

ORIGINAL CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Bayley.

SHAIK MOOSA' (ONE OF ORIGINAL PLAINTIFFS), APPELLANT, v. SHAIK
ESSA' AND OTHERS, RESPONDENTS.*

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January 25.

Probate when necessary in cases of Hindu wills—Probate not necessary in case of Mahomedan will—Executor—Act XXVII of 1860—Right of one out of three executors to carry on a suit—Indian Succession Act (X of 1865), Sec. 187—Probate Act V of 1881, Secs. 92, 154—Hindu Wills Act (XXI of 1870)—Construction of Act—Intention of Legislature—Reference to “objects and reasons”—Reference to various forms of a Bill brought before the Legislature.

Previously to the passing of the Probate Act (V of 1881) executors appointed by such wills as fell within the Hindu Wills Act (XXI of 1870) acquired the same estate and interest in the property of their deceased testator with the same restrictions in representing the estate in a Court of Justice as obtained under English law.

All the sections of the Indian Succession Act (X of 1865) relating to grants of probate and letters of administration which were formerly incorporated in the Hindu Wills Act (XXI of 1870) are now (with the exception of section 187)⁽¹⁾ removed from that Act by section 154 of Act V of 1881, but are, with the exception of section 187⁽¹⁾, re-enacted *verbatim* in Act V of 1881. Section 187, however, still remains incorporated by reference with the Hindu Wills Act (see section 154 of Act V of 1881). The result is, that probate is necessary in case of such Hindu wills as fall within the Hindu Wills Act. But the omission from Act V of 1881 (which applies to all Mahomedans and Hindus) of any section corresponding to section 187 of the Indian Succession Act, and the retention of that section in the Hindu Wills Act shows that it was the intention of the Legislature that, except in cases falling under the Hindu Wills Act, an executor of any Hindu or Mahomedan will may establish his right in a Court of Justice without taking out probate. In cases, however, falling within the provisions of Act XXVII of 1860, debtors have still the right (under section 2 of that Act) of insisting upon a plaintiff-executor taking out probate.

Where A, one of three executors of a Mahomedan will, none of whom had taken out probate, desired to carry on a suit originally instituted by their testator to recover a share of an estate, all the other parties to the suit being desirous that the suit should be dismissed,

Held that A, under section 92 of the Probate Act (V of 1881), being only one of three executors, could not carry on the suit without first taking out probate of the testator's will.

* Suit 447 of 1880.

(1) Section 187 of the Indian Succession Act is as follows:—“No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the Province shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration under section 180.

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Held, further, that A., being an executor, had a right to carry on the suit and get in the assets of his testator in order to meet possible claims on the estate. The other parties to the suit who were beneficially interested in the estate, and who desired that the suit should terminate, had the remedy in their hands by putting the executor in funds to discharge the debts.

For the purpose of ascertaining the intention of the Legislature in passing an Act where that intention, so far as can be gathered from the Act itself, appears doubtful, the "objects and reasons" may be referred to.

It is not, however, permissible to refer, for this purpose, to the various forms in which the Bill was brought before the Legislature.

APPEAL from an order made by West, J.,⁽¹⁾ on the 1st May, 1883, whereby, upon the application of the defendants to the suit, he ordered, under section 32 of the Civil Procedure Code (Act XIV of 1882), that the name of the appellant should be struck out of the plaint and proceedings, and, further, with the consent of the plaintiffs other than the appellant, that the suit should be dismissed.

The suit was filed in 1880 by one Abdulla bin Khaliffa and his sister Fatma against Shaik Essá bin Khaliffa and others, and its object was to obtain a partition of the property of one Khaliffa who was father both of the plaintiffs and the defendants. The defendants resisted the suit, mainly on the ground that the plaintiffs were illegitimate, and that by various deeds of gift the deceased Khaliffa had made over his property to the defendants. The plaintiffs, on the other hand, contended that, according to the Mahomedan law, they were legitimate, and that the deeds of gift to the defendants were invalid.

