1905.

CHHOTALAL v. NABIBHAI.

It is true that a different view was adopted in *Nimbaji* v. *Vadia Venkati*[1], but as it was the decision of a single judge, it is not binding on us, and out of deference to the concordant of opinions of the other High Courts we decline to follow that decision.

The result is that we make the rule absolute.

We make no order as to costs, seeing that the Subordinate Judge was right in following the decision in *Nimbaji* v. *Vadia Venkati*[1], though it was the decision of a single judge.

The case to be remanded and to be determined in accordance with these remarks.

G. B. R. *Rule made absolute.*

(1) (1892) 16 Bom. 683.

PRIVY COUNCIL.

1905 * *March* 21, 28, 29, 30. *May* 24.

BAI GANGABAI AND OTHERS, SOME OF THE PLAINTIFFS, *v.* BHUGWANDAS VALJI (DEFENDANT) AND OTHERS (THE REMAINING PLAINTIFFS).

[On appeal from the High Court of Judicature at Bombay.]

Will—Probate—Deed-Poll executed at same time as will and referred to in it—Will giving benefit to Solicitor who prepared it—Onus of proof—Testamentary writing—Succession Act (X of 1865), section 51.

A will made reference to a deed-poll which was executed at the same time, and also contained clauses under which the solicitor who prepared it took some benefit, and was appointed an executor of the will, and a trustee of the testator's estate. The first Court granted probate of the whole will, but the High Court on appeal varied that order by directing that the passage referring to the deed-poll and that giving remuneration to the solicitor should be omitted in the grant of probate.

Held by the Judicial Committee that the onus was on the solicitor to show that the deed-poll and the disputed parts of the will expressed the true intention of the testator who understood and approved of them, and that on the evidence and under the circumstances of the case he had discharged that onus.

The law relating to the case of a person taking a benefit under a will prepared by himself as laid down by Lord Wensleydale in *Barry* v. *Butlin*[1], and approved of in *Fulton* v. *Andrew*[2] followed.

* *Present* : Lord Davey, Lord Robertson and Sir Arthur Wilson.

(1) (1838) 2 Moore's P. C. 480. (2) (1875) L. R. 7 H. L. (E. and I. Ap.) 448.

1905.

BAI GANGABA v. BHUGWÁN-DÁS VÁLJI.

Held also that the deed-poll was not a testamentary document requiring probate, the reference to it in the will not being for the purpose of making, or so as to make, its contents part of the will: it was, therefore, not within section 51 of the Succession Act (X of 1865).

APPEAL from a judgment and decree (January 11th, 1904) of a Division Bench of the High Court at Bombay, which varied a decree (June 16th, 1903) of the same Court made in the exercise of its testamentary and intestate jurisdiction.

The question on this appeal related to the grant of probate of the last will and testament of one Gordhandas Sunderdas which was dated 5th October, 1902. The testator appointed five persons to be executors of his will: of these three, namely, Bai Gangabai his widow, Jamsetji Kavasji Patel his solicitor, and Lalji Narron his brother-in-law, were the present appellants; and the remaining two, Chatterbhuj Morarji and Narrondas Thakersey Moolji, were made *pro formâ* respondents in the appeal. The principal respondent, Bhugwandas Valji, was on the death of the testator the sole surviving partner in the testator's firm of Moolji Jaitha and Company. He was a cousin of the testator and on the application for probate of the will he lodged a caveat.

The testator carried on various businesses at Bombay, and was the chief partner in the firm of Moolji Jaitha and Company. He died on 10th October, 1902, aged 27 years, leaving him surviving his widow the appellant Bai Gangabai, his nephew Cursondas, and the respondent Bhugwandas Valji, his cousin. The testator's son, Kalianji, pre-deceased him in April, 1899; and Dharamsey, the testator's brother, died in February, 1899. Disputes then arose between the testator and the executors of Dharamsey in regard to various matters including the partition of the joint estate, and litigation followed in which the testator was eventually successful. For many years the firm of solicitors in which the appellant Jamsetji Kavasji Patel was a partner, had acted as solicitors for the testator, and Jamsetji was the member of the firm who attended to the testator's business.

The partnership deed of the firm of Moolji Jaitha and Company, dated 16th August, 1899, contained a clause which provided that the other partners

"hereby agree and bind themselves to abide by and act in conformity to the directions and provisions contained in any deed will or settlement which the said

1905.

BAI GANGABAI v. BHUGWANDAS VALJI.

Gordhandas Sunderdas may hereafter make with regard to the disposition and conduct and management of the said partnership business after his death. The said Gordhandas Sunderdas shall be at liberty by such deed will or settlement to provide for the continuance or discontinuance of the said business as he may think proper and in case he desires the business to be continued to confer upon any person or persons he may nominate for the purpose such and same powers authorities and discretions as are hereby vested in and reserved to the said Gordhandas Sunderdas with such limitations variations or additions as he may think proper. And in case he desires the business to be discontinued after his death to make such provisions as he may deem proper for the advantageous and efficient winding up and liquidations of the said business and the collection conversion and recovery of the property assets and monies of the said partnership."

The will was executed on 5th October, 1902, and on the same day the testator also executed a deed-poll. The will, after making provisions which were not material to the present question, referred in clause 6 to the above provision in the deed of partnership, and then proceeded :—

"And whereas by a deed-poll dated the 5th October, 1902, I have in the exercise of the power for this purpose reserved to me by the aforesaid deed of partnership and of every and any other power in this behalf me enabling appointed my wife Gangabai to take my place in the said firm and to exercise all the powers authorities and discretions which are by the said deed vested in conferred upon or reserved to me. Now I hereby confirm the said deed-poll and the appointment created thereby and I hereby declare that in the event of my wife predeceasing me she shall be succeeded by my executors as provided by the said deed-poll."

The clause referred to in the deed-poll was as follows :—

"Provided always and I hereby expressly declare that notwithstanding anything hereinbefore contained to the contrary my said wife Gangabai shall in all matters relating to the conduct and management of the business and affairs of my said firm and to the exercise and execution of the powers authorities and discretions hereinbefore mentioned always act with the assistance and co-operation of and in conformity to the advice and counsel of my solicitor Mr. Jamsetji Kavasji Patel. Provided always and I hereby declare that if my said wife Gangabai shall not be living at the time of my decease or if she dies during the continuance of my said firm I hereby nominate constitute and appoint the said Jamsetji Kavasji Patel to take my place in my said firm and to exercise the powers authorities and discretions hereinbefore mentioned."

By the 26th clause of the will the following provision was made for the benefit of Jamsetji :—

"And I declare that the said Jamsetji Kavasji Patel and his firm of Messrs. Mansukhlal Jamsetji and Hiralal shall be entitled to make and receive all such charges and emoluments for business whether of an ordinary professional or any other character done by him in relation to the administration of my estate or the execution of the trusts of this my will or any codicil hereto as he and his firm would have been entitled to make and receive in respect of such business if he had not been appointed one of my executors and trustees. And I further declare that the said Jamsetji Kavasji Patel shall receive a remuneration of 1 per cent. on the income of my estate for the time and trouble he will have to devote in the management of my estate so long as he continues to act as my executor and trustee."

An application for probate of the will was made to the High Court through Jamsetji's firm in November, 1902, and was opposed by Bhugwandas Valji, and the following issues were raised between the parties :—

"(1) Whether the said will and deed-poll or any and what part thereof were executed by the deceased as alleged ?

(2) Whether if so the deceased was in a sound and disposing state of mind when he executed them ?

(3) Whether the said documents or either of them or any and what part thereof are or is the will or deed of the deceased as alleged ?

(4) Whether the deed-poll is not a testamentary writing and whether probate should not be granted of it with the will ?

(5) The general issue."

On these issues the High Court (RUSSELL, J.) held that probate should be granted of the will in its entirety including the clauses conferring benefit on Jamsetji ; but that probate should not be granted of the deed-poll, it not being of a testamentary nature.

An appeal by the respondent from that decision came before CHANDAVARKAR and BATTY, JJ., who varied the decree of the first Court, holding that it was not satisfactorily established that the testator intended to confer on Jamsetji the benefits conferred on him under the will and deed-poll, and directing probate of the will to issue excluding therefrom all reference to the deed-poll in clause 6, and excluding also clause 26 of the will. The material portions of their judgment were as follows :—

"Such appears to be the evidence bearing directly upon the question, whether Gordhandas actually knew, understood and

1905.

