P. C.*
1882
March 17
and 21.

PRIVY COUNCIL.

THE MUSSOORIE BANK, LIMITED, *v.* ALBERT CHARLES RAYNOR.

[On appeal from the High Court for the North-Western Provinces.]

Construction of will—Precatory words—Misstatement in petition for special leave to appeal—Costs

IN order to create a precatory trust the words must be such that the Court finds them to be imperative on the first taker of the property; and the subject of the gift over must be well defined and certain

A testator made a gift in these words: "I give to my dearly beloved wife the whole of my property both real and personal (described), feeling confident that she will act justly to our children in dividing the same when no longer required by her." *Held*, that the widow took an absolute interest in the property, and that no trust for the benefit of the children was created.

An order in Council granting leave to appeal is liable at any time to be rescinded with costs, on its appearing that the petition upon which the order has been granted contains any misstatement, or any concealment of facts which ought to have been disclosed. Even if there has been no intention to mislead, a material misstatement having been made, the order is still liable to be rescinded; and, to maintain it, to clear the case of bad faith is not sufficient. *Mohun Lall Sookul* v. *Bebee Doss* (1) referred to and followed.

Of three grounds on which special leave to appeal had been obtained, two had been correctly stated, but with the third was connected error in the petition, to which objection was taken at the hearing. On its appearing that there had been no intention to mislead, the appeal was heard and allowed; but, in regard to the above, without costs. *Ram Sabuk Bose* v. *Monmohini Dossee* (2) referred to.

Appeal from a decree of the High Court, (22nd August, 1878,) reversing a decree of the Subordinate Judge of Dehra Dún, (10th May, 1878).

Two questions were raised on this appeal. The first, preliminary to the hearing, was whether the effect of certain misstatements in a petition of the appellant Bank, for leave to appeal, did not require that an order in Council of 14th August, 1879, granting leave, should be rescinded. The other question was whether, under the will of Captain Raynor, who died at Firozpur in the Panjab on the 13th December, 1860, possessed of shares in the Delhi and London Bank, besides other property, a trust was created for the benefit of his children, or his widow took absolutely. The will is set forth, and the facts are stated, in their Lordships' judgment.

* *Present*: SIR B. PEACOCK, SIR R. COUCH, and SIR A. HOBHOUSE.

(1) 8 Moo. I. A., 195. (2) 2 L. R., 2 Ind. Ap. 82.

The widow having obtained possession of the property, and having died in 1875, and having made a will, the present suit was brought by the respondent, the son of the late Captain Raynor, to have set aside an order of attachment, issued in June, 1876, against the above-mentioned Bank shares in the hands of Mrs. Raynor's executors, in execution of a decree obtained against them. The respondent claimed that, under his father's will, a trust, completed by the act of Mrs. Raynor in making a will in their favour, had been created for the benefit of Captain Raynor's children.

The Subordinate Judge dismissed this suit, holding that Mrs. Raynor had taken an absolute interest under the will of Captain Raynor. On appeal, the High Court reversed this decision, on the ground that the will of Captain Raynor constituted Mrs. Raynor a trustee of her husband's estate, for the benefit of his children, empowering her to appoint among them. The judgments of the Judges of the Divisional Bench of the High Court, (Stuart, C. J., and Pearson, J.,) are reported in the Indian Law Reports, 2 Allahabad Series, 55.

The High Court refused leave to appeal to Her Majesty in Council on the ground that the property involved in the suit was no more than Rs. 6,000 in value, and that no doubtful question of law had arisen. Special leave to appeal was thereupon granted by the order in Council dated 14th August, 1879, upon the Bank's petition. It now appeared that some of the statements in that petition were such as to cause confusion between the suit out of which this appeal arose and previous proceedings.

Two suits had been instituted by the Bank against Mrs. Raynor's representatives. In the first of the latter, numbered 41 of 1876, a money-decree, (15th December, 1876), had been obtained against them, and in that suit the attachment above-mentioned had been issued. In the second, numbered 115 of 1876, on a mortgage of land effected by Mrs. Raynor with the Bank, a decree had been obtained by the Bank, declaring its right to sell the interest of Mrs. Raynor to the extent of Rs. 20,000. The petition for special leave to appeal, after stating the institution of the suit on the mortgage, contained the following, in regard to the question of the estate taken by Mrs. Raynor:

