His Majesty in Council, when such an order is made by the High Court in a proceeding in an appeal arising out of the same suit. I do not think that such an anomaly exists.

It is also clear that a judgment or order in order to be final within the meaning of clause 39 of the Letters Patent must finally determine the rights of the parties. In other words if it be not appealed from, the adjudication must be final. In the present case it is not denied that in spite of this order, the petitioner is entitled either to apply for the probate of the will or to enforce his rights under the will by a separate suit. The adjudication is not, therefore, final. It may be that the question of petitioner's right to represent the deceased Virupakshappa in this litigation is finally decided. But that is a matter of procedure. So far as the substantial rights of the petitioner are concerned, it cannot be suggested that the adjudication is final.

For these reasons, I refuse to grant the certificate prayed for, and discharge the rule with costs.

HEATON, J. :—I concur.

Leave refused.

R. R.

APPELLATE CIVIL.

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

KISHORBHAI REVADAS, EXECUTOR (ORIGINAL PLAINTIFF), APPELLANT, *v.* RANCHODIA DHULIA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1914. *January* 27.

Evidence Act (I of 1872), sections 40, 41, 42 and 44—Probate and Administration Act (V of 1831), section 59—Will—Probate—Suit by the executor to recover possession and rent—Plea that the will was a fabrication and that probate had been obtained by fraud—Previous unsuccessful application by defendant to District Court to revoke probate on the same grounds, effect of—Jurisdiction of the Subordinate Judge to entertain the plea—Competency of the Probate Court, namely, the District Court.

An executor applied for the grant of probate and the Probate Court, namely, the District Court, made the grant. Subsequently a nephew of the testator

* Second Appeal No. 110 of 1912.

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made an application to the Court for the revocation of the probate on the ground that the will was a forgery and that he had been prepared to prove it in the probate proceeding, but at the last moment the executor had bought him off under a mutual arrangement, but after the order for probate had been made, the executor failed to perform his part of the arrangement and had thus committed a fraud both on the Court and the applicant. The application for revocation was disposed of by the Court on the ground that the applicant, on his own showing, was a party to a fraud upon the Court, that he had not come with clean hands and was not, therefore, entitled to the relief sought.

Thereafter the executor having brought a suit in the Court of the Subordinate Judge to recover rent and possession against a tenant of the testator as defendant 1 and against the aforesaid nephew as defendant 2, defendant 1 pleaded that the deceased (testator) had asked him to pay rent to defendant 2 and defendant 2 contended as in the previous proceedings that the deceased had made no will, that the will produced was a fabrication and that probate had been obtained by fraud.

Held, that defendant 2 was barred by the decision of the District Court in the revocation proceeding from raising the same question in the Court of the Subordinate Judge.

Held, further, that it was the District Court which was competent to decide the question of fraud and collusion vitiating the decree of that Court under which probate had been granted and that as the Subordinate Judge who tried the suit had no jurisdiction in probate matters, the title of the plaintiff was conclusively proved on the production of probate and it was no valid defence for the defendants to allege that the will was a forgery and that probate had been obtained by fraud and deception.

Quære: whether a debtor of the estate could raise such a defence if sued by the executor in a Court having jurisdiction to revoke the probate?

SECOND appeal against the decision of Rutonji Mancherji, Judge of the Court of Small Causes at Ahmedabad with appellate powers, confirming the decree of M. J. Yajnik, Subordinate Judge of Umreth.

Suit to recover two fields from two defendants and Rs. 144 from both or any of them on account of damages for wrongful occupation and costs. The plaint alleged that the fields in suit belonged to one Jijibhai Kasandas who died after making a will dated the 13th July 1902, that the plaintiff who was an executor under the said will obtained a probate on the 11th August 1904, that

defendant 1 was a tenant of the testator for one year under a rent note but he did not vacate the land after the expiration of the period and that defendant 2, who was a nephew of the testator, prevented delivery of possession by defendant 1.

Defendant 1 denied the plaintiff's claim and answered *inter alia* that the plaintiff was not the *vahivatdar* of the deceased Jijibhai, that the deceased had during his last illness asked the defendant to pay rent to his nephew Jivabhai, defendant 2, that the deceased had not made a will as alleged and that the plaintiff had obtained the probate fraudulently; it was, therefore, invalid.

