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for the proper investigation of this case as it now presents itself, it is indispensably necessary that the petitioner should in person be present in Court for examination, and I accordingly make an order to that effect, and adjourn the case to the 4th August next.

Motion adjourned to 4th August next.

Attorneys for the petitioner.—Messrs. *Crawford and Boevey.*

Attorney for the respondent.—Mr. *A. F. Turner.*

TESTAMENTARY.

Before Sir M. R. Westropp, Kt., Chief Justice, and Sir C. Sargent, Justice.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF HAJI ISMAIL HAJI ABDULA, CUTCHI MEMON MAHOMEDAN, DECEASED.

1880 *September* 10.

Probate in cases not governed by the Indian Succession Act—Power of High Court to grant probate in such cases—Probate to take effect throughout India—Limited probate—Probate duty—Cutchi Memon Mahomedan—Succession Act X *of* 1865, *Section* 331—*Act XIII of* 1875—*Hindu Wills Act, Section* 2—*Act* XX *of* 1841—*Act XXVII of* 1860, *Section* 18—*Court Fees Act VII of* 1870, *Schedule I, Article II.*

In cases not governed by the Indian Succession Act (X of 1865), probates and letters of administration granted by the High Court of Bombay in respect of Hindus, Mahomedans and other persons not usually designated as British subjects take effect only, and can only be granted, for the purpose of recovering debts and securing debtors paying the same, except so far as is otherwise provided in Act XXVII of 1860; and probate duty is only payable on the amount of such debts.

Cutchi Memons are not Hindus within the meaning of section 2 of the Hindu Wills Act (XXI of 1870), and, therefore, probate to take effect throughout India cannot be granted in the case of a will of a Cutchi Memon testator.

Cutchi Memons are Mahomedans to whom Mahomedan law is to be applied, except when an ancient and invariable special custom to the contrary is established.

THIS was an application for probate. The applicants were Haji Ahmed Haji Abdula and Haji Hussan Haji Abdula, brothers of the deceased, who in his will had nominated them together with a third brother (who had predeceased the testator) as his "trustees and executors".

The testator, who was a Cutchi Memon, died on the 16th June, 1878, leaving a widow, two sons, two daughters, and three grandsons him surviving. His will was dated the 19th February, 1878, and by it he disposed of all his property, which amounted to

upwards of Rs. 5,83,000. The greater portion of this property consisted of the testator's share of the capital stock, immoveable property and securities belonging to the firm of Haji Abdula Nur Mahomed in which he and his brothers were partners. His share of the immoveable property of the firm amounted in value to the sum of Rs. 1,50,000. All the property in question had been acquired by the deceased himself.

Certain ships belonging to the partnership were registered in the name of the testator, whose share therein amounted in value to the sum of Rs. 38,000, and there were also two Government promissory notes, for Rs. 1,000 each, belonging to the firm which stood in the testator's name. In order to deal with the ships and with these notes it was found necessary to apply for probate. The application was in the alternative (1) that probate should be granted to take effect throughout India; or (2), if such probate could not be granted, then that probate should be issued limited only to the above-mentioned ships and Government notes, and that probate duty should only be payable in respect of the value thereof.

Kirkpatrick for the applicants.—The power to grant probate to take effect throughout India is given by section 2 of Act XIII of 1875, which adds a proviso to section 242 of the Indian Succession Act (X of 1865). Such extended probate cannot be granted in this case, unless the Court holds that the testator belonged to a class to which the Indian Succession Act applies. Section 331 of this Act excludes Hindus from its operation; but by section 2 of the Hindu Wills Act (XXI of 1870), subsequently enacted, that portion of the Indian Succession Act which relates to grants of probate is made applicable to Hindus. The question, then, is whether the testator, who was a Cutchi Memon Mahomedan, can be included within the term "Hindus" as used in this section. The Cutchi Memons, although Mahomedans by religion, are Hindus by race, and they observe the Hindu law of inheritance. They are classed in this respect with the Khojas: *Rahimatbai* v. *Haji Jussap*(1). In that case Sir E. Perry says they "were originally Loannas, a Hindu commercial caste in Cutch. No records are forthcoming to indicate the period of their conversion."

(1) Perry's Oriental Cases, p. 110.

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As to Khojas, see *Shivji Hasan* v. *Datu Mavji* (1) and *Hirbai* v. *Gorbai*.(2).

