LAW COMMISSION OF INDIA

ONE HUNDRED AND TENTH REPORT

ON

THE INDIAN SUCCESSION ACT, 1925

FEBRUARY, 1985.

सत्यमेव जयते

अध्यक्ष
CHAIRMAN
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LAW COMMISSION
भारत सरकार
GOVERNMENT OF INDIA
New Delhi-110001.

JUSTICE K. K. MATHEW

Dated the 25th February, 1985

My dear Minister,

I have great pleasure in forwarding herewith the One Hundred and Tenth Report of the Law Commission on "THE INDIAN SUCCESSION ACT, 1925."

The subject was taken up by the Law Commission on its own. The subject owes its origin to the discussion that took place within the Law Commission and a Questionnaire was issued some time ago. The reasons for the revision of the Act are stated in paragraphs 1.4, 1.8, 1.9, and 1.10 of the Report.

The Commission is indebted to Shri P. M. Bakshi, Part-time Member, and Shri S. Ramaiah, Member-Secretary, for their valuable assistance in the preparation of the Report.

With regards,

Yours sincerely,

Sd/-
(K. K. MATHEW)

Shri A. K. Sen,
Honourable Minister of Law
and Justice,
Shastri Bhavan, *NEW DELHI*

Encl : 110th Report.

CONTENTS

CHAPTER I

INTRODUCTORY

1. The Law of Succession

Significance of the Act and need for revision.

1.1. The Indian Succession Act, 1925, has been taken up by the Law Commission as a part of its function of revising Central Acts of general application and importance. This Act is the principal legislative measure in India dealing with the substantive law of testamentary succession in regard to persons other than Muslims and intestate succession in regard to persons other than Hindus and Muslims. It is also the principal legislative measure dealing with the machinery of succession in regard to both testamentary and intestate succession in respect of such persons. As will be explained later[1], the Act is a consolidating enactment in the sense that it has brought in one place provisions scattered in several Central Acts.

The law of succession—like any other branch of law—cannot be regarded in isolation from other fields of law. It is, for example, tacitly supplemented by the tax laws, which turn the State into a hidden participant in the estates of many deceased persons in the country. There could be other branches of law which become relevant in a consideration of succession, even if one confines one's attention to the frontiers of one's own country. And if one look across the frontiers, there will be so many interesting questions involving a foreign element. Discussion of such questions occasionally lends colour to this apparently drab subject.

Previous revisions of the Act.

1.2. History of the law of succession itself is a matter interest. Detailed historical discussion of the subject will be found later in this Report[2], but we may say a few words about the history of the statutory law relevant to matters dealt with in the Act.

A consolidating Act

1.3. The Indian Succession Act, 1925, has consolidated several pre-existing Central Acts passed between 1841 and 1903[3]. There has not been under-taken any wholesale revision of the Act, though occasionally, when need arises, amendments have been made in the Act from time to time. In fact, the Act of 1925 was mainly a consolidating one which made no material changes in the previous laws, so that the previous Act—the Indian Succession Act of 1865—has now substantially been in force for more than a hundred years, as was pointed out by a learned commentator[4]. Though minor amendments have been made in 1939 and 1962, no comprehensive revision of the Act of 1925 has been undertaken for the last fifty years.

In fact, the framers of the Act stated thus[5] :—

> "The subject of this bill is to consolidate the Indian law relating to succession; the separate existence on the statute book of a number of large and important enactments renders the present law difficult of ascertainment and there is therefore every justification for an attempt to consolidate it. The bill has been prepared by the Statute Law Revision Committee as a purely consolidating measure. No intentional change of the law has therefore been made."

Need for revision

1.4. We shall deal later in detail with the justification for revision of the Act[6], but at this stage it is appropriate to state that the present social thinking, the mass of case law that has accumulated on various provisions of the Act and

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[1]Para 1.3, *infra*.

[2]See Chapter 2, *infra*.

[3]Chapter 2, *infra*.

[4]The late Mr. Paruck, in the Preface to the 4th Edition (June 1953).

[5]See statement of objects and reasons, *vide* Gazette of India, dated 4th August, 1923, page 5, para 401.

