Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bai Gungabai and others v. *Bhugwandas Valji and others, from the High Court of Judicature at Bombay; delivered the 24th May* 1905.

Present at the Hearing:
LORD DAVEY.
LORD ROBERTSON.
SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

The question on this Appeal is whether certain parts of the will of a Hindoo 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 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 Gujerati, the execution 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 Jivauram.

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 admissionof his sons (if any) on attaining th e 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 Hindoo 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 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 pre- "deceasing 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 Valiabhdass 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, 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.
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*, 2 Moo. P.C. 480, and *Fulton* v. *Andrew* L.R., 7 E. and I. A. 448. 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 pro-"pounded 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 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 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*, 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 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.