If, then, they are Hindus as regards their law of inheritance I submit that they are "Hindus" within the meaning of the word in section 2 of the Hindu Wills Act, and that, therefore, the Indian Succession Act and Act XIII of 1875 apply. The word has not apparently the same signification here that it has in section 331 of the Indian Succession Act. In the notes to Stokes' edition of the Indian Succession Act it is stated that the word "Hindu" in section 331 is used as a theological term, and, therefore, includes Jains and Sikhs. But section 2 of the Hindu Wills Act mentions Jains and Sikhs as well as Hindus. This would be superfluous if it was intended that religion should be the test. We contend that race and usage are the tests, and not religion, which may vary from time to time. A Hindu may discard all creeds, and become an infidel, but he does not thereby cease to be a Hindu. The testator was a Hindu by race and usage of inheritance, and, therefore, ought, by section 2 of Act XXI of 1870, to be entitled to the rights given by the Indian Succession Act, sec. 242, as amended by section 13 of Act XIII of 1875. Counsel referred also to Mayne's Hindu Law (1st ed.) paras. 53, 55, and 56; and *Abraham* v. *Abraham*(3).

But, if the Court decides against us on this point, then we ask for probate limited only to the Government promissory notes and the testator's share in the ships. No probate is needed in the case of a Mahomedan: see cases cited in *Lalchand Ramdayal* v. *Gumtibai*(4). Probate duty is to be paid on property in respect of which probate is granted: Court Fees Act VII of 1870, Sch. I, art. 11. We cannot be asked to pay duty upon the whole property when probate is only required for a small portion of it. Counsel referred to Act XX of 1841; Act XXVII of 1860, sec. 18; *In the goods of Ramchand Seal* (5); *Maniklal Atmaram* v. *Manchershi Dinsha*(6).

The Hon. *F. L. Latham* (Acting Advocate General) for the Crown.—We do not contest the first part of this application.

(1) 12 Bom. H. C. Rep. 281.
(2) *Ibid.* 294.
(3) 9 Moore's Ind. Ap. 195.
(4) 8 Bom. H. C. Rep. 140; see pp. 144-5-8-9.
(5) I. L. R. 5 Calc. 2.
(6) I. L. R. 1 Bom. 269.

In addition to the points already urged it may be argued that the sections of the Indian Succession Act which refer to the granting of probate relate merely to procedure, and, as such, apply to all cases. So far as that Act deals with the *effect* of probate, it is substantive law, and does not apply to Hindus and Mahomedans; but, so far as it relates to the extent to which probate is to operate, it is a law of procedure. This view of the Act appears to have been taken in Calcutta: *In the matter of Kokya Dine*(1).

As to the second point, we say that, if probate is obtained, duty must be paid upon the whole property with which the will deals. The probate, if once obtained, can be used for any purpose. It establishes the will. Limited probate is almost unknown in England. Counsel referred to the Charter of the Supreme Court, 1823; Act XXVII of 1860.

WESTROPP, C. J.—In this case the two surviving executors, appointed by the will of Haji Ismail Haji Abdula, apply for probate. Their application is, in the alternative, viz., either that probate should be granted to them to take effect throughout the whole of India, or (in case such grant should be refused) that they should be granted probate limited only to the share of the testator in certain ships which form part of the partnership property, and to certain Government promissory notes which stand in the testator's name. We will deal with the second branch of this application first.

The testamentary and intestate jurisdiction conferrred on the Supreme Court of Bombay by the charter of 1823 was in some respects more extensive than the jurisdiction given to the Supreme Court at Fort William. The latter Court was established in 1774, and by the 22nd clause of its charter, (which is dated the 26th March in that year,) it was created a Court of Ecclesiastical Jurisdiction, with power and authority to administer and execute within the provinces of Bengal, Bahar, and Orissa "*towards and upon our British subjects there residing* the ecclesiastical law as the same is now used and exercised in the Diocese of London in Great Britain, so far as the circumstances and occasions of the

(1) 2 Beng. L. R., A. J., 77.

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said provinces and people shall admit or require", and power is thereby given to the Court to proceed in all causes, suits, &c., "and also to grant probates under the same seal of the said Supreme Court of Judicature at Fort William in Bengal of the last wills and testaments of all or any of *the said British subjects* of us, our heirs, and successors dying within the said three provinces, countries or districts of Bengal, Bahar, and Orissa; and to commit letters of administration, under the same seal, of the goods, chattels, credits and all other effects whatsoever *of such British subjects as aforesaid,* who shall die intestate within the said three provinces, &c." By that charter, then, the power of the Supreme Court at Fort William to grant probates and letters of administration was limited only to the case of British subjects within the three named provinces.

