

(1894) 03 CAL CK 0003
In the Calcutta High Court

Prem Lall Mullick and Others

APPELLANT

Vs

The Administrator-General of Bengal

RESPONDENT

Date of Decision : 16-03-1894

Acts Referred:

Administrator Generals Act, 1874 — Section 31
Hindu Wills Act, 1870 — Section 5
Succession Act, 1865 — Section 179, 187, 191

Citation : (1894) ILR (Cal) 732

Hon'ble Judges : W. Comer Petheram, C.J.; Trevelyan, J.; Prinsep, J

Bench : Full Bench

Judgement

W. Comer Petheram, C.J.—The question we have to consider is whether the executor appointed by a Hindu testator who made his will in 1889, and died in 1891, can, after he has obtained probate, transfer the estate, effects and interests, vested in him by virtue of such probate, to the Administrator-General u/s 31 of the Administrator-General's Act (II of 1874). Mr. Justice SALE has come to the conclusion that he cannot, as he thinks that the estate of a Hindu is not within any of the provisions of the Act, except Sections 17 and 18, which are expressly made applicable to such estates. The argument on both sides has dealt, not only with the Act upon which we have now to put a construction, but with the history of the office of Administrator-General, and with the conditions under which the various Acts by which it has been constituted have been passed, and in what I have to say on the subject I propose to follow the same course.

2. The office was first constituted by Act VII of 1849 to supersede that of Ecclesiastical Registrar, and that Act deals exclusively with the estates of British subjects dying within the Presidency of Fort William in Bengal. Act VIII of 1855 was on the 3rd of March 1855 substituted for Act VII of 1849 which was then repealed. The Act of 1855 deals with the three Presidencies, and contains special provisions with reference to the estates of Mahomedans and Hindus. Section 9 provides in general terms that any letters of administration or letters "ad colligenda bona" granted by the Supreme Court shall, unless they are granted to

the next of kin, be granted to the Administrator-General, in preference to a creditor or next friend. Section 10 defines "next of kin." Section 11 provides that the Administrator-General must take proceedings to obtain letters of administration of the estates of all persons, whether British subjects or not, who were not Mahomedans or Hindus, who have left more than Rs. 500 within the jurisdiction of the Supreme Court, when no person has within a month applied for administration. Section 12 provides that upon the death of any person, whether a Mahomedan or Hindu or not, and where the assets are in danger, the Court may grant administration to the Administrator-General, and Section 14 provides that the Court may in such cases enjoin the Administrator-General to take possession of the assets. In 1855 there was no statutory law in this country relating to the administration of either testate or intestate estates, and in the case of Hindu estates the executor or administrator of the deceased took no estate in his property equivalent to that taken by the personal representative of a deceased person under English law, but was merely an agent for the purpose of distributing the property according to law or according to the will of the deceased-Shnro Bibi v. Baldeo Das 1 B.L.R. A.C. 24. In 1865 the Indian Succession Act (X of 1865) was passed dealing with the succession to all persons dying in British India, except Hindus, Mahomedans and Buddhists (Section 331), and except any of the members of any race, sect or tribe in British India or any part of such race, who might be exempted from its provisions by the Governor-General in Council (Section 332). Section 179 provides that an executor or administrator shall be the legal representative of the deceased for all purposes, and that all the property of the deceased person shall vest in him as executor or administrator. Section 187 provides that the right of an executor or administrator can only be established in any Court, if probate or administration shall have been granted to him, and Section 191 that letters of administration should entitle the administrator to all rights belonging to the intestate, as effectually as if the administration had been granted at the time of his death.

3. In 1867 the Administrator-General's Act of 1867 (Act XXIV of 1867) was passed. By it the Act of 1855 was repealed, and the new Act substituted for it. Section 15 takes the place of Section 19 of the old Act. Section 16 that of 11, and Sections 17 and 18 that of 12 and 14. It is apparent that this Act was passed with special reference to the provisions of the Indian Succession Act, as in Section 16 persons exempted from the operations of the Succession Act u/s 332 are added to Hindus and Mahomedans, and with them are exempted from the operation of Section 16. By Section 30 of this Act the power was first given to a private executor or administrator to transfer the estate, effects and interests vested in him, by virtue of the probate or letters of administration,* to the Administrator General, and so to relieve himself of all further liability or concern with the estate. In 1870 the Hindu Wills Act (Act XXI of 1870) was passed, and by it some sections of the Indian Succession Act, amongst others, Sections 179, 187 and 191, were made to apply to all wills of Hindus, within the territories of the Lieutenant-Governor of Bengal or the Original Civil Jurisdiction of the High

Court, but Section 5 provided that nothing in the Act should affect the rights, duties and privileges of the Administrator-General.

4. In 1872 a Bill was introduced into the Council of the Governor-General to amend the Administrator-General's Act of 1867 by the addition of two sections, the objects of which, as stated by Mr. Stephen who introduced the Bill, were to extend the operation of the Act to Native States where there was a European community, and to clear up some uncertainty as to the meaning of the word "distribution" in Section 52. The Bill was referred to a Select Committee whose report was presented by Mr. Hobhouse on the 27th of January 1874. The report recommended that several small amendments should be made, but did not notice the change in the position of executors of Hindus, which had been effected by the Hindu Wills Act. Mr. Hobhouse in presenting the report said that the only point which it was necessary to mention was that, inasmuch as the Act of 1867 had already been amended twice, the Select Committee thought it better to repeal the existing Acts, and re-enact them so as to have the law conveniently within the compass of a single enactment. Upon this the Administrator-General's Act of 1874 was passed, and it is the Act which we are now to construe.

