Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of Rajah Nilmoni Singh Deo Bahadoor v. *Umanath Mookerjee and others* (*Nos.* 31 *and* 32 *of* 1880), *from the High Court of Judicature at Fort William in Bengal, delivered 4th April* 1883.

Present:

Sir Barnes Peacock.
Sir Robert P. Collier.
Sir Richard Couch.
Sir Arthur Hobhouse.

The question in these appeals relates to the execution of the will of Bamundas Mookerjee, a large landed proprietor in the district of Nuddea, in Bengal, who died on the 7th of January 1875. He had at the time of his death three sons living, Umanath, Taranath, and Srinath, and three grandsons, Girendronath, Horendronath, and Norendronath (the sons of a deceased son named Arundass). The Respondent Bhoyarini is the wife of Taranath. The Appellant, the Raja, had in the years 1863 and 1864 obtained decrees against Taranath for over Rs. 60,000 in the district of Manbhoom, which had in 1872 been transferred into the district of Nuddea for execution.

Immediately after the death of Bamundas, namely, on the 11th of January 1875, Umanath, Srinath, the three grandsons, and Bhoyarini pre-

sented a petition to the District Court of Nuddea, stating that Bamundas had given the whole of his property to them, by a will dated 24th Pous 1281 (7th January 1875), and praying for a certificate for collecting the debts due to the deceased under Act XXVII. of 1860. A deposition of Norendronath, one of the witnesses to the will, proving its execution, was made on the 5th of February, and on the 20th of February the certificate was granted. On the 2nd of February the Raja, the Appellant, applied for the attachment of the right, title, and interest of Taranath in certain immoveable property of the deceased Bamundas, and the attachment was made a few days after. Thereupon Umanath, Srinath, the grandsons, and Bhoyarini presented a petition to the District Court of Nuddea, under Section 246 of Act VIII. of 1859 (the then Procedure Code) claiming to be in possession under the will. On the 29th of June their claim was disallowed by the Officiating Judge, but by an order of the High Court, dated the 7th of September 1875, the order of disallowance was set aside, and the Court was instructed to take up the claim again, with special reference to the question of possession, the Officiating Judge having called upon Bhoyarini to prove the execution of the will (which he ought not to have done), and tried the case as if the question was the validity of the will. The result of the hearing on the remand was that, on the 11th of February 1876, three fourths of Bamundas' share and interest in the estates under attachment were released, and the attachment was held good as to the remaining one fourth. The Section 246 provides that the order passed by the Court under that section shall not be subject to appeal, but the party against whom the order may be given shall be at liberty to bring a suit to establish his right within one year from the date of the order.

Accordingly, on the 1st of April 1876, Bhoyarini filed her plaint in the District Court of Nuddea for a declaration of her right under the will to a fourth share of the zemindaries, &c., mentioned in the schedule thereto, left by Bamundas Mookerjee, situated within the jurisdiction of the Court. The suit was brought against the Raja, and against Taranath as a *pro formâ* Defendant. The Raja in his written statement, filed on the 7th of June 1876, objected that, as no probate had been taken out under the will, as was required by law, the Plaintiff was not entitled to bring a suit for declaration of her right, and alleged that Bamundas did not execute the will, and that it was fabricated after his death by Taranath and his co-sharers in order to deprive him of the money due to him.

Before this Umanath, Srinath, Bhoyarini, and the grandsons had, on the 14th of March 1876, presented a petition to the Judge of Nuddea, praying that probate of the will, or if the Court thought they were not appointed executors under it, letters of administration with the will annexed, might be granted to them. The 24th of March was fixed for the hearing, and notice was ordered to be issued. On that date an order was made for granting probate, but before it was given Bhoyarini was to put in her husband's consent to her taking probate. It was not until the 21st of December 1876 that the Judge granted the certificate of probate, and what caused the delay in granting it did not appear. On the next day, the 22nd of December, the Raja presented a petition to the Judge of Nuddea, under Section 234 of Act X. of 1865, praying for an order setting aside the probate, on the ground that, as by the will the right of his debtor Taranath had, in a manner, been destroyed, and the will had been got up with a view to defraud him, he ought to have had notice of the application for probate,

and he had not had notice. Bhoyarini, in her petition in answer, said that the will was genuine, and was duly executed by Bamundas, and that the Raja could not become an objector in the probate case, and, consequently, was not entitled to apply to have it set aside.

It may be well to mention here that by Act XXI. of 1870, the Hindu Wills Act, certain portions of Act X. of 1865, the Indian Succession Act, are made applicable to wills of Hindus in the territories subject to the Lieutenant Governor of Bengal, and these portions include the different sections of the Act of 1865, which have been referred to in the course of this litigation.

The petition of the Raja for revocation of the probate and the suit by Bhoyarini were heard together, and issues were framed by the First Court on the 7th of June 1876.

