*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Tengachee Nachiar, deceased (now represented by Badar Bee)* v. *Habib Merican Noordin and others, from the Supreme Court of the Straits Settlements (Settlement of Penang); delivered the* 20*th July*, 1909.

---

Present at the Hearing:

LORD MACNAGHTEN.
LORD ATKINSON.
LORD COLLINS.
SIR ANDREW SCOBLE.

[*Delivered by Lord Macnaghten.*]

The controversy on this Appeal is limited to a question between the representatives of the next-of-kin of Mahomed Noordin living at the time of his death, and the persons beneficially interested under his will in his residuary real estate, who are generally called "the residuary legatees" in the various proceedings to which the testator's will has given rise.

The testator died in April, 1870. His will, dated 10th of May, 1869, was duly proved in May, 1870. By the 6th clause he gave certain lands in Penang, which he directed to be called "the Wakkoff of Mahomed Noordin," to trustees for certain purposes. Of those purposes two, and two only, are now subsisting, undetermined and capable of taking effect. One is the payment of

[30] P.C.J. 84. L. & M.—100—21/6/09. Wt. 98.

$20 per month to the managing body of a school in Chulia Street, Penang; the other is the payment of $40 per month for the maintenance of one Kulsome Beebee and her husband, Habib Mahomed Merican Noordin, a son of the testator, with remainders over.

There has been a great deal of litigation about the construction of the testator's will. The effect of it, so far as material to the present question, may, however, be stated shortly.

By a decree of the Supreme Court of the Straits Settlements, made by Sir William Hackett, C.J., in March, 1872, it was declared that the gifts of two sums, amounting together to $700 per annum, for the performance of Kandoories, or Mahomedan feasts for the poor for ever (being one of the purposes to which the income of the Wakkoff was to be applied), were void, as not being lawful charitable gifts, and "that the gifts fell into the undevised residue of the testator's estate."

Under this decree the sum of $700 per annum out of the rents and profits of the Wakkoff was for some years, and apparently with the assent of all parties interested, paid to the testator's next-of-kin. At some time, however, before the year 1889 the trustees ceased to make any payments either to the next-of-kin out of the income of the Wakkoff or to the residuary legatees out of the income of the testator's residuary real estate.

In 1889, in a suit numbered 229 of 1889, relief was sought by the Plaintiff in that suit, who was apparently one of the next-of-kin and also one of the residuary legatees, in respect of the annual sum of $700 and in respect of the testator's residuary real estate. The trustees, who were made Defendants, set up various defences. Among other grounds of defence they alleged that they had been advised that the said sum of $700 per

annum was payable under Sir William Hackett's decree to the residuary legatees and not to the next-of-kin. In reply to this defence the Plaintiff, who sued on behalf of herself and all other persons in the same interest, pleaded (1) that the Defendants were estopped from contending that the $700 was not payable to the next-of-kin, and (2) that the decree of 1872 remained in full force, and that the points raised in the suit in which that decree was made and those pleaded in the then pending suit were the same.

By a decree made on the 20th of March, 1891, Goldney, J., declared that the Defendants were estopped from alleging that the sum of $700 was not wholly undisposed of by the will, and various consequential accounts and inquiries were directed.

On the 11th of August, 1903, by the decree of Law, J., on the petition of the only daughter of the eldest son of the testator, who was the original Appellant in this Appeal, it was declared that the property comprised in the Wakkoff of Mahomed Noordin was at the death of the testator vested in his trustees and executors in trust for the next-of-kin of the testator living at the time of his death, subject to the monthly payments of $20, $60 and $40, and that the property was then vested in the Respondents, in trust for the next-of-kin of the testator or their personal representatives, subject to the said monthly payments of $20 and $40 only, the monthly payment of $60 having lapsed since the testator's death.

From this decree there was an appeal, and on the 4th of February, 1904, it was declared by the Court of Appeal that the whole of the rents and profits of Mahomed Noordin's Wakkoff were (subject to the monthly payment of $20 to the school in Chulia Street and to the monthly payment of $40 for the maintenance of Kulsome Beebee and Habib Mahomed Merican Noordin)

vested in the trustees as part of the undisposed residue of the testator's estate, and the Court reserved the question whether the said residue should pass to the residuary legatees or to the next-of-kin.

