without the need of making any such violent inference. My conclusion upon this body of evidence is that it proves no more than that the Cutchi Memons have adopted the custom of disposing of the whole of their property by will. It does not prove that they have adopted the notion of joint ancestral family property with all its legal attributes and incidents as exhibited in the law of the Hindu joint family. And indirectly it affords indications of the

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strong leaning towards the strict Mahomedan law which has been enlarged in favour of the Cutchi Memon community by the adoption of their special custom.

Before considering the oral evidence recorded in this case, I should like to make some general observations on those wills in which it is declared that the testator is only disposing of his own self-acquired property. We have no means at the present day of ascertaining what the property was and how it was acquired. Naturally, with some knowledge of the Hindu law of the joint family, a man who was disposing of what he knew to be ancestral family property in that sense would declare in his will that it was his self-acquired property whether in fact it was so or not. I expect that if the whole truth was known, an ingredient of the joint family property or joint ancestral property as these terms are used in the Hindu law would be found in what was disposed of by these wills. At any rate, a great number of them must include much property to which such notions were at least potentially applicable. From the mere fact that such declarations have been thought necessary, it is at least as inferable that the testator was disposing of what under the Hindu law of the joint family was not his own to dispose of as that he was making a simple truthful declaration of fact.

The first witness examined was Sidick Ebrahim Nakoda, who is a Cutchi Memon aged fifty-three. He is a man of no consequence or social position. He says that he sells turbans and caps, and says he keeps a very small shop and pays no income tax. He begins by saying that the Cutchi Memons will away their property as they please, sometimes the whole and sometimes a part. In answer to the Court he says that the Cutchi Memons cannot dispose of ancestral property by will. He says that his own father made a will of his property valued about Rs. 16,000 and that he himself

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was disinherited. He says that this property was self-acquired. He gives no particulars as to how his father started these self-acquisitions. He then goes on to depose to the making of wills of large estates by Cutchi Memons. This is of no great importance. In cross-examination he says that the law of succession is included in the Quran but the custom has gone the other way. He then goes on to explain how the custom went the other way. He says that the Cutchi Memons were originally Hindus, who were converted in Sind and migrated to Cutch. He says that they were under a Raja and if they had disputes they had to go to the Raja's Court and they were disposed of according to the law of the Raja, i.e., the Hindu law; and that practice was still going on. He says that they applied twice to the Sirkar to place them under the Mahomedan law but they failed. Speaking for himself, he says that he would prefer the law of succession laid down in the Quran, but he cannot speak for the sect generally. He says that the exclusion of wives and daughters from the succession originated in the Raja's Court. If this were really so, it must have been, I suppose, on the footing that the litigants constituted a joint Hindu family at the time. The question was then put to him:

"Do you say that the law of the Hindu joint family has been introduced into your sect by custom?"

A. Yes. If there is no will."

Then the next question:

"Do you mean to say that the law of survivorship is applicable to you?"

(After some explanation of what was meant by the law of survivorship)

A. No. That law does not apply, because the son of a pre-deceased son takes with his uncles. The daughter does not take with the sons."

(It is clear that the witness does not understand what he is talking about here.)

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" Q. Do you say that the Hindu law of partition applies ?

A. Yes. If one dies without a will."

He then goes on to say that the son can claim partition of ancestral family property during the life-time of his father.

" Q. Can you give a single instance of such a partition ?

A. Yes. Abdul Rahim Haji Mussa Suleiman. His son, Ibrahim, took some money and separated ; he took some Rs. 60,000. That was about two years ago. The father gave him the Rs. 60,000. Abdul Rahim was then, and still is, doing business. His son was in the business with him, a business in piece-goods.

Q. What was the ancestral property of which this Rs. 60,000 was a share ?

A. That I do not know."

(It is clear that this is not necessarily an instance of partition at all, but rather of the ancient practice of portioning a son off out of his father's wealth ; see the remarks of Sargent C. J. in *Ahmedbhoy Hubibbhoy v. Cassumbhoy Ahmedbhoy*.⁽¹⁾)

Further, he says that wills have been made for the last fifty years or sixty years, only after the community migrated to Bombay.

Reviewing the evidence of this witness, as a whole, it must be admitted that it is father emphatic in favour of the adoption of the law of the joint Hindu family, but the man himself is hardly of a character to command much confidence. Many of his answers in cross-examination suggest that he has not fully appreciated all that is involved in his earlier statements. It is not definitely so stated in his evidence but I suppose he has spent the whole of his life in Bombay ; so that he has naturally fallen under the belief, rooted in the decision of this Court and the practice of the profession, that the law is generally as he declares it to have become by

(1) (1889) 13 Bom. 534.

custom. I cannot say that I attach much importance to his evidence upon the custom as a custom.

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The next witness is Haji Adam Haji Usman Noorani, fifty-two years of age and a Cutchi Memon and a Shetia of the Jamat.

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“ Q. Do you know the custom of your community about the making of wills ?

A. Yes.

Q. Describe it.

A. If a Cutchi Memon has self-acquired property he can dispose of it as he pleases.

Q. Of the whole ?

A. Yes. But this does not apply to ancestral property. He cannot make a will disposing of any part of the ancestral property.

Q. How long has such a custom prevailed ?

A. Since I have been in Bombay, I have observed it, that is, for forty years.”

The rest of his examination-in-chief merely relates to instances of Cutchi Memons who had made wills and is of no importance. In cross-examination he says that he is disputing his brother's will on the ground that the property disposed of was ancestral property. And this might account for his statement in the earlier part of his evidence that the ancestral property cannot be disposed of by Cutchi Memons by wills. In his cross-examination he says that he would be greatly pleased if the Government put them under the Mahomedan law again.

“ Q. You now want power to dispose of all your self-acquired property, because you are told that the Courts hold that you are under the Hindu law, and in this way you may be able to give the remainder of your property to your heirs according to the Mahomedan law ?

A. Yes.

Q. In your community you have always been told that the Courts have held that the Hindu law governs you ?

A. Yes.

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Q. The whole Hindu law ?

A. Yes.

Q. And in that belief your people have been making these wills ?

A. Yes."

He says:

"I know that Sabu Sidick left his property to his son, Mohamed. Mohamed can dispose of that property by will."

(If the witness is right here, what becomes of his reiterated statements that the ancestral property cannot be disposed of by will?)

"Q. But if it came from his father it would be ancestral ?

A. No. The father had acquired it, and the son was a partner of the father."

This again makes it quite clear that these peoples' notion about what is meant by the term "ancestral family property" in the Hindu law is hopelessly confused. This witness appears to be a respectable man, but the quotations I have made from his evidence show that he has no very clear idea upon the main point to which his evidence is directed. He does not really know in the case of the wills he speaks to, whether the property left was, or was not, ancestral in the Hindu sense of that word. It is to be remembered that he is only fifty two years of age and his intelligent memory can, therefore, hardly go back more than thirty years. By that time the Bombay opinion was already definitely formed, and the witness' evidence shows how he received that opinion from the decisions of the Courts and the like sources in Bombay itself. In my opinion his evidence is worth little or nothing upon the alleged custom.

The next witness is Mohamed Cassim Lakhtani, a Cutchi Memon, fifty years of age and a landed proprietor. He says that Cutchi Memons can will away all

their self-acquired property; but if it be ancestral no will can be made. He then proceeds to give instances of numerous wills, including wills by Cutchi Memon widows. Such wills certainly would not be valid under the Hindu law in the ordinary circumstances, nor would they consist with notions underlying the law of the joint Hindu family. I am speaking here in the most general terms and am not overlooking cases in which Hindu women dispose of their own *Stridhan* property by will, but if I understand the witness aright, the widows who made wills here were wealthy Memon widows who disposed of their whole property in which, under the Hindu law, they would only have had a life-estate. In the absence of an explanation as to how they come by their property, this comment must be taken as in a measure merely conjectural. One thing is, however, to be noted and that is, that none of these wills, and, as far as I know, none of the wills exhibited in the case which I have already examined, were disputed. From this it is open to the plaintiff to argue that the custom was so well-settled that no one thought of calling it in question. On the other hand, if the custom had really been in exact accordance with the law of the joint Hindu family, it seems in the highest degree improbable that the wills disposing of so large wealth should have gone unchallenged on the ground that ancestral or joint family property made up part of the testators' estate.

In cross-examination he says :

“ I mean by ‘ancestral property’ property got from the father or grandfather. If the property is left to the son by will, then it is not ancestral in the hands of the son, but is his own.

Q. Your community believes that the Courts have held that the whole Hindu law governs them ? ”

A. Yes. But that also is the custom.”

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He says :

"I heard from my grand-father and my ancestors that there had been suits in the High Court here and that that custom had been deposed to and proved.

Q. What custom ?

A. I do not know what evidence they gave.

Q. What custom ?

A. The whole Hindu law.

The Court : Including adoption ?

A. No. I have not seen any adoption case. I do remember one instance of adoption."

He says :

"I had a brother. He is dead. He left a widow.

Q. You have taken that property claiming that it was joint ?

A. Yes, because it was got out of my father's money.

Q. But you have claimed it by survivorship ?

A. But that was ancestral property. My paternal cousins are joint with me. But I have my son, and he is likewise entitled to it. I cannot deal with that property ; else my son would come in and oppose me."

If this is correct it really does represent the adoption of the law of the joint Hindu family pretty completely. This witness is very strongly in favour of the contention that the whole Hindu law of the joint family had been adopted by the Cutchi Memons. He is entitled to more weight because it might affect a very large property of his own.

The next and perhaps the most important of this group of witnesses is Suleman Abdul Wahed, aged sixty seven. He is not a Shetia but is one of the leading members of the Cutchi Memon Jamat. He says :

"I know our custom about making wills. We cannot make a will of ancestral property, but we can make a will of self-acquired property, according

to the Hindu or Mahomedan law. We can dispose of the whole of the self-acquired property by will. A Cutchi Memon cannot dispose of any part of ancestral property by will..."

Next follow a number of instances of wills most of which are found among the wills recorded. In reference to one of them he says :

"But I think that at present unfortunately we are to that extent under the Hindu law."

To the Court : "I think so because I have been told so ever since I came to Bombay from Poona in 1874, and those decisions of the Judges made us subject to the Hindu law. I never heard from the Jamat in Bombay that there had been such a custom before the Courts here made it for us. The Jamat told me that the Courts had decided that we were governed by such a custom. I did not ask the Jamat what custom had governed them in Cutch before they came to Bombay...I have not heard of any case of the Cutchi Memon dying intestate where his property was divided among his heirs according to the Mahomedan law...I can only say that in Poona the estate goes upon an intestacy to the heirs under the Hindu law ; in Cochin, to the heirs according to the Mahomedan law, and, in Cutch, I do not know how it goes. I cannot give a single instance of a Cutchi Memon dying in Poona without leaving a will, and the property going according to the Hindu law ; the families in such cases would ordinarily be very poor, and the property might be divided according to either the Hindu or the Mahomedan law."

He then goes on to describe the circumstances of his own family, saying that they were "joint" in the Hindu sense.

"My nephew filed a suit for partition of this joint family estate, and the property was partitioned under a decree of the Court. I gave my son, Abdul Rehman, his share of the ancestral property and took a release from him."

After this follows the cross-examination in which the witness says :

"I am an orthodox Mahomedan, I believe firmly in the Quran. Memons are orthodox Mahomedans, they all believe in the Quran.

Q. You and they would consider it sinful to depart from what is laid down in the Quran ?

A. Yes. The Quran only allows us to dispose of one-third of our property by will. I and the members of our community would much like to follow that rule of the Quran.

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Q. But your people have been doing the contrary for some years because they have been told that the Courts have made the Hindu law binding on them ?

A. Yes.

Q. Your people have been told that ever since Sir Erskine Perry's decision ?

A. Yes. I much regret, and I know that others do too, that the Courts should have thus imposed the Hindu law upon us.

Q. If you were told that the Courts had never held that how would you dispose of your property ?

A. According to the Quran.

Q. Your community has never got reconciled in all these years to the Courts having imposed the Hindu law upon them ?

A. No.

Q. A large majority of you have striven all these years to get those decisions upset ?

A. Yes. Most certainly our people would wish to follow the Quran if they were allowed to ; they feel that they are helpless because they have been told that the Hindu law of intestate succession governs them. We got this idea of ancestral property from the Bombay Barristers, Solicitors and other like vultures. Until I came to Bombay I never heard of this distinction ; as strict Mahomedans we know nothing of it.

Q. What do you mean by ancestral property ?

A. Property which comes from the grandfather, whether the grandfather made a will of it or not. In Mecca and other holy places they will not allow that we are Mahomedans at all because we have had this Hindu law forced upon us. I feel very strongly upon all these points, and I much regret that the Courts should ever have decided as they have done. I say that the son takes a vested right in ancestral property by birth is an idea made for us by the Courts. It may be called a custom as it has been followed here for many years, since the Courts decided that way."

In re-examination the witness says :

"I would like the Mahomedan law to be applied in all cases of intestacy as well as in testamentary disposition. I should not like any part of the Hindu law to be left."

