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property, and we have such a will here. But to my thinking the existence of Bhagdari property does not affect the Mahomedan Law of wills in any way beyond this, that Bhagdari property might in certain circumstances be taken out of the operation of a will. That would happen if the will provided for a division of the testator's property which would be contrary to the Bhagdari Act. In that case the property would be taken out of the operation of the will because the Mahomedan Law could not be applied to it. But I do not think and I cannot see how the existence of Bhagdari property can affect the Mahomedan Law of wills any further than that. In this particular case the will leaves the entire property, including Bhagdari property, to one person. It does not in any way offend against the provisions of the Bhagdari Act. So far as they are concerned, the will would be a perfectly valid will. But when we come to consider the rule regulating the testator's power to make a will, then we find that the will is invalid.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

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December 4.

GOVIND BHIKAJI MAHAJAN (ORIGINAL PLAINTIFF), APPELLANT *v.* BHAU GOPAL LAD AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), section 59—Deed of mortgage—Attestation—Execution—Mark by illiterate executant—Mark described by the scribe—Signature—General Clauses Act (X of 1897), section 3, clause 52.

* Second Appeal No. 998 of 1915.

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An illiterate person signed a deed of mortgage by putting his mark to it, which mark was described by the scribe of the deed. It was attested by two witnesses. The deed was sought to be proved by the testimony of one of the witnesses and the scribe :—

Held, that the deed was duly proved, for its execution was completed when the executant made his mark ; and the object of the scribe in describing the mark was to authenticate the mark, that is, to vouch the execution.

SECOND appeal from the decision of J. A. Saldanha, Assistant Judge at Thana, reversing the decree passed by K. G. Palkar, Subordinate Judge at Alibag.

Suit on mortgage.

The defendants' father passed two mortgage deeds in favour of the plaintiff each for Rs. 300. Both deeds were in the handwriting of a scribe, who had completed the body of the deeds by writing : "The handwriting of....." The signatures on the deeds were made by the defendants' father by affixing the mark of a dagger ; the description of the mark was made by the scribe as follows :—"The mark of a dagger (representing the signature) of Gopal Bapu (made by him) with his own hands. The handwriting of Keshav Chintaman Vaishampayan" (the name of the scribe). Each document was attested by two independent witnesses.

The plaintiff sued to recover the money due on the mortgages. The defendants contended *inter alia* that they had no knowledge of the mortgages. At the trial, the two deeds were sought to be proved by the testimony of one of the attesting witnesses and the scribe.

The Court of first instance held that the deeds were duly proved, and decreed the claim.

On appeal, this decree was reversed by the Assistant Judge who dismissed the suit on the ground that the execution of the deeds was not proved, for it was not shown that both witnesses were present when the deeds

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were signed, and the defect could not be cured by the signature of the scribe.

The plaintiff appealed to the High Court.

R. W. Desai, for the appellant:—In this case the view taken by the lower appellate Court is erroneous. The scribe in this case has not only written the mortgage-deeds but after the mark of the executant has also put his signature and should be regarded as an attesting witness. It would seem that if the scribe witnessed the execution of the document, he should be regarded as an attesting witness: see *Radha Kishen* v. *Fateh Ali Ram*,[1] *Muhammad Ali* v. *Jafar Khan*,[2] *Raj Narain Ghosh* v. *Abdur Rahim*.[3] Even a person signing the name of the executant, but not as a witness to the deed, has been regarded as an attesting witness: *Dinamoyee Debi* v. *Bon Behari Kapur*.[4] This point did not arise in the case of *Ranu* v. *Laxmanrao*.[5] In that case the scribe had written down the document and in concluding the writing had stated that it was written by him. In fact in that case the name of the writer had come before the names of the executing parties. Nor had the point submitted now arisen in the Privy Council case of *Shamu Patter* v. *Abdul Kadir Ravuthan*.[6]

The word "signature" includes "mark," (vide, Stroud's Judicial Dictionary, Vol. III, p. 1879 and the cases cited there): see also the General Clauses Act, 1897, section 3 (52). The mark of the executant is a sufficient signature even though his name is not placed against the mark. The execution is perfect as soon as the mark is affixed. Hence the signature of the scribe that follows the mark is sufficient execution.

(1) (1898) 20 All. 532.
(2) (1897) 17 All. W. N. 146.
(3) (1901) 5 Cal. W. N. 454.
(4) (1902) 7 Cal. W. N. 160.
(5) (1908) 33 Bom. 44.
(6) (1912) 35 Mad. 607.

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P. B. Shingne, for the respondent:—The real point is whether in the moffussil where the present deeds were executed, the signature of the scribe placed after the mark is to be taken as forming a part of the transaction of the functions of execution. The lower appellate Court finds in the affirmative on the point. Therefore, the scribe should not be taken as an attesting witness: see *Burdett* v. *Spilsbury*,[1] *Ranu* v. *Laxmanrao*,[2] *Bryan* v. *White*,[3] *Roberts* v. *Phillips*,[4] vide Stroud, Vol. I., p. 146: "Attest."

BATCHELOR, J.:—The plaintiff, who is the appellant before us, sued to recover on two mortgage bonds. He was defeated in the lower appellate Court because the learned Assistant Judge was of opinion that the bonds were not validly attested as required by section 59 of the Transfer of Property Act.

