APPELLATE CIVIL.

FULL BENCH.

Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Batchelor and Mr. Justice Davar.

KALYANCHAND LALCHAND AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SITABAI KOM DHANASA LAKHMICHAND (ORIGINAL PLAINTIFF), RESPONDENT.* 1913. *November* 5.

Evidence Act (I of 1872), section 41—Probate and Administration Act (V of 1881), section 83—Civil Procedure Code (Act V of 1908), section 11—Contentious proceeding for probate—Will not proved—Probate refused—Suit for recovery of property from defendants who held as executors —Judgment in the probate proceeding refusing probate, not judgment in rem—Res judicata.

In a contentious proceeding for probate, the will produced by the applicants was held not proved and the probate was refused. The applicants appealed to the High Court which dismissed the appeal.

The widow of the deceased thereupon brought a suit for the recovery of the property of the deceased from the defendants who held it as executors under the will and the first Court allowed the claim.

On appeal by the defendants two questions having arisen, namely, (1) whether the judgment refusing probate was as much within the scope and intention of section 41 of the Evidence Act (I of 1872) as a judgment granting probate and (2) whether the judgment in the probate proceeding operated as *res judicata*,

Held by the Full Bench that section 41 of the Evidence Act (I of 1872) was not applicable to the judgment of the appellate Court refusing probate.

Held, further, that the judgment in the probate proceeding operated as *res judicata* between the parties under section 83 of the Probate and Administration Act (V of 1881) and section 11 of the Civil Procedure Code (Act V of 1908).

FIRST appeal against the decision of G. B. Laghate, First Class Subordinate Judge of Nasik, in original Suit No. 305 of 1910.

The plaintiff sued to recover possession of the property specifically mentioned in the plaint and to

* First Appeal No. 220 of 1912.

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compel the defendants to produce all the property of plaintiff's deceased husband Dhanasa in Court and to recover possession thereof, or in the alternative to obtain a decree against the defendants for the value of the said property together with damages for wrongful possession and detention of it. The plaint alleged as follows :—

Plaintiff's husband Dhanasa Lakhmichand died on the 25th August 1905 leaving behind him two widows, Bhikubai and plaintiff, and considerable property consisting of cash, jewels, clothes, account-books, bonds, etc. All the said property was kept in a treasury in the house in which the widows were residing at the time of Dhanasa's death. Bhikubai died in or about the month of October 1905 and after her death the defendants broke open the treasury, removed all the property that it contained, sold all the cloth of Dhanasa's shop and took away all the ornaments of the plaintiff except gold *patlyas* (wristlets). The plaintiff was at that time a minor and was in mourning. A few jewel ornaments were returned to her through the intercession of friends but the rest of the jewellery was taken away. The defendants had no authority to thus intermeddle with the property. The plaintiff had full ownership over the said property and sued to recover it from the defendants. So far as the plaintiff was aware there was no will made by the deceased Dhanasa. But the defendants set up his will and claimed to be trustees appointed under it. They removed wrongfully and without any pretence of authority the moveable property of the deceased Dhanasa. The defendants applied for probate of the said will, but their application, No. 60 of 1908, was rejected as the will set up was not proved. They appealed to the High Court but there also they were unsuccessful. On the 11th July 1910 the plaintiff served a notice of demand on the defendants but as

they did not comply with the notice, the plaintiff's cause of action arose on the 13th July 1910.

The defendants contended *inter alia* that the plaintiff's husband Dhanasa having made a will and appointed executors thereunder to administer his estate, the plaintiff was not entitled to bring the present suit, that the plaintiff's suit for the recovery of moveable property was barred by three years' limitation, that the plaintiff being more than 20 years old at the time of the suit the claim was time-barred, that the defendants had given a reply to the plaintiff's notice, therefore, the plaintiff had no cause of action against them, that the defendants gave into the custody of the Nazir of the District Court a small brass box which contained the jewellery owned by Dhanasa, that they had with them Rs. 8,500 which belonged to the deceased, that out of the said sum they expended Rs. 2,500 for the deceased and that the rest of the money was with them.