Defendant 2, Jivabhai Becharbhai, contended *inter alia* that he did not admit the claim, that the will relied on by the plaintiff was a got up one, that the deceased had during his illness told his tenants to pay to the defendant the rent due, that the plaintiff fraudulently obtained probate in the District Court, that the will having been sent to the Collector for registration as the District Registrar, he directed an inquiry in connection with it and the Mamlatdar made a report suggesting prosecution, that the plaintiff, thereupon, applied to the District Court for probate, that the defendant having opposed the grant of the probate, the plaintiff got some persons to intervene and promised to give back to the defendant the property of the deceased or its equivalent if the opposition to the application was withdrawn, that it was under these circumstances that the plaintiff obtained the probate which was, therefore, bad and legally ineffectual and that the plaintiff was, therefore, not entitled to recover possession and the rent claimed was excessive.

The Subordinate Judge found that in spite of the probate the plaintiff had not the right to recover

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possession and mesne profits as executor of Jijibhai as it was open to the defendants to contest that the will, the basis of the probate, was not genuine and that the said will was a forged one. The Subordinate Judge, therefore, dismissed the suit relying mainly upon section 44 of the Evidence Act.

On appeal by the plaintiff the appellate Judge found that the first Court had both jurisdiction and power or authority to go behind the probate on the ground of fraud, that the will was a forged one and the plaintiff obtained its probate by means of fraud and collusion and that the plaintiff could not be permitted to take advantage of his own fraud and to recover possession. The appeal was, therefore, dismissed.

The plaintiff preferred a second appeal.

Jayakar with *B. F. Dastur* for the appellant (plaintiff) :—The probate of the will was granted to us under section 59 of the Probate and Administration Act. The grant is conclusive as to our representative title against the defendants. Defendant 2 was a party to the probate proceedings. Subsequently he applied to the District Court for the revocation of the probate on the ground that the will was a forgery and that the probate had been obtained by fraud practised on the Court and on himself, but his application was rejected. The judgment of the Probate Court operates as *res judicata*. It is a judgment *in rem* : section 41 of the Evidence Act, Taylor on Evidence, Vol. II, para. 1713 (10th Edn.), *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy*[1].

The Court of the Subordinate Judge had no jurisdiction to decide the question of the genuineness or otherwise of the will. That jurisdiction is vested solely in the District Court.

[1] (1882) 6 Bom. 703.

Section 44 of the Evidence Act lays down a rule as to the admissibility of evidence and refers to the method of proof. Although the language of the section is very wide, a person who is a party to the fraud cannot avail himself of the section and lead evidence to prove that the previous judgment of the Probate Court was obtained by fraud: *Venkatramanna* v. *Viramma*[1], *Chenvirappa* v. *Puttappa*[2], *Rangammal* v. *Venkatachari*[3], *Meadows and wife* v. *Duchess of Kingston*[4].

Defendant 1, the tenant, cannot raise the defence that the will was a forgery. Section 59 of the Probate Act gives an indemnity to a debtor paying a debt to the executor.

Patel with *M. N. Mehta* for the respondents (defendants):—Under section 44 of the Evidence Act, defendant 2, although a party to the probate proceedings, can show that the decision of the Probate Court was obtained by fraud. The language of the section is very general, the words being "any party to a suit". We rely on *Barkat-Un-Nissa* v. *Fazl Haq*[5], *Shama Charn Kundu* v. *Khettromoni Dasi*[6], *Rajib Panda* v. *Lakhan Sendh Mahapatra*[7].

The observations of Latham, J., in *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy*[8] are *obiter dicta*. Civil Courts are not deprived of their jurisdiction to determine the question of fraud. In *Shedden* v. *Patrick*[9] Lord Brougham has observed, "When a judgment has been obtained by fraud, and more especially by the collusion of both parties—such judgment, although confirmed by the House of Lords, may, even in an inferior tribunal, be treated as a nullity."