BAI GANGABAI v. BHUGWANDAS VALJI.

assented to the new provisions of the will and deed-poll, conferring a benefit upon Jamsetji, the solicitor who prepared, attested and propounded them. The direct evidence upon this point rests upon the statements of Jamsetji, the solicitor himself. Practically the only corroboration to his statements consists of the evidence of Jamsetji's clerk, Bomanji, that the testator said he had read the documents in question, and the evidence (not hitherto discussed) of Jamsetji's father, Cawasji Patell, who says that at some unspecified dates between June and October, 1902, he had some conversations with the testator about the drafts of those documents, and examined them and suggested alterations therein which the testator accepted. But at that stage neither of those drafts contained any reference to Jamsetji, and Jamsetji's father does not profess to have had any idea that it was his own son whose name was to be inserted as executor in the will and in the deed-poll nor does he mention the 26th clause of the will about the remuneration and charges as attorney to which Jamsetji would thereunder be entitled, which clause indeed appears not to have been inserted till the 4th October, the day when the will was finally engrossed. It seems therefore that there is no evidence except that of Jamsetji himself to show that the testator had given instructions for the provisions alleged to be for the benefit of Jamsetji and no evidence that he understood the purports of those provisions except the statements of Jamsetji and his clerk that the testator said he had read the whole of the documents containing them.

"This evidence would be fully sufficient no doubt in ordinary circumstances, the unquestioned execution by a testator whose mental capacity is established being in itself evidence of his intention to accept what has been presented to him for his signature. * * * * Knowledge and approval are in general presumable from execution by a competent testator: see *Woomesh Chunder Biswas* v. *Rashmohini Dassi*[1] which contains a summary of several authorities cited in this appeal on this point including *Barry* v. *Butlin*,[2] and *Cleare* v. *Cleare*[3].

(1) (1893) 21 Cal. 279. (2) (1838) 2 Moor's P. C. 480 (484).
(3) (1869) L. R. I. P. and D. 655 at p. 657.

"This presumption of knowledge and approval on proof of the signature of a testator is a disputable presumption of law. The various suspicious circumstances by which it is liable to be rebutted are compendiously stated by Pitt Taylor on Evidence (Vol. I, 8th Edn., page 177, C. V. s. 160), and include the inability of the testator to read whether from want of education or from bodily infirmity, doubt as to his capacity at date of executing the instrument the fact that the party materially benefitted by the will prepared it or conducted the execution or has been in a position calculated to exercise undue influence. And even apart from such matter of suspicion and when a draft has been submitted to and returned corrected and approved by the testator, knowledge and approval of a provision due to manifest mistake will not be ascribed to the testator in the absence of evidence that it was specially brought to his notice, *Brisco* v. *Baillie Hamilton*[1], *Morrell* v. *Morrell*[2].

"How far in the present instances all or any of such circumstances exist and how far their effect has been neutralized by evidence are the main questions now to be considered. With regard to the first mentioned of those circumstances we think that inability to read must be considered relatively with reference to the documents in question. There is in this case no doubt that the testator was able to read English and could write his signature at least with ease and fluency. But we do not consider that it has been established that he understood the language so readily as to use it habitually in conversation or in correspondence. Had he been able to do so, there could we think have been little difficulty in adducing independent witnesses as to sustained conversation with him in that language. The English doctors who attended him were not impressed with his attainments in that direction and there is no decisive evidence as to his ability to write original letters in the language. We think therefore there is but little room for doubt that he would have found great difficulty in mastering unassisted the contents of a will of 40 pages in length. It is matter of common observation that laymen not infrequently find such difficulty in understanding lengthy legal documents in English even when it is their mother

(1) (1902) P. 234 (237). (2) (1882) 7 P. D. 68.

1905.

BAI GANGABAI v. BHUGWANDAS VALJI.

tongue. It is pressed upon us that in this instance it would have been quite unnecessary for the testator to read through the whole of the will, as most of its provisions were already familiar to him from documents which he had previously executed, and that all he needed to look at was the new provisions embodied in clauses 6, 18 and 26. This argument would have had more weight if there had been evidence that those clauses had been marked or specially pointed out to him at the time of perusal. But unless he knew where to look for them he would probably have had to read through the will in order to discover them. And in this case, although we believe the testator to have been fully conscious at time of execution, we cannot leave out of account the facts that he had then been ill with fever for nine days, that he died of that fever five days later, and that on the date of the will or the next day five doctors attended him and deemed his condition critical. Unless therefore the testator was fully apprised beforehand of the terms of the will we see the gravest reason to doubt whether he could have ascertained them by reading the final drafts submitted to him on the night of the 4th October. In this view we are confirmed by the manifest and admitted conflict between the deed-poll and the sixth clause of the will, which could hardly have been passed over without notice had the testator fully understood the contents of both. We are unable to hazard a conjecture as to whether the oversight on this point was due to failure to read both documents or only one of them as to which was read and which left unread. Next arises the difficult question whether the new provisions to which this will was specially designed to give effect conferred on Jamsetji who prepared it and who virtually alone conducted its execution were such as to confer on him a substantial benefit or, as contended on his behalf, only to provide an insignificant remuneration for services to be performed. The precise *quantum* of the benefit to be derived has not been very clearly ascertained and we have some difficulty in gauging it. But we think it is of importance to note that none of the clauses relating to Jamsetji had been embodied in antecedent wills executed by the deceased, and the will was in all other respects practically a mere reproduction of those antecedent wills. So far, therefore,

as it could operate to modify pre-existing arrangements it was in effect directed solely to the purpose of placing Jamsetji, the solicitor, who prepared it in the position which he now claims. Jamsetji admits that he did not draw attention to these clauses. He also admits that the deed-poll gives the absolute power of continuance or discontinuance of the firm to himself and Gangabai, the testator's widow. This and various other powers, including admissions to the partnership, altering, managing or disposing of the business, are vested by the 6th clause of the will in Jamsetji jointly with his co-executors and co-trustees. Clause 18 gives large powers to the executors and trustees of investment at their absolute and uncontrolled discretion, and generally to manage the estate, but the passage therein to which the Counsel for the appellant claims special attention is that containing a provision that unless the trustees are fully satisfied with the conduct of the son to be adopted by Gangabai, the testator's widow, the whole of the residuary estate is to go to charitable institutions to be selected by them. It is contended that the power thus placed in the hands of the trustees would enable them, and Jamsetji among them, to secure by arrangement with the adopted son such favourable terms as they might desire. Taken in conjunction with the circumstances that the names of the executors were entered only at the time of execution, that the testator never intimated to anyone else an intention of appointing Jamsetji, that Jamsetji and his clerk were the only persons present when the testator expressed his approval of the will, that the deed-poll was in conflict with the will as to the powers Jamsetji was to exercise, and that the testator was in a weak condition at the date of execution, there may be room for doubt as to the deliberate intention of the testator. But as the powers conferred by clauses 6 and 18 could under the will as distinct from the deed-poll be exercised by Jamsetji only conjointly with his co-executors and trustees, it would be difficult to say those clauses by themselves confer such large benefit upon Jamsetji as to throw suspicion upon the will prepared by him. The clause on which the greatest stress is laid by the Counsel for the appellant is clause 26. That clause provides that Jamsetji and his firm shall be entitled

1905.

BAI GANGABAI v. BHUGWANDAS VALJI.

to make and receive all such charges and emoluments for business whether of an ordinary professional or other character done by him in relation to the administration of the trusts as he and his firm would have been entitled to if he had not been appointed one of the executors and trustees, and further that the said Jamsetji shall receive a remuneration of one per cent. on the income of the estate for the time and trouble he will have to devote in the management of the estate so long as he continues to act. It is contended for the appellant that the provision for professional charges is in effect a legacy of profit costs to the solicitor under the ruling in *In re White* (1) and that in addition to this charges of an unprofessional nature are allowed. That case was one in which the solicitor was sole executor and trustee of a will. That point, however, does not seem to have affected the decision. It was there said that the right to charge profit costs must be regarded as a bounty, a gift by the testator to the solicitor of something which the law will not otherwise allow him to take. As to the power to charge for items not strictly professional, the judgment in *In re Chapple* (2) shows that though the introduction of the provision in the form given in Wolstenholme's work on the Conveyancing Acts would authorise such charges, yet it is one which '*No solicitor ought to put in its entirety* into a will drawn by himself, unless the testator has expressly instructed him to insert those very words.'