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"The High Court of Allahabad, without deciding this question, ordered that the interest of Mrs. Raynor in the properties should be sold in satisfaction of the claim of the Bank under the decree in the above suit. The Bank attached the shares of the Delhi Bank held by Mrs. Raynor's executor and executrix, and the respondent herein objected to such attachment on the same ground as above stated, *viz.*, that Mrs. Raynor possessed only a life interest in the said shares; but his objection was dismissed. He thereupon brought the suit, which is the subject of the present application. The suit was brought in the Court of Small Causes at Dehra, exercising its extraordinary jurisdiction, against the Mussoorie Bank, Limited, and prayed for possession of 24 shares of the Delhi Bank, attached under the above decree in the suit of *The Mussoorie Bank* v. *Executors of Mrs. Raynor*, on the ground that under the will of her deceased husband Mrs. Raynor held them only for her own life, and in trust after her death for her children. The suit was valued at Rs. 6,000, and was numbered 24 of 1877."

Mr. *J. Graham*, Q. C., and Mr. *J. T. Woodroffe* appeared for the appellant,

Mr. *R. V. Doyne*, for the respondent.

On the objection that the above statements in the petition, as well as others, were calculated to mislead; inasmuch as the present suit was brought to set aside an order made in 1876, more than a year before the date of the decision which had been represented as affording the ground of the relief sought, Mr. *R. V. Doyne* was heard. He referred to *Ram Sabuk Bose* v. *Monmohini Dossee* (1) and contended that the order granting special leave to appeal should be rescinded.

The suit under appeal was brought to set aside an order made in the suit 41 of 1876, and the statement in the petition as to the connection between the suit 115 of of 1876 and the present suit was such as to conceal the real state of the case. Whether this was intentional or not the result would be the same. There was no ground for concluding that the leave to appeal would have been granted had the true statement been made; and therefore the order granting it must now be rescinded.

(1) L. R., 2 Ind. Ap. 82.

Mr. *J. Graham*, Q. C., for the appellant, argued that there were grounds, apart from the inaccuracies of the petition, which contained no intentional misstatement, on which the order for leave to appeal could be maintained. Affidavits had been filed to explain how the error in the petition had arisen. The misstatements were, in a certain sense, immaterial; for on the merits the appellant Bank was entitled to the leave granted.

Mr. *R. V. Doyne* replied.

Their Lordships decided that the appeal should be heard.

For the appellant it was argued that Mrs. Raynor had taken an absolute interest, under her husband's will, unaffected by a trust in favour of the children. The Chief Justice had referred in his judgment to the law of precatory trusts as applied in *Curnick* v. *Tucker* (1). In that case the testator appointed his wife sole executrix and left to her all his property, "for her sole use and benefit, in the full confidence that she would so dispose of it amongst all their children during her lifetime and at her decease, doing equal justice to all of them." It was decided that she took a life interest, with a power of appointment amongst the children; and the previous case of *Lamb* v. *Eames* (2) was distinguished. This latter was it was submitted nearer the present. In it, a testator devised to his wife his property, "to be at her disposal in any way she may think fit for the benefit of herself and family." This was held to be an absolute gift to the widow. In *In re Hutchinson and Tenant* (3), where all the property was given to the wife, absolutely, with full power to her to dispose of the same, as she might think fit, for the benefit of the testator's family, it was held that she took the entire estate. In *Parnall* v. *Parnall* (4) a testator gave his wife the whole of his real and personal property for her sole use and benefit, and added—"It is my wish that whatever property my wife might possess at her death be equally divided between my children." In this there was held to be no precatory trust, and the widow took absolutely. In *Stead* v. *Mellor* (5) a trust for such of the testatrix's nieces as should be living at her death, her desire being that they should distribute such residue as

(1) L. R. 17 Eq., 320.
(2) L. R. 10 Eq., 267; on appeal, L. R., 6 Chanc. App., 601.
(3) L. R. 8 Ch. D. 540.
(4) L. R. 9 Ch. D. 97.
(5) L. R. 5 Ch. D. 225.

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they might think would be most agreeable to her wishes, was held to confer upon the nieces an estate for their own benefit. *Sale* v. *Moore* (1) was also referred to.

For the respondent it was argued that the Bank shares, which had been treated by both the Courts below as part of Captain Raynor's estate, and as passing under his will, were not liable to be sold in execution of a decree obtained against the widow. Though the tendency of recent decisions had been against the lax recognition of words as creating precatory trusts, the doctrine in regard to the latter had not been altogether set aside.

It was stated in *Knight* v. *Knight* (2) that, as a general rule, where property was given absolutely to any person, and the same person was, by the giver, who had power to command, recommended or entreated, or wished, to dispose of that property in favour of another, the recommendation, entreaty or wish was held to create a trust; subject to this, that (i) the words were so used that upon the whole they ought to be construed as imperative; (ii) the subject of the gift over was certain; (iii) the persons intended to receive the benefit were certain.