On the 21st March, 1881, the suit was referred to arbitration, and by the order of reference it was directed that the defendant Shaik Essá should make certain monthly allowances to the plaintiffs which were to continue until further order.

On the 13th May, 1881, the plaintiff Abdulla died, and by his will he appointed his nephew Ahmed (his son-in-law), Shaik Moosá (the appellant), and his sister Fatma executors and executrix of his will.

On 20th June, 1881, by order of Court, the suit was revived, and the proceedings amended by adding as plaintiffs the heirs (the widow Shaika and the daughter Amina) and the executors (Shaik Moosá, Ahmed and Fatma) of the deceased plaintiff Abdulla.

⁽¹⁾ See I. L. R., 7 Bom., 266.

Subsequently to the revival of the suit the arbitration went on for nearly two years.

On the 6th April, 1883, Shaika and Fatma wrote a letter to their solicitors, Messrs. Smith and Frere, declaring that they had no right to any of the property claimed in the suit. On the 9th April they, together with Ahmed, left Messrs. Smith and Frere, and employed Messrs. Payne and Gilbert as their attorneys.

On the 24th April, 1883, Messrs. Macfarlane and Edgelow, the attorneys for the defendants, wrote to Messrs. Smith and Frere, who now represented only Shaik Moosá, giving them notice that an application would be made to the Court for an order striking out the name of the plaintiff Shaik Moosá from the record, and, further, for the dismissal of the suit by consent.

In an affidavit filed by him in support of the application, the defendant Shaik Essá stated that the will of the original plaintiff Abdulla had never been proved, and that, at meetings before the arbitrators, he had objected to the executors being allowed to act as executors until they had proved the said will. He further alleged that no notice of the order of revivor of the suit of the 20th June, 1881, had been given to him or the other defendants until after it had been obtained.

In resisting the application Shaik Moosá, in his affidavit, contended that, according to Mahomedan law, it was not necessary for him or his co-executors to take out probate in order to enable them to continue the suit; that the defendant Shaik Essá was acting in collusion with the plaintiffs Shaika, Fatma and Ahmed; that he believed that, when the accounts in the suit were taken, a large sum would be found due by the defendants to the estate of the deceased Abdulla; that he, as a creditor of the said deceased, and the other creditors were beneficially interested in the subject-matter of the suit.

The application was made to West, J., on the 1st May, 1883, who made an order striking out the name of Shaik Moosá from the proceedings⁽¹⁾. He did so on the ground that, under the Probate Act V of 1881, the appellant, not having taken out probate of Abdulla's will, was not entitled to represent Abdulla's estate, or to

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(1) See I. L. R., 7 Bom., 166.

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be a party to the suit. Having struck out the appellant's name as plaintiff, the learned Judge then dismissed the suit by consent of the parties remaining on the record.

Shaik Moosá appealed.

Hon. *F. L. Latham* (Acting Advocate General), *Jardine* and *Anderson* for the appellant.

Inverarity for the respondents *Fatma*, *Shaika* and *Ahmed*.

Lang for the remaining (original defendants) respondents.