"In this connection we are referred on behalf of the respondent to the more recent ruling in *In re Fish*, (3) when a solicitor was under a similar clause held entitled to charge for his trouble as well as to make professional charges for business done by him as solicitor though himself an executor and trustee to whom a legacy was given. That case however only touches the question similarly decided in the case of *In re Ames*, (4) namely, whether such charges can be allowed when the right has been duly conferred by the testator. It does not touch the question whether a clause giving the right to such charges is of the nature of a gift or bounty which throws on the person introducing the clause the onus of proving that the testator knew and approved of it.

(1) (1898) 1 Ch. 297: 2 Ch. 217.
(2) (1884) 27 Ch. D. 584 at p. 587.
(3) (1893) 2 Ch. 413.
(4) (1883) 25 Ch. D. 72.

That latter question is the one which arises here and seems to have been more directly dealt with in the case of *In re Barber*(1) since followed in the case of *In re Pooley*.(2) In both of these cases the direction in the will was regarded as a beneficial gift from claiming which the solicitor as an attesting witness was precluded by the Wills Act. It is true that section 54 of the Succession Act under Act XXI of 1870 would not apply to the will now in question which is that of a Hindu, and would therefore not invalidate the gift as made to an attesting witness. But this does not affect the applicability of the doctrine which requires that a person who takes a benefit under a will which he has prepared, must prove affirmatively full knowledge and approval thereof by the testator. We are asked indeed to hold that it is an insignificant benefit and really as suggested by the case of *In re Fish*(3) of the nature of a payment for services in pursuance of a stipulation. We are however unable to hazard such a conclusion which would at most be conjectural and so far as we are able to gather from the past one not likely to be justified by the event. The estate of the testator appears to be large and invested in a complex business and Mr. Jamsetji's experience in connection with it does not encourage the idea that its management will be free from litigation. The strenuousness with which this appeal has been resisted hardly points to an inference that the benefits derivable by the chief supporter of the will, are insignificant and the clause conferring them was inserted at the eleventh hour without the knowledge of any independent witness.

"As to the last provision in the clause which confers an annuity of one per cent. on the income of the testator in addition to all charges whether of a professional or of an unprofessional character, we think there can be still less doubt that it is of the nature of a benefit. The precise amount is in dispute. The respondent's Counsel urges that is also insignificant and only a stipulated remuneration for services. This power depends on unknown factors the income of the estate, the time and trouble required, and the means of the solicitor. What would be insignificant to a man of large means may be a considerable sum to a poor man.

(1) (1886) 31 Ch. D. 665. (2) (1888) 40 Ch. D. 1.
(3) (1893) 2 Ch. 413.

1905.

BAI GANGABAI v. BHUGWANDAS VALJI.

The respondent estimates the value of the provision at Rs. 2,000 per annum only. The appellant contends that it would be much more, and probably Rs. 5,000 per annum having regard to the number of agencies held by the firm, and also urges that it is in addition to all legitimate charges for business done in relation to the estate. The will does not appear to contemplate any independent action by Jamsetji in the management of the estate outside the range of such business in relation to its administration as is referred to in the first part of the clause, and we think that the onus is on the solicitor Jamsetji to show that the whole of the 26th clause was inserted with the knowledge and express approval of the testator. That clause purports to confer benefits upon him for which he states he specially stipulated, and as he alone prepared the will and conducted its execution it is, we think, for him to establish affirmatively the propriety of the transaction and its accordance with the testator's wishes. This clause Jamsetji himself admits was deliberately left to be drawn at the last moment. It was only inserted on 4th October, so that its terms could only have been considered by the testator if he read the will between 7 p. m. on the 4th and 11 a. m. on the 5th. Jamsetji says he deliberately waited till the last possible moment before he inserted his own name in the deed-poll and the 26th clause of the will, because he thought it possible the testator would change his mind. He evidently recognized therefore that the testator had not arrived at an advised and final decision, and though Jamsetji says he was told when alone with the testator on the 4th to insert his own name in the deed-poll, he admits that on that day he had no talk about the rate of his remuneration or about it at all. He states that the first time Gordhandas' attention was drawn to clause 26 was after the engrossment of the will. But he also admits that he did not draw the testator's attention to these clauses. The effect therefore of his evidence is to show that the only opportunities the testator had of final knowledge and approval depended on his having read the will before Jamsetji's arrival, and his appreciation of the whole clause when the rate of remuneration was discussed, filled in and initialled. The importance of showing a full understanding of the whole clause is, we think, the more manifest because the solicitor's own diary shows that the testator had months previ-

ously considered and discarded Jamsetji's demands in that connection, that the final draft was submitted only the night before execution, that the deed-poll was not mentioned in the notes of instructions till 4th October, and that it could not have been in accordance with the testator's wishes if the will was. The evidence adduced by Jamsetji himself thus indicates that he was in some uncertainty as to the testator's wishes, and that the provisions drafted by Jamsetji relating to himself required to be specially brought to the notice of the testator. In this connection we think that some weight must be given to the circumstance that he had so far won the confidence of the testator by successful conduct of litigation, that it is conceivable the testator may, in the condition in which he then was, have been content to rely entirely on him, without troubling to satisfy himself as to the correct expression of his wishes. Added to all these considerations which throw doubt as to full knowledge and approval comes the circumstance that no wholly disinterested person was present either when the instructions were given or at the execution of the documents or during the life-time of the testator was told by him of his intentions in favour of Jamsetji. The cumulative effect of such circumstances on the ordinary presumption in favour of a knowledge and approval is very succinctly stated in *Paske* v. *Ollat*[1] cited with approval by Lord Watson in *Donnelly* v. *Broughton*[2]. * * * * * * * * * *. That the effect of this presumption is unaffected by the question whether section 54 of the Succession Act applies to Hindu Wills, is not disputed. Among the circumstances that may rebut such presumption the most important seem to be (*a*) "the absence of concealment," as in *Paske* v. *Ollat*[1], and *Perera* v. *Perera*[3], (*b*). "previous instructions," *Perera* v. *Perera*[3], *Parker* v. *Felgate*[4], *Goodacre* v. *Smith*[5], (*c*) "reading over of the will" (by or to the testator), *Paske* v. *Ollat* [1], and *Atter* v. *Atkinson*[6], but this is not an unyielding rule of law, (*d*) "subsequent acknowledgments",

(1) (1815) 2 Phillim 323.
(2) (1891) A. C. 435 (442).
(3) (1901) A. C. 354 (362).
(4) (1883) 8 P. D. 171.
(5) (1867) L. R. 1 P. and D. 359 (361).
(6) (1869) L. R. 1 P. and D. 665 at p. 668.

1905.

BAI GANGABAI v. BHUGWANDAS VALJI.

Donnelly v. *Broughton*[1]. It is urged on behalf of the respondents in this appeal that there was an absence of concealment in this case inasmuch as Jamsetji paid his visit quite openly. It was well known that he had come to the house, that the testator intended to send for him if he had not already done so, and was about to execute a will, and stress is further laid on the fact that the will and deed-poll after execution were left with the testator and were not as in the case of *Tyrrell* v. *Painton*[2] at once removed and withheld till after the testator's death. But we can attach no great weight to the bare knowledge of the solicitor's visit, and of the testator's intention to execute a will when the instructions given for the will and the special provisions in it were entirely unknown to any one but the solicitor himself. As to the fact that the will was left with the testator it may be noted that Jamsetji's diary shows that he wanted to take away the documents with him for safe custody. It is true this was not done, but we do not think that great weight can attach to the fact that an English will of 40 pages in length was left in a Hindu household with a moribund testator. It seems to us far more significant that no one, not even the testator's brother-in-law, his intended executor, nor the solicitor's own father, had ever heard of the proposal with regard to the solicitor during the many months the drafts are said to have been in contemplation; that no relation or thoroughly independent intelligent witness was called in at execution, and that the testator's condition was such that even when he and his wife desired it, his brother-in-law refused to excite or tire him by reading over the voluminous documents. The omission of all direct mention of the deed-poll in the solicitor's diary up to the 3rd October is also important in this connection. No necessity for secrecy is suggested, and if such necessity had existed, it is difficult to suppose that the testator could have found no one among his relations, friends or professional attendants on whose discreet reticence he could rely.

