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Ganesh Hari Patvardhan, for the applicant, had obtained a *rule nisi*, which he now moved to make absolute, calling upon the decree-holder to show cause why the orders of the courts below should not be set aside for want of jurisdiction.

Pándurang Balibhadra, for the decree-holder :—The applicant, Manohar, appeared to defend the suit in the Munsif's court. He might then have objected to the court's trying the suit, on the ground of want of jurisdiction. But not having done so, he must be considered to have waived his right to take that objection, and to have submitted to the jurisdiction of the Munsif's court. It is too late for him now to urge the objection.

WESTROPP, J. :—Before the Munsif the applicant either did, or did not, raise the objection of want of jurisdiction.

If he raised it, and the Munsif wrongly disallowed it, he ought to have appealed to the Judge ; and there would have been a special appeal to this court.

But if he did not raise it, he must be taken to have waived it ; and it is certainly too late for him to raise it now, when the Munsif's decree is sought to be executed.

The application is, therefore, rejected with costs.

TUCKER AND WARDEN, JJ., concurred.

Application rejected.

Civil Petition.

Dec. 13.

JAMSEDJI KA'VASJI .....*Appellant.*
MOTI'BA'I, wife of Bamanji Nasarvánji ..... *Opponent.*

Certificate of Administration—Párs Woman—Act XXVII. of 1860.

Where two relatives of a deceased person severally apply, under Act XXVII. of 1860, to a District Judge for a certificate to administer the estate :—*Held* that it is not a proper course for the District Judge to refer them to a regular suit ; he should determine, in the manner pointed out by the Act, whether either, and if so which, of the applicants has a right to the certificate, and grant the same accordingly.

THIS was an application, in the nature of an appeal against an order made by the District Judge of Súrat,

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on the 9th of September 1865, refusing to grant a certificate of administration, applied for under Act XXVII. of 1860.

The applicant's wife, Kharsedbái, having died childless at Súrat, on the 25th of May 1865, leaving considerable property, consisting of lands, houses, Government, promissory notes, shares in joint stock companies, decrees against several debtors, &c., the applicant, who was in possession of the greater portion thereof, on the 16th of June following, applied to the District Judge for a certificate of administration, under Act XXVII. of 1860, alleging that the deceased, in her last will and testament, dated the 24th of September 1862, had appointed him her executor and residuary legatee.

The District Judge, therefore, issued a proclamation inviting all persons who wished to dispute the applicant's right to such certificate to appear, and enter their objections. Accordingly, the opponent, Motíbái, a maternal aunt of the deceased Kharsedbái, appeared to oppose the grant of such certificate to the applicant; and, in an application she presented to the Judge, prayed that such certificate might be granted to her.

The case came on for hearing before the Judge on the 9th of September 1865, when he called upon the applicant's vakíl to show, in the first place, that the deceased Kharsedbái was by law competent to make a will. Arguments were, accordingly, addressed to him on that point; but without expressing any opinion whatever on the legal question of competency, or examining a single witness as to the genuineness of the will propounded by the applicant—although several witnesses were present in court—or desiring the opponent to adduce any evidence whatever in support of her claim to such certicate, or against the claim of the applicant, the Judge refused to grant him the certificate applied for, recording a minute in Gujaráti, of which the following is a translation:—

"Jamsedji's application is to the effect that his wife Kharsedbái, made a will: that he is her heir, and that,

therefore, he should get a certificate for the management of her property.

"The opponent contends to the effect that the said will is false; that it becomes void by the conditions mentioned therein; that the deceased Kharsedbái was not competent to make such a will; that the will is void according to the usage of the Pársi caste; that according to the will made by one Rastamji, deceased, she (the opponent) has a right of inheritance to the property of the deceased (Kharsedbái); that, therefore, she should get the certificate; that a woman is not competent to make a will: that the husband of a wife dying without any issue cannot inherit the property which she may have obtained from her mother's house; and many other arguments are taken.

"The point for decision in this case is whether a certificate can be granted to the applicant, according to his application, or not. In regard to this, I am of opinion that a certificate cannot be granted to the applicant; because, from the purport of the application, it appears that he seeks to establish his right of inheritance under the will; and the application is made under Act XXVII. of 1860. Under these circumstances, the Court cannot, under the said Act, declare him to be an heir on the strength of the will. Therefore, the application of the applicant is rejected; and it is determined that the party, who believes himself to have a just right, should file a suit to get this dispute disposed of by the Civil Court."

Hence this application, which was made on the 8th of November 1865, when, it appearing to the Court that the District Judge's refusal to grant the certificate asked for by the applicant, was the result of a misconception on his part as to the nature of the application, the papers and proceedings in the case were ordered to be sent up; and a notice was sent to the opposite party to show cause, why the Judge's order should not be set aside.

The Honourable J. S. White (with him *Shántárám Náráyan*) now appeared to show cause:—The court should not enter-

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tain the application, as the Act, under which the application to the District Judge was made, allowed no appeal against an order rejecting it.—[WESTROPP, J. :—We have jurisdiction to hear this application under Reg. II. of 1827, Sec. v., Cl. 2.] The Judge was not bound to give a certificate to the applicant. It was discretionary with him to grant him one or not; and no case was made out to his satisfaction for granting one. The applicant has not shown that he is likely to suffer by the Judge's refusal. The points in dispute between the parties would be more conveniently disposed of in a regular suit by one of them; and it would be hazardous to give a certificate without requiring security.

Howard (with him *Nánábhái Haridás*), *contra* :—The claim to a certificate under Act XXVII. of 1860, which either party put forward before the District Judge, ought to have been determined by him. He had no option in the matter. The words of Sec. 3 are : "The Court * * * shall determine the right to the certificate, and grant the same accordingly." Counsel was here stopped by the Court.