5. The present Act, except as regards the amendments mentioned by Mr. Stephen in 1872, is practically a re-enactment of the Act of 1867, Sections 15, 16, 17, 18 and 31 being in substance reproductions of Sections 15, 16, 17, 18, and 30, and the Advocate-General argues that, as this is the case, we must, in construing the Act of 1874, have regard, not to the state of the general law on the day in 1874 when it was passed, but to the state of the general law in 1867 when the Act of that date, of which the Act of 1874 is a re-enactment, came into force. No authority has been cited in support of this argument which, as far as I can ascertain, is quite new; but reliance is placed on the fact that neither in 1872, when the Bill to amend the Act of 1867 was introduced by Mr. Stephen, nor in 1894, when the report of the Select Committee was presented by Mr. Hobhouse, is any trace to be found of any intention on the part of the Legislature to change the position of the executor of a deceased Hindu. In my opinion the history of the Act of 1874 is inadmissible to explain it, and we ought not to consider what was the intention of the Members of Council by whom it was introduced (see the cases collected in Wilberforce on Statutes, page 105). But even if we do consider its history, as it appears from the reports of the proceedings which I have mentioned, I think it is altogether insufficient to show that it was not intended that the ordinary presumption should apply, that the Legislature were aware of the then existing state of the general law, and that the Act of 1874 was enacted by them with reference to the general law which was in existence when it came into operation, and concurrently with which the new particular law would operate. The Act came into force on the 10th of February 1874, the Act of 1867 being repealed at the same moment, and from the time when the new Act came into force, it was the only law in existence relating to the office and duties of the Administrator-General, and the office which he has since held, and the duties for which he has since then been responsible, are those

created by that Act, and by that Act only, and in considering the nature of his office and duties we must, I think, look at the general law relating to the position of the executors or administrators of testate or intestate estates at and since that moment, and not at their position at any earlier period.

6. It is argued for the plaintiff that the meaning of the words "any private executor or administrator" in Section 31 of the Act of 1874 must be limited to the executor or administrator of any estate to which the provisions of the Indian Succession Act were applicable when that Act was passed, because the right given to the Administrator-General by Section 16 of the Act is limited to the estate of persons to whom the Indian Succession Act applies, and because it is said that the general scope of the Act shows that it was not intended to apply to any other estates. It is also contended that Section 15 of the Act only prescribes the order in which persons who are otherwise entitled to them shall be entitled to grants of administration, and does not give the Administrator-General any right to apply for a grant in any case; and further that no executor or administrator of any estate, except those within the provisions of the Indian Succession Act, could transfer the estate, effects and interests of his testator under that section, as they were not vested in him. In my opinion the last of these contentions rests upon no foundation of fact, as it is certain that after the passing of the Hindu Wills Act of 1870 the whole estate of a Hindu testator was vested in the executor of his will, in precisely the same way as that of an English testator who had died and whose will had been proved in this country was vested in him; and it is clear that after the passing of the Hindu Wills Act the executor of the will of a Hindu was in precisely the same position as the executor of the will of a European, inasmuch as the sections of the Indian Succession Act, which deal with the position and interest of executors, are made to apply to Hindu's wills; and if the executors of Europeans are within the scope of the Administrator-General's Act, the executor of a Hindu must be within it also, inasmuch as their positions with reference to the estate of their testator are precisely the same. It cannot in my opinion be successfully contended that Section 15 of the Act does not confer on the Courts the power to grant letters of administration to the Administrator-General in some cases, inasmuch as they have always been granted to him in the case of Europeans, in cases which are not within the provisions of Section 16, and if Section 15 does not give them the power to grant them to him, I cannot find any section which does; and if the section gives the Courts the power to grant them to him, in the case of Europeans, I am of opinion that it gave them the same power in the cases of Hindus and Mahomedans if they had the power to make a grant in respect of such estates at all. It is no doubt the case that grants of probate or letters of administration were not necessary before 1870 for the administration and distribution of the estates of Hindus and Mahomedans, but there is no doubt that in many such cases grants were before then in fact made by the Courts, in respect of such estates, and if they had the power to make such grants at all, I think that they had the power to make them to the Administrator-General under the Acts of 1855, 1867 and

1874. Assuming, however, that they had no such power, it could not have been because the words of the Acts are not wide enough to give it, as the words are general and, unless restrained by the rest of the Act, must include every one, but because such grants were not necessary in cases of the estates of Hindus and Mahomedans, and that therefore it cannot be supposed that the Legislature intended to give the power to the Courts to make grants which would be useless. If this argument is sound, the powers of the Courts, as far as the Administrator-General is concerned, were not affected by the Act of 1870, as that Act only deals with estates of Hindus where the deceased has left a will, and appointed his own executor; but this fact could not, in my opinion, prevent Section 31 from operating upon the new interest which was created by the Act in the executor of a Hindu.

7. Whether, however, this was so or not, the whole condition of affairs was changed in 1881, which was long before either the will or the transfer with respect to which the present- question arises. In that year the Probate and Administration Act was passed, and since that time grants of probate and administration are as necessary for the administration and distribution of the estates of Hindus and Mahomedans as they are for those of Europeans, and as since then they are in precisely the same position, I think that the Courts must have the same powers of granting letters of administration to the Administrator-General to the estates of Hindus and Mahomedans, u/s 15 of the Act of 1874, as it has to make the same grants with reference to other estates; and that since then at all events it is impossible to say that a right can be transferred to the Administrator-General u/s 31 which could not be granted to him by the Courts under the earlier sections of the Act. Section 16 is no doubt limited to estates which are within the provisions of the Indian Succession Act, but that section deals with very particular cases, and I do not think the fact that the duties of the Administrator-General under it are limited to those cases can be sufficient to limit the powers of the Courts under the other sections which are general in their terms. It is true that Section 5 of the Hindu Wills Act provides that nothing in that Act contained shall "affect" the rights, duties and privileges of the Administrator-General, and it is argued that "affect" in that clause means change, and that if the effect of Section 179 of the Indian Succession Act, when incorporated in the Hindu Wills Act, was to enable the Administrator-General to accept a transfer of a Hindu estate u/s 30, it would change his rights and duties, and its operation on him would be prevented by Section 5 of the Act of 1870; but assuming that this is the correct reading of the section, the present Administrator-General was not appointed under the Act which was then in force, and is not exercising any powers under it, but derives all his rights, duties and privileges from the Act of 1871, and I do not think that the rights, duties and privileges of an office created by the Act of 1874 can be affected by a clause in the Act of 1870, which saved the rights, duties and privileges of an office which was created in 1867 and was abolished in 1874.

