Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mirza Kurratulain Bahadur (since deceased, and now represented by Nawab Akbari Begum and others) and others, v. *Nawab Nuzhat-ud-dowla Abbas Hossein Khan*, alias *Peara Saheb, from the High Court of Judicature at Fort William in Bengal; delivered the 5th July* 1905.

Present at the Hearing:

LORD DAVEY.
LORD ROBERTSON.
SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

This is an Appeal from a judgment and decree of the High Court in Calcutta dated the 6th August 1903, which reversed the previous judgment and decree of the Subordinate Judge of the 24 Pergunnahs dated the 4th March 1901.

The controversy between the parties relates to the estate of a Mahomedan lady known as Khas Mahal, who was the principal widow of the late ex-King of Oudh, and who died on the 1st April 1894. About the facts which have to be considered there is no longer any controversy. The Respondent, shortly known as Peara Saheb, was a distant relation of the ex-Queen. About the year 1881 he entered her service, in which he continued to the date of her death. He acquired her confidence in the highest degree, and became the head of her household and the manager of all her affairs. While occupying that position he received from her by way of gifts a large amount of property, in fact, substantially, the whole of the property possessed by her which yielded any income.

36990. 125.—7/1905. [36] A

On the 12th November 1891 the lady executed a deed of release in the following terms :—

"I, of my free will and accord and without inducement and "temptation exercised by anybody, do declare that Nawab "Peara Saheb, who is a near relation of mine, has pleased me "with his good behaviour and services; and (his services) "have afforded me much relief. The gift of things which I "have from time to time made to him from the time of his "connection with the management of my affairs down to the "present time, have been made out of my natural affection for "him and in recognition of his good and loyal services; and "the cash and the things which I have given him have not "been kept with him by way of deposit or trust or given as "loan, and I and my heirs and representatives neither at pre-"sent have, nor in future shall have, any right to get the same "back or make demand for them. I further declare that the "account of the cash and things and kind that up to the time "of execution of this deed have been made over to him for my "own personal use, is not to be rendered or made up by him, "and that I have kept with myself alone accounts and tahbil "of all kinds, and that I look after my jumma kharach (income "and expenses) personally, and keep the account thereof with "myself. The items which he has applied to his own uses, or "which are with him, are those very items which I have out "of my affection for him and in recognition of his services "given him and allowed him to make use after due deliberation. "If I or after me my heirs and representatives prefer claim "or demand against him in respect of the gifts and accounts, "and tahbil and things and cash given, then it shall be "considered null and void according to Shara (Mahomedan "law) common usage and law. These words have therefore "been written in the shape of a deed of release and acquit-"tance and *safinama*, and after the completion of the necessary "formalities delivered to him, so that it may serve him the "purposes of an authority."

On the 30th June 1893 the lady made her will, by which she appointed the Administrator-General of Bengal to be her executor if he should be willing to act, and if that officer should decline to act she appointed Peara Saheb.

In paragraph 2 she said :—

"I have from time to time made gifts of money and cash "to the said Nawab Peara Saheb and on the 12th day of "November 1891 I executed a *safinama* in his favour which "has been duly registered. I have also by a deed of trust "dated the 15th day of February 1893 duly registered dedi-"cated certain property therein described for religious and "charitable purposes. I confirm these transactions."

The Respondent's influence over the lady continued unabated down to her death, and there is no evidence that at any time during the course of her dealings with him she had the advantage of any separate and independent advice. From the evidence in this case he appears to have taken a prominent part in arranging the provisions of the will, and to have given instructions to the attorney who drafted it.

When the lady died she left surviving her as her sole heirs (according to the Shiah law by which the family was governed) two grandchildren. Their title as heirs was denied by the lady herself in her will, and after her death was persistently contested by those who were interested in denying that title. Their right of inheritance has, however, been finally established.

Soon after the death of the testator the Administrator-General, having been put in motion by Peara Saheb, and acting under an indemnity from him, applied in the High Court for probate of the will. The grandchildren as heirs entered a caveat. Their right to appear as caveators was disputed, but was ultimately established.