The principal, and now the only material one, is, Was any will executed by Bamundas on the 7th of January 1875? Evidence was given on both sides, and the Officiating Judge of Nuddea, on the 3rd of September 1877, ordered the probate to be revoked and dismissed. Bhoyarini's suit against the Raja. Bhoyarini appealed to the High Court, which, on the 9th of July 1878, set aside the order as irregular, on the ground that notice of the application to revoke the probate had not been given to all the members of the family who were interested under the will, the parties being at liberty to take fresh proceedings upon the original petition of the Raja. The decree in the suit by Bhoyarini was also set aside, and the case remanded to the Lower Court to be reheard.

Fresh proceedings were taken and more witnesses were examined, and on the 24th of March 1879 the Judge of Nuddea gave his judgment. He first considered the question

whether the Raja was entitled to be heard against the will, and held that holding a decree against Taranath, and having attached Taranath's supposed share of the paternal estate immediately after the death of the father, the Raja did acquire such an interest in it as entitled him to oppose probate of the will, which he contended was not executed by his debtor's father, and which purported to disinherit the debtor. He then held that the will was not genuine, saying he concurred generally in the reasons for the conclusion that the will was not executed by Bamundas given by the officiating Judge in the judgment of the 3rd of September 1877. He said, however, that the propounders of the will had succeeded in showing, beyond a doubt, that Bamundas did certainly contemplate the execution of such a will, and that he caused a draft to be made. The probate granted on the 21st of December 1866 was ordered to be cancelled, and the suit by Bhoyarini was dismissed with costs. The parties appealed to the High Court, which gave judgment on the 10th of September 1880. The Court held that the Raja had such an interest in the property of the deceased as entitled him to dispute the genuineness of a will which purported to divert the succession from Taranath to another, but that the will was duly executed by Bamundas, and made an order in the application for revocation of the probate, and a decree in the suit by Bhoyarini accordingly, from which order and decree the Raja has appealed to Her Majesty in Council. The following passage from the judgment of Mr. Justice Morris states the reasons for the decision upon the former question :—

"The first question that arises is, whether Nilmoni Sing, as creditor of Taranath, has any *locus standi*, whether he has such an interest in the estate of the deceased Bamundas as gives him a right to apply for revocation of the probate granted of his will. In support of the proposition that he cannot apply

for revocation of probate, several authorities have been cited. In the matter of Mu Tsee, petitioner, reported in 15, W. R., p. 351, Mr. Justice Norman, delivering the judgment of the Court, says:—'We have no doubt of the soundness of the pro-'position that a person who is not next of kin, and who has no 'interest in the estate of a testator, has no right to oppose the 'grant of the probate or dispute the validity of the will. In 'England it has been held, that even a creditor cannot con-'trovert the validity of a will, because it is a matter of in-'difference whether he should receive his debt from the 'executor or from an administrator.' Then the case of Baijnath Sahai and others *v.* Desputty Sing, reported in 25, W. R., p. 489, is quoted to show that the learned Judges there considered that, in this country too, creditors of the next of kin to the deceased are not entitled to have citation served upon them under Section 250, Act X. of 1865, calling upon them 'to come and see the proceedings before the grant of 'probate or letters of administration.' But this case came subsequently under the consideration of another Bench of this Court, of whom a member of the present Bench was one, in connection with the case of Komul Lochun Dutt and others *v.* Nilruttun Mundul, reported in I. L. R., 4th volume, p. 360; and Mr. Justice Markby, in giving the judgment, made the following observations: 'If we thought that the decision in 'Baijnath Sahai *v.* Desputty Sing went as far as to hold that 'a purchaser or an attaching creditor could not apply for 'revocation of a probate, we should, as at present advised, 'refer the point to be settled by a full Bench, because we 'should disagree from such a ruling.' We entirely concur in the opinion here expressed, and consider that it is applicable to, and meets the circumstances of, the present case. There is no question that Nilmoni Sing, immediately after the death of Bamundas, and before probate of his alleged will had been taken out, attached the property, which is the subject of the suit of Bhoyharini, as the property of his judgment debtor Taranath, to which he had succeeded on the death of his father owing to the devolution of the property of Bamundas by natural succession to Taranath."

The case of Baijnath Sahai *v.* Desputty Singh as reported in the Indian Law Reports, 2 Calcutta, Series 208, was this,—A Hindu testator died, leaving B, alleged to be his adopted son, and C, who would be his heir in default of adoption, and made a will of which B applied for probate, and it was held under the Succession Act and Hindu Wills Act that creditors of C were not parties having any interest in the estate of the deceased, and were therefore

not entitled to oppose the grant of probate. Their Lordships think this was a right decision.

