co-plaintiffs by amendment, it is barred as to the original plaintiffs also. But the inconvenience will be the same in kind, if greater in degree, as must result from the application of the section to any joint promisees; and to my mind it must be dealt with, if at all, by the Legislature altering the expressions of its intention, and not by a Judge putting a forced construction on the words in which that intention is at present embodied.

I therefore find that Hemraj Haridas is not a necessary party to the suit.

Attorneys for the plaintiffs.—Messrs. *Payne and Gilbert.*

Attorney for the defendants.—Mr. *Khunderao Morojee.*

ORIGINAL CIVIL.

Before Mr. Justice Latham.

September 29-30.

AHMEDBHOY HUBIBHOY, PLAINTIFF, v. VULLEEBHOY CASSUMBHOY, SATBAI AND FAZULBHOY CASSUMBHAI, DEFENDANTS.*

Decree—Fraud—Decree when binding—Effect of fraud—Parties and privies to suit—Strangers to suit—Collusive fraud between parties in obtaining decree—Civil Procedure Code (Act X of 1877), Section 13—Res judicata—Evidence Act (I of 1872), Section 44—Khoja Mahomedan administrator with the will annexed.

The powers of a Khoja Mahomedan executor or administrator, like those of a Cutchi Mahomedan executor or administrator, seem to be generally limited to recovering debts and securing debtors paying such debts.

Where a will gave the executor full powers with regard to the payment of the testator's debts, *Held* that an administrator with the will annexed who was a Khoja Mahomedan succeeded to those powers, and in a suit brought against him as such administrator by an alleged creditor of the testator's estate represented all the persons interested in the estate.

Where a decree in a suit has been honestly obtained without fraud it cannot be subsequently disputed by the parties threto or their privies or by persons who were represented by such parties. Strangers to the suit (*i. e.* persons neither privies to nor represented by the parties thereto) are not bound by such a decree if it be a decree *inter partes*; but if it be a decree *in rem* and passed by a competent Court, they are bound by it and cannot controvert it.

Where a decree has been obtained by means of the fraud of one party against the other, it is binding on parties and privies and on persons represented by the parties so long as it remains in force, but it may be impeached for fraud and may

* Suit No. 486 of 1881.

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be set aside if the fraud is proved. In the case of judgments *in rem* the same rule holds good with regard to persons who are strangers to the suit.

Where a decree has been obtained by the fraud and collusion of both the parties to the suit it is binding upon the parties. It is also binding upon the privies of the parties; except, probably, where the collusive fraud has been on a provision of the law enacted for the benefit of such privies. But persons represented by but not claiming through the parties to the suit may, in any subsequent proceeding, whether as plaintiff or defendant, treat the previous judgment so obtained by fraud and collusion as a mere nullity, provided the fraud and collusion be clearly established. The same rule applies with regard to strangers where the previous judgment is a judgment *in rem*.

Section 13 of the Civil Procedure Code (Act X of 1577) is not exhaustive as to the effect of *res judicata*. It does not deal with the case of judgments *in rem*, nor with that of parties represented by though not claiming under the parties to a former suit.

Quære—As to the proper construction of sec. 44 of the Indian Evidence Act.

THE plaintiff sued to establish his right to attach a certain house in Bombay in execution of a decree obtained by him on the 29th August, 1876, in Suit No. 401 of 1876.

In that suit the plaintiff sued Fazulbhoy Cassumbhai (the third defendant in the present suit) as administrator with the will annexed of the estate of his father Cassumbhai Nathubhai, and obtained a decree for Rs. 17,243-9-7 against the said estate.

The first defendant was the son and one of the residuary legatees of the said Cassumbhai Nathubhai. The second defendant was the widow of Cassumbhai Nathubhai, and was entitled under his will to a provision out of his estate.

