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doubtful right of little value, which could only be established by a suit at the expense of the estate.

The construction of the third clause of the will is free from doubt. It falls within the second rule above referred to. The opposite view was but faintly contended for by Mr. Robertson in his opening address. The Advocate-General in his reply practically abandoned it.

[149] I find on the issues (His Lordship stated the findings and continued:)

Declare that, upon the true construction of the will of Louis Maria De Souza, the legal representative of Louis Gabriel De Souza was entitled to share in the distribution of the testator's moneys, directed in the second clause of his will, equally with the defendants Peter Francis and Rosa Miranda and the plaintiff Pascoal; and was also entitled to share equally with the defendant Peter Francis and the plaintiff Pascoal in the house and articles specifically devised by the third clause of the will; and direct that the defendant Joao Feleciano Vaz do now deal with the estate in accordance with such declaration. Further directions reserved.

As to costs. The executor Vaz, will of course have his out of the estate taxed as between attorney and client. As the plaintiff does not press the charges against the executor, it is to be regretted that he did not adopt the suggested course of stating a special case, as was done in *Vorley* v. *Richardson* (1). It would be improper to give him his costs out of the estate relating to those charges which he has not established; but it does not seem to make much practical difference, whether he is given his costs out of the estate, or whether he pays them out of his share in it. The same remark applies to the defendant Rosa Antonio. The fairest way to the defendant Rosa Miranda, who has incurred no costs or very little, would be to leave all parties to bear their own out of their own shares; but as, if the plaintiff had stated a special case, I should have given him his costs out of the estate. I consider the proper order now to make is to give him the equivalent of such costs. I shall direct that his costs, taxed as in a short cause, be paid to him out of the estate. All costs not provided for, will be paid by the parties respectively.

Attorneys for the plaintiffs:—Messrs. *Bicknell and Kanga.*

Attorneys for the defendants:—Messrs. *Tobin and Roughton*; and Messrs. *Hore, Conroy, and Brown.*

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12 B. 150.

[150] APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

MIR IBRAHIM ALIKHAN AND OTHERS (*Original Plaintiffs*), *Appellants v.* ZIAULNISSA LADLI BEGAM SAHEB AND OTHERS (*Original Defendants*), *Respondents.** [4th May, 1887.]

Certificate under Act XXVII of 1860—*Reg. VIII of* 1827, *s.* 9—*Jurisdiction to grant certificate of administration—Foreigners residing abroad.*

Under s. 3 of Act XXVII of 1860 a certificate can be granted only for the estate of a British subject either resident within the district where the certificate

* Appeal No. 68 of 1884.

(1) 8 DeG. M. & G. 126.

is sought, or else having no fixed place of residence. The Act does not make provision for administration of the effects of a foreigner domiciled abroad.

While Act XXVII of 1860 has regard to the person, Reg. VIII of 1827, on the other hand, looks simply to the *locality of the assets as the ground of the* Court's jurisdiction to grant a certificate of administration. The intention of s. 9 seems to be that when there are assets within a *zilla*, and the circumstances exist which are specified in the section, a certificate of administration may be granted. The authority given under s 9 must be understood to be the same as under s. 7.

B., a *sardar* of Baroda residing within the Gaikwar's territory, died there, leaving considerable property in the district of Surat. On his death, Mr. Lely, the Assistant Collector of Surat, was appointed administrator of B.'s estate under s. 9 of Reg. VIII of 1827. Shortly after his appointment as administrator, Mr. Lely went to England on furlough. During his absence, the plaintiffs sued, as heirs of B., to recover the balance of principal and interest due on a bond executed by the defendants in favour of B.

Held, that the plaintiffs were incompetent to sue. Mr. Lely having been appointed administrator of B.'s estate, and never having been relieved of his office as administrator by the Court, as contemplated by s. 9 of Reg. VIII of 1827, his *status* still subsisted, and while it subsisted, no one else could represent the estate. The appointment of an administrator excludes other representatives so long as it endures.

[D., 21 B. 102 (105).]

APPEAL from the decree of Khan Bahadur B. E. Modi, First Class Subordinate Judge of Surat, in suit No. 177 of 1881.

The facts of this case, so far as they are material for the purposes of this report, are as follows :—

The plaintiffs sued, as the heirs of Mir Bakar Ali, deceased, to recover the sum of Rs. 1,11,727-15-9, being the balance due on account of principal and interest on a bond executed by the defendants in favour of the deceased on the 9th May, 1871. The [151] plaint stated that the cause of action had accrued on the 13th November, 1879, on which day it was alleged interest was last paid on account of the bond by the defendants. The suit was filed on the 4th October, 1881.

The deceased Mir Bakar Ali was a *sardar* residing at Baroda, outside British India. He died on the 11th August, 1880, leaving considerable property in the district of Surat.

On the 11th January, 1881, the District Judge of Surat appointed Mr. Lely, the Assistant Collector of Surat, to be administrator of the deceased's estate, under s. 9 of Reg. VIII of 1827. On the 17th January, 1881, Mr. Lely gave notice to the defendants, requiring them to pay to him, as administrator, the balance due under the bond of 9th May, 1871. A few months afterwards Mr. Lely went to England. In his absence the plaintiffs filed the present suit, as stated above, on the 4th October, 1881.

On the 16th June, 1882, an order was made by the District Court of Surat granting a certificate to plaintiffs Nos. 1, 2, and 3, under Act XXVII of 1860 ; but no certificate was taken out.

