CRIMINAL REFERENCE.

Before Mr. Justice Jardine and Mr. Justice Ránade.

QUEEN-EMPRESS *v.* DEVJI GOVINDJI.* 1895. *July* 29.

Verdict of jury—Special verdict—Murder—Culpable homicide—Grave and sudden provocation—Loss of self-control—Burden of proving loss of self-control on accused—Penal Code (Act XLV of 1860), Secs. 299 and 300—Criminal Procedure Code (Act X of 1882), Secs. 238, 303 and 307—High Court's power of interfering with the verdict of a jury.

The accused was tried for murder. The first verdict of the jury was "guilty of murder under grave and sudden provocation." The Sessions Judge told the jury that it was their duty, after considering the question of provocation, to return a simple verdict of guilty or not guilty. The jury, therefore, brought in a second verdict of "not guilty." The Judge, considering this verdict to be perverse, referred the case to the High Court under section 307 of the Code of Criminal Procedure (Act X of 1882).

Held that the discretion given to the jury after the first verdict was wrong, as the case fell under section 238 of the Criminal Procedure Code (Act X of 1882). Although the charge was only one of murder, the jury had a right to bring in a verdict of culpable homicide, if there was grave and sudden provocation so as to deprive the prisoner of the power of self-control.

Held, also, that the jury were not bound to find a simple verdict of guilty or not guilty. They might have found a special verdict, or findings on matters of fact to which the Judge applies the law.

Held, also, that the first verdict was a verdict of murder, as the jury did not find that the provocation had destroyed the power of self-control.

It is not a necessary consequence of anger, or other emotion, that the power of self-control should be lost. Except where unsoundness of mind or real fear of instant death is proved, the pressure of temptation is no excuse for breaking the law.

Held, lastly, that the High Court will not interfere with the verdict of a jury unless it is shown to be clearly and manifestly wrong.

A verdict ought to be considered a proper and not a perverse verdict if it is one which reasonable men might find on the facts in evidence.

Queen-Empress v. *Dáda Anna*(1) and *Queen-Empress* v. *Maganlál*(2) followed.

THIS was a reference under section 307 of the Code of Criminal Procedure (Act X of 1882) by G. McCorkell, Sessions Judge of Ahmedabad, in the case of *Queen-Empress* v. *Devji*.

The accused was charged with the murder of his wife under section 302 of the Indian Penal Code.

* Criminal Reference, No. 94 of 1895.

(1) I. L. R., 15 Bom., 452. (2) I. L. R., 14 Bom., 115.

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The reference was made under the following circumstances :—

"On the return of the jury into Court, the foreman stated that they were unanimously of opinion that the accused was guilty of murder under grave and sudden provocation.

"The Court pointed out that such a verdict could not be accepted, and that the jury were bound to find a simple verdict of guilty or not guilty. That, if they were of opinion that there was such grave and sudden provocation as the law allows, their verdict should be one of acquittal, but if they find that there is an absence of such grave and sudden provocation, then their verdict should be one of guilty.

"The Court then read over the two accounts of the killing given by the accused in his confession of the 12th May, and in his statement before the Committing Magistrate, and pointed out to the jury that, assuming that there was provocation, it was neither grave nor sudden, and it was actually created by the actions and conduct of the accused himself. Before the Committing Magistrate, the accused practically admits that he had misbehaved with his mother-in-law, and, therefore, he was debarred from pleading that provocation, howsoever grave and sudden, as a plea in abatement of his offence.

"The jury again retired for five minutes and came into Court, and through their foreman delivered a unanimous verdict of 'not guilty.' This verdict is, in my opinion, so clearly perverse, that I feel bound to refer the case to the High Court under section 307, Criminal Procedure Code" (Act X of 1882).

The reference was heard by a Division Bench (Jardine and Ránade, JJ.).

Ráo Sáheb *Vásudev J. Kirtikar*, Government Pleader, for the Crown.