[6]Para 1.6, et seq. *infra*.

certain juristic and other developments that have taken place in the field of family law and in other branches of the law, seem to justify a review of the Act.

Institution of succession.

1.5. The institution of succession is intimately connected with private property. This much is obvious. But it serves a variety of values cherished by a free society. These include the re-inforcement of family ties and responsibilities, economic and social pluralism and encouragement of private philanthropy to improve the quality of life[1]. Perhaps at a more fundamental level, the institution of succession is a proper response of the society to elemental motives, ranging from concern for one's immediate family to a desire to extend one's personality far beyond death. In fact, established patterns of inheritance may be the least objectionable means of deciding the ownership of property on a person's death.

At the same time, transfers of substantial wealth tend to conflict with other basic social values, including equality of opportunity, dispersal of economic power, reward according to merit, and avoidance of rigid class distinctions.

In formulating or re-formulating the law of succession, all these considerations become relevant.

Wider meaning of "succession".

1.6. Of course, testate and intestate succession are only a part of the wider process of succession. That process embraces many other methods of transmitting property to one's successors in situations where death is, or could be, relevant—such as, the gift *mortis causa,* life assurance in its various forms, joint ownership, partnership arrangements and pension and provident fund schemes. The legal requirements for each method vary. These variations were imposed in the context of the interests which the law was seeking to safeguard when imposing such requirements. Amongst the factors, which are likely to influence the choice of the machinery to be utilised by the citizen, one that has become prominent in modern times is, of course, taxation.

Recognition of certain claims.

1.7. Apart from the choice of the machinery[2] of succession, there is the question of the choice of the beneficiaries who will take after death. A major aspect worth noting is the conflict between the citizen's wish and the law's demand. It is the wish of the average educated person to choose his own successors, rather than to have that choice decided for him by an application of the rule of intestacy. But how far this desire should be allowed a freeplay is a question which has come up for debate in recent times. In certain countries, for example, the claims of heirs are regarded as material, and the decision of the owner of property is not treated as conclusive. "Family provision" legislation and various statutory provisions for the protection of the creditors constituted examples of the legal recognition of such claims.

II. Justificaion for Review

Review of law of succession.

1.8. It would be appropriate to mention at this stage certain aspects justifying a review of the law. The law of succession is, in part, concerned with the apparently simple process of giving effect to a person's wishes in relation to the disposition of his property in the event of his death, and in part, with the equally simple question—what should happen to the property where a deceased person has not expressed his wishes (or not expressed them effectively) in relation to such disposition. However, the mass of rules, principles, statutory provisions and judicial decisions which has accumulated shows that the process is far from 'simple'. No less a figure than Coke complained[3], "Wills and the construction of them do more to perplex a man than any other learning.....".

Importance of periodical revisi on.

1.9. As a branch of private law, then, the law of succession is of vital concern to the community. Periodical revision of legislation dealing with this branch of the law accordingly needs no elaborate explanation. Moreover, there have taken place certain important developments which render a review of the Act necessary. In the first place, a large number of sections of the Act have yielded

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[1]Death, Taxes and Family Property, Final Report of the American Assembly (December 2-4-1976) as reproduced in (January 1977) A.B.A.J. 86-87.

[2]Para 1.6, *supra.*

[3]*Roberts* v. *Roberts* (1613) 2 Bulstr. 123, cited by Curzon, Law of Succession (1976), Preface.

a rich crop of case law leading to a conflict of decisions or a number of other difficulties in many cases. Secondly, the content of some of the legal concepts which underlie the operative provisions of the Act—for example, domicile—has undergone change during the last thirty years or so, in legal thinking. It is desirable that the provisions of the Act should be re-considered in the light of these developments.

Thirdly, social thinking in regard to some of the notions which form the basis of the Act has as undergone changes which should find a reflection in the scheme of the Act. The position of illegitimate children is one example. The late Shri P. L. Paruck, in his commentary on the Act[1], also pointed out the need for revision of the Act[2].