The Supreme Court of Madras was established twenty six years later. Its charter is dated the 26th December, 1800, and, by the 37th clause, power is given to the Court to administer "within and throughout Fort George and the limits thereof and the factories subordinate thereto, and all the territories which now are, or hereafter may be, subject to or dependent upon the said Government and towards and upon all persons so described and distinguished by the appellation of British subjects as aforesaid there residing the ecclesiastical law as the same is now used and exercised in the Diocese of London"; and power is given to the Supreme Court "to grant probates of the last wills and testaments of all or any of the said subjects of us, our heirs and successors dying and leaving personal effects within the said territories or districts respectively, *and of all persons who shall die or have effects within the places aforesaid,* and to commit letters of administration, under the seal of the said Court, of the goods, chattels, credits and all other effects whatsoever, *of the persons aforesaid* who shall die intestate." The Supreme Court of Madras had, therefore, under this clause power to issue probates and letters of administration to persons other than British subjects.

The charter to the Supreme Court of Bombay was not granted until December, 1823. The 47th clause of that charter gives to the Supreme Court powers similar to those given to the Court at

Madras. It empowers the Court to administer "within the town and island of Bombay and the limits thereof and the factories subordinate thereto, and all the territories which now are or hereafter may be subject to or dependent upon the said Government, and *towards and upon all persons so described and distinguished by the appellation of British subjects as aforesaid* there residing, the ecclesiastical law as the same is now used and exercised in the Diocese of London in Great Britain"; and full power and authority is given to the Court to grant probates "of the last wills and testaments of all or any of *the said subjects* of us, our heirs and successors dying and leaving personal effects within the said town, island, territories or districts respectively, *and of all persons who shall die or have effects within the places aforesaid,* and to commit letters of administrtion, under the seal of the said Court, of the goods, chattels, credits and all other effects whatsoever *of the persons aforesaid* who shall die intestate, &c."

The provisions of Stat. 21 Geo. III, c. 70, sec. 17, preserved to Hindus and Mahomedans their laws of inheritance and succession, and it was formerly considered doubtful whether this enactment (section 17) did not prevent the Supreme Court of Fort William from granting probates or letters of administration to the estates of Hindus and Mahomedans. That enactment applied to the Supreme Court of Fort William only. A similar provision was, however, introduced into the charter of the Recorders' Courts at Madras and Bombay, and into the charters of the Supreme Court at Madras (cl. 22) and at Bombay (cl. 29).

The cases in which this subject has been discussed will be found collected in the reported case of *Lalchand Ramdayal* v. *Gumtibai* (1). It was eventually held in Calcutta that, with the consent of all the next of kin of the deceased, letters of administration to such estates might be granted: *In the goods of Beebee Muttra*(2).

In 1844, Peel, C. J., said: "In granting administrations to native estates the interference of the Courts originally proceeded upon the supposition of the consent of the parties interested"(3), and in

(1) 8 Bom. H. C. Rep., O.,C. J., p. 140; see p. 144.

(2) 1 Morton 75; 1 Morley's Dig. 245, pl. 60, and p. 384, pl. 195.

(3) *In the goods of Shaik Nathoo,* Fulton's Rep. 485-6.

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the case of *Sumbhoochander Mitter* (1) the same learned Judge said : " A Hindu is not bound to apply for probate...... We have several times been applied to for administration of Hindu and Mahomedan estates on consent of *some* of the next of kin, but have always refused it, as it would be establishing indirectly a compulsory jurisdiction over Hindus and Mahomedans. *It can only be done on the consent of all, and then the jurisdiction is founded on their consent.* But, if done with the consent of some only, *it would be an interference with their law of inheritance, by breaking the descent and making one representative, whereas the Hindu law says all representatives.* Such an interference would be a violation of the Statute (21 Geo. III, cl. 70, sec. 17), which says ' that Hindus and Mahomedans are to have their own law of inheritance and succession.' "

Section 14 of Act XX of 1841 (which Act related only to "Hindus, Mahomedans and others not usually designated as British subjects" (2) " declared and enacted that all probates and letters of administration granted by any Court in cases in which any of the assets of the deceased were within the local jurisdiction of the Court granting the probate or letters of administration should have the effect of probates and letters of administration granted in respect of the property of British subjects, *but for the purpose of the recovery of debts only and the security of debtor paying the same,* except so far as in this Act provided." (3)