In 1880 the plaintiff attached the house in question in execution of his decree in Suit No. 401 of 1876, whereupon the first and second defendants took out a summons for the removal of the attachment upon the grounds (among others)that the said house had been made over and distributed among the persons interested in the residuary estate of the said Cassumbhai Nathubhai, and that the first defendant Vulleebhoy Cassumbhoy was then solely entitled to the said house subject to the life-interest in a portion thereof of the third defendant Satbai, and that the defendants were then in possession of the said house. It was thereupon ordered that the plaintiff might, if so advised, bring a suit to establish his right to attach the said house in execution. The plaintiff then filed the present suit.

The first and second defendants filed written statements, in which (*inter alia*) they alleged that the debt in respect of which the plaintiff had obtained his decree in Suit No. 401 of 1876 was not a debt due from the estate of Cassumbhai Nathubhai, but was a private debt due to the plaintiff by the administrator Fazulbhoy (the third defendant) and that the said decree had been obtained by the plaintiff against the estate by fraud and in collusion with the said Fazulbhoy.

The defendants subsequently sought to obtain discovery and inspection of the plaintiff's books. The plaintiff objected to give the inspection sought for, and insisted that, even admitting that the decree in Suit No. 401 of 1876 had been (as alleged by the defendants) obtained by the fraud of the plaintiff and in collusion with the said Fazulbhoy, nevertheless it was now a binding and valid decree against the estate of Cassumbhai Nathubhai and all persons interested therein.

The plaintiff took out a summons under section 135 of the Civil Procedure Code (X of 1877) calling on defendants to show cause why an issue upon the above point should not be framed and determined before the plaintiff should be ordered to make the discovery or give the inspection demanded by the defendants.

By an order dated the 5th September, 1882(1), the said summons was made absolute, and it was ordered "that this suit be set down for hearing for the determination of the following issue, viz., whether assuming the allegations in the fourth paragraph of the written statement of the defendant Vulleebhoy Cassumbhoy and the defendant Satbai respectively contained to be true, and assuming that the decree in Suit No. 401 of 1876 was obtained by fraud of the plaintiff and in collusion with the defendant Fazulbhoy Cassumbhai as in the said fourth paragraph alleged, the said decree is not, for the purposes of this suit, a binding and valid decree against the estate of Cassumbhai Nathubhai and all persons interested therein; and whether the said decree is not in this suit binding upon the defendants and each of them; and

(1) See *supra*, p. 572.

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whether the defendants or any or either of them can in this suit in any way object or dispute the said decree."

The suit now came on for the determination of the above issue.

Hon. *B. Lang* (Acting Advocate General) and *Startling* for the plaintiff.

Farran and *Inverarity* for defendant No. 1.

Kirkpatrick and *Telang* for defendant No. 2.

The third defendant did not appear.

Farran applies to be heard first in support of the defendants' plea.

LATHAM, J.—This is in effect a demurrer to the plea of the defendants, and the party demurring has the right to begin.

Starling for the plaintiff.—Under sections 13 and 14 of the Civil Procedure Code (Act X of 1877) a defendant in a suit on a foreign judgment is permitted to plead fraud. No similar provision is made for suits on other judgments, and a defendant cannot therefore be allowed to plead as to a judgment obtained here that it was obtained by fraud.

If a defendant is allowed to plead fraud a plaintiff must be allowed to reply fraud. Under the system of pleading in India there is no replication, and a plaintiff would, therefore, surprise the defendant at the hearing by alleging fraud for the first time, an allegation which the defendant might be unprepared to meet.

[LATHAM, J.—That is an impeachment of our system of pleading. The argument would apply where a defendant pleads a deed as well as a judgment. The plaintiff's answer might be that the deed was fraudulent.]

Here the parties admit the decree in Suit No. 401 of 1876, but they desire to re-open the whole question decided by that decree. They were represented in the suit by the defendant who was administrator of the estate, and they are, therefore, bound. They have not sued to set the decree aside: *Huffer* v. *Allen*[1];

(1) L. R. 2 Ex. 15.

Flower v. *Lloyd*(1); *Flower* v. *Lloyd*(2); *Patch* v. *Ward*(3); *Allen* v. *Macpherson*(4); Daniel's Chancery Practice (5th ed.), Vol. I, p. 1428.