Hormasji C. Coyaji for the accused.

JARDINE, J.:—The jury by unanimous verdict acquitted the prisoner of murder, the only charge made against him. The Sessions Judge considered this verdict to be clearly perverse, and, therefore, submitted the case for the disposal of the High Court under section 307 of the Code of Criminal Procedure. Before

dealing with the facts as a jury, we have as Judges to make some remarks on procedure. The jury were not bound to find a simple verdict of guilty or not guilty. They might have found a special verdict, a string of facts, as in *Reg.* v. *Dudley*(1), to which the Judge applies the law. The option is theirs, not his. This is clearly laid down in *Queen-Empress* v. *Dáda Anna*(2), and again in *Imperatrix* v. *Abdul Razak*(3), a case from the Consular Court at Mombassa in Africa. The verdict first returned was "guilty of murder under grave and sudden provocation." This was, in terms, a verdict of murder under the Indian Penal Code, as the provocation does not reduce the offence to culpable homicide unless it destroys the power of self-control, a fact which this verdict did not find. If a man acting in cold blood slays the man who has given him grave and sudden provocation, the homicide is murder. The verdict does not affirm either that the person provoking was the person killed. Still as the jury in the second verdict acquitted of murder, it may be supposed that they meant at first that only culpable homicide had been proved. This would have been made clear if the learned Judge had questioned them under section 303. Upon their finding a verdict of culpable homicide, which is punishable more severely where there is an intention to kill than in other cases, it would have been the duty of the Judge to ascertain from the jury if there was in their judgment such an intention. Killing by criminal negligence or gross want of skill is different in its quality from killing with intention to kill, caused by grave provocation, suddenly given by the person who is killed. See Criminal Ruling No. 62 of the 27th November, 1890, on section 304 of the Penal Code. The learned Judge also appears to have told the jury that their duty after considering the question of provocation was only to acquit or convict of the charge of murder. This direction was wrong. The present is a case falling within section 238 of the Procedure Code, which says: "When a person is charged with an offence, and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it." If the jury found as a fact that the person killed had given grave and sudden provocation

(1) 14 Q. B. D., 273. (2) I. L. R., 15 Bom., 452

(3) Cr. Rulings for 1894, No. 42.

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so as to deprive the prisoner of the power of self-control, they as the judges of the facts had a right, where the only charge was murder, to find a verdict of culpable homicide.

Before approaching the merits I refer again to *Dáda Anna's* case and to *Queen-Empress* v. *Mánia*[1], as showing the settled practice of this Court not to interfere with the verdict of a jury unless it is shown to be clearly and manifestly wrong. These are the words in *Queen-Empress* v. *Mánia*, which Sargent, C. J., adopted in *Dáda Anna's case*. I sat in both, and it is well known that in my opinion, in which Mr. Justice Ránade has in sundry cases concurred, a verdict, whether correct or not, ought to be considered a proper and not a perverse verdict, if it is one which reasonable men might find. The case ought not to come before this Court under section 307 unless the Judge disagrees so completely with the jury that he considers it necessary for the ends of justice to submit the case. This view taken in *Imperatrix* v. *Bhawáni*[2], by Westropp, C. J., and Melvill, J., was adopted in the Code of 1882. There are many cases where two juries, both composed of reasonable men, unswayed by any prejudice, may take different views, exactly as two Judges may differ. One kind of mind more readily believes in testimony, more readily draws inference of crime. Another kind of mind hesitates to believe, pauses and gives the benefit of doubt. Each draws on its experience of life; and thus we find wide differences between Judges and juries, between the Judge that tries the case and the Judges of appeal. In criminal cases such things as confessions, the testimony of accomplices, the possession of stolen property, are weighed in different scales by different minds. The same occurs in civil cases; *e. g.*, where indiscreet familiarities of a married woman are proved, are they evidence of adultery? A harshly judging set of men might say yes. A more lenient or cautious jury might say no; but if you allowed a new trial in the one case you would have to do the same in the other, as the Judge Ordinary points out in *Gethin* v. *Gethin*[3], and so you would never get to finality. *Dáda Anna's case* is a sample where two different Sessions Judges differ from two different juries, and on the reference,

(1) I. L. R., 10 Bom., 497. (2) I. L. R., 2 Bom., 525.
(3) 2 S. and T., 560.

under section 307, the two Judges of the High Court differ, and at length a third Judge decides the matter. (The Judge then read from report of *Gethin* v. *Gethin*.)

