TESTAMENTARY JURISDICTION.

Before Panckridge J.

In the goods of SARAH EZRA, *deceased.**

1930

Aug. 12, 14.

Succession-Intestacy—Jews, if exempted from Part V of the Indian Succession Act—Statute, interpretation of—"Child," meaning of—Indian Succession Act (X of 1865), ss. 2, 105—Indian Succession Act (XXXIX of 1925), Part V; ss. 3, 5 (2), 8, 29, 37, 219.

In order to show that the English law on its introduction to India in 1726 was inapplicable to a particular community, it is not enough to prove that the community had, prior to that date, been governed by a law differing from English law. What must be shown is that the English law is based on or presupposes social or political conditions peculiar to the country of its origin and it is impossible or inexpedient to apply the provisions of it to the community in question.

Solomom Hayum Musleah v. *Ezra Ezekiel Musleah* (1) referred to.

The Jewish community, in Calcutta, is not governed by any customary law peculiar to itself and Part V of the Indian Succession Act, 1925, applies to its members.

Where words or expressions in a statute are plainly taken from an earlier statute in *pari materiâ* and have received judicial interpretation, it must be assumed that the legislature was aware of such interpretation and intended it to be followed in later enactments. [Halsbury's Laws of England, Vol. 27, p. 142, note (*k*).]

The word "child" in section 37 of the Indian Succession Act, 1925, does not include an illegitimate child.

Smith v. *Massey* (2) relied on.

APPLICATION FOR LETTERS OF ADMINISTRATION, by the brother of the deceased.

The relevant facts and arguments of counsel appear in the judgment.

J. A. Clough for the applicant.

S. C. Roy (*M. N. Mitter* with him) for the caveator.

Cur. adv. vult.

PANCKRIDGE J. This is an application by one Isaac Raphael Davidson (formerly known as Isaac Raphael Ezra) for a grant of letters of administration

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to the estate credits and effects of Sarah Ezra, late of 34, Kapâlitalâ Lane, Calcutta.

Sarah Ezra died in Calcutta on September 6th, 1929, intestate and a spinster. Her parents predeceased her, and she was survived by her brother, the applicant, and her sisters, Lizzie Ezra and Flora Abrahams, who consent to the petition now before the Court.

She also left her surviving an illegitimate son, Moses Ezra.

The estate of the deceased, which consists entirely of moveable property, has been sworn at Rs. 5,696-5-11.

On April 24th, 1930, Moses Ezra filed a caveat in the goods of the deceased.

On May 1st, the present petition was presented; and an affidavit in support of the caveat was filed by Moses Ezra on May 31st, and a further affidavit in opposition to the grant prayed for was filed on June 17th. The second affidavit alleges that the deceased, prior to her death, made a gift of all her personal property to the caveator.

Now, it would appear, at first sight, clear that, under the terms of section 219 of The Indian Succession Act, 1925, the applicant is entitled to the grant prayed, if the deceased was a person subject to Part V of the Act. The caveator in the first place maintains that the deceased is not governed by that part, inasmuch as she was admittedly a person of the Jewish faith and a member of the Jewish community.

He states that under the Jewish law and custom, by which the deceased was governed, he, as her son, is solely and absolutely entitled to the estate left by her which was acquired by "self exertion."

Alternatively he contends that, even if part V does apply, he is the deceased's "child" within the meaning of section 37 and entitled to the estate.

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As regards the applicability of the Act to Jews, section 3 gives power to the Local Government, by notification in the Official Gazette, to exempt from the operation of certain sections of the Act (including the sections relevant to this application) any race, sect or tribe in the province. It is not maintained, however, that the Government of Bengal have exempted the Jews either in Bengal or in Calcutta in the manner indicated.

Section 5 (*2*) enacts that succession to the moveable property of a deceased person is regulated by the law of the country in which such person had his domicile at the time of his death.

It is common ground that the domicile of the deceased, in September, 1929, was Indian.

Section 29 of the Act is as follows:—

(*1*) This part shall not apply to any intestacy occurring before the first day of January, 1866, or to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina.

(*2*) Save as provided in sub-section (*1*) or by any other law for the time being in force, the provisions of this part shall constitute the law of British India in all cases of intestacy.

If allowance is made for the differences in the scheme of the two acts, sub-section (*2*) reproduces the law of intestate succession as enacted by section 2 of the Succession Act of 1865.

The caveator's contention is that there exists a law in force, whose provisions exclude the operation of part V of the Act of 1925.

The argument runs thus: The Charter of 1726 establishing the Mayor's Court in Calcutta did not specifically enact the law which that court was to apply, but judicial decision has established that the law then introduced was the law of England except such parts of it as are inapplicable in Indian circumstances.

The Charter 1753 left this state of things unaltered, except in so far as it made the jurisdiction of the court in disputes between natives of India dependant on the consent of both parties.

13 Geo. III. c. 63, commonly known as the Regulating Act, in pursuance of which the Charter

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establishing the Supreme Court was granted in 1774, while it had the effect of abolishing the Mayor's Court, left the substantive law as it was, and the same law was applied by the Supreme Court as by the Mayor's Court.

13 Geo. III. c. 63 was amended by 21 Geo. III. c. 70, of which section 17 is as follows:

> Provided always, and be it enacted, that the Supreme Court of Judicature at Fort William in Bengal, shall have full power and authority to hear and determine, in such manner as is provided for that purpose, in the said charter or letters patent, all and all manner of actions and suits against all and singular the inhabitants of the said City of Calcutta; provided that their inheritance, and succession to lands, rents and goods, and all matters of contract and dealing between party and party, shall be determined, in the case of Mahomedans, by the laws and usages of Mahomedans, and in the case of Gentûs, by the laws and usages of Gentûs; and where only one of the parties shall be a Mahomedan, or Gentûs, by the laws and usages of the defendant.