There is no case which decides the position of a Khoja Mahomedan administrator. The will in this case gives the person named as executor large powers: *Narayan Gop Habbu* v. *Pandurang*(5); *Brammoye Dassee* v. *Kristo Mohun Mookerjee*(6); *Mufti Jalaluddeen Mahomed* v. *Shohorullah*(7).

Farran for the first defendant.—The defendants' plea is this—that the plaintiff had no claim against the estate. The defendant knew this also, but did not appear at the hearing to contest the plaintiff's suit, and in collusion with the plaintiff allowed a decree to be passed against the estate. The essence of the plea is that there was no debt due by the estate, but that it was fraudulently made liable.

Fraud in a decree may be either unilateral, *i.e.*, the fraud of either plaintiff or defendant; or it may be bilateral, *i.e.*, it may be a fraud, common to both of them directed against some third person. All the cases which have been cited are cases of unilateral fraud, and in such cases no doubt a decree is binding until set aside. But cases in which there has been fraud of both plaintiff and defendant to the injury of a third person, stand on a different footing. We contend that such a decree is not valid until set aside; it is void altogether. It is as if non-existent: *Price* v. *Dewhurst*(8); *Meddowcroft* v. *Huguenin*(9); *Perry* v. *Meddowcroft*(10); *Earl of Bandon* v. *Becher*(11); *Philipson* v. *Egremont*(12); *Bradley* v. *Eyre*(13); *Ochsembein* v. *Papellier*(14); *Turnor's Case*(15).

The person injured must be permitted to plead the fraud when the decree is about to be enforced against him. Why should he

(1) 6 Ch. Div. 277.
(2) 10 Ch. Div. 327.
(3) L. R. 3 Ch. Ap. 203.
(4) 1 H. L. Cases 191.
(5) I. L. R. 5 Bom. 685.
(6) I. L. R. 2 Calc. 222.
(7) 15 Beng. L. R., Appx. I.
(8) 8 Sim. 279 at p. 305.
(9) 4 Moore's P. C. 393 *per* Lord Brougham
(10) 10 Bea. 122.
(11) 3 Cl. & F. 510.
(12) 6 Q. B. 587.
(13) 11 M. & W. 432.
(14) L. R. 8, Ch. Ap. 695.
(15) Coke's Rep., Part VIII, 132a (Vol. IV, p. 403, ed. by Thomas and Fraser).

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move in the matter until then ? It may never be enforced against him at all.

The first and second defendants were in no sense privies to the administration, and they are not bound by his acts : *Whittingham's Case*(1). They claim not under him, but from the testator. If they are privies, and as such precluded from pleading the fraud of the administrator against the decree, they must be also precluded from suing to set the decree aside.

As to the position of a Khoja Mahomedan administrator, counsel referred to *In re Haji Esmail Abdula* (2) ; *Lalchand* v. *Gumtibai*(3) ; *Srimati Jaykali Debi* v. *Shibnath Chattirja*(4) ; Mayne's Hindu Law, para. 304.

Kirkpatrick for the second defendant.—He cited *Prudham* v. *Phillips*(5) ; William's on Executors (8th ed.), pp. 1971-2 ; *In re Place*(6) ; *Shattock* v. *Carden*(7) ; *De Medina* v. *Grove*(8) ; *Gopi Wasudev Bhat* v. *Markande Narayan Bhat*(9).