8. It is said in the case of *Leveson v. The Queen* L.R. Q.B. 394 that acts which

have been done under a Statute may be taken into consideration in construing it, and in the present case what has taken place since the Hindu Wills Act was passed would seem to indicate that it was understood to be the intention of the Legislature in passing that Act to bring Hindu estates within the operation of Section 30 of the Act of 1867; but that some doubt having arisen as to the effect of the saving clause in the Hindu Wills Act, it was decided to repeal the Act of 1867 and to re-enact it in 1874 to avoid any such difficulty. It appears from the records of the office that the first time on which the estate of a Hindu was transferred by his executor to the Administrator-General was on the 6th November 1871, Afterwards transfers were made of Hindu estates on December 5th 1874, July 15th 1878, March 4th 1879, July 21st 1884, November 25th 1886, and September 20th 1888. In 1881 the Probate and Administration Act of 1881 was passed, which applies to the estates of all persons to whom the Indian Succession Act does not apply. By it so much of the Hindu Wills Act as incorporates Section 179 of the Indian Succession Act is repealed, but Section 4 of the new Act is identical in its terms with Section 179 of the Succession Act, so that, since the passing of that Act, the position of the executor or administrator of a Mahomedan or Hindu has been the same as that of the executor or administrator of a European, and we find that on the 25th of January 1888 the administrator of a Mahomedan transferred the estate to the Administrator-General u/s 31 of the Act of 1874.

9. The number of the estates which have been transferred by Hindu or Mahomedan executors and administrators since 1870 is no doubt small, but some of them are large, and I have no doubt that there has never been a time in recent years in which a substantial part of the business of the office has not been connected with such estates; indeed, there has been a good deal of litigation in this Court arising out of them, to which the Administrator-General has been a party, so that the practice has for years been notorious.

10. In what I have said so far I have assumed that Section 5 of the Hindu Wills Act was sufficient to prevent the Administrator-General from accepting a transfer of the estate of a Hindu u/s 30 of the Act of 1867, and I have done so because I think it makes no difference to the result of this case, whether it was so or not, and because I think the course of business in the office, which I have before noticed, indicates that this view was taken by the Legislature, but in my opinion that is not by any means the case. The marginal note to Section 5 is saving the rights of the Administrator-General, Bengal, "to Section 149 of the Probate and Administration Act it is "saving clause," and although the marginal notes are not any part of the Act they do, I think, indicate that the object of both sections was to save the existing rights, duties and privileges of the Administrator-General and not to prevent him from acquiring any new ones if any such were conferred upon him by the Act; but, however, that may be, I am of opinion that no new rights, duties or privileges were in fact conferred upon him either by the Act of 1870 or by that of 1881, or that his position was changed or affected by either of them. The right and privilege of the Administrator-General u/s 30 of the Act of 1867

and u/s 31 of the Act of 1874 was to take over the estate of the deceased from any executor or administrator who had the power to transfer it to him. His duty was to administer the estate according to law, and those rights, duties and privileges are the same to-day as they were in 1867 when the Act of that year came into force. The persons whose positions have been affected by the Hindu Wills Act and the Probate and Administration Act are the executors and administrators of Hindus, Mahomedans, and all the other inhabitants of India who are not within the provisions of the Indian Succession Act. By the Hindu Wills Act the executor of a Hindu was placed in precisely the same position as the executor of a European who had died in India,, and by the Probate and Administration Act the same change was made in the position of all executors and administrators in India who were not within the provisions of the Indian Succession Act, and when that was done I think that first the Hindu executor in 1870, and afterwards all other executors and administrators in 1881, were brought within the operation of the transfer sections of the Administrator-General's Acts, by virtue of the principle which has been constantly acted upon, and which was stated by Lord Holt in the case of *Lane v. Cotton* 12 Mad. 486 to be, that "when an Act of Parliament creates a new interest it shall be governed by the same law that like interests have been governed before." This principle has been acted upon and illustrated in a number of codes, which will be found collected in *Wilberforce on Statutes*, pages 166, 167, and in the case of *Queen v. Smith* L.R. 1 C.C.R. 270 is again stated in somewhat different terms by Bovill, C.J. He says that when the earlier Statute deals with a genus within which a new species is created by a subsequent Act, the earlier Act will include the new species. In my opinion the present case is within the strictest reading of this principle, By the Act of 1870 a new interest is created in the executor of the will of a Hindu, and I think that to use the words of Lord Holt "such new interest shall be governed by, the same law that like interests were governed before;" or, to apply the words of Bovill, C.J., the executors of Hindus are converted into a new species of executors by the Act of 1870 within the genus of executors upon which the older Acts, i.e., the Administrator-General's Act of 1867, operated.

11. For these reasons, I think that this order cannot be maintained, and I would decree the appeal and dismiss the application with costs in both Courts.

12. I have thought it better to rest my judgment on the later legislation, because I think that the course of business since 1870 indicates that in the opinion of the Legislature a change in the powers of the executors of Hindus under these sections took place at that time, but in doing so, I am anxious not to be understood as expressing any opinion that the executor or administrator of a Hindu or Mahomedan had not in 1867 any interest in the estate of the deceased which he could have transferred to the Administrator-General u/s 30 of that Act.

Prinsep, J.