The proceedings with reference to the probate then went forward, and on the 2nd July 1900 the learned Judge who heard the case pronounced in favour of the will. The probate accordingly issued, dated the 30th August 1900. It further appears that there was an appeal against that decision, and that the appeal was dismissed.

While the probate proceedings were pending, the present suit was instituted on the 26th March 1897 in the Court of the Subordinate Judge of the 24 Pergunnahs. The Plaintiffs were the two grandchildren of the testatrix and another person to whom they had assigned a portion of their interest. The first Plaintiff is now represented by the first group of Appellants, and the other Plaintiffs are Appellants. The Defendants to the suit were Peara Saheb

(Respondent in this Appeal) and the Administrator-General. The plaint stated the confidential relations which had existed between Peara Saheb and the lady, and alleged that Peara Saheb had misused his position of confidence, and thereby become possessed of the bulk of her property; and the material part of the prayer was to the effect that Peara Saheb should be compelled to account for the property which had thus come into his hands, and should be declared to be a trustee for the Plaintiffs. The written statement of Peara Saheb denied the case alleged in the plaint. Issues were settled of which it is only necessary to notice, for the present purpose, the 7th, 8th, and 9th :—

"7. Is the Deed of Release relied upon by Defendant No. 1 " genuine? Was the said Defendant the confidential agent of, " or in a fiduciary relation to, the late Khas Mahal as alleged " in the plaint? Is the release bad on the ground of undue " influence? Is it a fact that any of the properties in suit " were obtained by undue influence or while Defendant was in " a fiduciary relation from Khas Mahal? Does the release bar " the present Plaintiffs?

"8. Is Defendant liable to render an account? If so, to " what extent and in respect of what properties?

"9. What properties, if any, belonging to Khas Mahal " deceased were removed or received by Defendant No. 1 or " otherwise came into his possession either with or without her " consent, and is he liable to render an account in respect of " the same or of any and, if so, for what portion thereof, and to " restore any, if so, for what portion thereof?"

The Subordinate Judge delivered his Judgment on the 4th March 1901. He held that Peara Saheb had occupied a position of confidence, and had obtained the property in question by the exercise of undue influence, and that the alleged release was not genuine and not binding.

Before the time at which this Judgment of the Subordinate Judge was delivered, the decision of the High Court, establishing the will, had been passed. It was necessary for him therefore to consider the effect of that decision upon the case before him. His view was that "the " Judgment of the High Court in the probate

" case conclusively proves that the Admini-
" strator-General is the executor under the will
" of Khas Mahal. It does not conclusively
" prove that all statements in the will are true."
And he held that the statements relating to the transactions with Peara Saheb and the release to him were not true. In the result he made a decree in favour of the Plaintiffs.

On appeal to the High Court, that Court on the 6th August 1903 held that the probate proceedings were conclusive of the questions arising in the present case.

The learned Judges said :—

" The will was strongly contested by the present Plaintiffs
" Nos. 1 and 2, when probate was applied for by the Adminis-
" trator-General of Bengal, and the probate proceedings were
" pending during the trial of the present case in the Court
" below, judgment being delivered on the 2nd of July 1900,
" and probate issuing on the 30th of August in the same year.
" The decree now appealed against is dated the 4th of March
" 1901. The Administrator-General of Bengal applied for
" probate on the 14th of May 1894, and a caveat was entered
" by the Plaintiffs Nos. 1 and 2 shortly afterwards. In the
" probate suit substantially the same issues were raised as in
" the present case. The caveators set up that Khas Mahal
" was physically and mentally incapable of giving instructions
" for the will, or of understanding the will, that she was unable
" to understand the nature of the dispositions contained in the
" will by reason of her feebleness of body and mind, and that
" the will was prepared and executed under the undue influence
" of the Defendant Peara.

" Mr. Justice Sale sitting on the Original Side of the High
" Court, held, however, that the caveators had absolutely failed
" to make out their case. He was satisfied that the lady did
" give instructions for her will, that she thoroughly understood
" its contents and executed it as a free agent, and not under
" the influence or ascendancy of Peara, and with full testa-
" mentary capacity, and probate was accordingly granted.
" The present Plaintiffs Nos. 1 and 2 appealed against that
" decision, but the appeal was dismissed with costs. There
" was no further appeal from that decision.

