gám and had excused the delay which was manifestly occasioned by a *bond fide* mistake as to the proper course to follow; but as all the proceedings are now before us, we are of opinion that this is a case in which we ought to interfere under clause 2, section 5 of Regulation II of 1827, on the principles explained in Mr. Justice Melvill's decision in *Ganesh* v. *Ránchandra* (1).

It is not disputed by Mr. Goverdhanrám that the original order of the Second Class Subordinate Judge of Viramgám, which was passed without reference to the provisions of Act VII of 1887, was erroneous. We now set aside that order, and direct that the plaint be sent to the Subordinate Judge of Viramgám and be admitted by him and numbered and registered as duly presented on 27th June, 1892. All costs hitherto incurred in the Second Class Subordinate Judge's Court at Viramgám, in the First Class Subordinate Judge's Court, in the District Court, and in this Court, to be costs in the cause.

Order set aside.

(1) P. J., 1881, 133.

APPELLATE CIVIL.

Before Mr. Justice Ránade and Mr. Justice Fulton.

BA'I BA'IJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* BA'I SANTOK (ORIGINAL DEFENDANT), RESPONDENT.*

1894. *October* 2.

Borâh Mahomedans—Suni Borâhs—Conversion, effect of—Hindu converts to Mahomedanism—Inheritance—Succession among such converts—Native Christians—Law applied to Native Christians prior to Indian Succession Act (X of 1865)—Custom and usage of inheritance among converts—Burden of proof—Evidence—Matter of public interest—Decrees—Evidence of custom—Practice.

The Suni Borâh Mahomedan community of the Dhandhuka Táluka in Gujarát are governed by the Hindu law in matters of succession and inheritance.

Held, therefore, that in this community a widow is entitled to succeed to her husband's estate to the exclusion of a daughter or a step-daughter.

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

* Appeal No. 72 of 1892.

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If evidence is given as to general prevalence of Hindu rules of succession in a Mahomedan community in preference to the rules of Mahomedan law, the burden of proof is discharged, and it then rests with the party, disputing the particular Hindu usage in question, to show that it is excluded from the sphere of the proved general usage of the community.

Among Native Christians certain classes strictly retain the old Hindu usages, others retain these usages in a modified form, and others again wholly abandon them. Before the Indian Succession Act (X of 1865) the Christian convert could elect to attach himself to any one of these particular classes, and he would be governed by the usage of the class to which he so attached himself—*Abraham* v. *Abraham*(1). These same principles are applied to the case of Hindu converts to Mahomedanism such as Khojás and Cutchi Memons.

The decrees of competent Courts are good evidence in matters of public interest, such as the existence of customs of succession in particular communities. Such decisions form an exception to the general rule, which excludes *res inter alios actæ*.

APPEAL from the decree of Ráo Bahádur Lálshankar Umiáshankar, First Class Subordinate Judge of Ahmedabad, in Suit No. 314 of 1891.

The parties to the suit were members of the Borá̀h community of Ránpur, in the Dhandhuka Táluka, who were Rájputs converted to Mahomedanism several centuries ago.

The plaintiff was the daughter and defendant was the widow of one Nur Bápu who died at Ránpur on 23rd December, 1889. The plaintiff was the step-daughter of the defendant.

The plaintiff sought to recover the whole of the property belonging to her deceased father, alleging that according to the custom of her caste a daughter was entitled to succeed to her father's estate to the exclusion of his widow; she also alleged that her father had made a will bequeathing to her the whole of his property. She prayed for the whole of the said property, and, in the alternative, for one-half, as a legal sharer under the Mahomedan law.

The defendant pleaded (*inter alia*) that the caste to which the parties belonged was governed by the Hindu law, and not by the Mahomedan law, in matters of succession and inheritance; that according to the Hindu law she had a widow's estate in her deceased husband's property; that the plaintiff had no such preferential title as she set up according to the custom of the caste, and that the said will was a fabrication.

(1) 9 Moo. I. A. 195

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The Subordinate Judge found that there was a long-established custom among the Boráhs of Ránpur to follow the ordinary Hindu law of succession and inheritance; that according to this custom the defendant was the heir of her deceased husband; and that the plaintiff had failed to prove either the will or the special custom on which she relied.