Latham for the appellant.—The name of the appellant, who was a plaintiff, was struck out in order that the suit might then be dismissed by consent of the remaining parties. All the other parties to the suit, both plaintiffs and defendants, are members of the same family. Some private arrangement has, no doubt, been made as to the distribution of the property which is the subject-matter of the suit, and it was necessary to oust the appellant, who is an independent person, and who, being himself a creditor of the deceased *Abdulla* and in the interests also of *Abdulla's* other creditors, is desirous of securing the share which, if the suit proceeds, will be found to belong to *Abdulla's* estate. The other executors of *Abdulla's* will (*Fatma* and *Ahmed*) are members of the family, and careless of the creditors' interests. So the conflict now is between one executor (the appellant) and the whole family. The question is, whether the appellant, although he has not taken out probate of *Abdulla's* will, is entitled to represent *Abdulla's* estate, and, consequently, to be a plaintiff in this suit. In other words, does Act V of 1881 make it necessary for a person named as executor of a Mahomedan will to take out probate before he can represent the testator? The Court below held that, although there was no clause in that Act expressly requiring probate, yet that the general intention of the Act was so obvious as to destroy the inference suggested by the omission. I submit that the Act does not affect Mahomedans so far as regards probate. Section 187 of the Indian Succession Act (X of 1865), which does not apply to Hindus or Mahomedans, requires an executor to take out probate. Next comes the Hindu Wills Act (XXI of 1870), which has a very limited application in this Presidency, *viz.*, (a) to Hindu wills made in the town of Bombay, (b) to such wills made outside those limits,

but relating to property within them. Section 2 of that Act by reference incorporated section 187 of the Succession Act, thus making probate requisite for Hindu wills of the two classes to which Act XXI of 1870 applies. Next comes Act V of 1881. That Act is made applicable to all Hindus and all Mahomedans after 1st April, 1881; but by clause 3 of section 2 no application for probate, except in cases under the Hindu Wills Act, is to be received by any Court outside the Presidency town until authorized by Government. The necessity, then, for probate in cases of Hindu wills remains as it was. Probate is necessary in cases to which the Hindu Wills Act applies, and unnecessary where it does not apply. The question here, however, is with reference to a Mahomedan will. There is nothing in Act XXI of 1870 as to Mahomedan wills. Act V of 1881 no doubt applies to Mahomedans, but there is no section similar to section 187 of the Succession Act making probate necessary for Mahomedan wills. That section is neither embodied in the Act, nor incorporated by reference. It must have been intentionally omitted. The sections of the Succession Act which relate to probate and administration (see sections 179 *et seq.*), *with the exception of section 187*, are embodied in Act V of 1881 (see sections 4 *et seq.*) Section 186 of the former Act becomes section 11 of the latter, and section 188 becomes section 12, but there is no trace of section 187. That this was done intentionally appears from the fact that section 154 of Act V of 1881 amends section 2 of the Hindu Wills Act. It repeals it so far as it incorporates the sections of the Succession Act which relate to probate, because these sections appear in the Probate Act V of 1881, and, therefore, it was not necessary to retain them in the Hindu Wills Act; but, by the amendment, it again incorporates section 187, and that section only, into the Hindu Wills Act. This shows that the Legislature intended that probate should still be required for Hindu wills, to which the Hindu Wills Act XXI of 1870 applies, but for them only.

[SARGENT, C. J.—Although, no doubt, Act V of 1881 may have ultimately a larger operation, it appears that at present Act XXI of 1870 and Act V of 1881 apply to the same classes of Hindu wills, so that we have this anomaly—that for the same Hindu will it is necessary, under the former Act, to take out probate, and unnecessary under the latter Act.]

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That is so. Until the operation of Act V of 1881 is extended, both Acts apply to the same classes of wills. But we should read both Acts together, and where we are dealing with cases to which the Hindu Will⁸ Act applies we must add section 187 of the Succession Act. It is clear, then, that it was deliberately intended that section 187 of the Succession Act should be incorporated in the Hindu Wills Act which applies to certain classes of Hindu wills, and that it should not form part of Act⁷ V of 1881, which applies to Mahomedans as well as to Hindus

Again, if, as was held by the Court below, the provisions of section 12 of Act V of 1881 justify the inference that probate is requisite, the provisions of section 14 should lead us to the same conclusion as to letters of administration. No one, however, has ever suggested that letters of administration are compulsory.

