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it, and the reference to time is made only to indicate the event on which certain consequences are to follow according as debts and liabilities of the description indicated do or do not exist.

The point does not admit of elaboration, and is one which would strike different minds in different ways. And though I naturally hesitate to differ from so careful a Judge as Chandavarkar, J., this is the conclusion to which I come.

The result then is that the decree of the first Court must be reversed and the suit dismissed. The cost of all parties throughout will come out of the residue, those of the executors as between attorney and client.

Decree reversed.

Attorneys for appellants :—*Messrs. Unwalla & Pherozshaw.*

Attorneys for respondents :—*Mr. K. D. Shroff*, and *Messrs. Ardeshir, Hormusji, Dinshaw & Co.*

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ORIGINAL CIVIL.

Before Mr. Justice Batchelor.

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February 26.

EMMA AGNES SMITH, PLAINTIFF, *v.* THOMAS MASSEY AND OTHERS, DEFENDANTS.*

Indian Succession Act (X of 1865), sections 20, 22, 105—Relationships contemplated by the Act are legitimate relationships only—Gift by will of the residue to such charities as the trustees may think deserving, is good.

The Indian Succession Act (X of 1865) contemplates only those relationships which the law recognizes, that is, those flowing from a lawful wedlock.

The gift, by will, of the residue to "such charities as the trustees may think deserving" is a good gift, the objects being wholly charitable.

ORIGINATING SUMMONS.

This summons was taken out by Emma Agnes Smith, executrix of the will of one Mary Anne Houghland.

* O. C. J. Suit No. 875 of 1905, O. S.

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Mary Anne Houghland died at Bombay on or about the 22nd of August, 1905, leaving her surviving one Thomas Massey, son of her sister Georgiana Massey

On the 21st August, 1905, Mary Anne Houghland made her will. She appointed the plaintiff and Margaret Connell as executrices of the will. The plaintiff took out its probate on the 4th October, 1905.

Mary Anne Houghland and her elder sister Georgiana were the illegitimate daughters of one Captain Dallas, an Englishman and a Captain in the 3rd Native Cavalry, by a native woman, a Mahomedan or a Kamatee by caste, and were born about the years 1840 and 1836, respectively. The two sisters were some time after their birth baptised as Christians and they subsequently adopted European dress, habits, manners and mode of life.

Georgiana was married to Henry Massey in 1855. She died in 1858 leaving her surviving her son Thomas Massey (defendant).

Mary Anne married John Charles Houghland in 1865. John Charles Houghland died in 1895, leaving him surviving Mary Anne Houghland and no next-of-kin. She died in 1905. By her will she bequeathed certain pecuniary and other legacies to the children of Thomas Massey and to certain other persons.

The will also contained (amongst other) the following provisions :—

(*a*) A sum of Rs 300 to the Bombay Christian Burial Board for the purpose of keeping decently and in good order in perpetuity the grave of the testatrix's late husband John Charles Houghland.

(*b*) Rs. 10,000 to the community known as the Sisters of All Saints at Mazagaon.

(*c*) Rs. 500 to the Bombay Educational Society's Schools, Byculla.

(*d*) Rs. 500 to the Church Missionary Society's Church at Girgaon.

Mary Anne Houghland by her will further directed the remainder of her estate to be divided among such charities as her executrices should think deserving.

On the 5th December, 1905, the plaintiff took out an originating summons for the determination of the following questions :—

1. Whether Thomas Massey is the nephew of the deceased Mary Anne Houghland ?

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2. If he be the nephew, whether the bequests to the community known as the All Saints Sisters, the Educational Society's Schools, Byculla, and the Church Missionary Society's Church, Girgaon, are valid?

3. Whether the direction in the will to divide the remainder of the estate among such charities as the executrices think deserving is valid?

4. Whether the bequest to the Burial Board, Bombay, is valid?

The summons was argued before Batchelor, J.

Strangman, for plaintiff.

Bahadurji, for defendant 1.

Lowndes, for defendant 3.

Raikes (acting Advocate General), for defendant 6.

Bahadurji for defendant 1:—The Indian Succession Act (X of 1865) applies to the testatrix, as she was Christian by religion, though born of a Hindu or Mahomedan mother and a European father. To ascertain her kindred, who would be entitled on intestacy, we have to find the nearest connection descended from a common ancestor (section 20), whether on the father's or mother's side (section 23). And section 8 of the Act shows that the Act is applicable to illegitimate as well as legitimate testators: see also the Oudh Estates Act I of 1869. The Succession Act varies and departs to some extent from the principles of English Law: see the remarks of the Privy Council in *Kurratulain Bahadur* v. *Nuzbat-ud-Dowla* [1]. The defendant No. 1 is therefore a nephew of the testatrix and section 105 of the Indian Succession Act applies to the testatrix's will.

Lowndes:—A bastard in the eye of the law is *nullius filius*. Therefore the testatrix and Georgiana could not have inherited *inter se*: if so, how could their descendants. The testatrix and Georgiana are not sisters in the eye of the law, therefore, Thomas Massey, Georgiana's son, is not a nephew of the testatrix and section 105 of the Succession Act cannot therefore apply. There has been no case on the point since 1865, the year in which the Succession Act was enacted. Further, English law refuses to follow Civil Law when it says that subsequent marriage legitimizes offsprings previously born. The Oudh Estates Act I

(1) (1905) 33 Cal. 116: 7 Bom. L. R. 876.

