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such an illegality as vitiates a sale which has taken place without such notice having been served. We have been referred by the learned pleader for the appellant to a considerable number of cases dwelling upon the distinction between an irregularity and an illegality. Indeed, I suppose I may fairly say all the cases have been brought to our notice. I confess that there appears to me to be an apparent contradiction between some of them. None of them is on all fours with this case: not one is entirely in point.

I am of opinion that the issuing of the notice required by s. 248 of the Code of Civil Procedure is a condition precedent to the execution of the decree against the representative of the deceased judgment-debtor. I agree with the judgment of the Subordinate Judge, and I think this appeal must be dismissed with costs.

BEVERLEY, J.—I concur with my learned colleague in dismissing this appeal. Having regard to the provisions of s. 248, 249, and 250 of the Code of Civil Procedure, it seems to me clear that until notice is issued on the legal representative of the judgment-debtor, the Court has no jurisdiction to issue its warrant for the execution of the decree.

The appeal is therefore dismissed with costs.

C. D. P. *Appeal dismissed.*

PRIVY COUNCIL.

GREENDER CHUNDER GHOSE (PLAINTIFF) *v.* TROYLUCKHO NATH GHOSE AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

*P. C.** 1892 *November* 10 & 11.

Deed, construction of—Construction of deeds releasing future and contingent interests—Agreement excluding a possible question between the parties as to the effect of words in a will, under which they took their rights.

Three brothers, under their father's will, were entitled, each on attaining full age, to the testator's residuary estate in equal shares. When all had attained full age, two having been minors at the testator's death, they effected a separation of their interests derived from the will, and

* *Present:* LORDS HOBHOUSE, MACNAGHTEN, and SHAND, and SIR R. COUCH.

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executed to one another instruments of compromise and partition containing words relating to possible claims which they gave up.

One of the two younger brothers afterwards died, having taken, under the will of the other younger one, all the estate of the latter, who had died without issue before him. The eldest then attempted to raise the question whether, on the one hand, the brothers had taken under their father's will absolute interests, or on the other, interests that were divested and went over to a surviving brother in the event of death without issue. As to this the Courts below differed, but the Appellate Court decided, and on this appeal the decision was affirmed, that the above instruments relinquished future demands, this claim included, relating to the brothers' estates under their father's will.

APPEAL from a decree (18th March 1889) of the Appellate High Court reversing a decree (3rd September 1888) of the High Court in its Original jurisdiction.

The plaintiff, now appellant, was the eldest son of Anundo Narain Ghose who died in July 1850, having by his will, which was in the vernacular, and dated 23rd February 1850, left his residuary estate to his three sons on their attaining majority. This the eldest had already attained at his father's death. The two younger were of full age before 1860, and before the execution of the instruments giving rise to the principal question on which the decision of this appeal turned.

The defendants respondents, Troyluckho Nath and Omer Nath, were the sons, and the defendant respondent, Khettermoni, was the widow, of Monendor Nath the second son of the testator, who died in 1884; the third son, Nogender Nath, died in 1878, having by his will bequeathed all his estate to Monender his brothers, and having no issue.

The claim of the eldest brother, Greender Chunder, related to a clause in the will of his father Anundo Narain, which was as follows:—

"If previous to the minor sons attaining their age of discretion, or after having attained their majority either of them should, without leaving a son or adopted son, die issueless, in such case any sons then in existence shall take the share of that son, dividing the same in equal portions."

After litigation commencing in 1851, terms of settlement of disputes and for a partition were agreed to. On this a decree

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was made in a suit, to which the brothers were parties, on the 10th February 1860. A commission of partition was issued by the Supreme Court, possession was given of rightful shares, and deeds, of which the principal one was dated 18th May 1861, were executed. This deed of 1861 was a release of the present plaintiff's one-third share in the immoveable property allotted to Nogender; and it contained the words of which the construction was the main question now raised. They were as follows, in the operative part:—

"They, the said Greender Chunder and Monender do, and each of them doth, by these presents, grant, bargain, sell, alien and release, and by way of conveyance only and not by way of warranty of title, do and each of them doth, also grant and confirm unto the said Nogender, his heirs, representatives, and assigns," (here the parcels) "and all the estate, right, title, interest, use, trust, property, possession, possibility, claim, and demand whatsoever, both at law and in equity, of them, &c."

There were other deeds dealing with particular properties.

The case made by the plaintiff was that upon the death of Nogender one-half of his share under the will of Anundo Narain, his father, vested in his eldest brother, Greender Chunder, under the gift over in the will which was to be understood as the effect of the clause above quoted; and that the plaintiff was entitled to possession as against the defendants of one-half of the property allotted to Nogender upon partition, as representing his one-third share, one-half of a one-third share of the property remaining undivided.

The defence was, besides other grounds, that the gift over applied only to the death of Nogender during his own minority, or at any rate during the minority of Monender: also, that the effect of the conveyance and release, on the partition of 1861, had been to convey to Nogender an estate indefeasible by any words of a gift over in the will, however construed, and that thus the claim failed as against the defendants.

