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his co-parceners (1). They, in such cases, take the whole property by survivorship. But here the adoption came after the alienation.

We must reverse the decrees of the Courts below, and make a decree for the appellant, the defendant. The parties respectively must bear their own costs of the suit and of both appeals.

Decrees reversed.

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[638] TESTAMENTARY JURISDICTION.

Before Sir Charles Sargent, Kt., Justice.

IN THE MATTER OF THE WILL OF PITAMBER GIRDHAR.
SOORJI JIVANDAS *(Petitioner)*. [27th July, 1881.]

Probate—Revocation—Indian Succession Act (X of 1865), s. 234—Practice—Review in testamentary matters.

Section 234 of the Indian Succession Act (X of 1865) applies to Hindus, and an application to revoke probate of the will of a Hindu may be made under that section.

When once probate in solemn form has been granted, no one who has been cited or has taken part in the proceedings, or who was cognizant of them, can afterwards seek to have it cancelled : *Quære*—whether a review may not be granted.

The practice in India in testamentary matters previously to Act V of 1881 was the same as that of the Ecclesiastical Court in England, except so far as that practice might be inconsistent with the Civil Procedure Code.

[R., 11 C. 492 (494) ; 18 C. 45 (47) ; 27 C. 927 (935) ; 17 M. 373 ; 11 C.L.J. 623 (630) = 6 Ind. Cas. 301 ; 13 C.L.J. 547 (549) = 15 C.W.N. 1021 (1022) = 10 Ind. Cas. 434 (435) ; 10 Ind. Cas. 717 (718) = 14 C. C. 77.]

IN this case the petitioner, on the 7th March, 1881, obtained a rule *nisi* calling upon one Navivahoo to show cause why a citation should not be issued calling upon her to bring in to the Registry the probate of the last will and testament of the said deceased granted to her on the 9th August, 1880, and to show cause why such probate should not be revoked and cancelled.

The testator, Pitamber Girdhar, died on the 10th August, 1879, while on pilgrimage, having left Bombay on the 8th February, 1879.

On the 14th January, 1880, Navivahoo applied for probate of the will of the testator dated the 5th February, 1879, and on the 12th February, 1880, Soorji Jivandas, the petitioner, entered a caveat. He alleged that the will propounded by the applicant was a forgery ; and he produced a will made by Pitamber Girdhar and dated 1st February, 1879, whereby the petitioner and three other persons were appointed executors. The petitioner stated that on the 8th February, 1879, just before the testator's departure from Bombay, he (the testator) had handed over this will for safe custody to Kuverji Narsi, one of the executors, in whose possession it had ever since remained. He also stated that several letters had been received by the said executors, written shortly before the testator's death, in which he had referred to the will which he had left with Kuverji Narsi.

(1) *Gangubai* v. *Ramanna*, 3 B. H. C. R. A. C. J. 66; *Vrandavandas* v. *Yomunabai*, 12 B. H. C. R. 229 and see 3 B. H. C. R. 9; 11 B. H. C. R. 80; 2 Stra. H. L. 261. cl. 2.

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The case came on for hearing on the 18th June, 1880. It was not denied that the testator had made the will of the 1st February, 1879, as above stated, in which a large proportion of his property had been left to charity, but it was alleged by the widow **[639]** Navivahoo that four days subsequently, *viz.*, on the 5th February 1879, at her request he had revoked it, and had made a fresh will, in which he left all his property to her.

At the close of the evidence given in support of this latter will, the caveator, without having called any evidence, declined to proceed with the case, on the ground that as he was not personally interested, he did not wish to incur the risk of having to pay costs in case his opposition should prove unsuccessful. The Court thereupon found in favour of the will of the 1st February 1879, and probate thereof was granted on the 9th August 1880.

On the 28th February 1881, Soorji Jivandas presented a petition, praying that inquiry should be made as to the genuineness of the alleged will, and that the same might be declared a forgery; that the probate thereof might be recalled and cancelled, and that he might be at liberty to prove in due form the will of the 1st February 1879.

In support of his petition he stated that he had recently discovered that Navivahoo had, previously to the hearing in June 1880, through her solicitor, submitted the will of the 5th February 1879 to the examination of an expert, Mr. G. W. Terry, of the Sir Jamsetji Jijibhoy School of Art, and that Mr. Terry had pronounced it to be a forgery; that he (petitioner) had recently again submitted the said will to Mr. Terry and other experts, who were of the same opinion.

The petitioner obtained a *rule nisi* on the 7th March 1881, which now came on for hearing. He and the other executors, appointed by the will of the 1st February 1879, filed affidavits in which they set forth the circumstances which they were prepared to prove in support of their allegation that the latter will of the 5th February 1879 was a forgery. The other executors stated that they were willing that their names should be joined in the present proceedings if necessary.

Inverarity showed cause—Section 234 of the Indian Succession Act (X of 1865), under which these proceedings are taken, does not apply to Hindus. The Hindu Wills Act (XXI of 1870) only extends to Hindus so much of part XXX of the Succession Act as applies to grants of probate. The new Probate Act V of 1881 expressly makes this section applicable to Hindus. It is, therefore, to be inferred that it did not previously apply. Probate when **[640]** granted after proof in solemn form cannot be revoked at the instance of one who had been caveator or who was cognizant of the previous application for probate: Coote's Probate Practice, p. 239: Brown's Probate Practice, p. 101. This is an application for a re-hearing. The Civil Procedure Code (X of 1877) applies, and the petitioner is too late.