LATHAM, J.—The question argued before me is that raised by the preliminary issue, " whether, assuming the allegations in the fourth paragraph of the written statements of the first and second defendants respectively to be true, and assuming that the decree in Suit No. 401 of 1876 was obtained by fraud of the plaintiff and in collusion with the third defendant as in the said fourth paragraph alleged, the said decree is not for the purposes of this suit a binding and valid decree against the estate of Cassumbhai Nathubhai and all persons interested therein ; and whether the said decree is not in this " suit binding upon the defendants and each of them ; and whether the defendants or any or either of them can in this suit in any way of object to or dispute the said decree." This issue was set down for determination under section 135 of the Civil Procedure Code (Act X of 1877) before disposing of a summons taken out by the first and second defendants to obtain discovery from the plaintiff with reference to the alleged fraud. That fraud is that the plaintiff

(1) Coke's Rep., Part VIII, 42b (Vol. IV, p. 224, ed. by Thomas and Fraser).
(2) I. L. R. 6 Bom. 452.
(3) 8 Bom. H. C. Rep. 140, O. C. J.
(4) 2 Beng. L. R., O. C. J. 1.
(5) 2 Amb. 763.
(6) 8 Exch. 704.
(7) 6 Exch. 724.
(8) 10 Q. B. 152.
(9) I. L. R. 3 Bom. 30.

and the third defendant Fazulbhoy Cassumbhai, the administrator with the will annexed of Cassumbhai Nathubhai, father of the first and third defendants and husband of the second defendant, by collusion procured a decree to be passed in Suit No. 401 of 1876, wherein they were respectively plaintiff and defendant, against Fazulbhoy as such administrator for a debt which was due, not by the estate of the testator, but by Fazulbhoy in his personal capacity to the plaintiff. The matter is tried as it were on demurrer; and the question shortly is, whether admitting the truth of the allegations of fraud and collusion made by the first and second defendants, they are entitled to set up such fraud and collusion in their defence in this suit, while the decree in Suit No. 401 of 1866 still stands unreversed.

I think that persons other than parties to a suit in which a decree or judgment, to use the more general term, has been obtained, may be divided into three classes with reference to their position as affected by such judgment. These classes are:—

(*a*) Persons who in the language of the Civil Procedure Code, (X of 1877), section 13, claim under the parties to the former suit or, in the language of English law, *privies* to those parties. Privies are, according to Lord Coke (*Whittingham's Case* (1)) of three kinds—Privies in blood, Privies in estate, Privies in law. In Wharton's Law Lexicon, p. 764, I find a six-fold division: (1) Privies in blood; (2) Privies in representation, as the executor or administrator to his testator or intestate; (3) Privies in estate; (4) Privies in respect of contract; (5) Privies in respect of estate and contract; (6) Privies in law. But I have been unable to discover the original authority for this division;

(*b*) Persons who though not claiming under the parties to the former suit were represented by them therein. Such are persons interested in the estate of a testator or intestate in relation to the executor or administrator; shareholders in a company under 7 Wm. IV and I. Vic. c. 75, in relation to the registered officer of that company, and in India members of a joint and undivided family in such cases as those referred to in *Jogendro* v.

(1) Coke's Rep., Part VIII, 42b (Vol. IV, p. 227, ed. by Thomas and Fraser).

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Funindro (1), "where the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit which may afterwards be considered as binding upon all the members of the family, their interests being taken to have been sufficiently represented by the party in the original suit;"

(*c*) Strangers, neither privies to nor represented by the parties to the former suit.

In the present case I think that the first and second defendants fall within class (*b*). No doubt the powers of the executor or administrator of a Cutchi Memon according to *Re Ismail H. Abdula*(2) are generally limited to recovering debts, and securing debtors paying the same; and the same rule would seem to apply to the executor or administrator of a Khoja. But the will of Fazulbhoy gave his executor full powers with regard to the payment of debts; and the administrator with the will annexed succeeded to these powers, and so occupied in Suit No. 401 of 1876 nearly the same position as an English executor, or still more closely the position of the manager of a joint family in the case described in the passage above quoted from *Jogendro* v. *Funindro*.

I next consider the effect of a previous judgment on these three classes respectively, with reference to their capacity to dispute it. In the first place the judgment may be an honest one, obtained in a suit conducted with good faith on the part of both plaintiff and defendant. In such a case the previous judgment is clearly binding both on class (*a*) and class (*b*). Class (*c*) (strangers to the former suit) will be in no way affected by the judgment if it be *inter partes*; but if it be one *in rem* passed by a competent court, they will be bound by and cannot controvert it.

