1908.
October 12.

Present: Mr. Justice Wendt and Mr. Justice Grenier.

PUNCHI BANDA, Executor of the Last Will of Bandara Menika, *v.* YUSUBU LEBBE.

D. C., Kandy, 18,697.

Judicial settlement of estate—Decree, effect of—"Probate jurisdiction" of District Court—Judgment in rem.

A decree made by a District Court in a proceeding for the judicial settlement of an estate is not a decree made in its "probate jurisdiction" within the meaning of section 41 of the Evidence Ordinance, and does not operate as a judgment *in rem.*

WENDT J.—"Probate jurisdiction" does not mean the same thing as "testamentary jurisdiction." It is limited to the power in the exercise of which the Court grants or refuses probate of a testamentary paper.

APPEAL from a judgment of the District Judge of Kandy. The facts are fully set out in the judgment of Wendt J.

H. J. C. Pereira, for the plaintiff, appellant.

Van Langenberg, for the defendant, respondent.

Cur. adv. vult.

October 12, 1908. WENDT J.—

This is an interlocutory appeal against the ruling of the District Judge upon an issue of law as to estoppel. The question arose in this way. The lands which are the subject of the action were the acquired property of one Siyatu, who died intestate in 1889, survived by his widow Ran Menika and two daughters Bandara Menika and Tikiri Menika. Ran Menika in 1905 took out letters of administration to his estate. In 1906 the present plaintiff, as executor of Bandara Menika, applied for a judicial settlement of the administratrix's account on the footing that his testatrix was the sole heiress, her sister having forfeited her inheritance by adoption into another family. In his petition the present plaintiff alleged that the administratrix had transferred Siyatu's lands in equal moieties to Tikiri Menika and Bandara Menika's heirs, reserving to herself a life interest. The petitioner averred that Ran Menika, the administratrix, had no right whatever to the estate. In the result the Court held that Bandara Menika had been sole heiress of her father, and ordered the administratrix to account on that footing. Nothing was said expressly in the judgment or the order as to Ran Menika's right to a life interest. The decision of the District Judge was affirmed in appeal. It appears that in June, 1903, Ran Menika and Tikiri Menika had sold and conveyed Tikiri Menika's alleged half

share of the lands in question and Ran Menika's alleged life interest to the defendant, who is in possession, and the object of this action is to vindicate the lands from him. Ran Menika is still alive.

In this state of the facts the first two issues of law framed were as follows:—

(1) Is the defendant estopped by the judgment in the proceedings in D. C., Kandy, 2,360, from denying that Bandara Menika was entitled to the whole of the lands in dispute?

(2) Is the defendant estopped by these proceedings from claiming a life interest in Ran Menika in the lands in question?

The first of these issues the learned District Judge decided in the affirmative, on the ground that the decree in the judicial settlement was a decree *in rem*, which under section 41 of the Evidence Ordinance bound the whole world. The second issue he decided in the negative, on the ground, as I understand it, that the question of Ran Menika's life interest was not in issue in the judicial settlement. The defendant has not appealed against the adjudication on the first issue, but his counsel has contended, as he was entitled to do, that that adjudication was wrong. The plaintiff has appealed against the decision of the second issue, and had it been necessary to review the District Judge's reasons for that decision, I should have been prepared to hold that Ran Menika's right had been directly put in issue by paragraphs 4 and 5 of the plaintiff's petition.

In my opinion the appeal fails, because the decree for judicial settlement was not, as plaintiff contends it was, a decree of the District Court in the exercise of probate jurisdiction. The rule that a judgment binds only the parties to it and their privies is such a fundamental rule and so salutary in its effects that the exception to it in the case of what are comprehensively called judgments *in rem* must be strictly construed with a due regard to all the safeguards enacted by the law. Although the term "judgments *in rem*" is not itself mentioned in section 41 of our Evidence Ordinance. which is a re-enactment of section 41 of the Indian Evidence Act, we know that the latter was intended to embody the law relating to the effect of those judgments, as declared by Sir Charles Peacock, Chief Justice of Calcutta, in *Kanhya Lall v. Radha Churu*[1] (see *Report of the Select Committee on the Bill, Ameer Ali and Woodroffe, 2nd edition, App. p. xlii.*). According to the section the judgment must, in a case like the present, be pronounced in the exercise of probate jurisdiction, and must be one which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character. It is then conclusive as to the possession or non-possession of that character, according to the declaration in the judgment. "Probate jurisdiction" does not mean the same thing as our term "testamentary jurisdiction," which includes the control of

[1] *(1867) 7 W. R. 339.*

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the administration of the estates of deceased persons by executors and administrators. It must be limited to that power of the Court by which it grants or refuses probate of a testamentary paper, and thereby conclusively authenticates the paper as containing the last will of the deceased. It declares the executor named in the will to be entitled to that legal character. Perhaps a grant of letters of administration also comes within the section as conferring a legal character, and will, while unrevoked, be regarded as conclusive of the administrator's provision of that character, but not of the grounds upon which the grant proceeded, viz., that the grantee was the next of kin or a creditor. I am clearly of opinion that a decree for judicial settlement is not one made in the exercise of the Court's " probate jurisdiction. " It comes at a later stage, when the Court has already granted probate or letters and is *functus officio*, so far as that special jurisdiction is concerned. It may deal with questions of construction of a will, or with questions of kinship and consequent rights to distributive shares of the estate, as to which the Court's adjudication would not fall under section 41, but only bind parties and their privies. Section 739 of the Civil Procedure Code, defining the effect of a decree of judicial settlement, declares that it shall be conclusive evidence against all parties who were duly cited or appeared and all persons claiming under them of certain specified facts and no others; and among the facts specified is not included any determination as to the next of kin of the deceased. The Court, therefore, in making the decree now relied upon by plaintiff, could not have regarded itself as proceeding *in rem*, with the effect of binding the whole world, and that is a cogent reason for not extending the conclusive operation of the decree beyond the actual parties to the proceeding in which it was pronounced.

The appeal must therefore be dismissed, and the case remitted for trial in due course. If, however, the ruling on the first issue, against which defendant has not appealed, were allowed to stand, the District Judge would be bound by it to reject any question of Bandara Menika's sole heiress-ship. The defendant, in the final appeal, would be entitled to re-open the question, and, according to our view of the law, would succeed, thus necessitating a new or further trial. To avoid this inconvenience, I think we ought, in revision, to set aside the ruling on the first issue, leaving defendant free to dispute the plaintiff's claim that Bandara Menika was her father's sole heiress.

The plaintiff will pay the defendant the costs of the hearing in the District Court and of the appeal.

GRENIER J.—

I agree to the order proposed by my brother, and have nothing to add to the reasons given by him in support of it.

Appeal dismissed: case remitted.