APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1887. *August* 17.

HORMUSJI NAVROJI, (ORIGINAL APPLICANT), APPELLANT, *v.* BA'I DHANBA'IJI, JAMSETJI DOSA'BHA'I, AND OTHERS, (ORIGINAL CAVEATORS), RESPONDENTS.*

Will—Letters of administration—Citation—Defective citation—Revocation of letters of administration—Probate, nature and effect of—Act V of 1881, *Secs.* 16 *and* 50.

S., a Pársi, died, leaving a will, whereby he directed that after his death his estate should be managed by his widow Jivibái, and after her death by his sister-in-law Hirábái, and after Hirábái's death by the appellant, his adopted son Hormusji. On Jivibái's death the testator's brother Dosábhái applied for letters of administration, and issued a citation to the appellant Hormusji. Hirábái entered a caveat. No further proceedings were taken, and the matter remained pending. On Hirábái's death, Dosábhái applied for a fresh citation to the appellant Hormusji, but the District Judge held it to be unnecessary, and declined to issue it. Letters of administration were then granted to Dosábhái. The appellant Hormusji subsequently applied for probate of the testator's will. The respondents filed caveats, alleging that the will was void, on the ground of certain bequests contained in it. They further contended that as the appellant had been cited to appear when application was made by Dosábhái for letters of administration, he could not now apply to have letters of administration cancelled.

Held, that the letters of administration granted to Dosábhái should be revoked, and that probate should be granted to the appellant. The only citation which had been issued to the appellant was in 1882, when Dosábhái commenced his proceedings to obtain letters of administration. At that time Hirábái, who was the executrix named in the will (the appellant Hormusji being only named as executor on her death), was still alive, and the citation did not, therefore, call on him to accept or renounce executorship. On Hirábái's death, however, which took place before the actual grant of administration was made to Dosábhái, such a citation was necessary, under section 16 of Act V of 1881, before the grant could be legally made. In default of such a citation the proceedings were defective in substance—a circumstance which constituted good cause for the revocation of the letters of administration, under section 50 of Act V of 1881.

Held, also, that the District Judge was wrong in refusing probate of the will, on the ground that the bequests contained in it were illegal and void. Probate is only conclusive as to the appointment of executors and the validity and contents of the will; and in an application for probate it is not the province of the Court to go into the question of title with reference to the property of which the will purports to dispose, or the validity of such disposition.

THIS was an appeal against an order of E. T. Candy, District Judge of Surat, in application No. 11 of 1884 under Act X of 1865.

* Appeal No. 52 of 1885.

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By his will, dated the 10th September, 1877, one Shápurji, a Pársi, left the management of his estate to his wife, and after her death certain others of his relatives.

The material portion of the will, as stated by the District Judge in his judgment, was to the following effect:—"After the testator's death, his wife Jivibái should manage his estate, and from its revenue she should, according to testator's religion, defray the entire expenditure incurred on account of the anniversaries of the deceased parents of the testator and Jivibai and of the *doshá* and *gambhár* of the dead. During her life, Jivibái was to be the sole owner of the estate; on her death, Hirábái, wife of testator's brother Navroji, was to manage the estate and defray Jivibái's funeral expenses, as mentioned above, together with all the expenses on account of the anniversaries, *doslás*, &c. On Hirábái's death, Hormusji, son of testator's brother and adopted son of testator, was to manage the entire estate and defray the above expenses. On his death, his wife Dosibái and his sons Sorábji and Kharsedji were to be the managers, as above described, and defray all the said expenses." On Jivibái's death, in 1882, Dosábhái, the testator's brother, applied for letters of administration, and the appellant Hormusji, the nephew and adopted son of the testator, was cited, but he failed to appear. Hirábái, however, who was then alive, entered a caveat, and the matter remained pending till the death of Hirábái, which took place in February, 1884.

On the death of Hirábái, Dosábhái applied to the District Judge for a fresh citation to the appellant Hormusji, which the Judge thought was unnecessary, and he then granted letters of administration to Dosábhái.

