(XIV of 1882) should be followed—*Appasami* v. *Scott*[1]. In such a case there ought to be a certificate of sale—*Hurjivan* v. *Jamsetji*[2].

SARGENT, C.J.:—We agree with the judgment in *Debendra Kumar* v. *Rup Lall*[3] and the remarks of Turner, C. J., in *Appasami* v. *Scott*[4] in holding that the sale of a mortgage-debt described as such in execution of a decree carries with it the security without attaching the mortgaged property under section 274 of the Civil Procedure Code (XIV of 1882). An objection was taken that there should be a certificate of sale, and *Hurjivan* v. *Jamsetji*[2] was referred to; but there a decree was attached and sold, and it was held that what was really attached and sold was not the piece of paper on which the decree was written, but the interest in immoveable property recoverable under the decree. We must, therefore, reverse the decree and send back the case for a decision on the merits. Costs to abide the result,

Decree reversed.

(1) I. L. R., 9 Mad., 5.
(2) I. L. R., 9 Bom., 64.
(3) I. L. R., 12 Calc., 546.
(4) I. L. R., 9 Mad., at p. 7.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

1893. *December* 20.

MOTIBA'I, WIDOW OF GOVINDJI PREMJI (ORIGINAL OPPONENT), APPELLANT, *v.* KARSANDA'S NA'RA'YANDA'S AND ANOTHER (ORIGINAL APPLICANTS), RESPONDENTS.*

Executor—Section 18 of Act V of 1881—Hindu Wills Act—Indian Succession Act—Acceptance or renunciation of executorship—Probate—Letters of administration with will annexed.

An executrix after being cited as provided by section 16 of Act V of 1881 to accept or renounce her executorship, stated that she was administering the estate, but having applied for a certificate under Act VII of 1889 did not consider it necessary to take out probate.

Held that this was not such an acceptance as is contemplated by section 18 of Act V of 1881, the language of which is the same as that of section 195 of the Indian Succession Act (X of 1865), and that on the executrix declining to prove the will the District Judge was right in granting letters of administration with the will annexed to the sole residuary legatee.

* Appeal, No. 101 of 1893.

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MOTIBA'I v. KARSANDA'S NÁRÁYANDÁS.

THIS was a first appeal from the decision of C. E. G. Crawford, District Judge of Thánáá.

One Govindji Premji, a resident of Thánáá, died on the 20th of December, 1890, leaving him surviving his widow Motibái (the appellant) his nephew Karsandás (a deceased brother's son), his brother Ratansi Premji, his mother Puribái, &c. The testator left a will, dated the 13th December, 1890, in which he appointed his widow Motibái (the appellant) his executrix, and his nephew Karsandás (who was a minor) his sole residuary legatee. The will remained in Motibái's possession, but she did not apply for probate, and accordingly Karsandás, represented by his uncle Ratansi Premji, and Ratansi Premji himself applied to the District Court at Thánáá for letters of administration with the will annexed.

Motibái was duly served with a citation, under section 16 of the Probate and Administration Act (V of 1881), to produce the will, and was required to say whether she would take probate or not. In answer she stated the will was in the custody of the Court

connection with the proceedings which were then pending at her instance under the Succession Certificate Act (VII of 1889).

In answer to a subsequent citation calling upon her either to accept or renounce her executorship on or before the 30th September, 1890, and in the latter case to show cause on that day why petitioner No. 2, Ratansi Premji, should not be granted letters of administration with the will annexed, she said she did not renounce her executorship, that she was already acting as executrix and administering the estate, and that she did not consider it necessary at that stage to take out probate, having applied for a certificate under the Succession Certificate Act (VII of 1889).

The Judge was of opinion that though the above answer was not a renunciation of executorship, still it was not such an acceptance as was contemplated by the Probate and Administration Act (V of 1881), and that under the Act an acceptance must be an expression of the executor's willingness to accept probate.

Motibái having declined to prove the will, the Judge allowed the petitioners to do so, and passed the following order :—

"I direct that letters of administration with will annexed be granted to Ratansi Premji as guardian of the minor, the sole residuary legatee. Costs on opponent."

The opponent Motibái appealed.

P. M. Mehta (with *Jamietrám Nánabhai* and *Chimanlál Setalvad*) appeared for appellant (original opponent):—We accepted the executorship, but declined to take probate which the Judge asked us to do. We have not renounced the executorship. The Judge cited us to produce the will and take probate. This was the first citation. There was also a second citation, and it asked us either to accept or renounce executorship. We answered that we did not renounce executorship, and that we were acting as executrix. Under section 16 of the Act it is not necessary for us to say that we accept the executorship; what was necessary for us to say was that we do not renounce it.

The Judge says that, in order to satisfy the provisions of the Act, the executor must express his willingness to take probate. That is the rule of English law; but, according to the law applicable to the Hindus in the mofussil, it is not necessary for the acceptance of the office of executor that he should express his willingness to take probate. Under the provisions of the Probate Act (V of 1881) what is necessary is to express his willingness to accept the office of executor; it is not necessary to take probate—*Shaik Moosa* v. *Shaik Essa*[1] The parties to this case were Mahomedans, but the law is the same for Hindus as well as Mahomedans. Section 19 of the Act strengthens our contention. In India it is open to a person to act as executor without proving a will.