The Subordinate Judge, therefore, rejected the plaintiff's claim.

Against this decision the plaintiff preferred an appeal to the High Court.

Viccáji (with him *Nagindás Tulsidás*) for appellant.

Branson (with him Ráo Sáheb *Vásudev J. Kirtikar*) for respondent.

The following authorities were cited in argument:—*Abraham* v. *Abraham*(1); *Jowala Buksh* v. *Dharum Singh*(2); *Mahomed Sidick* v. *Háji Ahmed*(3); *Ahmedbhoy Hubibbhoy* v. *Cássumbhoy Ahmedbhoy*(4); *Rája Bahádur* v. *Bishen Dayál*(5).

RA'NADE, J.:—The appellant in this case is the daughter, and the respondent is the widow, of the deceased Nur Bápu, who died in December, 1889. Nur Bápu belonged to a community of Rájputs who were converted to Mahomedanism some centuries ago, and are known as Suni Boráhs in the northern part of Gujarát. The appellant sought to recover possession of the whole of her father's estate to the exclusion of his widow under her father's will, and also under a special custom, and in the alternative she claimed a half share of the property under Mahomedan law. The title based on the will and on the custom was disallowed by the lower Court, and the appellant's counsel did not press these points on our attention, but he rested his case solely on the ground that the parties were bound by Mahomedan law, and not by Hindu law or usage, as the respondent contended. This latter contention was upheld by the lower Court.

(1) 9 Moo. I. A., 195.
(2) 10 Moo. I. A., 511.
(3) I. L. R., 10 Bom., 1.
(4) I. L. R., 13 Bom., 534.
(5) I. L. R., 4 All., 343.

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The only issue that is raised in appeal is, whether the strict Mahomedan law or the Hindu law and usage governs the succession to the estate of the deceased Nur Bapu as a member of the Suni Borah community of Dhandhuka Taluka in the Ahmedabad District.

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

The leading case on the subject of the succession of converted Hindus is *Abraham* v. *Abraham*[1], where it was held that though, by the fact of his conversion, Hindu law ceases to have any binding force upon the convert, yet it does not necessarily involve a complete change in the relations of the convert in the matter of his rights and interest, and his power over property. The convert, though not bound by Hindu law, may, "by his course of conduct after conversion, show by what law he intended to be governed as to these matters." This case related to Native Christians, among whom certain classes strictly retain their old Hindu usages, others retain their usages in a modified form, and others again wholly abandon those usages. The Christian convert could, before the Indian Succession Act was passed, elect to attach himself to any one of these particular classes, and he would have been governed by the usage of the class to which he so attached himself. The case of *Jowala Buksh* v. *Dharum Singh*[2] was also cited on appellant's behalf, but it has no ap-

(1) 9 Moo. I. A., 195. (2) 10 Moo. I. A., 511.

plication, for it only lays down that a single family cannot make a special customary law for itself.

The same principles which govern the case of Hindu converts to Christianity have been applied to the case of Hindu converts to Mahomedanism in this Presidency, such as the Khojás and Cutchi Memons. The first case was decided by the Supreme Court so far back as 1845—*Khojas* and *Memons' case*(1); and it has been followed since in a succession of cases—*Gangbái* v. *Thávar Mulla*(2); *Hirbái* v. *Gorbái*(3); *Rahimatbái* v. *Hirbái*(4); *In re Háji Ismail Háji Abdula*(5); *Ashábái* v. *Háji Tyeb Háji Rahimtulla*(6); *Abdul Cadur Háji Mahomed* v. *C. A. Turner*(7); *Mahomed Sidick* v. *Háji Ahmed*(8); *Ahmedbhoy Hubibbhoy* v. *Cássumbhoy Ahmedbhoy*(9); *Rája Bahádur* v. *Bishen Dayál*(10).

The principles laid down in these decisions may be thus stated, (1) that, though the Mahomedan law generally governs converts to that faith from the Hindu religion, yet (2) a well-established custom of such converts following the Hindu law of inheritance would override the general presumption; (3) that this custom should, however, be confined strictly to cases of succession and inheritance; (4) and that if any particular usage, at variance with the general Hindu law applicable to these communities in matters of succession, be alleged to exist, the burden of proof lies on the party alleging such special custom. These principles may now be regarded as settled, and they govern the presumptions of law and the burden of proof in cases like the present, if the Borâh community to which the parties belong are shown by the evidence in this case to occupy the same position and status as the Khojás and Cutchi Memons.

