1906
June 28.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

SHIB SABITRI PRASAD AND OTHERS (PLAINTIFFS) *v.* THE COLLECTOR OF MEERUT (DEFENDANT).*

Will—Separated Hindu domiciled in the United Provinces—Revocation of will—Evidence—Presumption.

A separated Hindu residing at Meerut executed a will on the 20th of January 1885 and registered the same in the office of the District Registrar on the 22nd of January of the same year. The testator died on the 16th of October 1899. On the 8th of July 1902 a suit was instituted by certain persons, who claimed the property of the testator as his next of kin against the Collector of Meerut, who had taken possession of the property as trustee under the terms of the will for purposes therein set forth. The plaintiffs alleged that the testator had revoked the will of the 20th of January 1885, and tendered evidence to prove that on a certain occasion the testator had said that he had revoked his will. On the death of the testator the original will was not to be found; but, on the other hand, it was shown that persons interested in the disappearance of the will had had access to the house of the testator since his death.

Held that evidence that the testator had said that he had torn up the will was not admissible. *Staines* v. *Stewart and Jones* (1), *Doe dem. Shallcross* v. *Palmer* (2) and *Keen* v. *Keen* (3) referred to.

Held also that the presumption of English law that if a will is traced to the testator's possession and is not forthcoming at his death it has been destroyed by him, *animo revocandi*, would, at least, not be so strong in India as in other countries where wills are taken greater care of, and under the circumstances disclosed by the evidence in the present case did not arise at all. *Podmore* v. *Whatton* (4), *Finch* v. *Finch* (5) and *Brown* v. *Brown* (6) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Moti Lal Nehru*, Babu *Durga Charan Banerji* and Mr. *Shams-ud-din*, for the appellants.

Mr. *A. E. Ryves*, for the respondent.

KNOX and AIKMAN, JJ.—This appeal arises out of a suit brought by the plaintiffs, who are appellants here, to recover possession of property, movable and immovable, of the value of upwards of Rs. 6,00,000. The property belonged to one Nanak Chand, a Brahman residing in Meerut, who died on the 16th of October 1899. He left him surviving his widow named Musammat Champa, who died at Calcutta on the 9th of March 1900. He

* First Appeal No. 4 of 1904 from a decree of Mr. H. David, Subordinate Judge of Meerut, dated the 18th of September 1903.

(1) (1861) 2 Sw. and Tr., 320.
(2) (1851) L. R., 16 Q. B., 757.
(3) (1873) 3 P. and D., 105.
(4) (1864) 3 Sw. and Tr., 449.
(5) (1867) 1. P. and D., 371.
(6) (1858) 8 E. and B., 876.

left no issue. The plaintiffs are the grandsons and great-grandsons of one Kishan Sahai, the paternal uncle of Nanak Chand, and claim to be entitled to his estate as reversioners. On the 20th of January 1885 Nanak Chand executed a will, which is printed at page 72 of the respondent's book. He was then in the 23rd year of his age. By this will he left his property, subject to an allowance of Rs. 100 a month to any widow he should leave behind, in trust to the District Judge, and, if he should decline to act, to the Collector of the district. By paragraph 8 of the will he declared that ¼ of the income of his estate should be spent in charity, namely, in the distribution of food among travellers, faqirs, and devotees, and in assisting the needy. He states that it is not his object that such persons as are healthy and habitually carry on begging as a profession and dislike to do work should be assisted. By paragraph 9 another ¼ of the income of the property is devoted to the assistance of friendless people and widows of respectable families who would feel it a disgrace to ask openly for relief, and to other matters of public utility. By paragraph 10 of the will the remaining ½ of the income is directed to be applied to the construction of a school to be called "The Nanak Chand Anglo-Sanskrit School" for teaching English, Sanskrit, Nagri and Urdu to students of all castes and creeds, preference being given to Hindu boys. The will provides that if the testator should leave a son, the whole of his property should go to him and he reserves to himself the right to adopt a son. The will provides that only in the event of the testator leaving neither a begotten nor an adopted son is the property to go to the District Judge. The will also makes provision for any daughters that he might leave. In paragraph 1 of the will the testator says that he has long been living separate and has up to that moment been separate from the descendants of his uncle Lala Kishan Sahai. This will was witnessed by no less than twenty-eight witnesses, and it was presented for registration, and duly registered by the District Registrar Mr. Harrison on the 22nd January 1885. The original will is not forthcoming, but an authenticated copy of it, taken from the transcript made of it in the District Registrar's book at the time of registration, is on the record. The District Judge having declined to administer,

