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July 11.*Before Mr. Justice Norman.*SHARO BIBI *v.* BALDEO DAS.*Will of Hindoos—Probate—Evidence.*

Grant of probate of the Will of a Hindu confers no title upon the executor, but he derives his title from the Will itself. Probate is evidence of his title, only so far as a decree of the Court granting it would be, namely between the parties and those privy to the suit in which the decree is made.

THIS suit was brought by Sharo Bibi, a Hindu widow, in respect of a house, No. 2, Cotton Street, in Calcutta, of which she sought a decree for possession, as trustee for religious purposes, under the Will of her husband; and for an account and payment by the defendants to her, as such trustee, of the mesne profits.

The material part of the will of Bedheerchand, the plaintiff's husband, was as follows:

"I appoint my wife and sole heir, Sharo Bibi, sole executrix of this my Will, and devise and bequeath all real and personal estate unto and to the use of the said Sharo Bibi during the term of her natural life, subject to such conditions as are hereinafter declared.

"I further devise, that of the aforesaid real estate, one piece of land, No. 2, Cotton Street, which was purchased by me at the sheriff's sale, will be kept apart, or otherwise allotted, exclusively and entirely, all and whatever may be the profits derived therefrom, for religious expenses, to be performed in my memory by the said Sharo Bibi during her life-time, and after her death by her successor, or any person, executor or trustee, &c., whom she may appoint to manage the same; and that the said piece of land will not be sold or mortgaged, or disposed of, on any account by any such parties, or the rents and profits thereof applied to any other purpose, except as above devised."

Probate of the Will in common form had been granted to the plaintiff, by the late Supreme Court. She alleged that she had come into possession of her husband's estate, including No. 2, Cotton Street; and that she had remained in possession as trustee for religious purposes, under the Will, until dispossessed by the defendants, under colour of some legal process against her. She submitted that, under the Will, the house and premises were devised as a religious endowment, and were not liable to seizure

Mr. *Eglinton* and Mr. *Lowe* for plaintiff.

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The *Advocate General*, Mr. *Woodroffe*, and Mr. *Goodeve* for defendants.

Probate of the Will was tendered as evidence, against the defendants, of the validity of the will.

The *Advocate General*, for defendants, objected to the probate being admitted. He contended, that the rule of English law, that it is conclusive so far as it extends to personal property, does not apply in reference to Hindus ; it is not even *prima facie* evidence against them ; it stands no higher than a certificate of administration, under Act XL. of 1958. The proposition that Hindu law makes no difference between movable and immovable property, and that, therefore, what applies to one applies to the other, cannot be maintained.

Mr. *Eglinton* contended, that the probate was admissible. If it was to be impeached, it should have been impeached in the usual way. A suit ought to have been brought for the purpose.

NORMAN, J.—I am of opinion the probate in this case does not prove the Will. In English law, probate is proper evidence of the executor's title to personalty. That depends on a peculiar law and state of things, which does not exist in regard to Wills of Hindus. Much controversy has taken place as to the powers of the English Ecclesiastical Courts, and as to the exact nature of that of which they divest themselves and confer on the executor in granting probate to him. The subject was very much discussed, and the true principle laid down in *Dyke v. Walford* (1). Probate in England is granted to the executor by the Ecclesiastical Court, which has a right of possession and administration of the estate. If the executor had the grant, he had the title ; the Will was not recognised as conferring a title to personalty without the assent of the Court that had the power to put the executor in a position to administer. In

(1) 5 Moore, P. C., 434.

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England, the effect of probate for the purposes of evidence is not treated as standing on the same footing as an ordinary judgment. It is treated as a *quasi* estoppel. It is so classed by Mr. Smith in his notes to *the Duchess of Kingston's case* (1). As regards a person appointed as executor of the Will of a Hindu, his position is different. He takes nothing from any grant of the Court. His title is founded solely and simply on the Will of the testator, considered as an instrument of gift. Except for the purposes of evidence, the Will of a Hindu does not require probate, the executor obtains a sentence of the Court, and in looking at the effect of that sentence in evidence against others, we must apply those principles which determine whether decrees of Courts of Law, Equity, or Admiralty are evidence against persons not parties to these. As against those who get the probate or oppose the grant of it, is no doubt binding, as against parties cited it is evidence, but it has no greater effect than the ordinary decree in a Civil Court against persons who have no means of appearing in the suit, or right to dispute the grant. Probate under the English law of evidence, is no proof of the title to land, or of the due execution of a power, because on such subjects the Ecclesiastical Court had no jurisdiction or power. As the technical reason which makes a grant of probate in England evidence of title to personalty, does not apply to the grant of probate of the Wills of Hindus, I think we can only apply the rules governing the admissibility of decrees of Courts. Was the party against whom the probate is sought to be used a party or privy to the suit? Here the defendants were strangers. They purchased the rights and interest of the widow. A purchaser of the rights of a debtor at a sale under an execution, ordinarily speaking, is not bound by the acts of such debtor; were it otherwise, he might be bound by acts committed for the express purpose of defrauding him. In this case I cannot treat the probate as evidence, against the defendants, of the execution of the Will.

Attorneys for the plaintiff: *Messrs. Goodall and Leslie.*

Attorney for the defendants: *Mr. Paliologus.*

(1) 2 Smith's Leading Cases 5th Ed., 713.