(1) (1886) 10 Mad. 17.
(2) (1887) 11 Bom. 708.
(3) (1895) 18 Mad. 378.
(4) (1775) 2 Amb. 756 at p. 762.
(5) (1904) 26 All. 272.
(6) (1899) 27 Cal. 521.
(7) (1899) 27 Cal. 11.
(8) (1882) 6 Bom. 703.
(9) (1854) 1 Mac. Rep. 535 at p. 619.

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The application of defendant 2 for the revocation of probate was dismissed by the District Court on the ground that the defendant himself was a party to the fraud on the Court. There was no decision on the merits; therefore, there can be no bar of *res judicata*. Defendant 2 does not want to take advantage of his own fraud. He defends his title by showing plaintiff's fraud of which the plaintiff should not be allowed to take advantage.

Defendant 1, the tenant, is a stranger. He was not a party to the probate proceedings and he does not claim under defendant 2.

Jayakar in reply :—He relied on Field on Evidence, p. 188, and cited *Varadarajulu Naidu* v. *Srinivasulu Naidu*[1], *Monmohini Guha* v. *Banga Chandra Das*[2], *In re Pitamber Girdhar*[3], *De Metton* v. *De Mellon*[4].

SCOTT, C. J. :—This suit was instituted by Kishorbhai Revadas, the executor who had obtained probate of the will of Jijibhai Kasandas, to recover from the first defendant Rs. 144 as rent of certain fields occupied by him as yearly tenant, and possession of those fields.

The defence of the first defendant was that the deceased Jijibhai had asked him to pay the rent to his nephew Jivabhai, who was the second defendant in the case, and the second defendant Jivabhai contended that the deceased made no will, and that the will proved was a fabrication.

The second defendant prior to the institution of this suit on the 2nd of March 1905 made an application to the District Court for revocation of the probate granted to the plaintiff upon the ground that the will was a forgery, and that he (the second defendant) had been

(1) (1897) 20 Mad. 333 at p. 338.
(2) (1903) 31 Cal. 357.
(3) (1881) 5 Bom. 638.
(4) (1810) 2 Camp. 420.

prepared to prove it in the probate proceedings, but at the last moment the plaintiff had bought him off, and that a mutual arrangement had been effected whereby the second defendant agreed not to cross-examine the plaintiff's witnesses and to call evidence, and thus facilitated the grant of probate to the plaintiff who would otherwise have been prosecuted for forgery on the strength of the Mamlatdar's report, and in consideration of the withdrawal of his opposition the plaintiff agreed to restore the property of the deceased to him (the second defendant), or to pay the equivalent in cash directly the probate had been granted, but after the order had been passed the plaintiff declined to carry out his part of the arrangement and thus committed a fraud on the one hand upon the Court, and on the other on him (the second defendant), and that, therefore, the probate should be revoked. The application for revocation was disposed of by the District Court on the ground that the second defendant on his own showing was a party to a fraud upon the Court, that he had not come with clean hands, and was not therefore entitled to the relief sought.

The first defendant, as I have stated, claims to be entitled to pay rent for the property to the second defendant. He, therefore, claims under him since the death of the testator. The second defendant in this suit has taken advantage of the first defendant claiming under him to put forward the same grounds as he put forward in the application for revocation, and the Subordinate Judge who tried the case in the first instance, and the Subordinate Judge with appellate powers who tried the case in appeal, having gone into the questions of fraud, which the District Court declined to entertain upon the revocation application, have found that the will was a forgery, and that the probate granted by the District Court is of no avail to

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enable the plaintiff to recover from the first defendant the property of the deceased.

This investigation was permitted in the lower Courts upon the strength of section 44 of the Evidence Act which states that: "Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

Now the party who seeks to prove the fraud and collusion vitiating the decree of the Probate Court, under which probate was granted to the plaintiff, is the second defendant, and the second defendant has already raised that question in the only Court which was competent to decide it, namely, the District Court, for the Subordinate Judges who tried the present case have no jurisdiction in probate matters, and the Court competent to decide it dismissed the application, for the reasons which I have already stated. It was an application in the nature of a suit, as all contested probate proceedings are, and the decision could have been appealed from by the second defendant, and if the learned District Judge was held to be wrong in rejecting the application upon the grounds upon which he had rejected it, the result would have been that those allegations of fraud would have been investigated by a Court competent to give effect to its findings. The second defendant, therefore, is, we think, barred by the decision of the District Court in the revocation matter from raising again the same question in the Court of the Subordinate Judge.

