sion reached by the Full Bench of the Madras High Court in the case of *Chenna Reddi* v. *Peddaobi Reddi*[1] is really correct. But for the reasons I have stated, I consider my own personal opinion in these matters as of no particular importance. Therefore I concur in the order which my learned colleague has proposed.

Rule made absolute.

R. R.

[1] (1909) 32 Mad. 416.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

GANGAPPA REVANSHIDAPPA HUNDEKAR, APPLICANT, *v.* GANGAPPA MALLESHAPPA HUNDEKAR AND OTHERS, OPPONENTS.*

1914.
January 19.

Leave to appeal to Privy Council—Final order—Interlocutory order—Order rejecting an application for bringing on record the legal representatives of a deceased party to a pending appeal—Amended Letters Patent, clause 39—Civil Procedure Code (Act V of 1908), sections 109, 110.

The applicant, claiming to be the legal representative of a deceased party to a pending appeal, applied to have his name brought on the record. The High Court disallowed the application and ordered the names of the heirs of the deceased to be substituted. The applicant applied for leave to appeal to His Majesty in Council from the order rejecting the application :—

Held, that the order having been passed on an application in a pending appeal, was not a final, but an interlocutory order ; and that no appeal lay from it to His Majesty in Council under the provisions of clause 39 of the Amended Letters Patent.

THIS was an application for leave to appeal to His Majesty in Council.

One Gangappa Rudrappa obtained a decree against Chanbasawa on the 12th February 1909, declaring that he was the adopted son of Rudrappa, the deceased husband of Chanbasawa. She appealed to the High Court ; and adopted one Virupakshappa on the 12th May 1909. Virupakshappa applied to the High Court on the 7th

* Civil Application No. 545 of 1913.

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August 1909 to be joined as a co-appellant with Chanbasawa. The application was granted on the 13th idem. Chanbasawa died on the 15th October 1910; and Virupakshappa died on the 3rd July 1912.

The applicant, Gangappa Revanshidappa, applied to the High Court to be brought on the record as the legal representative of Virupakshappa. He based his claim on a will alleged to have been made in his favour by Virupakshappa. The High Court sent down an issue to the lower Court to determine the factum and validity of the alleged will. The finding was duly certified. The High Court held that the will was not proved; and rejected the applicant's application on the 29th August 1913. On the same day, the High Court granted the application made by the natural heirs of Virupakshappa to be brought on the record as the legal representatives of Virupakshappa.

The applicant applied to obtain leave to appeal to His Majesty in Council from the order rejecting his application.

Nilkanth Atmaram, for the applicant:—I admit that I have no right to appeal under the Civil Procedure Code, as the order is not one passed on appeal. Still, I have a right to appeal under clause 39 of the Amended Letters Patent. Further, the order in question is not interlocutory but final; for the rejection of my application has absolutely debarred me from having anything to do with the appeal.

K. H. Kelkar, for opponent No. 1.

Setlur, with *G. S. Mulgaonkar*, for opponents Nos. 2 to 4:—The present order is not appealable under clause 39 of the Letters Patent. It is not a final order and does not affect the merits of the case: see *Aben Sha Sabit Ali* v. *Cassirao Baba Saheb Holkar*[1].

[1] (1882) 6 Bom. 260.

SHAH, J. :—This is an application for leave to appeal to His Majesty in Council, arising under the following circumstances :—

A suit was brought by one Gangappa Rudrappa Hundekar in the Court of the First Class Subordinate Judge at Bijapur, substantially to have it declared that he was the adopted son of the deceased Rudrappa Hundekar against Chanbasawa *kom* Rudrappa and others. The suit was decided on the 12th February 1909 in favour of the plaintiff. Chanbasawa preferred Appeal No. 61 of 1909 to this Court against the decree in the said suit. On the 7th August 1909 an application was made by one Virupakshappa to be joined as a co-appellant with Chanbasawa and to continue the appeal with her alleging that he was adopted by Chanbasawa on the 12th May 1909. The application was granted on the 13th August 1909 subject to any objections the respondents might have to urge at the hearing. Chanbasawa is stated to have died about 15th October 1910 ; but apparently no application was made by anyone to be brought on the record as her légal representative. Virupakshappa died on the 3rd July 1912.

One Gangappa Revanshidappa Hundekar made an application (No. 547 of 1912) to this Court to be brought on the record as the legal representative of the deceased Virupakshappa. He claimed to be his legal representative on the strength of a will said to have been executed by Virupakshappa. An issue was sent down to the lower Court as to the factum and validity of the alleged will. The lower Court recorded the evidence and returned its finding to this Court. The application was then heard by us with the result that the will of Virupakshappa was held not proved. We accordingly rejected the application on the 29th August 1913. On the same day we granted the application of the natural heirs of Virupakshappa (Civil Application No. 572 of 1912) to

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be brought on the record as the legal representatives of Virupakshappa. The main appeal (No. 61 of 1909) is still pending in this Court.