Act XX of 1841 was repealed by Act XXVII of 1860, the Act by which these matters are now governed. It recites that "it is expedient to consolidate and amend certain Acts now in force which provide greater security for persons paying, to the representatives of deceased Hindus, Mahomedans, and others not usually designated as British subjects, debts which are payable in respect of the estates of such deceased persons, and which facilitate the collection of such debts by removing all doubts as to the legal title to demand and receive the same." It relates to the persons above specified only (4), and it re-enacts many of the provisions of Act XX of 1841, including section 14. The section re-enacting that section is section 18, which runs thus : " All probates and

(1) 1 Taylor & Bell, 39-40.

(2) Secs. 1 & 15.

(3) *Vide* sec. 7.

(4) Preamble and sec. 23.

letters of administration granted by any Supreme Court of Judicature in cases in which any effects belonging to deceased persons were, at the time of their deaths, within the local jurisdiction of the Court granting the probate or letters of administration, shall have the effect of probate and letters of administration granted in respect of the property of British subjects, *but for the purpose of the recovery of debts only,* and the security of debtors paying the same, except so far as is in this Act provided"(1).

Under the High Court charters of 1862 and 1865 the testamentary and intestate jurisdiction of this Court remained the same as it was at the time when the Supreme Court charter was granted—qualified, however, by Act XXVII of 1860, sec. 18, with respect to Hindus, Mahomedans and others not usually designated as British subjects in the manner already stated; and the result is this in cases to which the Indian Succession Act does not apply, that probates and letters of administration granted by this Court in respect of such persons take effect only for the purpose of recovering debts and securing debtors paying the same, except so far as is otherwise provided in Act XXVII of 1860. It is, therefore, only for this purpose that probate can be granted; and, in the case now before us, probate must be granted, limited as indicated in section 18 of this Act.

The amount of probate duty payable is regulated by Act VII of 1870, Sch. I, art. 11, which provides that a duty of two per cent. shall be paid on the amount or value of the property in respect of which probate is granted if such amount or value exceeds Rs. 1,000. As, in the present case, probate is only granted in respect of such debts as may be due to the estate, the duty payable by the executors will be two per cent. on whatever the amount of such debts may be. The amount secured by the Government promissory notes will be included among the debts in respect of which such duty is leviable, and for which probate will be granted, but the probate can have no operation in respect of the testator's share in the ships mentioned in the affidavits of the appellants.

With reference to the first branch of the application, viz., that probate should be granted to take effect throughout India, we are

(1) See secs. 8, 21.

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of opinion that such probate cannot be granted. We do not think that Cutchi Memons can be regarded as Hindus within the meaning of the Hindu Wills Act, by which section 242 of the Indian Succession Act with the clause subsequently added by Act XIII of 1875 is made applicable to Hindus. We know of no difference between Cutchi Memons and any other Mahomedans, except that in one point connected with succession it was proved to Sir E. Perry's satisfaction that they observed a Hindu usage which is not in accordance with Mahomedan law. That is not enough to bring them within the term 'Hindu' as used in the Hindu Wills Act. It is admitted that, among such Memons, marriages are celebrated by the Kazi, they attend the masjid, they belong to the Suni division of Mahomedans, and make pilgrimages to Mecca. Under these circumstances we must hold them to be Mahomedans to whom Mahomedan law is to be applied, except when an ancient and invariable special custom to the contrary is established.

Probate, therefore, in this case cannot be granted to take effect throughout India. It must be limited to this Presidency, and will be in such form as to confine its operation within the limits prescribed by Act XXVII of 1860.

Attorney for the applicants.—Mr. *H. W. Payne.*

Attorney for Government.—Mr. *R. V. Hearn.*

TESTAMENTARY.

Before Sir M. R. Westropp, Kt., Chief Justice, and Sir C. Sargent, Justice.

September 27.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF THAKER MADHAVJI DHARAMSI.

GOKALDAS MADHAVJI, APPLICANT.

Indian Succession Act (X *of* 1865), *Sections* 179, 226—*Probate—Limited probate.*

Probate limited to part of the estate cannot be granted in cases where under section 179 of the Indian Succession Act (X of 1865) the whole estate is vested in the executor.

THE applicant in this case was the only son and universal legatee and devisee of the testator (a Hindu) who died on the 18th January, 1880, leaving a large amount of property, both