Before Mr. Justice White and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF SHEETANATH MOOKERJEE. 1880
SHEETANATH MOOKERJEE *v.* PROMOTHONATH MOOKERJEE AND ANOTHER. *Aug.* 25.

Certificate to collect Debts, Right to—Act XXVII of 1860*—Question of Validity of alleged Adoption—Title.*

A, alleging himself to be an adopted son, opposed the application for the grant of a certificate under Act XXVII of 1860 to *B*, who, irrespective of the alleged adoption, would be the legal lineal heir of the deceased. The Court before whom the application was made refused the grant of the certificate, on the ground that sufficient *primâ facie* evidence existed establishing the validity of the adoption. On appeal *held*, that the Appellate Court, concurring with the opinion expressed by the Court of first instance in respect of the factum of the adoption, would not be justified in setting aside the decision, on the ground, that such Court was wrong in entering into and deciding the question as to the validity of the adoption.

On an application for the grant of a certificate under Act XXVII of 1860, which is opposed by a party, who alleges he has a preferable title to it, the Court should adjudicate the question of title, with a view to determine which party has the preferential right to the certificate.

IN this case one Sheetanath Mookerjee applied for the grant of a certificate under Act XXVII of 1860 in respect of the debts of one Umasundari Debi, deceased. The applicant was admittedly the heir to the deceased in the ordinary course of succession, but it was alleged by the guardian of one Promothonath, a minor, who appeared to oppose the application of Sheetanath, that such minor was the validly adopted son of the deceased Umasundari Debi, and on that ground no certificate could be legally granted to Sheetanath.

The Court of first instance entertained the question as to the factum and validity of the adoption, and being of opinion that strong *primâ facie* evidence existed as to the adoption, dismissed the application.

The petitioner appealed to the High Court.

Baboo *Srinath Das* (with him *Baboo Hurrender Nath Mookerjee*) for the appellant.—The Court below had no jurisdic-

* Appeal from Order, No. 126 of 1880, against the order of P. Dickens, Esq., Judge of Nuddea, dated the 8th March 1880.

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tion to enter into, and decide, the question of adoption. The alleged adopted son has no *locus standi* at the hearing of an application of this sort, and should not have been heard. The certificate should have been granted, as a matter of course, to the applicant, he admittedly being the legal lineal heir of the deceased. See *Kali Coomar Chatterjee* v. *Tara Prosunno Mookerjee* (1).

Baboo *Nilmadhab Bose* and Baboo *Radhika Churn Mitter* for the respondent.

The judgments of the Court (WHITE and FIELD, JJ.) were as follows :—

WHITE, J.—I think that the Judge, Mr. Dickens, was right in his view, both of the law and of the facts in this case.

Under Act XXVII of 1860, the Court is to determine the right to the certificate, subject to an appeal to this Court.

It appears to me, having regard both to the language and also to the authorities upon the construction of the Act, that when there are two claimants for the certificate, and they dispute between themselves as to the right to the certificate, the Judge ought to determine between those two claimants which of them has the preferential right to the certificate. So also, if one of them only claims the certificate, and the other merely opposes the grant, there is no difference made in the duty of the Judge by the fact, that the opponent alleges himself to be the adopted son of the deceased, and the claimant is the man who would be the heir of the deceased if the adoption had not been made. In the present case the certificate was applied for by the man who was the heir of the deceased failing the adoption, and its issue was opposed by the father and guardian of the adopted son, who is a minor. The Judge has held that so strong a *primâ facie* case in favor of the adoption was made out, that he considered that he was entitled to refuse the application of the claimant. We see no reason to differ from the Judge.

We have been referred to the case of *Kali Coomar Chatterjee* v. *Tara Prosunno Mookerjee* (1) in which the following law is laid

(1) 5 C. L. R., 517.

down :—"An adopted son not being, so to say, a natural heir, and the fact being disputed, we think the Judge was warranted in refusing to enter into that investigation, and the certificate was properly given to the nephew of the deceased, who was the next heir according to the Hindu law, in the absence of any nearer kinsmen and heirs."

That case has been cited as an authority to show why the decision appealed against before us should be reversed, but it appears to me no authority for that purpose. In the case cited, the lower Court had refused to go into the question of adoption, and the High Court considered that the Judge was warranted in so refusing.