I have quoted from this witness *in extenso*, because his evidence, as a whole, is striking and characteristic, I

think, of the real and best sentiment of the community. It is clear from the opening portions that the root ideas of the Hindu family have struck deep in spite of religious protest, and that much against their will the strictest Mahomedans among the Cutchi Memons have accepted though it can hardly be said that they have become reconciled to the Hindu law so liberally made for them by the Courts. It cannot be denied that, in the first instance, there was none of this marked repugnance to the Hindu law of the joint family. And when I come to look a little more closely into the previous cases, I dare say I shall have to admit that, at any rate, when the question first came before Sir Erskine Perry that learned and eminent Judge was right in supposing that by enlarging in some directions the restrictions imposed by the Mahomedan law, and giving the Cutchi Memons a part, if not the whole, of the Hindu law of succession including that of the joint Hindu family, he was meeting the wishes of a majority of the community as well as validating a single proved custom in derogation of the Mahomedan (and the Hindu) law. But in view of the growing wealth and intelligence of the community and the development of a strong re-action in favour of strict adhesion to the Mahomedan law, I can entertain no doubt but that the opinion has now been proved mistaken. In the evidence of this witness we find *in petto* a reflection, and I submit a complete confirmation, of most of the general views I ventured to express regarding the real attitude of this community towards the case-made law, in my former judgment.

The witness is a very intelligent and influential old man of undoubted probity who has held the high office of Sheriff of Bombay. The effect of his evidence is, I think, that while, in his opinion, his community is, at the present day, under the Hindu law of the joint family, that has not been brought about by the deliberate

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and volitional adoption of that law as a custom, but by the too precipitate action of the Courts. And the feeling of the better part of the sect to-day is strongly in favour of throwing off every feature of the Hindu law with which it has gradually been fettered. I have said that in the course of the arguments addressed me on behalf of the plaintiff in this case, I have been reproached over and over again with having insisted, upon a misconception of what actually happened at the trials, the procedure and the form of the issues, that the Courts and the profession forced a most unwelcome law upon reluctant Mahomedan sects. I think that I am vindicated, to some extent, by the strong feeling shown by this witness. It may well be that the law was not so unwelcome in 1847 as it has since become, and I certainly do not mean to suggest that the eminent Judges and counsel mainly responsible for bringing it to its present state, were not guided in each and every trial by the most correct judicial principles. But I do say, and shall remain for ever convinced that over and over again much, too much, was taken for granted, and that it was as much the decisions of the Courts and the opinion, of course, the perfectly honest opinion of the profession, as any real customary adoption by either Khojas or Cutchi Memons of parts or the whole of the Hindu law of the joint family, that have made the law as it is generally supposed to be to-day. One thing at least is made clear beyond all possibility of dispute, that if Mr. Wahed is a true spokesman for his sect, this sect, would, if left to itself, and not pinned down by judicial decision, renounce any such custom (admitting that it had ever been adopted) as that which the legal doctrine of this Court has now made an integral, and indeed the dominating, factor of their personal law.

The next witness examined was Ali Mahomed Haji Yusuf, a Cutchi Memon, fifty years old. He is a person

of little importance compared with the last witness. He says he is a dealer in salt.

"I know the custom of our community as to making wills. Cutchi Memons make their wills according to Hindu law. They can dispose of the whole of their self-acquired property."

The Court : "When did you first hear of self-acquired property ?

A. I was born in Bombay, so I have heard of it all my life. We cannot dispose of our ancestral property by will."

In cross-examination the witness says :

Q. Your custom exists because you have been told that the Courts have decided that the Hindu law of wills, &c., applied ?

A. Yes.

Q. You have been told so all these years by the lawyers ?

A. No member of the legal profession has talked to me about it. My community however has been told that this was settled by the Courts ?

Q. They were told that the Courts had applied the Hindu law in all particulars ?

A. No. Only about wills, and about property and inheritance and succession. There is a feeling in our community that the Courts have been wrong in applying the Hindu law to us.

Q. And but for this they would follow the Mahomedan law ?

A. Yes."

The next witness is Haji Yusuf Subhani, aged sixty. He says he is an ordinary member of his community, a mill-owner and the President of the Anjumn-i-Islam.

"I know the custom of our community in the matter of making wills. A Cutchi Memon can dispose of his self-acquired property by will, the whole of it. He cannot dispose of ancestral property. I have never heard it said that a Cutchi Memon cannot dispose of more than a third of his self-acquired property."

In cross-examination he says :

"I have been told that a custom had been established in the Courts. That is why we have made the wills in the manner I have described."

After some cautious answers which do not commit him much to any great preference for the Mahomedan law he says :

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"From a religious point of view I should prefer the Mahomedan law. I would prefer the rule laid down by the Quran."

We gain little information from this witness. His last answers show that he is a peace-loving man, sitting on the fence for the present, waiting to throw in his lot with the winning side.

The next witness is Abdul Satar Gaya, a Doctor, aged thirty-two. He says that he knows the custom of his community about making wills.

"A Cutchi can dispose of his self-acquired property as he pleases. A Cutchi Memon cannot make a will of his ancestral property.

The Court: "What do you mean by ancestral property?"

A. Property coming from great-grandfather, grand-father, father."

In cross-examination he says:

"I have been told ever since I was grown up that the Courts had held that the Hindu law governs Cutchi Memons generally in matters of inheritance, or property.

Q. If the Courts had not decided, as they have, you Memons would prefer to follow the Mahomedan law?

A. I think so.

Q. If they were left free now, would they follow the Mahomedan law?

A. I think the majority would, I myself would. I do believe that in giving the go-by to the Quran and forcing the Hindu law on us the Courts have done wrong. I should say that that was the feeling of the majority of our community."

The next witness is Ibrahim Haji Sidik, aged thirty-five, a landed proprietor.

I know the custom of our people in making wills. Sometimes they make their wills according to custom.

Q. What is the custom?

A. I have heard that the Hindu law applies.

Q. Do you mean the whole Hindu law?

A. I do not know that. We can make our wills as we please, whatever the property is. We cannot dispose of ancestral property by will. Grandfather's property becomes joint family property. I include father, grandfather great-grand-father, &c."

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In cross-examination after showing an intelligent understanding of what is meant generally by ancestral and joint property, he says :

"I have heard that the Courts have held that the Hindu law of wills applies to us. That is the belief in our community. That is why we make our wills in that way. The Hindu law of property and inheritance has been held by the Courts to apply to us, that is what is generally believed in the community. I am an orthodox Mahomedan, so are most of us Memons. We should like to follow the precepts of the Quran."

The next witness is Tyeb Haji Gul Mahomed, aged sixty-two, a merchant and a contractor. He says :

"I know our custom about making wills. We can dispose of our self-acquired and our ancestral property too. Was born at Malabar."

(N. B.—This is the only one of these witnesses, I think, who says that Cutchi Memons can dispose of their ancestral as well as their self-acquired property by will. Possibly because, being from Malabar he is not so saturated as the rest with the legal doctrine of this High Court.)

In cross-examination he says :

"The custom had been in force many years before the decisions of the Court gave legal effect to it."

I may observe on that that the witness could here only be speaking from hearsay, as the decisions of the Court began before he was born.

"Q. If the Courts had not so decided you would have preferred to follow the Mahomedan law ?

A. But the custom had been in vogue for a long time.

Q. Who told you that this was the custom when you came to Bombay ?

A. My grandfather told me. He was then in Bombay. I came here first in 1918 (1860). It was when I was here in 1930 (A. D. 1874) that I first heard of this custom."

The next witness is Abdul Rahim Haji Ibrahim, aged thirty-six, not a leading member of the community, a hosier. He says a Memon can will away his self-acquired property as he pleases. He cannot will away his ancestral property.

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"I would like to follow the Mahomedan law of wills. I have always been told that the Courts have held that the Hindu law of wills governs us. That is what all the members of my community believe."

The next witness is Abubakar Haji Mahomed, aged fifty-four, owns landed property in Bombay and says he knows the custom of his community about making wills.

"I have made a will according to the Mahomedan law. I have disposed of the whole of my property. I have said that the distribution is to be made according to the Mahomedan law. The decisions of the Courts in our cases have put us under the Hindu law. Among the Memons the custom is that the Hindu law applies.

Q. What is the power of the Cutchi Memon to make wills ?

A. The thing is this, as the Hindu law prevails they make wills so that their widows and daughters may get something out of the estate.

Q. Do you know whether these Cutchi Memons recognize the law of ancestral family property ?

A. Yes. A Cutchi Memon cannot will away ancestral property."

In cross-examination he says that the Courts have decided that the Cutchi Memons are governed by the Hindu law in all matters of succession, inheritance, wills, &c.

"We think that if we do not make a will our property will go by Hindu law.

Q. You think then that the Courts have wrongly applied the Hindu law ?

A. All I know is that this has been the custom from the time of my forefathers."

This concludes the evidence of this kind given before the Court. It must be admitted that it points directly to a considerable and settled opinion, however unpalatable, that much, if not the whole, law of the joint Hindu family governs Cutchi Memons. But it is to be remembered that over the period covered by the lives and personal experience of all the witnesses, it was virtually impossible for any Cutchi Memon to approach the Courts except upon the footing of a Hindu, in all the essentials of the personal law of the joint Hindu

family. And it cannot be denied that the decisions of the Courts had done more than anything else to contribute to that result. It is only when we turn back to the origin of the wide rule, which had thus been established, and follow as I did in my former judgment the various steps of the process, that we shall be in a position to discriminate, if indeed this be now possible, between what was a real custom and what was rapidly added to it by judicial decision.

As I have said the points actually in controversy between the litigants before Sir Erskine Perry lay within a very narrow compass. I think it very unfortunate, looking back over this piece of legal history, that that great Chief Justice should have delivered one judgment in the cases before him, thus, at the very outset introducing elements of logical confusion which rapidly bred and multiplied. I think, too, that the procedure followed put the preliminary enquiry on much too wide and loose a base. For all essential purposes, the points in controversy need not have been so extended as to lead the learned Chief Justice to believe that in order to deal with them it was necessary to open a general enquiry into the question whether the two sects of Khojas and Cutchi Memons had, by that time, adopted, as a custom, the whole Hindu law of the joint family, with all its derivative legal notions and consequences, as directly affecting the law of succession and inheritance.

But with the fuller information given me in the course of this trial at my disposal, it seems to me that something of this kind happened. The result was not very satisfactory even for the limited purposes of the two trials, since the learned Chief Justice, in his judgment which, after all, is all that now concerns us, confined himself to a very cautious opinion that these sects had adopted a law analogous to the Hindu law.

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How closely analogous, or in what main points diverging from it, and if so diverging then whether back to the Mahomedan law, or in the direction of merely analogous customs, nothing, I think, is said. But what the learned Chief Justice meant to hold was, I believe, that Khojas and Cutchi Memons were under a customary law closely akin to, if not identical with, the Hindu law of their former co-religionists, and that from that starting point it lay on them to prove customs in derogation not of their own, the Mahomedan, but of this rather vaguely adopted analogue of the Hindu law.

The Cutchi Memon case tried before Sir Erskine Perry arose out of a dispute between the widow, Rahimatbai, of one Haji Nur Mahomed and three uncles of the deceased. Following the procedure of those days it appears that the Chief Justice sent certain issues down to be tried before himself on the Plea Side of the Court. These are very instructive as showing how the subject, then virtually *res integra* in this High Court, was then approached.

The issues were :

(1) Whether the sect of Mahomedans commonly called or known by the name of Cutchi Memons is subject to a valid usage or law of inheritance and succession different from the general Mahomedan law of inheritance and succession to goods ?

(2) Whether from the death intestate of Haji Nur Mahomed in the pleadings of this cause mentioned, his uncles, &c., succeeded to his estate as his heirs or otherwise, in exclusion of the said complainant, and one, Tezbai, another widow of the said Haji Nur Mahomed, subject, however, to providing for their maintenance ?

(3) Whether upon the death intestate of the said Haji Nur Mahomed the said complainant as one of his two widows became entitled by succession to a share consisting of one-sixteenth part of his estate ?

And it is ordered that the complainant here shall be the plaintiff on the trial of such issue on the Plea Side of this Court and that the said defendants, &c.,... and if the Court at such trial shall find any other special matter, the same shall be indorsed on the postea.

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So far this appears to be perfectly correct, and to establish the general proposition from the very beginning of this litigation, that any one alleging a special custom in derogation of the law of the parties must prove it. We find, accordingly, that the defendant opened with witnesses in support of the plea.

The first of these witnesses was Haji Jusuf Haji Baludina, who says that "he had lived in Bombay for seventy years, was regarded as a sort of head of his sect." (*N. B.*—The witness talks of 'caste'). He says "there is a particular custom of inheritance among them, namely, that a widow is entitled to maintenance as long as she remains unmarried. Some say that the Cutchi Memons were converted to Mahomedanism two, three or four hundred years ago. They were Hindus before, Lohanas." He then speaks of the custom prevailing among Lohanas proper. But no one has ever alleged in these Courts, I believe, that they are not subject to the ordinary Hindu law, and it is plain from what the witness says, namely, that among Lohanas a widow is maintained by her sons, &c., that he is thinking of the condition of widows in an undivided Hindu family. He says :

"I am not particularly informed of the custom among the Lohanas. Divorce is not allowed among Memons, plurality of wives is allowed in case of sterility. According to Mahomedan law females ought to inherit, but we have not allowed any female as yet to inherit."