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the Collector of Meerut took possession of the estate a few days after the death of Musammat Champa. The present suit was instituted against the Collector on the 8th of July 1902, and it was dismissed by the learned Subordinate Judge on the 10th of November 1903. The case of the plaintiffs is that Nanak Chand owing to his displeasure with the other members of his family executed the will, but that before his death he became reconciled to them and increasingly fond of his wife Musammat Champa; that he accordingly changed his intentions about his property, and cancelled the will mentioned above in order that his estate might devolve upon his heirs in the ordinary course of inheritance. How and when the will was cancelled the plaint does not state. In paragraph 11 of the plaint it is stated that the will "was declared to be invalid and ineffective by means of cancellation made in clear words." It is alleged that Nanak Chand having cancelled his will died intestate, and that his estate devolves on the plaintiffs as reversioners. Another plea put forward by the plaintiffs is that at the time when the will was executed Nanak was member of a joint Hindu family, to which they belonged, and that the will is consequently invalid. The defence was that Nanak Chand was separate from the members of his family for a considerable time before the execution of the will, that he was the sole owner of the property bequeathed by him and that the will was never cancelled.

The great bulk of the voluminous evidence, both oral and documentary, which has been adduced in the case, was directed to the issue as to whether Nanak Chand was or was not separate from the rest of his family at the time he made his will. The other main issue in the case was whether he had revoked the will. On both these issues the lower Court found in favour of the defendant. In the memorandum of appeal to this Court eight pleas are put forward. The last two were not pressed by the learned advocate for the appellants, the remaining six pleas relate to the two issues set forth above. The first, second and third have reference to the issue as to whether Nanak Chand was at the time he made the will a member of the joint undivided Hindu family. If it were necessary to decide this issue we should not have much difficulty in agreeing with the Court below

in its finding. Nanak himself distinctly says in his will that he was separate at the time he made his will, and there is a mass of evidence in support of his assertion. But in our opinion this issue is not at all material to the case. It is admitted that Nanak did separate from the rest of his family in 1886 and that he was separate when he died. Having regard to this admitted fact the contention on behalf of the plaintiffs that, assuming that he was joint at the time of the will, the will is thereby invalidated, cannot in our judgment be sustained. The rule enacted in 1 Vict., Cap. XXVI, section 24, namely, that a will is to be construed as speaking and taking effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will, has been embodied in the Indian Succession Act, 1865, section 77. That section has been incorporated in the Hindu Wills Act of 1870. It is true that this Act does not extend to these Provinces; but we see no reason whatever why the principle should not be held applicable to the case before us. We hold therefore that, even if it had been shown that Nanak Chand was joint at the time when he made the will, the will must be construed as speaking and taking effect with reference to the state of things in existence immediately before the testator's death, when admittedly he had separated from the members of his family. This disposes of the first three grounds of appeal.

The 4th, 5th and 6th grounds refer to the issue as to whether the will had been revoked by Nanak before his death. It may be mentioned here that it appears from the pleadings that on the 9th of November 1899, a will purporting to have been executed by Nanak on the 14th October 1899, that is, two days before his death, was presented for registration by one Ram Sarup on behalf of the widow Musammat Champa. Registration of this was refused, and we are informed that it is common ground that the will propounded by Ram Sarup was a forgery. We have no information as to what were the contents of this forged will, or as to the grounds on which it was refused registration, the documents relating to it which were filed with the plaint having been returned to the plaintiffs.

The will of the 20th January 1885 is no longer forthcoming, and the case for the plaintiffs is that it was torn up by Nanak

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Chand himself. The plaintiffs also rely upon the presumption which is set forth in many English authorities, namely, that if a will is traced to the testator's possession and is not forthcoming at his death, it has been destroyed by him *animo revocandi*.

The evidence adduced by the parties, and particularly by the defendant, relating to this issue is singularly meagre when compared with the mass of evidence adduced in regard to the other question as to whether Nanak Chand was joint or separate when he made his will.