Further, the Hindu Wills Act, under which probate is necessary, only applies to wills made on or after 1st September, 1870, in which year that Act was passed; but Act V of 1881 applies to the wills of persons "dying *before* or after 1st April, 1881," so that, if probate is held to be necessary, the Act must operate retrospectively, and probate must be immediately obtained for all Mahomedan wills however ancient. The Legislature could not have intended to impose this burden. The definition of executor in section 8 does not make it necessary for him to take out probate, nor does section 88, which gives him power to sue.

The intention of the Legislature is, as I have shown, clear from the Act itself; but I propose on that point to refer to the "objects and reasons" submitted to the Legislature on the introduction of the Bill, and also to the various forms in which the Bill was brought before the Council, *viz.*, first its original form, (2) after being submitted to the select committee, (3) as finally accepted and passed. The objects and reasons are signed by the Legal Member of Council who introduced the Bill. I refer to them, not as a guide to the construction of the Act, but to show the intention of the Legislature where, as here, the Act is ambiguous. Cites *In re Mew*⁽¹⁾; *Drummond v. Drummond*⁽²⁾.

(1) 31 L. J. Bkcy., 87.

(2) L. R. 2 Ch. Ap., 32.

Lang objected.

Latham.—I am not putting in evidence. I propose to read these documents as part of my argument.

[SARGENT, C. J.—If we ought not to look at them, we ought not to hear you read them.]

Lang as to whether the “objects and reasons” could be referred to.—I object to any reference to the objects and reasons. The state of the law can only be ascertained from the Acts themselves and from judicial decisions—*The Queen v. Bishop of Oxford*⁽¹⁾; *Martin v. Hemming*⁽²⁾; *Logan v. Earl of Courtown*⁽³⁾; *Ewart v. Williams*⁽⁴⁾. As to reference to the various forms of the Bill, no authority has been cited.

[SARGENT, C. J.—On the authority of *In re Mew*⁽⁵⁾ I think the objects and reasons may be referred to. I think they may be regarded as in the same position as the documents permitted to be used in that case. I would, however, myself base my decision rather on the established practice of this Court, where it has for many years been our custom, in cases like the present, to refer to the objects and reasons presented to the Legislature. Here we are asked to look at them for the purpose of ascertaining the intention of the Legislature in a case in which that intention, so far as appears from the Act itself, appears doubtful. Considering that these objects and reasons are really the formal statement made by the Legal Member of Council who introduced the Bill, I think we cannot refuse to allow them to be used. I do not, however, think we can go further, and look at the various forms in which the Bill was brought before the Legislature.]

BAYLEY, J.—I concur.

[Counsel then read the “objects and reasons” for the Bill from the Government of India Gazette of 3rd July 1879.]

The order of the Court below should be reversed on two grounds: first, because probate was not necessary to complete the title of the appellant to represent the estate of his testator, and he was entitled without probate to be a plaintiff in the suit; (2) because, if it

(1) 4 Q. B. Div. at p. 534.

(3) 13 Bea., 22.

(2) 18 Jur., 1002.

(4) 3 Dr., 21.

(5) 31 L. J. Bkcy., 87.

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was necessary, the learned Judge ought to have granted time in order that probate might be obtained. If this Court holds probate to be necessary, I ask that we may be permitted to take out probate.

Lang, contra.—The Court below dismissed the suit on the ground that all the heirs of the deceased plaintiff and the surviving plaintiffs and two of the executors consented to its dismissal. The only party objecting was the appellant who had no interest. I submit that under these circumstances, even if this Court decides against me on the other points, it will not allow the suit to go on.

The appellant objects to the dismissal of the suit on behalf of creditors. But its dismissal will not in any way prejudice the creditors. They can attach the property in the hands of the heirs. The will of Abdulla contains no direction as to payment of debts.

What was the position of the Mahomedans before Act V of 1881? What right had Abdulla to appoint the appellant executor so as to give him any rights as against the heirs? The statement of the law as regards Hindus on this point in the case of *Haji Ismail*⁽¹⁾ applies to Mahomedans. No person or persons could be appointed save with the consent of all the parties interested. See also *Lalchand Ramdayal v. Guntibai*⁽²⁾.