All these factors justify a consideration of the Act section by section. The changes needed in the Act may not necessarily be radical, but a review is eminently desirable.

Concrete reasons for revision—illustrations from particular provisions.

1.10. It may be useful to mention, by way of illustration, some of the concrete reasons justifying a review of the Act.

This would involve some elaboration of points already mentioned above or anticipation of suggestions to be made later. Nevertheless, it would be useful. The concrete reasons are as under:—

Changing social actions.

(i) As a result of changing conditions, notions on various matters relevant to the law of succession have also undergone change (as stated above). In illustration of this, the status of illegitimate children[3], and the doctrine of domicile[4], (married women) may be referred to.

Conflicting decisions.

(ii) Several sections of the Act have been the subject-matter of conflicting decisions. There is some obscurity even as to the very applicability[5] of the Act (Part IV) to certain areas previously forming part of the erstwhile State of Travancore-Cochin. Are Indian Christians in those areas still governed by the Travancore Christian Succession Regulation 2 of 1092? Or, are they now governed by the Indian Succession Act, 1925? The law required clarification.

Changes of substance—position of lunatics.

(iii) On certain important matters, changes of substance may be needed in the provisions of the Act. For example, the law relating to the disposition by will of the property of lunatics justifies a second look. In England, a judge has now power[6] to make certain orders to give certain directions for the disposal of property of mentally incompetent persons. Further[7], there is power to execute a "statutory will" in regard to persons who are mentally incompetent.

Section 17 of the Administration of Justice Act, 1969 containing the relevant law, is quoted below :—

> "17. (1) In the Mental Health Act, 1959, (in this Part of this Act referred to as "the principal Act") in section 103(1) (powers of the judge as to patient's property and affairs) the following paragraph shall be inserted after paragraph (d) :—
>
> > (dd) the execution[8], for the patient, of a will making any provision (where by way of disposing of property or exercising a power or otherwise) which could be made by a will executed by the patient if he were not mentally disordered, so however that in such cases as a nominated judge may direct the powers conferred by this paragraph shall not be exercisable except by the Lord Chancellor or a nominated judge."

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[1]P.L. Paruck, Commentary on the Succession Act, 3rd Ed. quoted by Shri J.L. Joshi in the 5th Ed. (1966), preface.

[2]See also suggestion of Shri A.C. Mukherjee in the preface to his edition of Mitra, Succession Act.

[3]E.G. section 37, as interpreted *In goods of Sarah Ezra*, A.I.R. 1931 Cal. 560.

[4]Sections 6—20.

[5]This is with reference to section 31.

[6]Sections 103 and 103A, Mental Health Act, 1959 (England).

[7]Section 17(1) and (2), Administration of Justice Act, 1969 (Eng.).

[8]Commas have been added to facilitate understanding.

(2) At the end of section 103(3) of the principal Act there shall be inserted the words "and power of the judge to make or give an order, direction or authority for the execution of a will for a patient:—

(a) shall not be exercisable at any time when the patient is an infant, and

(b) shall not be exercised unless the judge has reason to believe that the patient is incapable of making a valid will for himself."

(iv) Another important topic requiring consideration is the effect of marriage on a will. As the law stands at present[1], a will is automatically revoked by the marriage of the maker of the will (where he is governed by the relevant section) except in the case of a will made in the exercise of the power of appointment in certain specific circumstances. However, some hardship is caused by this provision, in as much as even a will *which is made in contemplation of marriage falls* within it. In England,[2] it is expressly enacted that a will expressed to be made in contemplation of marriage shall not be revoked by the solemnisation of the marriage contemplated, thus overriding section 18 of the Wills Act, 1837, which provided to the contrary.

Proof of title on Succession.

(v) Sections 211 to 214, which deal with the proof of title by a probate or letters of administration or succession certificates, have, in practice, created certain problems in the case of property passing by survivorship. In particular, the question has arisen whether letters of administration can be granted in respect of shares in joint stock companies standing in the name of the Karta of a Mitakshara Joint Hindu Family. On the death of the Karta who was the registered holder of the shares, the title to the shares vis-a-vis the company does not pass by survivorship to the surviving members without letters of administration. This position has been judicially reached on a construction of the scheme of the Companies Act under which the legal title in the shares is regarded as vested in the (registered) holder of the shares[3]. The practical importance of this question is enough to justify a re-consideration of the law on the subject.