The pleadings in the case gave rise to several issues but the findings of the Subordinate Judge on the principal issues were that the defendants could not resist the plaintiff's claim on the plea of Dhanasa having made a will, even though the so-called will had been held not proved, that it was not competent to them to re-open the question of the genuineness of the said will. and even if it had been competent to them to do so, the will was not proved, that the claim was not time-barred and that Rs. 10,077-1-6 were due to plaintiff. The Subordinate Judge, therefore, passed a decree directing the defendants to deliver possession of the property to the plaintiff and to pay her Rs. 10,077-1-6 together with interest at 6 per cent. per annum from the year 1906 upto the date of the satisfaction of the decree with costs of the suit.

The Subordinate Judge in his judgment observed :—

This is a suit by the surviving widow of a deceased Hindu of Yeola to recover from the defendants the moveable property consisting of valuable

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ornaments, cash, cloth, etc., of her husband, alleging that the defendants have wrongfully taken possession of the same under colour of a will said to have been made by the deceased appointing them executors thereunder. Plaintiff denies the existence of any such will as that set up by the defendants. Therefore the first important question is as to the existence of the will. I find that no such will as the defendants rely on, can be held to be proved on the evidence.

The defendants have applied for probate of this alleged will. But exhibit 144, which is the judgment of the Court in the matter of the probate, shows that no will such as has been now put forward could have been made in the then state of health of the deceased testator. The Court remarks in exhibit 144 as follows :—

"In view of the medical evidence as to the testator's state of health and the painful nature of his decease (gangreen) it does not seem possible that he could have given instructions for so detailed a will afterwards. Moreover there is the confusion of the date, the death of both attesting witnesses and the non-production of the will for so long after the death, I therefore hold it not proved."

The Court therefore refused probate. The High Court affirmed the decree of the lower Court.

The judgment of a Court refusing a probate is as much a judgment *in rem* as one which grants it. Such a judgment takes away from the executors named in the will the legal character of executors and from the legatees and beneficiary their legal character and this result is final as against all persons interested under the will.

The above judgment therefore is final against the defendants. They cannot now re-open the question of the genuineness or otherwise of the will.

The learned pleader for the defendants refers to 21 Bom. 563 as an authority for this Court to re-open the question but in that case the finding of the High Court was, that the will admitted to probate by the lower Court was *not duly proved.*

In the present case, the finding of the Probate Court was, that the doctor's evidence being believed, there could have been no such will, as that propounded by the defendants. That means that the will propounded could not be held to be genuine. Relying on 16 Mad. p. 383, I hold that the order of the Court refusing probate is conclusive and debars the defendants from setting up the will and re-opening it.

Even if the effect of that judgment were not so and the matter of the genuineness or otherwise of the will is still open, I cannot hold on the evidence on the record that the will in dispute is satisfactorily proved.

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The defendants preferred an appeal.

The appeal was heard by Beaman and Macleod, JJ., who, in referring the case to a Full Bench, delivered the following judgments.

BEAMAN, J. :—Dhanasa died in September 1905. He is alleged to have made a will within forty-eight hours of his death. The executors petitioned for probate in 1908. The widow Sitabai, plaintiff in this suit, opposed, alleging in general terms that there was no will. To understand the vagueness of her caveat it is necessary to state that at the time of her husband's death she was a minor. The executors averred that the will was executed in her presence. She therefore replies in her caveat that no such will was ever executed in her presence, and that what is now propounded as the genuine last will and testament of the deceased Dhanasa, does not seem to be a genuine will. In the circumstances I do not see how she could have been expected to be more explicit, and I think that her contention fairly raised all points upon which the genuineness of a will can be disputed.

The learned District Judge refused probate, clearly on the ground that the deceased Dhanasa could not have been in a sound disposing state of mind, even were the will really made and signed by him. The executors appealed to the High Court, and the appeal was disposed of by Scott, C. J., and Batchelor, J. The appeal was dismissed and probate refused. No definite issue was raised, it very rarely is in appeal to this Court, but it cannot be seriously denied that the appellate Court held that the evidence proved that the alleged testator was not, at the time the alleged will was executed, of a sound disposing mind. This is as clear as though the learned Judges had raised the issue in so many words and answered it in the negative and against the executors. It is necessary to emphasize

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these points in the statement of facts, to clear the way of a certain amount of irrelevant and untenable argument which might otherwise obscure the questions we propose to ask a Full Bench.

