APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice Wazir Hasan.

1927 *December*, 2.

MITAR SEN SINGH (PLAINTIFF-APPELLANT) *v.* MAQBUL HASAN AND OTHERS (DEFENDANTS-RESPONDENTS).*

Caste Disabilities Removal Act (XXI of 1850), section 1—Ancestor of propositus renouncing Hindu religion and embracing Islam—Heir to the propositus, determination of—Act XXI of 1850, application and scope of—Regulation 7 of 1832—Date of application of Act XXI of 1850 to Oudh—Change of religion before annexation—Personal law, whether applicable.

Regulation 7 of 1832 or Act XXI of 1850 can be held to be applicable to the province of Oudh from the date of annexation at the earliest. Where, therefore, the father of the propositus embraced, before that date, the religion of Islam, recourse must, in determining the heir or heirs to the estate of such a person, be had to the Shia law of inheritance which was the personal law of the propositus.

Act XXI of 1850 has no application to a case where the claimant of rights has neither renounced nor has been excluded from the communion of any religion or been deprived of caste; and section 1 of that Act cannot be read in any wider sense than that it removes the personal disability of the person who has changed his religion from enforcing his rights which he possessed prior to the change.

If any ancestor of the propositus in any degree of ascent has changed his religion, it cannot be said that Act XXI of 1850 would apply in determining the status of an heir to such a propositus. *Jowala Buksh* v. *Dharam Singh* (1), *Abraham* v. *Abraham* (2), *Lala Khunni Lal* v. *Kunwar Gobind Krishna Narain* (3) and *Vaithilinga Odayar* v. *Ayyathorai Odayar* (4), relied upon. *Bhagwant Singh* v. *Kallu* (5) and *Rupa* v. *Sardar Mirza* (6), dissented from.

*First Civil Appeal No. 46 of 1927, against the decree of S. M. Ahmad Karim, Additional Subordinate Judge of Fyzabad, dated the 14th of February, 1927, dismissing the plaintiff's suit.

(1) (1865) 10 M.I.A., 511 (537).
(2) (1863) 9 M.I.A., 195.
(3) (1911) L.R., 38 I.A., 87.
(4) (1917) I.L.R., 40 Mad., 1118.
(5) (1889) I.L.R., 11 All., 100.
(6) (1919) I.L.R., 1 Lah., 376.

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Messrs. *P. L. Banerji, Jai Jai Ram, Radha Krishna* and *Hardhian Chandra*, for the appellant.

Messrs. *Bisheshwar Nath Srivastava, Ali Zaheer* and *Ali Mohammad*, for the respondents.

STUART, C. J. and HASAN, J. :—This is the plaintiff's appeal from the decree of the Additional Subordinate Judge of Fyzabad, dated the 14th of February, 1927. By the decree under appeal, the appellant's suit for the recovery of certain moveable and immoveable property, described in the two schedules A and B attached to the plaint, has been dismissed.

The property in suit was last held in full ownership by one Agha Hasan Khan, who died on the 11th of October, 1921. Agha Hasan Khan had a daughter, Musammat Sajjadi Begam. The daughter predeceased her father. The daughter's children Maqbul Hasan Khan, son of defendant No. 1; Musammat Amatul Kubra, defendant No. 2, and Musammat Amatul Sughra, defendant No. 3, daughters; are now in possession of the estate of their grandfather, Agha Hasan Khan. Agha Hasan Khan's widow, Musammat Kaniz Zainab, also died on the 5th of November, 1922.

The plaintiff, Babu Mitar Sen Singh, claims title to the estate in suit by right of inheritance as the nearest reversioner and pleads family custom of the exclusion of daughters and their issue in defeasance of the natural rights of the defendants in the estate of their grandfather, Agha Hasan Khan. This is the plaintiff's case as set forth in the plaint.

The custom pleaded by the plaintiff was denied by the defendants, and the issue relating to it has not been tried so far. Besides the daughter's issue, who are the defendants in the suit, it also appears that Agha Hasan Khan had a sister, Musammat Askari Khanam, who survived him and that Musammat Askari Khanam on her

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death has left children as heirs-at-law. The defendants denied the plaintiff's right of succession to the estate of Agha Hasan Khan and this is the issue which has been tried and found in favour of the defendants by the court below.