Previously to any legislation, Mahomedan wills were regarded as deeds of gift, and were judged according to the Mahomedan law. A Hindu or Mahomedan executor was not in the same position as an English executor. He was merely manager of the estate. The estate did not vest in him. Then came Act XXVII of 1860, section 2 of which made a certificate or probate or letters of administration necessary for the purpose of collecting the debts of an estate. An executor cannot recover debts unless he takes out probate. Next came Act V of 1881, which has made probate necessary in all cases. Application for probate cannot now be made except under Act V of 1881: see sections 150, 151, 152. All the property of a deceased man vests in his executor, and he is the legal representative for all purposes (sec. 4). As to the position of an executor independ-

(1) I. L. R., 6 Bom. at p. 458.

(2) 8 Bom. H. C. Rep., O. C. J., 140.

ently of this Act, see *Māneklāl Atmārām v. Manchershá Dinshá*⁽¹⁾;
Srimati Jaykali Debi v. Shabnúth Chatterjee⁽²⁾

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As to Act V of 1881 I submit that West, J., was right in holding that, although section 187 of the Succession Act was not incorporated with it, yet the general intention of the Act is obvious, *viz.*, that probate must be obtained. The Court below did not look at the "objects and reasons". It based its judgment on the Act itself; and, looking at the Act only, no other conclusion is possible. Section 12 implies the necessity of probate, because the inference is that, until probate is granted, the acts of an executor *may* prove to be invalid: *e. g.*, a subsequent will may be found, and, if so, the executor's acts under a previous will are invalid, unless he is protected by probate. If he is, then his acts are valid. Again, does not section 82 imply that without probate no executor can act? It is contended that probate is optional. Suppose there are four executors—one takes out probate, the others refuse to take out probate, but claim their right to act without it. What is the result under section 82? The section is an absurdity if the intention of the Act was to leave probate optional, for it purports to deprive executors of their powers, because they do not do something which the Act does not require them to do. From section 90 the inference is stronger. For, by section 4, all the property of the deceased vests in the executor. If probate be optional, and if that section applies to executors with probate, then by section 90 we have this anomaly, that an executor without probate has unlimited power to sell the estate which has vested in him, and can give a good title to it, while an executor who has taken out probate has only a limited power, and must obtain the permission of the Court to sell the estate.

[SARGENT, C. J.—An estate vests in a trustee, but his power over it is limited.]

But, section 4 says "for all purposes", so that, if it be optional, no executor ought to take out probate, unless he wishes to hamper himself in dealing with the estate. Suppose there are two executors, one of whom proves the will; can one do as he pleases, and must the other get the sanction of the Court?

(1) I. L. R., 1 Bom. at p. 275.

(2) 2 Beng. L. R., O. C. J., 1.

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Again, section 92 expressly gives to one executor who takes out probate the right to exercise the powers of all. Surely, the inference is that one who has not taken out probate has not such power. Suppose one executor takes out probate, and the other does not: can the latter exercise the powers of both? Can the former override the latter? If the Act does not require probate, he cannot, for the latter cannot be forced to do what the Act leaves optional. Again, section 98 requires an executor "with probate to file an inventory. But there is no such obligation on an executor who has not proved the will. He can only be compelled by a regular suit for administration. If this Court holds that probate is optional under Act V of 1881, it must hold that the Act contemplated two classes of executors, one of which takes out probate and has limited powers and prescribed obligations, while the other is left free. In England an executor who acts without probate is subject to a penalty—Stat. 55 Geo. III, c. 184, sec. 37; see Williams on Executors (8th ed.), 323. If he does not take out probate, he must renounce. Here, if probate is optional, he cannot be compelled to renounce.

Again, section 102 implies that probate shall always be obtained: otherwise after the word "probate" the words "in cases where probate is obtained" would have been inserted. Is an executor without probate to observe the rules laid down in sections 100, 101, 102 and 103?

