APPELLATE CIVIL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Blagden.

1940

Apl.

CYRIL *v.* J. D'ATTAIDES.*

Succession to estate of Christian dying intestate—Adopted or illegitimate child not an heir—Treatment of child as kittima *or* apatitha*—No power to confer rights on such child—Burma Laws Act, s. 13—Burma Succession Act, s. 37—Codicil, when entitled to be admitted to probate.*

S. 13 of the Burma Laws Act does not apply to Indian or Burmese Christians, and an adopted child is not an heir entitled, on an intestacy, to inherit the estate of his deceased adoptive parent, such parent dying a Christian. S. 37 of the Succession Act does not include adopted children or illegitimate children. A Christian dying without a will cannot confer any rights of succession upon children whom he may have had living with him in his household and treated in the kind of way which would suggest in a Burmese Buddhist household either an *apatitha* or a *kittima* adoption.

Kamawati v. *Digbijai Singh*, I.L.R. 43 All. 525 (P.C.); *Ma Khin Than* v. *Ma Ahma*, I.L.R. 12 Ran. 184, referred to.

A Court could admit to probate a codicil which was intended to be independent of a will where the will was proved to have been in existence and proved to have been lost.

A document cannot be admitted to probate as a codicil when the terms of the codicil will be incapable of being carried out without independent knowledge of what was in the alleged will.

In the Goods of Grigg, 1 P. & D. 72, referred to.

San Po Lwin for the appellant.

Trutwein for the respondent.

ROBERTS, C.J.—This is an appeal by one Cyril through Ma Thein May, his next friend, objecting to the grant of letters of administration to Miss Irene D'Attaides in respect of the estate of the late Mr. L. D'Attaides, who died at Bassein on the 9th November 1938. Miss Irene D'Attaides is a niece of the deceased and the learned District Judge granted her letters of administration notwithstanding the objections of the appellant.

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* Civil First Appeal No. 135 of 1939 from the judgment of the District Court of Bassein in Civil Regular Suit No. 6 of 1939.

Cyril, the appellant, in his objections, said that he was an adopted son. Secondly, he said that there was a will made by the deceased, Mr. D'Attaides, in his favour, that it had been lost, and that an Exhibit document, known as exhibit C-I, which indicated some of his last wishes, should be regarded as a codicil and should be admitted, independently of the will, to probate.

It is perhaps convenient to take the claim in respect of adoption first. The appellant is a Roman Catholic. His father, apparently, was a Buddhist and his mother a Roman Catholic; but the evidence as to who his real father is is by no means conclusive, and he must be taken to be—and, what is much more important, the old Mr. D'Attaides was, quite clearly—a member of the Christian faith, and, accordingly, the rules of Burmese Buddhist Law have no application at all to this case.

Section 13 of the Burma Laws Act does not apply to Indian or Burmese Christians and it is quite clear from the decision in *Ma Khin Than* v. *Ma Ahma* (1) that an adopted child is not an heir entitled, on an intestacy, to inherit the estate of his deceased adoptive parent, such parent dying a Christian. We have been referred to Roman Law and the doctrine of *patria potestas*, but these are not relevant to the appellant's case, and it is clear from the judgment in *Kamawati* v. *Digbijai Singh* (2), and the passage cited with approval by my learned predecessor in giving his judgment in the Rangoon case (1) to which I have just referred, that no acceptance can be given to the view that a deceased person, even though a Christian, had by his acts made such an indication as the law would respect, to the effect that his succession is not to be governed by the Succession Act.

(1) (1934) I.L.R. 12 Ran. 184. (2) (1921) I.L.R. 43 All. 525, 533 (P.C.).

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It was pressed upon us in argument by the learned counsel for the appellant that in section 37 of the Succession Act, which deals with the death of a person intestate who leaves surviving him a child or children, we ought to include adopted children. There is no authority for this view. It is clear that illegitimate children are never included, and it is a fact, as has been explained in many English decided cases, that there is no rule in English Law or among Christians that a person dying without a will confers any rights of succession upon children whom he may have had living with him in his household and treated in the kind of way which would suggest in a Burmese Buddhist household either an *apalhita* or possibly even a *kittima* adoption.

[His Lordship commented on the evidence. No doubt the deceased treated Cyril as a son. It is the custom for Burman Christians to take into their household children as though they were Burman Buddhists and after their death for their relations to accord to those children some share (without making a dispute about it) in the inheritance. These are customs arising out of moral obligations only and the Court has nothing to do with them.

There was some evidence that there existed a document purporting to be a will of the deceased, but of its due execution as a will there was no evidence. There was another document, exhibit 1, which purported to be a codicil. The judgment proceeded as follows:]

Our attention has been drawn by Mr. Trutwein to the provisions of section 63 of the Succession Act; and it is clear from that that the execution of wills is one, as every lawyer knows, which is attended with some solemnity. The testator shall sign or affix his mark to

the will, or it shall be signed by some other person in his presence and by his direction. Secondly, the signature or mark of the person signing (testator or other) shall be so placed that it was intended thereby to give effect to the will of the testator. Then the will must be attested by two or more witnesses: each of them must have seen the testator sign or affix his mark, or see the other person sign; and each witness shall sign the will in the presence of the testator.

There is no kind of evidence that the will was duly executed in this manner, and we are therefore driven to the secondary conclusion that Exhibit C-I if of any legal effect at all would have to be regarded as a codicil independent of the will.

In connection with that matter we obtain some guidance from the case of *In the Goods of Grigg* (1), where it was held that a Court could admit to probate a codicil which was intended to be independent of a will where the will was proved to have been in existence and proved to have been lost. But this is not the case here because, as I have pointed out, we are not even certain that there ever was a will. If there was a will, it is not by any means established that such will was lost, and it may very well have been revoked.

I regret that the learned Judge found it necessary to record the evidence of Father Brun, since it appears to me that what Mr. D'Attaides said to him about revoking a will is not evidence, and we do not know whether the will was lost or revoked if there ever was a will.

Then the next thing is that the codicil must have been independent of the will, but it is quite plain that Exhibit C-I is dependent on the will and itself expressed in its opening words: "To be taken as part

(1) P. & D. 72.

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of my Last Will and Testament and acted upon." It refers to executors of whose identity we are quite unaware.

A person relying on a lost will must not only show that there was a will, but also show what were its terms ; and it will be quite impossible to admit to probate a document as a codicil when the terms of the codicil will be incapable of being carried out without independent knowledge of what was in the alleged will.

* * * *

[His Lordship dismissed the appeal with costs in favour of the respondent to the extent of the security provided.]

BLAGDEN, J.—I agree.