In cross-examination he says :

"No disputes regarding inheritance have ever occurred with us in Cutch." "the husband and wife were expelled from the caste, they were expelled because this custom had never been disputed before.

This was the first instance I ever knew."

(*Note.*—As the husband appears to have died intestate, thus giving rise to the dispute, it is not easy to understand why he was expelled from the "caste".)

To the Court, "I say that the Mahomedan law lays down the rules as to inheritance, but we have not observed it. Our custom is not of recent origin but has prevailed four or five hundred years."

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The next witness is Abdulla Rakhia, who says that there are many tribes of Cutchi Memons but they are all of one "caste."

"We do not follow the Mussulman law as laid down in the Quran. *I do not know what the Hindu law is. We do not allow females to inherit with us. If a man leaves a widow and brothers she is not allowed any particular share."

(This again would only be true under the Hindu law in the case of a joint-family.)

"We do not allow daughters to inherit. If a man died leaving brothers and sons, if the family is divided the sons take alone; if undivided, the brothers equally. If four brothers should be in partnership, and one dies leaving sons, the sons inherit."

(Observe the loose confusion between partnership, and the true "joint Hindu family.")

"I have often heard that part of the Quran read which lays down the rule of inheritance but we do not follow it because it is not our custom. We did not set the Quran aside but our custom did. This custom of inheritance has existed among us always. If a man left his property to his widow the *panch* would give effect to it. Divorce is not allowed amongst us. When this case was brought into Court the *panch* expelled the husband and the woman."

The next witness is Haji Fazul Jaffir, says he is one of the *panch*, came from Bhuj.

"With us women do not inherit, when a man leaves a widow she remains in the house and gets maintenance."

In cross-examination adds nothing of note.

The next witness is Haji Absakur, says he knows the law of inheritance laid down in the Quran but the Cutchi Memons do not follow it. According to the law Cutchis follow, women do not inherit.

At this point I find the note by the learned Chief Justice:—

"I intimate that a *prima facie* case is launched of custom amongst Cutchi Memons, and if they have evidence to show it (*sic*) they should call witnesses."

Then Haji Mahommed Haji Ibrahim is called and says, that he is a Cutchi Memon, and that his father

died three months ago leaving brothers, nephews, daughters and a widow. He made a will (this is called for).

Another witness is then called, Mulluk Haji Umar, who gives an instance in which it would seem that some sort of distribution was made of the deceased's property, but not strictly according to the Mahomedan law.

"I have not heard of any widow in our caste being allowed a share as Mahomedan widows are."

Another witness appears to have been offered but not examined, and the Advocate-General then admits that his evidence does not go further to disprove the custom set up.

That is the whole evidence upon which a judgment was based that has had such astonishingly wide consequences. I should observe that, at this trial, the evidence in former cases was tendered and it was found to take up so much time discussing it sentence by sentence in order to determine whether or not it was against the declarant's interest, that much was let upon the record, subject to stricter examination when the case was over.

After the above analysis I cannot say that I think any of this record of previous depositions is relevant under section 32, clause 3. I do not find in these depositions *per se* any declarations against the interest of the makers. Nor do I think that these depositions of men long dead are admissible under any other provision of the Indian Evidence Act. I have examined them, however, with the object of bringing out clearly what really were the materials before Sir Erskine Perry in 1847. Many statements do suggest that the witnesses were saturated with the Hindu law, or, at any rate, that they had accepted, with modifications, some salient features of it. But I do not think it would be correct to say that anything to be found in the trial on the Plea

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Side before Sir Erskine Perry establishes a conscious adoption of the whole law of the Hindu joint family. The witnesses appear to draw no distinction between the position of females in an undivided and a divided Hindu family. They appear to have been imbued generally with the stringent limitations imposed by the early Hindu law-givers on a woman's capacity. But the custom they set up goes very much further than the true Hindu law. It does not appear to recognize the widow's estate and peremptorily excludes daughters altogether and in all circumstances.

I cannot understand how upon these issues and this evidence it ever could have been supposed that the Chief Justice found that the Cutchi Memons were not only not governed by the strict Mahomedan law of succession and inheritance, but that they were governed by the Hindu law of succession and inheritance. All that the issues suggest and the evidence proves is that there was a valid custom or usage inconsistent with the Mahomedan law. Sir Erskine Perry appears to have thought that it was, in a measure, analogous with the Hindu law of succession and inheritance. Further than that, I do not think he went in the way of generalization *obiter*. He certainly found it proved, as a special custom, that among the Cutchi Memons widows would not take, and that uncles would exclude them upon the intestacy of husband or nephew. That was all that he was asked to decide, and that was all that he did decide. I do not suppose that it will be contended, e.g., that this case decided *inter alia* that the Cutchi Memons had proved a special custom in supersession of the Mahomedan law of divorce or marriage.

The evidence recorded in the case of *Mahomed Sidick v. Haji Ahmed*⁽¹⁾ has been given in evidence here,

as it is pretty certain that a great deal of it, at any rate, must have been against the interest of the declarants. Before running over it I may make one or two general observations on the case. The Court was asked to try the validity of two wills made by two Cutchi Memon brothers, who, with two more brothers, had for a considerable time, carried on a large and flourishing partnership business. The objection was that the property was ancestral, and that the testators had no power to dispose of any part of it by will. An attempt was made by Mr. Inverarity to re-open the whole question with reference to the power of making wills, and the restrictions upon that power arising out of the legal notion of ancestral property peculiar to the Hindu law, which was supposed to have been included in the law of "succession and inheritance," consistently applied (in theory) since Sir Erskine Perry's judgment in 1847 to the Cutchi Memons. But this attempt was not successful. The issues are, however, interesting in this connection. The learned Judge, notwithstanding the principles he sets fourth in the opening passage of his judgment, virtually conducted the trial on the second of his presumptions, treating the first as already disposed of. What actually happened was that the learned Judge took it for granted, as far as I can see, that the Hindu law of succession and inheritance had been judicially and finally decided to govern Cutchi Memons. That being so, it was mere surplusage to mention, as a fundamental principle, that in all cases arising between Mahomedans the Mahomedan law must, in the first instance, be presumed to govern. That is a perfectly correct principle, but at the time of this trial the learned Judge was evidently convinced that it had been completely displaced, and that trials of the kind he was conducting must start from the second principle, namely, that Cutchi Memons are to be presumed to be

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governed by the Hindu law of succession and inheritance. Along with this he appears to have taken it for granted that the distinction between ancestral and self-acquired property is an integral part of that law. The burden of proving, therefore, that among the Cutchi Memons a custom had been established ignoring any such distinction, was thrown upon the parties alleging it. This is in conformity with the third of the learned Judge's principles, namely, that it will be open to this community to prove any special custom whatever even in matters of succession and inheritance in derogation of the ordinary Hindu law. It appears that a good deal of the old evidence, taken from the records of the Ecclesiastical Side of the Court, was again laid before the Judge at this trial, as though upon the trial of an issue arising under his first principle. But it is as clear that he regarded that original presumption as wholly displaced by the decisions of the Court from Sir Erskine Perry's time onwards. And I think that the evidence of witnesses recorded at this trial was all directed to proving the special custom relied upon in derogation of the Hindu law of succession and inheritance. Such a "custom" is of course, no more than a part of the Mahomedan law which has never known any distinction between joint ancestral, joint family and self-acquired property. But, then, for the double assumption (a) that the Hindu law and not the Mahomedan law governed this sect in all matters of inheritance and succession, and (b) that included in that branch of Hindu law was the whole legal notion of the joint Hindu family; it is clear that the trial must have taken another course. I repeat that had the onus been thrown, as, in my opinion, it clearly ought to have been thrown, on those who alleged that, even conceding wills formed a part of the Hindu law of succession and inheritance, the Cutchi Memons had further

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imposed upon themselves the Hindu law of the joint family with its dominant conceptions of ancestral and joint family property, the result of the trial might, and probably would, have been very different. I am supported in that opinion by the remarks of the learned Judge himself upon the character of much of the evidence recorded and the light it threw upon the attitude of the community, as a whole, towards this substitution of Hindu, for their own Mahomedan law.

I think it is impossible to say that anything by way of proof coming from the right quarter and directly given for that purpose, is added by this trial to the extremely meagre and inconsequent proofs formerly collected and made the foundation of the Court's doctrine that the Cutchi Memons were in all respects governed by the Hindu law of succession and inheritance. The learned Judge, indeed, remarks that a good deal of the evidence led to prove the special custom, confirms in his opinion the correctness of the Court's previous decisions on this point. While that may be so, it is equally clear that none of it has any bearing (I mean none that is quoted in the judgment) upon the actual point under investigation. If the law of succession and inheritance governing this sect is understood to be the Hindu law of succession and inheritance, as limited to the case of a divided Hindu disposing of, or leaving, self-acquired property, then the succession would, in all cases, be the same and the only contentious question that could arise would be not as to the testamentary power of the deceased, for that is always full under the Hindu law, but as to the ownership of the property bequeathed. No man can give by will what is not his own. No Hindu can, of course, dispose by will of any part of the joint family property whether movable or immovable for the simplest of all reasons, that it is not his own during his life-time to give away.

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Precisely the same principle would, in theory, regulate gifts *inter vivos*, but in practice a good deal of confusion and obscurity has been introduced into the Hindu law here, because of the inaccurate and unsystematic habits of thought which make every original treatise on the Hindu law, the despair of exact thinkers. The question which the learned Judge had to answer was the narrow and sharply defined question, whether the Cutchi Memcns had ever voluntarily imposed upon themselves, as a custom, the Hindu law of the joint family as exhibited particularly in the distinction between the ancestral, joint and self-acquired property? Because they are supposed to have imposed upon themselves a law of inheritance and succession corresponding with that which would be applied to the case of a separated Hindu in possession of self-acquired property, it does not follow that they had also adopted a totally different feature of the Hindu law which, speaking strictly, has nothing to do with succession and inheritance at all.

I will now go over this evidence, or parts of it, critically, for my purposes in the present case.

Mahommed Sidick Haji Abdulla, plaintiff, says: "We all lived together as a joint undivided family" but in cross-examination he was asked what he meant by an undivided family, and answered: "I only meant by it that I and my father lived together and ate together. If there had been no property we should have done so." Slight though this is it is very instructive. The learned Judge has noted that when the witness was given the word for "undivided" in the sense of the Hindu law, he did not know what it meant. What he says in cross-examination clearly sets the limits upon his idea of a joint Hindu family. And it is, I have no doubt, perfectly true, that the archaic custom of families living together to the third and even fourth

generation, a patriarchal custom noticed by Sir Charles Sargent in his judgment in *Cassumbhoy's case*,⁽¹⁾ prevailed almost as universally among Bombay Mahomedans as Hindus. But it does not follow from this that the former had any knowledge of, or desire to adopt the peculiar legal consequences attaching to, the Hindu concept of the joint Hindu family. After this witness was examined the record shows that Mr. Inverarity was called upon to open for the defendant, that is to say, to prove the custom among Cutchi Memons of *not* making any distinction between joint family, and self-acquired, property. At the outset it may be noted that it would be almost impossible to prove such a custom. Instance after instance might be given of sons and brothers inheriting, but in every such instance *ex hypothesi* the property in question must be assumed to have been self-acquired in the Hindu sense. On the other hand, it would have been comparatively easy to prove the custom affirmed by the Court as a custom, namely, that this sect had adopted the Hindu law of the joint family. Of course had it been open to the defendant to prove that, e.g., daughters had inherited, that would have been in point to show that the property there could not have been joint family property. But all instances of that kind had long ago been ruled out by the first decision. Nor can there be much doubt, I think, but that to that extent the Cutchi Memons had long ago and on the whole consistently renounced the Mahomedan law. It is instructive too to note how Mr. Inverarity opened his case. He said that the questions to be answered were questions of fact: (1) Was Ismail's property ancestral? (2) Whether among Cutchi Memons there is ancestral property in the sense that the son takes a right by birth? He goes on to say that if the property is ancestral, then the will

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does not operate against the plaintiff, which seems to be giving up his main defence.

Haji Hassam, who appears to be the defendant, says :

"There are not many instances of sons and father dividing the ancestral property in their life-time. I never heard of any. I know Haji Cassum Haji Ibrahim ; he separated from his father during his father's life. Cassum had a share in the trade. The father gave a share in the estate of his own accord. He got a share out of his father's property, not out of the ancestral property. He got it, not as a share of what his father got from his grandfather, but as a share of his father's own property...I know Aji Adam Haji Rahim Alwani. He had four sons. They did not get a share out of the grandfather's property, but out of the father's property which he had received from his father. I heard that they gave their father releases. I know Haji Hussain Abdul Rahim. He has either three or four sons. All his sons separated from him. They got a share, but at the father's own pleasure, not by suit. The property of the father may have come from the grandfather. I mention Haji Elias Haji Jusub. I heard he made a will. He was my uncle's son. He had a son, Haji Saleh Mahommed. This son separated in his father's life-time. He got a partition from his father, but when sons get a partition they hold it to come from their father at his pleasure. The son gave his father a release. Memons have made wills for many years, I cannot say how many. We have fixed customs ; all that our Jamat follows is fixed. So extremely uncertain are the customs that there is no difficulty in producing any number of witnesses on either side."