The widow Sitabai having come of age has now brought the present suit against the defendants as executors *de son tort*. They have again set up the will and claim to be invested under it with all the legal character of executors.

Two questions then arise.

1. Whether section 41 of the Evidence Act is not applicable to the judgment of the appellate Court and upon a right construction of its terms does not make that judgment conclusive against the present defence of the executors? It is admitted that had the judgment been in favour of the will it would have fulfilled all the requirements of section 41 and conclusively established the legal character of the present defendants. But it is contended that a judgment of a Probate Court refusing probate does not, having special regard to the language of section 59 of the Probate Act, either take away any legal character of the defeated petitioners, or have the like conclusive effect against, which it would admittedly have had for, them.

2. Whether the finding of fact of the appellate Court that the testator was not of sound disposing mind when the alleged will was made, is not *res judicata* between the same parties in the present litigation?

The need of reference to a Full Bench arises out of the decision of Farran, C. J., and Parsons, J., in *Ganesh Jagannath Dev* v. *Ramchandra*[1].

We might, we think, have distinguished that case for the purposes of the second question without much difficulty. But it appears to have been extended since

[1] (1896) 21 Bom. 563.

in this High Court by judgments which purport to follow it. One of these is an unreported decision of Chandavarkar and Heaton, JJ., in S. A. No. 261 of 1910 which was cited in argument. It appears from the record that although the finding of the Probate Court was against the "genuineness" of the will, the learned Judges of appeal found no difficulty, basing their decision on *Ganesh* v. *Ramchandra*[1] in holding that in a subsequent suit between the same parties the same question of fact might be raised and determined. We are unable to distinguish that case from the case before us. If it be a legitimate extension of *Ganesh's* case, then we find ourselves unable to agree with that decision either.

Both questions are of great general importance. Differences of opinion are likely to arise in answering either, and we have therefore thought this a suitable opportunity to invite an authoritative and final answer to both.

In my opinion the judgment of a Probate Court refusing probate is as much within the scope and intention of section 41 as a judgment granting probate. The distinctions sought to be drawn, though lying on the surface, easily made intelligible and plausible, will not, I submit, bear critical examination. I believe the true rule to be this. In any probate proceeding prosecuted to final judgment, that judgment, whether for or against the will, is a judgment *in rem*, and, if against the will, takes away the legal characters of all those claiming to be executors and legatees under it, as conclusively as a judgment for the will confers such characters upon them, and I further believe that that rule is universal and subject to no exception. Dismissals of petitions for probate for default may be distinguished and for the purposes of this reference

[1] (1896) 21 Bom. 563.

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neglected. The reasoning which appears to underlie that part of the decision in *Ganesh* v. *Ramchandra*[1] and has been strongly pressed, with further elaborations upon us by the Honourable and learned Advocate General, is this. Hindu wills in the mofussil unless disposing of property in the town and island of Bombay are not governed by the Succession Act or the Hindu Wills Act. Executors of such wills derive their rights direct from section 4 of the Probate Act, and are under no obligation to apply for probate. Section 187 of the Succession Act has no applicability to them. If in the exercise of a mere option they do apply for probate and it is refused, the judgment even going the length of declaring that the testator was insane when the alleged will was made, or that the alleged will was a forgery, they may still continue to act under this alleged will in the mofussil and set it up in any suit as though the judgment of the Probate Court had never been pronounced.

This appears to me, with all becoming deference, to be utterly fallacious. The fact that the executors of such wills need not obtain probate to meet the requirements of section 187 of the Succession Act ceases to have any bearing or even relevance upon or to cases in which they have availed themselves of their option and deliberately invited the judgment of the Probate Court. Once having done that, once the judgment has been given, it is there, a fact which has to be reckoned with and to which all the legal force and effect with which it is legislatively invested under section 41 of the Evidence Act must be given. The degree and extent of that force and effect must be determined solely with reference to section 41 and to the fact of the judgment, entirely irrespective of any such side consideration as that if the executors had not voluntarily invoked it, it

[1] (1896) 21 Bom. 563.

never might have been given, never would have been a fact.