Drafting flaws.

(vi) Drafting flaws have also been discovered in a few sections of the Act. For example, an anomaly seems to exist[4] on a very important point, namely—can Hndus, Buddhists, Sikhs, Jains, etc. make a privileged will? This difficulty has arisen because of the fact that section 65 (privileged wills) does not apply to persons belonging to these communities[5], as the section is not listed in the Third Schedule as one of those sections which apply to Hindus, etc. The defective draftsmanship of sections 63 to 66 has led to the postition that, at present, the capacity of soldiers belonging to the Hindu etc. religion to make wills has become extremely doubtful. Section 63, dealing with unprivileged wills, excludes soldiers from its fold. Section 65, dealing with privileged wills, is inapplicable to Hindus, etc. by reason of the Third Schedule. The result is that Hindu soldiers are, in relation to the making of privileged wills, governed not by sections 65 and 66—these being expressly excluded under the Third Schedule—but by the unenacted law of wills as applicable to Hindus. This position cannot be ragarded as satisfactory. It is therefore necessary to extend section 65 to Hindus, etc. by amending the Third Schedule[6].

Meaning of certain expessions.

(vii) Certain important and far-reaching questions have also arisen in connection with expressions like 'Dharma' used in wills. Under section 89 of the Succession Act, bequests for "Dharma, Dharmada", etc. are liable to be regarded as void by reason of certain judicial decisions; these decisions hold the field unless the position is rectified by legislative amendment[7].

This position, however, is not satisfactory and is substantially contrary to Indian social notions. By way of illustration of local legislation that has sought to rectify this deficiency, reference may be madt to the Explanation to section 10

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[1]Section 69.

[2]Sec177, Law of Property Act, 1925 Halsbury, 3rd Edition, Vo.. 39, page 888, parn 1851.

[3]In the *goods of Sew Prasad*, A.I.R. 1954 Cal. 444, 446 paragraph 24.

[4]This is with reference to section 65.

[5]See the Third Schedule.

[6]To be considered under the Third Schedule.

[7]Point concerns Section 89.

of the Bombay Public Trusts Act, 1950, The section (along with the Explanation) reads as under[1] :—

> "10. Not-withstanding any law, custom or usage, a public trust shall not be void, only on the ground that the persons or objects for the benefit of whom or which it is created are unascertained or unascertainable.
> *Explanation*—A public trust created for such objects as dharma, dharmada or punyakarya, or punyadan shall not be deemed to be void, only on the ground that the objects for which it is created are unascertainable."

Need for chang

It appears to be desirable to incorporate such a provision in the Indian Succession Act in regard to bequests. Section 89 of the Act provides that a will or bequest "not expressive of any definite intention" is void for uncertainty. Re-enacting, as it does, section 76 of the Succession Act of 1865, this is a provision sound in principle. But its application to certain situations has created difficulties, and the view in judicial decisions[2-3] that a bequest for 'dharma' is void, does not, unfortunately, reflect the sense of the community. It is urgently necessary that the law should be amended so as to reflect the thinking in Indian society on the subject.

Effect of murderer

(viii) Certain gaps in the law need to be filled up. There is need for a specific provision prohibiting a murderer from succeeding to the estate of person murdered[4].

(ix) In the case of two or more persons who die in a calamity such as fire, flood, earthquake and the like, there is need for a specific provision laying down a presumption as to whose death occurred first. In this connection, reference may be made[5] to section 21, Hindu Succession Act, which provides as follows :—

> '21. Where two persons have died in circumstances when it is uncertain whether either of them, and if so, which, survived the other, then, for all purposes affecting succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder.",

There is, however, no such presumption in the Indian Succession Act. In the absence of a statutory provision, the matter would have to be decided primarily with reference to the burden of proof. The Privy Council[6] has rejected the argument that the wife being younger than her husband, survived him when both of them die together in an earthquake, observing—"it is clear to their Lordships that when two individuals perished in a common calamity and the question arises as to who died first, in the absence of evidence on the point there is no presumption in law that the younger survived the elder".