It is one thing to say that a Judge is warranted in refusing to go into a particular question, and another thing to say, when he has gone into that question, that his order must be set aside. When a case comes before us, in which the facts are identical with those which are accepted in *Kali Coomar Chatterjee* v. *Tara Prosunno Mookerjee* (1), it will be necessary to consider whether the law there laid down is in accordance with the current of authorities on the subject. It is sufficient now to say that that decision does not stand in the way of our declining to interfere with Mr. Dickens's order.

The appeal is dismissed with costs.

FIELD, J.—The first ground taken in this appeal is, that the District Judge was wrong in entering into and deciding the question of the validity and factum of the alleged adoption.

I am of opinion that this objection to the decision of the lower Court cannot prevail.

The third section of Act XXVII of 1860 provides, "that the applicant, in his petition, shall set forth his title," and that the Court "shall determine the right to the certificate and grant the same accordingly." I think this language clearly shows that it is the duty of the Court to enter into the question of title, when there are contending parties, and the title of the person who bases a preferential right thereupon is not admitted between them. Until this question has been decided, I do not see how

(1) 5 C. L. R., 517.

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the Court can determine the right to the certificate, and grant the same accordingly.

It has been held in the Madras Presidency that the language of the section is not limited to heirs-at-law, and that a person, claiming under a will (to which the Succession Act is not applicable), may obtain a certificate under the Act upon proof of the title based upon the will. In the case of *Mussamut Anundee Koer* v. *Bachoo Sing* (1) Mr. Justice Phear observed as follows:—"No doubt the Judge is quite right in thinking that the proceedings initiated for the purpose of obtaining a certificate under this Act, are not civil proceedings in this qualified sense,—namely, that no title is judicially determined between the parties as the result of the enquiry; still the Court is bound, under the Act, to give the certificate to the person who makes out a title; and it is for that purpose necessary, when parties are not agreed upon the facts, that the Judge should try the issues in the ordinary way by the aid of the evidence put forward by the parties." In *In re Oodoychurn Mitter* (2), the question of title was considered in order to the grant of a certificate under the Act. In another case, *Koonj Behary Chowdry* v. *Gocool Chunder Chowdhry* (3), the case of *Mussamut Annundee Koer* v. *Bachoo Sing* (1) was quoted as an authority for the proposition, that the Judge is bound to enquire which title has been made out for the purposes of the legal requirements of the Act,—a proposition in no way controverted or dissented from, although in that particular case the application for a certificate was rejected upon other grounds, one of which was that this application was made, not really for the purpose of obtaining a certificate to collect debts, but with the object of obtaining a decision on a question of title which could be definitively determined only in a regular civil suit.

In the case now before us, the question of title was raised with immediate reference to the grant of the certificate, and as the District Judge has decided this question carefully, guarding his judgment with the observation, that it shall have effect for the purposes of the Act XXVII only, I am of opinion that his deci-

(1) 20 W. R., 476. (2) I. L. R., 4 Calc., 411.
(3) I. L. R., 3 Calc., 616.

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sion ought not to be disturbed upon the first ground taken in the petition of appeal.

On the question of fact, I think that a strong *primâ facie* case was made out before the District Judge, and that the order made by him in the case is supported on the evidence.

I concur in dismissing the appeal.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Maclean.

THE EMPRESS *v.* SUNKER GOPE.*

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Sept. 17.

Criminal Procedure Code (Act X of 1872), s. 66—Dishonestly retaining in British Territory property stolen beyond British Territory.

A Nepalese subject, having stolen cattle in Nepal, brought them into British territory, where he was arrested and sentenced to one year's rigorous imprisonment. *Held*, that he could not be tried for the theft itself, but that he might be convicted of dishonestly retaining the stolen property.

Reg. v. *Lakhya Govind* (1) followed.

REFERENCE to the High Court under s. 296 of the Criminal Procedure Code.

A Nepalese subject had stolen two head of cattle from the homesteads of two separate individuals in Nepal, and had brought the cattle with him into British territory, where he was arrested and sentenced by the Officiating Joint Magistrate of Mohubarri to one year's rigorous imprisonment under s. 411 of the Penal Code.

The Officiating Magistrate of Durbhangah was of opinion that the case was not cognizable in British territory, and referred the matter to the High Court.

No one appeared on the reference.

* Criminal Reference, No. 1324 of 1880, from F. H. Barrow, Esq., Officiating Magistrate of Durbhangah, dated the 31st August 1880.

(1) I. L. R., 1 Bom., 50.