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The facts are as follows :—

Agha Hasan Khan's father, Ali Hasan Khan, embraced the religion of Islam in the year 1843 A.D. It is admitted that the sect to which he attached himself on conversion was the Shia sect. Ali Hasan Khan's name before his conversion was Jagardeo Singh. It is agreed that his father, Sarabdawan Singh, was a Hindu as were his ancestors from the earliest times. Sarabdawan Singh had a brother, Ranjit Singh, and the plaintiff, Miter Sen Singh, is the great-grandson of Ranjit Singh. It is also agreed that the plaintiff's father, his grandfather and his great-grandfather were all born and died in Hindu faith, and that the plaintiff is a Sanatan Dharam Hindu, both by birth and conviction.

Before proceeding father, we desire to state at the outset that at some stage of the proceedings in the trial court the plaintiff seems to have set up the case of his right to succeed to the estate in suit upon some general custom of the family whereby a Hindu is permitted to succeed to the inheritance of a Moslem blood relation. This was the subject-matter of issue No. 2. At the hearing of the appeal, however, this case was expressly abandoned by the learned Advocate, who appeared before us on behalf of the plaintiff. He rested his client's right to succeed on law and law alone subject, of course, to the proof of the custom of exclusion of daughters. For the purposes of the decision of the case in the trial court and the appeal before us it was assumed that the last-mentioned custom exists. During the progress of the arguments at the Bar, there was some confusion as to

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the precise nature and extent of the custom pleaded by the plaintiff, but we are quite clear in our minds that a plea of custom may be entertained in modification of the personal law, Hindu law or Muhammadan law, but not in entire abrogation of such law. This conclusion is fully borne out by section 3, sub-section (*b*), clause (2), of the Oudh Laws Act, 1876. The plaintiff's case as to the modification of the personal law by custom is set forth in paragraph 4 of the plaint. It may be mentioned here that it was agreed by the parties in the court below, and the agreement was adhered to before us that the property now in suit is not the property which Ali Hasan Khan might have acquired from or after the death of his brother, Amresh Singh. It was also stated on behalf of the plaintiff that Ali Hasan Khan on his conversion ceased to be a member of the joint Hindu family.

The first question which on the premises stated above arises for determination is: what law of inheritance governs the succession to the estate of Agha Hasan Khan? The answer to this question does not appear to us to be involved in any doubt. We think that in determining the heir or heirs to the estate of such a person recourse must be had to the Shia law of inheritance which was the personal law of the propositus. As observed by their Lordships of the Judicial Committee in the case of *Jowala Buksh* v. *Dharam Singh* (1) "the written law of India has prescribed broadly that in questions of succession and inheritance the Hindu law is to be applied to Hindus, and the Muhammadan law to Muhammadans; and in the judgment delivered by Lord KINGSDOWN in *Abraham* v. *Abraham* (2) it is said that 'this rule must be understood to refer to Hindus and Muhammadans, not by birth merely, but by religion also.'" It is quite clear that the plaintiff is not an heir-at-law according to that law even if the children

(1) (1865) 10 M.I.A., 511 (537). (2) (1863) 9 M.I.A., 195.

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of the daughter of the propositus are also not his heirs by virtue of the family custom. This conclusion was not seriously disputed by the learned Advocate for the appellant. It was argued, however, that though the plaintiff has no right of inheritance according to the Muhammadan Shia law to the estate in suit yet he has such a right under the provisions of Act XXI of 1850 and this was the only point argued at the Bar.

We think it necessary to note that the annexation of the Province of Oudh to the British territories took place on the 13th of February, 1856. Previous to that day it must be presumed that the law regulating rights to property was the Hindu law in case of Hindus and the Muhammadan law in case of Muhammadans and that conversion from one religion to another entailed all the consequences and penalties provided by those laws. Therefore when Jagardeo Singh (afterwards Ali Hasan Khan) renounced the Hindu religion and embraced the faith of Islam, he forfeited his rights to property under the Hindu law and acquired rights under the Muhammadan law. One of such rights was the "status" with all its consequences with which he came to be endowed on his conversion by the Muhammadan law. Regulation 7 of 1832 or Act XXI of 1850 can be held to be applicable to the Province of Oudh from the date of annexation at the earliest. This being so, we seriously doubt that those enactments will have the effect of restoring rights lost and of divesting persons of their "status" acquired before the date of the annexation. This will not be so in the Province of Agra which was a part of the Presidency of Bengal on the date of the Regulation and a part of the British territories in India on the date of the Act. It was assumed in the court below and in the arguments before us that the Act of 1850 will apply if it is applicable in terms thereof to the facts of this case.