"Previous instructions may suffice, even though the testator may be unable to follow the provisions at time of executing the

(1) (1891) A. C. 435 (442). (2) (1894) P. 151.

will. *Perera* v. *Perera*[1], *Parker* v. *Felgate*[2], and *Goodacre* v. *Smith*[3], are cited as to this effect. In all these cases, however, the wills were prepared by solicitors who took no benefit, and in *Goodacre* v. *Smith*[3], the solicitor, though instructed by persons interested, had previously been informed by the testatrix of her wishes. No case has been cited to us in which proof of knowledge and approval rested solely on instructions given to no one but the person taking the benefit.

"Next it is admitted that at execution the will was not as in *Paske* v. *Ollat*[4] read over by or in the presence of the solicitor taking the benefit. Indeed it appears from *Fulton* v. *Andrew*[5] that Lord Penzance in *Atter* v. *Atkinson*[6] laid too much stress on such a circumstance as conclusive evidence of knowledge and approval. In ordinary cases reading over to a testator of sound mind and memory and capable of understanding it. 'But there is a further onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of showing the righteousness of the transaction.' In this case, however, admittedly the will was not read over to or by the testator in the presence of any one. The utmost evidence is that of the solicitor and his clerk that the testator said he had read over the will. The case therefore more nearly resembles that of *Atter* v. *Atkinson*[6] than that of *Fulton* v. *Andrew*[5]. It is not even so strong as that of *Atter* v. *Atkinson*[6], for in that case the solicitor (Torkington) who deposed to a statement by the testatrix that she had read the will was not the person (Atter) who prepared and would have benefited by it. In *Atter* v. *Atkinson*[6] the address to the Jury, after stating that the law requires that 'those who have to judge of a will should be satisfied, upon very good and sufficient evidence, that the contents of the will were made known to and approved by a testator in a case in which the person who has drawn the will is the person who is himself largely benefited,' adds 'there is no special rule applying to attorneys, but the force of the observation is obviously increased

(1) (1901) A. C. 354 (362).
(2) (1883) 8 P. D. 171.
(3) (1867) L. R. 1 P. and D. 359 (361).
(4) (1815) 2 Phillim 323.
(5) (1875) L. R. 7 H. L. 448 (462, 463, 468, 471, 472).
(6) (1869) L. R. 1 P. and D. 665 at p. 668.

1905.

BAI GANGABAI v. BHUGWANDAS VALJI.

in such a case, for we know that a person making a will confides more in a professional man than he generally does in any other person he may call in to assist him.' And further on, with reference to evidence as to a bare statement by the testatrix that she had read the will, it is observed that it raised two questions, *viz.*, first whether the testatrix said so at all, and, secondly, whether if she said so, she had actually read the will: because it is said 'many a person who has had a long paper put into his hand may say he has read it, when he may have only glanced over it. Is it not possible that having confidence in Mr. Atter, and having noticed that the legacies were given as she intended, she skipped the latter part under the impression that it contained merely formal clauses? and how can we be sure she read it merely because she said she had done so? The difficulty arises from a professional man not doing as he ought to have done, not having read over the paper to his client in the presence of the clerk.' Such being the duty of a solicitor who does not stand to benefit by a will, there can be no doubt that *a fortiori* it was the duty of Jamsetji here. The least the solicitor could have done would have been to read over the will in the presence of his clerk and of the testator. And, moreover, as observed by Lord Hatherley in *Fulton* v. *Andrew*[1], 'it would not have been difficult for them to have had other persons present when the reading over of the will took place; but that does not appear to have been done.' Here the second attesting witness was not even called in to hear the testator's statement that he had read the will. In *Farrelly* v. *Corrigan*[2] great stress was laid upon the omission by the confidential agent largely benefiting to read over the will to an illiterate testator in the presence of witnesses. In the present instance the testator, though not wholly illiterate, was under a very appreciable disadvantage in dealing with a document in a language not his own, and, as in *Atter* v. *Atkinson*[3] the transaction was conducted without the intervention of any independent adviser and with a reticence, if not a secrecy, that if not designed seems unaccountable. If the deceased had read over the will it would be only

(1) (1875) L. R. 7 H. L. 448 (472). (2) (1899) A. C. 563.
(3) (1869) L. R. 1 P. & D. 665.

natural to expect evidence that Jamsetji had taken care to obtain an admission from him to that effect in the presence of some one else besides himself and his clerk. The condition of the testator may not have been such as to render it improbable that he would be able by himself to read and understand the comparatively few and brief passages relating specially to Jamsetji. But it is no more improbable that he might have read only such portions as were familiar to him as reproducing his formerly expressed intentions and, satisfied with that, would not toil through the 40 pages to detect new matter. Had he realized the bearing of the new provisions on the continuance of his business, it would not have been unreasonable to suppose that the deceased would spontaneously have referred to them when asked to authorize Bhugwandas to sign cheques for the firm.

"As to subsequent acknowledgments the respondent can at most rely on the evidence which shows the testator's consciousness of execution of the documents and which, at the same time, shows that he gave no indication of his knowledge of their contents but desired to have them read over and was refused on account of his exhausted condition.' The final result of our considerations may be summed up as follows:—The provisions not included in any previous will of the deceased purport to confer a benefit on the solicitor who prepared it. The extent of that benefit may be somewhat indefinite, but owing to his dual capacity of executor and legal adviser may be far from inconsiderable. The whole of the transaction was conducted by the solicitor in whom the testator reposed great confidence. No third persons intervened. The final provisions in the solicitor's favour were inserted on the eve of execution, when the testator, though conscious, was certainly very ill and probably incapable of sustained mental effort. Those provisions were not as a whole specially brought to his notice. The evidence that he said he had read them rests entirely on the depositions of the solicitor benefited and his clerk. He certainly failed to discover that they were inconsistent in a very important particular with another document executed at the same time. The perusal, if any, must, we think, have been superficial. The notes of previous instructions made by the solicitor fail to indicate the

1905.

BAI GANGABAI v. BHUGWANDAS VALJI.

position assigned to him by the documents finally executed. No intimation was given by the testator to any third person of his intentions as to the solicitor, and the whole transaction was conducted with a secretiveness which is left unexplained. It is urged upon us that the solicitor is an officer of the Court in whom confidence must necessarily be reposed and for whose reputation we should have tender regard. We are glad to believe that the solicitor in question is a gentleman of integrity, but at the same time we consider that he would have shown a more becoming regard for his own reputation if he had followed the course very frequently indicated in decided cases, as the course which it is proper for a confidential adviser to adopt in a transaction beneficial to himself. The precaution of having the will read over to the testator in the presence of disinterested persons was one which he could without apparent difficulty have observed and one with which without apparent reason he dispensed. We do not wish to imply that his neglect of that precaution was due to any deliberate intention to obtain a benefit which he knew the testator was unwilling to confer. But we think that a solicitor preparing provisions for such benefits should not place himself in a position which makes it impossible to prove affirmatively the willingness of the testator by other evidence than his own. And we think the generally recognised rule in such matters cannot be relaxed without fear of detriment to the public and to the reputation and the confidence which the legal profession should command and which no member thereof should either by negligence or design be allowed with impunity to imperil. Unwilling as we are to ascribe in this instance to any deliberate and improper motive the negligence referred to in the conduct of the solicitor concerned, we think that its result was such as to show that he had taken insufficient precaution to satisfy either himself or others that the provisions under which he claims benefit were finally approved with full knowledge by the testator. All the other provisions of the will are admittedly in accord with the wishes of the testator expressed in previous wills, and we think that his conscious execution of the will is sufficient to uphold its validity in all but the clauses which, in our opinion, confer a benefit on the person who prepared it. We

therefore decide to vary the order of the Lower Court and exclude the 26th clause of the will from the operation of the order granting probate of the will. As to the deed-poll, Counsel for respondents contend that section 51 of the Succession Act does not apply thereto, and that there is no necessity to include it in the probate, as its operation would be complete and independent. We could not in any case grant probate of that document as expressing the intentions of the deceased, as we consider that its terms would confer such large powers exclusively on the person who prepared it as to be tantamount to a benefit in his favour. And very strict proof would be necessary of full knowledge and approval in the testator. Such strict proof we consider is wanting. Having regard to the omissions of all reference to such a document in the solicitor's diary up to the 3rd October and the manifest inconsistency between the provisions in the deed-poll and the reference thereto in the will, coupled with the other circumstances connected with the will, we think that there has been a complete failure of proof that the deed-poll correctly expressed the intentions of the deceased and that he understood and approved its contents. We must therefore exclude from the grant of probate the passage in the will which refers to the deed-poll, as we are unable to hold that the testator understood and approved the terms in his will which purport to confirm a deed, the effect of which, there is reason to believe, he could not have understood even if he ever had an opportunity of considering it."