" We must take it, then, for the purpose of the present
" discussion, that the lady thoroughly understood the purpose
" and effect of her will and that it was her voluntary act, and
" that she was of full testamentary capacity to make the will,
" and in that will she expressly confirms this release."

They therefore reversed the decision of the First Court, and dismissed the suit with costs. Against that decision of the High Court the present Appeal has been brought.

In the course of the argument before their Lordships the questions for decision became greatly simplified. It was admitted on behalf of the Respondent that, apart from the will, the release and the other transactions between Peara Saheb and the lady could not have been supported. It was not disputed, indeed it could hardly have been disputed, that, upon the evidence in the present case, and apart from the alleged effect of the probate and the proceedings which led up to it, the Respondent could not have relied upon the confirmation of the earlier transactions contained in the will. The Appeal was resisted solely upon the legal ground that the Appellants are estopped by the probate, or by the proceedings which led to the issue of the probate, from denying the validity of the confirmation which the will purports to contain of the transactions between Peara Saheb and the testatrix during her lifetime, and particularly of the release alleged to have been executed by her. The correctness of that contention is what their Lordships have to consider.

The estoppel was rested upon two distinct grounds which must be considered separately. First, it was said that the matters now in question were *res judicata* under Section 13 of the Civil Procedure Code; and, if their Lordships rightly understand the case, that is the ground upon which the learned Judges in the High Court disposed of the case. Section 13 enacts that "no Court shall try any suit or issue "in which the matter directly and substantially "in issue has been directly and substantially in "issue in a former suit between the same parties,

" or between parties under whom they or any " of them claim, litigating under the same title " . . . . and has been heard and finally " decided by such Court."

It was contended that the probate proceedings were opposed as caveators by the first and second original Plaintiffs, of whom the second is now an Appellant, while the first is represented by the first group of Appellants, and the third Plaintiff-Appellant claims under the others; that in those proceedings, the questions were at issue whether the will had been executed under undue influence, whether that will represented in its entirety the free and independent intention of the testatrix, and therefore whether the confirmation which it purports to contain of the previous gifts and release was a valid testamentary disposition.

Several objections have been raised to the estoppel so set up.

First, such an estoppel can only arise from a decision in a former suit between the same parties, and it is contended that in the present instance this condition is not fulfilled. The former proceedings were between the Administrator-General, who propounded the will, and the present Appellants or those whom they represent, though it is true that the Administrator-General was set in motion by the present Respondent and acted under his indemnity. For reasons which will be stated their Lordships think it unnecessary to consider this point.

Secondly, to give rise to an estoppel not only must the former suit have been between the same parties as the latter, it must also have raised the same issues. It was argued for the Appellants that assuming the issues raised in the probate proceedings to have been precisely what the High Court in the present case understood

them to have been, the issues in the present case were not the same, because in the present case, in order to validate the confirmation by the will of the release and other transactions, it was necessary to show, not only that the testatrix knew and intended what she purported to do by her will, but also knew what her actual rights were in respect to that release and those transactions, and knew them to be invalid and not binding upon her, a matter which it was said did not and could not arise in the probate proceedings. This seems to present a serious difficulty in the way of the Respondent.

But their Lordships think that the contention of the Respondent under Section 13 fails upon another and a simpler ground. The Respondent is relying upon a bare legal difficulty to resist a case to which there is no substantial answer on the merits. He says that the questions now in issue were formerly in issue in the probate proceedings. How can their Lordships tell that? Those proceedings are not in evidence, as they ought to have been in order to support such a case. There is a petition for probate and the probate itself. There is mention of a caveat, and of an affidavit in support of it. There are two judgments delivered at different stages, and there is mention of a decision on appeal. One of the judgments of the learned Judge shows clearly enough what he understood to be the questions for decision, but that is not enough. Their Lordships cannot give effect to the estoppel contended for unless they can say for themselves that the matters now in issue were in issue in the probate proceedings. Whether any issues were settled in those proceedings, or the points in dispute were otherwise formulated, does not appear, nor do the terms of any decrees or orders made therein. Their Lordships therefore think

that the alleged estoppel under Section 13 fails, because in the absence of the probate proceedings there is no sufficient evidence to support it.

