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crime committed. We accordingly agree with the Sessions Judge in finding that the accused was guilty of murder, and not of the lesser offence of culpable homicide as found by the jury in their first verdict. The second verdict was perverse and must be set aside.

For the above reasons, the Court found the accused guilty of murder and sentenced him to be hanged, but as there were reasons that he had been probably excited by drink, their Lordships said they would ask the Governor in Council whether the sentence might not be commuted.

TESTAMENTARY JURISDICTION.

Before Mr. Justice Starling.

1895.
September 7.

IN THE MATTER OF THE WILL OF TULSIDA'S VARAJDA'S.

DAYA'BHAI TA'PIDAS, APPLICANT, *v.* DA'MODAR TA'PIDA'S, RESPONDENT.

Probate—Will—Executor who has acted required to lodge will and obtain probate.

One Tulsidás Varajdás died in 1883, and by his will appointed his brother Tápidás sole residuary legatee and also his executor, and he directed that in case of Tápidás' death, Dámodar (Tápidás' son) should be executor. Tápidás accordingly acted as executor until his death in May, 1886, and then his son Dámodar continued to administer the estate, but neither of them obtained probate of the will. Tápidás left a will whereby he appointed his two sons Dámodar and Dayábhai (the applicant) his executors and also his residuary legatees. In June, 1895, Dayábhai, stating that he was one of the residuary legatees of Tápidás, who was the sole residuary legatee of Tulsidás Varajdás, applied for a citation to be issued to Dámodar directing him to bring in and prove the will of Tulsidás Varajdás. In reply, Dámodar submitted that there was no necessity to prove the will; that the estate was fully administered, and that he had no funds left in his hands out of which to pay the costs of probate.

Held, that the executor Dámodar must lodge the will in Court, and that, on the applicant Dayábhai paying half the estimated cost of obtaining probate (including probate duty), the executor Dámodar should take out probate of the will.

CITATION to an executor to bring in and prove the will of his testator.

One Tulsidás Varajdás died at Bombay on 21st January, 1883, possessed of considerable moveable and immoveable property in Bombay. He left a will dated the 8th November, 1882.

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By this will he appointed his brother Tápidás Varajdás his executor, and directed that, in the event of Tápidás' death, his son Dámodar Tápidás (step-brother of the applicant Dayabhai Tápidás) should act as executor. Tápidás Varajdás was the sole residuary legatee under the will.

Tápidás acted as executor until his death on the 31st May, 1886, and Dámodar Tápidás then acted and continued to administer the estate, but probate of the will was not obtained either by Tápidás or Dámodar.

Tápidás left a will dated the 26th May, 1885, which was duly proved by his sons the executors thereof, *viz.*, Dámodar Tápidás and Dáyábhai Tápidás (the applicant), on the 27th November, 1886. The said two executors were the residuary legatees under the said will.

On the 29th June, 1895, Dayábhai Tápidás applied for a citation to be issued to his step-brother Dámodar Tápidás requiring him to bring in and prove the will of Tulsidás Varajdás. In his affidavit he stated as follows:—

"5. The said will of Tulsidás Varajdás was not proved by the said Tápidás Varajdás during his lifetime, and the said Dámodardás Tápidás has not yet proved the same although I repeatedly called upon him so to do, and in answer to my inquiry whether he would prove it or not he says that it is not necessary for him to do so.

"6. As one of the residuary legatees of the said Tápidás Varajdás the sole residuary legatee under the said will of Tulsidás Varajdás, I am anxious that the original will of the said Tulsidás Varajdás should be produced and deposited in the office of the Registrar, and that the said Dámodardás Tápidás should be called upon to prove the same, he having already elected to act thereunder.

"7. Under the aforesaid circumstances I pray that this Honourable Court will be pleased to issue a citation addressed to the said Dámodardás Tápidás to produce and deposit the said original will of the said Tulsidás Varajdás into the office of the Registrar, and to prove the same."

In reply, Dámodar Tápidás filed an affidavit in which he stated that the testator's estate had been administered without probate by his father Tápidás and himself with the knowledge and consent of the applicant (Dayábhai); that Dayábhai had never before required the will to be proved; that Dayabhái was trustee of various trusts created in pursuance of the will; that the estate had been completely administered, and that he had now no funds out of which to pay the costs of obtaining probate; and that the

application was now made merely for the purpose of annoyance. The last paragraph of his affidavit was as follows :—

"10. I say that I have no objection to produce the original will of the abevenamed deceased in the Honourable Court ; but having regard to the fact that the estate of the testator has already been fully and completely administered as aforesaid, and the residue paid, I submit there is no necessity of proving the said will. I also submit that under the events which have happened, the said Dayábhai Tápidás had no justification to obtain the present citation to call upon me to deposit and prove the said will. I say that no funds are left from which I can pay the heavy costs of obtaining probate, as the residue of the said testator's estate has already been paid off as aforesaid. Should, however, this Honourable Court be of opinion that it is now necessary to obtain probate of the said will, I am ready and willing to carry out the Court's direction. In that case, the said Dáyábhai Tápidás ought to be made to pay all the costs of obtaining probate, as it is he who, for reasons best known to himself, desires that this expenditure should be incurred, which said expenditure is otherwise entirely unnecessary."