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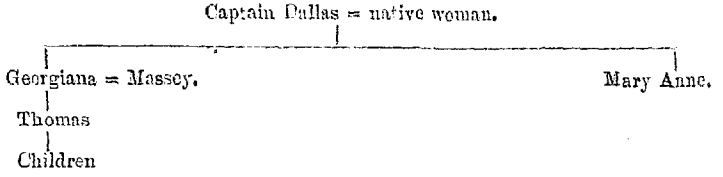
of 1869 cannot help to a construction of the Succession Act, as the former is later in date. Section 105 of the Succession Act does not apply at all, as in this case there is no gift for religious or charitable uses. There is merely a gift to a number of people sued under section 30 so far as my clients are concerned. The community may divide the money among themselves.

Raikes and *Strangman* submitted to the order of the Court.

BATCHELOR, J.:—This originating summons was taken out for the determination of certain questions arising upon the will of one Mary Anne Houghland, a Eurasian. The facts are admitted to be as stated in the plaint, and the relation between the parties is shown in the subjoined tree :



The only questions argued are those numbered (1), (2) and (3) ; and they all turn upon the question whether Thomas Massey is the nephew of the testatrix, Mary Anne, within the meaning of the Indian Succession Act, which admittedly is the law applicable to the parties. The will was made only a day before the testatrix's death, so that, under section 105 of the Act, Thomas Massey if he is the nephew of Mary Anne, would bar bequests to religious and charitable uses. That is the claim which Thomas now prefers, but the difficulty in his way is that his mother Georgiana and Mary Anne were illegitimate daughters of Captain Dallas by a native woman, of whom nothing further is known beyond that she was a Mahomedan or else a Kamati. At first sight it would appear that Georgiana and Mary Anne being in the eye of the law *filiæ nullius*, they were not sisters, and Thomas's claim to be regarded as Mary Anne's nephew must consequently be rejected. That was the view which seemed to me quite clear during the argument, but, since apparently simple cases frequently conceal real difficulties, I adjourned the judgment till to-day in order to see whether Mr. Bahadurji's argument for Thomas might not prove to be more substantial than it seemed. But, in the result, I remain of the same opinion.

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Mr. Bahadurji has cited sections 20 and 22 of the Act, pointing out that there are no words limiting the relations contemplated to relations by legitimacy. But it appears to me that this consideration is really decisive against Thomas's claim. The Act is an English Act, and, as Mr. Lowndes has observed, must be read as part of a system of law which has refused to follow even the Civil law in its relative tenderness towards illegitimate children. Since the Act speaks of certain relations, without more, I infer that the only relations contemplated are those which the law recognizes. There can be no doubt that in an English Act of Parliament the word "child" always applies exclusively to a legitimate child: see per Pollock C. B. in *Dickinson* v. *N. E. Railway Co* (1), per Cotton L. J. in *Guardians of Northwich Union* v. *Guardians of St. Pancras Union*(2). No doubt the Act is applicable to others than persons of exclusively English descent, but these sections are not extended to Hindus, and for my own part I cannot conceive that such an Act as this which defines certain relations *simpliciter*, intended any other relations than those flowing from lawful wedlock. If the argument were conceded, a bastard would share equally with a son—*i. e.* a legitimate son, he being the only son known to our law—and this result appears to me wholly repugnant and impossible. I observe also that though the Act has been in operation for forty years, it is not suggested that the present contention receives any countenance in the reports.

Then it was said that the absence of distinction between legitimate and illegitimate relations in the Act makes in Thomas's favour because in the Oudh Estates Act I of 1869 there is a special provision directing that words expressing relationship denote only legitimate relationship, but it is impossible to construe the Succession Act by another Act passed many years later and possibly *diverso intuitu*.

I have no wish to labour a point which, I confess, appears to me to be too plain for much argument, but if any doubt should remain, reference may be made to section 87 of the Act. This section enacts that in the construction of a will words expressing relationship ordinarily denote only legitimate relationship,

(1) (1863) 12 W. R. 52 (Eng). (2) (1888) 22 Q. B. D. 164.

though, where there is no legitimate relative, they will include an illegitimate relative, who has acquired the reputation of being the relative in question. That of course is a well-known doctrine of English law, and may be found illustrated in such cases as *Seale-Hayne* v. *Jodrell*[1]. But section 87 would be misleading surplusage if the whole scheme of the Act contemplated legitimate and illegitimate relatives indifferently. I must find, therefore, that Thomas Massey is not the nephew of the testatrix, and cannot take advantage of section 105 of the Act.

That being so, it is unnecessary to pronounce upon Mr. Lowndes's other argument that the gift to the "All Saints Sisters at Mazagaon" is a gift to individuals and not a gift to religious or charitable uses. The gift is actually to the "Community known as the All Saints Sisters at Mazagaon", and, if I had to decide the point, I should hold it to be a gift to charity, having regard to the words used and to the other similar dispositions in the will.

The gift of the residue to "such charities as the Trustees may think deserving" is, I think, a good gift, the objects being wholly charitable: see *Moggridge* v. *Thackwell*[2].

There has been no argument as to the gift of Rs. 300 to "The Burial Board, Bombay," for the purpose of keeping in good order in perpetuity the grave of the testatrix's husband, but in the absence of objection, I think the gift may stand. Apart from the constitution and objects of the "Burial Board," upon which there is no evidence, the disposition may be regarded as the settlement of the price to be paid for a certain continuous service which the Burial Board will presumably contract to render.

The answers to the questions will therefore be :—

(1) No;
(2) Does not arise;
(3) Yes;
(4) Yes.

As to costs, the first defendant must pay his own costs: other costs may come out of the estate, those of the plaintiff and of the Advocate General as between attorney and client.

Attorneys for the plaintiff: *Messrs. Smetham, Byrne and Noble.*

R. R.

(1) [1891] A. C. 304.

(2) (1803) 7 Ves. 36.