ORIGINAL CIVIL.

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

MAHOMED HAJI ABU (DEFENDANT) APPELLANT *v.* KHATUBAI AND OTHERS (PLAINTIFFS), RESPONDENTS.* 1918. September 21.

Memons—Halai Memons and Bombay Memons—Hindu law governs Halai Memons of Kathiawar in matters of succession and inheritance—Custom—Domicile—Change of domicile of origin—Value of Judgments of a foreign Court for proving a custom peculiar to a community—Indian Evidence Act (I of 1872), section 13—Value of evidence of tradition given by leading men of the community.

A Halai Memon, a native of Porebunder in Kathiawar, died intestate at Bombay, leaving him surviving a widow, the 2nd defendant, one son, the 1st defendant, and two married daughters one of whom had since died, the survivor being the plaintiff. The estate of the deceased consisted of five immoveable properties in Bombay, a share in a business in Bombay and a house and land at Porebunder. The plaintiff claimed to be entitled as a daughter to 7/32 of the estate as her share, on the footing that the deceased as a Bombay Memon was governed by the Mahomedan law of succession, and she was supported in her contention by the representatives of the deceased daughter. The first defendant contended that Hindu law applied and that under that law he was entitled to the whole estate subject to the maintenance of the deceased's widow. The second defendant supported the first defendant though as widow of the deceased she would have been entitled under Mahomedan law to 4/32 of the estate. The Court of first instance decreed the plaintiff's suit, holding that though the deceased belonged to a family of Halai Memons who had settled in Porebunder, the Halai Memons settling in Porebunder did not as regards succession and inheritance retain Hindu law at the time of their conversion nor had they adopted Hindu law by immemorial custom. The first defendant appealed :—

Held, reversing the decree of the lower Court, (1) that the plaintiff was not entitled to any share in the estate of her deceased father as he was governed by Hindu law and not by Mahomedan law in matters of succession and inheritance ; (2) that the evidence established that the Memons of Kathiawar of whatever group or sect followed the Hindu rule of succession and this conclusion was supported as to Porebunder Memons particularly by a large number of instances in which widow and daughters had been excluded

* Appeal No. 2 1918 : Suit No. 1136 of 1915.

1918.

MHOMED HAJI ABU v. KHATUBAI.

from succession, sons had divided the property with their father in his lifetime or equally with each other after his death and the right of predeceased brothers' sons to share with their uncles had been repeatedly recognised, all these results being incidental to the Hindu and not to the Mahomedan system.

Per SCOTT, C. J. :—There is no principle recognised by the law administered in this country upon which a Hindu's or Mahomedan's possessions may be distributed partly by one law and partly by another according to the locality of the possessions. They must all fall under either the law of the religion or the customary law of the community. There is no *lex loci* for the purpose of distribution...Permanent residence in Bombay does not necessarily import the Mahomedan law of succession for one whose ancestors were converted from Hinduism. Severance from the domicile of origin and permanent residence in Bombay would, in the case of persons falling within the purview of the Indian Succession Act, effect change of domicile and with it a change of law, e. g., from French to Anglo-Indian or Portuguese to Anglo-Indian, but it would not change the law of succession for Hindus or Mahomedans.

Kojahs and Memons' case (1), *Bai Baiji* v. *Bai Santok* (2), *Abdurahim Haji Ismail Mithu* v. *Halimabai* (3), and *Abdul Hussein Khan* v. *Bibi Sona Dero* (4), referred to.

One Haji Abu Haji Habib, a Halai Memon died intestate at Bombay on or about the first day of December 1914 leaving him surviving a son Mahomed, the first defendant, a widow Bibibai, the second defendant, and two married daughters, Khatubai, the plaintiff, and Ayshabai as his next of kin. Ayshabai died after her father leaving as her heirs her husband Mahomed Haji Sakoor, the third defendant, and her daughter Hawabai, the fourth defendant. The deceased Haji Abu Haji Habib was at the time of his death entitled to five immoveable properties in Bombay valued at Rs. 1,40,000, a ten annas share in a cutlery business in Bombay valued at Rs. 60,000, and a house and land at Porebunder valued at Rs. 25,000. On the 3rd September 1915, Khatubai, the plaintiff, wrote through her solicitors to her brother Mahomed stating that their father left considerable property in Bombay, moveable and

(1) (1847) Perry's O. C. 110.
(2) (1894) 20 Bom. 53.
(3) (1915) L. R. 43 I.A. 35.
(4) (1917) L. R. 45 I. A. 10.

immoveable, and calling upon him to render an account and hand over to her her share in the estate left by the deceased.

On the 7th September 1915, Mahomed's solicitors replied that as the parties came from Porebunder, according to the law applicable to them a married daughter was not entitled to any share in the estate of her deceased father, and in a subsequent letter, dated the 17th September 1915, they further intimated that the parties were governed by the rule of Hindu law.

On the 20th September 1915 Khatubai filed the present suit against her brother Mahomed, her mother Bibibai, and the heirs of Ayshabai, claiming *inter alia* that the plaintiff was one of the heirs of her father Haji Abu and as such entitled to a 7/32 share in the estate left by him.

The first defendant in his written statement contended: (1) that the parties were governed by the Hindu law of inheritance and succession on the ground that such Hindu law was retained by Halai Memons of Porebunder and Kathiawar generally when they were originally converted to Mahomedanism or that such law was theirs by custom which had been followed by them from time immemorial; (2) that though the deceased had come to Bombay and carried on business there for many years he continued to be a Porebunder man and his family had always been governed by the custom of inheritance and succession which prevailed at Porebunder amongst Halai Memons and (3) that the custom of Halai Memons in Kathiawar that they were governed by the Hindu law of inheritance and succession had been frequently judicially determined in the Courts of Kathiawar. The first defendant accordingly claimed the whole estate subject to the second defendant's maintenance. The second defendant Bibibai, the widow of

1918.

MAHOMED HAJI ABU v. KHATUBAI.

the deceased, supported the first defendant. The third and fourth defendants, the heirs of Ayshabai, though believing the contention of the plaintiff to be correct were content to abide by the decision of the Court.

On the 26th February 1916, an order was made that a commission be issued for examination of witnesses at Porebunder on the question of inheritance amongst Halai Memons in Porebunder. Twenty-seven witnesses on behalf of the first defendant and two witnesses on behalf of the plaintiff were examined on commission. The suit came on for hearing before Mr. Justice Marten when further evidence both oral and documentary was led by the parties. The learned Judge decided that the deceased Haji Abu belonged to a family of Halai Memons who were settled in Porebunder, that Halai Memons settled in Porebunder did not as regards succession and inheritance retain Hindu law at the time of their conversion to Mahomedanism, nor had they by immemorial custom adopted Hindu law, and that the deceased at the date of his death was governed by Mahomedan law as regards succession and inheritance to his properties moveable and immoveable in Bombay and outside Bombay. The plaintiff was accordingly held entitled to a 7/32 share in the estate of the deceased.

The first defendant appealed.

Setalvad, with *Desai*, for the appellant.

Jinnah, for the first respondent.

Campbell, for respondents Nos. 2 and 3.

Respondent No. 4 did not appear.

SCOTT, C. J. :—This suit relates to the succession to the estate of Haji Abu Haji Habib who died at Bombay on the 30th November 1914 intestate. He left him surviving a widow, the 2nd defendant, two married

daughters, one of whom has since died, the survivor being the plaintiff, and one son, the first defendant.

The plaintiff claims to be entitled as a daughter to 7/32 her share on the footing that Mahomedan law is applicable; she is supported by the representatives of the deceased daughter who would under Mahomedan law be entitled also to 7/32.

The first defendant contends that Hindu law applies and that under that law he is entitled to the whole estate subject to the maintenance of the deceased's widow. In the lower Court the widow, his step-mother, supported his contention though under Mahomedan law she would be entitled to 4/32 of the estate. She has not appeared in this appeal.

The estate is valued at 2¼ lacs and consists of five immoveable properties in Bombay valued at Rs. 1,40,000, a ten annas share in a cutlery business in Bombay valued at Rs. 60,000, and a house and land at Porebunder valued at Rs. 25,000.