This is a question of fact, and on this point we feel satisfied that the lower Court has correctly appreciated the oral and written evidence adduced on both sides. The decrees of competent Courts are good evidence in matters of public interest, such as the existence of customs of succession in particular communities; and

(1) Perry's Oriental Cases, p. 110.
(2) 1 Bom. H. C. Rep., 71.
(3) 12 Bom. H. C. Rep., 294.
(4) I. L. R., 3 Bom., 34.
(5) I. L. R., 6 Bom., 452.
(6) I. L. R., 9 Bom., 115.
(7) *Ibid*, 158.
(8) I. L. R., 10 Bom., 1.
(9) I. L. R., 13 Bom., 534.
(10) I. L. R., 4 All., 343.

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such decisions form an exception to the general rule which excludes *res inter alios acta—Madhub Chunder Náth Biswás* v. *Tomee Bewah*(1). Exhibits 49 and 50 are copies of two such decrees in which the cases came before this Court, and though no judgments were recorded, the decrees of the lower Courts affirming the custom alleged by the respondent in this case of succession in accordance with Hindu law, were upheld. The judgment in Exhibit 50 refers to a number of other decisions of the lower Courts which have been perused by us. In one of these cases, (No. 855 of 1886 of the Dhandhuka Court,) the parties were Boráhs, and the dispute was between the widow and the nephews of a deceased Borah in the Dhandhuka Táluka. The judgment recorded refers to a series of eleven decisions, one of them dating as far back as 1818, in which it was held that these Boráhs follow Hindu customs of inheritance, and, on the strength of this custom, the widow's claim to inherit was upheld as against the separated nephews, and the decision was confirmed in appeal. The widow's claim was similarly upheld in Appeal No. 91 of 1867 by the District Court of Ahmedabad, on the ground of a custom of succession admittedly not in conformity with Mahomedan law. In Suit No. 1107 of 1883, the First Class Subordinate Judge's Court at Ahmedabad upheld the right of a widow to succeed to the estate of her deceased husband to the exclusion of her daughter and nephews, solely on the ground of ancient custom. It is not necessary to refer to the other decisions, copies of which were produced before us by the respondent's pleader, and which are all referred to in Exhibit 50.

Looking at the oral evidence in the case, it may be of use to note that the appellant-plaintiff herself did not rest her claim solely on the Mahomedan law. She also set up a custom which she failed to prove. Her witnesses were unable to cite a single case where a daughter shared the estate of her father, either with her brothers or her mother. Plaintiff's witness No. 22 admitted that there had been no remarriages in the community of Dhandhuka Boráhs to which he and the parties belong. Witnesses Exhibits 23, 25 did indeed state that a daughter took

(1) 7 C. W. R., 210.

her father's estate excepting the widow's ⅛th share, but they cited no instances. Witness No. 25 deposed that he had given a share to his sister, but this witness admitted later on that in a former suit he might have deposed that he did not know of any case where nephews excluded the widow as heir, and that the gift to his sister was made by his and her father. Witness No. 26 did not know of any case in which sisters received a share from their brothers as heirs to their father. Witness No. 27 stated that there had been no case in which the daughter inherited her father's estate, and excluded the mother. This witness was a party with the deceased Nur Bápu in a suit which ultimately came before the High Court, which Court confirmed the decision of the lower Courts. As noticed by the lower Court, this witness's statement of the customary law was distinctly in favour of the general application of the Hindu law in matters of succession. Mere opinion-evidence is entitled to no weight in such matters, and the custom must be proved by specific instances, which plaintiff's witnesses have failed to adduce—*Rahimatbái* v. *Hirbái*[1].