The true effect of the disputed clause in the will was that the testator gave to his widow the right of enjoyment for her life, with a power of appointment to be executed in a prescribed mode, *viz.*, justly, among the children. Thus, both subject and object were clear. *Hutchinson and Tenant* (3) was distinguishable, and *Curnick* v. *Tucker* (4) had not been over-ruled. The latter case and *Le Marchant* v. *Le Marchant* (5) were authority for the judgment of the Court below. *Briggs* v. *Penny* (6) was also referred to.

The appellant was not called upon to reply.

Their Lordship's judgment was delivered by

SIR A. HOBHOUSE.—In this case their Lordships have felt almost more difficulty in deciding whether or not to hear the appeal than they have in disposing of it when heard, and in order to show the nature of that difficulty it is necessary to state the precise course which this litigation has taken.

(1) 1 Simon, 234.
(2) 3 Beavan. 48; 11 Cl. and Fin. 513.
(3) L. R. 8 Ch. D. 540.
(4) L. R. 17 Eq. 320.
(5) L. R. 18 Eq. 414.
(6) 3 Macnaghten and Gordon, 547.

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In the month of December, 1860, Captain William Raynor died, having left a will which he expressed in the following terms:—"I give to my dearly beloved wife, Mary Anne Raynor, the whole of my property, both real and personal, including my Government promissory notes, Delhi Bank shares, my house at Firozpur, No 50, together with all my plate and plated ware, and whatever money, furniture, carriages, horses, &c., may be in my possession at the time of my decease, together with all moneys due or which may afterwards become due, feeling confident that she will act justly to our children in dividing the same when no longer required by her." And he appointed his son William Joseph Raynor, and his wife Mary Anne Raynor, to be his executors. Mrs. Raynor alone proved the will.

During her lifetime no question arose as to the true nature of Captain Raynor's will. It appears that she possessed herself of his property, and she assumed to deal with it as though it were her own. On the 5th September, 1868, Mrs. Raynor made her will by which she gave to her son Albert Charles Raynor, who is the respondent in this appeal, "24 of my shares in the Delhi and London Bank," and she also gave him a house and some land. Other property, consisting mainly of houses and land and of Government rupee paper, she gave partly to her daughter Adelaide Louisa Swetenham, partly to her son William Joseph Raynor, and partly to her step-daughter Elizabeth Golding. To the latter was given the house No. 50 at Firozpur, which the testatrix describes as "my house and estate." Mrs. Raynor died some time in 1875, and her will was proved, it does not appear by whom.

In the year 1876 the Mussoorie Bank, who are the appellants, instituted two suits against Mrs. Raynor's executors for the purpose of recovering the sum of Rs. 25,000 advanced by the Bank to Mrs. Raynor upon the security of 30 Delhi Bank shares and of certain houses. One of these suits, No. 41 of 1876, was instituted in the Small Cause Court at Dehra Dún, and on the 5th December, 1876, the Bank obtained a decree under which the 30 shares were attached. The other suit, number 115 of 1876, instituted before the Subordinate Judge of Dehra Dún, was to enforce the Bank's mortgage upon the houses. On the 12th December, 1876, the Bank obtained

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a money-decree for the sum of Rs. 32,121-2-4, but the Subordinate Judge refused to give them any specific relief on the basis of the mortgage. His principal reason appears to have been that the nature and extent of Mrs. Raynor's interest in the mortgaged properties was uncertain.

Against this decision the Bank appealed to the High Court, who gave judgment on the 2nd of January, 1878. They held that Mrs. Raynor certainly had some interest in the properties she mortgaged to the Bank; that she might have had an absolute interest in them, especially as she had acquired them after Captain Raynor's death; and that the Bank was entitled to enforce its security against whatever interests might ultimately prove to be hers. They varied the decree accordingly. As regards the interest which Mrs. Raynor had in the properties the High Court pronounced no opinion, holding, quite rightly as their Lordships think, that the question did not arise in a suit in which Captain Raynor's estate was not properly represented.

While the appeal in the mortgage suit was pending, Albert Raynor brought the present suit for the purpose of setting aside the order of the 5th of December, 1876, so far as regards the 24 bank shares bequeathed to him by his mother, and of obtaining possession of those shares. The identity of the shares with the shares bequeathed by Captain Raynor may be assumed for the present purpose; and the case made by the respondent is that Mrs. Raynor took only a life-interest in her husband's property. On the 10th of May, 1878, the Subordinate Judge dismissed the suit, holding that Mrs. Raynor took an absolute interest under her husband's will. Albert Raynor appealed, and on the 22nd of August, 1878, the High Court gave him a decree on the ground that Mrs. Raynor held her husband's estate, not absolutely in her own right, but as trustee for their children, with a power of appointment among them.