In the second place the judgment may be passed in a suit really contested by the parties thereto, but may be obtained by the fraud of one of them as against the other. There has been a real battle, but a victory unfairly won. In this case again I think that class (*a*) and class (*b*), and, as regards judgments *in rem*, class (*c*) are in one and the same position, which is that

(1) 14 Moore's I. A. at p. 376. (2) I. L. R. 6 Bom. 452.

of the parties themselves, to whom indeed the the authorities mostly relate. The judgment is binding on them so long as it remains in force, but it may be impeached for fraud and set aside if the fraud be proved.

It is not easy to reconcile all the opinions expressed in the various cases, but the general principles above laid down seem to me borne out by the authorities. See Mitford on Equity Pleadings (5th ed.) 113, original page 93; 1 Daniel Chancery Practice (5th ed.) 837, and *Flower* v. *Lloyd*(1), where James, L.J., said: "In the case of a decree being obtained by fraud, there always was power and there still is power in the Courts of Law in this country to give adequate relief." I cannot think that the opinions expressed by James and Thesiger, L.JJ., in the later case of *Flower* v. *Lloyd*(2) were intended to question the general rule, although they do tend to restrict its application in the particular class of fraud there alleged. See also *Huffer* v. *Allen*(3); *Patch* v. *Ward*(4); *Brooke* v. *Lord Mostyn*(5) and *Tommey* v. *White*(6), where the House of Lords discharged its own order as having been obtained by suppression and misrepresentation. "Although", said the Lord Chancellor at page 334, "in any question decided by this House upon appeal the matter is finally settled between the litigant parties * * * all the commonest principles of justice compel this house, as they must compel any other tribunal, to interfere to prevent its own decisions from being made the machinery for effecting a fraud."

In the third place, the previous judgment may have been obtained by the fraud and collusion of both the parties to the former suit; as, for the purposes of the present issue, must be assumed to have been the case here. In this case there has been no battle, but a sham fight. "*Fabula, non judicium hoc est; in scena, non in foro, res agitur,*" to cite from the celebrated argument of Mr. Solicitor Wedderburn in the *Duchess of Kingston's Case*(7). As between the parties to such a judgment I apprehend that it is binding; and that, as Willes, C.J., said in *Prudham* v.

(1) 6 Ch. Div. 297.
(2) 10 Ch. Div. 327.
(3) 2 L. R. Ex. 15.
(4) 3 L.R. Ch. 203.
(5) 2 De G. J. & S. 373.
(6) 4 H. L. Ca. 313.
(7) 20 Howell's State Trials, 478.

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Phillips(1), "if both parties colluded it was never known that one of them could vacate it." The same rule will, I think, though I can find no express authority on the point, apply as between the privies of these parties; except probably where the collusive fraud has been on a provision of the law enacted for the benefit of such privies. For instance, I think that the heir would be allowed to show that a decree was obtained by his ancestor collusively in fraud of the Mortmain Act; indeed the effect of the provision of law is that the heir as regards it is made the antagonist of his executor, and *cessante ratione legis cessat ipsa lex.* But, as regards class (*b*), persons represented by but not claiming through the parties to the former suit, and (where a judgment *in rem* is in question) class (*c*) strangers, I think that any member of either class may in any subsequent proceeding whether as plaintiff or defendant treat a previous judgment so obtained by fraud and collusion as a mere nullity, provided of course that he clearly establish the fact of the fraud and collusion. The point has been frequently decided with respect to judgments *in rem*. See *Meddowcroft* v. *Huguenin*(2), where Lord Brougham said (page 398), "a collusive suit is not a real judgment, but something obtained by fraud from the Court which is not binding"—*Perry* v. *Meddowcroft*(3), where Lord Langdale, M. R., said—"a sentence may be refused the respect which would otherwise be due to it, if it can be shown, as it may be shown, that the sentence was obtained by fraud and collusion," and *Harrison* v. *Mayor of Southampton*(4), in which case the Court of Appeal in Chancery held the appellant to be the lawful issue of a marriage which had been declared to be null and void by the Consistory Court of the Bishop of Winchester,—Turner, L.J., saying (p. 151) "that this sentence, if obtained without fraud and collusion, would bind the question and establish the invalidity if the marriage was not disputed on the part of the appellants; but it was contended on their part that the sentence so obtained by fraud and collusion and that a sentence was obtained could have no valid or binding effect. To this latter position I have no difficulty in assenting."