Detailed examination likely to reveal other defects.

1.11. The above is merely a brief mention of selected provisions of the Succession Act that require revision, or at least, re-consideration. A detailed examination of the Act would reveal many more areas of the law where reform is desirable, or even imperative. It is not necessary to encumber the discussion at the present stage with those details, leaving them to be dealt with under the relevant sections.

Scheme of the Act.

1.12. It would be convenient to deal with the scheme of the Act briefly at this stage. The Act is divided into eleven parts, apart from the Schedules. Part I contains certain preliminary provisions, dealing with the defintions and power of the State Government to exempt certain classes of persons from the operation of the Act. Part II deals with the concept of domicile. The concept is of importance, because the application of the Act to movable property of a person depends thereon.

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[1]Section 10, Bombay Public Trusts Act, 1950.

[2]*Ranchhordas* v. *Parvatibai*, I.L.R. 23 Bom. 725 (P.C.)

[3]See the judgement of Subrahmania Ayyar J. in *Parthasarathy* v. *Thiruvengada* I.L.R. 30 Mad. 340.

[4]See chapter 48, *infra*.

[5]Section 21, Hindu Succession Act, 1956.

[6]*Agha Mir Ahmed* v. *Mudassir Shah*, A.I.R. 1944 P.C. 100.

Part III deals with the effect of marriage on wills and certain allied matters. Part IV treats of the concept of consanguinity—again a concept of importance for the purposes of intestate succession.

With Part V begin the provisions actually dealing with the order of intestate succession. Chapter I of this Part is of a preliminary character. Intestate succession in the case of persons to whom this Part applies, other than Parsis, is dealt with in Chapter II, Chapter III contains special rules for Parsi intestates. It should be mentioned that this Part (Intestate succession) does not apply to Hindus Mohammedans, Bhuddhists, Sikhs or Jains.

1.13. Testamentary succession is dealt with in Part VI, which is the longest part of the Act (23 Chapters), and is to be read with the Third Schedule. The first five chapters of this Part deal with the formalities requisite for wills of various classes. Chapters VI, VII and VIII are in the nature of provisions relating to the construction, operation or effect of wills and the vesting of legacies. Chapters IX to XXI are concerned with legacies in favour of particular persons, and connected matters. Chapter XXII deals with the abstract doctrine of "election". Chapter XXIII is concerned with gifts in contemplation of death—gifts which may be described as a kind of transfer ambivalent between a transfer during lifetime and a transfer by way of will.

1.14. Substantive matters concerning succession having been dealt with, the Act now proceeds to lay down procedural rules.

Part VII deals with protection of the property of the deceased. Establishment of representative title to the property of the deceased on succession is the subject matter of Part VIII which, though consisting of only six sections (sections 211 to 216), is of the greatest practical importance. In the scheme of the Act, representative title can be established by obtaining (i) probate, (ii) letters of administration or (iii) succession certificate. The first two (probate and letters of administration are dealt with at length in Part IX, containing B chapters. third (succession certificate) is dealt with in Part X. It may be stated that these Parts of the Act are concerned with procedure and are primarily of importance to lawyers and courts.

uccession Certi- cates.

1.15. Part X of the Act which deals with succession certificates is important, both for its theoretical interest and for its practical utility. In the scheme of the Act, a succession certificate is generally granted to a person entitled to a 'debt'—an expression which would embrace the major categories of what English lawyers know as "cheses in action". The proceedings for obtaining the certificate are summary, and are intended to facilitate realisation of the debt.

ractical utility.

1.16. In most cases under the Act, the taking out of letters of administration on intestacy is not obligatory and it is enough if a succession certificate is taken out where a "debt" is to be recovered which was due to the estate of the deceased. This procedure has proved popular. The Banks, insurance Companies and others also insist on the production of a succession certificate as a matter of safeguard. The certificate has thus become the common man's usual document of title in regard to the property which he has inherited and which was not in the immediate possession of the deceased. One could appropriately describe it as the "poor man's letters of administration.

heoretical interest.