Similar principles were, from time to time, laid down by the Regulations.

The Indian High Courts Act (24 & 25 Vict. c. 104) made no difference to the law, but merely transferred to such High Courts, as should be established by Letters Patent at Fort William, Madras and Bombay, the jurisdiction previously exercised by the Supreme Courts they respectively superseded. This position is recognized in clause 18 of Letters Patent of 1862 and clause 19 of the Letters Patent of 1865.

The only other reference to statute law necessary is to the Government of India (Consolidating) Act, 1915 (5 & 6 Geo. V. c. 61), section 112, which provides as follows:

> The High Courts at Calcutta, Madras, and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, as the case may be, shall, in matters of inheritance and succession lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject.

It is admitted by counsel for the caveator that this section is not intended to alter the law, which remained the same after its passing as before its enactment.

The short question, therefore, is whether from 1726 onward the law of England has applied to the Jewish community in Calcutta in the matter of succession, or whether that community is governed by a customary law peculiar to itself, which this Court will enforce.

Now, in my opinion, in order to show that the English law, on its introduction in 1726, was inapplicable to a particular community, it is not enough to prove that the community had, prior to that date, been governed by a law differing from English law. What must be shown is that the English law is based on or presupposes social or political conditions peculiar to the country of its origin. Here, no attempt has been made to demonstrate that there is any inherent inconvenience in applying the English law of intestate succession to persons of the Jewish community. It is significant that in only one case has the attempt ever been made to establish the validity of a law of intestate succession peculiar to Jews. That was in the case of *Solomon Hayum Musleah* v. *Ezra Ezekiel Musleah* (1), decided in 1856, when it was held that the English law of inheritance applied to the *mofussil* lands of a Jewish intestate domiciled in Calcutta, at any rate as far as the Supreme Court was concerned. It is true, there are observations, in the judgment of Colville C. J., to the effect that, if it could be established that there was a local law or a custom in the nature of one, differing from the English law of inheritance as to the succession of immoveable property in Bengal when held by others than Hindus, Mahomedans or British-born subjects, effect would be given to it, but I can find, in this expression of opinion, no warrant for holding that in the matter of succession to moveable property Jews in Calcutta are governed by a special or personal law.

The present law of succession received statutory sanction in 1865 and, as far as I am aware, it has until to-day never been questioned that Jews are

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subject to that law. The conclusion I arrive at is that there is nothing to indicate that the Jewish community is now or has at any material time been governed by any law other than that which applies in these matters to the inhabitants of Calcutta not exempted therefrom by the provisions of the statute. In other words, I hold that part V of the Succession Act, 1925, applies to its members.

I may here refer to a passage in Ilbert's Government of India, 3rd edition, page 362:

> The Indian Succession Act, 1865 (X of 1865), which is based on English law, is declared by section 2 to constitute, subject to certain exceptions, the law of British India applicable to all cases of intestate or testamentary succession. But the exceptions are so wide as to exclude almost all natives of India. The provisions of the Act are declared (section 331) not to apply to the property of any Hindu, Mahomedan, or Buddhist. And the Government of India is empowered (section 332) to exempt by executive order from the operation of the whole or any part of the Act the members of any race, sect, or tribe in British India, to whom it may be considered impossible or inexpedient to apply those provisions. Two classes of persons have availed themselves of this exemption—Native Christians in Coorg and Jews in Aden. The former class wished to retain their native rules of succession, notwithstanding their conversion to Christianity. The Jews of British India had agreed to place themselves under the Act, but it was not until some twenty years after the Act had become law that the Jews of Aden, who lived in a territory which is technically part of British India, but who still observed the Mosaic law of succession, discovered that they were subject to a new law in the matter of succession. They petitioned to be released from its provisions, and were by executive order remitted to the Pentateuch.

I have not referred to this before giving my decision, because I do not know the materials on which it is based, and also because I am doubtful whether the circumstances of a political agreement can afford any aid in the interpretation of a statute.

The second point taken is that, although illegitimate, the caveator is the child of the deceased within the meaning of the Succession Act. Mr. Roy maintains that section 8, which speaks of an "illegitimate child," is an indication that where the word "child" is used without qualification it includes children both legitimate and illegitimate.

In my opinion, this is concluded by authority. In *Smith* v. *Massey* (1), Batchelor J. held that where there were two sisters born of unmarried parents, the son of one of them was not the nephew of the other

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for the purposes of section 105 of the Succession Act, 1865, and he observed that he could not conceive that such an act which defines certain relations *simpliciter* intended any other relations than those flowing from lawful wedlock. If this is correct "child" cannot possibly include an illegitimate child.

This is a decision of 1906 and the present Act was passed in 1925. I hold that the ordinary rule for the interpretation of statutes must apply, namely that where words or expressions in a statute are plainly taken from an earlier statute in *pari materiâ* and have received judicial interpretation, it must be assumed that the legislature was aware of such interpretation and intended it to be followed in later enactments. See cases collected in Halsbury's Laws of England, Vol. 27 : Statutes, p. 142, note (*k*).

As to the alleged gift by Sarah Ezra to the caveator, this can give him no interest to support his opposition to the grant. If he is advised to assert his claim to the estate on this basis the proper time to do so is after representation has been obtained.

In the result, I make the order prayed by the applicant and discharge the caveat. The applicant is entitled to his costs on scale No. II as of a hearing. He is further entitled in the first instance to have his costs, out of the estate, taxed as between attorney and client.

Application granted.

Attorneys for applicant : *Orr, Dignam & Co.*

Attorneys for caveator : *K. K. Dutt & Co.*

S. M.