In the present case the Judge and jury were agreed that the prisoner Devji killed his wife Bái Lakhshmi, who was then eight months with child. The question whether he intended to kill her was not asked, but as the medical witness deposes to fracture of the skull and many cutting and punctured wounds, and that these injuries could not have been self-inflicted, it is easy for this Court to hold that the prisoner had an intention to kill. The difference between the Judge and the jury was on the question whether some provocation given by Lakshmi was grave and sudden. The answer in the complete absence of any witnesses has to be gathered from the various statements made by the prisoner to the tribunals. The Judge read them over to the jury and pointed out that in his opinion the provocation alleged by the prisoner was not grave nor sudden; and that whatever it was, he had provoked it himself by misbehaviour with his mother-in-law, which we think cannot be treated in the evidence as an incident forming part of the homicidal transaction, as it belongs to quite a different time and place. I exclude from consideration as evidence some statements made by the prisoner to the police that he was the murderer, as inadmissible under the ruling in *Queen-Empress* v. *Nána*[1], as conduct or otherwise. I think the Judge rightly states the effect of the evidence to be that some time about 4 P.M. on the 11th May last, Lakshmi was heard crying inside their house, where between 5 and 6 P.M. the prisoner Devji was found by the police alone and in bloody clothes with her dead body, the front door being locked from the inside. On the 12th May, he made a confession that just before the police came he had struck his wife on the head with a pound weight, a knife, and a sickle, and that he was caught in his bloody clothes after the police had got the door opened, which he had locked from the inside. He said he had given these deadly injuries, because he was enraged at some *foul abuse* Lakshmi gave him at the time. He accounts for the abuse by a long story. He and his wife had paid a visit to Visnagar; he sent his wife home and stayed with

(1) I. L. R., 14 Bom., 260.

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her mother. He was taunted with insinuations that he had there misbehaved with the latter. When he got home to Ahmedabad and on some occasion, two days before the killing, a third person openly taunted him with the same charge and went on doing so for two days—singing a ribald refrain. Prisoner goes on: "I heard it patiently for two days. My wife said that he had been saying this for two days. It was true. I said that I would write a letter to her mother. She replied that if a letter were written, her mother would be disgraced. My wife began to give me foul abuses, so I was enraged." It is not easy to understand fully what the prisoner means. Under the circumstances the wife had a good right to ask him if the charge was true. Possibly his reply was adding insult to injury, and on his own showing it enraged the wife. On the 20th May, the prisoner made another statement to the Magistrate. From that it appears that the wife was at first angry with the man that made the charge. "For about one and a half day I persuaded my wife to believe that I had not misbehaved, but she was not satisfied and began to abuse me much. She said that she would either kill herself or kill me. We quarrelled much for one and a half day. I then smoked a chillam of gánja. She abused me in the name of my mother and sister, and I then slapped her on the face. She then lifted up the hatchet from the ground and struck it on her head. She was striking this on her head and, therefore, I took up an iron weight and struck her with it in the head. She then took up a knife and came to strike me with it. I gave her a push, and she fell down on the cot. While she was on the point of death, I put water into her mouth." Afterwards on the 24th May, the prisoner denied the killing and said he knew nothing about the matter; he had been taking liquor and gánja; and the defence at the trial was similar. It is not impossible that he had smoked gánja. I think the prisoner's two confessions to be on the whole a tolerably true story. But to what do they amount? They show that the quarrel was not sudden, but had been going on for two days at least. The wife's feelings were probably lacerated by the prisoner's misbehaviour. She may very likely have given him some words of abuse, and he slapped her face. But even if she did, an unprejudiced juryman could not call this abuse, which is a very