Inverarity for the applicant in support of the citation. He referred to Williams on Executors (8th Ed.), pp. 226-7.

Scott for the executor showed cause.

STARLING, J. :—The respondent in this matter, Dámodardás Tápidás, is the executor of the will of one Tulsidás Varajdás, but he has not proved the will which is in his possession, and has paid away or set apart the estate which came into his hands. The applicant Dayábhai Tápidás, the brother of the respondent, asks for an order that the respondent should bring the will into Court and prove the same, or else renounce probate. The respondent is unwilling to renounce probate, as that would enable his brother to take out letters of administration *cum testamento annexo* and claim possession of the estate of the deceased which has not been distributed, and also to interfere in the management of certain charitable trusts provided for by the will. At the same time the respondent does not desire to take out probate, although, since his father's death, he has been acting as executor, because he would have to pay the whole of the probate duty, and he has in his hands no portion of the estate which can apparently be devoted to that object, and consequently he would have to pay it out of his own pocket.

The question I have to decide is, whether I can order the respondent to prove the will.

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The Indian Succession Act, 1865, and the Probate and Administration Act, V of 1881, do not provide for a case like this. Similar cases have, however, occurred in the Ecclesiastical and Probate Courts in England.

In *Pytt* v. *Fendall*(1) Sir George Lee held that an executor having acted as executor could not renounce probate, and ordered him to take out probate before a certain day. In *Jackson* v. *Whitehead*(2) Sir John Nicholl said he found no case where the Court had refused to dismiss an executor except on the ground of the party having intermeddled with the effects, and that the reason was obvious; that where a party had intermeddled, he had taken upon himself the burden and acquired the responsibility of an executor. In *Long* v. *Symes*(3) the same learned Judge said that if intermeddling would render a man *executor de son tort*, it would also render an executor compellable to take probate, and assigned the executor in that case to take probate before a certain day. See also *Mordaunt* v. *Clarke*(4), where the same principle was followed. This course of proceeding is in no way inconsistent with the provisions of the Indian Acts already referred to, and I think it should be followed in the present case.

The will of Tulsidás Varajdás must, therefore, be lodged by Dámodar Tápidás with the Testamentary Registrar of this Court, and he must take out probate thereof; but I will not, under the peculiar circumstances of this case, order him to do so unconditionally. A portion of the administration was carried out by Tápidás Varajdás, the original executor, and for his acts Dámodar is not responsible personally. All the legacies under the will except two seem to have been paid, and those two seem to have been set apart in a way which is not apparently improper, and the apparent residue was settled in a more or less formal manner between Dámodar and his brother Dayábhai (the applicant), and the same has been divided between them. It is apparent, therefore, that the only reason for the present application is that Dayábhai desires to bring a suit against Dámodar in respect

(1) 1 Ca. Temp. Lee., 553.
(2) 3 Phillim, 577.
(3) 3 Hagg., 774.
(4) 1 P. and M., 592.

of his administration of the estate of Tulsidás, which he cannot do until some one has been recognised as the personal representative. Dayábhai, having quarrelled with Dámodar, wants to make Dámodar pay out of his own pocket all the costs of obtaining probate, and then to have the gratification of bringing the estate into Court. I do not think he should have this double gratification, as I am doubtful whether there is any necessity for probate, except for the purpose of enabling one brother to compel the other to render an account of the estate, and his application thereof to the Court. If he wants probate taken out, he must pay one-half the costs including probate duty.

The order I shall, therefore, make is that Dámodar do lodge the will in Court, and that on Dayábhai paying to Dámodar or his attorneys half the estimated costs of applying for and obtaining probate (including probate duty), such estimate to be settled, if necessary, by the Taxing Master, but without prejudice to Dayábhai's right to have the same debited against the estate, Dámodar do as soon as practicable thereafter apply for and take out probate of the will of Tulsidás Varajdás, deceased. Each party to bear his own costs of this citation and order.

Order accordingly.

Attorneys for applicant:—Messrs. *Chitnis, Motilál and Málvi.*

Attorneys for executors:—Messrs. *Thákordás, Dharamsi and Cáma.*