(1) 2 Ambler 763.
(2) 4 Moore P. C. 386.
(3) 10 Beav. 122 at p. 137.
(4) 4 De G. M. & G. 137.

The point has also been decided in cases in which the parties belonged to class (*b*), *i.e.* though not privies to, yet were represented by the parties to the former suit. In *The Earl of Bandon* v. *Becher* (1), a case in which the Court of Chancery in Ireland had at the instance of the then tenant in tail set aside a decree of the Exchequer made against a former tenant in tail who was treated throughout the argument as sufficiently representing his successor for the purposes of the suit, Lord Brougham, after saying that it was undeniably true that the Court of Chancery had no right to review a decree of the Court of Exchequer, added (p. 510), "but it is equally true, that if the decree has been obtained by fraud it shall avail nothing for or against the parties affected by it, to the prosecution of a claim or to the defence of a right." And a little further on he said: "It is not an irregularity, it is not an error which is here complained of; but it is that the whole proceeding is collusive and fraudulent; that it cannot therefore be treated as a judicial proceeding, but may be passed by as availing nothing to the party who sets it up." And in *Philipson* v. *Earl of Egrement*(2), on a *scire facias* against the defendant a shareholder in a company under 7 Wm.IV and 1 Vic., c. 75, on a judgment obtained by the plaintiff in a previous action against the registered officer of the company, the Court held good a plea that "the registered officer fraudulently and deceitfully and by connivance with the plaintiff suffered the judgment in order to charge the defendant." In this case the Court of Queen's Bench relied on the opinion expressed in *Fowler* v. *Rickerby*(3) by Tindal, C.J., that such a plea would be good; and differed from dicta of Parke, B., in *Bradley* v. *Eyre* (4) and *Bradley* v. *Urquhart* so for as they were to the effect that such a plea would be bad, though agreeing with the opinion therein expressed that relief for the fraud might also be had by motion to the Court. The technical ground on which the Queen's Bench proceeded was, that there had been no previous opportunity to plead the fraud and collusion alleged. The cases of *The Earl of Bandon* v. *Becher* and *Philipson* v. *Lord Egremont*

(1) 3 Cl. & F. 497.
(2) 6 Q. B. 587.
(3) 2 M. & G. 776.
(4) 11 M. & W. 450.
(5) 11 M. & W. 460

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were referred to with approval by Willes, J., in *The Queen* v. *Baddlers' Company*(1) where he said : "a judgment or decree obtained by fraud upon a Court binds not such Court nor any other ; and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding."

With regard to the case of executors allowing the judgment to be passed against them by collusion with the plaintiff I may refer to 2 William on Executors (8th ed.), p. 1971, where it is said that "where an executor pleads that he has *no assets ultra* a judgment which, in truth, was recovered against him upon an unjust or fictitious debt, the plaintiff (creditor) may reply that the judgment was had and obtained by fraud and covin between the executor and the creditor (the plaintiff in the former suit) ; but he cannot traverse the averment that the debt for which the judgment was had,was a just and true debt ;" and also to note (3) to *Williams* v. *Fowler*)(2),and 2 Williams Saunders, p. 50, on which that passage is based.