The learned Judges who decided *Ganesh Jagannath Dev* v. *Ramchandra*[1] appear to have made this one of the main, if not the main, ground of their conclusion, that in all such cases refusal to grant probate, which is in effect an affirmative finding against the will, no matter how worded or how arrived at (as I hope to show presently) has not the conclusive effect given to all such judgments which "confer or take away" etc., certain legal characters under section 41. With all proper respect I am unable to agree in that conclusion. Logically it might be extended to every case of litigation, if the ground of reason be confined to the option of the plaintiff to sue or not to sue. For no plaintiff is legally compelled to sue. But when a plaintiff does sue and invites the adjudication of the Court, the adjudication and its result is binding upon him. It may be urged that this is not quite a fair representation of the real argument. What is meant is that executors and legatees governed by the Succession Act *must* sue, if they are to obtain any benefit under the will in the character of executor or legatee (section 187) while executors who are not governed by the Act are under no such compulsion. That is perfectly true, but it does not affect, in my opinion, in the slightest degree the validity of the argument, that once having chosen to ask for probate, they must be as bound as any other persons who have asked for the same judicial aid, by the judgment, whether for or against them. It is surely a *reductio ad absurdum* to contend that executors, not governed by the Succession Act, may come in and invite the judgment of the Probate Court upon a will, and when that judgment positively declares upon evidence that the will propounded is a forgery, may go back to

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the mofussil and continue to act as executors under it. Even the Advocate General shrank from pushing his argument that length. Yet that length it must go if sound at all. For no true logical distinction can ever be drawn between the particular grounds upon which probate is refused. In every case without exception there is one question and one only for the Court to answer, *will* or *no will*? If it finds that there *is* a will (by which of course I mean a will legal and valid in all respects) it must grant probate. It can only refuse probate on the ground that in law there is *no* will, and the refusal is logically tantamount to the affirmative proposition, founded upon evidence, that there is no will. So that in my opinion it does not make the slightest difference whether probate be refused for failure to comply with the requirements of section 50 of the Succession Act or because the Probate Court held that the will was a forgery, or the testator of unsound mind when it was made. (I may point out merely as a curiosity of law, that in the particular case with which Farran, C. J., and Parsons, J., were dealing, probate was refused for failure to have complied with the requirements of section 50 of the Succession Act, while, so far as I can gather from the facts that section had no applicability at all to the case.) But I am now entering upon another line of reasoning which does not properly belong to the ground that if an executor has an option to apply for probate or not and does apply the resultant judgment is on a different legal footing, has different legal consequences, from a like judgment given on the application of a person who is (virtually) compelled to obtain probate under section 187.

To say that in the former case the executor is in no worse position after asking and obtaining the final decision of a competent Court against the will, appears to me to be logically untenable, to be radically unsound,

regarded either theoretically or practically, and surely to involve absurd consequences.

2. It is next contended that since section 59 of the Probate Act expressly confers finality and conclusiveness upon a judgment in favour of the will, while the Act is silent as to the effect of judgments against a will, there is a plain and designed legislative distinction. The latter cannot be regarded as having the same legal effect as the former. The answer to this is short and decisive. What is wanting in the Probate Act is supplied in section 41 of the Evidence Act. As to that it is urged that the section when it speaks of a judgment "taking away" any legal character, means doing so expressly as upon a revocation. I think that that is much too limited and technical a construction. In construing and applying the section we surely must look at what has actually been done. Holding that a will is a forgery for example is, to all intents and purposes, as express a taking away of all rights rooted in it, as a declaration that the will is genuine and therefore entitled to probate is an express conferring of such rights. In reason there is *no* distinction, nor can one be suggested if extreme cases like this are put. It is only in cases where the ground of refusal is less definite, confined, let us say, to formalities of execution, rather than to inherent turpitude, that any room can be found for such arguments. But here again it is easy to trace and expose their radical fallacy. For I repeat, and without much fear of contradiction, that rightly analyzed what every Probate Court has to decide is one thing and one thing only, *will or no will?* A will is just as much *not* a will in the eye of the law, if essential formalities have not been complied with, as though it be found affirmatively to have been a forgery. So that the refusal to grant probate implies the affirmative finding on the evidence, *no will.* And that being found it follows that

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the Court by declaring that there is no will takes away all legal characters which are referable exclusively to the will.