The deceased was a native of Kathiawar belonging to the group of converts to Islam from Hinduism known as Memons (Muamins, believers). Memons are in Bombay popularly classed in two categories, Cutchi Memons from Cutch, and Hálai Memons from the Halar District of Kathiawar. Porebunder, Bantwa and Kutania are Native States in Kathiawar near the borders of the Halar Prant and there is evidence that Memons in these places are regarded in Kathiawar as Halai Memons.

The customs governing succession among the Cutchi Memons have often been the subject of investigation in this High Court and in every case the Hindu law of inheritance applicable to the point in controversy has been applied.

1918.

MAHOMED HAJI ABU v. KHATUBAI.

The first recorded case is that tried by Sir Erskine Perry in the Supreme Court in 1847 and preserved in Perry's Oriental Cases, p. 110. It was there laid down that if a custom as to succession is found to prevail amongst a sect of Mahomedans and is valid in other respects the Court will give effect to it, even though it does not accord with the rule of the Koran. The actual decision was limited to this that the custom pleaded that females are not entitled to any share of their father's property but only to maintenance and the expenses of marriage, if any, was satisfactorily proved.

It was remarked in that case that the Halai Memons follow the Koran in matters of succession, but the remark was *obiter* and so far as appears from the evidence of immigrants from Cutch recorded by Sir Erskine Perry (see Exhibit P) those spoken of as Halai Memons were Memons who had been in Bombay for many years (one witness said 150 years) and were also known as Bombay Memons. There has never been any contest in the Bombay Courts as to the law applicable in matters of succession and inheritance to those calling themselves Halai Memons in Bombay. It has always been accepted that the Mahomedan law applies.

In Exhibit A 41, the summary of between thirty and forty Probate and Administration grants in Bombay in the matters of the estates of Halai Memons from 1857 to the date of this suit, all except three relate to Bombay residents and Bombay estates. In the case of the exceptions in two cases the deceased left houses at Veraval in Junagadh State, Sorath Prant, as well as in Bombay and in one case in Kutiana as well as in Bombay.

In Exhibits A 45 and A 46, summaries of pleadings in 32 suits for administration in Bombay of Halai

Memons' estates, none states that the deceased left property in Kathiawar though according to some the deceased left properties in either Surat, Ghogha, Bangkot or Madras as well as in Bombay.

In the present case an entirely novel question is raised, namely, what is the customary law governing succession to a non-Cutchi Memon of Porebunder who, though residing for a considerable time in Bombay and acquiring property there, has clearly indicated his intention to keep up and not to sever his connection with Porebunder ?

Speaking generally the evidence which will later be referred to with more particularity establishes that the Memons of Kathiawar of whatever group or sect follow the Hindu rule of succession and this conclusion is supported as to Porebunder Memons particularly by a large number of instances in which widow and daughters have been excluded from succession, sons have divided the property with their father in his life time or equally with each other after his death and the right of predeceased brothers' sons to share with their uncles has been repeatedly recognised. All these results are incidental to the Hindu and not to the Mahomedan system.

The husband of the plaintiff who is a Porebunder man and had the fullest opportunity of countering the evidence adduced in Court by the first defendant, has not been able to produce any Porebunder evidence to support the contention that the Mahomedan law applies.

The plaintiff relies upon the evidence of Bombay Memons which does not necessarily help us to decide what is the customary law of Porebunder—in only very few of these cases does it appear that there was any continuous connection with Kathiawar and in

1918.

MAHOMED HAJI ABU v. KHATUBAI.

none does there clearly appear to have been, as in the case of Haji Abu, an intention of retiring permanently to Kathiawar.

A priori there is nothing astonishing in the result of the Porebunder evidence.

That the Memons of Kathiawar are converts to Islam from Hinduism is undoubted. It would be surprising if in Kathiawar they had divested themselves of the social system of their fore-fathers. Such a result has not followed in the case of other Hindu converts to Islam in Western India, for example, the Khojas, the Cutchi Memons, the Sunni Borahs of North Gujarat (see *Bai Baiji* v. *Bai Santok*[1]), the Molesalam Girasias of Amod (see *Maharana Shri Fatesangji Jasvatsangji* v. *Kuvar Harisangji Fatesangji*[2]), and the Nassaporia Memons of Sind (see *Abdurahim Haji Ismail Mithu* v. *Halimabai*[3]). It may indeed be said that the habit of the Bombay Memons (other than the Cutchis) to follow the Mahomedan law of succession is rather the anomaly. It may perhaps be explained by the fact that, as testified in 1847 before Sir Erskine Perry, they had been settled for a long time in the City. There they would be open to the influence of professional lawyers at a time when the exclusion of the law of the religion by the customary law anterior to the conversion was not established as a legal possibility: or it may be that the influence of some religious teacher in the City operated to enforce the adherence of the Bombay Memons to the rule of the Koran. Whatever the cause, the result has been that the Bombay lawyers sweep into the category of pure Mahomedans not merely the Memons settled in Bombay with no Kathiawar connections but also

(1) (1894) 20 Bom. 53. (2) (1894) 20 Bom. 181,
(3) (1915) L. R. 43 I. A. 35.

occasionally Memons who have not given up their Kathiawar connections.

The general Bombay assumption that every Memon who is not a Cutchi is governed by the Mahomedan law of succession is well illustrated by the notice of the Bombay Government (Exhibit L) of the year 1897 described as a "Public notice to the Memon Community by the Government of Bombay at the desire of the Government of India" in which it is stated: "The Memon Community in India is divided into two sects, the Halai Memons and the Cutchi Memons. The former without exception follow the Mahomedan law in all respects." This notice appeared in the "Porebunder Gazette" (Exhibit M) with a view to elicit the wishes of the Memon Community there. The result must have been a surprise to the Bombay Government for the leaders of the Porebunder Memons (not Cutchis) went to the Administrator and informed him that the Jamat had approved of the Hindu law of inheritance by which they were governed.

I will now consider the evidence in detail.

First as to the general evidence regarding Kathiawar Memons.

Many of the witnesses examined on commission at Porebunder on behalf of the first defendant depose that in matters of succession and inheritance Memons follow the Hindu customs, that all Kathiawar Memons are Halais and all Cutch Memons are Cutchis—that Memons residing in other Kathiawar towns such as Dhoraji, Upleta, Kutiana, Bantwa, Gondal, Rajkot, Vantli and Vasavad (some of them being under Mahomedan jurisdiction) follow similar customs; that all Memons were originally Lohanas in Sind before their conversion. These witnesses are Haji Cassum (Com.1); Haji Dada (Com. 2); Sakur Haji Ahmed (Com. 3);

1918.

MAHOMED HAJI ABU v. KHATUBAI.

Mahomed Haji Dada (Com. 4); Haji Umar (Com. 5); Haji Jusab Haji Dada (Com. 6); Haji Jusab Haji Issack (Com. 7); Haji Sakur Haji Habib (Com. 8); Abdul Karim (Com. 9); Haji Ismail (Com. 10); Haji Ibrahim (Com. 11); Haji Essa (Com. 13); Haji Sulleman (Com. 14); Alli Mahomed Khamisa (Com. 17); Noor Mahomed Abdul Karim (Com. 18); Umar Haji Dada (Com. 20); Karim Beg Mahomed (Com. 21); Umar Noor Mahomed (Com. 23).

Eleven judgments of Judicial Assistants to the Agent to the Governor in Kathiawar sitting in appeal from the Courts of the Nyayadhish of Bantwa or the Sorath Prant establish that the Hindu law of succession, maintenance and partition is applied to Memons of Bantwa. In a Vasavad case between Memons it was decided by the Court of the Judicial Assistant that a widow's rights are superior to those of her husband's mother, the latter only being entitled to maintenance.

In none of these cases was there any contest as to the applicability of the Hindu law of succession and inheritance though the right to partition as among Hindus was disputed more than once.

In a case between Memons of Veraval which went through three Courts in the Mahomedan State of Junagadh it was held that among Memons the Hindu law applied, and ancestral property was divided equally between three brothers to the exclusion of their sister.

I come now to the Porebunder evidence.

In dealing with that evidence I do not treat the decisions of the Porebunder Courts as proof of foreign law, for our inquiry is not concerned with the law of the Porebunder State as created by any local legislative authority or with a Porebunder custom affecting

subjects of the State as such. We are inquiring as to the custom in fact followed by a certain community in Porebunder, a custom peculiar to the community and not resulting from residence in the State. I shall refer to some of the Porebunder judgments incidentally only, and would not put them higher than instances in which the custom alleged has been recognised and which are thus admissible under section 13 of the Indian Evidence Act.