WESTROPP, J. :—It appears to us that the Judge made his order, refusing to determine the right to a certificate of administration under Act XXVII. of 1860, because he was under a complete misconception as to what would be the legal effect of such a certificate.

He seems to have thought that the certificate would, of necessity, carry with it the right to the beneficial enjoyment of the property of which Kharsedbái died possessed; but such a certificate confers upon the grantee nought save a representative title (Secs. 4 and 5), and he or she would hold the moneys or other effects recovered or taken possession of under it *in usum jus habentium*. The certificate should make no declaration whatever as to the beneficial enjoyment of the property. It should merely authorise the grantee to collect the outstanding assets of the deceased. The 5th section of the Act leaves it open to any person entitled to a beneficial interest in the estate of the deceased, by regular suit, to call the administrator to account for the moneys received by him under the certificate.

The testatrix in the present case seems to have been a Pársi woman, who died domiciled in the Mofussil, and possessed of considerable property. The English law (*a*), which has hitherto been applied to Pársis domiciled in Bombay, would not govern such a case. The *jus mariti* would not attach upon the property of Kharsedbái, nor would her coverture have subjected her to any disability with regard to testamentary power. It has been stated that she was entitled to a life-interest only in some portion of the property of which she died possessed. That circumstance, however, would be no sufficient reason for refusing a certificate of administration for the collection of assets in which she had an interest exceeding a life-estate; and if the executor or administrator sought to recover property in which her estate ceased with her life, either by reason of the limitations contained in the will of Rastamji, or for any other reason, it would be open to the party sued in respect of such latter property to raise that defence.

The Judge, by refusing to grant a certificate of administration to some person as representative of Kharsedbái, may cause great and irreparable injury to her estate. If a long delay be suffered to take place in the constitution of a legally qualified representative, many debtors to the estate may become insolvent, or depart beyond the jurisdiction, or the debts may become barred by the operation of the Law of Limitation; and the very circumstance of the Judge having, after two applications had been made to him, permitted the right of representation to remain undetermined and in abeyance, would go far to warrant debtors (Sec. 2) in withholding payment in the mean time.

We are not by any means to be understood as asserting that a Judge is bound to give a certificate to any person who may first ask for it. But if the will in the present case were fairly and duly executed, we are at a loss to perceive any good reason for refusing a certificate of administration to the husband of the testatrix, if he were named in it as her

(*a*) Now qualified, as regards *intestate* succession, by Act XXI. of 1866.

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executor. As a general rule in England, security cannot be required from an executor; for the Ordinary has no authority to interpose and demand caution (security) of the executor where the testator himself required none: 1 Wms. on Exors., 5th Edn., p. 205. Where an executor is insolvent, Courts of Equity will require him to give security before he enters upon the trust: *Ibid.* 206. Act XXVII. of 1860, Sec. 5, includes the case of an executor as well as of an administrator, and in that respect confers upon courts acting under it, a power not enjoyed by Ecclesiastical Courts. It would have been quite within the competency of the Judge to have protected all persons beneficially entitled, by taking such security as he might think necessary from the executor.

As to the objection made on behalf of Motíbái, who fills the double position of caveatrix and what may be called cross-promovent, that no appeal lies from the order of the Judge in such a case as the present, we do not feel at all certain that it is well founded, or that Sec. 6 can be so strictly construed as to preclude such an appeal; but we do not feel called upon to decide that question, as we conceive that we had full authority, under Reg. II. of 1827, Sec. v., Cl. 2, to do what we have done here: that is, to call for the proceedings of a subordinate court, and to direct the Judge of it to exercise the jurisdiction conferred upon him by an Act of the Legislature, which, on examining the record sent up here in compliance with our order, we find that, owing to a misconception, he has declined to do,—an omission on his part which we consider may be highly prejudicial to the estate of the deceased, and to be quite opposed to the policy of the Act, which is to facilitate, and not to retard, the collection of assets.

We wish it to be distinctly understood that, in making the foregoing remarks, we do not intend to offer any opinion as to who may be the parties beneficially entitled to the property which Kharsedbái possessed.

TUCKER, J., concurred.

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PER CURIAM :—Ordered that the case be remitted to the District Judge : that he may ascertain whether the will is a genuine one; and on due inquiry, after notice to the parties concerned, grant a certificate to the person who may appear entitled thereto, after first taking from the person receiving the said certificate such security as shall seem requisite for the protection of the estate, according to Sec. 5 of Act XXVII. of 1860.

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Jan. 11.

Civil Petition.

Ex parte MANISHANKAR HARGOVAN.

Certificate of Heirship —Irregular Order—Reg. VIII. of 1827.

An order set aside as irregular; it having been made in the absence of one of the parties, to whom no intimation had been given of the day when the case would be heard, and also because the examination of witnesses had been referred to a Munsif.

THIS was an application to set aside, as irregular, the order of the Senior Assistant Judge of Broach, made in a judicial proceeding to which the petitioner was a party.

On the death of Bálmukan Hargovan, his brother Manishankar, the petitioner, applied to the Senior Assistant Judge at Broach for a certificate of heirship, under Reg. VIII. of 1827. The application was opposed by Lalitá, widow of the deceased. The Senior Assistant Judge referred the matter to the Munsif for inquiry and report. The Munsif, accordingly, inquired into the matter, and reported the result to the Senior Assistant Judge, who, without fixing any day for resuming consideration of Manishankar's application, or giving any kind of notice whatever, either to him or to his vakíl, as to when there would be a further hearing of the application, took up the case, and upon the evidence taken before the Munsif, and the report made by him, and after examining one more witness, passed an order in the matter adverse to Manishankar, in the absence of Manishankar and of his vakíl. Hence this application.

Nánábhái Haridás, on the 16th of November 1865, ob-