On the 4th of July, 1905, on the appeal coming on for further hearing, the Court ordered that the interlocutory judgment of the 4th of February, 1904, should be varied by omitting the word "undisposed" before the word "residue," and that so much of the judgment of the 11th of August, 1903, as declared that the lands mentioned in Clause 6 of the will were at the death of the testator vested in the trustees in trust for the next-of-kin be set aside, and the Court declared that the said lands were vested in the said trustees in trust for the residuary legatees, save and except the two yearly sums amounting to $700, which yearly sums were payable to the testator's next-of-kin, and the Court affirmed the decree of the 11th of August, 1903, save as varied by their judgment and the interlocutory judgment of the 4th of February, 1904, as amended by the decree.

The ground of the decision was, as appears from the opinion delivered by Cox, C.J., in which his colleagues concurred, that the residuary legatees were estopped by the judgment of Hackett, C.J., so far as regarded the yearly sum of $700, which had always been dealt with as belonging to the next-of-kin. "Their right to it," said the C.J.,

> has been expressly recognised by the judgment of Goldney, J., of the 20th of March, 1891, in Suit 229 of 1889. The decree in that case was subsequently served on such of the legatees as were not parties to the suit, and is therefore binding upon them (Civil Procedure Ordinance, Sec. 122). I am of opinion we must hold, as was held in the judgment referred

> to, that the legatees are estopped from denying the right of the next-of-kin to the sum of $700, which should be paid to the next-of-kin as heretofore. But I am unable to carry the estoppel further. This sum forms a small portion (about one-twelfth) of the total income yielded by the properties mentioned in Clause 6, and I can find nothing in the case from which it can be inferred that the next-of-kin have been recognised as entitled to anything beyond the $700. I hold, therefore, that the legatees are estopped only with regard to the $700, and that the rest of the property must pass to them.

From the Order of the 4th of July, 1905, this Appeal has been brought on behalf of the next-of-kin. On their behalf it was submitted that the order appealed from should be reversed or varied, and that it should be declared that the whole of the rents and profits of the Wakkoff and the corpus thereof, subject only to the monthly payments of $20 and $40, became vested in the trustees for the next-of-kin of the testator, or the persons deriving title under them, as undisposed-of estate of the testator.

It appears to their Lordships that the decree of Sir Wm. Hackett, C.J., of the 13th of March, 1872, was a decision on the construction of the testator's will as to the destination of funds released from the operation of the trust declared by the 6th clause of the will. The records of the Court do not show whether that decree was or was not pronounced in the presence of, or served upon, all parties interested in the question. But it appears from the judgment of Cox, C.J., already quoted, that the decree of the 13th of March, 1872, was recognised, or re-affirmed, by the decree pronounced by Goldney, J., on the 20th of March, 1891, in Suit No. 229 of 1889, and that the latter decree was duly served on such of the residuary legatees as were not parties to the suit, and is therefore binding upon all the residuary legatees.

The result is that it appears that the point raised by this Appeal has already been adjudicated upon. There is here, as there was in the case of *Peareth* v. *Marriott*, to which Mr. Levett referred (22 Ch. Div., 182), a decree *inter partes* on the very same subject. In the words of the Digest, Lib. XLIV., t. 2, s. 7., "exceptio rei judicatæ obstat quotiens eadem quæstio inter easdem personas revocatur." It is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal. If the decision was wrong, it ought to have been appealed from in due time. Nor can the residuary legatees be heard to say that the value of the subject-matter on which the former decision was pronounced was comparatively so trifling that it was not worth their while to appeal from it. If such a plea were admissible, there would be no finality in litigation. The importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute.

Their Lordships will therefore humbly advise His Majesty that the order appealed from should be varied by omitting so much thereof as purports to vary the decree of the 11th of August, 1903, and to amend the interlocutory judgment of the 4th of February, 1904.

Their Lordships think that, in the peculiar circumstances of the case, the costs of all parties may be paid out of the estate as between Solicitor and Client.

LONDON: Printed for His Majesty's Stationery Office
By LOVE & MALCOMSON, LTD., Dane Street, High Holborn, W.C.
1909.