The Bank then applied to the High Court for leave to appeal against this decree. On the 13th of January, 1878, the High Court refused leave on the ground that the property at stake in this suit was valued at no more than Rs. 6,000, and that the question of law was so clear that an appeal could only result in the affirmance of the judgment.

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The Bank then presented a petition to Her Majesty in Council for leave to appeal, on which leave was granted by an order in Council, dated the 14th August, 1879. And it is the frame of that petition that gives rise to the preliminary question now raised. Waiving all questions as to the honesty of the petitioners, the respondent's counsel insists that in fact their petition is so framed as to mislead this Board, and to bring it to a favourable decision on false grounds.

The petition states the petitioners' mortgage suit, number 115 of 1876, and it states the effect of the decree of the High Court therein; but it does not give the date of that decree. Then it goes on to state that under that decree the Bank shares were attached; that Albert Raynor objected; that his objection was overruled; and that thereupon he brought the present suit. The proceedings in the present suit are correctly stated; but it is not true that the Bank shares were attached under the decree in the mortgage suit, or that Albert Raynor's objection and suit directly struck at any portion of the decree in the mortgage suit. The shares were attached in the suit relating to them alone, which was valued at Rs. 6,000 only; whereas the mortgage suit was of greater value.

The first question is, whether the preliminary objection is taken too late. The order was made more than two years ago, and the respondents were fully aware of it; yet no objection was made until all the costs of the appeal had been incurred. As a general rule, the proper course, in a case like the present, is for the respondent to move as early as possible to rescind the order in Council; and their Lordships think it right to call attention to the opinion expressed in the second volume of the Law Reports, Indian Appeals, page 82. It is there said, "In their Lordships' opinion an objection of this kind ought to be taken by the respondents as early as the matter is brought to their notice, for the plain reason, that if the leave to appeal is on that ground rescinded, no further costs are incurred: and it is wrong to leave the objection until the hearing of the appeal, when the record has been sent from India, and when all the costs attending the hearing have been incurred." At the same time their Lordships desire it to be distinctly understood that an order in Council granting leave to appeal is liable at any time to be

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rescinded with costs, if it appear that the petition upon which the order was granted contains any misstatement, or any concealment of facts which ought to be disclosed.

In this case, if their Lordships had any reason to think that there were intentional misstatements in the petition, they would at once rescind the order and dismiss the appeal. But they do not think there was any intention to mislead. The appellants' solicitor has filed an affidavit showing how he confused the decree of the 12th of December made in the mortgage suit, with the decree of the 5th of December under which the shares were attached; and it appears that he did not leave the judgment of the 12th of December to be explained solely by the petition, because a copy of it was among the papers put in with the petition. Still if there has been a material misstatement, it is not sufficient to clear the case of bad faith. To use the words of Lord Kingsdown (1), "Where there is an omission of any material facts, whether it arises from improper intention on the part of the petitioner, or whether it arises from accident or negligence, still the effect is just the same if this Court has been induced to make an order to which, if the facts were fully before it, it would not, or might not, have been induced to make." Their Lordships therefore proceed to ask whether the order in question was one which they might not have been induced to make if the facts had been fully and truly stated.

The grounds which the petitioner relies on as reasons why an appeal shall be allowed, notwithstanding the value of the suit is only Rs. 6,000, are three in number: first, that the decision virtually affects the right of the Bank to have a mortgage security for the whole sum of Rs. 32,000 odd; secondly, that the point of law decided by the High Court will cover other claims arising in reference to the estate of Mrs. Raynor; and thirdly, that the decision on appeal in this suit will probably prevent any appeal against the decree in the mortgage suit or against the proceedings in execution thereof. Their Lordships consider that the first two grounds are solid grounds for granting the leave asked; and they are not at all affected by the error in the petition. It is clear that if Mrs. Raynor took only a life-interest in her husband's property,

(1) *Mohun Lall Sookul* v. *Bebee Dossee*, 8 Moo. I. A., 195.