In the family of the plaintiff's husband (see Pedigree, Exhibit 13 A) four instances are adduced which, it is contended, indicate that Hindu law governed the parties. Haji Kassum Khanu left a will (Exhibit 23), dated the 20 August 1892.

He begins by directing that if he does not make another will his heirs and representatives shall give effect to this will according to its terms.

His property is described as consisting of (*a*) a house worth Rs. 6,000 next to his brother Adam's house also worth Rs. 6,000 the title deed of which stands in the name of his father Khanu: also two houses at Mozambique.

(*b*) Rs. 60,000 being the balance to credit in his shop account at Mozambique and invested in business.

(*c*) Rs. 8,000 the value of his boat, Ganje Bere Zum Zum. As to the house next to his brother's, his widow is to reside in it but she cannot sell it.

The boat is left to his sons Sulleman and Tyeb as his heirs subject to a charge of Rs. 100 out of its profits for his widow's maintenance. The rent of the two houses at Mozambique is also allotted towards his widow's maintenance.

Subject to religious trusts to the extent of Rs. 4,000, Rs. 60,000 invested in the Mozambique business is to be

1918.

MAHOMED HAJI ABU v. KHATUBAI.

taken according to Mahomedan law. This direction, however, is subsequently explained thus: His three sons are to decide whether the business should be stopped or continued. If his widow bears a son that son is to inherit everything since the testator has on different occasions paid his sons their respective shares and "kept them separate from him." If another son is not born "the heirs shall divide and take according to Mahomedan law, that is to say, that my cash (Punji, assets) shall be divided into four equal parts, three parts going to my present sons and one part to their step-mother" and she may deposit her share at any place she likes. Lastly, his sisters, if entitled to a share according to Mahomedan law, are to be given it or if not entitled they are to be given presents at the time of the obsequial ceremonies.

In spite of the reference to the Mahomedan law the will is the will of a man following Hindu customs. The whole property is dealt with: an earlier separation with his sons is referred to and in default of a posthumous son the commercial assets are to be partitioned equally between the sons and the widow, and maintenance and residence is provided for her.

Zuleikha the widow was not paid the maintenance provided by the will nor her share on partition of the trade assets. She received only Rs. 30 as maintenance for nine or ten years. She, therefore, sued the representatives of her three step-sons and got a decree (see Exhibit 10 A) for Rs. 17,205 being maintenance for ten years and Rs. 14,000 (one-fourth of Rs. 60,000-4,000). To enforce the decree after her death her son, by her marriage prior to her marriage with Kassum Khan, proceeded separately against the sons of Tyeb Kassum and Abu, the son of Sulleman (who is also the present plaintiff's husband). The proceeding against Tyeb's sons

failed finally on the 27th March 1912: see the judgment (Exhibit 10 H) of the Highest (Huzur) Court in Porebunder which decided that Zuleikha's rights under the decree passed not to her son by her first husband, but to her heirs according to Hindu law, the grandsons of her second husband, following the decision in *Moosa Haji Joonas* v. *Haji Abdul Rahim*[1].

The same result was eventually arrived at on the 24th September 1916 by the Huzur Court in the proceeding against Abu Sulleman, after some difference of judicial opinion (see Exhibits 10 B, 10 C and 10 D).

The disputes relating to Zuleikha thus form the subject of five of the Porebunder judgments in evidence in this case.

The case of Kassum Khanu above analysed is instance No. 13 among the instances adduced for the first defendant. It shows that the grandsons as heirs according to Hindu law succeeded to the property of their step-mother and the will of Kassum indicates how deeply he was impregnated with Hindu ideas of succession.

The brother of Kassum Khanu, Adam Khanu, the uncle of the father of the present plaintiff's husband is instance No. 14 among the defendant's instances.

Adam had two sons, Joosub and Habib and one daughter. Habib predeceased his father, leaving a son, Ahmed. Of the three witnesses examined in regard to this instance one is the brother-in-law of Habib. He says Ahmed and his uncle Joosub divided Adam's property which included a house in Porebunder and a house in Mozambique. Adam's daughter is living but got no share.

[1] (1905) 30 Bom. 197.

1918.

MAHOMED HAJI ABU v. KHATUBAI.

The plaintiff, whose husband's grand-father was brother to Adam, calls no witness to contradict this story, nor does the cross-examination of the witnesses indicate that the story is untrue. If it is true the division by Joosub with his brother's son was consistent only with the application of the Hindu law of the joint family as is also the daughter's exclusion.

The third son of Khanu was Latiff. He is instance No. 15 for the defendant. His son-in-law Haji Sulleman Abba says his wife, Latiff's daughter, got no share, but he does not say that there was any property. The evidence that there was a house in Porebunder is that of Haji Kassum Haji Ahmed—not an accurate witness—but the statement is not disputed by the plaintiff whose husband should have had means of knowledge.

Instance No. 1 is the last one from this family. It is the case of the father of the plaintiff's husband. All witnesses agree that he was worth several lacs when he died and his daughters got nothing. The witness Karim Haji Beg Mahomed says one of the daughters married his nephew Ahmed, another his sister's son, and a third the son of his brother-in-law. If they had got any inheritance he would have known of it. Abdul Latiff Haji Habib says two other daughters married two sons of his sister and he would have known if they had got a share.

All the witnesses agree that Sulleman's sons never divided their father's property. The learned Judge thinks this was because the estate was lost before it was divided but the facts appear to be that the sons were living jointly with their father who died in June 1895 or earlier, leaving businesses in Bombay and Africa and property in Porebunder. In the Bombay business a share of six annas stood in the name of Sulleman and his brother Tyeb. Tyeb died in 1897-98 and

then Ibrahim son of Sulleman sued the other partners on behalf of Sulleman's and Tyeb's families (see Exhibit F, plaint in suit No. 646 of 1898) in the Bombay High Court. He recovered under a release in that suit Rs. 34,000 from the other partners on the 31st December 1898 (see Exhibit G) which was paid by Havala or draft on Tyeb Sakoor & Co. of Beira. The plaint recited that Kassum Khanu till his retirement in 1889 was head of a joint family whereof the other members were Sulleman, Tyeb and Ibrahim Sulleman. In 1889 Kassum separated from the other members of the joint family. Ibrahim then started business in Bombay in the name of Ibrahim Haji Sulleman & Co. This Bombay business failed in 1905 and Ibrahim Sulleman went through the Bombay Insolvency Court. The African business, Tyeb Sulleman & Co., failed about 1911. We have the evidence of the plaintiff's husband who survived his brothers Ibrahim and Moosa that till 1911 or 1912 he and his cousins Tyeb's sons were interested in that business. He had from the time of Sulleman's death jointly with his cousin Abdulla Tyeb family ships of which two have been sold. His father also left a house and a *Vanchi* or oart in Porebunder which were attached by Haji Kassum Ghadialli (Com. Wit. No. 1), for a debt of Rs. 6,000 upon which Hurbai, Sulleman's widow, in 1911, unsuccessfully tried to establish a claim for maintenance (see judgment of Porebunder Nyayadish, Exhibit 29). He says he gave no part of the ships to his sisters or his mother and says he cannot mention any instance of a daughter getting a share in his family. The judgment of the Nyayadhish (Exhibit 29) records that Hurbai deposed that a partition was effected between her and her surviving sons whereby Abu got the Vadi, Moosa, the house and Hurbai, Rs. 10,000, but Abu does not confirm this and says she only got Rs. 700. There is thus ample

1918.

MAHOMED HAJI ABU v. KHATUBAI.

evidence that Sulleman's sons enjoyed his property for years after his death to the exclusion of his daughters as a Hindu's sons would enjoy it.

All these instances have been rejected by the learned Judge, as it seems to me, without a sufficient cause. If it stood alone the instance of Latiff (No. 15) would not be of much value but taken with the other instances Nos. 14 and 1 in the same family it points to a continuous adoption of the rule of Hindu succession by which daughters are excluded from inheritance when there are sons. The succession of grand-sons is also well established which would only occur where Hindu law was followed. The instances of Kassum Khanu and Sulleman Kassum are also of importance, in that they show that Porebunder Memons trading in Bombay without cutting themselves off from Porebunder follow the customs of Hindus.