13. Some two and half years after probate had been obtained by the executors of the will of Nundo Lall Mullick, a Hindu, who died in 1891, they executed a deed

purporting, u/s 31 of the Administrator-General's Act of 1874, to transfer to the Administrator-General all estates, effects and interests vested in them as executors.

14. The only point raised in this appeal is whether this is a valid transfer, that is, whether u/s 31 of the Administrator-General's Act of 1874 the executor of the will of a deceased Hindu is competent to transfer by deed all estates, effects, and interests vested in him by virtue of a probate or letters of administration obtained by him. The matter is complicated only by the course of legislation which has left in doubt and obscurity what might have been clearly expressed. It is true that this point has been raised now for the first time and only after some years, but the learned Counsel who appears for the Administrator-General has been able to show us only few instances in which such transfers have been made. We have not therefore a long and unvarying practice to assist us in deciding what is and has been accepted to be the intention of the Legislature. After a consideration of the legislation since the creation of the office of Administrator-General by the Administrator-General's Act VII of 1849, Mr. Justice Sale has held that no such power of transfer, as in this case, has been conferred on the executors of a will of a deceased Hindu.

15. I do not think it necessary to discuss what were the powers of Sir Thomas Turton who filled the office of Ecclesiastical Registrar under the late Supreme Court up to 1847, It is sufficient in my opinion that we should consider the state of the law since the creation of the office, of Administrator-General in 1849 for that was new office with certain specified duties attached to it, and it does not therefore necessarily follow that all the powers exercised by Sir T Turton by virtue of that and other offices were conferred on the Administrator-General. Nor is it necessary to consider how far the powers so exercised were with or without the authority of law. Before the Act of 1849 creating the office of Administrator-General the only Indian legislation in respect of probates and letters of administration in regard to the estates of deceased Hindus in which any assets were within the local jurisdiction of the late Supreme Court, is to be found in Acts XIX and XX of 1841. Section 20 of Act XIX of 1841 alone applied to the late Supreme Court, and it enabled that Court to direct the Ecclesiastical Registrar or one or more curators to collect and take charge of the effects of any deceased person who may have left moveable or immovable property within the local limits of the jurisdiction of that Court, if it was "satisfied that danger is to be apprehended of the misappropriation and waste of the property before it can be ascertained who may be legally entitled to the succession to such property."

16. Section 14 of Act XX of 1841 expressly limited the effect of such probate and letters of administration to the recovery of debts only so as to provide security to debtors paying the same. That Act was expressly repealed only in 1860. So any powers exercised by the Administrator-General under probate and letters of administration granted by the late Supreme Court in respect of the estates of deceased Hindus would be limited in the manner just stated.

17. Act VIII of 1855 took the place of Act VII of 1849, repealing it. That Act provided specially for the estates of deceased Hindus. Section 9 directed that all letters of administration or letters ad colligenda bona which shall hereafter be granted by the Supreme Court of Judicature at any of the said Presidencies (that is, of Bengal, Madras or Bombay), shall be granted to the Administrator-General of the Presidency, unless they shall be granted to the next of kin of the deceased. Section 11 required the Administrator-General to obtain letters of administration, either generally or with the will annexed, to the effects of any person, not being a Mahomedan or Hindu who may have left assets exceeding Rs. 500 if probate shall not have been applied for within one month of his decease. (I have thought it unnecessary to set out this section in detail and accurately, as it is sufficient to show that in dealing with the estates of British subjects and others over which the Supreme Court had jurisdiction the estates of Hindus were expressly excepted.)

18. Section 12 empowered the Administrator-General, on the application of a person interested in the assets of the estate of a deceased person, whether a Mahomedan or Hindu or not, showing that danger is to be apprehended of the misappropriation of such assets, unless letters of administration of the effects of such person are granted, to obtain from the late Supreme Court an order directing him to apply for such letters of administration. This was, it may be observed, a re-enactment of Act XIX of 1841, Section 20. It may also be usefully here mentioned that the proviso to Section 17 made a special exception in respect of the estates of a deceased Mahomedan or Hindu, if, on an application for the grant of letters of administration applied for u/s 12 by the Administrator-General, the Court was satisfied that such grant was unnecessary for the protection of the assets.

19. Section 14 empowered the late Supreme Court to direct the Administrator-General to take charge of moveable or immoveable property within the local limits of its jurisdiction belonging to the estate of any deceased person, whether a, Mahomedan or Hindu or not, if it was satisfied that danger is to be apprehended of the misappropriation and waste of such property before it can be ascertained who may be legally entitled to the succession to such property, or whether the Administrator-General is entitled to letters of administration to such deceased person.

20. Section 43 is the next section which demands attention in connection with this case. That section specially exempts estates of deceased persons, Mahomedans or Hindus, from its operation; it enabled the Administrator-General to grant a certificate to collect debts due to estates of all other persons, within the local limits of the jurisdiction of the late Supreme Court, when the effects do not exceed on the whole Rs. 500.

21. The Indian Succession Act (X of 1865) is the next legislative enactment relating to this subject, but that expressly does not apply to certain persons, and amongst others Hindus, so that it did not affect the previously existing law in

respect to the administration of the estates of deceased Hindus.

22. In 1867 the Act of 1855 was repealed, and in many respects re-enacted by Act XXIV of that year. Section 16 of the Act of 1867 re-enacted Section 11 of that of 1855, except that the limit of the value of the assets to be administered was altered. Section 17 re-enacted Section 12 of the Act of 1855, and the proviso to that section repealed the proviso to Section 17. Sections 18 and 33 re-enacted Sections 14 and 43 of the Act of 1855. I have therefore thought it unnecessary to refer to these parts of the Act of 1867 at length.

23. But the Act of 1867 for the first time by Section 30 empowered a private executor or administrator, with the previous consent of the Administrator-General, to transfer to that officer by an instrument in writing all estates, effects and interests vested in him by such probate or letters, and the Administrator-General was given the rights and made subject to the liabilities which he would have had, and to which he would have been subject, if the probate or letters of administration had been given to him.