On this appeal *Cohen, K. C.*, and *W. C. Bonnerjee* for the appellant contended that the decree of the first Court was right in granting probate of the whole will and that decree had been wrongly varied by the High Court on appeal. The learned Judge of the first Court in whose presence the witnesses had been examined, and who was therefore in a better position than the Court of Appeal to appreciate their testimony at its true value, was of opinion that there was ample and sufficient evidence that the testator was at the time of execution of the will of sound and disposing mind and that he understood and approved of their contents in signing the will and deed-poll, which latter document was, it was submitted, made part of the testa-

1905.

BAI GANGABAI v. BHUGWANDAS VALJI.

mentary intentions of the testator by the reference to it in the will. Reference was made to the Succession Act (X of 1865), section 51, which was made applicable to Hindus by the Hindu Wills Act (XXI of 1870). The evidence showed that the documents were left with the testator in order that he might read them, and that before the testator signed them Jamsetji offered to read them over to him but was told by the testator that it was unnecessary as they had already been read to him and that he knew and understood their contents. The insertion of Jamsetji's name was no new idea, nor one unconsidered by the testator who had had that intention in 1900 when he executed a previous will; but the amount of remuneration required by Jamsetji could not then be satisfactorily settled. The High Court was therefore wrong in holding th at the testator did not know and approve of the full text of the will. The deed-poll conferred no pecuniary benefit on Jamsetji, and its rejection by the High Court on appeal caused serious pecuniary and other loss to the appellant Gangabai. The onus, as both Courts below had held, was on Jamsetji to show that the deed-poll and the disputed parts of the will represented truly the intentions of the testator. This, it was submitted, had been under the circumstances of the case sufficiently proved by the uncontradicted evidence of Jamsetji and his clerk, corroborated as it was by the entries made in the ordinary course of his business in his diary by Jamsetji. Reference was made to Cordery on Solicitors, 3rd edition, page 209, as to solicitors who are also trustees; *Powell* v. *Powell*[1]; *Wright* v. *Carter*[2]; Williams on Executors, 10th edition, pages 33, 35; *Willis* v. *Barron*[3]; *Hindson* v. *Weatherill*[4]; *Parfitt* v. *Lawless*[5]; *Boyse* v. *Rossborough*[6]; *Wingrove* v. *Wingrove*[7]; *Gurdhouse* v. *Blackburn*[8]; *Parker* v. *Felgate*[9]; *Rhodes* v. *Rhodes*[10]; *Perera* v. *Perera*[11]; *Barry* v. *Butlin*[12]; *Scouler* v. *Plowright*[13]; *Tyrrell* v. *Painton*[14]; *Shama Ohuru Kundu* v.

(1) (1900) 1 Ch. 243.
(2) (1903) 1 Ch. 27.
(3) (1902) A. C. 271.
(4) (1854) 5 De. Gex. M. & G. 301
( ) (1872) L. R. 2 P. & D 462
(6) (1857) 6 H. L. C 2 (47)
(7) (1885) 11 P. D. 81.
(8) (1866) L. R. 1 P. & D. 109 (116).
(9) (1883) 8 P. D. 171.
(10) (1882) 7 App. Cas. 192 (198)
(11) (1901) A. C. 354 (362).
(12) (1838) 2 Moore's P. C 480
(13) (1856) 10 Moore's P. C. 440.
(14) (1894) P. 151.

Kheltromoni Dasi(1); *Fulton* v. *Andrew*(2); *Goodacre* v. *Smith*(3); and Act V of 1902, section 4, sub-section 3.

Haldane K. C. and *L. DeGruyther* for the respondent Bhagwandas Valji contended that the High Court on appeal was right in excluding the passages in the will referring to the deed-poll, and to the remuneration of Jamsetji, and in only granting probate of the will with the limitations prescribed in the decree appealed from. Under the circumstances of the case such benefits were conferred on Jamsetji by the will as he ought not to be permitted to retain except on the strictest proof that the passages excluded were inserted in the will and formed part of it with the knowledge and approval of the testator; that such knowledge and approval were given by the testator when he was of sound and disposing mind and because such passages truly expressed the intentions which his execution of the will meant to authenticate. This proof, it was submitted, had not been given. The onus was admittedly on Jamsetji and he had not discharged it. The evidence that the will and deed-poll were read over by or to the testator was not sufficient: no independent or disinterested person was present at the execution. A person acting *bonâ fide* in Jamsetji's position would have had some one present besides himself and his clerk, and would also have insisted on reading and explaining to the testator the documents which he was to execute. The documents were prepared in haste and the passages objected to were only inserted at the last moment; and no one in the family appeared to have known the intentions of the testator as to Jamsetji, though, it is alleged, he had formed those intentions long before the execution of the will. The discrepancy between the deed-poll and the will with respect to the provision in case of Gangabai dying before the testator tended to support the contention that there was undue haste in the preparation of the documents; and though it is alleged that they had been read by or to the testator he failed to find any inconsistency between the two, thus showing that he did not fully understand them. There was no credible

(1) (1899) 27 I. A. 10 (16); I. L. R. 27 Calc. 521 (525).

(2) (1875) L. R. 7 H. L. (E. & I. Ap.) 448 (472).

(3) (1867) L. R. 1 P. & D. 359.

1905.

BAI GANGABAI v. BHUGWANDAS VALJI.

evidence that the testator had received the deed-poll and draft of the will for consideration in August 1902; the only evidence of this was that of Jamsetji's father which, it was contended, was concocted in order to support Jamsetji's case. In the absence of the necessary proof the appellants' case must fail. As to Jamsetji's right to retain the benefits conferred on him by the will reference was made to *Paske* v. *Ollat* (1); *Donnelly* v. *Broughton* (2); *Fulton* v. *Andrew* (3); Williams on Executors, pages 33, 66; *Huguenin* v. *Baseley* (4); and *In re Chapple* (5). As to the deed-poll being part of the will (section 51 of the Succession Act) *Sheldon* v. *Sheldon* (6) was cited: and as to costs *Orton* v. *Smith* (7) and *Armstrong* v. *Huddleston* (8) were referred to.

Counsel for the appellants was not heard in reply.

1905, May 24th:—The Judgment of their Lordships was delivered by

LORD DAVEY:—The question on this appeal is whether certain parts of the will of a Hindu testator have been properly excluded from the probate of the will. The learned Judge who tried the action (Russell, J.) admitted the whole will to probate, but on appeal, the High Court of Bombay, by their decree, dated the 11th January 1904, varied his order by directing that the passages in question referring to a deed-poll executed on the same day by the testator, and to the remuneration of the solicitor who prepared the will, and was appointed an executor and trustee of it, should be omitted.