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common habit, a grave provocation: to kill a wife under such circumstances by the use of deadly weapons is an act out of all proportion to the abusive words. The prisoner probably got angry as he says: but, in the absence of proof and of any distinct finding by the jury, I will not believe that the power of self-control was lost. She appears to have threatened to kill herself with the hatchet, whereupon he says he struck her on the head with the iron weight. Now the Penal Code makes provocation a question of fact more distinctly one from the jury, than in England, where Judges have modelled the law; and section 299 of the Procedure Code shows this distinctly; it was for the jury to believe or disbelieve the confessions, and to accept or reject any part thereof as true or false. But they have, in my opinion, gone further, and without any reason treated the usual angry language of a quarrel between husband and wife as grave provocation to the use of deadly weapons. It is not clear whether they found that the power of self-control was lost. If this unanimous verdict of acquittal of murder had been given in Bombay, the Judge would have been bound to accept it, and no responsibility for it as a judgment on the facts could be cast on him. It is otherwise in the Mofussil in cases under section 307, where the Judge has a severer duty.

I have given my views sitting as a jury, and now turn to some considerations as a Judge. If a verdict like the present were allowed to stand there would be a precedent in the High Court for acquitting of murder any husband or wife who kills the other with a deadly weapon and then explains that anger was caused by bad language in a domestic quarrel, and that the result was a sudden stop of moral and religious restraint and the fear of the gallows: so that all power of self-control was gone. This would be contrary to *Queen-Empress* v. *Sakhárám*[1], where we say that the fear of the punishment for murder is meant to hold in check these irritable vagabond gánja-smoking husbands, the exception about grave provocation was not meant to supply them with excuses. I am clear that as Judges we cannot give our sanction to the view taken by the jury, which is either an evasion or a new view of the law. Like the killing of the

(1) I. L. R., 14 Bom., 564.

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unoffending and unresisting boy by the starving sailors in the *Queen* v. *Dudley*(1), the killing is murder unless extenuated by *some well-recognized excuse admitted by the law.* We cannot as Judges tolerate any mere suggestion which would lessen the security the law throws round human life. For some reason or other, fallacious excuses are often debated here where cases come from so many Courts, and it is one of our highest functions as the *sacerdotes legum*, the *leges loquentes*, to uphold the ancient and settled doctrines of the law, *e.g.* where a man was killed under torture by a policeman, to lay down that the maxim *respondeat superior* had no application in favour of the prisoner, so in another case that mere jealous suspicion of a wife, however strong, does not reduce the murder to anything less. I regret that when the jury first announced their findings on fact in the special form, it was not ascertained whether they found that words spoken by Bái Lakshmi had destroyed the prisoner's power of self-control. I do not think that a reasonable set of men would have found that those mere words used in a long quarrel had reduced him to an irrational state entirely forgetful of the law and its terrors, something like a spoiled child or an animal. All our training as Judges, all the great decisions make us look with dislike on any theory which makes crime easy and excuses atrocious acts. Many people are angry on serious provocation, yet they do not slay the man or woman who has given it: it is not a necessary consequence of anger or other emotion that the power of self-control should be lost. The use of such a phrase shows that the law takes no notice of those metaphysics which assume that the human will is not free. Except where unsoundness of mind is proved, or real fear of instant death is proved, the burden being on the prisoner, the pressure of temptation is not an excuse for breaking the law. In *Reg.* v. *Dudley*, the Judges would not allow any theory about "necessity" to be made "the legal cloak for unbridled passion and atrocious crime." Since Lord Hale condescended to refute the Jesuits of France, that theory has hardly been mooted in the High Courts of Justice until *Reg.* v. *Dudley*, where Lord Coleridge hints at a Satanic origin:—

> "So spake the Fiend, and with necessity,
> The tyrant's plea, excused his devilish deeds."