Instance No. 2 Ismail Mahomed died in 1903 as is deposed to by his widow's cousin Haji Dada and his daughter-in-law's uncle Haji Umar. His grand-son Mahomed Sakoor married the third defendant who sides with the plaintiff. The evidence of several witnesses is that he left four sons and two daughters and property of considerable value in Porebunder and Africa. The daughters got no share. The sons did not partition the property until after the present suit was filed, twelve or thirteen years after their father's death. The partition is said to have taken place in Africa. The learned Judge rejects this instance as the partition was not till after this suit had begun, it was made in Africa, and rests on hearsay evidence. If the evidence had been false it would have been easy for the third defendant's husband to disprove it but he has not done so. If we hold that this partition is not proved, the position seems to be that the four sons

have enjoyed the property and the daughters have got nothing. The instance cannot, therefore, be rejected.

Instance No. 3 is that of Haji Dada Tar Mahomed who went with the other leaders in 1897 to the Administrator and declared for Hindu law. Witness No. 21 Karim is his son-in-law and says the daughters, one of whom was his wife, got no share. The learned Judge rejects his evidence on the ground that he had repeated an untrue story of the cause of a daughter of another (instance) receiving a share in Bombay. I do not think this is a sufficient ground for discarding the evidence of the witness about his own wife.

Instance No. 4 Ahmed Haji Habib is a very well-established case of sons taking the whole estate and providing in a separation deed with one of them that the two widows should be maintained and the marriage expenses of the sisters and of the unmarried brother should be charged on the family property. The daughters got no share. There were two widows of whom one Hanifa was mother of all the children while Zuleikha was the step-mother: Hanifa was to get Rs. 100 for maintenance of herself and her daughters and Zuleikha Rs. 50. This is evidenced by the documents executed on the 27th April 1902 (Exhibits 10 A and 10 B). Zuleikha objected and sued for her share under Mahomedan law. The sons also sued her apparently for a house in her occupation and its contents including Rs. 16,000 in cash contending they were entitled under Hindu law. An arbitrator's award gave to Zuleikha the house valued at Rs. 11,000 for residence for life (with remainder to the step-sons) together with all the contents in lieu of maintenance. The arbitrator says he had Hindu law in mind in making his award. The value of the instance for the present case is that it shows the sons took the property and the daughters got no share. The learned Judge

1918.

MAHOMED HAJI ABU v. KHATUBAI.

rejects the instance because Zuleikha's claim, which was compromised, was based on Mahomedan law. This does not affect the instance as regards the other widow Hanifa and her daughters.

Instance No. 5 Haji Kassum Tar Mahomed (one of the leaders who declared for Hindu law in 1897) which the learned Judge accepted as established, is one which shows a partition deed (Exhibit 5 A) between four brothers and the sons of their deceased brother of a business in Bombay and of properties at Porebunder and Natal on the footing of Hindu custom. There were two daughters of Kassum who got no share from their brothers yet their husbands attested the partition deed. It is a case where Memons trading in Bombay retained property and connections with Porebunder and acted according to Hindu custom.

Instance No. 6 Cassum Haji Abu is rejected by the lower Court. It should be considered with those of Moti Haji Abu, instance No. 10, and of Haji Abu Jiva, the father of these men.

Haji Abu had three sons, Moti, Sulleman and Kassum and two daughters, Hurbai and Hawabai by his first wife who died in Porebunder. He married again a Memon of Bantwa and having separated from the sons of his first wife went and settled in Bombay where he acquired a house. He had a family of sons by his second wife also who were born, married and resided in Bombay. He died in Bombay in 1893. His surviving daughter by his first wife was paid Rs. 925 in April 1893 by her step-brothers in Bombay in consideration of the transfer to them of her right, title and interest in her father's estate: see Exhibit A 1. This was a Bombay transaction arranged for Hawabai by a Bombay solicitor, Mr. K. D. Shroff, and in the release the deceased Haji Abu is described as of Bombay. One

of Hawabai's three step-brothers, Essa Haji Abu, died in Bombay in 1909 and in an administration suit in the High Court filed by his full brother Tar Mahomed Haji Abu the estate of Essa was divided between Essa's widow and his posthumous son according to Mahomedan law (see Exhibit A 36). Thus in the case of settlers in Bombay Mahomedan law was applied. It was otherwise however with the children of Haji Abu's first marriage who remained in Porebunder. Kassum Haji Abu died at Porebunder in 1910 leaving seven sons and the grand-son of a predeceased son, Ismail. In 1915 (see Exhibit A) Ismail's son and his mother passed a release to Kassum's surviving sons and became separated from what is styled the joint family receiving Rs. 4,000 in respect of "whatever right Joosub Ismail the releasor might have in getting the releasees' joint property or Kassum Abu's property divided and with regard to whatever right the (releasor's) mother Hawabai might have against the releasees' property or against Kassum Abu's property." Ismail had been acting as Moonim in Bombay of Kassum Abu. The release mentions that Kassum Abu's daughter was to be married as well as three unmarried sons and the calculation of Joosub's share was arrived at on that basis after the accounts of Kassum's estate had been shown to Ismail's father-in-law.

Moti Haji Abu left four sons and three daughters. The father-in-law of one of Moti's sons says Moti's property was inherited by his sons to the exclusion of his daughters.

I do not think these instances were rightly rejected by the lower Court. The release, Exhibit A, is said to be too recent since the present suit had already been started. I am not able to agree with the apparent suggestion that the release had any connection with the parties to this suit nor with the learned Judge's

1918.

MAHOMED HAJI ABU v. KHATUBAI.

opinion that the statement of the witness Com. 2 concerning his own son-in-law should be disbelieved because at different times he had given self-contradictory evidence on a wholly different matter and biassed evidence regarding Hawabai's release (Exhibit A 1).

Instance No. 7 Beg Mahomed Tar Mahomed is held established by the lower Court. Beg Mahomed was a resident of Porebunder and traded first in Africa and afterwards in Bombay in partnership with Abu Jiwa with whose estate this suit is concerned. Beg Mahomed left two daughters and a grandson, son of his predeceased son Moosa. The grandson inherited the property to the exclusion of the daughters and his sister the daughter of Moosa also got no share.

Instance No. 8 Beg Mahomed Hassnu is also held established by the lower Court. His wife was sister of Jiwa Haji Abu's father. He left a son and three daughters and two houses in Porebunder, the son inherited and the daughters got no share.

Instance No. 9 is Khanu Hassam one of the leaders who declared for Hindu law before the Administrator in 1897. This instance is rejected by the lower Court as the evidence is unsatisfactory. I agree that it is of no value.

Instance No. 11 Haji Beg Mahomed Haji Jiwa was one of the leaders who appeared before the Administrator in 1897 and declared for Hindu law. He left three sons and two daughters and the son of a predeceased son. He had a shop at Bombay and his family lived at Porebunder. The Bombay shop was subsequently closed. The sons and the grandson inherited the property and the daughters got no share. The lower Court holds this instance established; in this conclusion I agree.

Instances Nos. 16 and 17 Haji Alli Janu and Haji Joosub Janu were brothers, residents of Porebunder, who both had property in Africa also. Their sons inherited to the exclusion of their daughters. I agree with the lower Court that these instances are established.

Instances Nos. 18 and 19 are Haji Umar Habib and Haji Sakoor Habib, brothers of witness Com. 2 Haji Dada Habib. He says that after their deaths his brother's sons were joint and the females (widows in Haji Umar's case) and (daughters in Haji Sakoor's) got no share. The learned Judge here—and I think rightly—accepts the evidence of Haji Dada as establishing these instances.

Instances Nos. 21, 22 and 23 are the father, paternal grand-father and maternal grand-father of Haji Kassum Ahmed Com. witness 1. Owing to his distrust of this witness the learned Judge rejects the instances. There was however no cross-examination. Moreover Haji Kassum was a man of some property since he attached the property of the plaintiff's husband for a debt of Rs. 6,000 (see the judgment, Exhibit 29). I doubt if there is sufficient reason for rejecting these instances. This is a convenient place to consider whether Haji Kassum should be considered as a false witness unless corroborated. He is as a matter of fact corroborated as regards all the instances he speaks to except instances Nos. 21, 22 and 23 in his own family. The charge against him is that he is a bought witness and told a false story to conceal the fact. He was the person employed by the first defendant to collect evidence as to custom at Porebunder and not unnaturally received remuneration for his labours. Equally naturally having regard to the inveterate practice of such witnesses in India he was unwilling to tell the truth as to his remuneration. He appears to have worked hard for the first defendant. I am not prepared to hold that

1918.