24. In 1870 the Hindu Wills Act (XXI of 1870) was passed. This was what has been termed a skeleton Act. It extended and applied certain sections of the Indian Succession Act of 1865 to the wills of Hindus, and amongst these were Section 179, 187 and 191, which are important in connection with this case. Section 179 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, Section 187 provided that no right as executor or legatee can be established in any Court of Justice, unless probate of the will or letters of administration, with copy of the will annexed, shall have been granted. Section 191 declared that letters of administration entitles the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death.

25. Section 5 of the Hindu Wills Act, however, provided that nothing contained in that Act shall affect the rights, duties and privileges of the Administrator-General of Bengal, Madras and Bombay, respectively. From this I understand that in respect of all matters connected with the wills of deceased Hindus and others to whom the Hindu Wills Act applied, the position of the Administrator-General remained as before.

26. It will be necessary to refer presently to a portion of Section 3 of the Hindu Wills Act, but I will pass on to state the course of legislation. In 1874 there was fresh legislation in respect of the office of Administrator-General. Act II of 1874 is entitled an Act to consolidate and amend the law relating to the office and duties of Administrator-General. I find that since the passing of the previous Act of 1867 some Acts had been passed making several amendments in matters of no general importance. The consolidation was the incorporation of these Acts in one Act with the existing Act of 1867 which dealt generally with the subject. The amendment of the law so far as was expressly made was on matters which do

not touch the case now before us. The sections of the Act of 1867 to which I have referred were re-enacted verbatim in the new Act so as to attain the object of consolidation, and amongst these Section 30 of the Act of 1867 was re-enacted as Section 31 of the Act of 1874.

27. It has been contended however that, having regard to the application of Sections 179, 187 and 191 of the Indian Succession Act of 1865, by a new law relating to the office of Administrator-General, it was the intention of the Legislature to alter the previously existing law as expressed in Section 30 of the Act of 1867, and to make it what it would have been if that Act had been applicable to Hindus, or if the Hindu Wills Act of 1870 had been passed simultaneously with the Act of 1867. To determine this it is desirable that we should consider the intention of the Legislature so far as we can properly gather it from the course of legislation and the proceedings of the Legislative Council. I do not think that this is absolutely necessary for the purposes of this case, for the law, though obscurely expressed, can be ascertained. But I think that we are at liberty to do so, and that such a course of enquiry is open to us, and is in this instance satisfactory in its result, because in my opinion it confirms what in my understanding of the law is its proper interpretation as having been intentionally so declared.

28. It is contended that as Section 179 of the Indian Succession Act of 1865, which was made applicable to the executors or administrators under the wills of deceased Hindus, declared that they shall be the legal representatives of such persons for all purposes, and that all the property of such persons shall be vested in them as such executors or administrators, of the entire estate, not as a manager as held by the Courts, but absolutely, an executor or administrator was competent u/s 31 of Act II of 1874 to transfer all estates, effects and interests vested in him by virtue of such probate or letters to the Administrator-General.

29. There can be no doubt that when the Act of 1867 was passed the powers of an executor of the estate of a deceased Hindu was only that of a manager. The cases cited-Sharo Bibi v. Baldeo Das I B.L.R. O.C. 24 and Jaykali Debi v. Shibnath Chatterjee 2 B.L.R. O.C. 1-are sufficient authorities for this, and the law was so understood or accepted. This had its origin from the principle under which the power of a Hindu to make a will originated. It was regarded only as a gift which inter vivos was legal under Hindu law, but was intended to have effect after the death of the donor testator. I find that this has been adopted by the Legislature, for Section 3 of the Hindu Wills Act provides that nothing in the Act" shall authorize a testator to bequeath property which he could not have alienated inter vivos, or to deprive any persons of any right of maintenance of which but for Section 2 of this Act he could not deprive them by will." And it cannot, I think, be disputed that as the law was accepted in 1867 when the Administrator-General's Act (XXIV of 1867) was passed, the executor of the will of a deceased Hindu had no "estate, effects or interest" vested in him which he could have transferred to the Administrator-General u/s 30 of that Act. Moreover, by reason of Section 5 of

the Hindu Wills Act, 1870, the position of the Administrator-General in respect of such executors remained unaltered. The application, of Section 179 of the Indian Succession Act of 1865 to Hindu wills, with the limitation enacted by Section 5 of the Hindu Wills Act, did not alter the law. The question then arises, was there any alteration in the law in consequence of the passing of Act II of 1874?-the Act to consolidate and amend the law relating to the office and duties of Administrator-General.

30. I do not, first of all, regard this Act as creating a new office with new duties. It was a more convenient mode of expressing the old law with some amendments, and I find no indication in it of any intention to modify the previously existing law and practice in regard to the manner of dealing with the estates of Hindu testators after probate and letters of administration have been obtained. With the practice adopted by our Indian Legislature, it is extremely difficult, if not impossible, to apply all the rules laid down by the Courts in England for ascertaining the intention which has caused the passing of any particular law. The course of legislation in this country affords a tolerably sure guide, because such measures are the acts of a Government having some claim to a continuous policy, and whenever any departure from that policy in any matter of importance to the general community or even to a large body, such as Hindus, has been arrived at, it; is almost always clearly and* emphatically indicated.

31. Accordingly the introduction of any Bill into the Legislative Council is always accompanied by a statement of the Objects and Reasons for the proposed measure. On these grounds, I believe, the Judges of our Court have taken this statement of Objects and Reasons into consideration as having some indication of the motives which have caused legislation on any particular subject and the object which it is desired to attain. I would refer only to the judgment of a Full Bench of this Court-Queen-Empress v. Kartink Chunder Das ILR Cal. 721.