The petitioner (Gangappa Revanshidappa Hundekar) now applies to this Court for leave to appeal to His Majesty in Council against the order dated 29th August 1913.

It is not disputed in this case that the value of the subject-matter of the suit and the value of the subject-matter on the proposed appeal is far in excess of rupees ten thousand. The order, which is sought to be appealed from, involves questions respecting property exceeding rupees ten thousand in value.

It is not suggested by the petitioner that there is any substantial question of law. But it is argued that as the order of this Court does not affirm any decision of the lower Court it is not necessary that the proposed appeal should involve any substantial question of law. So far I think the argument is good. In this case there is no decision of the lower Court which this order can be said to affirm. The order is made on an application to this Court with which the lower Court would have nothing to do in the ordinary course. An issue was sent down to the lower Court apparently for the convenience of the parties to have the voluminous evidence recorded by that Court and a finding was called for. This finding or opinion is clearly not a decision of the lower Court within the meaning of section 110, Civil Procedure Code. Under Order XXII, Rule 5, read with section 107, Civil Procedure Code, it was the duty of this Court to determine the question. I am, therefore, of opinion that if the petitioner is otherwise entitled to appeal he has to satisfy only one condition under section 110, Civil Procedure Code, relating to the value of the property involved in the suit or the appeal and that the case fulfils that condition.

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The important question that remains to be considered is, whether the petitioner is otherwise entitled to appeal to His Majesty in Council. It is conceded by the learned pleader for the petitioner that the order complained of is not covered by section 109, Civil Procedure Code. It is clear that clauses (*b*) and (*c*) have no application and clause (*a*) does not apply, as the order is not passed *on appeal* at all. The appeal is still pending and no order is made thereon. This is only an order on an application in the appeal. But it is urged on behalf of the applicant that he has got a right to appeal to His Majesty in Council under clause 39 of the Amended Letters Patent. Under this clause any person may appeal to His Majesty in Council from any final judgment, decree or order of any Division Court from which an appeal shall not lie to this High Court under the provisions contained in the fifteenth clause of the Letters Patent. The order, no doubt, is an order of a Division Court from which there is no appeal to this Court under the fifteenth clause of the Letters Patent. The question, therefore, that remains to be considered is whether it is a final judgment or order within the meaning of clause 39. I think that this is not a final judgment or order as contemplated by the Letters Patent. It is an order made in a proceeding incidental to the appeal. It is an order which the Court can make under Order XXII of the Code of Civil Procedure for the purpose of ascertaining the legal representatives of the deceased Virupakshappa. The order does not affect the merits of the appeal, and it certainly does not decide any matter in dispute between the parties to the appeal.

A final judgment or order has been thus described in Halsbury's Laws of England, Volume 18, paragraph 490 :—

" A judgment or order which determines the principal matter in question is termed ' final '. An order which does not deal with the final rights of the parties,

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but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure ; or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory'. . . . . . The decisions on the question whether an order is 'final' or 'interlocutory', therefore, must be grouped with reference to the particular purpose for which each was given."

If we apply this test in the present case—and I see no reason why it should not be applied—it is clear that the order in question is not final but interlocutory. It decides no matter in appeal. It is made before judgment in appeal and gives no final decision on the matters in dispute but is merely on a matter of procedure. Even Virupakshappa's status is not finally determined yet. He was brought on the record as a co-appellant in 1909. In consequence of his death having occurred before any adjudication of his rights, it became necessary to determine as to who should be allowed to occupy his place in the litigation for the purpose of continuing the appeal on his behalf. The matter in dispute between the parties would be obviously the matter in appeal and not in an incidental proceeding of this kind: see *Bozson* v. *Altrincham Urban District Council*[1]. The observations of Sargent, C. J., in *Aben Sha Sabit Ali* v. *Cassirao Baba Saheb Holkar*[2] lend support to the conclusion that the order in question is not "final".

It appears to me that the result of holding the order to be final within the meaning of clause 39 of the Letters Patent would be somewhat anomalous. If such a question had arisen during the pendency of the suit in the lower Court, and if an order, such as we have made, had been made by the trial Court, it is clear that no appeal could have been preferred against the order. This follows from the fact that no appeal is provided by Order XLIII, Rule 1, against such an order under Order XXII, Civil Procedure Code ; while, according to the petitioner's contention there could be an appeal to

(1) [1903] 1 K. B. 547.

(2) (1882) 6 Bom. 260.

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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.

1914. January 27.

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

Evidence Act (I of 1872), sections 40, 41, 42 and 44—Probate and Administration Act (V of 1881), 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.