Branson (with *Shivrám V. Bhandárkar*) appeared for the respondents (original applicants):—*Shaik Moosa* v. *Shaik Essa*[1] lays down that it is not necessary to take out probate with respect to the debtors of the deceased, and nothing more. But when there is a contest between executors appointed under a will and a residuary legatee under the will, it is necessary that the executors should take out probate—*Krishna Kinkur Roy* v. *Rai Mohun Roy*[2]. Sections 16 to 19 of the Probate Act are taken from the Indian Succession Act (X of 1865)—see sections 193, &c.—which

(1) I. L. R., 8 Bom., 241 at p. 253. (2) I. L. R., 14 Calc., 37.

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shows that the Legislature intended to make the rule of English law applicable to Hindus. Browne's Practice, pp. 147 and 350, shows what is the English law on the point. The law relating to wills in India is introduced by English law, and, therefore, the law in India must be governed by the rule of English law—*Mordaunt* v. *Clarke*[1].

SARGENT, C. J.:—The question in this case is, whether the District Judge was right in granting letters of administration with the will annexed to the applicants, the opponent having stated, after being cited as provided by section 16 of Act V of 1881, that she was administering the estate, but did not consider it necessary to take out probate, having applied for a certificate under Act VII of 1889.

Section 18 of the Act of 1881 provides that letters of administration with the will annexed may be granted if the executor "renounces or fails to accept the executorship within the time limited for the acceptance or refusal thereof." It was contended for the appellant that she did not "renounce or fail to accept the executorship" by the mere circumstance of her declining to take out probate. The citation issued under similar circumstances by the English Probate Court calls on the executor "to accept or refuse the probate and executorship of the will."

The language of section 18 of Act V of 1881 is the same as that of section 195 of the Indian Succession Act, which provides for granting letters of administration with the will annexed and which was made applicable to Hindu wills under the Hindu Wills Act, and where it cannot be doubted, from the general provisions of the Act, that the language was intended to mean what is more distinctly expressed in the English form of citation.

But it was contended for the opponent that that construction, if applied to section 18 of the Act of 1881, would be inconsistent with the decision in *Shaik Moosa* v. *Shaik Essa*[2]. The result of that decision is that a Hindu or Mahomedan executor named in a will can sue to recover the estate of the testator without taking probate; but here the question is an entirely different one, *viz.*, whether administration with the will annexed

(1) L. R., 1 Pro. and Div., 592. (2) I. L. R., 8 Bom., 241 at p. 253.

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will be granted, although executors have been named in the will. We see, therefore, no reason for putting a different meaning on the language of section 18 of the Act V of 1881 from what it cannot be doubted is the meaning of the same language in the Succession Act; and the District Judge was, therefore, right in granting letters of administration with the will annexed to the respondents.

Order confirmed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

TURMUKLA'L HARKISANRA'I (ORIGINAL APPLICANT), APPLICANT, *v.* KALYA'NDA'S KHUSHA'L (ORIGINAL OPPONENT), OPPONENT.*

1894. *January* 9.

Civil Procedure Code (XIV of 1882), *Sec.* 285—*Small Cause Court—First Class Subordinate Judge's Court—Grade—Small Cause Court inferior in grade to First Class Subordinate Judge's Court—Decree—Execution—Attachment and proclamation of sale in execution of decree of Small Cause Court—Subsequent application for execution of decree of First Class Subordinate Judge—Validity of sale by Small Cause Court.*

Gumna obtained a decree against Máneklál in the Small Cause Court of Surat and in execution he attached a debt due to Máneklál, and a proclamation of sale was duly issued. Before the sale took place, however, one Kalyándás applied to the First Class Subordinate Judge for execution of a decree which he had obtained against Máneklál in that Judge's Court, and the same debt was then attached. The proceedings, however, under the Small Cause Court decree were continued, and the debt was sold in execution and was purchased by the applicant.

Held, following *Pátel Naranji* v. *Haridás*(1), that the sale by the Small Cause Court was not rendered invalid by the subsequent proceedings in the First Class Subordinate Judge's Court.

The term "grade" in section 285 of the Civil Procedure Code (Act XIV of 1882) has the same meaning as it had in section 5 of the Code (Act VIII of 1859),—that is, it depends upon "the pecuniary or other limitations" of the jurisdiction of the particular Court, and, therefore, as section 285 is applicable to Small Cause Courts, the Small Cause Court is inferior in grade to the Court of the First Class Subordinate Judge.

THIS was an application under the High Court's extraordinary jurisdiction against the order of Khán Bahádur M. N. Nánávati,

* Application No. 93 of 1893 under the extraordinary jurisdiction.

(1) P. J., 1893, 314; I. L. R., 18 Bom., 458.