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The trial court is of opinion that the provisions of Act XXI of 1850 have no application to the facts of this case, and we agree with that opinion. Before interpreting those provisions certain preliminary observations fall to be made. Act XXI of 1850 neither professes to nor does in fact create a new class of heirs constituted of persons who are not heirs under the personal law of the propositus. The Act does not lay down any code of inheritance prescribing the line of succession to the estate of a convert. It does not create new rights. It only removes obstacles to the enforcement of existing rights. The obstacles intended to be removed are clearly obstacles arising by reason of the claimant renouncing his religion, or having been excluded from the communion of any religion, or being deprived of caste. We think that the substantive enactment may be interpreted in no other sense, and we think that this interpretation is supported by the preamble. The substantive enactment is as follows:

> "1. So much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the courts of the East India Company, and in the courts established by Royal Charter within the said territories."

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The interpretation which we place on it can best be brought on surface by analysing section 1 as follows:—

So much of any law or usage as . . . .

(1) inflicts on any person forfeiture of rights or property. *or* (2) may be held in any way to impair or affect any right of inheritance.	By reason of his or her (*a*) renouncing, *or* (*b*) having been excluded from the communion of *or* (*c*) being deprived of caste.	Any religion.

shall cease to be enforced as law . . . .

We are of opinion that both class of cases covered by clauses 1 and 2 as given above are controlled by the condition precedent of conversion or exclusion or deprivation from caste of the person whose rights are questioned in a given case, such rights being rights which such a person has under the law which was applicable to him immediately preceding the change of religion or deprivation of caste.

Clause (1) deals with one class of rights while clause (2) deals with another class of rights. Under the former fall rights which have come to be vested prior to conversion in the person who has changed his religion and under the latter fall inchoate rights of the nature of *spes successionia*. The former class of rights may be illustrated by the right of a member of a joint Hindu family who has acquired his right in the family property from the moment of his birth, by the right of a legatee in the subject-matter of bequest after the death of the testator, and generally by the right which a person has acquired by right of inheritance after the death of a propositus. Clause (1) provides for the protection of such vested rights as against the effect of the rule of

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personal law entailing the destruction of such rights by reason of conversion. Clause (2) contemplates protection of rights of a person who has changed his religion prior to the vesting of such rights: in other words if an heir has changed his religion before the opening of succession, that fact will not stop the devolution of inheritance on him whenever it comes to happen. In each case it seems to us rights, whether vested or inchoate, are protected by the statute but only of the person whose rights are forfeited in one case or affected in the other by reason of that person renouncing or having been excluded from the communion of any religion or being deprived of caste. We are of opinion that the Act has no application to a case where the claimant of rights either of one class or of the other has neither renounced nor has been excluded from the communion of any religion or been deprived of caste as the present case is. The words "forfeiture" and "impair or affect any right" in the first part of the section and the words "by reason of his or her" in the second part of the section are important words. In short, we are unable to read the section in any wider sense than that it removes the personal disability of the person who has changed his religion from enforcing his rights which he possessed prior to the change. Further, even if the Act be assumed to be applicable to a case where the person whose inheritance is in question has changed his religion the present case is not of that nature and, therefore, it is not necessary to give reasons against the soundness of the assumption. But surely it cannot be contended that if an ancestor of the propositus in any degree of ascent has changed his religion the Act would apply in determining the status of an heir to such a propositus. If it were so, the results would be startling, if not revolutionary. In families of more than half of the population of Moslems of British India and similarly in Indian Christian families conversion from Hinduism

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may well be traced to some near or remote ancestor, and when the inheritance comes to fall on collaterals the Hindu relations of the Moslem or the Christian convert must be held to displace if nearer in degree the rights of the Moslem collaterals more remote. Not only that, the female heirs of the propositus and also the females who have succeeded in the past must be held to possess only such rights of property as they would have possessed if their ancestor had remained a Hindu.

The interpretation which we have placed on the substantive enactment contained in Act XXI of 1850 is, it appears to us, supported by the preamble as well. The important words of the preamble are " the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled." This language clearly means the recognition and subsistence of pre-existing rights either under the Muhammadan or the Hindu law, and it does not create new rights. It, however, removes the penalty of losing existing rights which the personal law imposes on the party or parties by reason of difference in religion. The removal of penalty is clearly intended for the benefit of the party who has incurred the penalty, and not for others.