Pushed to its logical conclusion the principle contended for by the defendants would warrant executors, not governed by the Succession Act, inviting the judgment of the Probate Court on the same will year after year thus offending against the universal principle of *res judicata*. And for all reason to the contrary I do not see why all executors should not be in the same case, that is to say, at liberty to try and try again, no matter how often the Probate Court had pronounced against the will. Why should one judgment affirming a will be final and conclusive against all the world, while a hundred judgments against a will should have seemingly no legal effect whatever? The contention that judgments refusing probate do not take away any legal character from petitioning executors and legatees could hardly be used generally; in the exceptional case with which we are dealing, namely, where the executors are not under the disabilities of section 187 and therefore need not take out probate at all unless they desire to get in debts, is shown, I hope, to rest upon reasoning equally unsound and untenable. Indeed looked at merely as a logical argument there is much more to be said for executors bound by section 187 than for those who are not. In the latter case the argument is that since they have rights as executors independently of probate, refusal to grant them probate cannot take away such rights. But that is exactly what it does. It would be a much more ingenious, and for the mere purposes of dialectic a much sounder argument to say that executors and legatees bound by section 187 have no rights at all under the will until probate has been granted, therefore refusal to grant probate does not take away any of their rights or characters under the

will, because they never had any. Which (as is the other argument but more so) is absurd. In my opinion where the question *will or no will* is submitted to the decision of a Probate Court, tried out and finally determined by that Court, its judgment either way is conclusive, within the meaning of section 41 of the Evidence Act. This too, in my opinion, is by far the most important of the two questions we are submitting to the Full Bench. For if my view be adopted we shall have a clear rule of universal applicability about which there will be no room for further argument or uncertainty, the most fruitful sources of litigation. Whereas if in all such cases, I mean where probate has been refused, the judgment is not within the scope of section 41, the parties relying on it have to fall back upon the general principle of *res judicata*, matters of difficulty and uncertainty are likely often to arise.

If, for example, in the present case the judgment of the High Court on the probate petition of the executors be held to be final and conclusive against them under section 41 (as with respect I submit it ought to be) there is an end of the matter. There is no will, there are no executors, no legatees, and the present defence is not available to the defendants.

The point has recently been considered by a division bench of the Calcutta High Court (Mookerjee and Carnduff, JJ.) in *Ramani Debi* v. *Kumud Bandhu*[1]. I do not consider it necessary to examine cases in detail, where the point is, as it is here, one of simple construction and correct reasoning only. But while the tenor of Mookerjee, J.'s judgment will be found, I think, strongly to support my view, a view which also has the support of American Courts, all these Judicial pronouncements seem to me to fall a little short of

[1] (1910) 14 Cal. W. N. 924.

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complete accuracy. Looking to such authorities it is fair to represent them as agreeing generally that judgments refusing probate, on the merits, are as much judgments *in rem* as judgments granting probate. But this will always leave room for a certain amount of foggy thought and argument. After all what *are* these judgments *in rem* but a part of the law of *res judicata*? Just as every judgment *inter partes* upon the same materials is *res judicata* between them and their representatives, so in a special class of cases the judgment is *res judicata* not only *inter partes* but *extra partes contra mundum*. Even so the judgments *in rem* are no more than *res judicata*. And we thus arrive at once at a simple general principle which will do away with all need to argue about particular exceptions on any other ground. It is this. In every case where the judgment is *in rem*, if it would have been *res judicata inter partes*, it is also *res judicata* against all the world. That disposes of all such cases as Mookerjee, J. was considering, and dispenses with the need of arguing them. What would not be *res judicata inter partes* (*e. g.* dismissal for want of prosecution) cannot be *res judicata* against anybody. And this brings me back to the general rule I began by stating that where probate proceedings have been prosecuted to judgment (in other words where that judgment would, upon the facts and contentions before the Court, be *res judicata inter partes*), it must always be *res judicata contra mundum*. But until some clear view is thus obtained of the fundamental principles underlying any part of the law, its practical administration is almost sure to be complicated by drawing distinctions upon particular cases, most of which, in the argument here, can easily, I think, be shown to be no true distinctions at all.