1.17. Apart from the practical utility of the certificate, it is of interest to note that it is India's original contribution to the law of administration of decedent's estates. Such a document is rarely to be found in other legal systems.

hanges needed on everal matters

1.18. In view of the manifold importance of a succession certificate, we have devoted some attention to an examination in detail of the provisions relating to the procedure for obtaining it, and we were surprised to find that there were several points of substance as well as of form, which required attention. For example, to take an illustration chosen at random—a point of substance that needs to be considered is whether this procedure should be extended to cases where a debt devolves on a person not by "succession" (as technically understood) but by "survivorship".

1.19. As to point of form, we may—again by way of illustration only—mention that the criteria by which the jurisdiction of a District Court to grant

a succession certificate is regulated (sections 370 and 371) are expressed in a language different from that defining the criteria for the jurisdiction to grant probate (section 372). It would be necessary to consider whether there is any sound reason for maintaining this disparity between the two provisions.

We propose to consider this and other points of substance and form relating to succession certificates in the appropriate chapter.

1.20. Part XI of the Act contains certain miscellaneous provisions. Lastly, there are schedules dealing with various matters of detail. Of these Schedules, the Third Schedule is of vital importance; the application of the provisions of the Act relating to testamentary succession (Part VI) to Hindus, Buddhists, Sikhs and Jains has to be ascertained from this Schedule[1].

Private international law and the Indian Succession Act.

1.21. So much as regards what is already contained in the Act—what may be called the "positive aspect". We may now point out a few negative aspects of the scope of the Act. In the first place, the Act does not contain the whole law of succession applicable in India. We have already adverted to this aspect earlier[2]. Secondly, the Act does not contain any express provisions as to rules of private international law, excepting section 5 (which provides for the application of the *lex-situs* in the case of immovable property and the law of domicile in the case of movable property) and excepting possibly a few other sections[3]. Even section 5 is, as the law stands, at present, of limited application[4].

The question of inserting suitable provision on the subject will be considered in due course[5].

Comments received on the Working Paper.

1.22. The Law Commission had circulated, for comments, a Working Paper on the Act[6] to interested persons and bodies. Such comments as have been received on the Working Paper will be dealt with in detail at the appropriate place under the relevant section. At this stage, it will suffice to mention that comments have been received from the following:—

(a) Two State Governments[7];

(b) Three High Courts[8];

(c) Delhi Hindustan Mercantile Association[9]; and

(d) The Catholic Bishops' Conference of India. (The Catholic Bishops' Conference of India has forwarded views communicated to it by others).

Besides these, the Commission has had the advantage of perusing an interesting article published in the Statesman[10], dealing with some of the proposals that had been put forth in the Working Paper[11].

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[1]Section 57.

[2]Para 1.1, *supra*.

[3]See Chapter 4, *infra*.

[4]See discussion as to section 5, *infra*.

[5]See, for example, Chapter 31, *infra*.

[6]Working Paper on the Indian Succession Act.

[7]Law Commission File No. F. 2(6)/84-L.C. Serial No. 6 and S. No. 13.

[8]Law Commission File No. F. 2(6)/84-L.C. Serial Nos. 5, 8 and 9 (High Courts).

[9]Law Commission File No. F. 2(6)/84-L.C. S. No. 6A. Hindustan Mercantile Association, Delhi, letter dated 30th May, 1984.

[10]Shahnaz Anklesaria, article in (20th June, 1984), The Statesman, page 6.

[11]All comments received upto the 10th October, 1984, have been dealt with, in the Report.

Incidentally, it may be mentioned that of the three High Courts that have responded to the Working Paper, the judges of two Courts have no comments to offer[1]. The judges of the third have welcomed the general idea of revising the Act and the proposals put forth in the Working Paper[2].

Of the State Governments, again, one has no comments to offer[3]. The comment of the other relates to section 30, and will be dealt with thereunder[4]. The comment of the Delhi Hindustani Mercantile Association raises a few points[5]. The comments contained in the letter of the Catholic Bishops' Conference of India relate to numerous sections.