We think that the interpretation which we have placed on Act XXI of 1850 is also supported by the decision of their Lordships of the Judicial Committee in the case of *Lala Khunni Lal* v. *Kunwar Gobind Krishna Narain* (1). A few facts of that case may first be stated. A joint Hindu family possessing considerable property within the British territories consisted of two persons, Ratan Singh, and his son, Daulat Singh. Each of these two persons was thus entitled in joint tenancy to a moiety of the family property. In 1845, Ratan Singh

(1) (1911) L.R., 38 I.A., 87.

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abandoned Hinduism and adopted the Muhammadan faith. Change of religion, however, made no change in the status of the family until the death of Daulat Singh in January, 1851. Daulat Singh left him surviving a widow named Sen Kuar and two daughters, Chhatar Kuar and Mewa Kuar. Ratan Singh died in September, 1851. Thereafter the name of his widow, Raj Kuar, was recorded in the revenue register in place of her deceased husband in respect of the entire family property. After the death of Sen Kuar and also of Raj Kuar a settlement was arrived between the daughters of Daulat Singh and one Khairati Lal, who was the son of a daughter of Ratan Singh. According to this settlement Chhattar Kuar and Mewa Kuar obtained an $8\frac{1}{2}$ annas share while Khairati Lal received the remaining $7\frac{1}{2}$ annas share. Possession followed in accordance with the allotment. Chhatar Kuar died first and then died Mewa Kuar in 1899. The plaintiffs in that case were the sons of Mewa Kuar. The defendants were transferees from Khairati Lal. The case of the plaintiffs was that on the abandonment of Hinduism by Ratan Singh he forfeited his half share in the joint property which vested in Daulat Singh. They claimed the entire 16 annas in the character of heirs of Daulat Singh, challenging the validity of the compromise under which Khairati Lal had acquired the $7\frac{1}{2}$ annas share. On the question of the effect of the abandonment of Hinduism by Ratan Singh on his rights in the joint property their Lordships of the Judicial Committee interpreted section 9 of Regulation 7 of 1832 and the provisions of Act XXI of 1850. After having quoted these enactments their Lordships said as follows:—

> "The intention in both enactments is perfectly clear; by declaring that the Hindu or Muhammadan law shall not be permitted to deprive any party not belonging to either

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of those persuasions of a right to property, or that any law or usage which inflicts forfeiture of rights or property by reason of any person renouncing his or her religion, shall not be enforced, the Legislature virtually set aside the provisions of the Hindu law which penalizes renunciation of religion or exclusion from caste. The effect of the legislation of 1832 and 1850 was that on Ratan Singh's abandonment of Hinduism Daulat Singh did not acquire any enforceable right to his father's share in the joint family property which he could either assert himself or transmit to his heirs for enforcement in a British Court of Justice."

This pronouncement clearly means that Daulat Singh by reason of conversion of his father did not come to possess any new right in the family estate which he did not otherwise possess. It further means that Ratan Singh's rights in the family property were not forfeited by the conversion. The enactments simply removed the penalty of forfeiture of rights imposed by the personal law on conversion.

The learned Advocate for the appellant strenuously pressed on us the decision in the case of *Bhagwant Singh* v. *Kallu* (1) and contended that it afforded complete support to his client's case. One of the two learned Judges, who formed the Bench, was Sir JOHN EDGE and he delivered the judgment. The other learned Judge simply recorded his concurrence. We feel that out of respect to so eminent a Judge as Sir JOHN EDGE, we must examine the decision with great care. We have done so and have come to the conclusion that the decision in the first instance is inapplicable to the facts of

(1) (1889) I.L.R., 11 All., 100.

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this case and in the second instance we find ourselves, with utmost respect, in disagreement with the grounds of the decision. The facts were these. In that case the grandfather of the plaintiff, Hari Singh, had three sons, Mohan Singh, Bacha Singh and Mahipat Singh. Mahipat, who was the father of the plaintiff, was converted to Muhammadanism. The property in suit had belonged to Bacha Singh. The plaintiff was a Muhammadan as was his father, Mahipat. Bacha Singh on his death was succeeded by his widow, Banoo, who had alienated the property which had devolved on her by right of inheritance. The alienees were the defendants. The plaintiff Kallu in support of his title to the estate of Bacha Singh relied upon the provisions of Act XXI of 1850. This was upheld by the High Court at Allahabad.