[N. B.—That is probably true.]

Haji Ahmad Haji Abdulla is asked :

"Among the Cutchi Memon community is there no distinction made between self-acquired and property derived from the father as to the power of alienation ?

A. After him it should go to his son. What a man gets from his ancestors he gets as his own property, and he can deal with it as he pleases in his life-time. He can will it. According to our usages a son does not acquire by birth a right to the ancestor's property."

He then gives the names of testators all of whom "had received property from their fathers." "They all had sons at the time of their death."

In cross-examination he says :

"We Memons are governed by Mussulman law. So long as there are sons no one else will get the property. If there are two sons living and a grandson of a third son, the two brothers could give to the son of the third son."

[N. B.—Here we have a considerable confusion of thought, but an indication, it must be admitted, that some infiltration of ideas from the law of the Hindu joint family, had taken place.]

"The Court adopted Hindu law, and made *Stridhan*, but we do not agree to the Hindu law. Whenever a Memon suit comes into Court, nearly always a custom is set up. There is no difficulty in getting any number of witnesses on either side. Since Sir Erskine Perry's time I do not know of any instance of a custom being established in a Court of law."

[N. B.—Here the witness is not so far wrong.]

Haji Tyeb Rahimatulla says he is one of the principal members of the Cutchi Memon community. Asked as to whether according to the usages of the community there is no distinction between ancestral and self-acquired property, he replies :

"The son becomes the *mukhtyar* on the death of the father. The father may do what he likes with his property. If he does not give it to his son, he may give it to any one. He can will it away. Among Cutchi Memons a son does not acquire by birth a right to his father's property. As to the ancestral property in the Hindu sense, if there is a son he gets it after his father. The son can get it in the father's life if the father gives it of his own accord ; but not against his father's will. So long as the father is alive the son cannot prevent him from giving it away."

Very little comes out in cross-examination, but the witness says with emphasis :

"We are not governed by Hindu law. All our customs are related to Mahommedan law, but there are some differences in our customs."

Haji Alana Vaidina says that he is one of the principal members of his sect :

"There is no ancestral property in the Hindu sense of the word. The son does not acquire any right by birth in the property of the father. The father can make a will of the property if he likes."

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"It is true that when there is a suit in Court the caste divides into sections, and you can get witnesses to say anything in support of a suit...The Memons are governed by the law of the Quran. A man can will away his property from his relatives, but it is contrary to the law of the Quran. Nobody can prevent him."

Tar Mahommed Haji Arab says :

"Among Cutchi Memons there is no ancestral family property in the Hindu sense. A son acquires no right by birth in the property of his father. A Cutchi Memon can leave away by will the property left him by his father. Such a will is in accordance with our usages."

Gives instances. In cross-examination he says :

"I mean by there being no ancestral property in the Hindu sense, that the grandson has no right in the grandfather's property. I do not understand Hindu law. I do not know what Hindu ancestral property is. We are Mahommedans and we want Mahommedan law...I know only a little of Mahommedan law. We have hitherto, by custom, made sons inherit to the exclusion of all the other sharers. Mahommedan law out of Court can be applied, but a few go to Court to get Hindu law since 1847. I have never heard of the will of a Cutchi Memon which has given the property away from the sons."

In re-examination :

"The application of Hindu law to us is not according to our usages. A grandson has no right by birth in the grandfather's property. A living son would exclude the son of a dead son, by Mahommedan law, and so among the Memons."

Rahimtullah Junas says he is a man of position, a tailor :

"If a Cutchi Memon received property from his father he can give or will it away and his son cannot prevent him. According to Hindu law I do not know the rights of the grandson to his grandfather's property. Among the Cutchi Memons a grandson has no right to share in property inherited from his grandfather. A will made by his father in such circumstances is valid according to our usages. The application of the Hindu law by the Court is not according to our usages...We observe the Mahommedan law of marriage and divorce; we are much stricter than Khojas. We observe all the feasts."

In cross-examination he says :

"According to inheritance formerly we did not conduct ourselves according to Mahomedan law. Formerly our law of inheritance was according to Hindu law. For a long time, thirty or forty years, we were governed by the Hindu law of inheritance. For many years, wills have been in use among us."

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Gives instances. In re-examination he says :

"We have been governed by Hindu law of inheritance since the case decided by Sir Erskine Perry."

Sabu Sidick (the ancestor of the present litigants I think) says that he is a principal member of the Cutchi Memon community, and a large merchant :

"Cutchi Memons who inherit from a father can, according to our usages, will it away even if there are sons. A son has no right to share in the property which his father has got from the grandfather. A son acquires no right among us to the property inherited by his father. If the father wills away the property according to our usages the will is valid."

Gives instances. In cross-examination he says :

"The Cutchi Memons have been governed by our law, that is, the Mahomedan law, ever since we became Memons. There is no other law given us. Those who do not obey that law are sinners. I observe that law, if others do not, they go to hell. Nothing about inheritance has happened in my family, but I would act according to the Mahomedan law. My father has power to give away all his property to the exclusion of his heirs."

[*N. B.*—This is not of course in accordance with the Mahomedan law.]

There are customs among us which differ from the Mahomedan law. It is not a fixed custom not to observe Mahomedan law. There is no rule whatever in cases of inheritance; there are customs which agree with Mahomedan law, and some which do not. There are no fixed customs which do not agree with Mahomedan law. There has been a revival of the Mahomedan religion among us."

In re-examination he says :

"It has been religious zeal, not the Courts, which has caused our movement. We object to the Court deciding according to Hindu law."

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I have quoted freely from the evidence of this witness, partly because he was a man of considerable importance and the ancestor of the present litigants, but more because his evidence is so strongly indicative of what was then the feeling among the community about the extent to which it had been brought under the Hindu law.

Haji Jusub Haji Ahmad says :

"Among Cutchi Memons, a man who has inherited property, I do not know what he can do with it."

But instance the case of his own father who apparently inherited what, in the eye of the Hindu law, would have been ancestral property, and yet was distributed under an oral will.

In cross examination he says :

"The family comes from Cannanore. His father made no will. Releases were not passed and the property was divided. I was joint with my father and grandfather; we were all joint in trade."

[*N. B.*—This goes no further than the notion of partnership, which is quite familiar among the sect.]

Usman Alla Rakhia is a well-to-do Cutchi Memon merchant.

"If a Cutchi Memon inherits property from his father I have not seen anyone do what he likes with it. I do not know much about it, I do not attend the Jamat much.

Q. Among Cutchi Memons are the customs and usages in force according to the Hindu or the Mahomedan law ?"

The question was excluded as there was no issue and the plea was not taken in the pleadings, "moreover it is not for the witness but for the Judge to say what law is applicable." In view of what had already preceded I must own that this strikes me as very strange. It appears to indicate that the learned Judge

had made up his mind that, speaking generally, the whole Hindu law of the joint family applied.

"A son has no right to his father's property during his father's life. A son cannot prevent his father from doing what he likes with it."

In cross-examination he says :

"A father can will away his property to anybody. He has the right. He can will away the whole of his property; it is by Mahomedan law that he can deal with his property as he pleases. A man dying and leaving ancestral property and sons can will his property away from them. I do not know of any such case."

Haji Satar Haji Ibrahim says he is a leading member of the Cutchi Memons, a merchant.

"According to the usages of the Cutchi Memons, a son has no right to his father's property until the father gives him property. Son cannot prevent the father from willing it away. It makes no difference if the property was derived from the grandfather."

In cross-examination :

"A man may give away all his property from his heirs, such is a *mushaa* (custom) of our Janat. I do not know Mahomedan law. The power to will away from the heirs is a special custom of the Memons."

In re-examination he says :

"We have Mahomedan law now, but the practice of the Court is that daughters do not get a share."

Haji Jakaria Muledina says that he is a dealer in European goods, and is reputed to be a leading member of the community :

"According to the usages of the Cutchi Memon community we can make a will if we like. Son cannot prevent father from making a will. There is no difference between what a man has made himself and what he has inherited."

In cross-examination :

"The son always gets his father's property after the death of his father. If the Mahomedan law takes away testamentary powers it must go. We want Mahomedan law."

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Aba-Fakir Maltommed says :

" Among Cutchi Memons a father has power to make a will of his property. I have not heard of such a thing being done if he has inherited the property from his father. It depends upon his pleasure, no one could prevent it. A son could ask his father for partition, it is at the pleasure of his father, a father has power over all property whether inherited or not."

In cross-examination:

" When a man makes a will he follows his pleasure. I have never heard of property being willed away from the sons. A Cutchi Memon in his life has power to give his property to anybody, I have never heard about a will."

Nur Mahommed Haji Jakaria says he is a merchant on a large scale in Calcutta :

" Cutchi Memon rules in Bombay and Calcutta differ, in Calcutta there is Mahomedan law for all Cutchi Memons. I do not know about the law in Bombay."

In cross-examination :

" All Mahomedans of all kinds in Calcutta are governed by the Mahomedan law."

This is interesting as showing that in the small offshoot of the sect settled in Calcutta (there are said to be only about one hundred and twenty in all) no material departure from the orthodox Mahomedan law has taken place.

Jusub Lakha says he is a large Cutchi Memon shop-keeper :

" Cutchi Memons can make a will and give the property to whom it ought to be given. It makes no difference whether he acquired property or inherited it. Among us Cutchi Memons a son has no right to the father's property during the latter's life."

In cross-examination :

" I have never known a case of a Memon willing his property away from his sons : he has power to will away one-third of his property. The rest goes to those who are entitled."

[N.B.—That is the true Mahomedan law ; but this is the first witness yet who has declared that the law is strictly observed in this point.]

“ I have never known of a case of a Memon giving away by will, all his property. Our questions have been decided according to Hindu law, and to that we do not agree. We Memons bring suits on one or another set of customs : we can get any number of witnesses on either side.”

In re-examination :

“ The suit decided in the Courts a few months ago against the Mahomedan law made us get up our petition. I do not know our usages well, but we go by Mahomedan law.”

Mahommed Ahmed says he is a well-to-do Cutchi Memon merchant :

“ A memon can make a will of his property if he likes, inherited as well as other property. A son cannot prevent his father dealing with his property as he likes.”

In cross-examination :

A Memon can make a will excluding his sons, he is the owner...has never heard of the property being willed away from the sons.”

Sidik Parpaiya, a land owner, says his property is self-acquired :

“ According to our usages I can make a will of that property. It would be just the same if I had inherited it. According to our usages, a son cannot prevent his father from willing it away. A son has no right to property inherited by his father from his father.”

In cross-examination :

“ A man can will away his property to whom he pleases including the property inherited from his father. He can will it to a stranger, I do not remember an instance. If a son gets a share it depends upon the pleasure of the father. I remember Sir Erskine Perry's decision, it was well known to all the members of the Jamat.”

Haji Jan Mahommed says :

“ A Cutchi Memon can make a will according to Mahomedan law, there is no difference between inherited and self-acquired property.”

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In cross-examination :

" A will according to Mahomedan law can be made by a Cutchi Memon. I have never known property willed away from sons to strangers. There is no difference between inherited and self-acquired property, that is, according to Mahomedan law."

Juna Sidik Ladha, a tailor, says :

" A Cutchi Memon can make a will of his own property. Some make wills if there is inherited property but it cannot be done. I do not know that a Cutchi Memon cannot make a will of inherited property. We follow Mahomedan law, that is my opinion."

Haji Abdul Latif is the Kazi of Bombay :

" Cutchi Memons I know, they are undoubtedly Mussalmans ; but those who have acted contrary to the Mahomedan law must be excluded. In cases of divorce Memons come to me and get it."

In cross-examination, nothing material.

In re-examination he says :

" Jusub who gave evidence before Sir Erskine Perry C. J. repented publicly in the presence of many persons, on the third day ceremony of Abdul Harun's death, in the mosque."

Haji Ismail Mehdi had a grandfather who was Kazi of Bombay :

" The Cutchi Memon community are very orthodox Mahomedans."

Then follows re-butting evidence on behalf of the plaintiff.

Haji Kassim Sukkur, one of the Shettias of the Cutchi Memons, seventy three years old :

" I am well acquainted with the customs of the Cutchi Memons. A man who has inherited property from his father cannot make a will giving it away, but it must go to his sons. (*Gives instances of sons getting a "share" from their fathers during the lifetime of the latter*). We recognize ancestral property. It follows the same rule as ancestral property among the Hindus. Wills are a late institution among us."

In cross-examination :

" A son cannot prevent his father making a will of his property. If a Cutchi Memon had inherited property from his father and made money

out of it by trade, his son could not prevent his making a will of it. If a Cutchi Memon inherited property from his father, and made money in trade the grandson by a deceased son has a right. If a son is born he has a right. I am an orthodox Mahomedan but the Sirkar will not let us be so. We would follow Mahomedan law in everything but for the Sirkar. Before the Sirkar made us unorthodox we followed the Mahomedan law. It was Sir Erskine Perry who made us unorthodox. Before that we followed Hindu law. I cannot give you an instance of that. I never heard of our following the Hindu law before that decision of Sir Erskine Perry."

