lants, which do not seem to have been argued in the Courts below. In the first place, it was suggested that in section 111 of the Act of 1865 the qualification or proviso, "unless a contrary intention appears by the Will," is to be understood. In some sections of the Act those words are to be found. Full effect must be given to them where they occur. But, where the qualification is not expressed, there is surely no reason for implying it. The introduction of such a qualification into section 111 would make the enactment almost nugatory. Then it was argued that in the present case the fund is not "payable or distributable" within the meaning of the enactment, until the testator's younger sons attain their majority. But in their Lordships' opinion that is not the effect of the Will. The period of distribution is the death of the testator. It would be impossible to hold that that period is to be postponed by reason of the personal incapacity of some of the beneficiaries.

The view of the High Court that section 111 applies to bequests of all descriptions of property, there being no difference in India between real and personal property, was not impugned in the argument before their Lordships.

Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*
Solicitors for the respondent: Messrs. *Barrow & Rogers.*

C. B.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

MADHUB LALL DURGUR (PLAINTIFF) *v.* WOOPENDRANARAIN SEN (DEFENDANT.)

1896 *February* 11

Summons, Date of service of—Sheriff's return—Civil Procedure Code (Act XIV of 1882), Chapter XXXIX, section 78.

In a suit under Chapter XXXIX of the Civil Procedure Code the defendant obtained an *ex-parte* order on 9th January 1896 for leave to appear and defend the suit.

1896

MADHUB LALL DURGUR v. WOOPENDRA-NARAIN SEN.

The plaintiff on the 23rd January 1896 obtained an order calling on the defendant to show cause why the order of the 9th January 1896 should not be set aside, on the ground that the application was not made within ten days from the date of the service of summons.

The date of service as shown in the Sheriff's return was the 23rd December 1895. The defendant alleged he had not come to know of the service till the 5th January 1896, as he was not at that time residing at his dwelling house, when the service was alleged to have been effected.

Held, that, as regards limitation, the only date to which reference could be made was the date shewn in the Sheriff's return, and that the Court could not at the present stage of the case allow the defendant to show a state of things different from that appearing in his original petition.

THIS was a suit brought by the plaintiff against the defendant under Chapter XXXIX of the Civil Procedure Code. The defendant obtained an *ex-parte* order on the 9th January 1896, granting him leave to appear and defend the suit without giving security for costs. The plaintiff on the 23rd January 1896 obtained an order before the Judge in Chambers, calling on the defendant to show cause why the order dated 9th January 1896 should not be set aside, and the case set down on the undefended board for hearing, and why the defendant should not pay to the plaintiff the costs of and incidental to the application.

The matter came on before the Judge in Chambers, and was with the consent of both sides adjourned into Court.

Mr. *Apcar* for the plaintiff.—This is a suit for the recovery of a sum of Rs. 10,000, with interest thereon due on a promissory note. An application for leave to defend under Article 159 of Schedule II of the Limitation Act (XV of 1877) must be made within ten days from the day upon which the summons was served. The defendant says he received notice of the service of the summons on the 5th January 1896, whereas the summons shows that it was served on the 23rd December 1895, and the application would therefore be barred, and he could not have obtained leave. Under section 78 of the Civil Procedure Code it is a perfectly good service. Not being able to find the defendant, we find his son and tender the summons to him; but he refuses to take it. We then post it up on the wall.

1896

MADHUB LALL DURGUR v. WOOPENDRA-NARAIN SEN.

Mr. *Pugh* for the defendant.—My client was not living in his dwelling house at the time, but was staying in his garden house, and the summons was not therefore properly served, and I am not barred by limitation. The plaintiff contends that the application for leave is barred by limitation, the summons being served on the 23rd December 1895, and that ten days had elapsed before the application was made. My client states that he did not come to know of the service till the 5th January 1896, and that the summons was not properly served on him, as he was not at home at the time, but the Court held that his applying for leave must be held as waiving service. My client was away at his garden house, and the plaintiff know where he was, so that it could not be said that he could not be found. The service therefore cannot be said to be good under section 78 of the Civil Procedure Code.

SALE, J.—I must, I think, adhere to the opinion I have already expressed. In my opinion no ground has been shown for a review of the order rescinding the leave granted to the defendant to appear and defend. As regards the question of limitation, I still think that the only possible date to which I can refer is the date of the service of summons as shown in the Sheriff's return. From the statement made in the petition, the proper inference is that service of the summons was effected on the 5th of January, and that the period of limitation in respect of the application to appear and defend began to run from that date. I do not think that the situation is altered by the fact that on the plaintiff's application to rescind the order giving the defendant leave to appear and defend, the defendant came prepared to show that there had been, in fact, no service of summons at all. The proper time to determine questions of limitation relative to *ex-parte* applications is when the application is made, and I do not think it is open to the defendant afterwards to attempt to escape the law of limitation by showing a state of things different from that appearing on the face of the original petition. The question as to what took place upon the occasion of the service of summons by the Sheriff is one which may properly be taken into consideration on an application under section 534 to set aside the decree, if made; but for the reason I have already

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stated, it is not, I think, a matter which I am at liberty to enquire into at the present state of the case. The rule must be discharged with costs.

Rule discharged.

Attorneys for the plaintiff: Messrs. *Remfry & Rose.*

Attorney for the defendant: Mr. *Farr.*

C. E. G.

1896
March 15.

Before Mr. Justice Sale.

IN THE MATTER OF AN ATTORNEY.

Practice—Attorney,—Charges against—Publication of name.

The practice which prevails in England as regards the non-publication of the name of an attorney, against whom a rule has been obtained, approved of and followed.

DURING the hearing of a rule obtained by the petitioner against an attorney of the High Court, in which he alleged certain charges of misconduct which, however, were not substantiated, the attention of the Court was called by the Counsel for the attorney to the fact that, contrary to the ordinary practice which prevails in England, the name of the attorney against whom the charges were being brought had been published in Court by the Counsel for the petitioner, and appeared in the Court list for the day.

His Lordship expressed his dissatisfaction with such a practice, and gave the following ruling in the course of his judgment:—

SALE, J.—The practice which prevails in England and to which Counsel has called my attention, namely, that of not publishing the name of the attorney, until the charges have been proved, has my entire sympathy. The present case affords an instance of the very great hardship which can be inflicted upon an attorney, when that course is not adopted.

C. E. G. *Rule discharged.*