Kirkpatrick (with *Marriott*, Advocate General) *contra*.—The words "grant of probate" in the Hindu Wills Act must be held to include such applications as the present, and to extend s. 234 of the Succession Act to Hindus. There is no express decision on the point, but the Courts appear always to have assumed it; *Kommollochun* v. *Nilrutton* (1); *Mohundass* v. *Lutchmundass* (2); *Nobeen Chunder* v. *Bhobosoonduri* (3). As to the right of one who has been a party to previous contentious proceedings, to

(1) 4 C. 360. (2) 6 C. 11. (3) *Ibid*, 460.

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apply subsequently for revocation, there is nothing prohibitory in the Succession Act. The strict English rule has not been adopted. Here there is a clear case of fraud and forgery: *Barnesley* v. *Powell*(1). If Soorji Jivandas cannot apply, he having been concerned in the former proceedings, the petition may be amended by substituting the names of other executors. Navivahoo and her solicitor were guilty of fraud on the Court when they applied for probate, in suppressing the fact that they had obtained an adverse opinion as to the genuineness of the will.

Inverarity in reply.—The amendment of the petition would be useless, as the other executors knew of the former proceedings, and that is enough to bring them within the rule. Navivahoo was not bound to disclose Mr. Terry's opinion.

JUDGMENT.

SARGENT, J.—The application in this case has been made under s. 234 of the Indian Succession Act. It has been objected that this section does not apply to the case of a Hindu will, inasmuch as it is not a section which, in the words of the Hindu Wills Act, "relates to the grant of probate." I am, however, of opinion that, on a fair construction of the Act, it must be held that this section does apply, and that such an application as the present may be made in the case of a Hindu will under the provisions of this section.

[641] It was next contended that the petitioner, having been concerned in the proceedings which resulted in the grant of probate, is precluded from now seeking to have this probate revoked. The rule in England is clear, that when once probate in solemn form has been granted, no one who was been cited, or who has taken part in the proceedings, or who was cognizant of them, can afterwards seek to have it cancelled. The only question is, whether that rule is applicable here. By the rules of the Supreme Court (2), it was laid down that "the practice of the Ecclesiastical Court of the diocese of London is adopted in this Court with respect to Probates and Letters of Administration, or as near thereto as the circumstances of the country permit." The High Court Charter of 1865, cl. 37, gives the High Court power to make rules and orders for the purpose of regulating all testamentary proceedings, provided that the High Court should be guided, as far as possible, in making such rules by the provisions of the Code of Civil Procedure Act VIII of 1859 and of any law which has been made amending or altering the same: and under that power was made rule I, ch. II of the High Court Rules, which provides that "the procedure of this Court in its Testamentary and Intestate Jurisdiction, as heretofore, shall continue to be the same as that of the Supreme Court at the time of its abolition." The result, then, appears to be that the practice here in testamentary matters—at any rate previously to Act V of 1881—was the same as that of the Ecclesiastical Court in England, except so far as that practice might be inconsistent with the Civil Procedure Code. I have not been able to discover any testamentary case in England in which a review has been permitted. The power of reviewer, however, is expressly given to the Courts in India in civil cases by the Civil Procedure Codes of 1859 and 1877; and as our rules in testamentary proceedings are to be consistent with those Codes, it might

(1) 1 Ves. 80; Willams on Executors (7th ed.), 553.
(2) Supreme Court Rules (Ecclesiastical), No. 488.

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be right, under proper circumstances, to allow a review in testamentary matters.

But, assuming that such a review could be granted, I do not think the facts of the present case are such as would justify it. In the month of June last, the petitioner had an opportunity of laying his case before the Court. He did so partially, at all **[642]** events. In the exercise of his own discretion he thought proper to withdraw his opposition at the close of the evidence given in favour of the propounded will, and thereupon probate of that will was granted by the Court. Now, however, he says that he has discovered that Mr. Terry was, and is, of opinion that the alleged will was a forgery, and on this ground he seeks to have the whole question of the validity of the will re-opened. If this circumstance were to be held sufficient to justify a review, there would be no limit to such applications as the present. It would always be possible for a party to a cause to discover some individual whose opinion was favourable to his case, but it can hardly be contended that the fact of his having obtained such an opinion would entitle him to ask the Court to set aside its former decision, and allow a re-hearing of the case. It was suggested, however, that Mr. Terry having examined the will and pronounced it a forgery, was a circumstance which Navivahoo or her solicitor ought to have disclosed, and that their having suppressed it, amounted to a fraud on the Court. I do not think there was any obligation upon them to disclose the fact. Whatever their duty might have been if this had been an uncontested matter, and if they had been applying for probate in common form, I cannot hold that where there are two parties contesting the validity of a will, and each of them endeavouring to establish his case in a Court of law, it is in any sense the duty of either to give evidence which he has discovered to be adverse to himself and favourable to his opponent.

On behalf of the petitioner's case it was argued that, although the petitioner might be precluded from applying for revocation of the probate by reason of his having been caveator in the former proceedings, the other executors named in the will of the 1st February, 1879, did not labour under the same disability, as they had not joined in the caveat, nor had they been cited by the widow, and it was contended that the petition might be amended by inserting their names. It is admitted, however, that they were fully aware of the former proceedings, if, indeed, they were not actively engaged in supporting the case of the caveator; and I think, therefore, that they are equally bound with him by the decision of the Court, and that the rule laid down in *Radcliff* v. **[643]** *Barnes* (1) and *Newell* v. *Weeks* (2) prohibits them also from applying for revocation of the probate that has been granted.

Rule discharged with costs.

Attorneys for applicant.—Messrs. *Hearn, Clevelānd, and Little.*
Attorney for opponent.—Mr. *Khanderav Moroji.*

(1) 2 Sw. & Tr. 486.

(2) 2 Phill. 224.