(1) 14 Q. B. D., 273.

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In this Presidency the metaphysical question has been debated several times. The leading case is *Queen-Empress* v. *Maganlál* (1), where an inferior tribunal had acted on some rhetorical expressions of Sir Raymond West in a printed minute of the Government of Bombay, which excuses some corrupt Judges and Magistrates, who had volunteered to pay bribes for promotion, on the ground that they were under some coercion of circumstances or the desire to get on in the world, and, therefore, did not act of free will, p. 130. The report shows how strenuously the Judges, at least Mr. Justice Bayley and myself, denounced that sort of philosophy as bad law. It was impossible to retain a corrupt Judge in the service of the Crown; and the specious argument of supposed philosophy did not prevail, and those persons were removed, for Magna Charta will tolerate no purchase of a Judge's office, and will recognise no superior. But since we uttered that deliverance on the law, we have had pointedly to enforce it again at sundry times and in divers manners as appears from the published criminal rulings. So deeply do wrong theories about human free will, if admitted as maxims of law, affect the people. In one of these cases this Court had to uphold the verdict of the jury convicting two persons of murder whom the Judge, whose attention was afterwards drawn to that leading case, would have acquitted. The decisions on the law are clear, and they are guides for the Courts to follow. Our Courts have no duty cast on them of discussing the varying motives to crime as a matter of metaphysics—of sitting as did the fallen angels reasoning high of

> "Providence, foreknowledge, will and fate.
> Fixed fate, free will, foreknowledge absolute,
> And found no end in wandering mazes lost."

Unless the jury were influenced by these things, the Oriental notion of fixed fate, they were not bound to assume, if they ever did, that the prisoner had lost his power of self-control. The law puts on him the burden of proving this loss of power—of proving that the act was not a mere result of natural ferocity, perhaps roused by drink or gánja. I think this theory accounts for what happened better than the theory that the power of self-

(1) I. L. R., 14 Bom., 115.

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control was lost by the trivial provocation. As Sir James Stephen remarks, "the moral character of homicide must be judged of principally by the extent to which the circumstances of the case show on the one hand brutal ferocity, whether called into action suddenly or otherwise, or on the other inability to control natural anger, excited by serious cause"—3 Stephen's History of the Criminal Law, 71.

I am, therefore, of opinion that the learned Sessions Judge was in the present case required by his duty to express complete dissent with the unanimous verdict. To conclude, my judgment on the case sitting both as a jury and a Judge is that the verdict is manifestly wrong and unreasonable, and that the prisoner is guilty of murder and nothing less. As my brother Ránade comes to the same conclusion, the Court now assumes all the responsibilities of a jury and convicts the prisoner of murder and sentences him to death. But on consideration not so much of the jury's verdict by itself as of the obscurity of the evidence and of some indications that the prisoner had been probably excited by drink or gánja, we will ask the Governor in Council to consider whether the sentence may not be commuted.

RÁNADE, J.:—I concur. The Sessions Judge in his charge to the jury appears to me to have too emphatically expressed his opinion in favour of the conviction of the accused on the charge of murder, and discredited the two pleas set up in defence, one of grave and sudden provocation, and the other of intoxication. The questions suggested by both these pleas were matters of fact, and as such the jury, and not the Judge, had to decide them. Clause (*d*) of section 298 no doubt contemplates a certain extent of liberty to the Judge to express his view on questions of fact, but when a Judge lays down that there is not *sufficient* evidence to establish the plea, he in fact trenches upon the peculiar province of the jury to decide upon the sufficiency or otherwise of the evidence to prove allegations of fact (section 299). The charge, indeed, concluded with an admonition to the jury, that it was for them to decide, whether, from the facts proved and the statements made by the accused, they could come to the conclusions that the accused caused the death of his wife, and did so