Further, see section 127. Can the Legislature have intended to provide for the protection of a minor's property where the executor has obtained probate, and to omit making any provision for cases in which no probate was obtained? Clearly it intended that probate should always be obtained, and this section was considered sufficient.

In this case I submit that the appellant is a wholly unauthorized person, and he wishes to continue a suit which all the parties interested desire to terminate. The other two executors are heirs of the deceased. Two out of three executors can release a debt, and may compromise a suit—section 92, Act V of 1881. One executor cannot sue alone. So that, if this order is reversed, the appellant cannot proceed against the wish of his co-executors.

As to giving the appellant time to take out probate, there is no statement in the affidavits that he intends to apply. Ten months have elapsed since notice of this application was given.

Inverarity for Fatma and Ahmed on the same side.—My clients are co-executors with the appellant. He cannot continue the suit independently of them. By doing so he would be exercising alone the powers of all three. That is forbidden by section 92 of Act V of 1881, which applies, whether probate is optional or not.

Latham in reply.

SARGENT, C. J.—In this case a suit was filed by Abdulla bin Khaliffa and his sister Fatma against Essá bin Khaliffa and others to obtain a share of alleged joint family property in the possession of the defendants. On the 13th May, 1881, the plaintiff Abdulla died, leaving him surviving, his widow Shaika and his sister Fatma, and leaving an alleged will whereby he appointed his said sister Fatma, her son Ahmed, and one Shaik Moosá Shaik Latiff his executrix and executors. On 30th June, 1881, an order was made *ex parte* by the Judge in chambers, substituting the names of Shaik Moosá, Fatma and Ahmed, as the executors and executrix of the will of Abdulla, and the said Fatma and Shaika, as his heirs, as plaintiffs in the place of the said Abdulla. The arbitration before two arbitrators, to which the suit had been referred by order of the Court on 22nd March, 1881, was carried on until 1883, when all the parties, except Shaik Moosá, having come to an amicable arrangement, the defendants appealed to the Court to have the name of the said Shaik Moosá struck off the record as a plaintiff; and that the suit be dismissed by the consent of all the parties. Mr. Justice West ordered this to be done, being of opinion that, since the passing of Act V of 1881, a Mahomedan cannot claim to represent the estate of his testator unless he has taken out probate. From that order Shaik Moosá now appeals.

Now the law regarding the effect of a grant of probate and letters of administration by the High Courts to natives of this country is summarized in two judgments of this Court which, taken together, contain a complete exposition of the law. Mr. Justice Green, delivering judgment in *Máneklál Atmáráam v. Manchershá*⁽¹⁾, says:

(1) I. L. R., 1 Bom. at p. 275.

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“It would seem that, independently of the provisions of the Indian Succession Act X of 1865, as applied by Act XXI of 1870 to the wills executed, within the local limits of the ordinary civil jurisdiction of the High Courts, by Hindus after 1st September, 1870, the executors of a Hindu do not, in the character merely of executors, take any estate, properly so called, in the property of the deceased—or, in other words, that the mere nomination of executors, though followed by probate, does not, of itself, confer any estate on the executors further than the estate he may have by the express words of the will, or as heir of the testator.”

Mr. Justice Green was dealing in that judgment only with the case of Hindus; but the law, as stated by him, equally applies to all persons in India not usually designated British subjects. In *In re Hájí Esmáíl Hájí Abdulla*⁽¹⁾ Westropp, C. J., delivering the judgment of the Court, after discussing the charters of the late Supreme and present High Courts, says: “The result is this, in cases to which the Indian Succession Act does not apply, that probates and letters of administration granted by this Court in respect of such persons (meaning Hindus, Mahomedans and other persons not usually designated as British subjects) take effect only for the purpose of recovering debts and securing debtors paying the same, except so far as is otherwise provided by Act XXVII of 1860. It is, therefore, only for this purpose that probate can be granted.”

