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 TAMAYA
 v.
 TIMAPA
 GANPAYA.

Defendants 1, 2 and 3 to pay plaintiff half his costs throughout. Plaintiff to pay the other half of his own costs. Defendant 5 to pay his own costs. Plaintiff to pay defendant 4 his costs throughout.

Decree reversed.

ORIGINAL CIVIL.

Before Mr. Justice West.

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 May 1.

FATMA AND OTHERS, PLAINTIFFS, v. SHAIKH ESSA BIN KHALIFFA
 AND OTHERS, DEFENDANTS.*

*Mahomedan will—Probate and Administration Act V of 1881—
 Necessity of probate.*

An executor of the will of a deceased Mahomedan, since the 1st April, 1881, the date of the coming into force of the Probate and Administration Act V of 1881, cannot claim to represent the estate of his testator until he has taken out probate.

MOTION for dismissal of the suit by consent of all the parties save one plaintiff; and for removal from the record of the name of the plaintiff so refusing to consent.

This suit was originally brought by the plaintiff Fatima and her brother Abdoola bin Khaliffa against the defendants, the brothers and sisters of the plaintiffs, claiming a share in alleged joint family property in the possession of the defendants.

On the 22nd March, 1881, the suit was referred by an order of Court to the arbitration of two arbitrators. On the 13th May, 1881, the plaintiff Abdoola died, leaving him surviving his widow Shaikha and his sister Fatma, and leaving an alleged will whereby he appointed his said sister Fatma, her son Ahmed bin Abdoola, and one Shaik Moosa Shaik Abdool Latiff his exe-

* Suit No. 447 of 1880.

cutrix and executors. On the 30th June, 1881, an order was made, *ex parte*, substituting the names of Shaik Moosa, Fatma, and Ahmed bin Abdoola as the executors and executrix of the last will of Abdoola bin Khaliffa, and the said Fatma and Shaikha as his heirs, as plaintiffs in the place of the said Abdoola bin Khaliffa.

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The alleged will of Abdoola bin Khaliffa was never proved.

All the parties (save only the plaintiff Shaik Moosa) having come to an amicable arrangement of the matters in dispute in the suit, the defendants now applied that the name of the said Shaik Moosa Shaik Abdool Latiff be struck off the record of the suit as a plaintiff, and that the suit be dismissed by the consent of all the parties thereto, save and except the said Shaik Moosa Shaik Abdool Latiff.

Lang for the defendants.—Only one person, Shaik Moosa, now stands in the way of the compromise of this suit, and he is on the record merely as one of three executors of a will which has never yet been proved. Shaik Moosa has no personal interest in the suit whatever, and only objects to our application because he is put up to do so by a third party who in another suit is attempting to establish a claim against the estate of the deceased Abdoola. Abdoola died on 13th May, 1881; the new Probate Act of 1881 came into operation on the 1st April, 1881, and therefore applies. The preamble of Act V of 1881 recites that the object of the Act is “to provide for the grant of probate of wills and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act, 1865, does not apply.” Obviously the intention in passing this Act was to reduce the law of probate and administration to uniformity. Since the Act there has existed no exception to the rule that an executor must arm himself with probate before he claims to represent his testator. Many sections of the Act proceed on that supposition, *e. g.*, sections 90-92, though no one section, it must be admitted, expressly states as much. The whole scheme of the Act, however, shows that that was the intention.

[WEST, J.—Sections 12 and 14, making probate and letters of administration, when taken out, relate back to the death, certainly seem to point to such a construction.]

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Shaik Moosa has, therefore, no *locus standi* in this suit. Section 50, illustration (a) of the Civil Procedure Code (Act XIV of 1882), also implies that probate is necessary.

Inverarity on behalf of all the plaintiffs, other than Shaik Moosa Shaik Abdool Latiff, consented to the application.

