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he is to pay the money out of the estate in his hands, and that this man, the plaintiff, is entitled to get the whole of his claim, and that it is to be paid in full if the whole estate of the insolvent is sufficient to pay him. This is clearly wrong, and consequently this appeal must be allowed, and the judgment of the Subordinate Judge and the order substituting Mr. Miller's name on the record must be set aside, and the case remitted to the Subordinate Judge for retrial as against the original defendant. The plaintiff must pay the cost of this appeal.

Appeal allowed.

A. A. C.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

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July 11.

NISTARINY DABYA, MINOR, BY HER GUARDIAN SARASATY DABYA (PETITIONER) *v.* BRAHMOMOYI DABYA (OPPOSITE PARTY).*

Probate—Revocation of Probate—"Just cause" for revocation—Probate and Administration Act (V of 1881), s. 50.

The mere absence of a special citation in proceedings in which probate of a will is granted is not, where the person to whom a citation has not been issued is otherwise aware of the proceedings, a "just cause" for revocation of probate as making the proceedings substantially defective within the meaning of section 50 of the Probate Act, even where such person is a minor.

THIS was an application for revocation of probate. The will in respect of which probate was granted was said to have been executed by one Gopal Chandra Das, who died some time in July 1887, leaving him surviving his widow, Nistariny Dabya, a minor, who is the petitioner in this case and is now represented by her mother, Sarasaty, and his mother, Brahmomoyi, who was appointed executrix under the will. Brahmomoyi applied for probate in October 1887. The usual citations were issued; and thereupon one Kali Prasad Tripati, paternal uncle of Nistariny, entered a caveat, representing that the minor, Nistariny, was living under his care, and was the heiress-at-law of Gopal Chandra, and that the alleged will was a forgery. Evidence was gone into on both sides, and the District

* Appeal from original decree No. 166 of 1889, against the decree of J. Pratt, Esq., Judge of Midnapore, dated the 8th of April 1889.

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Judge refused probate, holding that the will was not proved. On appeal by Brahmomoyi, the High Court, on the 25th of June 1888, reversed the Judge's decision, and ordered probate to be granted.

The present application was made on the 23rd of March 1889 for revocation of probate, on the ground that the grant had been obtained by Brahmomoyi fraudulently and in collusion with Kali Prasad Tripati. The only evidence adduced in support of this allegation of fraud and collusion was that of Sarasaty, the mother of Nistariny. She admitted, however, that Kali Prasad was not on bad terms with her daughter, and that she was living in the same house with him.

The District Judge considered the allegation of fraud and collusion unfounded, and rejected the application. Against that decision the petitioner appealed to the High Court.

Dr. *Rash Behari Ghose* and Baboo *Boidya Nath Dutt* for the appellant.

Dr. *Troylokya Nath Mitter* for the respondent.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was (omitting the facts which were stated as above) as follows:—

It is very properly conceded before us that the allegation of fraud and collusion has not been substantiated, and the only point pressed upon us is that the appellant is entitled to ask the executrix, Brahmomoyi, to prove the will in solemn form in her presence, as she neither appeared nor had she been specially cited to appear in the previous proceedings, and that there was just cause for revocation of probate within the meaning of section 50 of the Probate Act, the absence of special citation making the proceedings substantially defective.

We do not think this contention is sound. The authorities cited in its support do not bear it out. In *Komol Lochun Dutt* v. *Nilruttun Mundle* (1), the only point decided was that the grant of probate could not be contested by a regular suit, and that if the probate was wrongly granted, the proper course was to apply for its revocation according to the procedure laid down in the Succession Act. Some of the observations made in the judgment no doubt show that under certain circumstances the grant of probate

(1) I. L. R., 4 Calc., 360.

after a will is proved in solemn form may still be called in question, but the learned Judges do not say, nor were they called upon to say, what those circumstances are. In the case of *Kamona Soondury Dassee* v. *Hurroo Lall Saha* (1) the only points raised (in addition to that relating to the genuineness of the will) were that the Court below had no local jurisdiction to revoke the probate, and that the petitioner had no sufficient interest in the property of the alleged testator to entitle him to apply for revocation of probate. And though in the judgment it is observed that when a will is propounded which alters the devolution of property, the District Judge should, in the exercise of the discretion vested in him as to the mode of issuing citations, direct special citations to be served on every one immediately affected by the will, the issue of special citations is not held to be imperative, so as to make the proceedings substantially defective merely by reason of its absence. In *Brinda Chowdhrani* v. *Radhica Chowdhrani* (2) the learned Judges observed:—"If it appeared that the applicant had had notice, or had been aware of the former proceedings before the grant of probate issued and had abstained then from coming forward, this would constitute a ground for refusing to allow her to intervene [see *Ratcliffe* v. *Barnes* (3) and *In re Pitambar Girdhar* (4)], unless perhaps it were made out that the circumstances leading her to believe that the will was not genuine had not come to her knowledge until after the grant of probate." In those observations we entirely agree; but they do not under the circumstances of this case presently to be noticed at all support the appellant's contention: on the contrary, they support the opposite side.