The appellant Hormusji having now applied for probate of the will, the respondents Dhanbáiji and Jamsetji, who were the children of another brother of the testator and his brother Dosábhái, filed caveats, impeaching the will as void by reason of certain provisions therein. The caveators contended *(inter alia)* that the letters of administration which had already been granted to Dosábhái should be cancelled before probate could be granted to Hormusji, and Dosábhai further contended that the appellant's

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application for probate could not now be heard, as he had already been twice cited, and had omitted then to apply for probate. The District Judge held the will void, and refused to grant probate.

Hormusji thereupon appealed to the High Court.

Gokuldás Kahándás, for the appellant, relied on *Behary Lall Sandyál* v. *Juggo Mohun Gossain*[1], and contended that the Judge was wrong in entering into the question of the validity of the will, which had been proved.

Jardine, (*Mánekshán Jehángirshán* and *Motilál Mugutlál Munshi* with him) for the respondents:—The appellant's omission to appear when he was cited on previous occasions disentitles him now to probate. The present application of the appellant is rather one for the revocation of the letters of administration than for probate. A person who has been cited, and fails to appear at the time probate is granted, cannot afterwards get it cancelled—*In re Pitámber Girdhar*[2]. See also sections 16 and 50 of Act V of 1881.

SARGENT, C. J.:—The question in this case arises upon a refusal of the District Judge to grant probate of the will of one Shápurji Nasarwánji to Hormusji Navroji, on the ground that the bequests contained in it are illegal and void. The probate is only conclusive as to the appointment of executors and the validity and the contents of the will—Williams on Executors, p. 452 (4th ed.); and on the application for probate it is not the province of the Court to go into the question of title, with reference to the property of which the will purports to dispose, or the validity of such disposition—*Behary Lall Sandyál* v. *Juggo Mohun Gossain*[3].

But it has been contended that as Hormusji was cited on Dosábhái's second application for letters of administration in 1882, the grant of administration to him cannot now be revoked. It appears, however, that when those proceedings were commenced, and when Hormusji was cited, Hirábái, who was the executrix named in the will (Hormusji being only named in the will as executor on her death), was still alive, and the citation did not, therefore, call on him to accept or renounce executorship.

(1) I. L. R., 4 Calc., 1. (2) I. L. R., 5 Bom., 638 at p. 641.
(3) I. L. R., 4 Calc., 1.

On Hirábái's death, however, which took place before the actual grant of administration to Dosábhái, such a citation was imperatively required by section 16 of Act V of 1881 before the grant could be legally made, and, therefore, in default of such citation, the proceedings were defective in substance—a circumstance which constitutes good cause for the revocation of the letters of administration, as provided by section 50 of the above Act. We must, therefore, discharge the order, and direct that the letters of administration granted to Dosábhái be revoked, and probate be granted to Hormusji, in accordance with his application.

The applicant to have his costs here and in the Court below.

REVISIONAL CRIMINAL.

Before Mr. Justice West and Mr. Justice Birdwood.

IN *RE* HOWARD.*

1887. August 25.

Defamation—Republication of defamatory matter already published—Indian Penal Code (Act XLV of 1860), Sec. 499—Dismissal of complaint—Criminal Procedure Code (Act X of 1882), Sec. 203.

A complaint was filed, under section 499 of the Indian Penal Code, against the proprietors, editor, and printer of a newspaper for publishing matter alleged to be defamatory. The Magistrate, before whom the complaint was lodged, found that the publication complained of was a mere reproduction or republication of what had been previously printed and published in another newspaper. He was, therefore, of opinion that, unless and until criminal proceedings had been taken in respect of the earlier publication, a charge of defamation could not properly be brought with regard to the later publication. He, therefore, dismissed the complaint, under section 203 of the Code of Criminal Procedure (Act X of 1882).

Held, that the order of dismissal was improper. The Indian Penal Code (sec. 499) makes no exception in favour of a second or third publication as compared with a first. If the complaint is properly laid in respect of a publication which is *primâ facie* defamatory, the Magistrate is bound to take cognizance of the complaint, and deal with it according to law.

THIS was an application under the criminal revisional jurisdiction of the High Court, under section 435 of the Code of Criminal Procedure (Act X of 1882).

The applicant Howard lodged a complaint in the Court of the Chief Presidency Magistrate, charging the proprietors, editor, and printer of a Bombay newspaper, called the *Advocate of India*, with defamation.

* Criminal Revision ; Application No. 172 of 1887.