MAHOMED HAJI ABU v. KHATUBAI.

because he told a false story as to his remuneration he is in other respects a false witness. I would accept these instances.

Instance No. 25 Haji Abba Hassum is a very well-established case of a partition in 1890 (see Exhibit 3 A) of the property in Porebunder and Africa of Haji Abba according to Hindu law. The sons divided the property in equal shares providing for their mother but their sisters got no share. The lower Court with good reason holds this established.

Instance No. 26 is Haji Adam Sale Mahomed who died about 1864 leaving Rs. 5,000 to 7,000. His son says that after he and his brother had made money in Africa about ten years later they gave Rs. 700 or 800 each to their sisters. As this would be about the amount of the daughter's share under Mahomedan law, I agree with the learned Judge that the instance is too doubtful to be relied on.

Instance No. 32 Haji Dada is one in which five sons got the property which consisted of a house and a few thousand rupees in Porebunder to the exclusion of the daughters. The learned Judge has, I think, rightly held this instance established.

Instance No. 36 Haji Ayub Hassum is accepted by the lower Court on very clear evidence.

Instance No. 37 Valli Mahomed Khamissa.

The brother of the instance deposes to litigation in the Supreme Court at Pretoria in which he held a Power of Attorney for Valli Mahomed's adult sons who contested the right of their sister to share. The witness says the Court decided against the sister but the decree is not produced. The proof is therefore defective. On this ground it must be rejected as it was rejected by the lower Court.

Instances Nos. 38 and 39 are accepted by the learned Judge while instance No. 40 is rejected. The learned Judge rejects 40 as it is deposed to only by Com. witness 19 who would not admit having joined in valuing the estate of Sale Mahomed in Bombay for the purpose of assessing the widow's one-eighth share. I doubt if this is a good ground for rejecting the witness' evidence as regards his own family particularly as he was not cross-examined as to this part of his evidence. The evidence as to each is that the daughters got no share. In none of them is the property which the sons got indicated. It seems to me that either all should be rejected on the ground that there is not sufficient evidence of the property or all should be accepted. If accepted the number of the defendant's instances is increased; if rejected the case for the application of Mahomedan law is in no way strengthened.

I think all should be rejected as the existence of property is not clearly established.

Instances Nos. 44 and 45 are also instances of exclusion of daughters. The learned Judge, I think, rightly accepts them as established.

I now come to the evidence in support of the plaintiff's cause.

Plaintiff's instance No. 1 Ebrahim Noor Mahomed Daina was a case of an arbitration in Bombay in which the witness says a widow and daughters claimed according to Mahomedan, while the sons claimed according to Hindu, law. He cannot say if the widow got nothing by the award, the married daughter certainly got nothing. The witness merely speaks from his recollection as a clerk to whom the award was dictated. This instance must be rejected.

Plaintiff's witnesses 2, 2A and 5 will be referred to later.

1918.

MAHOMED HAJI ABU v. KHATUBAI.

Plaintiff's instance No. 3, Mahomed Jumma Chaya.

Joosub Haji Valli speaking from hearsay says the instance who was once his servant died leaving female relations only and his property at Ranavav was distributed according to Mahomedan law. The other witness Haji Moosa Haji Oosman tells an entirely different story and says there were sons of the deceased who traded and died in Bombay and left property in Bombay. He says the sons separated from their father in his life-time and does not know if he left any property in Porebunder.

It is clearly a Bombay case but not so clearly a case in which Mahomedan law was applied and is of no value as evidence of the custom followed in Porebunder. It is rejected by the lower Court.

Plaintiff's instance No. 4 Mahomed Joosub Patel is spoken to by a witness who has no personal knowledge of it. According to his account there was no son to compete with the daughters. It is rightly rejected by the lower Court.

Plaintiff's instance No. 6 Sulleman Haji Adam.

This is a Bombay case and therefore rightly rejected

The same must be said of plaintiff's instance No. 7 Ayoob Noor Mahomed and No. 8 Haji Ahmed Pir Mahomed.

Plaintiff's instance No. 10 Hasham Haji Hassum is the case of one who was described in his widow's application in 1904 for Letters of Administration U2 as of Bombay. Two years after the grant of Letters the Bombay estate was divided according to Mahomedan law between the widow and the heirs of the son and daughter who survived their father. The document evidencing this division mentions two houses in

Porebunder which were not included in the settlement, but the witness Haji Kassum Ahmed said he was about to distribute the sale proceeds of these houses according to Mahomedan law. The deceased is said to have visited Porebunder from time to time, till his death. There is therefore a similarity between the circumstances of the deceased and Haji Abu though there is no clear evidence that Hassam intended to retire to Porebunder. No objection was raised to the estate being treated as that of a Bombay Memon governed by Mahomedan law. It was indeed to the interest of the deceased's male collaterals that it should be so treated.

Plaintiff's instance No. 11 Mahomed Adam is one of Memons who came originally from Bhavnagar settling permanently in Bombay and having no property in Bhavnagar. It is, therefore, of no assistance.

Plaintiff's instances Nos. 12, 14, 15, 17, 18, 19 and 21 are all cases of Bombay Memons who had no property eleswhere.

Plaintiff's instance No. 20 is one of a Memon settled in Madura. The only witness is not very clear in his account of what happened to the estate of the deceased which was entirely in the Madras Presidency. It is of no value for either side.

Plaintiff's instance No. 13 was a case of two Memon brothers from Kutiana who settled in Bombay and acquired a small property there. On their deaths the widow of one bought out the widow of the other (see Exhibit A 16), and the sister got nothing. The same result would have followed under Hindu law.

There are three instances deposed to for the plaintiff which the learned Judge has considered were established as being cases of Mahomedan succession amongst Halai Memons domiciled in Porebunder.

1918.

MAHOMED HAJI ABU v. KHATUBAI.

(1) Saleh Mahomed Haji Vali.

He came to Bombay from Ranavav in Porebunder State with his father and brothers thirty-five years ago. He seems to have carried on business in Bombay and South Africa and died at Ranavav in November 1910 leaving properties in Porebunder, Ranavav, Bombay and South Africa. He left him surviving a widow Zuleikabai, a daughter, three brothers, Abdulla, Karim and Yusuf and three sisters. His estate remained in the possession of Karim. Until 1915, the widow was maintained by Yusuf. In that year one Jusub Tyab, witness Com. A for the plaintiff, wrote a letter to Yusuf Haji Vali. According to the writer as no maintenance had been received for three or four months he asked Yusuf not to stop the maintenance. Yusuf asked him to come to Bombay. He went and asked Yusuf to pay up the maintenance account. Yusuf said he was unwilling to pay it any longer and wanted to settle. On the other hand Yusuf says that Joosub Tyab asked by letter for Zuleikabai's share according to Mahomedan law. However that may be, Saleh Mahomed's estate was valued by five persons and Yusuf purchased the widow's share for Rs. 5,567-4-11, which she received partly by retaining ornaments belonging to the estate and partly in cash. See Exhibit O, which was signed by Yusuf Tyab as her constituted attorney on the 5th July 1915. Prior to that, on the 12th June 1912, the three brothers and three sisters of Saleh Mahomed had executed at Ranavav a curious document (Exhibit Q) whereby they declared that they relinquished their shares in the estate of the deceased according to Mahomedan law on condition that their shares should be used for any charitable or religious purpose or purposes which Abdulla might select, provided the money was spent in India. The estate seems to be still in the hands of Karim and nothing was done to give

effect to Exhibit Q except that, if Yusuf is to be believed, a payment of Rs. 200 has been made in charity. It seems to me that whether Saleh Mahomed may be said to have retained his Porebunder domicile or not his estate came into the hands of his brothers who had become Bombay Memons and were therefore permeated with the ideas of Bombay Memons.

(2) Sulleman Hassan Kali.