[N.B.—The evidence seems to have been taken down wrongly here, as it is contradictory on the face of it.]

"Hindu law is applied to us in all questions concerning property. Sir Erskine Perry made it Hindu law—Hindu law—Hindu law. I should not have said so before my nephew brought a suit against me."

In re-examination :

"Before the decision of Sir Erskine Perry Hindu law was followed. A father cannot will away ancestral property to the injury of his son or son's son."

Haji Ibrahim Saki Ladha is a Cutchi Memon shroff :

"I know what ancestral property is. A father cannot deprive his son by will of his share of ancestral property. A son has a right by birth in it. Ancestral property is governed among us by Hindu law. The custom of making wills is new ; it arose in 1844."

In cross-examination :

"A Cutchi Memon cannot make a will disinheriting his son. All my property is self-acquired ; if I had a son I could not disinherit him. We cannot disinherit anyone whether the property is self-acquired or ancestral. I first heard about Hindu law about fifty years ago. All my life I have wished to carry out the precepts of the Quran ; all Cutchi Memons are Mussalmans ; if the Sirkar allowed it, we would all follow the Mahomedan law. I do not know what the Hindu law about ancestral property is. Before 1847 I can give no instance of property divided among Cutchi Memons."

Haji Abdul Rahim, a leading member of the community, says that he sold some immoveable property and his sons were asked to join in executing the

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sale-deed which they did. They were asked to do so by Abdulla. Payne was the Solicitor.

"A man who received property from his father cannot disinherit his sons of it by will. I observe Hindu law as regards ancestral property. There is no difference among us between ancestral and self-acquired property, the father's right over both is the same. Among Cutchi Memons the son has a right during the father's life to ancestral and self-acquired property. A father can make him a sub-partner and he afterwards gets it on the father's death. A father cannot disinherit his son of either kind of property because it is contrary to Quran. It is the invariable practice of Cutchi Memons to obey the Quran and not to disinherit their sons. Many Cutchi Memons make wills. I have never heard of one being disputed before this case. When Cutchi Memons make wills we observe Hindu law. We give legacies in the way the Hindu law gives the property."

Haji Alarakhia Dada :

"I do not know what ancestral property is. It is what is left by father or grandfather. In the case of a son and a grandson by a predeceased son all is divided between them. I cannot say whether a Memon with ancestral property can disinherit his sons."

In cross-examination :

"There is no difference between ancestral and self-acquired property ; the sons have a right to both. The son's right arises on the death of the father. It depends on the father's pleasure ; that is so whether the property is self-acquired or ancestral."

In re-examination :

"There is no difference between ancestral and self-acquired property. I do not know if it can be willed away. When a son is born he gets a right to the property, all the property, not only that of a special kind which belonged to his father."

I pause on this man's evidence to observe the curious light that it throws on the ideas prevalent among the poorer and less instructed members of the sect, upon the question of disinheritance. The man is comparatively poor and of no consequence. But his evidence shows how easily legal ideas clothed in popular language are picked up, confused, and attributed to widely different sources. Thus while this witness is

very emphatic in declaring that no Cutchi Memon can will his property away from his sons (heirs according to the Mahomedan law) he bases this on the Mahomedan law and refuses to acknowledge any distinction between ancestral and self-acquired property in this connection. And yet it is solely on this distinction that the Hindu law rests. The Hindu law shows no particular repugnance to the disinherison of sons by a father who is disposing of his self-acquisitions.

Haji Harun Haji Adam says that he is acquainted with the law which governs inheritance among Cutchi Memons :

“It is Cutch law, which is Hindu law.”

Here again we get an useful side-light on the origin and development of this reversion to Hindu legal notions.

“Wills are now made by Cutchi Memons, it is a custom only a few years old. The will is valid if made according to Hindu law; it could not be made differently.”

This kind of statement is really meaningless, except as intended to introduce the distinction between classes of property, of which a Hindu may or may not dispose by will. But the prevalent idea in the minds of most illiterate or imperfectly educated Hindus and Mahomedans is that a will must follow the main lines of ordinary inheritance. This is not true either of Hindu or Mahomedan law, for the simple reason that wills were quite unknown to the Hindu law, until recent times, while the provisions of the Mahomedan law were intended to prevent arbitrary dispositions of more than a fraction of the property, in defiance of religious and moral obligation.

“Ancestral property is property belonging to ancestors, grandfather and so on. There is no custom different from Hindu law as regards the

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disposal of ancestral property. A man cannot deprive sons, &c., of their share in ancestral property. He cannot leave his ancestral property to anyone but his son.

“Of course he cannot really leave his ‘ancestral’ property to anybody.

“But the grandfather could make a will if the property is self-acquired. He can will his own share of ancestral property after giving the sons their share.”

This means, if it means anything, that after a partition each member of the family can dispose of his share by will. (Gives instances of a partition enforced by sons.)

In cross-examination :

“Is insolvent and lives on what his wife allows him.”

Haji Jalta Musa says he is acquainted with the laws and customs of Cutchi Memons with regard to property :

“I know what ancestral property is. It is ancestor’s property. There is no custom regarding it which differs from Hindu law. The son at birth acquires a right in it. A son can get partition during the life of the father. The father cannot will it away. I know cases where sons have obtained shares of ancestral property.”

Gives instances. In cross-examination :

“I have no money whatsoever, I have been insolvent twice. I have never spoken to Cutchi Memons about the custom about ancestral property. I have always talked about this since I came to Bombay in 1915 (circa 1861). Not because I had any doubt. I know it. If a man has sons he cannot leave his ancestral property from them by will. He cannot deal with his self-acquired property. He cannot leave it to an outsider.”

In re-examination :

“As to ancestral and self-acquired property the difference is that a man cannot give ancestral property save to his sons or grandsons but if his property is self-acquired he can give it to his widow or any other person. No one has ever given it to an outsider.”

[N.B.—Though the man is of no account his evidence is interesting as showing that in spite of his strong leaning to the plaintiffs’ case he cannot trace

the prohibition in the Hindu law against alienation of ancestral property to any other notion than the sentiment much stronger in the Mahomedan than the Hindu law against depriving the natural heirs of the estate.]

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Haji Sidik Jan Mahommed :

" I got a share of my uncle's property. I do not know anything of the customs of my community."

In cross-examination :

" Is a Molloo, a Muccadam of cargo boats...His father divided his estate in his lifetime between his sons...He gave us our share willingly and we asked him to give something to the grandson...He made this division of his own accord. It is Mahomedan law in respect of property. Those who have a right to it get it. A Cutchi Memon can give property he gets from his father to anyone he likes, he is full owner...I know of no instance of willing it away to strangers."

In cross-examination he says :

" According to the practice of our community the father is *mukhtyar* of both kinds of property, self-acquired and ancestral. The son has no right in inherited property unless the father gives it to him."

In re-examination :

" Self-acquired property is the money a man gets himself. I do not know of any other kind of property save what a man makes for himself. The property he has received from his father is also property. In a father's lifetime everything is joint, if sons be living with the father it is all joint but the father is *mukhtyar* of everything."

Haji Jan Mahommed Hussain :

" Sells bundles of coir matting. Nobody knows about wills in Cutch."

In cross-examination he says :

" I know nothing about it. I am only a labourer. I only knew labourers in Cutch. I have never known people who had property either there or here."

Ibrahim Haji Jakaria, appears to have been only eighteen years old.

[N. B.—This is the witness upon whom the learned Judge lays much stress as showing that Hindu and not

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Mahomedan rules of succession were followed. But it is obvious that the witness' evidence has no bearing at all upon the main question, namely, whether there is any known distinction among Cutchi Memons between ancestral or self-acquired property since, in the circumstances, the succession to either kind of property would have been just the same.]

Saleh Mahommed Elias says :

"The custom among us is that if there is a property belonging to the father it comes to the son. There is no such thing known as a will."

Describes a rule of succession akin to that of the Hindu law, but having no bearing on the distinction between ancestral and self-acquired property.

"If a man has inherited property from his father and has none himself he cannot leave it from his sons."

Haji Mahommed Saleh Mahommed says :

"Wills are not known in Cutch. They are never made there. If a man with ancestral property has a son I do not know whether the son has any right by birth. I know no difference between inherited and self-acquired property. There is no inheritance in Cutch, there is no money in Cutch. A Cutchi Memon widow cannot, in any circumstances, get more than maintenance whatever the husband's property was. If a man gets nothing from his father but makes money himself he could not give it away from his sons unless he did it secretly...Our Quran says half should be given to daughters of what is given to sons. A father's property is his, let it come to him from anywhere."

[N. B.—Again note how radical is the idea that in no circumstances and no matter what the property, can a father disinherit his sons, a Mahommedan rather than a Hindu notion.]

Hassan Dada :

"Amongst us Cutchi Memons a man cannot make a will disinheriting his son if he has ancestral property. A grandson has an equal right with the son to ancestral property if the ancestral property has descended through two or three generations. The sons have a right to it if they ask for it."

Haji Mahommed Haji Ismail :

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"Ancestral property is property which the father has as grandfather's property. A son and grandson by a predeceased son would equally inherit ancestral property. I do not know whether the law is that sons can demand partition from the father."

In cross-examination :

"Among Cutchi Memons I do not think there is any difference between ancestral and self-acquired property as regards the father's power of disposal. I cannot even say what is in law the difference between ancestral and self-acquired property."

Blas Haji Abdulla :

"After my grandfather's death his property was not divided; it is still undivided. How could I have a share? I was admitted to a right so I kept quiet. We are joint. I do not know what right I was admitted to."

In cross-examination it is clear that the witness' condition is one of ordinary partnership with his uncles rather than that of a member of an undivided Hindu family.

Haji Sidik Haji Ibrahim describes what happened in his own family. It appears that members of the family asked for a partition and the matter was referred to arbitration. But again the subject is inextricably mixed with what might have been the ordinary partnership rights of these persons.

"Among us Cutchi Memons a man cannot will away his ancestral property from his sons or grandsons. A man with ancestral property making a will can only leave equal shares to his sons. The son has a right at birth in ancestral property."

In cross-examination he says that his father's will was valid according to the customs of Cutchi Memons.

In re-examination he says :

"A son acquires a right at birth in all kinds of property. But there is a distinction between ancestral and self-acquired property. A grandson can take the grandfather's property, but he takes self-acquired property too. A father

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cannot make a will disinheriting his son of self-acquired property. A father cannot disinherit a grand-son (sic) of self-acquired property."

[*N. B.*—The concluding part of the witness's evidence points the same way as that of many others. Clearly he has no real idea of any difference between ancestral and self-acquired property, but he is deeply imbued with the Mahomedan sentiment against disinheriting the natural heirs, and that is about all his evidence, stripped of mere terms, comes to.]

Hassam Dada re-called for cross-examination says :

"A man should give his ancestral and self-acquired property to his sons."

Maulvi Hissam-ud-Din :

"The Mahomedans always make converts when they can. Such converts always follow the Mahomedan law, that law is contained in the Quran. I have considered the Cutchi Memons to be full Mahomedans even as regards the inheritance of females, till that day (i.e., the day of the meeting in the mosque). That is the only difference I have heard of."

Haji Dada appears to have been re-called and he says:

"As regards ancestral and self-acquired property, the father can do what he likes with self-acquired property, but the son has a right in ancestral property. No one has willed self-acquired property away that I know of. How can a man give his property to other people? He cannot do it. Cutchi Memon had self-acquired property and five sons he ought to give every one of them, I cannot say if he can give it all to one. I do not know if he can. I do not know if a man with ancestral property can give it all to one. A man should give his ancestral and his self-acquired property his sons."

I have now completed this long and tedious labour. Much of the evidence I have been examining is, in my opinion, inadmissible in the present suit; much of it, however, certainly is admissible. I have made an abstract of it all partly because the trial I am engaged upon is of a somewhat unusual nature, possessing, for the limited purposes of this branch of law in this Court, what might perhaps be called an historical

interest ; partly because it was not easy without going over all the evidence to say what parts of it were, and what were not, relevant ; partly again because Mr. Inverarity was extremely desirous that not only what was put on record to-day, but what had been recorded before Sir Erskine Perry nearly seventy, and before Scott J., thirty, years ago, should also be available for the Court's information ; and lastly, because I have permitted myself both in this and the incorporated judgment to comment upon Scott J.'s judgment with some freedom. I have thought it best, then, to reproduce in the form of a mere abstract, the most valuable (as it seemed to me) portions of the material upon which that learned Judge based his conclusions. Whatever may be advanced against the relevancy of much of this evidence its general interest can hardly be denied, nor the importance if this can be done, in a controversy of the kind, of tracing the formation of opinion in the sect. Several points of importance emerge. This complete review of the evidence confirms, in my opinion, what I have said more than once in this, and the incorporated judgment, that but for the strong judicial and professional prepossessions of longstanding which existed at the date of this trial, its result would have been different. It can hardly be doubted that if the matter had been *res integra*, and the question raised had been whether among a sect of Mahomedans an alleged custom recognizing and adopting the distinction between ancestral and self-acquired property in the sense of the Hindu law of the joint family existed, no Court could have held on such evidence that the alleged custom was proved. But the Court started its real inquiry from the point that the decisions of the Court had settled the law so far, that this Mahomedan sect was governed in all matters of succession and inheritance by the Hindu law, therefore,

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that it lay upon any one of them, who alleged that notwithstanding that the sect had never adopted the Hindu distinction between ancestral and self-acquired property, to prove it. Even so, the evidence was so conflicting and nicely balanced that the decision may be thought to have been determined by the placing of the onus. The learned Judge did not think that the defendants setting up the custom had proved it, that is to say, the negative of the custom, as, in my opinion, it ought to have been stated for decision. The defendants could not prove that "by a custom of the community" no regard was, or ever had been, paid to the distinction drawn by the Hindu law of the joint family between ancestral and self-acquired property. But suppose that, without making any assumptions at all, or taking anything for granted, the plaintiffs had been called on to prove affirmatively that the Cutchi Memons had, by custom, incorporated the complete legal notions of ancestral and self-acquired property as applied in the law of the Hindu joint family, in their own law, can any one suppose that the evidence I have just reviewed would have satisfied any Court, or proved the affirmative proposition to the satisfaction of any Judge?

