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not observed, will lead to a nuisance, they must first insure that these precautions will be taken. The Town Council are under no obligation, statutory or otherwise, to counteract the illegal proceedings of the respondents." Remarks similar to these may well be made in the present case.

For these reasons we think that the plaintiff is entitled to restrain the defendant from discharging the refuse liquid of his [709] factory into the Municipal drain. From the history of this case it appears that the defendant has successfully resisted Municipal control, that he has enlarged his factory and that he has been discharging a greater volume of refuse liquid into the drain. It is plain that, if no injunction is issued, there will be nothing to prevent him from aggravating the present nuisance by further enlarging his factory and discharging still more refuse into the drain. An injunction for permanent stoppage of the nuisance is the only effectual remedy, and we have abundance of authority for issuing an injunction in the cases decided in England.

With regard to the question of the damage caused to the plaintiff, objections have been urged against the opinion formed by the Subordinate Judge. Persistence in a proved nuisance has been held in England to be a just cause for giving exemplary damages, see Pollock's Law of Torts (6th edition), Chapter X, 407. The defendant has certainly persisted in spite of Municipal warning. This therefore is not a case in which the damages awarded should be nominal. There can be no doubt that material injury has been caused to the plaintiff, and the damages should be substantial; and, while holding this view, we think that the Subordinate Judge's estimate is reasonable and not excessive. For these reasons we affirm the decree of the Court below and dismiss this appeal with costs.

Appeal dismissed.

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[710] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Pargiter.

DELANEY *v.* ROHAMAT ALI. *

[3rd March, 1905.]

Evidence—Executor, proof of title of—Probate—Administration, grant of—Jurisdiction of Court to modify—Indian Succession Act (X of 1865), ss. 3, 179, 187, 260—Sale for arrears of rent—Incumbrances, annulment of—Notice—Disclaimer—Bengal Tenancy Act (VIII of 1885), s. 167.

Under sections 179, 187 and 260 of the Indian Succession Act, where probate of a will has been granted, the executor, in order to bring a suit as such, is bound to prove his title; to do which in case of dispute he must file, not merely a copy of the grant of administration, but also the copy of the will attached to it, the two together forming the probate as defined by section 3.

But a Court, not being the Court of Probate, cannot go behind the grant and interpret and modify its terms by the provisions of the will.

In a suit for possession after annulment of an under-tenure under s. 167 of the Bengal Tenancy Act, absence of due service of notice on a person, who in the suit disclaimed all interest therein, cannot prejudice the plaintiff.

But if the application for the issue of the notice against some of the persons jointly interested in the incumbrance was not made within time, the whole suit must fail.

* Appeals from Appellate Decree Nos. 2194 and 2743 of 1902 against the decree of H. Walmsley, officiating District Judge of Noakhali, dated July 30th, 1902, affirming the decree of Hari Das Bose, Munsiff of Sandip, dated May 27th, 1901.

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SECOND APPEAL by the plaintiff, Ellen Delaney.

The plaintiff instituted these two suits as executrix to the estate of her deceased husband on the 2nd October 1899 on the allegation, that she had purchased in the year 1884 two *taluqs* in the zamindari estate called *taraf* Bhabani Charan bearing number 14 in the Collector's *tauji*; that under the said *taluqs* there was a *howla*, which she purchased with power to avoid incumbrances at a sale in execution of a decree for rent on the 16th April 1896, and obtained possession through Court on the 27th July of that year; that she subsequently came to know that the principal defendants in the suits, claimed to hold possession of certain lands, the subject-matter of the suits, within the *howla* under *shikmi howla* titles and that she had thereupon presented a petition to the Collector of the district on the 3rd March 1897 praying for the [711] service upon them of notices under section 167 of the Bengal Tenancy Act; that the notices had been duly served in October 1897 and the said *shikmi howlas* had been avoided. The plaintiff prayed for recovery of possession of the lands on establishment of her *talukdari* and *howladari* titles and on a declaration that the *shikmi howla* of the principal defendants had been avoided. The raiyats on the land and the proprietors of another estate, with whom the lands of the estate *taraf* Bhabani Charan were held jointly, were also made defendants to the suit.

The contending defendants pleaded that the plaintiff was zemindar of a fractional share only and as such was not entitled to annul incumbrances, that their interest was not liable to be annulled, and that the notices had not been duly served.

Sixteen issues were framed, of which the first two were as follows:—

(*i*) Was notice duly served on the defendants?

(*ii*) Can plaintiff maintain the suit as executrix?