32. An original Bill is, as experience has shown, considerably altered in its character and scope while passing through the Legislative Council, and chiefly after its committal to a Select Committee for report, after consideration of the opinions expressed by various persons, official and non-official, on the measure before the Council. As an easy and certain way of learning the amendments contemplated and proposed by the Select Committee it is not unusual, and I think not improper, to refer to the Report so made. The Report contains mention not only of the proposed amendments of the law but generally reasons for recommending them. By this means we can learn the reasons for which legislation has been thought necessary, and the objects in view, that is, the particular points on which it is desired to amend the existing law or for passing any new Jaw. With this explanation I think that there is nothing inconsistent in our practice with the rules laid down by the Courts in England. I should also state that the statement of Objects and Reasons for the introduction of any Bill into the Legislative Council's, as well as the Report of any Select Committee to whom

the Bill may be committed for report, are invariably published under authority of Government in the Government Gazette for public information.

33. As the intention of the Legislature in passing Act II of 1874 has been made the subject of argument before us, I think that, so far as it bears on the point for our decision in this appeal, it may be gathered from a consideration of the statement of Objects and Reasons and the Report of the Select Committee.

34. Now, in respect of the Act of 1874, we find no indication, either in the statement of Objects and Reasons or in the Report of the Select Committee as published in, the Government Gazette, of any intention to modify the law as previously expressed in Section 30 of the Act of 1867 and the Hindu Wills Act of 1870. The modification which it was intended to make and the objects to be attained are all explicitly set out. The original intention, as stated in the Objects and Reasons, was to amend the law on some points which do not touch this case. The Report of the Select Committee shows that other matters, also irrelevant to this case, were presented to them, and were accepted as desirable amendments. These are set out in the Report made by the Committee to the Legislative Council. The Report further shows that the Committee also considered that the law as thus amended and contained in the Act of 1867, and some small Acts amending that Act, should conveniently be consolidated. The passing of the Act of 1874 shows that this recommendation was accepted. There was no expressed intention to modify the previous law by extending the powers of the executor of a will of a deceased Hindu, or the powers of an Administrator-General to accept the duties and responsibilities of such an executor under deed executed to him. The position of such an executor as laid down by our Courts was no doubt known to the Legislature, and there is no indication of any deliberate intention to alter that position or to confer on him the powers to relieve himself from all the responsibilities of that office. No such intention can safely be inferred. We have further the fact that not only was Section 5 of the Hindu Wills Act of 1870, which declares that nothing in that Act shall affect the rights, duties and privileges of the Administrator-General, allowed to remain unrepealed, but a similar provision was made by Section 66 of the Act of 1874 to the effect that nothing in the Indian Succession Act, 1865, shall be taken to supersede or affect the rights, duties or privileges of the Administrator-General. Although by making Section 179 of the Indian Succession Act applicable to the wills of Hindus, the Hindu Wills Act of 1870 declared that the executor or administrator of a deceased (Hindu) person is his legal representative for all purposes, and that all the property of the deceased person vests in him as such, it further enacted that nothing in that Act shall affect the rights, duties and privileges of the Administrator-General. The argument from the application of Section 179 of the Indian Succession Act of 1865 to Hindu wills, that as the entire estate became vested in an executor or administrator, such person was competent u/s 31 of Act II of 1874 to transfer to the Administrator-General by an instrument in writing all estate, effects and interests so vested in him, seems to me to be completely met by Section 66 of that Act, which declares that nothing

contained in the Indian Succession Act of 1865 (and therefore nothing in Section 167 of that Act) shall be taken to supersede or affect the rights, duties and privileges of the Administrator-General. If therefore before the enactment of Act II of 1874 the executor or administrator under a Hindu will had not the power of transfer, and in my opinion he had not, the terms of Section 66 of that Act show that it was not intended to give him that power by reason only of anything contained in Section 179 or any other section of the Indian Succession Act of 1865. I am further of opinion that the passing of the Probate and Administration Act (V of 1881) has not altered the law in this respect. It is applicable to Hindus, but it must be read subject to the Hindu Wills Act, 1870, which by Section 154 it has amended by repealing portions of it which made certain sections of, the Indian Succession Act, 1865, applicable to Hindu wills, the reason for such amendments being that these sections appeared in the new Act. Still that Act must be read with Section 5 of the Hindu Wills Act, and there is, I think, no valid reason for holding that it was intended by that Act to alter the law as expressed first in Section 30 of Act XXIV of 1867 and as now expressed in Section 31 of Act II of 1874, read with Section 5 of the Hindu Wills Act, and as further explained by Section 66 of the Act of 1874. There is also much force in the argument of the learned Advocate-General who draws attention to the fact that in the case of the will of a Hindu, save under exceptional circumstances, such as waste, the Administrator-General cannot take out letters of administration, although if appointed executor by the will, he can obtain probate, and that therefore it is not likely that the Legislature should have intended that he should by the act of an executor do what he could not ordinarily do. It is remarkable that in Sections 17 and 18 of Act XXIV of 1867, and in the corresponding Sections 17 and 18 of Act II of 1874, it should be specially provided that these sections are applicable to the general community, whether the person whose assets are dealt with is a Hindu, Mahomedan, Buddhist or not, and that Section 16 of the Act of 1867 and the corresponding Section 16 of Act II of 1874 especially exempt persons of that description, while both Section 30 of the former Act and the corresponding Section 31 of the Act of 1874 do not either expressly include or exempt such persons.

35. For these reasons I am of opinion that the construction of the law expressed by Mr. Justice Sale is correct, and this appeal should be dismissed with costs.

Trevelyan, J.

36. Nundo Lall Mullick died on the 22nd of February 1891, leaving property in Calcutta. He left a will dated the 5th of August 1889. The executors of this will took out probate on the 17th of March 1891, and on the 14th of August 1893 executed a deed by which they purported, u/s 31 of Act II of 1874 (the Administrator-General's Act), to transfer all estates, effects and interests vested in them by virtue of the probate to the Administrator-General of Bengal.