CHAPTER 2

HISTORICAL

I. Origin of succession.

Scope of the Chapter.

2.1. We propose to give in this chapter a brief historical resume of the law of succession, including the Indian statutory law relevant to matters dealt with in the Act. Such a resume is not of mere academic value. The rationals of many of the provisions of the Act and their limited applicability[6] cannot be properly appreciated without a knowledge of their history.

Origin of succession.

2.2. The origin of succession has been thus dealt with by Dr. P. N. Sen[7] :—

"The origin of succession, like that of so many other legal ideas, is probably to be traced to a religious basis. According to many authorities, it is derived from primitive animism, the source of the worship of the House-spirit, always a male, generally an ancestor. The vesting of the succession in the heir himself originally, like the House-spirit, always a male, was necessary for the purpose of continuing the family rights and observances on which, according to primitive belief, the very existence of the family depended. Property and **sacra** were indissolubly combined. It was a point of family honour that the spirit of the deceased, and, through him the House-spirit, was to be propitiated by ritual observance. Such observances were neglected at the peril of the survivors, for the family was one and indivisible, the dead members were still members in a sense, and the heir was simply a co-proprietor with the deceased. The theory of the unity and perpetuity of the family is, in fact, the key to the early rules of succession[8]. The principle of spiritual benefit is also a characteristic guiding principle in the Dayabhaga law of succession. *Srikrishna Tarkalankar* points out that a stranger who throws the bones of the deceased into the Ganges, or presents funeral cakes to his departed spirit at the holy shrine of Gaya might, on the ground of superior spiritual benefit, claim his property even in preference to his relations.

II. Wills in Roman Law.

Roman Law.

2.3. Much of the law of testamentary succession has its genesis in Roman law, and it would be of interest to know the position under that law. The position has been thus stated[9] :

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[1]Law Commission File No. F. 2(6)/84-L.C. Serial No. 5 and 9.

[2]Law Commission File No. F. 2(6)/84-L.C. Serial No. 8.

[3]Law Commission File No. F. 2(6)/84-L.C. Serial No. 6.

[4]See Chapter 7, *infra* (section 30).

[5]See section 372 (*i*) (f), and miscellaneous chapter.

[6]E.G. section 57.

[7]P.N. Sen, Hindu Jurisprudence, page 161.

[8]Williams on Wills and Intestate Succession, page 2.

[9]Encyclopedia American (1966), Vol. 23, page 646.

"*Law of Succession.*—Upon the death of a person an inheritance (*hereditas*) is conceived as the whole of the property, moveables and immoveables, rights, claims and obligations of the deceased.

"Through succession on intestacy (*ab intestato*) the inheritnance developed on those members of the family who, at the time of the death of its head, had been under his paternal power and through his death become independent (*sui-juris*). In the absence of such heirs, relatives tied with the deceased by descent from a common ancestor through males (agnates) received the inheritance. Paretoriam law admitted, to succession on intestacy, sons who had been emancipated, then cognates (relatives by blood through males or females), and the wife. The whole succession on intestacy was liberally reformed by Justinian. Intestate succession occurred only when there was no valid last will or where there was one, but it became void by later events (previous death of the heir instituted or his refusal to accept the inheritance).

"The usual forms of testament here manifold, written and oral, with more or less formalities which under praeterial law (seven witnesses for a written will) and later legislation became simplified. A will had to contain the institution of an heir (heares) in the opening phrase without which it was not valid. It could contain various other dispositions, such as legacies (legata, originally expressed in prescribed words, later formless fideicomissa), manumissions of slaves, appointments of guardians for the testator's children or wife, disinheritances, and many other wishes to be fulfilled by heirs or by legatees. A later will made the previous one null, the testator, however, could make new dispositions or modify former ones in an additional document (codicil)."

Development of the will a feature of Roman Law.