with the intention of causing her death, but it also asked them to state that the prisoner did not do so in consequence of grave and sudden action or intoxication. The Sessions Judge after setting forth the evidence for and against the prisoner, should have left it to the jury to decide whether it was murder pure and simple, or culpable homicide not amounting to murder, as was alleged by the defence. The jury in the first instance returned a verdict of guilty of murder under grave and sudden provocation. As the degree of intensity of this provocation was not mentioned in the verdict, it was certainly open to the Sessions Judge under section 303 to put a question on that point with a view to ascertain what was the true character of the verdict. The Sessions Judge, however, informed the jury that he could not accept a qualified verdict, and he required them to find the prisoner either guilty or not guilty of murder. He told the jury that if the grave and sudden provocation was of the kind which the law allows, they should acquit the prisoner. In this there was certainly a misdirection, for it was open to the jury on a charge of murder to bring in a verdict stating circumstances which might reduce the murder to culpable homicide not amounting to murder (section 238). The Sessions Judge next read over the evidence again, and pointed out that the provocation was not grave and sudden, and, being the result of his own conduct, it could not be pleaded in extenuation, even if held to be proved. Under the stress of such a reiterated charge, the jury brought in a second verdict of *not guilty* which the Sessions Judge has characterized as perverse, and which it no doubt is on the face of the record, when taken by itself. Reading it in connection with what had preceded it, it is plain that the jury in this case intended really not to acquit the prisoner altogether, but to bring in a verdict of culpable homicide not amounting to murder. The apparent perverseness was to a great extent due to the emphasis laid by the Sessions Judge in his charge on their duty to find the accused guilty of murder, and murder alone. If, instead of calling upon the jury to return an unqualified second verdict, the Sessions Judge had asked them a question as to whether the grave and sudden provocation was of a sort to deprive the prisoner of all self-control, the jury would in all probability have returned a verdict which

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would have satisfied the Sessions Judge—a verdict of guilty of murder. The unusual procedure followed by the Sessions Judge was thus to some extent responsible for the apparent perverseness of the final verdict. This irregularity is, however, not of a sort which has been prejudicial to the prisoner, and this brings us to the consideration of the question of fact as to how far the alleged provocation was grave and sudden so as to deprive accused of self-control. Both the jury and Judge found that the death was caused by an act of the accused, and the only question is whether there was grave and sudden provocation. The accused in his first statement made on the next day after the murder, after giving a long rigmarole story which was not very relevant to the charge, stated that his wife abused him because somebody said that he had committed incest with her mother, and he got enraged and struck her three times with a seer weight, and by a knife eight or nine times, and with a hoe eight or nine times. No amount of abuse could under the circumstances be held sufficient provocation for such cruelty to a pregnant wife. In his second statement made nine days after, he added that he had taken gánja that day, and that his wife had, besides the abuses she gave, threatened to kill herself, and he, therefore, struck her a blow with the seer weight. She then threatened to strike him with a knife, and he gave her a push which made her fall down. Later on, on 24th May, he retracted this statement, and stated that he was drunk and did not know. Of course this second statement of 20th May is not borne out by the numerous wounds found on the body of the deceased in the *post-mortem* examination. In his third statement he admitted that he had taken both *majum* and drink, and that God only knew if he killed her or she killed herself. He would not venture on positive denial. He in fact abandoned the plea of provocation. This is all the evidence on the point. The evidence about his movements in the house before he was captured shows that the accused was not then quite in his senses, and this excitement was due either to intoxication or was the effect of the madness which horrible crime such as this engenders. The plea of intoxication cannot help accused, as it was voluntary intoxication. The other plea was virtually abandoned by him, and even at its best it did not constitute any provocation for the

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.

IN THE MATTER OF THE WILL OF TULSIDA'S VARAJDA'S. DAYA'BHAI TA'PIDAS, APPLICANT, *v.* DA'MODAR TA'PIDA'S, RESPONDENT.

1895. *September* 7.

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,