the Bank cannot enforce their decree against any portion of the property enjoyed by her in her lifetime, whether comprised in the mortgage or not; unless they successfully contest against the Raynor family, as to each such portion, the question whether or no it belonged to Captain Raynor or was purchased with his assets. The third ground is affected by the misstatements in the petition; first, because the date of the decree in the mortgage suit is not given, and therefore it does not appear on the face of the petition that the time for appealing had, as in fact it had, then expired; secondly, because the decree obtained by Albert Raynor appears to be more directly mixed up with the mortgage suit, when it is stated that the shares were attached under that very decree, than when they are shown to be attached under a decree in a different suit. Still there is a sense in which the third ground may be explained. It is impossible to suppose that, after the decision of the High Court in this suit, any effectual proceeding could be taken by way of simple execution of the decree in the mortgage suit, for all purchasers would be deterred by the knowledge that they were buying a formidable litigation. It certainly would be necessary for the Bank to frame a new suit properly constituted for the purpose of contesting all questions with the Raynor family and seeking execution of their decree against them. In such a suit as that, the construction of the will might, and probably would, be brought by appeal before this Board. And it might possibly, though probably it would not, be found necessary for properly working an appeal in a subsidiary suit of that kind to obtain leave to appeal from the original decree the execution of which was being prosecuted.

Their Lordships are of opinion that the petition is very faulty, and that due care was not shown in its preparation; but on examining the grounds for asking leave to appeal, they do not think that any different conclusion would or could have been arrived at if the strictest accuracy had been observed. Their Lordships also were, when hearing the preliminary objection, strongly impressed with the circumstance that there was *primâ facie* strong ground for an appeal upon the merits. For these reasons they have thought it right to hear the appeal.

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Passing to the merits of the case, their Lordships are of opinion that the current of decisions now prevalent for many years in the Court of Chancery shows that the doctrine of precatory trusts is not to be extended; and it is sufficient for that purpose to refer to the judgments given by Lord Justice James in the case of *Lambe* v. *Eames*, and by Sir George Jessel in the case of *Re Hutchinson and Tenant*. They are further of opinion, that if the doctrine of precatory trusts were applied to the present case, it would be extended far beyond the limits to which any previous case has gone. No case has been cited, and probably no case could be cited, in which the doctrine of precatory trusts has been held to prevail when the property said to be given over is only given when no longer required by the first taker.

Now these rules are clear with respect to the doctrine of precatory trusts, that the words of gift used by the testator must be such that the Court finds them to be imperative on the first taker of the property, and that the subject of the gift over must be well defined and certain. If there is uncertainty as to the amount or nature of the property that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust because the Court does not know upon what property to lay its hands, but the uncertainty in the subject of the gift has a reflex action upon the previous words, and throws doubt upon the intention of the testator, and seems to show that he could not possibly have intended his words of confidence, hope, or whatever they may be,—his appeal to the conscience of the first taker,—to be imperative words.

In this case nothing is given over to the children of the testator except by an expression of confidence in his wife that she will deal justly in dividing the property among them, and that she will do it when the property is no longer required by her. If the testator had given to his children such property as was not required by his wife, or if he had given over his property if it was not required by his wife, the gift over would, according to a very well-known and well-established class of cases, have been void, because of the uncertainty. It would have been void, not merely because the words of gift over were precatory only, but it would have been void notwith-

standing that the most direct and precise words of gift over might be used. Their Lordships think that substantially the words "when no longer required by her" must in this will be taken to have the same meaning as if he had said, "I give to my children so much as is not required by her." Considering the nature of the property, which includes a number of articles as to some of which the use is equivalent to the consumption; to the nature of the first gift, which, although not expressed in terms to be an absolute gift, is quite unlimited, and is legally an absolute gift; and to the fact that the first gift is only cut down by words which do not constitute a direct gift, but are to operate through an influence upon the conscience and feelings of the wife, their Lordships cannot come to any other conclusion than that the testator intended his wife to use the property according to her requirements. That is equivalent to an absolute gift to the wife.

They do not think it necessary therefore to enter into a consideration of the various authorities which have been cited as to the application of the doctrine of precatory trusts, or nicely to weigh one authority against another. They consider it sufficient to say that upon this will the wife took an absolute interest, and that to apply the doctrine of precatory trusts to it would be a very large extension of that doctrine.

The result is, that their Lordships will humbly advise Her Majesty to reverse the decree of the High Court, and to substitute for it a decree dismissing the appeal to the High Court with costs; but with respect to the costs of the present appeal they think it right to follow the case, from which a citation has already been made, in the second volume of the Law Reports, Indian Appeals, of *Ram Sabuk Bose* v. *Monmohini Dossee*; and having regard to the nature of the petition presented for leave to appeal, and the course pursued by the appellants, they will give no costs of the appeal. The money which has been deposited will be returned to the appellants.

Solicitors for the appellants: Messrs *W. Carpenter and Sons.*

Solicitors for the respondent: Messrs *Watkins and Lattey.*