[ECCLESIASTICAL JURISDICTION.]

In the Goods of Nánábhái Sorábji Mestri, deceased. 1874. January 9.

AVA'BA'I ... ...*Applicant*
PESTANJI NA'NA'BHA'I ... ...*Caveator.*

Will—Signature for testator by another—Attestation—Indian Succession Act X. of 1865, *Sec.* 50—*English Wills Act,* 1 *Vic., C.* 26, *Sec.* 9.

The person making the signature of a will for the testator, is not competent as an attesting witness of its execution under the provisions of the Indian Succession Act.

In the Goods of Bailey, 1 Curt. 914, and *Smith* v. *Harris,* 1 Rob. 262, distinguished.

Badrudin Tyabji, for the caveator, on 6th September 1873, obtained a *rule nisi* calling upon the applicant to show cause why the issue of letters of administration ordered to be issued should not be stayed, on the ground of the existence of a properly executed will of the deceased.

The rule came on for argument before MARRIOTT, J., on the 13th December 1873, when *Mayhew,* for the applicant, showed cause.

Badrudin Tyabji, for the caveator, supported the rule.

On the 9th January 1874 the following judgment was delivered by

MARRIOTT, J. :—The alleged will of the deceased is dated the 16th of July 1868, and the deceased did not sign or affix his mark thereto; but it was alleged to have been signed for him by one Shápurji Sorábji, and the signature and attestation, as translated, were in the following words: "Nánábhái Sorábji, his signature (the testator), having been got to hold the pen, (his) signature was made. The handwriting of Shápurji.

"I Sorábji Hormji Shroff (his) attestation."

It was argued by Mr. Mayhew that Shápurji Sorábji, the person who signed the will for the testator, was not

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competent to be also an attesting witness, under the provisions of Section 50 of the Indian Succession Act, and that, therefore (assuming Shápurji's signature to have been made in the character of an attesting witness), the will was not attested by two witnesses as required by that section.

The first sub-division of Section 50 provides that "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;" and the third sub-division of the same section, omitting the words applicable to the case of a will signed by the testator himself, runs thus :—"The will shall be attested by two or more witnesses, each of whom must * * * have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement * * * of the signature of such other person, and each of the witnesses must sign the will in the presence of the testator; but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

The words "some other person," upon the construction of which the question turns, would appear, in their natural and ordinary sense (in which sense they must be construed), to mean not only some person "other" than the testator, but also some person "other than" the attesting witnesses. Mr. Badrudin Tyabji, however, (who appeared in support of the rule), contended that the words "some other person" mean some person other than the testator, but not other than the attesting witnesses. That construction, however, in my opinion, is incorrect. Because, if any one of the attesting witnesses made the signature himself, it is clear that he could not have seen it made by "some other person"; and inasmuch as the section requires that *each* attesting witness should have seen the signature made by "some other person," it necessarily follows that the words "some other person" must mean some person other than any of the attesting witnesses.

The words "such other person" in the subsequent part of the third sub-division of the section directly refer to the preceding words "some other person," and must also, therefore, mean some person other than the attesting witnesses.

I think, therefore, that the person making the signature to the will is not competent as an attesting witness, and that this alleged will has not been duly attested, according to the provisions of Section 50 of the Indian Succession Act.

In the course of the argument, I was referred to two cases, *In the Goods of Bailey* (*a*), and *Smith* v. *Harris* (*b*), in which it was held under the English Wills Act (1 Vic., C. 26, Sec. 9), that the person signing the will for the testator was competent to be an attesting witness. In my opinion, those cases do not apply. They turned upon the language of the English Act, and that language is materially different from that of the Indian Succession Act, and there is nothing in the English Act, indicating in express terms (as I consider there is in the Succession Act), the intention of the Legislature, that the person making the signature should not be one of the attesting witnesses.

As I have arrived at the above conclusion, it is unnecessary for me to consider the other points made by Mr. Mayhew.

I discharge the rule. Each party to pay their own costs.

Rule discharged.

(*a*) 1 Curt. 914. (*b*) 1 Rob. 262.