I attribute the result of this trial, the first in which any serious attempt appears to have been made to prove (though from a wrong starting point) that the Cutchi Memons had adopted parts of the Hindu law of the joint family ancillary to the general law of "simple succession and inheritance" whatever that may be, much more to the preceding case-law, and the strong professional opinion which prevailed within the Court, than to any proof of any custom whatever existing in reality and outside the legal atmosphere of this Court, among Cutchi Memons themselves.

Yet, if the decision had been the other way, as, in my opinion, it ought to have been and would have been,

but for the case-law, consider how different the position would be to-day.

One of the most striking features of the evidence, as a whole, taken before Scott J. in 1885 is that it is far more uncertain, more contradictory, and evidently more unsettled, than the evidence (such as it was) recorded forty years earlier before Sir Erskine Perry, or thirty years later before myself. So few witnesses were examined before Sir Erskine Perry, and the points to which his enquiry was directed were, comparatively speaking, so narrow, that it is little wonder that the evidence seemed so unanimous, and that counsel on the other side soon gave up the attempt to rebut it. I also believe that in those days, the sect, as a whole, probably was more under the influence of Hindu ideas than it is to-day: more particularly in all points affecting the legal capacity of females to inherit or enjoy property. But the evidence shows that all the witnesses were, in the most general sense, under the impression that the Hindu law of the joint family had, with other parts of the Hindu law of succession and inheritance, been adopted by the Cutchi Memon sect, or revived (with modifications) by inherited propensity or gradual pre-assimilation from a predominantly Hindu environment.

But in the next forty years there had been a strong revulsion of feeling. And notwithstanding that for some centuries after their conversion, these isolated Mahomedans had very likely fallen back in practice, under the example and pressure of great bodies of their former co-religionists, so that they hardly knew themselves to what extent their property law was, Hindu or Mahomedan, I should very gravely doubt whether they had, when the *Kojahs and Memons' case*⁽¹⁾ came before

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Sir Erskine Perry, any definite notions at all upon such a complex of law as that which makes up the Hindu law of the joint family and comprises the highly artificial notion of joint ancestral family property. For the most part, they probably did live together, as long as families held together, more than one generation at the time finding place under the paternal rule of the elders. From a habit so universally prevalent among primitive Oriental people and so propitious for the assimilation of the specialized legal concept of the Hindu family, they might very easily, merely by imitation and under the pressure of greater mass, even had they not themselves been predisposed by long centuries of heredity, have conformed in many respects to the law and usages of the Hindu states and peoples among whom they lived. But looking only to strict law it is clear that if they stated their customs correctly before Sir Erskine Perry, they had, while abandoning the Mahomedan law on the one hand, gone some distance beyond the Hindu law on the other. On one point there was, and always has been, practical unanimity that widows can only enjoy maintenance, and that, speaking generally, females are excluded from inheritance. It is not true, of course, that females are so excluded under the Hindu law. But for all practical purposes, as far as they were yielding to the pressure of circumjacent Hindu sentiment, that pressure probably transformed itself in idea, into a reproduction of the joint Hindu family, without much regard to the cognate notion of the separated Hindu. But it is not to be too hastily inferred from this conjecture, that while they realised with some precision the effect of that part of the law of the Hindu joint family which operates to restrict the legal capacity of females within the joint family, they had equally clear conceptions of the whole of that legal structure.

Rather, I should be inclined to say, that the evidence I have examined, taken as a whole, up to the year 1885, shows that Cutchi Memons, wherever it was a question how property should be disposed of, or descend, were deeply penetrated by the religious sentiments of the Mahomedan law, and that the determinant consideration (qualified as to women by the disfavour with which Hindu law has consistently treated them so long as the status of the joint family continued) always was the Divine disapproval of disinheriting natural heirs. Although the words come glibly enough to their tongues it is easy to read between the lines that hardly one of the witnesses who declare that no Cutchi Memon could deprive his sons of ancestral property, referred that doctrine to any technical legal distinction between ancestral and self-acquired property, or meant more than that a father had no right to will his property away from his sons. But for the exclusion of females from this rule, and the need of qualifying it in favour of a testator's limited power of disposition permitted by the Mahomedan law, such an opinion might be much more easily and naturally traced to the Quran and later Logoi of the Prophet or sages, than to any principle of the Hindu law of the joint family. Similarly, when witness after witness says that sons acquire a right by birth in their father's ancestral property, I am pretty confident that, apart from the ready use of loose phraseology, they meant what might as well have been expressed without suggesting any distinction, in the Hindu sense, between ancestral, joint and self-acquired property, namely, that whatever a father had and however he had come by it, belonged in a sense, and subject to a limited power of disposition to his natural heirs, these appearing in the light of Hindu sentiment, as primarily sons and grandsons. It is, of course, quite true to say loosely, that, under the

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Mahomedan law, sons acquire a right by birth in their father's property, since he cannot leave the whole of it away from them, without their consent. And relieving the evidence of these witnesses, quite untrained in legal dialectic, from words having a special legal connotation, the gist of what they mean, as well as say, appears to me to be in closer conformity, with the general Mahomedan, than the special Hindu, law of the joint family. The probability of this being the true interpretative key of the conglomerate of confused and inconsistent testimony laid before the Courts is seen to be the greater, when we allow ourselves to consider for a moment the root and binding principle of the unique legal concept of the Hindu joint family. This was undoubtedly religious, and divorced from its religious reasons and sanction, it is hardly thinkable that the elaborately artificial fabric of the Hindu joint family would have persisted and held its own to this day, against so many violently disruptive and disintegrating secular influences.

No compelling force of that kind operates upon the Cutchi Memons; on the contrary, what of Hindu law they have appropriated or retained, is in strong antagonism to divine precept. And the stronger their religious feelings the stronger must be their aversion from elements of Hindu law carrying with them echoes of the old faith, which survived their conversion to Mahomedanism. This note is audible enough in the evidence before me, as well as in that taken before Scott J. I seem to miss it in the earlier evidence given before Sir Erskine Perry. But that is probably because the few Cutchi Memons, who then gave their testimony, had not realized the full extent of their action, nor how far the apparently unimportant schism thus inaugurated might be carried. It is interesting to read forty years later, that some at least of the Cutchi

Memons who gave evidence before Sir Erskine Perry in favour of heretical customs and usages, were afterwards conscience-stricken and openly recanted, and did penance in the public mosques. It does not necessarily follow that they had not spoken the truth; but if this story be true, it throws a significant light upon the trend of the will of the sect, as a whole, even so far back as 1847. By 1885, the evil of which the seeds were so thoughtlessly and selfishly sown in 1847 had assumed serious dimensions, and to-day we are told that the faithful refuse to acknowledge Cutchi Memons as true Mahomedans in the shadow of the holy places. No wonder if that is so, that the community, a thoroughly sound Moslem community to-day, notwithstanding their origin and the subsequent irruption of Hindu ideas, should bitterly resent the apparent irrevocability of early lapses, most unluckily brought prominently before the Courts, and so clamped upon them by one judicial decision after another. No wonder they despair of any escape and salvation by the abandonment of every Hindu strain in their law and customs, and the unqualified re-adoption of the entire Mahomedan law, unless the Legislature intervene.

A comparison of the feeling of the community, and I might say, the sense of the community too, as expressed in the evidence given in 1885 and that given in 1915 with its feeling and sense to-day shows, I think, how powerfully the decisions of the Courts, and consensus of professional opinion have combined in operation, to curb the re-actionary movement that was so conspicuous in 1885. The ideas of some of the principal witnesses who have testified before me, are much clearer than any to be found on record in the earlier cases. They appear to understand much better than they did, all that is implied in the Hindu notion of joint ancestral family property. But I shrewdly suspect that that is

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not because they have in the intervening period become more Hindupized, but simply because, (a) they have become more intelligent, and (b) all the legal advice they can obtain is based upon an exaggerated idea of the extent to which they have proved by custom in the Courts, their subjection to the Hindu law. Until Macleod J. and I almost together struck the first loud note of dissent, it had become, and long been, virtually axiomatic in local professional circles, that both Khojas and Cutchi Memons were governed not only by the Hindu law of succession and inheritance as applied to an intestate separated Hindu, but the whole law with every one of its incidents and consequences of the Hindu joint family. In small measure, however distasteful this conviction undoubtedly must have been to a growing majority, many in the sect were reconciled to it by the compensatory consideration that they at least had full power of disposition over their "self-acquired" property. But we have seen reactionary tendencies at work even here. It is not very uncommon to find good Moslems of this sect making use of that extended power to defeat the custom which the Courts have imposed upon them. As the law stands to-day I have pointed out that they are in this predicament. If they make a will of the whole of their property, they run counter to their duties as good Moslems. But if they do not, the undisposed of two-thirds will certainly be given by the Courts not to the heirs designated by the Mahomedan, but to those designated by the Hindu, law. That is why we find Cutchi Memons giving away one-third of their property (usually to charity) and the other two-thirds to their heirs according to Mahomedan law. No stronger proof is needed of the desire of such people, were they free to choose, of replacing themselves under their own law. Even those who before me have admitted that

the Courts have given them the Hindu law of succession and inheritance, and that they to-day believe that they are governed by it, add, almost to a man, that if they had their own way they would abide by the Mahomedan law. Now if the decision of Scott J. in 1885 had been the other way, if he had held that the Cutchi Memons had no custom by which they recognized the Hindu legal distinction between ancestral and self-acquired property, I think, it is certain that, fortified by that decision, they would cheerfully have reverted, as far as they could, to their own law, from which they had been gradually driven ever further and further by the current of legal authority which began to set in that direction in 1847.

Adverting, for a moment, to the evidence which, throughout the chain of case-law, seems to have been the determinant factor, I mean the records of the Ecclesiastical Registrar, I must admit that not having those records before me, I find it difficult to appreciate the light in which the learned Judges regarded them or the reasoning based upon them.

Thus, in *Ashabai's case*⁽¹⁾ Sir Charles Sargent says :

"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 in 1847...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...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 quite admit that Khojas and Memons have, ever since Sir Erskine Perry's judgment, been regarded in the Supreme and afterwards in this Court, as Hindus. What next follows is an historical fact which no one

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⁽¹⁾ (1882) 9 Bom. 115 at p. 120.

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disputes. But it is apparently intended to support inferentially the immediately given conclusion that these sects had, in spite of their conversion, retained their old Hindu law. But the point is not how these people were regarded in the Court, and by an officer of the Court, the real point is whether they were rightly so regarded. And no one, I think, who desires to be scrupulously careful in his reasoning could say that the view necessarily or even rightly followed from the decision. Nor, except in cases of intestacy, am I able to understand what appears to have pressed so heavily on the minds of all these eminent Judges, except up to a point which falls very far short of the lengths to which they carried their conclusions. I think it may be correct to say that these records do establish the fact that members of the Khoja and Cutchi Memon sects had adopted the custom of making wills of their whole property. That custom is consonant with the Hindu, and opposed to the Mahomedan, law. But I am not at all clear what is meant by making wills in conformity with Hindu, rather than Mahomedan, law in any other sense, unless, indeed, we are here to import the conclusion, which is being sought to be proved in the present case, that the wills also prove that the Cutchi Memons had adopted the Hindu distinction between ancestral, joint and self-acquired property. How a will can prove that, except in preamble, where the testator states that the property disposed of is his own self-acquired property; I do not know. And such a statement is almost certain to be made, where the trend of professional opinion was so decided and unanimous in favour of the doctrine that these people were, although Mahomedan, yet governed by the whole Hindu law of the joint family. Apart from that, given a power of disposing of the whole property of the testator by will, it appears to me futile to point to the nature of the

dispositions and say, these are such as a Hindu, rather than a good Mahomedan, would make. The case is different, of course, where the records relate to the grant of Letters of Administration. As to this Sir Michael Westropp observes in *Shivji Hasam v. Datu Mavji Khoja*.⁽¹⁾

"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 consented to the grant to another.

"In the case of *The Goods of Vallu Musani* administration was granted by the Court, in 1855, to an undivided brother of the deceased in preference to the widow."