37. The only question before us is whether this transfer is a valid one, or, in other words, whether the executor of a Hindu testator has power to transfer the

property of the testator to the Administrator-General under the terms of Section 31 of Act II of 1874. This question has been argued before us with great care and ability, and it is to my mind a question of very great importance.

38. Counsel for the Administrator-General has informed us that in eight cases the estates of Hindus and Mahomedans have been transferred to the Administrator-General, such transfers purporting to be made either u/s 31 of Act II of 1874 or under the corresponding section of the former Administrator-General's Act, viz., Act XXIV of 1867. Of these cases, one was the transfer of the estate of an intestate Mahomedan, to whose case the considerations referred to in this judgment would have no application. Of the seven Hindu cases one was a transfer of letters of administration; of the other six cases four were the transfers of the probates of wills made before the Hindu Wills Act; the remaining two were transfers of probates which had been granted on the 21st January 1882, and 11th December 1884 respectively. If in a large number of cases the estates of Hindus and Mahomedans had, since a power of transfer was given by the Act of 1867, been transferred to the Administrator-General, it might have been said that this practice threw light on the construction of the Act; but it is clear that there cannot be said to have been anything like a practice. Eight cases only in nearly 27 years would not amount to anything approaching a practice, and, if anything, the small number of transfers would rather show that the view which the Administrator-General now contends for has by no means been generally accepted. We have no information at all as to what portion of the business of the office of Administrator-General has been connected with these estates. We have been referred to three suits in connection with these estates. In two of them the Administrator-General was a party, but no question of the kind which we have now to decide was raised. I think it clear that we must come to the determination of this question without considering these transfers in any way.

39. The words that we have to construe are as follows: "Any private executor or administrator may, with the previous consent of the Administrator-General of the Presidency in which the property comprised in the probate or letters of administration is situate, by an instrument in writing under his hand, notified in the local Gazette, transfer all estates, effects and interests vested in him by virtue of such probate or letters to the Administrator-General by name of his office."

40. One of the means by which a Court is entitled to seek assistance in construing the Acts of the Legislature is by referring to the previous history of the law and legislation on the subject. As Sir George Jessel, M.R. puts it in *Holme, v. Guy* L.R. 5 Ch. D. 905: "Although the Court is not at liberty to construe an Act of Parliament by the motives which influenced the Legislature, yet when the history of law and legislation tells the Court, and prior judgments tell this present Court, what the object of the Legislature was, the Court is to see whether the terms of the section are such as to carry out that object and no other, and to read the section with a view to finding out what it means and not

with a view to extending it to something that was not intended."

41. In construing the Acts which we have to deal with here, we must also remember that the Legislature is to be assumed to be aware of, and to have in contemplation, the existing law upon the subject. Therefore it is in this case necessary to see what the law was at the time when the Act of 1874 was passed, that being the Act under which the transfer now in question was made.

42. In my opinion, the question which we have to determine can be conveniently sub-divided as follows : (1) What was the position of the executor of a Hindu prior to the passing of the Administrator-General's Act of 1867? (2) Did Section 30 of that Act apply to the executors of Hindus? (3) Did the Hindu Wills Act alter the construction of Section 30 of the Administrator-General's Act of 1867 and make that section applicable to Hindus? (4) Has Section 31 of the Administrator-General's Act of 1874 altered the law which existed at the time it was passed.

43. I may here point out that so far as it has any bearing on the present question, the words of Section 30 of the Act of 1867 are the same as those of Section 31 of the Act of 1874.

44. I think there can be no doubt as to what was the position of the executor of a Hindu at the time that the Act of 1867 was passed. He was, unless greater powers had been given him by the will, merely a manager having no greater powers under the Hindu law than the kurtah of a joint family or the guardian of a minor property. The grant of probate by the Court vested nothing in him. The law on this subject is stated by Sir Henry Maine in his statement of Objects and Reasons for the Bill, which afterwards became the Hindu Wills Act, as follows: "Then the native executor takes nothing from any grant of the Court. His title is founded solely on the will considered as an instrument of gift."

45. In *Sharo Bibi v. Baldeo Das* 1 B.L.R. O.C. 24 Norman, J., at page 26 of the report, says: "As regards a person appointed as executor of the will of a Hindu his position is different. He takes nothing from any grant of the Court. His title is founded solely and simply on the will of the testator, considered as an instrument of gift." In the case of *Jaykali Debt v. Shib Nath Chatterjee* 2 B.L.R. O.C. 1 Phear, J., says at page 4 of the report: "I suppose it is now clear that probate does not confer upon the executor of a Hindu will any personal rights of property analogous in any way to an English estate or interest. The will gives him just such powers of dealing with the property comprehended in it as its words express, and no more. Beyond the scope of the will, and so far as he is not constructively restricted by its directions, it may be that he has the powers which are implied in the bare authority of a manager during minority, but these are all he can claim. At any rate this doctrine seems to have been laid down with regard to Immovable property in the case of *Sreemutty Dossee v. Tara Churn Coondoo Chowdhry Bourke* A.O.C. 48 : 3 W.R. Mis. 7 note, by which I readily admit myself bound to be guided." The case of *Sreemutty Dossee v. Tara Churn Coondoo Chowdhry* was decided before the Administrator-General's Act of 1867 was

passed. In the well known case of *Kherodemoney Dossee v. Doorgamoney Dossee* ILR 4 Cal. 455 Markby, J., (at page 468 of the report) says: "With regard to the first contention, there is no doubt that "vest" is not an appropriate word to describe the position of a Hindu executor in a will made prior to the Wills Act. It has been frequently held that the mere appointment of a person as executor to a Hindu does not cause any property to vest in him at all, and that if, as executor, he is entitled to hold the property, he holds only as manager."

