TESTAMENTARY JURISDICTION.

Before Mr. Justice Farran and Mr. Justice Candy.

1894. *July* 31.

DAME JA'NBA'I (ORIGINAL PLAINTIFF), APPELLANT, *v.* SA'LE' MAHOMED JA'FFERBHOY AND ALLI MAHOMED JA'FFERHOY (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (XIV of 1882), Sec. 608—Privy Council—Appeal to Privy Council—Decree—Stay of execution before appeal admitted—Practice—Procedure.

Where a petition for leave to appeal to the Privy Council from a decree of the High Court has been presented, the High Court may grant a stay of execution of its decree although the appeal has not yet been admitted under section 603 of the Civil Procedure Code (XIV of 1882).

MOTION to stay execution of the decree of the appeal Court.

The plaintiff was the widow of Sir Thária Thopán, a Khoja Mahomedan of Bombay. She brought this suit to obtain probate of the will of her deceased husband and of certain codicils, three of which were disputed by the defendants, who were nephews of the testator. On the 9th April, 1894, the Appeal Court (Sargent, C.J., and Farran, J.) varied the decree of the lower Court and ordered probate to issue of the said will and codicils. The defendants (respondents) desired to appeal to the Privy Council, and presented their petition for leave to appeal under sections 598 and 600 of the Civil Procedure Code (XIV of 1882), and notice of this petition was duly served on the plaintiff (appellant).

On the 14th May, 1894, before the appeal had been declared admitted (section 603), or a certificate granted (section 600), the defendants (respondents) gave notice to the plaintiff (appellant) that they would move "for an order that execution of the decree of the Court of appeal, dated the 9th day of April last, may be stayed, and that the registrar be directed not to grant probate of the three codicils dated respectively the 12th January, 1890, 1st November, 1890, and 6th February, 1891, until the proposed appeal to Her Majesty in Council has been heard."

The motion now came on for hearing.

* Suit No. 24 of 1891.

Anderson for the plaintiff (appellant) :—As a preliminary point I object that this motion is premature. The respondents have no right to obtain a stay of execution until their appeal to the Privy Council has been admitted. At present they have not got leave to appeal. It is possible that they may not obtain the necessary leave. Section 608 of the Civil Procedure Code plainly contemplates a stay of execution only after the appeal has been admitted.

Inverarity, for the defendants (respondents), *contra.*

FARRAN, J. :—The appellant has obtained a decree from the appeal Court ordering that probate shall issue to her of the will and codicils of her deceased husband. The respondents desire to appeal to the Privy Council, and with that view have presented the necessary petition under section 598 of the Code, but that petition has not yet come before the Court, and their appeal has not yet been declared admitted. In that state of circumstances they move to stay the execution of the decree which the appellant (plaintiff) has obtained, and the question now raised by the appellant is whether the motion is not premature. On inquiry we find there have been two similar cases before the Court, and there may be others, as the search has not been exhaustive. Those brought to our notice favour the view that the Court at this stage has power to grant the application, but they are not sufficiently numerous to enable us to say that a course of practice has been established which would relieve us from considering the matter upon its merits. The question turns on the construction of section 608 of the Civil Procedure Code. Does it preclude such an application as this until after the appeal has been admitted? We think not. The first clause of the section, referring to the admission of an appeal,—which must, we think, mean the final admission of the appeal under section 603,—declares and enacts what the result of such admission is in the absence of directions to the contrary: the decree notwithstanding such admission shall be unconditionally enforced. The words "admitting the appeal" following the word "Court" in the same clause has, we think, no reference to the time when the Court is to give directions, but are descriptive of the Court which is to give them. They compendiously describe the Court re-

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ferred to in section 598, *viz.* the Court whose decree is complained of. Then follow the remaining clauses of the section (608). They enable "the Court," *viz.* the Court "admitting the appeal," or in other words "the Court whose decree is complained of," to take steps to impose conditions and to give directions as to the execution of the decree sought to be appealed from, but they impose no limitation as to time upon the exercise by such Court of its powers. Nor is there any reason why they should. As to the power of impounding moveable property, it is plain that to be of avail it must be exercised at a very early stage. The same principle must be applied to all. This Court then being the Court admitting the appeal, and not being limited as to time in the exercise of its powers can, if it thinks fit, exercise its powers as to staying execution at the present time. We are, therefore, of opinion that we have jurisdiction now to hear the application, and that it is not premature, though the appeal has not been admitted.

Attorneys for appellant.—Messrs. *Roughton and Byrne.*

Attorneys for respondents:—Messrs. *Little, Smith Nicholson and Bowen.*

ORIGINAL CIVIL.

Before Mr Justice Candy.

1894.
July 31.

GOKULDA'S MUCCANJI, PLAINTIFF, *v.* VASSANJI JAIRA'M AND OTHERS, DEFENDANTS.*

Deed—Creditors' trust deed—Assignment of all his property by debtor to trustees for payment of creditors—Suit by creditor who had signed as creditor and as trustee to recover his debt notwithstanding the deed.

On the 30th March, 1894, the plaintiff sued the defendant, who traded under the name of Vasanji Jairam, to recover Rs. 7,705 due on an adjusted account. On the 17th April following the suit was on the board for hearing, but by consent of parties was adjourned for three months. Later on the same day the defendant executed a deed whereby he assigned all his property to the plaintiff and three other persons as trustees in trust for the payment of his creditors. The deed was executed by the plaintiff and the other trustees both as trustees and as creditors. It contained no release and no agreement by the creditors to take less than the full amount of their debts. It conveyed all the defendant's property to the trustee, who was to collect the estate and divide it rateably among the creditors "without prejudice to the rights of the several creditors to recover" the balance (if any) which might

* Suit No. 129 of 1894.