I will now deal with the second question referred to the Full Bench. Since I would use the judgment of

the appellate Court in the probate proceedings under section 41 against the defendants, it follows from the principles I have stated that I consider the finding of fact arrived at by their Lordships the Chief Justice and Batchelor, J., a *res judicata* and binding upon the present defendants. What their Lorships found (it is merely idle to dispute this because no definite issue was framed) was this that having regard to the medical evidence the testator Dhanasa was not of sound mind when the will was alleged to have been made. Therefore there was no will. If that be *res judicata* in the present case there is an end of the defence. Again, the defendants rely on *Ganesh* v. *Ramchandra*[1]. But while the learned judges did decide in that case that the finding of the Court against the will on the probate proceedings was not *res judicata* against the executors in a subsequent suit, they did not find that no finding of a Probate Court could ever be *res judicata*. In the opinion of their Lordships there was no issue affecting the genuineness of the will either raised or tried, and therefore no *res judicata*. With all respect I submit that that decision, even so restricted, is logically indefensible. The Court of appeal deciding the probate application held that to make the will, a will legally, certain formalities prescribed in section 50 of the Succession Act were indispensable and had not been complied with. It is true that section 50 did not, as far as I can now ascertain, apply at all, but that has nothing to do with the principle of the judgment in *Ganesh* v. *Ramchandra*[1]. If it had applied then the finding of the appeal Court on the probate was in effect that its requirements had not been complied with, and that as a result there was no will. That I submit is in all respects as much a finding of fact as a finding that the will was a forgery. And in

[1] (1896) 21 Bom. 563.

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my opinion it ought to have been held *res judicata* in the subsequent suit. There can be little doubt having regard to certain passages in the judgment that had the finding been that the will was a forgery or that the testator was insane when he made it, the learned judges would have regarded that as *res judicata*. So that had the matter rested there we might have been content to distinguish that case and base our present judgment on that ground. But there is the later case decided by Chandavarkar and Heaton, JJ., in which apparently the finding of the Probate Court was that the will was not genuine and yet their Lordships purporting to follow *Ganesh* v. *Ramchandra*[1] held that that finding was not *res judicata* in a subsequent suit. Now there could be no question at all apart from two verbal technicalities which I must advert to in a moment but that this finding of fact would be (and undoubtedly is) *res judicata inter partes*. The Advocate General contends that it is not because the probate proceedings are not a suit. Section 83 provides that wherever contentious, probate proceedings shall, as far as possible, take the form of a suit. All appeals from them come to the High Court on the appellate side in the form of regular ordinary first appeals from decrees. To all intents and purposes these proceedings are suits. But, of course, I must admit the verbal difficulty which I pointed out at once, that what is made to conform as nearly as possible to another thing is impliedly *not* that thing.

The second difficulty which I also pointed out arises out of the wording of section 11. It may be argued that the Court deciding the fact sought to be made *res judicata* is not itself competent to try the subsequent suit. But let us look first at the reason of the thing. Why is this part of the law of *res judicata*? Obviously

[1] (1896) 21 Bom. 563.

to prevent matters of great importance being decided incidentally, as they often are in Courts of inferior jurisdiction, so as afterwards to exclude those matters from the cognizance of Courts of superior jurisdiction. That is the single reason for the rule. But it has no more than a verbal application to such a case as this. Here the District Judge, who first decided the question of fact, was himself competent to try the subsequent suit, in which that question of fact would arise; and *a fortiori* their Lordships who heard the appeal were competent, and no higher tribunal in this country could be found for the trial of the issue. In my opinion the objection has no real substance, though it lends itself to a great deal of technical argument. The District Judge remains the District Judge when exercising his probate jurisdiction; there is no separate Court. Similarly the Judges of this High Court are sitting in the exercise of their appellate jurisdiction as much to deal with these, as with any other first appeals.