In their written statement the defendants replied (*inter alia*), first, that the suit was barred by Act XVIII of 1848 (1) ; secondly, that the

(1) Act XVIII of 1848 provides for the administration of the estate of the late Navab of Surat, and continues certain privileges to his family. Section 1 of the Act directs that no writ or process shall be sued forth or prosecuted against the person, goods, or property of certain members of the Navab's family (among whom was Ziaulnissa Begam, one of the defendants to this suit), except with consent of the Governor of Bombay in Council first obtained.

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plaintiffs were not entitled to sue without producing a certificate of heirship or administration with reference to the estate of the deceased Mir Bakar Ali; and, thirdly, that the suit was barred by limitation.

The First Class Subordinate Judge held that the suit was not barred by Act XVIII of 1848, as the sanction required by the Act was produced during the course of the suit, and the defendant Ziaulnissa Begam was not served with the summons till after it was filed. He was of opinion that, on the analogy of the decisions of the High Court allowing certificates of administration to be filed pending suit, this sanction was sufficient to [152] give jurisdiction to the Court, although it had not been produced when the suit was instituted.

The Subordinate Judge further held that no certificate was necessary under Act XXVII of 1860, as none but the plaintiffs were the heirs of the deceased, and, as such, entitled to recover the debt; and he was satisfied that the payment of the debt was withheld, not from any reasonable doubt as to the party entitled, but from vexatious and fraudulent motives.

The suit was, however, dismissed, on the ground of limitation—no payments on account of interest having been made within three years next before the institution of the suit.

Against the decision the plaintiffs appealed to the High Court.

Gokuldas Kahandas Parekh, for the appellants, contended that payments on account of interest had been made by a duly authorized agent on behalf of the defendants up to 1879, so that the suit was not barred by limitation.

Lang (with him *Shantaram Narayan*), for respondent No. 1.—The plaintiffs are not competent to sue for a debt due to the estate of the deceased Mir Bakar Ali. The administration of that estate is vested in Mr. Lely, who was appointed administrator under Reg. VIII of 1827. His appointment is still subsisting, and so long as he continues to act as administrator, he, and nobody else, can sue in respect of the estate of the deceased. Nor have the plaintiffs obtained a certificate under Act XXVII of 1860. The lower Court, no doubt, says that the defendants are acting from vexatious motives; but it is impossible to say, in a Mahomedan family, that other claimants may not turn up, and subject the defendant to further litigation. Refers to *Muttammal* v. *The Bank of Madras* (1); *Chunder Coomar Roy* v. *Gocool Chunder Bhuttacharjee* (2); *Janaki Ballav Sen* v. *Hafiz Mahomed Ali Khan* (3). The suit is also barred under s. 1 of Act XVIII of 1848.

Gokuldas Kahandas Parekh.—Mr. Lely was, no doubt, appointed administrator under Reg. VIII of 1827. But he went to [153] England shortly after his appointment. He does not continue to act as administrator. The estate is no longer represented by him. In the absence of any administrator, the plaintiffs are entitled, as heirs of the deceased, to recover the debt. But for this suit the debt would become time-barred, and the estate would suffer a heavy loss. Act XXVII of 1860 does not apply to the estate of an alien residing out of British India, just as the Bombay Minors Act (XX of 1864) does not apply to minors who are not resident within the Presidency of Bombay. Then, as to Act XVIII of 1848, the sanction of Government is not necessary for the institution of the suit. It must be obtained before any writ, summons, or other process is issued to any of the members of the Navab's family.

(1) 7 M. 115. (2) 6 C. 370. (3) 13 C. 47.

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[WEST, J.—You need not discuss this point. We agree with the Court below that the consent of Government is not necessary for the institution of the suit.]

V. K. Dhairyavan, for respondent No. 2.

JUDGMENT.

WEST, J.—The necessity for a certificate under Act XXVII of 1860 in this case is not clearly established. Section 3 of the Act seems to contemplate the issue of a certificate under it only for the estate of a British subject, either resident within the district where a certificate is sought, or else having no fixed place of residence. Here, the deceased Mir Bakar Ali was a *sardar* of Baroda, resident there, where also he died. The representation of such a person would properly be sought in the country he belonged to, and the constituted representative would then sue, or empower some one to sue, in the British Courts. The Act does not make provision for the administration of the effects of a foreigner domiciled abroad. The plaintiffs, however, were, no doubt, bound in some way to establish their representative character, and the certificate sought, under Act XXVII of 1860, was not taken out.

While Act XXVII of 1860 has regard to the person, Reg. VIII of 1827, on the other hand, looks simply to the locality of the assets as the ground of the Court's jurisdiction to grant a certificate of administration. It is unskilfully worded, but the intention of s. 9 seems to be that, when there are assets [154] within a *zilla*, and the circumstances exist which are specified in the section, a certificate of administration may be granted. Under this section it has been held that there must be a separate certificate for each *zilla* where property has to be administered, and the mere presence of property seems enough to found the jurisdiction. The authority given to the administrator under s. 9, as no other provision is made on the subject, must be understood to be the same as under s. 7.

The certificate in the present case was after Mir Bakar Ali's death granted to Mr. Lely. He gave notice, as administrator, to the now defendants to pay the debt claimed in this suit to him as administrator. He has never, it is admitted, been relieved of his office as administrator by the Court, as contemplated in the section under which he was appointed. His *status* subsists still, and while it subsists, no one else can represent the estate. The appointment of an administrator excludes other representatives so long as it endures. The plaintiffs, therefore, were incompetent to bring the present suit. There is strong reason to suppose that they have been met by accounts that have been unfairly tampered with,—a fault for which the defendants are at least civilly answerable. We confirm the decree of the Subordinate Judge in this sense, that we dismiss the suit as incompetently brought, but we direct that the parties respectively are to bear their own costs throughout.

Decree confirmed.