As regards Indian decisions, I may quote a passage from the judgment of West, J., in *Gope Wasudev* v. *Markande* (3) where a collusive mortgage had been supported by a collusive decree "if the ostensible sale or mortgage was really a mere colourable transaction, the vendee from the mortgagor may claim to have it disregarded, even though the fraud has been carried a stage further, so as to give to the sham mortgage the corroboration of a decree,which is then allowed to lie by unexecuted for several years." And I may refer also to *Narayan* v. *Pandurang*(4), where the frame of a suit brought by members of a joint Hindu family to recover from the defendant their shares in land of which he had got permission under a decree against the manager of the family, alleged to have been obtained by collusion, was not objected to by the Court consisting of Westropp, C.J., and West, J., though they held that the allegation of collusion failed altogether of proof.

So far I have dealt with the question on general grounds of English law. I now proceed to consider how far it is affected by special Indian enactments. Section 13 of the Civil Proce-

(1) 10 H. L. Ca. p. 431.
(2) 1 Strange 410.
(3) I. L. R. 3 Bom. 33.
(4) I. L. R. 5 Bom. 686.

dure Code (Act X of 1877), slightly altered in Act XIV of 1882, enacts that "no Court shall try any suit or issue, in which the matter directly and substantially in issue, having been directly and substantially in issue in a former suit in a court of competent jurisdiction between the same parties, or between parties under whom they or any of them claim, litigating under the same title, has been heard and finally decided by such court." In my opinion this section cannot apply to the present case, as the parties here do not claim under the parties to the previous suit. And, again, reading explanations I and II to the section with the remarks in *Philipson* v. *Lord Egremont* (1), it seems that the charge of collusion in the former suit was not and could not have been a matter directly and substantially in issue in that suit. But I must say that I do not think that section 13 of the Civil Procedure Code is exhaustive as to the effect of a *res judicata*. It does not deal at all with the case of judgments *in rem*, nor with that of parties represented by, though not claiming under the parties to the former suit, although the effect in this case of the previous judgment was recognized by the Privy Council in the passage in *Bogendro* v. *Funindro*(2) above cited.

Very different in the wideness of its terms is the 44th section of the Evidence Act, which enacts that "any party to a suit or other proceeding may show that any judgment, order, or decree, which is relevant under sections 40, 41 and 42 (which comprise all cases of judgment relevant *qua* judgments) and which has been proved by the adverse party * * * was obtained by fraud or collusion." This section clearly covers the present case; the difficulty is to say what it does not cover. Its language is wide enough to allow a party to the suit in which the judgment was obtained to aver that it was obtained by the fraud of his antagonist, though the judgment stands unreversed. This, indeed, has sometimes been thought to be the English rule (see 2 Taylor on Evidence, para. 1522); but I do not think that the contention can be successfully maintained, having regard to the recent authorities, especially

(1) 6 Q. B. at p. 605. (2) 14 Moore's I. A. at p. 376.

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to *Huffer* v. *Allen* (1)above quoted. It is also wide enough to allow a party to set up his own fraud or collusion in procuring the former judgment in order to defeat it, certainly a startling proposition. No doubt the section refers to the admissibility, not the weight of the evidence allowed thereby to be given; still it is hard to suppose that the Legislature contemplated that evidence should be admitted from which no result could follow. Possibly the Courts may hereafter read "fraud or collusion" as equivalent to "fraud and collusion", as denoting what Mr. Farran happily termed bilateral, as distinct from unilateral, fraud; and no doubt in many of the English decisions the term "fraud" is used where collusion is plainly meant, which ambiguity indeed has been the principal cause of the doubt last mentioned. Still the construction would be a somewhat forced one. But whatever we may conjecture, I do not feel it incumbent on or proper for me in this case to attempt to interpret the section. It suffices to say that, whatever its construction may be, the present case falls within it.

I, therefore, find the preliminary issue for the first and second defendants. The summons, the decision in which has been pending the decision on this issue, may now be brought on in chambers. Costs to be costs in cause.

Attorneys for the plaintiff.—Messrs. *Jefferson, Bhaishanker and Dinsha.*

Attorneys for the first defendant.—Messrs. *Payne and Gilbert.*

Attorneys for the second defendant.—Messrs. *Brdesir and Hormasjee.*

(1) 2 L. R. Ex. 15.