It appeared that the plaintiff's husband died leaving a will of which she was the executrix, and probate of the will was granted to her in April 1877. The testator left a son, who had since the date of the grant attained the age of majority. To establish her title as executrix, the plaintiff produced the grant of administration, but she did not produce the copy of the will annexed to it. The defendants contended that under the will the authority of the executrix had ceased, and that she was not entitled to maintain the suit. The notices under section 167 of the Bengal Tenancy Act had been served on defendants 1 to 4 in October 1897, but it was found that the service had not been effected according to law. It further appeared that in 1899 the plaintiff applied to the Collector for service of notices under section 167 upon one Mahammad Khurshed Alam Chowdhury and upon two persons named Chand Meah and Ahamad Ali for the annulment of the aforesaid *shikmi howlas*; the said Mahammad Khurshed was added as party defendant No. 28 to the one suit and the said Chand Meah and Ahamad Ali were added as party defendants Nos. 14 and 15 to the other suit by order of Court, dated the 3rd January 1900. The defendant No. 28 in the first suit, however, by his written statement disclaimed all interest in the land.

[712] The Court of first instance decided the first two issues against the plaintiff holding that the notices had not been duly served, and that notices on the defendant No. 28 in the one suit and on the defendants Nos 14 and 15 in the other had not been served in time, and that the production of the grant of administration without the copy of the will was not sufficient

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to establish the plaintiff's title, and observed that, if the copy of the will had been produced, the contention of the defendants that the authority of the executrix had ceased might have been borne out. The plaintiff's suit was accordingly dismissed.

This decision having been affirmed by the District Judge on appeal, the plaintiff appealed to the High Court.

The Advocate-General (Mr. *P. O'Kinealy*) (Babu *Baikanth Nath Das* and Babu *Golab Chandra Sarkar* with him) for the appellant. It is unnecessary to produce the copy of the will, for assuming that under the terms of the will the executrix is to make over the properties to the son on his attaining majority, still the grant of administration being unlimited, no other person except the executrix is entitled to sue, until the probate is recalled or revoked: Indian Succession Act (X of 1865) sections 260, 179 (1). It is only the Court of Probate, which can recall or revoke the probate. Under section 167, Bengal Tenancy Act, it is not necessary that the service of the notice should be effected within the one year allowed; it is enough, if the application is presented to the Collector within that time.

Maulvi *Seraj-ul-Islam* (Babu *Dhirendra Lal Kastgir* with him) for the respondents. To prove her title as executrix, the plaintiff must produce the probate, which means not only the grant of administration, but also the copy of the will attached to the grant; Indian Succession Act (X of 1865), section 3; not having produced the copy of the will she has therefore failed to prove her title as executrix. The finding by the Lower Appellate Court that the notices had not been duly served is conclusive.

BRETT and PARGITER, JJ. The present appeal arises out of a suit brought by the plaintiff as executrix of the will of her deceased husband. She purchased at a sale for arrears of rent a certain *howla* in April 1896, and in July 1896 she was put in [713] possession. Subsequently, according to her own case, she applied to the Collectorate of the district to issue notices on some at least of the present respondents, under section 167 of the Bengal Tenancy Act, to have annulled certain encumbrances existing on the *howla*, in which encumbrances they were interested. The present suit was brought to eject the defendants, the respondents, from those tenures which, it was alleged, formed the encumbrances on the purchased *howla*.

Three main objections appear to have been taken to the suit. The first was that the plaintiff was not entitled as executrix to maintain the suit, the second was that notices were not served on the defendants within one year from the time when the plaintiff became aware of the encumbrances as required by section 167 of the Bengal Tenancy Act, and the *third* was that the notices were not duly served according to law.

The two lower Courts have found against the plaintiff on all the three points and have dismissed the suit. The plaintiff has, therefore, appealed.

The first point taken on behalf of the appellant is that the lower Courts were wrong in their decision on the first point raised before them. It is urged that, when the executrix appeared in Court and filed, in order to prove her title as executrix, the copy of the grant of administration made to her at the time of probate, it was not open to the defendants to raise an objection to her title on the ground, that she had failed to file also a copy of the will and to prove that under the terms of that will she was still entitled to administer the estate as executrix. But the sections of the Indian Succession Act (179, 187 and 260) show clearly enough that where

probate of a will has been granted and an executor appointed, the executor, in order to bring a suit as such is bound to prove his title. The lower Courts appear to have held that, in order to prove her title as executrix, the plaintiff was bound to file, not merely the copy of the grant of administration, but also the copy of the will, of which probate was granted. We think, having regard to the provisions of section 3 of the Indian Succession Act and the definition therein given of the term probate, that when the title of the executrix as such was disputed by the defendants in the case, it was incumbent on her to file, [714] as proof of her title, not merely a copy of the grant, but also a copy of the will attached to the grant, which with the grant formed the probate. We are, therefore, of opinion that so far as the lower Courts decided that the plaintiff, on her failure to produce the complete probate, was not entitled to proceed with the suit, these decisions are correct.