Jardine for Shaik Moosa resisted the application.—This suit was begun in Abdoola's life-time. The present plaintiffs, being the executors and the heirs of Shaik Abdoola, were made parties to this suit by order of the Court after the death of Abdoola, and notice of the fact given to the defendants so far back as June, 1881. The defendants then took no objection. The suit was referred to arbitration in Abdoola's life-time, and that reference has been proceeded with up to the present time. One of the issues before the arbitrators is this very point, of whether the executors can sue without having taken out probate. Defendant having raised that issue, and all parties having accepted the trial of that issue by that tribunal, it is not open to him now to come here, the arbitration still existing, and ask the Court to try the very same question. On that ground I raise a preliminary opposition to the consideration of this matter by the Court at this stage of the case. Then, as to the point argued on the other side. It is not necessary that a Mahomedan executor should take out probate. It is conceded that before the recent Act V of 1881 he need not have done so. That being so, unless it finds express language to that effect, the Court will not hold that privilege to have been taken away by the recent legislation. The definition of executor in section 3, and the language of other sections—*e. g.*, sections 4, 88, 89—show that, in the view of the Act, the executor derives his power and authority, not by virtue of any proceeding, as that of taking out probate, but as being the person chosen and empowered by the testator in the will. If the intention of the Legislature had been to insist on probate in all cases, surely some express provision to that effect, such as is contained in section 187 of the Indian Succession Act X of 1865, would have been found in the new Act.

[WEST, J.—That section was made applicable to Hindus, Jains, Sikhs and Buddhists, by section 2 of Act XXI of 1870, and that Act

is not superseded by Act V of 1881. That does not touch Mahomedans it is true, but it may account for no such express provision being contained in this Act as is found in section 187 of Act X of 1865.]

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The effect is that Mahomedans are still excepted. When Act V of 1881 was passed, Hindus had been treated differently from Mahomedans in this respect for eleven years; and it is a natural presumption, in absence of express provision to the contrary, that the distinction was meant to be perpetuated.

[WEST, J.—If that is so, it is difficult to see how the Act can be worked. A Mahomedan executor, say, not having taken out probate, acts and recovers debts; next day some one comes in, also an executor, takes out probate, and recovers again from the same person. Does not section 12 imply that till probate nobody represents the estate under the will?]

Section 82 says that “after” probate no other than the person proving shall sue, which would be superfluous if no one could sue without first taking out probate.

[WEST, J.—Is not that section directed exclusively to the future? It says “After” probate, and “Until” some other event, only the executor can sue;—“After” meaning “from the moment of.”]

I contend that a comparison of the Acts of 1865, 1870 and 1881 makes it clear that no change has been effected in the law previously existing as to the necessity of probate in the case of Mahomedan executors.

As to section 50 of the Civil Procedure Code (Act XIV of 1882), that section existed in the old Code of 1877 when undoubtedly a Mahomedan executor need not have taken out probate. If my client is entitled to maintain the suit, the Court will not prevent him prosecuting it. There is no authority for saying that two executors can overrule the third and prevent him suing. They may provide the defendant with a good defence to the suit by giving him a valid quittance, but that is all. If the Court should think probate necessary I would ask for time to take out probate, and so perfect a title left imperfect, if it be imperfect, merely through ignorance of what the law on the subject really was.

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Long in reply.—If probate is necessary, the Court will not allow it to be taken out now, and keep the suit alive till that is done.

There are no merits in this executor's resistance to the application. This is a family squabble which all the parties really interested are anxious to settle, and the Court will give them every aid in so doing. The order making the executors parties was without notice and *ex parte*. We have always objected to Moosa appearing before the arbitrators, and we now come to the Court that made the order of reference virtually to ask it to rescind that order.

WEST, J.—The point that now arises on the construction of Act V of 1881 is by no means free from doubt. The difficulty is created by the way in which the Act is drawn with reference to the previous Acts X of 1865 and XXI of 1870. Section 2 of Act XXI of 1870, the Hindu Wills Act, incorporates, amongst others, section 187 of the Indian Succession Act X of 1865, thereby making probate necessary in the case of Hindus, Jains, &c. Act V of 1881, by section 154, amends in some respects, but not in this, section 2 of the Hindu Wills Act. The result is that section 187 of Act X of 1865 is incorporated in Act V of 1881; but that still leaves untouched the case of a Mahomedan will. *Primâ facie*, one would conclude from such inclusion and omission that the omission was intentional. But if we look at the history of this legislation, and see by what steps it has come to the point it has now reached, we must come, I think, to a different conclusion. In 1865 the first Act on this branch of the law was passed, following the lines of English law, but this Act was expressly made inapplicable to the case of the wills of Hindus, Mahomedans and Buddhists (see section 331). In 1870, however, the Legislature felt that it might go further, and, accordingly, it passed an Act (XXI of 1870), extending to Hindus, Jains, Sikhs and Buddhists the main provisions of Act X of 1865, but still excepting Mahomedans. In 1881 the Legislature felt it was safe to go further still, and proceeded, accordingly, to remove this last exception, and to enact Act V of 1881, which was made as applicable to Mahomedans as to other classes. But what was the state of things when this new Act came to be drawn? There was then no previous Act affecting Mahomedans, but there