Such was the limited effect of probate and letters of administration granted to persons in this country other than those usually designated British subjects, or in such cases relating to the wills and intestacies of Hindus, as the provisions of the Indian Succession Act had been made applicable to by the Hindu Wills Act XXI of 1870. Amongst the provisions so made applicable to Hindus by that Act are those contained in sections 179 and 187, by the former of which it is declared “that the executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such”; and by the latter “that no right as executor or legatee can be established in any Court of Justice unless a Court of competent jurisdiction within the province shall

(1) I. L. R., 6 Bom. at p. 459.

have granted probate of the will under which the right is claimed, or shall have granted letters of administration under the 180th section." Executors appointed by the particular class of Hindu wills contemplated by the Hindu Wills Act thus acquired the same estate and interest in the property of the deceased, together with the same restrictions as to representing the estate in a Court of Justice, as obtained by English law.

Such was the state of the law when Act V of 1881 came into force, which applies to the case of every Hindu, Mahomedan, Buddhist and persons exempted under section 332 of the Indian Succession Act of 1865 dying before, on or after the 1st day of April, 1881, with a proviso that, except in the cases to which the Hindu Wills Act, 1870, applies, no Court in any local area beyond the limits of the towns of Calcutta, Madras and Bombay and the territories administered by the Chief Commissioner of British Burmah, and no High Court in the exercise of the concurrent jurisdiction over such area shall receive applications for probate or letters of administration until authorized to do so by the local Government with the sanction of the Governor General in Council. It thus appears that, although the immediate operation of the Act was confined to persons living in or having property within the Presidency towns, it was in contemplation to apply the Act to all British India. Now by section 154 of Act V of 1881, section 2 of the Hindu Wills Act is amended by substituting the words "and section 187" for the words commencing "section 187" and ending with "administrator with the will annexed". The effect of this amendment is that the sections of the Indian Succession Act relating to grants of probate and letters of administration which had been incorporated in the Hindu Wills Act are removed from that Act, with the exception of section 187. On the other hand, all the above sections of the Indian Succession Act, excepting section 187, are incorporated *verbatim* in the Act of 1881. It is impossible to suppose that this exclusion of section 187 from the Act of 1881 could have been done inadvertently. On the contrary it bears, from the very manner in which it was done, all the marks of having been done advisedly and of intention. The effect is to bring all Hindus, Mahomedans and other persons exempted from the operation of the Indian Succession

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ion Act by section 332 of that Act either immediately or as soon as the local Government with the assent of the Governor General in Council may think fit to all the provisions of that Act relating to grant of probate and letters of administration, *excepting section 187*, which, however, remains in force in those cases to which the Hindu Wills Act of 1870 was made applicable. The object seems to have been to frame an Act which would be applicable to all natives of this country, whilst leaving the existing law as to those Hindus, to whom the Hindu Wills Act applied, untouched. Not only, therefore, is there no express provision in the Act of 1881 making section 187 of the Indian Succession Act applicable to Mahomedans and Hindus (except in such cases of Hindu Wills as the Hindu Wills Act applies to), but it would appear that, so far as intention can be gathered from the express provisions of the Act, it was the intention of the Legislature to exclude its operation. We gather from Mr. Justice West's judgment that whilst feeling the force of this argument he was of opinion that "Act V of 1881 must be looked at as regards Mahomedans just as if the Act of 1870 had never existed." But that, it appears to us, would be to disregard the above inference as to the intention of Legislature to be gathered from the manner in which the sections of the Hindu Wills Act relating to grant of probate and letters of administration have been introduced into the Act of 1881 at the same time that section 187 has been studiously excluded,—an inference which from its nature applies equally to all persons made subject to the provisions of that Act.