That may well have been, had it been taken for granted, as it undoubtedly was, immediately after 1847, that the Cutchi Memons and Khojas were, to all intents and purposes, excluding those purely religious, Hindus not Mahomedans. But it is precisely against such large assumptions, taken *per saltum*, that I enter my own emphatic protest. The further and fuller enquiry and argument in this case have strengthened, rather than weakened, the opinions I expressed in my judgment in *Jan Mohomed v. Datu Jaffer*⁽²⁾ on this point. Nothing could have been easier in the then state of professional opinion than to have satisfied the Court that any two brothers living together were "undivided" in the sense of the Hindu law. And as the parties concerned were probably quite content to have their property dealt with at that time on that footing, and if they were not, were certain to have been advised that it was no use protesting, the result was almost inevitable. Nevertheless it appears to me to represent an inversion of the proper sequence of cause and effect. The decisions of the Courts were not the effect of judicially

⁽¹⁾ (1875) 12 Bom. H. C. R. 281 at p. 293. ⁽²⁾ (1913) 38 Bom. 449.

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proved customs, but the practice of the Court, most arbitrarily adopted, was the cause of these customs being submitted to for many years by the sects concerned.

Later on we find a much fuller statement by that most eminent and learned Judge, Sargent J., upon this body of proof. He says in *Hirbai v. Gorbai*⁽¹⁾ :

“ 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 16 years which elapsed between the date of Sir Erskine Perry's 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 first of these latter cases is that of *Vallu Masni* in 1855, who died leaving a widow, a son and daughter who were minors, and a brother. The widow applied for administration. A caveat was entered by the brother, alleging that his brother had been his partner and joint in food and estate, and that the widow was illiterate and unfit to manage the estate, and that the widow of a Khoja leaving male issue was only entitled to maintenance. The Court granted Letters of Administration to the brother. This decision is in accordance with Hindu law on whichever ground the Court proceeded.

“ In the next case, that of *Pirbhai Manji*, the deceased left a widow and an infant son. Application was made by the widow, and at first opposed by persons who relied on a will ; but, the will having been declared invalid, they alleged that the deceased had other relations, viz., a maternal grand-mother and a maternal uncle, and his four sons. Administration was granted by the Court to the widow. This decision is in accordance with Hindu law, and exclusively so, as by Mahomedan law the widow would not be the natural guardian of her infant son for the purpose of managing his property, although she might be entitled to the custody of the child if under seven. And, as no custom was alleged, it is apparently a decision that the Court will apply Hindu law.

“ In the last case of *Dossa Nanji* in 1862 the deceased left a widow and niece. The widow applied for administration, and the niece objected on the

(1) (1875) 12 Bom. H. C. R. 294 at p. 300.

ground that the widow intended to sell the property; and the Court, consisting of Sir. M. Sausse and Sir J. Arnould, granted administration to the widow, she undertaking not to sell or mortgage. This is also in accordance with Hindu law.

"Passing to the cases decided by the Registrar, the first is that of *Jairaz Dharramsi* in 1855, who died leaving a widow, four brothers, and no issue. A brother applied for administration, and the widow entered a caveat, but withdrew it, and Letters were granted to the brother. The second is that of *Mahomed Alluwany*, where the application was by a brother, alleging that he had been joint in food and estate with his brother, and that a widow was only entitled to maintenance; and the Registrar, on consent of the widow, granted Letters to the brother. In the third case, *Pardhan Ravji*, the mother applied, there being a widow and an infant son, and the Registrar refused, unless the widow consented, which she ultimately did. The fourth is that of *Mithu Sonji*, where the family left consisted of three sisters, and administration was granted to one, the others being in Cutch. The fifth is that of *Vallubhai Alvany*, where Letters were granted to the widow, there being a mother and daughter. In the sixth, that of *Dada Alvanna* in 1859, the family consisted of a son, six daughters, and a grandson, and administration was given to the son. In the seventh, that of *Pachan Punjani*, administration was granted to the widow.

"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."

It is particularly instructive to note what was the nature of the caveat in *Vallu Musani's* case in 1855.

"A caveat was entered by the brother, alleging that his brother had been his partner and joint in food and estate and that the widow was illiterate and unfit to manage the estate, and that the widow of a Khoja leaving male issue was only entitled to maintenance."

I think it safe to conjecture that the first ground taken by the caveator was his own, and the true ground, while the others were suggested by his professional advisers in accordance with their own opinion. The

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second case cited certainly was decided rather in accordance with the Hindu than the Mahomedan law. The third was a conflict between widow and niece, the latter's objection apparently being confined to apprehensions lest the widow should alienate the property. The widow was granted administration on undertaking not to sell or mortgage. I cannot say that that is a very convincing case either way. Those appear to have been the only three contentious cases which were procurable before 1863. That is to say, no better evidence than this could be got from these records, during the seventeen years next following Sir Erskine Perry's judgment. It is obvious, I think, that no positive conclusion could or ought to be drawn from the cases decided by the Registrar, or even from these with the three contentious cases added. But the learned Judge, while conceding so much, thought that there was much subsequent corroboration, and this corroboration consists of the decisions, beginning with that of Sir Mathew Sausse in *Gangbai v. Thavar Mulla*⁽¹⁾ which, I hope, I have sufficiently dealt with and disposed of in my previous judgment. These extracts will show clearly enough what I mean when I say that I find it hard sometimes to follow the reasoning of the learned Judges who one after the other built up the law administered by this Court to Khojas and Cutchi Memons. In my opinion and speaking with great respect to the many much greater Judges than I, who have handled the subject, these records of the Ecclesiastical Side of the Court appear to prove very little more than the ease and rapidity with which, within a small legal circle, a doctrine may be developed and settled. I think too that, at any rate, in the earlier days, they suggest that there was great laxity of thought and indifference, to say no more, in distinguishing clearly between Mahomedan and Hindu law, and where the latter was found

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

to have invaded and superseded the former, setting precise limits upon these proved substitutions. Coming back to the case decided by Scott J. in 1885, I find the learned Judge saying :

“ In a series of Exhibits put in by Mr. Starling, Hindu law is evidently considered the governing law of the sect. Thus out of sixty Cutchi Memon wills...in only one...the principles of Mahomedan law seems to have guided the Registrar. That case did not go to the Court ; but Will No. 8 was submitted to the Court, and Perry C. J, decided (14th January, 1852) that the widow of a separated Memon is entitled to the property.”⁽¹⁾

I repeat I do not know what the first part of the passage cited means. I do not know how the Registrar could have been guided by the principles of the Hindu, rather than the Mahomedan, law in dealing with these wills. I suppose, though here I may be wrong, that all he had to do was to see whether the wills were duly executed. And as I have already said, if it be conceded that Mahomedans have so far departed from their own law as to have adopted the custom of willing away all their property, I am at a loss to understand upon what ground any distinction could be drawn in dealing with such wills between principles of Mahomedan and principles of Hindu law. It is curious to find that in 1852, five years after the decision of the *Kojahs and Memons' case*,⁽²⁾ Sir Erskine Perry holds that the widow of a “ separated ” Cutchi Memon is entitled to her husband’s estate. I have pointed out in this judgment that in all the sea of confused and conflicting testimony recorded the single point upon which all witnesses appear to be unanimous is that in no circumstances can a widow among Cutchi Memons get more than maintenance. I do not know whether Sir Erskine Perry’s decision rested on evidence, but, I should guess, in the absence of certain information, that it was grounded on a mere inference drawn by him from his own decision in 1847.

⁽¹⁾ (1885) 10 Bom. 1 at p. 12.

⁽²⁾ (1847) Perry O. C. 110.

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The last point I propose to mention as a result of my close examination of the case of *Mohomed Sidick v. Haji Ahmed*⁽¹⁾ is that it finally laid to rest the doubts which up to that time Mr. Inverarity had felt upon the question whether Cutchi Memons were subjected to the same extent as Khojas to the Hindu law, I will not say of simple succession and inheritance, but also of the Hindu joint family with all its legal incidents and consequences. How great must have been the formative influence of Mr. Inverarity's professional opinion through the succeeding thirty years of his brilliant and strenuous practice may be easily imagined. That may have had as much to do as any other single cause, with consolidating local opinion, at any rate, and compelling, if not reconciling, Cutchi Memons of Bombay to regard themselves as virtually governed by the whole Hindu law of succession and inheritance, and the joint family. I shall not pause to discuss in detail the evidence given by Messrs. Inverarity and F. E. Dinshah in this case. I have gone over it carefully. I need not attach any importance to Mr. Dinshah's opinion. He is a comparatively young, though, no doubt, distinguished attorney, and I do not consider that his opinion, the result of his practice for, say, the last thirteen years, is of much value. We all know what the Bar opinion has been during that period, and, I think, I know how it has come to be what it is. Mr. Inverarity's evidence is of a very different quality, and whether it be relevant or not, it assuredly is most interesting. But it does not help me much. It shows how a great advocate forms his opinions, beginning by taking all that his seniors at the Bar told him, for gospel, and gradually with ripening experience passing through a phase of critical doubt to a settled personal conviction. Even

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now I should doubt whether Mr. Inverarity is logically satisfied. I understand him to mean no more than that after 1885 he regarded the law as settled both for Khojas and Memons, and perhaps I ought to add, rightly settled, by the decisions of this Court. After that he accepted this position as the basis of all professional advice he gave. I think in this connection that I ought to say that, in my opinion, it must be conceded that the specific issue, whether or not the Hindu distinction between ancestral, joint and self-acquired property was part of the law governing the Cutchi Memons, was tried, and the learned Judge undoubtedly meant to find that it did. But as I have explained I am quite sure that he would not have decided the issue as he did, had he not approached it under pressure of a strong professional prepossession, and what I believe to have been an unwarrantable presumption, that is to say, from an entirely wrong point. And, at best, the judgment is only that of a Court of co-ordinate authority. It is a judgment which deserves to be treated with the highest respect, not only because of its intrinsic qualities but also because of the eminence of its author. And I hope that I have evinced my respect sufficiently by the length of time I have given to a very close study and criticism of it. I can only say now, that with deference, I cannot agree with it.

I may now resume this judgment so far and state in a word or two my own conclusions. Accepting the proposition that the Cutchi Memons are governed by the Hindu Law of simple succession and inheritance, I find that it is not proved in this case, and never yet has been proved, in this Court affirmatively that they have adopted the Hindu law of the joint family, or have made by custom the Hindu legal notions of

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ancestral joint family as distinguished from self-acquired property any part of their law. As these notions are foreign to their own law, not finding any countenance or place in true Mahomedan law, I hold that they are not to be deemed to affect in any way* the sect of Cutchi Memons either in the matter of making wills or in matters of succession and inheritance. In so holding I must refer to what has always been used as a weighty, if not a conclusive, argument, namely, that it is too late now to alter the law, and that a Court should look rather to uniformity of legal decision than to nice logical or philosophical accuracy. Policy requires that there should be continuity in legal decisions; for, nothing can be worse than keeping the law in perpetual uncertainty, and so, perhaps unsettling titles which have, for many years, been supposed to be thoroughly sound and marketable. I agree. I have no intention of unsettling a single title which has become good under the former decisions of this Court. If the principle for which I contend be uniformly accepted as good law, no member of the Cutchi Memon sect will have any reason to complain, nor will the titles under which they hold property to-day be in any risk of being destroyed or even impaired. For, I next hold that the custom of making wills of the whole of their property has now been proved to be a part of the law governing Cutchi Memons. And if we limit the old proposition to what I regard as the widest scope to which it has any right of legitimate application, namely, this, that Cutchi Memons are governed by the Hindu law of simple succession and inheritance as it would be applied to a separated Hindu with self-acquired property, it becomes apparent that the custom I find fits in easily and naturally with that proposition, and cannot operate to vex or unsettle titles acquired under the earlier case-law. Heretofore it has been the general

opinion, at any rate, during the last forty years or so, that Cutchi Memons, while empowered to dispose of the whole of their property by will, were yet precluded from disposing of any property which was joint ancestral, or joint family property in the sense of the Hindu law of the joint family. If I am right that distinction must now disappear, and the proposition will be much wider, namely, that a Cutchi Memon may dispose of the whole of his own property, no matter how he got it, by will. But that cannot undo anything which has been done under the more restricted power. Therefore, not a single title can be unsettled by adopting the rule of law I propose.

I do not think it necessary to decide whether the making of wills is part of the law of succession and inheritance. It is enough to find that the Cutchi Memons have proved that they have acquired by custom the power to dispose of all their property by will. This does not compel them to disobey their Mahomedan law. It leaves them free to give full effect to it if they so desire by doing what many have already done, that is, giving away one-third as they please and bequeathing the other two-thirds to their heirs according to Mahomedan law. It is true that if they die intestate the Courts will give their property to their heirs according to the Hindu and not according to the Mahomedan law. The more reason why they should not die intestate if they are really anxious to carry out the sacred commands.