Gordhundas Soonderdas, the testator, died on the 10th of October 1902 without issue (his only child having died in April 1899), leaving his widow, the appellant Bai Gungabai, his sole heiress. He was at the time of his death 27 years of age, and is described as a person of shrewd intelligence, and a good and careful man of business. The fair result of the evidence, in the opinion of their Lordships, is that the testator could read and

(1) (1815) 2 Phillim. 323.
(2) (1891) A. C. 435.
(3) (1875) L. R. 7 H. L. (E. and I. A.) 448 at p. 462.
(4) (1807) W. & T. L. C., Vol. 1, 7th Ed., p. 287.
( ) (1884) 27 Ch. D. 584.
(6) (1844) 1 Rob. E. 81.
(7) (1873) L. R. 3 P. & D. 23.
(8) (1837) 1 Moore's P. C. 478

understand English, and could also speak and write that language, but not with perfect facility or quite correctly. He was the younger son of Soonderdas Mulji, who was the only son of Mulji Jaitha. Mulji Jaitha was the founder of a large business of a merchant and agent in Bombay, which he carried on under the name of Mulji Jaitha & Co. until his death in August 1889. Soonderdas predeceased his father, and on the death of the latter his grandsons, Dharamsey Soonderdas and the testator, became entitled to his residuary estate, including the business. Dharamsey Soonderdas died on the 28th February 1899, leaving a son Cursoondas Dharamsey. Thereupon the testator claimed to be exclusively entitled to the business, and litigation ensued, which terminated in favour of the testator, and there was other litigation as to the division of the estate. The appellant Jamsetji Kavasji Patel (who will be hereafter referred to as Jamsetji) was and is a member of a firm of solicitors in Bombay, and conducted the litigation on behalf of the testator, who seems to have highly appreciated the services thus rendered to him, and the ability and zeal Jamsetji had displayed in the conduct of his case.

At the date of the testator's will the business of Mulji Jaitha & Co. was carried on by the testator in partnership with the respondent Bhugwandas Valji, who, however, was entitled only to a small share of the profits. The articles of partnership, dated the 16th August 1899, contained a provision that the testator should have in the conduct and management of the partnership business such absolute and uncontrolled powers, liberty of action, and discretion as he would have had if he had been the sole owner and proprietor of the firm. And the testator was empowered by any deed, will, or settlement to provide for the continuance or discontinuance of the business after his death, and in case he should desire the business to be continued to confer upon any person or persons he might nominate for the purpose such and the same powers, authorities, and discretions as were thereby reserved to the testator with such limitations, variations or additions as he might think proper.

The testator appears to have executed three wills. The first was a will dated the 21st April 1899 in Gujarati, the execution

1905.

BAI GANGABAI v. BHUGWANDAS VALJI.

of which was attested by Jamsetji and his clerk. The second was an English will dated the 15th September 1900, the draft of which was prepared by Jamsetji and settled by Mr. Inverarity, but the execution of this will was not attested by Jamsetji. The will now in question is dated the 5th October 1902 and was prepared by Jamsetji and the execution of it was attested by him and his clerk and a mehta of the testator named Bhaishanker Jivanram.

In order the better to understand the story it will be convenient to state shortly the material contents of the will of 1900. At that date the litigation between the testator and his deceased brother's executors had not been determined, and accordingly by clauses 2 to 5 he gives his executors power to carry on the litigation, effect a partition of the joint properties and settle the accounts of the business with his brother's executors. By clause 6, in exercise of the power reserved to him by the deed of partnership of the 16th August 1899, he appointed his executors and trustees to take his place in the firm and exercise all the powers thereby reserved to him, and he gave his executors very full and special powers as to the continuance or discontinuance of the business and made provision for the admission of his sons (if any) on attaining the age of 18 years. Clause 8 contains the provision for his wife, the first appellant. Clauses 9 to 16 contain personal legacies and charitable gifts. Clause 17 contains provisions for daughters. Clause 18 contains the residuary gift. In substance it was to sons, and in default of sons to daughters, and in default of daughters to such charitable uses as the executors should select. The other provisions are immaterial. The executors in this will were the appellant Bai Gungabai, Chaturbhooj Morarji, one of the *pro formâ* respondents to this appeal, Narranji Dayalji, and Lakhmidas Valji, a relative and former partner of the testator. By the joint effect of three codicils the other *pro formâ* respondent Narrondas Thakersey Moolji and another Hindu gentleman were substituted for Chaturbhooj Morarji and Lakhmidas Valji.

The evidence as to the preparation of the second and third wills, and the execution of the third will of 1902, is mainly the oral evidence of Jamsetji, supported by the entries in his diary. On

one very material point as to the third will there is important corroboration. There is also corroboration on some incidental points, and as to the execution of the third will the appellant Jamsetji is corroborated by his clerk Bomanji. No serious attempt was made by cross-examination or otherwise to impeach the genuineness or accuracy of at any rate the earlier entries in the diary which appear to be made in the ordinary course of a solicitor's business, and their Lordships see no reason why they should not give credit to them. From this evidence it appears that on the 21st April 1900 the testator requested Jamsetji to act as one of the executors and trustees of his will, and Jamsetji said that he would agree to do so only on being remunerated for his trouble, and that there ought to be a provision in the will that he should be entitled to charge for his firm as if he had not been a trustee, and that he should receive a remuneration of Rs. 500 a month for his trouble. Again, on the 8th June 1900, the testator opened the subject of Jamsetji acting as his executor, and desired him to accept less than Rs. 500 for his remuneration, but the appellant declined. Jamsetji, in his diary, states that he again told the testator that he was not anxious for the appointment and that it was only at his special request he consented to act as such, but that if he was to be appointed he must have his fair remuneration. The entry in the diary of the 25th August 1900 is as follows :—

"Gordhandas Soonderdas.

"*Re* Your will.

"Attending you when you expressed your desire to execute your will at an early date and asked me to give you the engrossment for perusal with your original will in Gujrati. You again pressed me to consent to act as an executor and asked me to state finally the remuneration I was willing to accept. I told you that it should be not less than Rs. 500 a month, but I gave you the option to allow me 5 per cent. commission on income. You then worked out your income on a piece of paper and stated that the commission would come to Rs. 10,000 a year. I told you that I gave you the option and you said that you would think over; engaged ½ hour."

Jamsetji, however (as we have seen), was not appointed an executor of the will of 1900.

According to the story told by Jamsetji, the testator first spoke to him about making a new will on the 3rd December 1901, and on the 29th January 1902 he had another conference on the

1905.

BAI GANGABAI v. BHUGWANDAS VALJI.

subject, but nothing was done until the 29th July 1902. On that day, and on the 31st July, Jamsetji had long conferences with the testator in reference to "certain matters about his will and the management of his firm after his death." He says that, in pursuance of instructions which he verbally received on the 31st, he prepared a draft deed-poll and altered the draft of the old will in red ink, and on the evening of the 12th August sent a fair copy, typewritten, of the draft deed-poll and the draft will with his red ink alterations to the testator. The reason stated to have been given by the testator for wishing to make new arrangements as to the management of his business was that he feared difficulties might arise from a possible disagreement between his executors in view of the hostile attitude of his brother's executors and other persons. And Jamsetji says that the scheme which is carried out by the deed-poll was suggested by him and after discussion approved by the testator.

The draft deed-poll contained an appointment of the appellant Gungabai to take the testator's place in his firm after his death, and to exercise all powers reserved to him by the articles of partnership, subject to a proviso that his said wife should in all matters relating to the conduct and management of the business, and to the execution of the powers, always act with the assistance and co-operation of, and in conformity with, the advice and counsel of * * * (the name being left in blank), and if his said wife could not be present for the transaction of any matter or business the said testator appointed the said * * * to represent her, and through her the interest of his estate, and if his said wife should predecease him or die during the continuance of the firm, he appointed the said * * * to take his place in the firm, and exercise the powers before mentioned, and it was declared that in all matters relating to the continuance or discontinuance of the firm after the testator's death, and in the event of its discontinuance or winding up, and in realisation of its assets, the appellant Gungabai or the said * * * (as the case might be), should act in conjunction and co-operation with the executors of his will, and in strict obedience to the provisions contained in his will relating to the business.

The draft will contained several important additions and alterations, particularly with respect to the residuary gift, but

the only alteration which is material for the present purpose was the insertion of a recital of the appointment of the appellant Gungabai by the deed-poll, and the following words: "Now I hereby confirm the said deed-poll and the appointment created thereby and I hereby declare that in the event of my wife predeceasing me she shall be succeeded by my executors as provided by the said deed-poll." The subsequent clauses relating to the continuance or discontinuance of the business and realisation of the assets were left unaltered. The names of the executors were left in blank.