Much reliance, however, has been placed on section 12 of Act V of 1881. This section, as showing a contrary intention, provides that probate of a will when granted establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such. We are, however, unable to agree with the learned Judge in the Court below that this is tantamount to saying that "until probate is taken out" there is no will at all exacting recognition of the disposition made and the authority conferred by it. The section appears to us to be intended to be a condensed statement of the English law, which regards probate as the authenticated evidence of the will itself from which the executor derives his title, and by virtue of which the property of the

testator vests in him from the death of the testator (Williams on Executors, p. 239, 4th ed.). It was urged, indeed, that inconvenience would arise from a debtor paying to a creditor who had not taken out probate, and being called on again to pay by the executor who had taken it: but, in truth, such inconvenience cannot arise when it is remembered that the executor, (*i. e.*, as defined in section 2) is declared by section 4 to be the legal representative of the deceased for all purposes, and that all the property of the deceased is stated to vest in him as such,—a provision which enables the executor before probate to give a valid discharge to the debtor, and places him in the same position in that respect as an executor by English law.

Upon the whole we are unable to adopt the construction placed by the Court below on the provision of the Act of 1881, and are of opinion that whilst it is framed, like the Indian Succession Act, upon the basis of the English law, it differs in one important respect in allowing an executor to establish his right in a Court of Justice without taking out probate of the will. This, however, is, of course, subject to the right reserved to debtors by section 2 of Act XXVII of 1860, which remains unrepealed, to insist upon the plaintiff taking out probate where circumstances are such as that Act contemplates. The present suit, however, is not one to recover a debt properly so called, but to obtain a share of the family property from the other members of the family, and does not, in our opinion, fall within the purview of the Act of 1860. We are, therefore, of opinion that, having regard to sections 4 and 88 of Act V of 1881, the names of Fatma, Ahmed and the present appellant Shaik Moosá were, from every point of view, properly placed on the record.

The question, however, remains to be considered as to what is the effect of Fatma and her son wishing to withdraw from the suit. Section 92, adopting the rule in equity (see Williams on Executors, p. 819), provides that “when there are several executors or administrators, the powers of all, (amongst which is the power to sue,) may, in the absence of any direction to the contrary in the will or letters of administration, be exercised by any one of them who has proved the will or taken out administration.” Applying that section to the circumstances of the present case, it follows, we think, that this suit could not be carried on by Shaik Moosá alone without first

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taking out probate, and that he alone would not represent the deceased Abdulla for the purposes of section 365 of the Civil Procedure Code. A passage was, indeed, cited from the *Hidaya* to show that by Mahomedan law any one executor might sue; but since the passing of Act V of 1881 the powers of Mahomedan executors in cases in which that Act applies are no longer determined by Mahomedan law, but by the provisions of that Act. Now, although the motion was, in form, one to have Shaik Moosá's name removed from the record, and then to have the plaint then dismissed by the consent of all the parties remaining on the record, we think we ought to regard it as virtually one to have the plaint dismissed, on the ground that all the parties to it wish for it, except Shaik Moosá, and that he cannot proceed with the suit alone—and in the absence of circumstances justifying an adjournment, as asked for on behalf of Shaik Moosá to give him time to consider whether he will take out probate, we think the motion would be properly granted. Shaik Moosá, however, has sworn that he is a creditor of the estate to the extent of some Rs. 3,000. Other creditors have filed a suit, (No. 72 of 1879,) which is still pending. Shaik Moosá is, therefore, in his strict right when he seeks to get in the assets to meet possible debts on the estate. The parties beneficially interested in the estate have the remedy in their hands by putting the executrix and executors in funds to discharge the debts. We must, therefore, reverse the order of the Court below so far as it directs that the name of Shaik Moosá should be removed from the record, and vary the order dismissing the suit by directing that it stand dismissed, unless Shaik Moosá within two calendar months apply for probate. In default of his doing so he is to pay defendants their costs of this motion throughout: on the other hand, if Shaik Moosá proceed with the suit, defendants must pay him his costs of this motion throughout.

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