He died about 1900 leaving a widow, a father, a sister and a maternal uncle. Yusuf Haji Vali, a nephew of the widow, said that Sulleman had a business in Bombay but kept up his connection with Ranavav. The widow got a share according to Mahomedan law. Her constituted attorney, Tar Mahomed Abba Sheriff, signed Exhibit A 17, together with the father of Sulleman and the maternal grand-father who was stated to be the executor of Sulleman's will. That document was a release in favour of the partners of the deceased of his share in the business for Rs. 3,205-2-6. Out of this sum the father got Rs. 1,600 and the widow Rs. 800. Though Yusuf says the deceased left property at Ranavav this is contradicted by Tar Mahomed. It may be taken therefore that Sulleman carried on business in Bombay in partnership. His share in that business was the only property left by him. He seems to have left a will which has not been produced, but his executor was a party to Exhibit A 17 and must have taken a part in the distribution of the money received from the partners of the deceased. How that money was distributed is by no means clear. If the father got Rs. 1,600 and the widow Rs. 800 that would not be a distribution according to Mahomedan law. In any event the distribution took place in Bombay and it is not certain that Sulleman remained a Porebunder man.

1918.

MAHOMED HAJI ABU v. KHATUBAI.

(3) Oosman Hamid.

This instance is deposed to by Haji Kassum Haji Ahmed who said: "Oosman Hamid was a Porebunder man and came to Bombay for a short time. He left immoveable property at Porebunder. He died in 1887 leaving a widow Yemnabai, two sons, Kassum and Hasham, and a daughter Safoorabai. Oosman's estate was administered privately by his heirs. A release was passed in favour of my son-in-law Hasham by his other heirs. It is dated 24th December 1889. Oosman dealt in Porebunder stone and so far as I know exclusively. He sent stone from Porebunder for sale in Bombay. His place of business was in Porebunder."

The release (Exhibit U), on which so much reliance has been placed by the plaintiff, puts a very different aspect on this story. In the first place it recites that Oosman Hamid died in 1877. The witness who gave his age as forty-nine could only then have been a boy of ten. It further recites that Oosman left moveable and immoveable property in Bombay and at Porebunder; that on his death Kassum took charge of it as eldest male member of the family and continued to carry on the business of tailoring for and on behalf of the parties interested therein until he died in 1888; and that Letters of Administration to the estate of Kassum were granted to his brother Hasham. Therefore it is clear that sometime before 1877 Oosman came to Bombay and started a tailoring business. He may before that have had a stone business in Porebunder, but if he had the witness could scarcely have had any personal knowledge of it. He could have known nothing more about Oosman Hamid beyond what he heard owing to his daughter having married Hasham. The release then recites that Yemnabai and Safoorabai and another Yemnabai, the widow of Kassum, had

agreed to receive certain sums fixed and ascertained as their shares in full satisfaction of their claim and demand in the property mentioned in the schedule as the heirs of Oosman Hamid and Kassum Oosman, and in consideration of the said sums the said parties released Hasham from all claims against the tailoring business and the property mentioned in the schedule, which included two houses at Porebunder valued at Rs. 3,000. Now the witness was a Bombay Memon and even if Oosman died a Porebunder Memon, which is not certain, his sons became Bombay Memons. Exhibit U was drawn up and executed in Bombay as a release to the administrator under letters granted in Bombay to the estate of Kassum. It is true that there were two houses at Porebunder belonging to that estate, but there is nothing unusual in Bombay Memons owning property in Kathiawar. It is difficult, therefore, to see how this can be considered as an instance of the estate of a Porebunder Memon being divided according to Mahomedan law. Oosman's estate was never really administered; it was only after the death of Kassum that the family property with its accretions since the death of Oosman was divided by Hasham, a Bombay Memon.

On a consideration of all the cases above mentioned the evidence seems to me to be all one way. Twenty-five cases are proved which indicate that Hindu law was applied and not Mahomedan law, and there is no clear case of the application of Mahomedan law among Memons settled at Porebunder. It is natural that there should be frequent proof of such cases occurring in recent years and but few witnesses as to cases more than twenty years old but there is evidence of a case dating from 1884.

The suggestion of the learned Judge that the bulk of the cases took place after 1897 perhaps in consequence

1918.

MAHOMED HAJI ABU v. KHATUBAI.

of the action of the leaders in that year does not explain that action and does not explain away the fact that in a suit of 1892 in which final judgment was given in 1896 the leaders of both branches of the Memon Community in Porebunder gave evidence that sons excluded daughters (see Exhibit 8). The learned Judge trying that case remarked that from 15 instances given by the witnesses it seemed clear that the Memons of Porebunder did not follow the Mahomedan law of succession.

In this state of the evidence we are, I think, justified in holding that the conditions of a valid custom have been established. The custom is certain in its operation excluding daughters in favour of sons. It is invariable inasmuch as no case of variation in Porebunder has been proved. It is ancient because it is the custom which must certainly have prevailed in the community before the conversion to Islam, for Mahomedans do not discard when once adopted, though they do not always on conversion adopt, the rule of the Koran relating to succession.

The suit as filed relates to property in Bombay alone and the deceased Haji Abu died in Bombay intestate. But he was a Porebunder man. Neither circumstance implies severance from Porebunder. The evidence is strong that the deceased had retired to Porebunder, where he had a house, with the intention of ending his days there and he only came to Bombay to consult a doctor during his last illness. Since, then, there was no severance from Porebunder, the customary law of Porebunder Memons must govern the distribution of the estate.

We do not think it is open to us in our view of the evidence to follow the course taken by the lower Court and hold that the defendant has not made out the

custom alleged. Nor can we hold that custom has established a *lex loci* peculiar to Bombay property, namely, the Mahomedan law, and another *lex loci* peculiar to Porebunder property, namely, the Hindu law. There is no principle recognised by the law administered in this country upon which a Hindu's or Mahomedan's possessions may be distributed partly by one law and partly by another according to the locality of the possessions. They must all fall under either the law of the religion or the customary law of the community. There is no *lex loci* for the purpose of distribution. If it were possible on the evidence to infer an election by the deceased—a severance of his connection with the Hindu Kathiawar environment and a permanent settling in Bombay where non-Cutchi Memons have long adopted the Mahomedan law for distribution, the analogy of the law of domicile could be applied as in the Mombassa case of *Abdurahim Haji Ismail Mithu* v. *Halimabai*[1]. It would not be the law of domicile, for permanent residence in Bombay does not necessarily import the Mahomedan law of succession for one whose ancestors were converted from Hinduism. Severance from the domicile of origin and permanent residence in Bombay would, in the case of persons falling within the purview of the Indian Succession Act, effect change of domicile and with it a change of law, e.g., from French to Anglo-Indian or Portuguese to Anglo-Indian but it would not change the law of succession for Hindus or Mahomedans.

Therefore since we are of opinion that the deceased died as he was born a Porebunder Memon, we must hold that according to the custom established by the evidence his son succeeds to all his property, his daughters are not entitled to share in his estate and

[1] (1915) L.R. 43 I. A. 35.

1918.

MAHOMED HAJI ABU v. KHATUBAI.

his widow is entitled only to maintenance. We set aside the decree of the lower Court and dismiss the suit. The plaintiff must pay the costs of the first defendant throughout.

The order as to costs is that the plaintiff must pay the costs of the first defendant throughout, including costs reserved, except that the defendant No. 1 must pay his own and the plaintiff's costs mentioned in the supplementary judgment as to costs of the 18th December in the Court below.

Respondent No. 4 to have her costs out of the estate.

The decree as to first defendant paying the costs of the second defendant stands.

Costs of respondents Nos. 2 and 3 to be borne by their guardian *ad litem*, the plaintiff's husband.

The Receiver to hand over possession to the first defendant of all the property in his charge.

The costs of the first defendant will include the costs occasioned by the appointment of the Receiver.

MACLEOD, J.:—One Haji Abu Haji Habib, a Halai Memon, died intestate at Bombay on or about the 1st December 1914, leaving a son Mahomed, a widow Bibibai and two daughters, Khatubai and Ayshabai, as his heirs according to Mahomedan law. Ayshabai died after her father leaving as her heirs her husband, Mahomed Haji Sakoor, and a daughter, Hawabai. Khatubai married one Abu Haji Sulleiman. On the 3rd September 1915 she wrote through her solicitors to her brother Mahomed stating that their father left considerable property in Bombay, moveable and immoveable, and calling upon him to render an account and hand over to her her share in the estate left by the deceased.

On the 7th September Mahomed's solicitors replied that as the parties came from Porebunder, according to the law applicable to them a married daughter was not entitled to any share in the estate of her deceased father.