46. Probate vested nothing. The practice of granting probate grew up as a convenient form of establishing the factum of the will in Court. These decisions, which all referred to wills made before the Hindu Wills Act came into force, show unmistakeably what has been considered to be the law applicable to the wills of Hindus before the passing of the Hindu Wills Act. The Legislature in giving the probates granted to representatives of Hindus before Act XX of 1841 came into force, the effect of certificates for the purpose of recovery of debts, recognized the limited character of probates which had been granted by the Supreme Court. Section 14 of that Act is as follows: "And it is hereby declared and enacted that all probates or letters of Administration granted by any of Her Majesty's Courts in cases in which any assets belonging to the deceased persons were at the time of their deaths within the local jurisdiction of the Court granting the probate or letters of administration, shall have the effect of probate and letters of administration granted in respect of the property of British subjects, but for the purpose of the recovery of debts only, and the security of debtors paying the same, except so far as in the Act provided." In this section "British subjects" is admittedly used in the limited sense of what we now call "European British subjects."

47. Having regard to these decisions, I think we must hold that until the passing of the Hindu Wills Act, probate vested nothing in the executor of a Hindu, and that accordingly the phraseology of Section 30 of the Act of 1867 was wholly inappropriate in the case of the executor of a Hindu. It follows, I think, that we must hold that in enacting Section 30, the Legislature did not intend to apply it to probates of Hindu wills. In all probability the phraseology of Section 30, which was then an entirely new enactment, was chosen with regard to the provisions of the Indian Succession Act, which had been passed two years before and which did not apply to either Hindus or Mahomedans.

48. The next question is whether the provision of the Hindu Wills Act had the effect of applying Section 30 of the Administrator-General's Act of 1867 to Hindus. By the Hindu Wills Act, Section 2, embodying Section 179 of the Indian Succession Act, the executor of the deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. The second section also embodied the 187th section of the Indian Succession Act, which was as follows: "No right as executor 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 the one hundred and eightieth section."

49. Section 5 of the Hindu Wills Act is as follows: "Nothing contained in this Act shall affect the rights, duties and privileges of the Administrator-General of Bengal, Madras and Bombay, respectively." The rights, duties and privileges of the Administrator-General were then contained within the four corners of the Act of 1867, and that Act related to nothing else. I think that the reasonable construction of Section 5 of the Hindu Wills Act is that the provisions of the Administrator-General's Act were to remain as if the Hindu Wills Act had not been passed. The ordinary grammatical meaning of the word "affect" is to act upon, or to produce an effect upon. In some Statutes it may appear from the context, that "affect" means "act injuriously upon." But in the Hindu Wills Act there is nothing in the context to give it such a qualified meaning. I think also that in construing this section it is proper to take into consideration the argument that it is unreasonable to suppose that the Legislature would have by implication, and not by express words, so largely increased the operation of Section 30 of the Administrator-General's Act of 1867, and thus have made such a radical change in the powers of the executors of a large number, in fact the majority, of the inhabitants of this country. The Legislature was then by the Hindu Wills Act adding in express terms to the power of Hindu executors. If they had intended to add the further, and that a most important, power of transferring the property of testators to the Administrator-General, they would have done so in express words. I think we must hold that the Hindu Wills Act did not alter the construction of Section 30 of the Administrator-General's Act of 1867, and did not make that section applicable to Hindus.

50. There remains the fourth question. As I have said before Section 31 of the Act of 1874 is identical in words with Section 30 of the Act of 1867. So the position is reduced to this : The Legislature knowing, as I must take it they did, that Section 30 of the Act of 1867 had no application to Hindus, even at the time when the Act of 1874 was under their consideration, re-enacted Section 30 in identical terms; therefore it follows, I think, that the new section was intended to apply to the same persons as the old section, even after the passing of the Hindu Wills Act referred to. I think this is a necessary inference from the identity of terms. If the Legislature had intended that Section 31 should give to the executors of Hindus powers which they did not possess when it was enacted, they would have said so. Again here, in seeking to discover the intentions of the Legislature, I think, I am right in assuming that they would not by implication have introduced such a radical change in the law.

51. There is not in the Act of 1874 any indication that the Legislature intended that Section 31 of that Act should bear a different construction from Section 30 of the Act of 1867. Furthermore in construing the Act of 1874, I think that Section 5 of the Hindu Wills Act precludes us from considering the change made in the position of the executor of a Hindu will by the Hindu Wills Act. In my

opinion for these reasons Section 31 of the Administrator-General's Act of 1874 did not alter the law which existed at the time it was passed. Reference was made during the argument to the Probate and Administration Act of 1881, but in the first place the terms of Section 148 of that Act prevent its application to this case, and in the second place it is difficult to see how it can throw any light on the earlier Act of 1874.

52. We were referred during the argument to the history of the Act of 1874 in its transition through the Legislature. Although the Courts here have sought to find assistance from sources of this kind, I have personally always felt the danger of depending to any substantial extent upon any such aid to the construction of an Act of the Legislature. As pointed out in page 105 of *Wilberforce on Statutes*, such a reference is inadmissible in England. But in this country reference has frequently been made to sources of this sort, and in the comparatively recent Full Bench decision of *Queen-Empress v. Kartick Chunder Das* ILR Cal. 721 the judgment depended in the main on the Report of a Select Committee. The Full Bench judgment contains the following passage:" But we thought it right from the proceedings of the Legislative Council at the time this measure was in preparation to obtain such light as they could throw on the intention and scope of the section in question. Such a course has been more than once taken by the Court here in recent times; and in a case of such difficulty and importance as this appeared to be, we felt bound to adopt it "All I need say is that, if such a reference were admissible, what was shown to us would incline me to the same construction as that which I have put upon the Act without such reference. I agree with the opinion expressed by Mr. Justice Sale in the Court below and consider that this appeal should be dismissed with costs.