In Komollochun Dutt *v.* Nilruttun Mundle, the facts were that Komollochun and Joynarain, two brothers, originally held possession of certain joint properties in which they each had a half share. On the 8th of January 1872 Joynarain died childless, leaving a widow, who would, therefore, under the Hindu law, succeed to his estates. It did not appear that she ever got into possession of her husband's property, and on the 13th November 1875 Komollochun obtained probate of a will, executed by Joynarain shortly before his death. Before the grant of probate, namely, in June 1875, the widow had sold her interest in her husband's estate to the Plaintiff, Nilruttun, who brought a suit to recover her share of the property upon the strength of his purchase, alleging the will to be a forgery. Komollochun, who was in possession, defended the suit, upon the ground that the will was genuine, and that by it the property was bequeathed to himself for certain purposes therein specified. The will having been found to be a forgery, the District Judge gave the Plaintiff a decree for the share of the property which had belonged to the deceased. The High Court held that the probate was conclusive, and that an application should have been made to revoke it, and they postponed the final decision until the Plaintiff had had an opportunity of making one. The whole passage, from which Mr. Justice Morris quotes a part, is as follows :—

"If this procedure be followed, we do not see what are the disastrous consequences of holding probate to be conclusive, to which the District Judge alludes. It was said that the Plaintiff in this case would be remediless, becuuse, according to the decision in Baijnath Shahai *v.* Desputty Singh, he could not apply to revoke the probate. The point is not directly before us, but as at present advised, we think that the Plaintiff could apply to revoke the probate. He is interested by assignment in the estate of the deceased, and if there be no

will he has a good title, at any rate, against Komollochun, as far as the will is concerned; whether the sale by the widow Bogolamoye would be good as against the reversioners does not appear to have been raised and tried, we do not, therefore, see why he should not apply to revoke the probate. The ground of the decision in Baijnath Shahai *v.* Desputty Singh was that the party there, a creditor of one of the next of kin, had no interest in the estate of the deceased. A purchaser from the next of kin is in a very different position from a creditor. If we thought that that decision went as far as to hold that a purchaser, or an attaching creditor, could not apply for revocation of a probate, we should, as at present advised, refer the point to be settled by a full bench, because we should disagree from such a ruling."

The case in which this judgment was given was that of a purchaser from the heir, but no distinction is made between a purchaser and an attaching creditor. Assuming that a purchaser can oppose the grant of a probate, or apply to have it revoked (which their Lordships do not decide), they entertain grave doubts whether an attaching creditor can do so, at least in a case which is not founded on the ground that the probate has been obtained in fraud of creditors. But as, after hearing the Appellant's Counsel upon the question of the execution of the will, their Lordships did not consider it necessary to hear the Counsel for the Respondents, the question whether the Raja could apply for the revocation of the probate has not been argued before them, and therefore they give no final opinion upon it.

They consider that the appeal should be decided in favour of the Respondents, on the ground that the High Court was right in holding that the will was duly executed by the testator. The effect of the will is to give the share of Taranath to his wife Bhoyarini, and it is expressly stated in it that it is the object of the testator to prevent Taranath's share falling into the hands of his creditors. Some time before his death the testator had had a draft will prepared, and sent it to be inspected by two members

of his family, and a vakeel named Parasaram Mustafi. The latter drew up a revised draft will, and took it to Bansbaria, where Bamundas then resided. He approved of it, and directed Chunderkant Surbogya to take and show it to his sons at Birnuggur, where the family residence was. This he did, and returned with it to Bansbaria. On the day of his return, and the next day Bamundas was unwell; but on the day after he asked him about the draft, and on Chunderkant saying that he had shown it to his sons and grandsons, who had no objection to offer, he directed him to make a fair copy of it. The fair copy was made, and was read and approved by Bamundas, and then entrusted to his grandson Norendronath to keep. This was done a fortnight before his death, and the Respondents' case was that, on the evening on which he died he asked for the will and duly executed it. The Raja's case was that he died without having executed it, being too unwell to do so, and that it was taken to Birnuggur, and his signature put to it there on the next day. The will was attested by Norendronath and Chunderkant Mookerjee, who was the gomashta at Birnuggur, and they deposed to its execution as required by the Hindu Wills Act. Dinonath Sen, the gomashta at Bansbaria, did not attest it, but he deposed to having seen it executed. It was argued that his not attesting showed that the signature of Bamundas was forged, and that the signatures of the witnesses were put to the will at Birnuggur on the next day, when Dinonath was not there. Other circumstances of a similar character were relied upon as suspicious, and a case to prove that Bamundas died suddenly under entirely different circumstances from those described by the witnesses of the Respondents was at first set up by the Raja, but it broke down, and was not pressed either in the first Court or in the High Court. After a full

examination of the evidence and the judgments of the first Court on the original hearing and the remand, the High Court came to the conclusion that there was no sufficient reason for disbelieving the testimony of the attesting witnesses and Dinonath Sen, and that it was impossible to discredit the direct and indirect evidence which was presented to prove the genuineness of the will. Their Lordships have come to the same conclusion. Looking at the facts which are not disputed, it appears to them that, so far from there being ground for disbelieving the witnesses, it is more probable that Bamundas carried out his intention to make the will, and did execute it in the manner stated, than that he died so suddenly as to be unable to do so.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss the appeal, the costs of which will be paid by the Appellant.