As to the first objection, it is met by the judgment of the Privy Council in *Ram Kirpal Shukul* v. *Mussumat Rup Kuari*[1]. True in that case the *res judicata* arose out of an execution proceeding which is normally part of a suit; but that was not the ground upon which the judgment proceeded. Broadly that ground was that section 11 does not contain the whole law of *res judicata*, which is general and of universal application. In other words, that in a proper case, Courts would be perfectly justified in neglecting the actual words of section 11, if the substance showed that the section ought to be applied. And that is certainly the case here. I mean, if there is any real difficulty in the words, I do not agree that there is, for I think that mere quibbling apart, these contentious probate proceedings are in effect suits. However that may be, I am

[1] (1883) L. R. 11 I. A. 37.

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emphatically of opinion that the substance and reason of the matter before us makes it as clear a case of *res judicata* as ever could be. Here is a simple question of fact offered for trial by the present defendants to the District Judge and found against them. They take it up on appeal to the High Court and again the finding is against them. Are they to be allowed now to ask a second District Judge it may be, and a second bench of this High Court to try the identical question of fact between the same parties, on virtually the same materials? Surely not. In this suit the defendants have added three more witnesses, but that in my opinion does not make the slightest difference. The decisions of both the Courts in the probate rested solely on the medical evidence. That is as it was then, and therefore there is really no new material before us affecting the ground of the previous judgments. But even if there were, I should still remain of the opinion that no such evidence could be led, because no such issue could be raised again, no such question re-agitated. In my opinion however it is much more important to have the first question answered in the way I propose. For, if it be only on the ground of *res judicata* that the judgment of the Probate Court bars the defendants, it would still be open to lagatees to reopen the question upon exactly the same materials, and if there were a dozen legatees and a dozen executors I see no reason in principle why there should not be two dozen suits all hinging upon the identical question of fact, namely whether or not there ever was a will.

I cannot bring myself to believe that such a result could be in the contemplation of the legislature, or that it would be consistent with the administration of this branch of the law upon sound general principles.

In my opinion then the judgment of this appeal Court on the probate, holding that the testator was not

of sound disposing mind, is relevant and conclusive against the present defendants under section 41.

I am also of opinion that even if this be not so, the finding of fact arrived at by the learned Judges of appeal in the Probate suit, (I call it so intentionally) is *res judicata inter partes* in the present suit. The parties are the same.

MACLEOD, J.:—For the reasons given by my brother Beaman I am of opinion that the two questions which we think should be referred to the decision of a Full Bench ought to be answered in the affirmative.

The reference was argued before the Full Bench composed of Scott, C. J., and Batchelor and Davar, JJ.

Strangman (Advocate General) and *Kanga* instructed by *Motichand* and *Devidas* with *R. R. Desai*, *D. S. Varde* and *M. V. Bhat* for the appellants (defendants).

Strangman (Advocate General):—The will in question was made in the mofussil. It is governed by the Probate and Administration Act and not by the Hindu Wills Act. It was, therefore, not necessary to the executors to obtain probate at all. The property of the testator vested in the executors immediately on the death of the testator under section 4 of the Probate and Administration Act corresponding to section 187 of the Indian Succession Act which is incorporated in the Hindu Wills Act.

Section 41 of the Indian Evidence Act has no application here. It is true that by reason of section 187 of the Indian Succession Act, the final judgment of a competent Court in the exercise of probate jurisdiction to grant probate or letters of administration would fall within the terms of section 41 of the Evidence Act, but it is extremely doubtful whether, in the event of the persons governed by Probate and Administration Act, it could be said under section 41, if the Court has

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conferred any legal character on any person, that legal character being already conferred by section 4 of the Probate and Administration Act. What we are concerned with here is not "conferring" but "taking away". Assuming for a moment that section 41 of the Evidence Act applies to Probate and Administration Act, "taking away" would arise only when probate or letters of administration which had already been granted were taken away. There is no question of revocation of grant in the present case. Further section 41 refers to declaring any person entitled to any legal character and does not refer to any declaration "not entitled," etc.