Issues raising these points having been fixed, the judgment of the first Court was in favour of the plaintiff.

On an appeal the High Court (PRINSEP, C.J., and WILSON, J.) reversed that judgment. In brief, the decision, delivered by WILSON, J., was that though the construction, as to the gift over

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in the will of 1850, that it was to take effect upon the death of either of the then minor sons of the testator at any time without issue, was a construction that the words, had they stood alone, would bear; yet, looking at the whole scope of the will and the words together, the Judges inclined to the opinion that the correct meaning of the clause and the intention of the testator was that the attainment of full age by the then minor sons, which was fixed as the period of distribution, was the limit of the time within which the event was to happen which would effect the defeasance: that the gift over, in other words, was not to take effect unless the death took place before the son dying without issue should have attained his majority. But the Judges did not consider it necessary to decide what construction should be placed on this clause, inasmuch as the view which they took of the deeds of 1861, executed upon the partition, rendered it unnecessary. They based their judgment, reversing the decision of the Court below, on this, that in their opinion an absolute and unqualified interest in the properties allotted and apportioned to Nogender had been by those instruments given and assured to him; that every possible claim of the kind now made had been renounced in favour of the brother through whom the defendants claimed; and that the plaintiff, having taken the benefit of the arrangement made in 1861, could not be allowed to derogate from his grant.

The plaintiff having preferred the present appeal

Mr. *T. H. Cowie, Q.C.*, Mr. *J. Graham, Q.C.*, and Mr. *H. W. Cave*, appeared for the appellant.

Sir *H. Davey, Q.C.*, and Mr. *J. H. A. Branson* for the respondents.

For the appellant it was argued that the agreement and deeds of 1861 were not made with the intention of including any prospective settlement, of a kind that would be final, of the interests of the parties under the will of 1850. It was hardly then in contemplation to conclude all possible questions that might arise between the families of the three brothers. Rather, the deeds were executed to confirm the partition, which, as a partition, settled all then existing rights. The agreement had reference only to the purposes and objects of the partition.

The Counsel for the respondents were not called upon.

Their Lordships' judgment was given by

LORD MACNAGHTEN :—There were two questions raised in this appeal. One depends upon the true construction of the will of Anundo Narain Ghose, the father of the appellant, Greender Chunder Ghose, and of his two younger brothers, who were minors at the date of the will and at the date of the death of the testator. The other depends upon the construction and effect of certain instruments made between the three brothers after the two younger had attained their majority. Unless both can be answered in accordance with the contention of the appellant, the appeal must fail. Their Lordships are of opinion that one at least of these questions must be answered in favour of the respondents.

Under the will of Anundo Narain the three brothers were entitled in equal shares to the residuary estate of the testator. The question on the will is :—Did the two younger brothers on attaining majority take an absolute interest, which they could deal with as they pleased, or did they take an interest liable to be divested or defeated in the event of death without issue, natural or adopted? Mr. Justice Trevelyan decided in favour of the latter view. The inclination of the opinion of the Appellate Court was the other way, but the matter was not finally decided.

Their Lordships also will leave this question undetermined. They are not prepared at present to assent to the view which commended itself to Mr. Justice Wilson. But as they have not heard Counsel for the respondents, it would not be proper to express an opinion upon the point.

Assuming that Mr. Justice Trevelyan was right so far, their Lordships agree with the Appellate Court that the instruments executed by the appellant on the occasion of the compromise and partition operated to pass every interest of every kind which the appellant had or could claim to have in the shares allotted to the younger brothers. So long as those instruments stand, it appears to their Lordships impossible for the appellant to contend with success that any interest, present, future, or contingent, was reserved to him.

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Their Lordships may add that there is nothing on the face of the deeds or in the previous agreement, or in the position of the parties, to suggest that this was not in accordance with the intention of every one concerned. They agree with Mr. Justice Wilson "that looking at the deeds the object of the parties was once for "all to dispose finally of the father's estate, and of all questions "connected with the father's estate."

The parties were acting under legal advice. They were effecting a separation of interests derived under the will. It is very unlikely that an obvious provision of the will should have been overlooked. It is almost inconceivable that the younger brothers, who were in a position to dictate terms, would have consented to take their shares subject to an executory gift in favour of their elder brother, which, however remote and however inconsiderable at the time, would have had the effect of making it impossible for them during their lives to dispose of the property by sale or mortgage. Their Lordships therefore entirely concur in the judgment of the Appellate Court.

There is one other point which perhaps ought to be mentioned. Their Lordships very much regret that, in order to assist them to determine these two simple questions, it should have been thought necessary to furnish them with a record of such enormous length. Nearly 300 pages are taken up by the schedules to the answer in the original suit, not one word of which in any circumstances could have any bearing on the questions before their Lordships. Their Lordships have more than once commented upon the bulk of records sent from India. They will consider whether some means cannot be devised to save litigants in future from this idle expense.

Their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed, and the appellant must pay the costs.

Appeal dismissed.

Solicitor for the appellant: Mr. *J. F. Watkins.*

Solicitors for the respondents: Messrs. *Barrow* and *Rogers.*

C. B.