Defendant's witnesses, on the other hand, gave a large number of such instances where brothers had excluded sisters, and also where the mother, *i. e.* the widow of the deceased, excluded her daughter. The Mookhi (witness Exhibit 18) cited the instances of nine out of fifty families of this community at Ránpur, where brothers had excluded sisters. He was unable to give specific instances of the settlement of disputed succession between daughters and mothers, excepting the case of his own wife, who succeeded to her father's property after the death of her mother. The next witness, Exhibit 31, gave three instances in his own family and two in other families in which the daughter was excluded by the mother. The absence of all disputes on this point is itself strong evidence that the custom is well-established. Witness Exhibit 32 gave three instances from other families and one in his own, where the mother succeeded to the exclusion of daughters. Witness Exhibit 39 cited an instance within his knowledge of the exclusion of a daughter by her mother. Witness Exhibit 40 gave evidence to the same effect.

[1] L. R. 3 Bom., 34.

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The oral evidence in the case thus fully corroborates the written evidence of the decrees noticed above, and shows that the customary rules of succession in this community are based on a general adherence to the Hindu law, and are not in conformity with the rules of Mahomedan succession. These customs, having been affirmed by the civil Courts for over eighty years, must be held to have acquired the force of legal and obligatory customs. The relations between a daughter and step-mother must be governed by the same rules which are shown to regulate those of mother and daughter, as long as no special custom at variance with the general custom is proved.

For all these reasons we reject the appeal, and confirm the decree of the lower Court with costs on appellant.

FULTON, J. :—The question for our consideration is, whether the Mahomedan Boráhs of Ránpur in Dhandhuka, to which community the parties belong, are governed as regards the succession of widows by Hindu or by Mahomedan law. Mr. Vicáji doubted whether Hindus converted to Mahomedanism, as appears to have been the case with these Boráhs several centuries ago, could retain the Hindu rules of succession, but I think it is well settled that a community may be subject to a custom of succession at variance with the ordinary law. The only point for consideration is, whether the custom set up by the defendant is satisfactorily proved.

That the parties have hitherto not believed that they were governed by Mahomedan law, seems clear. The plaint alleges a custom inconsistent with that law on which it falls back only in the event of the custom not being proved. This fact, though not sufficient to shift the burden of proof, tends to lighten its pressure on the defendant, showing, as it does, that the plaintiff and her advisers were conscious that in matters of succession Mahomedan law was not usually followed. It still, however, rests on the defendant to prove her custom, but I agree with the Subordinate Judge that she has done so. The defendant's witnesses Nos. 28, 31 and 40 give instances in which the Hindu law of succession has been applied. On the other hand, not a single instance has been shown in which any succession at all resembling

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that prescribed by Mahomedan law has taken place; and it is clear that the application of this law would long ago have broken up the property as could easily have been proved if it had been followed. In the cases referred to by the Subordinate Judge, Suit No. 854 of 1878 and Appeal No. 176 of 1887 (Exhibit 50), the parties were Boráhs and it was held that their custom of succession was according to Hindu and not according to Mahomedan law. The evidence of Polka Mulji (Exhibit 40) seems specially significant, for it shows that the sisters of Nur Bápu did not get the shares in the family property to which they would have been entitled under Mahomedan law, and this evidence was not contradicted as might without difficulty have been done if it had been incorrect.

Looking to these circumstances I think it sufficiently proved that the succession of the Boráhs of Ránpur is regulated by Hindu law, subject possibly to a special custom excluding altogether daughters and other females entitled by Hindu law to take more than a widow's interest. Whether this special custom really prevails, it is unnecessary to consider in this case, for there seems no doubt that Hindu law is applicable as between the widow of the last holder and his daughter.

On these grounds I concur in confirming the decree of the Subordinate Judge with costs.

Decree confirmed.

APPELLATE CIVIL.

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

MAHA'RA'NA ŞHRI RA'NMA'LSINGJI (ORIGINAL DEFENDANT), APPELLANT, *v.* VADILA'L VAKHATCHAND (ORIGINAL PLAINTIFF), RESPONDENT. *

1894. *October* 3.

Minor—Guardian and ward—Powers of guardian—Guardian not competent to bind his ward by personal covenants—Act XX of 1864, *Secs.* 18 *and* 29—*Guardian's authority to contract debts for the marriage of his ward without the sanction of the Court—Debts contracted for pilgrimage expenses not binding on minor—Guardian's power to acknowledge debts—Limitation Act (XV of* 1877), *Sec.* 19—*Acknowledgment.*

A minor cannot be bound personally by contracts entered into by a guardian which do not purport to charge his estate.

* Cross Appeals Nos. 161 of 1892 and 10 of 1893.