While, therefore, the law as I propose to declare it, is not open to any objection on the ground that it will unsettle settled titles, it has many great advantages. First, it is clear and easy of uniform application. Second, it will protect the Cutchi Memon sect against the worst danger to which they are now exposed, the

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liability to explain the accumulation of great wealth, often by successive generations over long periods, to avoid the application of the nucleus doctrine and generally to satisfy the Courts that in its present form it is self-acquired and not joint ancestral or joint family property. This is by far the most harassing and expensive litigation in which wealthy persons can become involved. Third, it will wipe out an existing anomaly, the isolated attitude of the Bombay High Court in dealing with Art. 127 of the Second Schedule of the Indian Limitation Act. Every other High Court in India has held that that Article does not apply to Mahomedans. The Bombay High Court alone has held that it does. I have shown in my previous judgment how that doctrine came to be accepted as settled law in this Court. It is surely desirable that upon such a question the law of the whole country should be uniform. And it would immediately become so as soon as all distinctions between ancestral, joint and self-acquired property among Cutchi Memons and Khojas were obliterated.

Further, it might help to remove certain other causes of doubt in regard to minor points of the Hindu law, which appear to have been taken for granted by the Court here, in isolated judgments as being included in the general proposition that Cutchi Memons and Khojas are in all respects governed by the Hindu law of succession and inheritance.

I shall now deal, as briefly as I can, with the second question to be answered at this trial. The bequests to charity are impugned on two grounds: (1) that they are bad for uncertainty, (2) that they are bad because they are conditional. The latter point has special importance in connection with the very elaborate and precise Mahomedan law of gift. I have said in an

earlier part of this judgment that assuming I find that Cutchi Memons have by custom acquired the right of disposing of the whole of their property by will I should certainly incline to the opinion that such wills must be interpreted, where interpretation is necessary, in the light of the Mahomedan, rather than of the Hindu, law. Where then it is a question whether a devise by a Cutchi Memon is good or bad, the answer must depend upon whether it conforms in essentials with the requirements of the Mahomedan law of gift. I feel no doubt on either of the points taken by the objectors. It has often been held that gifts to "Dharma" are void for uncertainty. I have never been able to concur whole-heartedly in the niceties of legal distinction which have led to, and been used in support of, these decisions. In this country "Dharma" does mean roughly, and almost invariably in the cases which have come up for legal decisions, just "charity" and nothing else. It is true that an Oriental's idea of charity might be a little wider and looser than that of Lord Eldon, particularly amongst the lower and more illiterate classes of Hindus and Mahomedans. But a liberal use of the convenient doctrine *cy pres*, which is surely elastic enough to reach almost anything, which Judges wish to reach, might have validated the technical defects, and cured the infirmity. The ground of the rule in England appears to have been that as all charities were the special care, and under the direct control of the Court of Equity, that Court must refuse to accept as "charity" any gift which, by reason of the vagueness of the language in which it was expressed, left the Court in doubt as to how it was to be applied. I should hardly have thought that, outside the region of a rather hyper-refined legal pedantry, such considerations had any substance or real practical weight.

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But so the law undoubtedly stands, and where testators bequeath funds to "Dharma" the Courts decline to validate the gift as a gift to "charity" in the English sense. But I do not think that the testator here leaves us in any doubt as to his meaning or true intention. We find in clause 24 of the will that he thus expresses himself, "they shall out of my 'punji' set apart three lacs," &c., "shall spend according to law the said sum or certain portions thereof in connection with some good works of charity, in such manner as they may think just and proper, such as Hospitals, Sanitarium, *Suwa-vadkhana* (lying-in-hospital), *Misafarkhana* (resting house for travellers), *Madressas* (schools), Scholarships, *Dharmashalas*, medical dispensaries, &c., i.e., in connection with any such 'Khairat' (that is, 'charity' work), that is, in connection with such different works of charity." The use of the Persian word "Khairat," followed by the English word "charity" as explanatory of "Dharma" shows how solicitous the testator was to make it perfectly clear that he meant charities in the legal sense. And this is plain too from the enumeration of objects, upon which he desired that the fund should be spent. All of these are good charities. Again, in clause 27: "they shall utilize the whole of the said 'punji' or portions thereof in such manner as they, in their discretion, think proper in connection with the above-mentioned or any other good works of 'Khairat' (charity)." Now, this must, I think, be read in connection with the fuller descriptions contained in the preceding clause 24. Thus, reading all together, I cannot see that there is any such uncertainty as would be a sufficient ground for declaring the bequests bad. In my opinion they are very good charitable bequests.

The next objection is based upon the language of clause 27. "Should no son be born to me agreeably to

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what is written above, or should (one) be born (and) should (he) die without leaving a son or heir,...then as regards my whatever 'punji' there may be left," &c. It is argued that this is a conditional gift to charity and, therefore, unsustainable. First, let us see what was written "above" agreeably to which what follows in clause 27 is to be understood. Clause 25 :

"I have no issue now whatever, as written above, but should hereafter, by the grace of God, any children be born of the womb of my present wife, or should I hereafter publicly marry another lady of my caste and creed according to the custom of my caste and creed and should any children be born of her womb-hereafter, and should daughters be so born to me, I direct... "shall set apart a sum of rupees one lac for each of my daughters, and they shall," &c., (continued in clause 26) "should any son or sons be born to me agreeably to what is written above by my present or any other wife," &c., then after paying, &c., my said son alone shall become the owner thereof should I have only one son, or my said sons shall become the owners thereof in equal shares should I have more than one,...but should any son whatever of mine die without leaving a child after his marriage but before attaining the age of eighteen years, his brother or brothers shall become his heir or heirs and should such deceased son have no brothers, then, under the circumstances first mentioned, the whole share of the deceased or, under the circumstances secondly mentioned, his remaining share shall be included in my remaining 'punji' and the same shall be utilized in 'Khairat' (charity) in accordance with what I have hereinafter written."

What is the total effect of these dispositions? The testator intends to provide for any daughters that may be born to him, but these are expressly excluded in clause 27 from among the heirs. Then he provides for sons being born to him by his present or future wife. There is a provision that should a son be born to the testator and die after marriage but before attaining the age of eighteen without leaving a child (the context shows that he means a son) his share is to go over to his brothers. This appears again in the concluding clause, where, however, the conditions disappear. Reading this with what follows in clause 27, I have no doubt that what the testator meant was that should he have a son

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at the time of his death that son would take absolutely and defeat the alternative gift to charity. Should he have had such a son and should he have died leaving a male child, alive at the testator's death, then the last named grandson would defeat the gift to charity. The intention cannot, in my opinion, be that should a son be born to the testator and be alive at his death, he should take an estate conditioned against the charity by having a son of his own. I read the will as intending to confer an absolute estate, against the charity, upon any son or grandson of the testator who might be alive when the will came into force. But should there be no such son or grandson living, then the residue of the "punji" was to go at once and absolutely to charity. I do not understand the testator to have meant, or said, that even if he had a son at the time of his death, that son was only to take conditionally against the suspended gift to charity, the condition being that before his estate could become absolute he must have a son of his own. In other words, I do not understand this to be a bequest to charity conditioned *in futuro* upon the testator's son, should he have left a son him surviving, in his turn having no son. In my opinion had there been a son of the testator alive at the date of the testator's death, the charity would have been at an end. In this view the gift is not conditioned *in futuro* but an absolute gift in the alternative. If a son be alive at my death, then no gift to charity, but if there be neither son nor grandson alive at my death then an absolute and immediate gift to charity, such is what I understand the testator to have meant and said. In holding then that the gift is good, I am not contradicting anything I have said in a previous judgment of my own, (*Jainabai v. R. D. Sethna*),⁽¹⁾ upon which Mr. Setalvad relied, or relaxing in any degree what I

(1) (1910) 34 Bom. 604.

conceive to be the very strict limitations imposed upon gift by the Mahomedan law. Nor do I think that this is a case governed by the recent decision of the Privy Council in *Chunilal Parvatishankar v. Bai Samrath*.⁽¹⁾ With the greatest deference to the highest judicial tribunal in the land, I can only say for myself that I find much difficulty in understanding how the principle which I understand to underlie that decision, could be given anything like uniform practical application. There, there was a devise to the testator's two sons equally of the whole estate, and it was provided that in the event of one son predeceasing the other without male issue, the surviving brother should take the whole. Again, speaking with submission, I should, from a very long experience of the natives of this country, their habits of life, social ideas and testamentary notions generally, have had no hesitation in concluding, as the learned Judges of appeal here did conclude, that the intention was that if one of the testator's sons should die during the testator's lifetime without leaving male issue, then the other son should take the whole estate and make due provision for the maintenance of his sister-in-law. But their Lordships of the Privy Council held, seemingly without hesitation or doubt, that the true construction of the will was that even though both sons should have survived the testator, and each should have accordingly taken half of the estate, yet, upon the death of one of them without leaving male issue, the other was to take his share. The practical objection which I have ventured to suggest is that, after such a gift had vested, and to all seeming absolutely, it is difficult to understand how the donee could be prevented from wholly dissipating it if he chose to do so. In the case put, for example, let us suppose that the two sons had taken the estate in equal shares in the year, say,

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1910, and both had lived to the year 1960, when one died. Let us suppose that in the meantime the son who died first in 1960, had been actively engaged in commerce, or land speculation and had enormously added to what he had received in 1910, while at the same time leaving his whole estate so blended and intermixed that it would be utterly impossible to say how much of it had come to him under the will, in 1910, could it be held that the surviving brother was to take the whole against, say, a surviving widow, or a daughter? Certainly not. But if not the whole then how much? I will not pursue that subject. Suffice it to say, that in the construction I put upon this will no difficulty of that kind need arise nor need I consider the hard doctrine laid down in the case of *Chunilal Parvatishankar v. Bai Samrath*.⁽¹⁾

I hold therefore :

That it is well-established and conclusively proved in this trial that Cutchi Memons have acquired by custom the power of disposing of the whole of their property by will.

I hold that it is not proved in this case and never has been proved affirmatively that the Cutchi Memons have ever adopted as part of their customary law the Hindu law of the joint family, as a whole, or the distinction existing in that law between ancestral family, and joint family and self-acquired property.

I hold further that Cutchi Memons are subject by custom to the Hindu law of succession and inheritance as it would apply to the case of an intestate separated Hindu possessed of self-acquired property and no more.

I further hold that the will challenged in this suit is a good and valid will in all respects, and that the

⁽¹⁾ (1914) 38 Bom. 399.

bequests to charity are neither void for uncertainty nor bad under the Mahomedan law as offending against the radical principle that a gift must be made *in presenti*, and not conditioned *in futuro*.

Various other points were taken in the pleadings, and have been raised in the form of issues. With the exception of certain allegations made against Mr. Hormasji Vakil, none of these were gone into at the trial, nor any mention made of them in the arguments. The allegations against Mr. Hormasji were, after his evidence had been recorded, withdrawn. As to the other points, I take it that the various parties who took them, intentionally abandoned them, since no evidence was led upon any of them nor were they mentioned in the elaborate concluding arguments of counsel. Some I gathered were left to be referred to the Commissioner, should a reference be found necessary, after judgment had been given on the main controversy. I am not, therefore, now in a position to say anything further upon, or attempt to decide any of those subordinate and incidental points.

By consent: The usual administration decree in terms of prayers (a) (b) (c) and (d) of the plaint. Referred to the Commissioner. Issues Nos. 12 and 13 to be argued after the receipt of the Commissioner's report. Issue No. 14 also referred to the Commissioner.

[Arguments on costs.]

All costs out of the estate including costs of a motion for Receiver. The costs of the Advocate-General between attorney and client. Those of the executors as between attorney and client.

[Mr. Setalvad, on behalf of defendant No. 7, applies for costs as between attorney and client.]

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On the strength of the authorities (*Mills v. Farmer*,⁽¹⁾ *Currie v. Pye*⁽²⁾ and *Moggridge v. Thackwell*),⁽³⁾ I think I may give defendant No. 7 her costs out of the estate as between attorney and client. So ordered.

Further costs and directions reserved.

Attorneys for the plaintiff: Messrs. *Mulla and Mulla*.

Attorneys for defendants Nos. 1-5-6: Messrs. *Ardeshir Hormusji & Co.*

Attorneys for defendant No. 2: Messrs. *Payne & Co.*

Attorneys for defendants Nos. 3-4: Messrs. *Matubhai, Jamietram & Madan*.

Attorneys for defendant No. 7: Messrs. *Shroff, Dinshah & Dharamsi*.

G. G. N.

⁽¹⁾ (1815) 19 Ves. Jun. 483.

⁽²⁾ (1811) 17 Ves. Jun. 462.

⁽³⁾ (1802) 7 Ves. Jun. 36.

Note.—From the decision of Beaman J., the 7th defendant, the widow of the testator filed an appeal, being appeal No. 35 of 1915, *Fatmabai v. The Advocate-General of Bombay and others*. The appeal came on for hearing before their Lordships Scott C. J. and Davar J. when the parties took a consent decree by which the lower Court's decree was virtually confirmed with a variation in favour of the appellant as regards maintenance. By the consent decree it was provided that the appellant be paid by way of maintenance allowance a sum of Rupees five hundred per month out of the estate of the deceased Mahomed Haji Sabu Sidick including all arrears from the death of the testator, Mahomed Haji Sabu Sidick, and that the said allowance be duly secured before the distribution of the estate of the said testator. [Ed.]