For the plaintiffs eight witnesses were examined to prove that, on four different occasions, Nanak said that he had torn up his will. In the case *Staines* v. *Stewart and Jones* (1) a witness was produced to prove that on a certain occasion the deceased said that he had made a will but he had destroyed it. It was objected that this evidence was inadmissible. Sir C. Cresswell, after referring to Lord Campbell's observations in *Doe dem. Shallcross* v. *Palmer* (2) said :—"If the declaration of a testator that he had revoked a certain will by a subsequent will could not be received, on what ground could the declaration that he had revoked it in any other manner be received," and he accordingly sustained the objection that the evidence referred to above was inadmissible. In a later case *Keen* v. *Keen* (3) it was, however, held by Sir J. Hannen that "a statement by a testator that he had altered his mind as to the dispositfon of his property and that he had therefore destroyed his will, although it may not be evidence of the fact of the destruction of the will, is evidence of intention from which the fact of destruction may be inferred, there being other circumstances leading to the same conclusion." In the present case we have no evidence to prove the actual destruction of the will. The only evidence adduced is that the testator *said* that he had destroyed the will, and there is, we think, in this case an entire absence of evidence of other circumstances leading to the same conclusion. The evidence of the eight witnesses referred to above has not been believed by the learned Subordinate Judge, who had an opportunity of seeing the witnesses and noting their demeanour. We have carefully read that evidence, and we must say that it carries no conviction to

(1) (1861) 2 Sw. and Tr., 320. (2) (1851) 16 Q. B., 757.
(3) (1873) 3 P. and D., 105.

our minds. As found by the learned Subordinate Judge, it was in the highest degree unlikely that a wealthy man like Nanak Chand in the prime of life should have had such difficulty as is referred to by the witnesses in finding a wife. From the evidence of Prasadi Lal of Khurja, one of the witnesses called for the plaintiffs, it appears that the motive which Nanak had for tearing up his will was that it was an obstacle to his getting married. That is not the reason assigned in the plaint, which attributes the cancellation of the will to the reconciliation between Nanak and his relations. In our opinion there is no reliable evidence of any such reconciliation. Nanak Chand, a witness for the defendant, whose house is in the same mohalla as that of Nanak, deposes that he saw no renewal of friendly relations between Nanak and the plaintiffs up to the time of Nanak's death. The evidence for the plaintiffs in our judgment entirely fails to prove that Nanak revoked his will.

On behalf of the plaintiffs, however, reliance is placed on the presumption of English law referred to above. The learned Subordinate Judge doubts whether that presumption would be applicable in this country. We are disposed to think that in India the presumption from a will not being forthcoming would at least not be so strong as in other countries where wills are taken greater care of. On the facts appearing in the evidence, however, we doubt whether, if this were an English case, the presumption referred to would arise. Nanak, as we have said above, died on the 16th of October 1899. His widow was at that time absent from home residing with a connection in the town of Anupshahr in a different district. It appears from the evidence of Sis Ram, a witness for the plaintiffs, that the plaintiff Sri Newas and others quarrelled about the property and put up locks on the house. Musammat Champa afterwards came and took possession. There is no evidence whatever to prove that a search for the will was made by any responsible person when Nanak died, and that it was not forthcoming at his death. This being so, does the presumption as of the revocation to the will arise? We think that on the facts it does not. In the case *Podmore* v. *Whatton* (1) Sir J. P. Wilde says:—"The will having been thus

(1) (1864) 3 Sw. and Tr., 449.

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made, the next and most important question is—what became of it? On the part of the plaintiff it was urged that this was an enquiry upon which the Court was not bound to enter; that the will thus made could only be revoked by the specific methods indicated in the Wills Act, and that unless the defendant established its revocation the Court was bound to pronounce it unrevoked and admit it to probate. On the part of the defendant it was argued that as the will itself was not forthcoming and had been last seen in the custody of the testatrix, the law must presume that she had herself revoked it. The Court cannot accede to either of these views. A material question of fact has to be decided in this case before any presumption arises on either side, and it is this, was the will found at the decease of the testatrix or not? If it was found at her death and in an unmutilated state, then she did not revoke it. If it was not so found then there is room and foundation for the revocation which the law will presume in the absence of testimony to rebut it. In most cases the solution of this question presents no difficulty, for the depositories of the deceased are duly searched by those whose good faith is not impugned and who vouch for the fact one way or another." But in the present case it is far otherwise. There is not shown to have been any search by any responsible person for the will when Nanak died. His house was in the possession of those whose interest it would be to get rid of the will. It was not till nearly five months after the death of Nanak that the Collector took possession.