A great deal was made by Counsel for the respondent Bhugwandas of the apparent discrepancy between the deed-poll and the will with respect to the provision for the event of Gungabai predeceasing the testator in support of their suggestion that the draft deed-poll and corresponding insertions in the draft will were prepared in a great hurry and only on the day before the date of the execution of the instruments. But their Lordships do not attach much weight to the circumstance.

According to the evidence of Jamsetji he heard nothing more of the drafts which had been sent to the testator on the 12th August until the following 3rd October. Jamsetji's account of what took place on that day and the two following days is as follows: He had been engaged on other business for the testator and had seen him in Court on the 25th September. In the early morning of the 3rd October, having heard that the testator was ill, he called upon him and found him in his office room on the first floor. The testator himself broached the subject of the will, sent for his despatch box, took out the two drafts, and instructed Jamsetji to make some further alterations in the will, the principal one being the insertion of a power to the appellant Gungabai to adopt the son of the testator's deceased relative Lilladhur Vallabhdass Valji. Jamsetji took away the drafts, prepared drafts of the required alterations on separate sheets of paper, and waited on the testator with them early the following morning. The testator (he says) read and approved the alterations and instructed him to send the engrossments in the evening, and he would send word as to execution, and the testator then named five persons whom he wished to appoint executors,

1905.

BAI GANGABAI v. BHUGWANDAS VALJI.

including his father-in-law Narranji Dayalji and Jamsetji himself, and said that the blank name in the deed-poll should be filled in with Jamsetji's name. Typewritten engrossments were made on the same day, and in the evening Jamsetji's clerk Bomanji took them in a sealed packet to the testator's house and handed them to the appellant Lalji Narranji, the testator's brother-in-law, who (according to his own evidence) took them to the testator, and by his direction made an appointment for Jamsetji to come at 11 the next morning. The names of the executors, however, were not filled in (it is said by an oversight of the clerk), but a clause numbered 26 was added at the end of the will entitling Jamsetji and his firm to charge for professional business as if he had not been appointed an executor and trustee, and allowing Jamsetji a remuneration of (amount left in blank) per cent. on the income of the estate for his time and trouble. There were also three other blanks for amounts in clauses 8 and 17.

On the 5th October Jamsetji with his clerk Bomanji attended the testator as appointed. They found the respondent Bhugwandas, the testator's nephew, Cursondas Dharamsey and another young man sitting with him, but they got up and left the room on the arrival of Jamsetji. The testator produced the packet which had been sent to him the previous evening (it is said with the seals broken), and there is no doubt that the will and deed-poll were, in fact, executed on this occasion. Jamsetji does not pretend that they were first read over to the testator, but he says (and Bomanji confirms him) that he offered to read them, but the testator said he had read them and knew all their contents, and it was not necessary to read them again. The deed-poll was first executed. The names of the executors in the executed will are in Jamsetji's handwriting. The word "father" is erased and the word "brother" written over it. Jamsetji's explanation is that he wrote the words "father-in-law" in accordance with the testator's previous instructions and then asked the testator for the name, and the testator then said he did not want his father-in-law appointed as he was an old man living up country, and directed the name of his brother-in-law, Lalji Narranji, to be inserted. The words "Rs. 5,000" in clause 8, and "Rs. 10,000" and "Rs. 15,000" in clause 17 in letters, the

word "one" in clause 26, and some words interpolated in the attestation clause are all written in Jamsetji's handwriting. The interpolation in the appointment of executors, an erasure made in clause 18, and the interpolation of the word "one" in clause 26, and the interpolation in the attestation clause are initialled by the testator with the letters G. S. Jamsetji's statement is—and again he is confirmed by Bomanji—that the word "one" was inserted by the testator's direction after some discussion, in the course of which Jamsetji said it was not what he expected, and (he says) he only gave way because it would have led to the non-execution of the documents as to which the testator seemed anxious. After the will had been executed and the testator's execution attested by Jamsetji and his clerk, the testator called in Bhaishanker, who at his request added his name as a witness and also wrote his name or initials in the margin below the testator's initials in four places in the margin. The deed-poll and will remained in the possession of the testator, who, in the afternoon of the same day, asked Lalji to read them over to himself and his wife. Lalji says he thought it was not good to tire him by reading those lengthy documents, but adds that when he asked him to do this his mental condition was all right, and he was talking sensibly and could understand what was said to him.

The testator died on the 10th October 1902. On the following 18th November the five executors petitioned for probate of the will, and on the 26th February 1903, the respondent Bhugwandas lodged a caveat. No objection was made on the ground of want of interest in the caveator, and it appears from a judgment of the High Court on the application for leave to appeal to His Majesty in Council, that the Counsel for the executors said that he had not raised any question as to the caveator's right to enter a caveat because they wished to have an adjudication on the merits. The question was not raised before their Lordships, and they will follow the course taken in the High Court.

The issues settled in the suit as amended were :—

1. Whether the said will and deed-poll, or any and what part thereof, were executed by the deceased as alleged.

2. Whether, if so, the deceased was in a sound and disposing state of mind when he executed them.

1905.

BAI GANGABAI v. BHUGWANDAS VALJI.

3. Whether the said documents, or either of them, or any and what part thereof, are or is the will or deed of the deceased as alleged.

4. Whether the deed-poll is not a testamentary writing, and whether probate should not be granted of it with the will.

5. The general issue.

It has been found by both Courts that the testator executed the documents, and that he was in a sound and disposing state of mind when he did so, and their Lordships need not add anything on this point. But notwithstanding this finding, it is suggested by Counsel for the respondent Bhugwandas that the testator was too ill to stand the mental and physical fatigue of mastering the contents of the documents, or forming a judgment on them. Their Lordships are satisfied on the balance of evidence that, on the mornings of the 3rd, 4th, and 5th October the testator was in full possession of his mental faculties, and capable of understanding, and forming and expressing a sound judgment on, any matter affecting his business or property. On this point the evidence of Lalji, who was treated in both Courts as a witness above suspicion, is almost conclusive. The testator was, no doubt, very ill and suffering from fever, and in fact in a more critical condition than he himself and those about him probably thought. And it is possible that he could not have stood the fatigue of mastering the whole contents and effect of a lengthy document like the will if it had been necessary for him to do so. But, in the opinion of their Lordships, he was quite capable of understanding and appreciating the effect of a short and comparatively simple document like the deed-poll, or a clause in the will such as the 26th clause. Their Lordships have had the unusual advantage of seeing the documents. The testator's signature is written in English characters in a rather large and loose handwriting. But the writing is straight, and the letters are firmly and well formed, quite unlike what would be expected of a man in the state of debility which the respondent Bhugwandas would represent him to have been in. And it should be added that the space left for his signature to the will being insufficient for his full name, he has split up his second name in the proper place and way. The initials also are

well and firmly written. On this point the evidence of Dr. Sidney Smith, on cross-examination, is important.

The question therefore is narrowed to this—whether the testator was aware that the passages excluded by the Appeal Court from the probate formed part of the instrument. If he was so, they must be taken to have expressed his mind and intention. This is a pure question of fact to be determined on the evidence. There is no doubt on the law relating to the case of a person taking a benefit under a will prepared by himself as laid down in *Barry* v. *Butlin*[1] and *Fulton* v. *Andrew*[2]. In the former case Lord Wensleydale giving the judgment of the Board laid down the rule thus: "If a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased."

But there is no rule of law as to the particular kind or description of evidence by which the Court must be satisfied. Both Courts have considered that the onus is on Jamsetji to show that the deed-poll and the disputed parts of the will expressed the testator's intention, and their Lordships have also considered the evidence from that point of view. It is obvious, however, that the degree of suspicion excited and the weight of the burden imposed on the person taking the benefit must depend largely on the nature and amount of the benefit taken by him and all the circumstances of the case.

Now what are the probabilities? There is nothing unnatural or unexpected in a careful man of business like the testator thinking it better to make one person responsible for the management of the business instead of dividing the responsibility between the executors with possibly divergent opinions and aims. Nor need it excite surprise that he should select for that purpose one of his executors of whose ability and character he had had some experience. And it is not otherwise than a

(1) (1838) 2 Moore's P. C. 480 at p. 482. (2) (1875) L. R. 7 H. L. (E. & I. Ap.) 448.

1905.