In the present case there was no necessity at all for the executors to take out probate. The refusal to grant probate left the executors as they were.

Under the Probate and Administration Act, a grant is final and conclusive under section 59. There is no corresponding section making the refusal to grant final and conclusive.

Under section 41 of the Evidence Act "taking away" means taking away of something granted by the Court. The refusal of probate only means that the Court declines to grant probate. Where a right is taken away there must be declaration to that affect in the order.

As to *res judicata*: Probate proceedings, when contentious, do not amount to a suit. Only they take the form of a suit: section 83 of the Probate and Administration Act. The Probate Court as such is not competent to try the second suit. Law of *res judicata* is not a law of procedure any more than the law of limitation: *Ram Kirpal Shukul* v. *Mussumat Rup Kuari*[1], *Mirza Kurratulain Bahadur* v. *Peara Saheb*[2].

Raikes and *Wadia* with *D. A. Khare* and *A. G. Desai* for the respondent (plaintiff).

(1) (1883) L. R. 11 I. A. 37. (2) (1905) L. R. 32 I. A. 244.

Raikes :—The question that has to be considered is, "is the judgment refusing a probate a judgment *in rem*?" After all a judgment *in rem* is an estoppel by record against all the world. Estoppel by record must be mutual. The judgment if it estops the one party one way, must estop the other party the other way. In section 41 of the Evidence Act the legislature has proceeded on the footing of this principle and hence they have not made the negative part express in the section.

The character of an executor accrues to him at the moment of the testator's death. He acts as an executor. By the probate proceedings he does not ask that that character should be declared. If the Court refuses probate, then the judgment takes the character away from the executor which he had assumed and leaves him an executor *de son tort*.

As to *res judicata* : Probate proceedings are a suit within the ordinary meaning of the term "suit". The term is not defined either in the Civil Procedure Code or in the General Clauses Act. The probate proceedings are to take the form of a suit : section 83 of the Probate and Administration Act, or a regular suit : section 261 of the Indian Succession Act.

Even supposing they are not a suit within the meaning of section 11 of the Civil Procedure Code, still if the section does not apply to *tidem verbis*, the principle underlying the section would apply.

The judgment of the Full Bench was delivered by

SCOTT, C. J. :—With regard to the first question referred we are of opinion that section 41 of the Evidence Act is not applicable to the judgment of the appellate Court. The finding of a Court that an attempted proof has failed is not a judgment such as is contemplated in that section. The only kind of negative judgment which is contemplated is that which expressly

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takes away from a person the legal character which has up to that time subsisted. That is not the case with the judgment in question here.

With regard to the second question we are of opinion that the judgment operates as *res judicata* between the parties. The contention was advanced on behalf of the appellants that the probate proceedings, in which the previous judgment was pronounced, were not a suit within the meaning of section 11 of the Civil Procedure Code, but section 83 of the Probate and Administration Act provides for the form which contentious probate proceedings shall take. They must take the form as nearly as may be of a suit according to the provisions of the Civil Procedure Code, in which the petitioner for probate or letters of administration shall be the plaintiff, and the person who may have appeared to oppose the grant shall be the defendant. There is no definition of the word "suit" either in the Civil Procedure Code or in the General Clauses Act, and we are of opinion that as contentious probate proceedings must take the form of a suit, they constitute a suit within the meaning of section 11 of the Civil Procedure Code. The contention appears to be a novel one. It was not advanced, so far as we can gather from the reports, in the case of *Mirza Kurratulain Bahadur* v. *Peara Saheb*[1] nor has it, so far as we know, ever been advanced before in this Court.

Order accordingly.

G. B. R.

[1] (1905) L. R. 32 I. A. 244 ; 33 Cal. 116.