It will be seen that on the facts the case before us is materially different from the case under consideration. In that case the claimant's title was sought to be defeated on the ground that his father had embraced Islam and therefore the right of inheritance which would have devolved upon the plaintiff in the estate of his uncle, Bacha Singh, was killed by reason of the conversion. This defence was sought to be supported by the only argument that Act XXI of 1850 would have saved the situation only if the plaintiff had renounced his religion. The argument was repelled on two grounds. It was observed that the argument, if sound, would have the effect of cutting down or curtailing the principle of section 9 of Regulation 7 of 1832. This could not be allowed for the reason that " no one can read section 9 of Regulation 7 without seeing that if Mr. Bajpai's argument is correct the operative portion of the Act, instead of extending the principle to the rest of the Company's provinces, would have limited the relief it was intended to extend." With great respect the preamable nowhere expresses the intention of extending the

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scope of the principle. The extension intended is only of the territorial limits and not of the principle. The second ground was that " if the latter part of the section was restricted to the protection of the right of inheritance of the persons renouncing their religion or being excluded from caste, their case was covered by the words of the early part of the section." With great respect again we do not agree with this view. As we have already shown, the first portion of the section relates to the forfeiture of rights, that is vested rights, by reason of change in religion of the person in whom those rights reside and prevents forfeiture of such rights. The latter portion of the section relates to rights of inheritance before the opening of succession and protects the loss of such rights of the person who has renounced his religion or been excluded from caste while he occupies the status of an heir simpliciter. We are clearly of opinion that the words " renouncing his or her religion " apply to both classes of cases, that is, the law affords protection against the forfeiture of vested rights and protection against the loss of status as an heir and in both cases of the person who renounces his or her religion. The Act of 1861 was recently interpreted in the sense in which we have interpreted it by the High Court of Madras in *Vaithilinga Odayar* v. *Ayyathorai Odayar* (1) and the Allahabad case was dissented from. The decision of the High Court at Lahore in the case of *Rupa* v. *Sardar Mirza* (2) was also quoted on behalf of the appellant. In that case the learned Judges simply followed the decision in the Allahabad case and advanced no fresh arguments in support of the conclusion. There are other decisions for the opinion which we have formed and they are noted in the judgment of the trial court. It will serve no useful purpose to recapitulate them in this judgment.

(1) (1917) I.L.R., 40 Mad., 1118. (2) (1919) I.L.R., 1 Lah., 376.

The result is that we uphold the decree of the trial court and dismiss the appeal with costs.

Appeal dismissed.

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APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice A. G. P. Pullan.

MAHABIR BAKHSH SINGH (PLAINTIFF-APPELLANT) *v.* SITLA BAKHSH SINGH AND OTHERS (DEFENDANTS-RESPONDENTS).*

1927 *December,* 7.

Settlement Court decree creating occupancy rights—Under-proprietary rights, claim for—Court's power to go behind settlement decree—Subsequent statements and entries in receipts of rent and revenue registers, effect of.

Where a decree of a Settlement Court in Oudh has, from the necessity of the case, been unable to decide whether a man is or is not an under-proprietor, where a decree of a Settlement Court has left in doubt the fact whether he is or is not an under-proprietor, or where there is no decree of a Settlement Court deciding the point, then undoubtedly the question as to whether a man has or has not under-proprietary rights must be decided upon other evidence. But where the decree of the Settlement Court can leave no doubt as to the fact that the parties are occupancy tenants and not under-proprietors, it is not open to the court to go behind it.

Where the judgment of the Settlement Court, which created the rights, distinctly shows that the rights were only the rights of occupancy tenants within the meaning of section 5, Act XIX of 1868, no subsequent statements that such tenants are under-proprietors whether contained in the mouths of witnesses, in receipts for rent or in entries in the revenue registers, can avail to show that they are under-proprietors.

*Second Civil Appeal No. 164 of 1927, against the decree of E. M. Nanavati, District Judge of Fyzabad, dated the 7th of February, 1927, upholding the decree of M. Muhammad Munim Bakht, Additional Subordinate Judge of Sultanpur, dated the 14th of September, 1926, dismissing the plaintiff's claim.