We are not, however, prepared to go as far as the lower Courts appear to have gone and to hold that it was open to the lower Courts, after the copy of the grant of administration to require that the copy of the will should be produced, in order to enable them to go behind the grant and to interpret and modify its terms by the provisions of the will. This could be done only by the Court of Probate. So far, therefore, as the learned Advocate-General, who appears for the appellant, has contended that the lower Courts were wrong upon this point, we are of opinion that his contention must prevail.

The second point taken, that the suit was barred by limitation admittedly in this case, applies only to the case of defendant No. 28. It is not contended by the learned vakil for the respondents that limitation is to be calculated up to the date of the actual service of notice, but he admits that it is to be calculated up to the date when the application for the issue of notices was made to the Collector.

It is not denied that the application in the case of all the defendants, respondents, except No. 28, was made within one year from the date when the plaintiff became aware of the incumbrances. So far then as all the defendants except No. 28 are concerned, there can be no bar by limitation.

The learned Advocate-General has invited our attention to the written statement, which was filed by defendant No. 28 on the 8th of March 1900, after the service of notice on him. In that statement, that defendant distinctly disclaimed all interest in the property; and it would appear that he was added as a defendant by the plaintiff on the 3rd of January 1900, on information gathered from the statements made by the other defendants in the other suit. As defendant No. 28 disclaims all interest in the tenure which it is sought to annul, there was in this case no necessity to serve any notice on him, and the fact that notice was served on him beyond the period of limitation, could not be taken [715] to prejudice the plaintiff in the present case or in any way to bar her present suit by limitation.

The third point taken is with regard to the service of notices. The learned Advocate-General admits that there is a finding on this point by the lower appellate Court, though he suggests that the finding is not a distinct finding and is confused by what he thinks was the impression of the Judge of the lower appellate Court with regard to the question of limitation. In our opinion the finding of the lower appellate Court is clear and distinct that the notices in this case were not served on the defendants in accordance with law; and, on reading the judgment of the learned District

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Judge, we think that he has sufficiently discriminated between the two points, namely, the question of limitation and the question of due service, and there is in fact no real confusion in his judgment on this point.

The finding with reference to the service of notice is a finding of fact, which we are unable to interfere with in second appeal ; and as that finding is conclusive so far as the present appeal is concerned, we must hold that the appeal fails and dismiss the same with costs.

Appeal No. 2743 differs from appeal No. 2194, in that it is admitted in this case that the application for the issue of notices against defendants Nos. 14 and 15 was not made within the period of limitation fixed by section 167 of the Bengal Tenancy Act. Those two persons appear to be interested in the encumbrances and were necessary parties, if the encumbrances were to be set aside ; and it was, in our opinion, impossible for the plaintiff to succeed in her suit without making them parties and proving that notices had been duly served on them. But the suit so far as those two persons are concerned is clearly barred by limitation, and it must therefore equally fail against all the other defendants jointly interested with them in the tenure.

We hold therefore that the suit fails, and we dismiss the appeal with costs, on the ground that the suit as against all the defendants is barred by limitation.

Appeals dismissed.

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32 C. 716.

[716] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Mookerjee.

RAJ CHANDRA ROY *v.* FAZIJUDDIN HOSSEIN.*

[4th August, 1904.]

Limitation—Limitation Act (XV of 1877), Sch. II, Art. 14—Estates Partition Act (Bengal Act VIII of 1876), s. 116—Suit for possession.

In a partition proceeding, a dispute arose as to whether certain plots of land were included in the property to be partitioned or not.

An enquiry was made by a Special Deputy Collector, who made a report to the Collector, holding the partition proceedings.

The Collector passed an order on the 9th August 1893 under s. 116 of the Estates Partition Act directing that the partition proceedings be struck off.

On the 19th January 1897, the plaintiffs brought a suit for declaration of their title to the said disputed plots of land and to recover possession thereof.

On an objection by the defendants that the suit, not having been brought within one year from the date of the order of the Collector, was barred by limitation:

Held that, Article 14, Schedule II of the Limitation Act (XV of 1877) did not apply to the case, and that the suit was not so barred.

Parbati Nath Dutt v. *Rajmohun Dutt* (1) distinguished.

[Ref. 36 Cal. 726 ; 49 I. C. 765.]

APPEAL by the plaintiffs Raj Chandra Roy and others.

This appeal arose out of an action brought by the plaintiffs to recover possession of certain plots of land on declaration of their title thereto.

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* Appeal from Original Decree No. 435 of 1902 against the decree of Dina Nath Sarkar, Subordinate Judge of Mymensingh, dated the 23rd of June 1902.

(1) (1901) I. L. R. 29 Cal. 367.