In *Finch* v. *Finch* (1) Sir J. P. Wilde, after referring to the passage cited above from *Podmore* v. *Whatton*, says:—"But that difficulty does present itself in the present case, for the depositories of the deceased before they could be searched by any independent person were clearly accessible to, and are proved in evidence to have been investigated by the only person who was interested in destroying the will if it existed." At page 374 of the same judgment the learned Judge says:—"It is enough that the Court is satisfied that there is no proof that this will was not found in the depositories of the testator. It is the non-existence of the paper at the time of death which leads to the legal

(1) (1867) 1 P. and D., 371.

presumption of revocation." In the case *Brown* v. *Brown* (1) Lord Campbell, C.J., at page 884, says:—"Certainly the fact of the will being last traced to the possession of the testator and not being found is not conclusive that he cancelled it. If, for instance, it could be shown that the heir at law had access to the place where the testator had deposited the will, and grounds could be shown for a suspicion that he had destroyed it, it would be a case to consider." Having regard to what was said in the cases cited above, we are of opinion that the facts established in this case are not such as to raise a presumption of revocation.

For the defendant evidence was called to prove the existence of the will after the time when, according to the plaintiffs' witnesses, Nanak said he had destroyed it, and one witness Murli Mahajan says that he saw the will in January or February following Nanak's death. The learned Subordinate Judge distrusts this evidence for the defendant. He may be right in his view as to the credibility of this evidence for the defence. But even if it is not believed, we think that the plaintiffs' case must fail. It is proved beyond any doubt that Nanak did execute the will under which the respondent has taken possession. In our judgment it is not proved, and no presumption arises that it was ever revoked. We consider it unlikely that Nanak, his relations with the family being what they were, should have destroyed the will and not executed another. If the case now set up for the plaintiffs is true, the destruction of the will must have been well known, not only to them, but also to Musammat Champa; and if they knew that the will had been destroyed, it is difficult to understand why an application was not made for mutation of names in the revenue records in favour either of Musammat Champa or of the plaintiffs. On a review of all the evidence and of the authorities we have no hesitation in coming to the conclusion that the appeal must fail.

In our opinion the respondent has printed a considerable mass of documentary evidence which was unnecessary. We may refer to the long list of biddings at the sale of movable property. Having regard to this we only allow the respondent four-fifths of the costs incurred by him in printing and translation in this

(1) (1858) 8 E. and B., 876.

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Court, as we do not think it right that the appellants should be saddled with the whole of these costs. We dismiss the appeal. The respondent, subject to the above exception, will have the costs of this appeal.

Appeal dismissed.

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July 24.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Rustomjee.

JUGAL KISHORE (PLAINTIFF) *v.* FAKHR-UD-DIN AND OTHERS (DEFENDANTS).*

Act No. XV of 1877 *(Indian Limitation Act), section* 19*—Limitation—Acknowledgment of title—By whom such acknowledgment may be made.*

Section 19 of the Indian Limitation Act, 1877, does not require that the person making an acknowledgment should have an interest in the property in respect of which the acknowledgment was made at the time when the acknowledgment was given: it prescribes that, if, before the period of limitation expires, an acknowledgment of liability or right has been made in writing signed by the parties against whom the property or right is claimed, a new period of limitation will be computed from the time of the acknowledgment. *Jagabandhu Bhattacharjee* v. *Harimohan Roy* (1) referred to.

THIS was a suit brought for partition of a house of which the plaintiff claimed to be part owner. The plaintiff's title was by purchase at a sale in execution of a decree, on the 18th of August 1890, of 14 sihams of the house in suit. On the 29th of March 1898, the plaintiff obtained formal possession of the share purchased, but actual possession was not delivered to him, and he had never been in actual possession of the house or any part of it. To save limitation the plaintiff relied upon an admission made by Alim-ud-din, one of the defendants, in a suit for pre-emption brought against Jugal Kishore in 1892. In the plaint in that suit Alim-ud-din stated that Raghubar Dayal had bought 28 sihams in execution of the money decree obtained by Jugal Kishore and further that Jugal Kishore had purchased 14 sihams under the mortgage decree obtained by Jafar Khan. The Court of first instance (Subordinate Judge of Bareilly) gave the plaintiff a decree against Alim-ud-din only for 6 sihams. On appeal,

* Second Appeal No. 391 of 1905, from a decree of E. O. E. Leggatt, Esq., District Judge of Bareilly, dated the 18th of January 1905, reversing the decree of Babu Prag Das, Subordinate Judge of Bareilly, dated the 29th of June 1904.

(1) (1895) 1 C.W.N., 569.