APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

THERESA, WIDOW OF PEDRU PASCOL MISQUITA (ORIGINAL DEFENDANT No. 5), APPELLANT *v.* FRANCIS JOHN MISQUITA, AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 1 TO 4 AND 6), RESPONDENTS *.

1920.
October 5.

Indian Succession Act (X of 1865), section 50—Will signed by some other person in the presence and by the direction of the testator.

Probate granted of a will signed by some other person than the testator in his presence and by his direction.

PER MACLEOD, C. J.:—"It does not matter whether there are other words written by that person so long as those words do not destroy the effect of the signature, so as to make it appear that the name of the person so signing is not to be taken as a signature intended to give effect to the writing as a will."

FIRST appeal against the decision of P. J. Taleyarkhan, District Judge of Thana, in Suit No. 20 of 1915.

Proceedings for probate.

The will sought to be propounded was made on the 4th August 1910 by one Pedru Pascol Misquita who died on the 6th August, leaving him surviving his widow Theresa, his sister Natal and his brother's daughters, Ana Mary, Monica and Roza. Pedru had no issue. The propounder of the will one Francis John Misquita was adopted by Pedru as his son. The will bequeathed the entire estate, subject to certain legacies, to Francis with a direction to maintain the widow and also a direction that if she left off living with Francis she should get Rs. 200. The will was executed by the testator by asking the Vicar to affix his signature and the Vicar did this by writing the words "the mark of Pedru Pascol Misquita by hand of F. V. D'Souza."

* First Appeal No. 218 of 1918.

1920.

THERESA v. FRANCIS MISQUITA.

Francis remained in possession and enjoyment of Pedru's estate after the latter's death. Theresa was also living with Francis after Pedru's death, and was maintained by him as provided in the will until some time before the application for probate, which was necessitated as a result of a suit brought by a stranger against Francis for a share in Pedru's estate under a sale-deed effected in his favour by one of Pedru's nieces.

The District Judge held that the testator was in a sound disposing state of mind when he made the will, that the marks made in the will were made by the deceased himself and that even if the marks with the writing appertaining to them had been made by the Vicar on his being asked by the deceased to sign for him, it satisfied the requirements of section 50 of the Indian Succession Act. The Judge therefore directed probate to issue.

Defendant No. 5 appealed to the High Court.

D. R. Patwardhan, with *J. A. Valles* and *K. A. Padhye*, for the appellant.

Jayakar, with *G. S. Mulgaonkar*, for respondent No. 1.

MACLEOD, C. J.:—This is an application for probate of the alleged will of one Pedru Pascol Misquita who died on the 6th of August 1910 leaving a widow and an adopted son Francis. The will left the property, apart from legacies, to Francis with a direction to maintain the widow, and also a direction that if she left off living with Francis she should get Rs. 200. It is admitted that the landed property belonging to the deceased was transferred to Francis. The widow continued to live with him for some years, while he managed the property of the deceased. Then disputes arose amongst the family, and evidently suggestions were made that the will of Pascol should be disputed. As the learned Judge points out, Natal, the sister of the

deceased, and his nieces thought that they were entitled to a share of the property; one of them had even purported to sell her alleged share of the inheritance to a third party who had, on the strength of the sale, brought a suit against Francis. The result was, that although there was no necessity for Francis to apply for probate while the family was living in amity, when the suit was brought against him he had to prove the will. Accordingly he filed these proceedings for probate, when they were opposed by the widow and another relation of Pedru Pascol. The learned Judge found that the will had actually been executed by the testator himself by making marks on the will, and directed probate to issue.

That decision has been appealed against, and we have to consider whether the document before us has been executed according to the rules laid down by section 50 of the Indian Succession Act. We cannot agree with the District Judge that the marks on the will which purport to be the marks of the testator were actually made by him. The marks appear altogether in seven places, and although the Vicar who wrote the name of the deceased at the end of the will and various other places said that the deceased made all the marks, he had to admit in cross-examination that he made two of the marks. But if the Vicar had written the words "mark of Pedru Pascol Misquita" leaving a blank space for the mark, and the testator had made the mark, the appearance of the marks in the will would certainly have been different. They evidently were made by the person who wrote the words. The question arises, therefore, whether we can hold that as the will has not been signed or marked by the testator, it has been signed by some other person in his presence and by his direction. I should be inclined to hold, provided the person who signs in the presence and by the direction

1920.