On the 17th September they wrote further that the parties were governed by the rule of Hindu law. Thereupon Khatubai filed this suit against her brother Mahomed, her mother Bibibai, and the heirs of Aysha-bai, praying *inter alia* that the plaintiff was one of the heirs of her father Haji Abu and as such entitled to a 7/32 share in the estate left by him.

The first defendant in his written statement contended that the parties were governed by the Hindu law of inheritance and succession on the ground that such Hindu law was retained by Halai Memons of Porebunder and Kathiawar generally when they were originally converted to Mahomedanism or that such law was theirs by custom which had been followed by them from time immemorial, that though the deceased had come to Bombay and carried on business there for many years he continued to be a Porebunder man and his family had always been governed by the custom of inheritance and succession which prevailed at Porebunder amongst Halai Memons, lastly that the custom of Halai Memons in Kathiawar that they were governed by the Hindu law of inheritance and succession had been frequently judicially determined in the Courts of Kathiawar. The widow Bibibai supported the first defendant, while the third and fourth defendants were content to abide by the decision of the Court.

The suit came on for hearing before Marten J. and after a very lengthy trial the learned Judge decided that the deceased Haji Abu belonged at all material times to a family of Halai Memons who were settled in Porebunder, that Halai Memons so settled in Porebunder

1918.

MAHOMED HAJI ABU v. KHATUBAI.

did not as regards inheritance and succession retain Hindu law at the time of their conversion to Islam nor had they by immemorial custom adopted Hindu law, and that the deceased at the date of his death was governed by Mahomedan law as regards the inheritance and succession to his properties moveable and immoveable in Bombay and outside Bombay. That, therefore, the plaintiff was entitled to a 7/32nd share in his estate.

From that decision the first defendant has appealed. The origin of the Halai Memons is by no means clear, The word 'Memon' is derived from the word Muamin, i.e., believer, and has been applied to a particular class of converts from Hinduism to Islam. The "Bombay Gazetteer", states that the Memons in Kathiawar were of two divisions : Cutchi Memons, who were supposed to be the descendants of converted Lohanas and to have come originally from Sind, and Halai Memons, the descendants of converted Kachhias. Kachhias are husbandmen and it is not clear whether it was intended to be implied that the Halai Memons were converted inhabitants of Kathiawar or were immigrants from some other country after conversion. It certainly appears from the evidence of several of the Porebunder witnesses in this case that the tradition is that the Halai Memons came over to Kathiawar from Cutch and were called Halai Memons as distinguished from Cutchi Memons, from Halar, the name of the Prant in which they settled. They do not intermarry with the Cutchi Memons and this points to their having belonged originally to a different Hindu caste though in Porebunder the tradition appears to be that they were also Lohanas. If then they were husbandmen in Sind they would naturally have preferred to pass through Cutch and settle in Halar which was more adapted to agriculture. It is also more probable that they were converted at or about the same time as the Lohanas in

Sind rather than that there was a conversion of the indigenous population in Halar. From Halar the Halais spread over Kathiawar and whatever their original occupation may have been it seems that they are now mostly occupied in trade. Thus they came to Bombay. In the *Kojahs and Memons' case*[1] the defendant, a Cutchi Memon, said that the Halais came to Bombay one hundred and fifty years ago, but, however that may be, it is now undisputed that Halai Memons who have settled in Bombay and are called Bombay Memons consider themselves governed by the Mahomedan law of inheritance and succession and no attempt has ever been made, as far as I know, to establish that they are governed by the Hindu law. But as regards the Cutchi Memons, ever since Sir Erskine Perry's decision, which has been followed in numerous cases in this Court, it has been taken as settled that they retained after their conversion the Hindu law of inheritance and succession. Their Lordships of the Privy Council have put the question beyond dispute by their remarks in *Abdurahim Haji Ismail Mithu* v. *Halimabai*[2].

If then the Halai Memons originally immigrated into Cutch and decided instead of settling down there with the Lohana Memons to pass on to a country more suited to agriculturists, and if it be taken for granted that the Lohana Memons retained their Hindu law of inheritance and succession there is nothing improbable in the Kachhia Memons having done likewise.

The first question to be decided is whether Haji Abu at the time of his death was a Porebunder or a Bombay Memon, for, if he was a Bombay Halai Memon, the question what law governs Halais in Porebunder becomes immaterial. Haji Abu was born in Porebunder of a Porebunder family. His father had a cutlery shop

(1) (1847) Perry's O. C. 110. (2) (1915) L. R. 43 I. A. 35.

1918.

MAHOMED HAJI ABU v. KHATUBAI.

there. Haji Abu himself went to Durban for five years and a few months. After his return to Porebunder his father died. Thereafter he continued his father's business for a short time when he sold it and came to Bombay at the age of twenty-five or twenty-six. For two or three years he was in service and then opened a shop in partnership with two others. That must have been about 1882 A.D. Until 1899, when Haji Abu spent over Rs. 20,000 on a house at Porebunder it does not appear that he had any family residence there of his own. No doubt he often used to visit Porebunder, marriages and other ceremonies would be performed there, and the women of the family would go there for their confinements, but that might very well be the custom with many Memons who considered themselves as settled in Bombay, and if Haji Abu had died before 1899 there would have been considerable difficulty in establishing that he was anything else than a Bombay Memon, nor is it likely that any such attempt would have been made. But whether before 1899 he considerd himself a Porebunder or a Bombay Memon, there is a considerable body of evidence as regards what happened after 1899 to show that he retained, or reverted to if he had ever lost, his Porebunder environment. He spent what must be treated as a fairly large sum in building a house there, he lived there a considerable part of the year and was a leader of the Jamat. In 1910 the rents of the 4th and 5th floors of his Bombay house, where he used to reside, were debited in the books to his son, and this undisputed fact certainly supports the first defendant's story that his father said to him then "Do whatever business you want to, I want to go to my native country," and again, "I am now going to Porebunder. If I die there bury me near the graves of my mother and my father's mother," and that thereafter his father only came to Bombay at his son's request when business was

pressing. There is also the evidence that the deceased was anxious that his daughters should marry Porebunder men and refused two offers from Bombay Memons for Ayshabai's second marriage, accepting finally a Porebunder man. The witness, Ex. Com. 21, deposed that he had had a talk with the deceased about these offers when deceased told him that he belonged to Porebunder and liked Porebunder customs of inheritance and therefore disapproved forming connections with Bombay men, as there was a difference of customs in Bombay. The witness does not seem to have been cross-examined about this statement and the probability of its truth is supported by undisputed facts. Then the deceased was taken ill at Porebunder and only came to Bombay because his son wrote to him that he would get better medical advice in Bombay.

Such being the evidence it would, in my opinion, be impossible to say that Haji Abu had so completely detached himself from his Porebunder environment as to become a Bombay Memon. It is not, strictly speaking, a question of domicile, since a Hindu or Mahomedan who renounces his domicile of origin does not thereby subject himself to the law of his domicile of choice. And in this connection it may be noted that it may be inferred from the Privy Council judgment in the Mombassa case above referred to that their Lordships would consider the case of a Memon migrating from Cutch to some other part of India as different from that of a Memon settling in another country outside India, much stronger evidence being required in the former case to establish a change of personal law.

As Haji Abu died a Porebunder man, his estate in Bombay must be distributed according to the personal law which governs Porebunder Halai Memons. If he had been a Cutchi Memon it would have been at once presumed that this was Hindu law and the onus of proving

1918.

MAHOMED HAJI ABU v. KHATUBAI.

the contrary would lie on the plaintiff. I do not see myself why a presumption which has been so easily arrived at with regard to Cutchi Memons in Cutch should not also be applied to Halai Memons in Porebunder. It is true that Porebunder is a few miles outside the limits of the Halar Prant but that does not, in my opinion, affect the issue. However, the burden of proof has been thrown on the first defendant and he has sought to prove his case: (1) by showing that the decisions of the Porebunder Courts establish that Halai Memons in Porebunder are governed by the Hindu law in matters of inheritance and succession, (2) by proving that there is a custom among Halai Memons of Porebunder that in matters of inheritance and succession Hindu law is applicable.

As regards the first point we have to find whether there is any law in Porebunder (which for the purpose of this case may be considered as a foreign country) governing the succession to estates of Halai Memons, and, if there is, what that law is.