The question is, whether this opinion is correct. It is clear to us that in the circumstances of the case the provisions of section 59 of the Transfer of Property Act are satisfied if the plaintiff can rely upon the scribe as an attesting witness. Now the state of facts in which this question is to be decided is this. Both the instruments stand on the same footing, and it will be simpler to refer expressly to one only. The executant, then, of this bond was one Gopal Bapu, a marksman. The scribe was one Keshav Chintaman Vaishampayan. The body of the document ends with these words: "I have duly passed in writing this deed of mortgage of my free will after receiving the money in cash. The handwriting of Keshav Chintaman Vaishampayan." And there follow on the left the attestations of two witnesses, and on the right under the word signature these words: "The mark of a dagger representing the signature of Gopal Bapu Lad made by him with his own

(1) (1843) 10 C. & F. 340 at p. 417.
(2) (1908) 33 Bom. 44.
(3) (1850) 2 Rob. 315 at p. 317.
(4) (1855) 4 E. & B. 450.

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hands. The handwriting of Keshav Chintaman Vaishampayan." Keshav Chintaman, the scribe, deposes that he witnessed the execution of the bond by Gopal's affixing of his mark. It is settled law that for the purposes of section 59 of the Transfer of Property Act an attesting witness must witness the actual execution of the document, and that mere acknowledgment of his signature by the executant is not sufficient: see *Shamu Patter* v. *Abdul Kadir*.[1] The learned Assistant Judge in explaining why he considers that the scribe here cannot be regarded as an attesting witness says: "The mere *making of the mark is not* the signature of the executant. There must be something more, that is, a description that it is the mark of so and so. This is done by the writer. The description, I think, only completes the signature or execution by the executant. The writer is only the *alter ego* of the executant or acts as an agent for him in writing his name after the mark, and in giving his name as 'Dastur' he merely indicates who wrote the document and the signature." This view appears to us to be erroneous. In our opinion in the case of an illiterate executant his mark is his signature, and is independent of any writing by which the mark may be explained. That, we think, is borne out by section 3, clause 52 of the General Clauses Act which explains that the word 'sign' shall, with reference to a person who is unable to write his name, include mark. The same view is also expressed in *Baker* v. *Dening*[2] and *In the goods of Thomas Douse*.[3] In this last mentioned case a will was executed by a marksman whose real name was Thomas Douse, but by mistake he was described as John Douse and against his mark was written "the mark of John Douse." The Court granted probate,

(1) (1912) 35 Mad. 607. (2) (1838) 8 A. & E. 94.

(3) (1862) 31 L. J. P. M. & A. 172.

being satisfied that Thomas Douse was the person who made the mark, Sir C. Cress well observing that the execution was perfect as soon as the mark was affixed, so that the writing of the words "the mark of John Douse" against the mark of Thomas Douse did not affect the question. On these grounds we think that the execution of this instrument was completed when Gopal Bapu made his mark.

We have now to consider the effect of the last writing which the scribe made on the paper as set out above. It is nowhere laid down as essential that an attesting witness must be formally described as such on the face of the document. In *Bryan* v. *White*[1], which was cited with approval by the Privy Council in *Shamu Patter's case*[2], Dr. Lushington pronounced in favour of the validity of a will where there was no attestation clause of any description, and laid down that "'attest' means the persons shall be present and see what passes, and shall, when required, bear witness to the facts." It seems to us that the scribe here is a person who fairly falls within this description. He was present and saw what passed; now, when required, he bears witness to the facts. His function as scribe ended when he signed his name at the conclusion of the body of the document. It is true that if matters rested there, he clearly could not be regarded as an attesting witness: see *Ranu* v. *Laxmanrao*[3]. But the differentiating circumstance in the present appeal is that, immediately after the execution by the marksman, the scribe signs his own name under the description of the mark. His object in so doing presumably was, and the effect of his so doing, in our opinion, was, to authenticate the mark, that is to say, to vouch the execution; in other words, this last signature was made not as a scribe, but as an attesting witness.

(1) (1850) 2 Rob. 315 at p. 317. (2) (1912) 35 Mad 607.
(3) (1908) 33 Bom. 44.

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On these grounds we allow the appeal, set aside the decree of the Assistant Judge and restore the trial Court's decree with costs throughout subject to the variation that the first instalment will fall due on the 1st day of March 1917 and thereafter the money will be payable by annual instalments of Rs. 75.

Decree set aside

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

1916. *January* 25. *February* 10.

WILFRED R. PADGETT (PLAINTIFF) *v.* JAMSHETJI HORMUSJI CHOTHIA (DEFENDANT).*

Contract with alien enemy—Status of hostile firms—Common law doctrine—Trading licenses granted to hostile firms, their effect—Licenses granted to Manager of a firm, not ultra vires—*The Hostile Foreigners' Trading Order of 1914—The Indian Councils Act of 1861, section 23—Act I of 1915—Interest made payable under contracts entered into before war—Suspension of interest after war—American cases though not authoritative, noted on a novel point.*

The existence of a state of war between the respective countries of the debtor and the creditor suspends the accrual of interest when it would ordinarily be recoverable as damages and not as a substantive part of the debt, the reason being that a party should not be called upon to pay damages for retaining money which it was his duty to withhold. The accrual of interest is equally suspended, even when the alien enemy creditor remains in the country of the debtor, until the debtor has actual notice that the principal can safely be paid without the possibility of its enuring for the benefit of the enemy during the continuance of hostilities.

SUIT on promissory notes.

The defendant signed five promissory notes for various amounts payable on demand with interest at

* O. C. J. Suit No. 1437 of 1915.