was one affecting Hindus. If the Legislature had repealed section 2 of the Act of 1870, which made many sections of the Act of 1865 applicable to the case of Hindus, and had set about to re-embody the substance of the latter in the new Act, it would have opened the door to all sorts of ingenious arguments to the effect that, by such repeal, a change in the law was intended : so it repealed and re-embodied but little, and left intact that part of section 2 which incorporated section 187 of Act X of 1865. The inference I am asked to draw from that is that it evidences an intention, not only to keep alive the applicability of section 187 of Act X of 1865 to Hindus, but at the same time, on the principle that *expressio unius est exclusio alterius*, to exclude its applicability to the case of Mahomedans. Certain it is that there exists nowhere in the Act any express provision making that section 187 applicable to the case of Mahomedans ; but, looking to the tenor and object of this last Act, it would be dangerous, I think, and undesirable, to draw a distinction in this respect between Mahomedans and Hindus, unless this were absolutely necessary.

Act V of 1881 must be looked at, I think, for this purpose, and, as regards Mahomedans, just as if the Act of 1870 had never existed.

Now, if one looks at the provisions of the Act itself, I think they imply that all classes of executors, with regard to the necessity of taking out probate, are on the same footing. Section 12 shows clearly that the idea at the bottom of the scheme of the Act was that a will was not to be considered established until probate had been taken out. If any one disputed an executor's title, probate would be necessary. Till probate there was no will "established" ; that is, there was no "will" at all, exacting recognition of the dispositions made and the authority conferred by it. If that is not the meaning of it, there will often arise the practical difficulties I referred to in the course of the argument ; and a debtor will be bound to pay, and yet have no safety in paying, an executor who for some reason or other prefers not to take out probate. A construction which will work such results is certainly one to be avoided, if possible ; the Act as a whole should, if possible, be made to work harmoniously, and should

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be construed so as to agree, as far as may be, with the principles of English law on which it is admittedly based. This section 12 of itself is enough, I think, to justify the construction I have put on the Act, and the rest of the Act I think supports that view. The Act, read as a whole, does, I think, say clearly enough that probate in all cases is necessary. It follows that a Mahomedan executor cannot now claim to represent the estate until he has taken out probate.

Nor on the other point argued do I think that there has been any such recognition of the executors, as such, that the parties must not be permitted now to deny their representative character. There has been no contract, nor anything in the nature of an estoppel: the defendants are better advised as to their rights now, and there is no reason why they should not assert them. I see no reason why Moosa should be allowed time to take out probate, or how any of the parties would benefit by the suit being kept alive. I, therefore, direct that Moosa's name be removed from the record as plaintiff. Costs of the motion to be paid by Moosa.

Attorneys for the plaintiff Shaik Moosa.—Messrs. *Smith and Frere*.

Attorneys for the other plaintiffs.—Messrs. *Payne and Gilbert*.

Attorneys for the defendants.—Messrs. *Macfarlane and Edgelow*.

APPELLATE CIVIL.

Before Mr. Justice Kemball and Mr. Justice Pinhey.

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March 8:

HARI NARAYAN BRAHME (ORIGINAL PLAINTIFF), APPELLANT, v.
GANPATRAV DAJI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*
Res judicata—*The Code of Civil Procedure (Act X of 1877), Sec. 13*—*Ancestral property*—*Partition*—*Omission to insist on property being brought into hotchpot*—*Property out of the jurisdiction*—*Subsequent suit for partition*.

The three defendants G., R. and K. and their brother M., the grandfather of the plaintiff, were members of one family possessing undivided ancestral property consisting of the villages of B., P. and S., the two former being situated in the Poona Zilla, the latter in the Satara Zilla. In 1866 the three defendants (each in a separate suit) sued M. in the Poona Courts for partition of the villages of B.

* Regular Appeal, No. 71 of 1881.