The second ground of estoppel rests not upon the probate proceedings, or any issues raised and decided in the course of them, but upon the effect of the probate itself. This gives rise to a question of some general importance, and for the purpose of determining it, it seems to make no difference whether probate has been obtained in common form and *ex parte* or after opposition.

The question thus arising seems to depend upon the terms of the Probate and Administration Act (V. of 1881). Section 4 of that Act says that "the executor or administrator, as the "case may be, of a deceased person is his legal "representative for all purposes, and all the "property of the deceased person vests in him "as such."

Section 88 gives to the executor or administrator power to sue in respect of causes of action that survive the deceased and to recover debts. Section 90 gives an executor or administrator large, but not unlimited, powers of disposition. Section 12 says that probate when granted establishes the will from the death of the testator, and Section 59 says that—

"Probate or letters of administration shall have effect over all the property, moveable or immoveable, of the deceased . . . and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted."

The title thus conferred upon every executor who has obtained probate, is obviously convenient as tending to facilitate the administration of the estate of the deceased, and the adjustment of the rights of all parties connected with it. But in

the case of every Mahomedan will, it establishes a somewhat peculiar state of things.

A Mahomedan testator has not an unlimited power of disposition by will; he can only deal with one-third of his property, the remaining two-thirds pass to his heirs whatever the terms of the will may be. Thus the executor, when he has realised the estate, is a bare trustee for the heirs as to two-thirds, and an active trustee as to one-third for the purposes of the will; and of these trusts, one is created by the Act and the probate, irrespective of the will, the other, by the will, established by the probate. There are thus two trusts for different sets of persons, of different properties, and based upon different titles. And this state of things does not arise from any accidental conflict of laws, such as gave rise to a somewhat similar complication in the case of *Concha* v. *Concha*, 11 A.C. 541, but by the deliberate action of the legislature. In giving effect to a system of so peculiar a nature as that described their Lordships think it necessary to proceed with great caution.

The Act in question applies only to persons to whom the Indian Succession Act (X of 1865) did not extend, that is to say Hindoos, Mahomedans, and Buddhists. And though the sections relating to probate in the Probate and Administration Act are substantially taken from the corresponding sections in the Succession Act, it must be observed that the last-mentioned Act, while to a large extent embodying the rules of the English law, yet departed in many particulars from those rules, and was not only made applicable to persons of European descent, or those to whom the system derived from the Ecclesiastical Courts might naturally be applied, but was made the law for all persons in British India other than Hindoos, Mahomedans and Buddhists, including for instance, the Parsees who form so important

a part of the community in some districts of India.

Testamentary jurisdiction was first given to the Supreme Courts by their original charters, that in Bengal dated in 1774 being the first. And it was then given as a branch of ecclesiastical jurisdiction, and was to be administered according to the ecclesiastical law as in force in the Diocese of London. In the course of the series of events by which the British territories in India grew from a group of trading settlements into an empire, various branches of jurisdiction which sprang originally from an ecclesiastical origin, have come to be applied by a number of legislative acts to new territories and new classes of persons, and administered by new tribunals. And in the progress of this development the ecclesiastical origin of such jurisdiction has been completely discarded, and the legislature has gradually evolved an independent system of its own, largely suggested, no doubt, by English law, but also differing much from that law, and purporting to be a self-contained system. Even in the case of the High Courts, the successors of the Supreme Courts (which alone possessed ecclesiastical jurisdiction) the testamentary jurisdiction which the charters purport to confer upon them is not given as a branch of ecclesiastical jurisdiction, and is not made dependent upon the law administered by English Courts.

Printed in 2 Morley's Digest, p. 549.