BAI GANGABAI v. BHUGWANDAS VALJI.

wise and provident arrangement to separate the management of the business from the decision of the larger questions of policy as to the continuance or discontinuance of the business, the admission of new partners and the like. The Court of Appeal have not excluded the appointment of Jamsetji as executor from the probate. Where a member of a firm of solicitors is appointed an executor, it is so usual to allow him to charge for professional work done by him or his firm that the insertion of such a clause would hardly raise a suspicion. The respondent Bhugwandas contended that this provision went beyond the proper work of a solicitor. Their Lordships are not of that opinion. They do not think it would enable Jamsetji to charge for services which an ordinary executor would be expected to perform without the intervention of a solicitor, or certainly for services which would be remunerated by the commission. With regard to the commission, it is on the income of the estate only, including, of course, the testator's share of the divided profits of the business and not upon the gross returns of the business itself. It is admitted by Jamsetji that the remuneration in the will was to include his remuneration as adviser under the deed-poll. The testator can hardly have expected a professional man to devote his time to the onerous duties imposed upon him by the deed-poll and will without some remuneration, and, if so, the amount seems moderate. The income of the estate is put at between two and three lakhs of rupees, and the commission therefore would not exceed Rs. 3,000, or, in English currency 200*l.* per annum. Their Lordships, however, accept Jamsetji's evidence that, when asked in 1900 to act as executor, he had declined to do so unless he was remunerated, and had asked for remuneration on a much higher scale, and that the amount of his remuneration if he acted had been a matter of discussion between the testator and himself on at least three occasions. The testator in determining to appoint him an executor must therefore have expected and known that he would not act unless he was allowed not only professional charges, but also remuneration for his time and trouble.

The evidence of Jamsetji himself was not materially shaken on cross-examination, and must not be altogether disregarded.

He is admittedly a solicitor of ability and experience, and, so far as appears from the Record, no imputation was made on his general character for integrity and honesty. He is confirmed by his clerk Bomanji in many particulars besides the circumstances of the execution, which may not go for very much, but must not be altogether discarded. Bomanji says that in August, 1902, he fair-copied in type the draft deed-poll, and by Jamsetji's instructions handed the fair copy and draft will to Bhaishanker for the testator. Bhaishanker speaks of receiving from Bomanji in August a packet, the contents of which he did not know, except what Bomanji told him of it, and giving it to the testator unopened. He also says that when the testator asked him to attest his signature, on the 5th October, he used the words "deed-poll" and "will" in English.

The case of the respondent is that the deed-poll was not prepared until the 3rd or 4th October. But if Cawasji Edulji Patel's evidence is believed, there is ample evidence that the testator had received the deed-poll and draft will in August and had considered and understood the contents of the former document. This witness was Jamsetji's father. He had at one time contemplated a legal career but had taken to business, and since September, 1900, had been the testator's assistant at a salary of Rs. 350 per mensem, and according to his own statement had got to know the testator very intimately. He had been consulted by the testator on his will in June, 1902, and had made notes in writing upon it, the suggestions in some of which were adopted in the subsequent will. He says that in August, 1902, the testator handed him the draft deed-poll and draft will and he went through them at home and afterwards discussed them with the testator, who in reply to his remark that the adviser of his wife must be an able, conscientious, and masterful man, said that he had thought of such a man. Mr. De Gruyther contended that this was a story concocted for the purpose of bolstering up the evidence of Jamsetji which he alleged had completely broken down. But there is not one line of cross-examination of this witness challenging either the truth of his evidence or his general credibility or even tending in that direction. Cross-examined he was at some length, but it was

1905.

BAI GANGABAI v. BHUGWANDAS VALJI.

entirely on other matters such as the testator's capacity for business during his last illness. The charge made by Counsel is no less than that of a fraudulent conspiracy between the witness and Jamsetji to mislead the Court by false evidence without a shred of evidence to support it, and was wholly unjustifiable.

The testator had ample opportunity to see that the blank space for the name of the person to act as Gungabai's adviser was filled in in accordance with his wishes and intentions. Their Lordships, in agreement with Mr. Justice Russell, find it difficult, if not impossible, to believe that a careful man of business in possession of his faculties signed the document without doing so. They cannot, therefore, agree with the judgment of the Appeal Court that there has been a complete failure of proof that the deed-poll correctly represented the intentions of the testator or that he understood or approved its contents. And they think that there are no grounds for excluding from the probate the passage in the will which refers to that deed.

In the opinion of their Lordships the importance of clause 26 has been very much exaggerated. It is conceivable that Bhugwandas was interested in the question whether the deed-poll expressed the mind of the testator but he has no interest in the question whether Jamsetji, who, according to the view of both Courts, is duly appointed an executor, shall or shall not be entitled to costs for professional business or to remuneration for time and trouble. Two out of the other four executors are co-appellants. Probably they are aware that the exclusion of Jamsetji might render necessary the appointment of a manager of the business, with increased remuneration, or the introduction of a managing partner into the firm with a share of profits taken out of the testator's own share. The other two executors do not join in the appeal, but they do not oppose, and have entered no appearance. One of these gentlemen, it is true, wished to make the business a family concern, and endeavoured to negotiate an agreement to prevent any question arising about the deed or will.

The best corroboration of Jamsetji's story as to clause 26 is the internal evidence of the will itself. The word "one" is written by Jamsetji, obviously at the time of execution, in the

space left in the type-written copy sent to the testator for execution, and is initialled by the testator who also initialled three other places. Their Lordships decline to believe that these interpolations were thus made in the testator's presence without his knowledge and instructions, or that the testator affixed his initials without understanding what it was he thereby authenticated. The Court of Appeal seems to have overlooked or not given sufficient weight to this circumstance. Having regard to the previous discussions on the question and all the circumstances of the case, their Lordships think that whatever suspicion attached to Jamsetji is removed, and they are judicially satisfied that the clause in question does express the true will of the deceased.

The Appeal Court acquit Jamsetji of any fraud, or of any intention to obtain a benefit for himself which he knew the testator was unwilling to confer, and, in fact, they allowed him his costs out of the estate. It would, no doubt, have been more prudent and businesslike to have obtained the services of some independent witness who might have been trusted to see that the testator fully understood what he was doing, and to have secured independent evidence that clause 26 in particular was called to the testator's attention. But whether the testator, who seems to have entertained some suspicion of some of the people about him, would have allowed the intervention of a third party one really does not know. Jamsetji, by the course he took, has brought this litigation on himself, but, after all, the question is one to be decided on consideration of the whole of the evidence and the circumstances of this case. And in coming to the conclusion which they have done, their Lordships must not be understood as throwing the slightest doubt on the principles laid down in *Fulton* v. *Andrew* [1] and other similar cases referred to in the argument.

Unavoidably the question whether the deed-poll was the deed of the testator has been discussed and has had to be decided. But it does not appear to their Lordships to be directly in issue in this proceeding. They agree with Mr. Justice Russell that it

(1) (1875) L. R. 7 H. L. (E. & I. A.) 448.

1905.

BAI GANGABAI v. BHUGWANDAS VALJI.

is not a testamentary document requiring probate. It is an independent exercise of a power contained in the articles of partnership, and does not appear to their Lordships to be referred to in the will for the purpose of making, or so as to make, its contents part of the will. It is not therefore within section 51 of the Indian Succession Act, 1865.

The Court of Appeal gave the costs of all parties out of the estate. Their Lordships do not propose to disturb this order, but having regard to the charges of direct fraud made at their Lordships' bar, they think it is due to Jamsetji that the present appeal should be allowed with costs.

Their Lordships will therefore humbly advise His Majesty that the decree, dated the 11th January 1904, of the High Court of Judicature at Bombay in appeal from its testamentary and intestate jurisdiction be discharged except so far as it directs the costs of the then appellant and respondents of the petition suit and of that appeal to be taxed and paid out of the estate of the deceased Gordhandas Soonderdas, and that the order, dated the 16th June 1903, of the said High Court in its original jurisdiction be restored except so far as it orders the then defendant to pay to the plaintiffs their costs of that suit. The respondent Bhugwandas Valji will pay the appellants' costs of this appeal, and there will be no order as to the costs of the other respondents.

Appeal allowed.

Solicitors for the appellants: *Payne and Lattey.*

Solicitors for the respondent Bhugwandas Valji: *Rawle Johnstone & Co.*

J. V. W.