While we deem it certainly desirable that when a will is propounded which alters the devolution of property, the District Judge should, in the exercise of the discretion vested in him by section 69 of the Probate Act (V of 1881) as to the mode of issuing citations, direct special citations to persons whose rights are immediately affected by the will, we do not think the absence of such special citation would of itself be sufficient to entitle a party to require a will to be proved in his presence after it has once been proved in solemn form, if he was aware of the proceedings. The contention

(1) I. L. R., 8 Calc., 570.
(2) I. L. R., 11 Calc., 492.
(3) 2. Sw. & T., 486.
(4) I. L. R., 5 Bom., 638.

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that the appellant is entitled to ask the other side to prove the will in her presence solely on the ground that she was not cited to appear, and she did not appear in the previous proceedings, was precisely the contention raised in *Newell* v. *Week* (1). But the contention was overruled, as there was no authority for it, and Sir John Nicholl observed:—"The process of citing parties is a convenient one for all suitors, because when that is done you need not prove actual privity; the law presumes actual privity after legal process—the *lis pendens* is sufficient notice that persons should appear and protect their own interests, but if you can prove actual privity, the legal process in point of solid justice and sound reason is superfluous, though *ex abundante cautelâ*, it may still be convenient to resort to it and have it upon record." The same view is affirmed in *Ratcliffe* v. *Barnes* (2), in *Wycherly* v. *Andrews* (3), in the case of *Brinda Chowdhrani* v. *Radhika Chowdhrani* (4) referred to above, and also in the case of *In re Pitamber Girdhar* (5).

It was strongly urged that as the applicant for revocation of probate is a minor, nothing short of special citation or actual appearance at the previous proceedings was sufficient to conclude her, as privity could not otherwise be presumed in such a case. Let us examine what the facts are. Kali Prasad Tripati, paternal uncle of the minor, clearly had notice of the proceedings. It is admitted by the minor's mother, who now represents her as her guardian, that he is not on bad terms with the minor, and that the minor has been living in the same house with him. Kali Prasad had no interest whatever in opposing the grant of probate otherwise than as representing the minor. He did oppose the grant of probate, expressly representing that the minor was living under his care and was the heiress-at-law of the alleged testator, and his opposition was successful in the first Court, though the Appellate Court took a different view of the case. And both the Courts regarded him as acting on behalf of the minor. These being the facts of the case and the allegation of fraud and collusion between Kali Prasad and the opposite side being now given up, the only conclusion that we can come to is that the persons under whose care the minor has

(1) 2 Phill., 224.
(2) 2 Sw. & T., 486.
(3) L. R., 2 P. & D., 327.
(4) I. L. R., 11 Calc., 492.
(5) I. L. R., 5 Bom., 638.

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been living, and who are interested on her behalf, were fully aware of the previous proceedings, and that the party who entered appearance and opposed the grant, though nominally appearing on his own behalf, did really appear on behalf of the minor.

We do not therefore think that any just ground has been made out for reopening the proceedings, and this appeal must consequently be dismissed with costs.

Appeal dismissed.

J. V. W.

ORIGINAL CRIMINAL.

Before Mr. Justice Wilson.

QUEEN-EMPRESS *v.* HURREE MOHUN MYTHEE.*

1890 *July* 25 & 26.

Child-wife—Culpable homicide not amounting to murder—Causing death by a rash and negligent act—Rashness and negligence—Penal Code, ss. 304, 304*A*, 325 *and* 338.

The prisoner, a fully developed adult man, was charged with causing the death of his wife, a girl aged about 11 years and 3 months, who had not attained puberty. The death was caused by hæmorrhage from a rupture of the vagina caused by the prisoner having sexual intercourse with the girl. For the defence it was alleged that he had had sexual intercourse with the girl on several previous occasions without injury to her, and there were circumstances in the case which showed that this was possible, and even not improbable, though the medical evidence was to the effect that, if such intercourse had previously taken place, the penetration was probably not so complete or with so much sexual vigour as on the occasion when the injury was caused. The medical evidence was further to the effect that the girl had not attained puberty, and was immature and wholly unfit for sexual intercourse; that under such circumstances sexual intercourse between the prisoner and the girl was likely to be dangerous to her, and to cause injuries more or less serious according to the degree of penetration effected. The prisoner was charged with (*a*) culpable homicide not amounting to murder under section 304 of the Penal Code; (*b*) causing death by doing a rash and negligent act under section 304A; (*c*) voluntarily causing grievous hurt under section 325; and (*d*) causing grievous hurt by doing an act so rashly or negligently as to endanger human life or the personal safety of others under section 338.

Original Criminal Case, 3rd Sessions, 1890.