THERESA v. FRANCIS MISQUITA.

of the testator at such a place that it will appear that it was intended thereby to give effect to the writing as a will, that the provisions of the section are complied with, and it does not matter whether there are other words written by that person so long as those words do not destroy the effect of the signature, so as to make it appear that the name of the person so signing is not to be taken as a signature intended to give effect to the writing as a will. Here the Vicar has written his name and purports to explain the meaning of the mark which he said was made by the testator. Setting aside that statement as not being entirely correct, and admitting that the Vicar himself made the mark, still there can be no doubt that what he was doing was intended to take effect as an execution of the will.

Then the question arises whether he was acting in the presence and under the directions of the testator. The general effect of the evidence makes it perfectly clear that this document was prepared on the 3rd, and that various persons assembled at the house of the testator, including the Vicar, the Khot's Karkun and the Sub-Registrar, when the writing at the end of this document was made, as well as the writings at various other places in it, and also the writing at the end of the admission of signature for the purposes of registration. Can it be suggested that all that took place without the knowledge and without the superintendence of the testator? Of course if he was unconscious, and all that was done while he was unconscious, then undoubtedly it could not be said that this will was properly executed. It is not suggested that he was anything more than ill. The Vicar has said "I had affixed his signatures to the corrections and to the will and to the endorsement before the Sub-Registrar. I asked him before the Sub-Registrar whether I should affix his signatures, and he said 'yes.' The marks of

the cross were made by him. Bastiav Gabriel and Bastiav Sinav were present at the time and had attested at the instance of the deceased. The Sub-Registrar then took down deceased's admission of the will. I affixed his signatures to it at his request, and the Sub-Registrar took his thumb-impression. He was in his senses at the time. He was in full possession of his senses till the next evening when I gave him last sacrament or extreme unction." Unfortunately the Sub-Registrar has died since August 1910. Therefore his evidence is not available. But there is the thumb-mark on the will to bear out the statements of the Vicar, and it seems to me that we are entitled to hold that the will was properly executed if we come to the conclusion that the testator was conscious at that time, and assented to what was being done in his name. I think, therefore, the decree of the Court below must be confirmed, although not for the same reasons, and the appeal will be dismissed. As we have decided the case on a different ground from that on which the learned Judge decided it, there will be no order as to costs.

FAWCETT, J :—I agree. I would add that, even supposing the signature of the Vicar in regard to the mark of the testator cannot be considered to be a signature by some other person in the presence of the testator and by his direction within the meaning of section 50 of the Indian Succession Act, yet the thumb-mark of the deceased, which there is evidence to show, was made from the deceased's thumb in the presence of the Sub-Registrar and the attesting witness Bastiav Gabriel, who identified the deceased, would constitute a proper execution. The thumb-mark would be a mark affixed by the testator to the will with the intention of signifying that it was his will, and that thumb-mark was made in the presence, at any rate, of one of the attesting witnesses Bastiav Gabriel, who admits that

1920.

THERESA v. FRANCIS MISQUITA.

he signed the endorsement of the deceased's identity before the Sub-Registrar and who had, therefore, presumably seen the testator sign the will in this manner. Then also I think it is legitimate to treat the Sub-Registrar himself, who made the endorsement about the deceased's admitting that the will was his, as an attesting witness to the will, for he had not only seen the testator affix his thumb-mark to it, but had also received from the testator a personal acknowledgment that the will was his. The endorsement on the will made by the Sub-Registrar and his certificate of registration are admissible for the purposes of proving that the document has been duly registered and that the facts mentioned in the endorsement have occurred as therein mentioned by virtue of the provisions of section 60 of the Indian Registration Act.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

1920.
October 5.

SITARAM SADASHIV SAPRE (ORIGINAL PLAINTIFF), APPELLANT *v.* TUKARAM DAJI PATIL, MINOR, BY HIS GUARDIAN BALA MUKUNDA JAGTAP (ORIGINAL DEFENDANT), RESPONDENT*.

Land Revenue Code (Bom. Act V of 1879), section 216†—Unalienated village—Grant of certain lands within unalienated village—Survey settlement—Permanent occupant—Right of grantee to enhance rent—Rent can be enhanced according to usage of district.

* Second Appeal No. 528 of 1917 (with Second Appeals Nos. 529 and 664 of 1917 on review).

† The section runs as follows :—

216. Save as is otherwise provided in section 111 and hereinafter in this section, the provisions of Chapter VIII to X * * * shall not be applied to any alienated village except for the purposes of fixing the boundaries of any such

Chapters VIII to X how far applicable to alienated villages.