From an early date the Supreme Courts granted probates of Hindoo and Mahomedan wills. The practice varied greatly from time to time, and it was never perhaps very satisfactorily determined upon what basis the jurisdiction rested. It was, however, established that such probates might issue. But the Supreme Courts never applied the English rule as to the necessity for probate to Hindoo or Mahomedan wills, nor did they attribute to such probates when granted

See Bebee Muttra's case, Morton, 75, also reported in Clarke's Rules and Orders, p. 119.

the English doctrines as to the operation of probate. Under that system a Hindoo or Mahomedan executor took no title to property merely as such by virtue of the probate. In the case of Mahomedan executors such a title was created for the first time by the Probate and Administration Act.

These considerations seem to their Lordships strong to show that the effect of probate of a Mahomedan will granted after the Probate and Administration Act must be that which is given by the terms of the Act itself, neither more nor less. What, then, is the effect of the Act? Section 4, supplemented by Section 88, vests the whole property of the testator in the executor. Section 59 makes the probate conclusive as to his representative title against debtors of the deceased and persons holding property of his, and gives a complete indemnity to those who pay debts or deliver up property to the executor holding the probate. Those enactments appear to their Lordships incapable of being applied so as to give to the probate in the present case the effect contended for. The Appellants do not, in this action, contest the title of the executor, though they show that, as to two-thirds of the estate, he is a mere trustee for them. They are not debtors of the estate, nor possessed of property belonging to it. They are not interested under the will, nor do they (necessarily) contest the validity of the will as a beneficial disposition to the legatees, and other persons claiming under it, of that part of the property of the testatrix which she could dispose of by will. But they say that they are entitled to two third parts of all the property of the testatrix which was not effectually disposed of by her in her lifetime. It is now admitted that the release was ineffectual for that purpose, and, if so, the money and other property in the hands of Peara Saheb was in the disposition of the

testatrix at the time of her death. As she could not dispose of more than one-third part of it by her will, the confirmation of the release could not confirm Peara Saheb's title in more than that one-third, and the Appellants are entitled to the other two-thirds. The controversy is between the heirs claiming adversely to the will, and a person who claims a beneficial interest under the will, and the provisions of the Act which have been cited seem to their Lordships to create no estoppel in such a case. They are, therefore, unable to concur with the learned Judges of the High Court in thinking that the suit ought to be dismissed.

It remains to consider what the decree ought to be.

The plaint, after alleging the position of the Respondent with reference to the lady, went on to state that he had obtained from her jewellery, money, and other property. But the latter statement was naturally made only in general terms.

The written statement admitted the receipt of jewellery which realised Rs. 30,000 or thereabouts, and of sums of money, the amount of which was not given, but said to have been invested in "Government of France promissory notes." The ninth of the issues settled for trial raised the question of how much the Respondent had received and ought to account for. At the trial these questions of amount were fully gone into, and the Respondent, who was examined, had every opportunity to show what he had received, and what he had done with it, and to prove, if it were possible, any credits which ought to have been allowed to him on the other side of the account. He could give no satisfactory account of what he had done with the moneys received by him, or of the transactions between him and the testatrix, nor did he assert that any

credits should be given to him, so that at the trial the account was taken, as far as it was possible to take it, and it was shown that no further account could be obtained. The Subordinate Judge held that it would be idle to direct any further account to be taken, and gave a decree against the Respondent for the amounts of which he admitted the receipt, with interest.

In the course of the argument before their Lordships the learned Counsel for the Appellants admitted that his clients were interested in the estate to the extent of two-thirds only, and intimated, that they would be content with a decree upon this footing.

Their Lordships are satisfied that no injustice can have been done by the Subordinate Judge by reason of the principle upon which he proceeded in framing his decree, but they think, for the reason just stated, that the present Appellants can claim only two-thirds of the amount awarded by the First Court.

Their Lordships will humbly advise His Majesty that the decree of the High Court should be set aside with costs, and the decree of the Subordinate Judge affirmed, with the modification that the amount awarded to the Appellants be reduced by one-third, and that any alteration which this may entail in the amount of costs ordered be made.

The Respondent will pay the costs of this Appeal.