As regards the first defendant, he does not raise these questions by his pleading, although he has made common-cause with the second defendant in his

defence. As regards him, it is not disputed that he is in possession of property forming part of the estate of the deceased, and the plaintiff seeks to recover possession of that property for the estate as its representative. The defendant does not dispute that he is liable to pay rent for his occupation at a rate which is not exceeded in the demand in this suit.

Now, where the demand is made by the executor claiming title under an unrevoked probate, a debtor to the estate has no answer, unless possibly he is sued in a Court having jurisdiction to revoke the probate. What would have been the result of this common defence if it had been put forward in the District Court is a question which is not free from difficulty and which we have not to decide in the present case. But we think it is clear that in the Subordinate Judge's Court, which has no jurisdiction to deal with the question of probate, the title of the plaintiff was conclusively proved by the production of the probate, and it was no valid defence on the part of the first defendant to join in the allegation of the second defendant that the will was a forgery, and that the probate had been obtained by fraud and deception.

Section 59 of the Probate Act says that "Probate . . . shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted." Therefore the first defendant in complying with the demands of the plaintiff would have been fully indemnified as against all persons entitled to share in the estate of the deceased.

The English cases afford illustrations of the rule stated in section 59 of the Probate Act. *Allen* v.

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Dundas[1] decides that: "Payment of money to an executor who has obtained probate of a forged will, is a discharge to the debtor of the intestate, notwithstanding the probate be afterwards declared null, and administration be granted to the intestate's next-of-kin. A probate, as long as it remains unrepealed, cannot be impeached in the temporal courts."

In *Attorney General* v. *Partington*[2] Mr. Justice Willes at page 204 says: "it is only necessary to bear in mind the nature of such a grant as the act of a Court of sole jurisdiction pronouncing as to personal property to the exclusion of all other Courts . . . upon the question of testacy and intestacy, and upon the right to receive and distribute the effects of the deceased in the event of intestacy, whether total or partial. Without the constat of such a Court no other Court can take notice of the rights of representations to personal property; and when such Court has by the grant of probate or letters of administration established the right, no other Court can permit it to be gainsayed." The last words of that quotation seem to us to be applicable to the case of a grant of probate by the District Court, which it is attempted to challenge in the Court of a Subordinate Judge. In *In re Ivory*[3] letters of administration of the estate of an intestate were granted *ex parte* to the defendant, as "his natural and lawful brother of the half blood." The plaintiff, who was an uncle of the intestate, then commenced an action in the Chancery Division for the administration of the estate, alleging that the defendant was illegitimate, and that he himself was next-of-kin; and moved for a receiver and an injunction. It was held by Lush, J., "that the application must be refused, for that as long as the letters of

(1) (1789) 3 Durn. & E. 125. (2) (1864) 3 H. & C. 193 at p. 204.
(3) (1878) 10 Ch. D. 372.

administration remained in force they were conclusive evidence that the defendant was one of the next-of-kin, and that the plaintiff's proper course of procedure was to apply in the Probate Division to have them recalled."

Whether a debtor of the deceased and one who holds property admittedly forming part of the estate would have any *locus standi* in applying to the District Court for revocation of the probate we need not decide. As regards the second defendant, although he had a *locus standi* to make an application, his right is now at an end by reason of the unsuccessful result of his application for revocation. That being so, it appears to us that the first defendant has no defence to this suit. He will be completely indemnified by paying and delivering over the property to the plaintiff, and it is a pity that under the circumstances he should have thought fit to make common-cause with the second defendant.

We reverse the decree of the lower Court and pass a decree for the sum claimed, and for possession of the property in suit against the first defendant, with costs throughout payable by both defendants.

Similar decree in F. A. No. 109 of 1912. The decree will be against the two first defendants for payment and possession, and costs against all three defendants.

Decree reversed.

G. B. R.