This is a question of fact and must be proved by evidence. There is no statute law but it is argued by the first defendant that the evidence of experts based on their opinion, and the decisions of the Porebunder Courts, prove what the law is. If the Porebunder Courts have decided that a particular custom exists, then there is a rule of decision and with all due respect to the learned Judge it is not open to us to question whether the Porebunder Courts were right or wrong, for then our conclusion would be not what the law of Porebunder is but what we think it ought to be. I should have been content myself to decide the point on the evidence given by Varajlal Ranchhodji, a pleader who has been practising in the Porebunder Courts for seventeen years. He was a witness for the plaintiff and was called to contradict evidence given by the witness, Ex. Com. 2,

regarding the distribution of the property of one Ibrahim Nur Mahomed. In cross-examination he said: "In Porebunder there is a conflict of decisions but the latest is that Hindu law governs Halai Memons. That is the decision of the final Court of Appeal there—the Huzur Court". The only expert called by the first defendant was Narbheshankar Jivanram who was in the judicial service in the Porebunder State from 1891 until he retired in 1913. He said that in three suits decided by him in 1896, the custom that the Hindu law of inheritance and succession applied to the Memons of Porebunder was held proved. After those decisions until he retired it was taken for granted by all the Courts of Porebunder that the Memons of Porebunder were governed by the Hindu law of inheritance and succession. That statement was not entirely accurate as in a case decided in 1900 by the Sar Nyayadhish it was held that Mahomedan law applied. The decisions of the Porebunder Courts are not reported but a large number of judgments on this question have been put in as Exhibits. In Appeal No. 8 of 1908-1909, decided by the Huzur Court in August 1909 (Exhibit 10A), the main question in dispute was the validity of the will of a Porebunder Memon who died leaving property in Mozambique and Porebunder. It was conceded in argument and found by the Court that the Porebunder Memons followed Hindu law as regards inheritance and succession. This decision was followed by the Huzur Court in Civil Appeal No. 16 of 1911-1912 which was an appeal in the proceedings for the execution of the decree obtained by one Zulekhabai in Appeal No. 8 of 1908-09. The judgment (Exhibit 10 H), given in March 1912 contains the following passage: "So in the matter of inheritance Mahomedan law does not apply but Hindu law applies to these Memons. This fact can be taken to be undisputed and even proved so far as

1918.

MAHOMED HAJI ABU v. KHATUBAI.

this case is concerned." Exhibits 10B, 10C, A15, are all judgments given in 1915 by the lower Courts in which it was taken for granted that the Hindu law of inheritance and succession applied to Porebunder Memons.

In Civil Special Appeal No. 37 of 1915-1916 the question was finally decided by the Huzur Court as to who was the proper legal representative of Zulekhabai and so entitled to execute the decree obtained by her. The Court decided that the parties were governed by the Hindu law for the purposes of inheritance and succession. The correctness of this decision has been questioned by Marten J. on the ground that the Court took an erroneous view of what was decided by the Privy Council in the Mombassa case. No doubt the Court considered that the Privy Council had decided that the distinction between Cutchi and Halai Memons had been done away with and that all Memons were as a general rule governed by Hindu law save where a local custom to the contrary was proved. But the Court then proceeded to consider the previous decisions of the Porebunder Courts, disapproving the decisions of the Nayadhish in February 1915 and the Sar Nayadhish in October 1900, and approving of the decisions of the Huzur Court in March 1918. It is not for us to say that if the Court had rightly read the decision in the Mombassa case as applying to Cutchi Memons only it ought to have decided otherwise than it did. It has been contended that as this decision was given after the death of Haji Abu it should not be taken into consideration; but the decision did not constitute a change in the law, it laid down what the customary law had always been. In my opinion, therefore, it has been proved that the law in Porebunder is that Halai Memons in Porebunder are governed by Hindu law in matters of inheritance and succession and this would be

sufficient to decide the case in favour of the first defendant. But assuming that I am not correct, and that the custom has not been judicially determined, there is abundant evidence in the case that the custom is as contended for by the first defendant. The onus of proof has been thrown upon him chiefly, it seems, on the ground that Halai Memons in Bombay have always followed Mahomedan law. This, however, may have been due to special circumstances after their arrival in Bombay and I am not prepared to accept the argument that because Bombay Halais follow Mahomedan law, Porebunder or Kathiwar Halais must be taken to follow it unless the contrary be proved. However that may be, it is an argument which should be disregarded in dealing with the evidence. That can be divided into two classes: (1) evidence of tradition, (2) evidence regarding the application of Hindu or Mahomedan law to particular instances. Twenty-six Halai Memons including many Shethias were examined on behalf of the first defendant. They all swore that Porebunder Memons were governed by Hindu law in matters of inheritance and succession. Although the Commission sat at Porebunder for over two months only two witnesses were called for the plaintiff. The first, Joosab Tyab said he had heard that Porebunder Memons were governed by Hindu law. The second, Haji Mahomed Hussan, said: "I cannot say in what manner and according to what law the Porebunder Halai Memons divide their property. But it ought to be divided according to Mahomedan law." The plaintiff's witnesses, who were examined in Bombay, were all Bombay Memons whose views may be considered as expressed by the typical answer of Haji Musa Haji Oosman at p. 355 of Paper Book: "There is a strong feeling amongst Halai Memons of Bombay that Halai Memons wherever they may be, they ought to be governed by Mahomedan law." The evidence of

1918.

MAHOMED HAJI ABU v. KHATUBAI.

the Porebunder witnesses regarding the tradition is supported by the fact that when the opinion of the community was invited by the Administrator of Porebunder on the Government Notification, Exhibit M, in 1897, several Shethias attended before the Administrator and told him that the Porebunder Halais did not wish to follow Mahomedan law. But apart from that there is no ground whatever for supposing that these Porebunder witnesses were saying something which they did not believe to be true.

With regard to the importance to be attached to evidence of tradition given by leading men of the community, I may refer to the remarks of their Lordships of the Privy Council in *Abdul Hussein Khan* v. *Bibi Sona Dero*[1]. This evidence of traditon would be negatived if it could be proved that as a matter of fact the property of Porebunder Halais was distributed according to Mahomedan law.

The instances which have been brought forward on both sides have been considered in detail by the learned Chief Justice and I entirely agree with the conclusions at which he has arrived. No instance has been proved in which the estate of a Porebunder Halai Memon has been distributed in Porebunder according to Mahomedan law, while, considering the numbers of the community, a large number of instances have been proved in which the distribution has been according to Hindu law. The custom may, therefore, be said to have been established by evidence. It may also be noted that the plaintiff's husband, who may be safely treated as responsible for this litigation, was a party to the proceedings in the Porebunder Courts in the matter of the decree obtained by Zulekhabai, and there it suited him to contend that Hindu law governed Porebunder Memons.

[1] (1917) L. R. 45 I. A. 10.

Reference has also been made to numerous decisions in the Court of the Agent to the Governor in Kathiawar on appeal from the Courts of States which do not possess final jurisdiction, and also in the Courts of Junaghad. They are of no value except to show that it has always been taken for granted that Halai Memons in Kathiawar are governed by Hindu law in matters of inheritance and succession, while the chief question in dispute was whether they were also governed by the Hindu law of partition and the joint family.

I agree that the appeal succeeds and the plaintiff's suit must be dismissed.

Solicitors for appellants: Messrs. *Wadia, Gandhy & Co.*

Solicitors for first respondent: Messrs. *Payne & Co.*

Solicitors for respondents Nos. 2 and 3: Messrs. *Little & Co.*

Solicitors for respondent No. 4: Messrs. *Surveyor & Co.*

Appeal allowed.

G. G. N.

APPELLATE CIVIL.

Before Mr. Justice Shah, on difference between Mr. Justice Heaton and Mr. Justice Pratt.

VASUDEV VISHNU HASABNIS (ORIGINAL DEFENDANT NO. 1, JUDGMENT-DEBTOR), APPELLANT *v.* GOPAL PARASHRAM KULKARNI (ASSIGNEE OF ORIGINAL PLAINTIFF, DECREE-HOLDER) RESPONDENT.*

1919. *January* 27.

Indian Limitation Act (IX of 1908), Articles 181, 182—Redemption of mortgage—Decree for redemption—Application for time to pay the mortgage amount into Court and recover possession—Limitation—Dekkhan Agriculturists' Relief Act (XVII of 1879), section 15B.

* Second Appeal No. 358 of 1917.