2.4. Testamentary succession was extensively developed in Rome. The will, if not purely Roman, at least owes to Roman law its complete development,[1]—a development which, in most countries, was greatly aided, at a later period, by ocelosiatics versed in Roman law, and in England, especially, by the Judges of the Court of Chancery. The effect has been that, as Sir Henry Maine expresses it, "The English law of testamentary succession to personal has become a modified form of the disposition under which the inheritances of Roman citizens were administered."

Mosaic Law and Roman Law.

2.5. In the Mosaic law, the will, if it existed at all, was of a very rudimentary character, in spite of the assertion of Eusebius that Noah made a will disposing of the whole world. In any case, there was no absolute freedom of testation in the Hebrew legal system. The testator could not disinherit his natural children[2]. Intestacy was the normal course[3]. In contrast, the Roman Law developed, refined and made general the use of the will.

Will in Roman Law.

2.6. The will in Roman law was conceived as a transfer of the inheritance as a whole. The testator must dispose of the whole or none; he could not (unless a soldier) die partly testate and partly intestate.

The earliest form of will which was made publicly in the *comita curiata* in Roman times[4] looked like the irrevocable abrogation of an heir that is to say, the debarring of certain heirs who were not the ordinary heirs. The alternative will, made before people drawn up for battle, probably had for its object the disposal of the testator's arms, and other objects especially dear to him. But the will of mature Roman law originated in a *mancipatio* of his estate by the testator—probably on his death-bed-to a person who acted as a kind of trustee and who distributed it according to the instructions of the testator. Such a person was known as the *familia emptor*.

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[1]Williams on Wills and Intestate Succession, page 8, cited in N.D. Basu, Succession Act (1957), pages 11—13.

[2]Kagan, Three Great Systems of Jurisprudence (1955), page 20.

[3]Kagan, Three Great Systems of Jurisprudence (1955), page 153.

[4]Chambers Encyclopaedia, Vol. II, pages 807, 808.

Roman law wills mentioned by Gaius and wills in emergencies.

2.7. It is certain that wills existed already at the time of the XII Tables (450-451 B.C.) and it is highly probable[1] that the form used was still that mentioned by Gaius as the oldest—the will made publicly in the assembly of the *curiae* (*testamentum comitiis calatis*), with the will made before the people drawn up for battle (*testamantum in procinctuas*) as a variant. It may be however, that the mancipatory will (*testamentum per aes et libram*) had already been invented. This began as an expedient for effecting the purpose of *a will in an emergency*, when the other forms were impossible, and consisted in the use of mancipation to convey the estate of the dying man to a kind of trustee (*familia emptor*) who then distributed it in accordance with the testator's instructions.

Developments at the end of the republic.

2.8. By the end of the Republic[2], the Roman will had become revocable during the testator's life time, and did not divest him of his estate until death. But the original influence remained strong enough to ensure that the primary and essential element of the will was the institution of an *heir or heirs* who should carry on the personality of the testator. Later, there took place certain developments, in the course of which possession of the estate was given to any one "instituted" in a testamentary document, if the document wos sealed with "seven seals" and otherwise in order, even though *mancipation* had not taken place. In Justinian's times, the commonest form of will was a document sealed with seven witnesses and signed by them as the testator. A codicil could be sealed by five witnesses. Perhaps this sealing by witnesses contains the germ of the modern requirement of attestation.

Mancipation.

2.9. The "mancipation" had become a mere formality and the instructions of the testator, which were now contained in a written document, constituted a true will, operative only at the death and revocable at any time during the testator's lifetime by the making of a new will. In classical times the praetor had already given effect in most cases to a document sealed by seven witnesses[3]. In post-classical times, the mancipation had ceased to be necessary and the commonest form of will was the *testamantum griperitum*, needing for its completion the seals of seven witnesses and the signatures of the witnesses and of the testator.

Requirements of Roman Will.

2.10. The first requirement of any Roman will of historical times was the appointment of one or more *heres*. A *heres* is a universal successor, i.e., he takes over the rights and duties of the deceased (in so far as they are transmissible at all) as a whole. On acceptance, the heir becomes owner where the deceased was owner, creditor where he was creditor and debtor where he was debtor, even though the assets were insufficient to pay the debts. It was thus possible for an inheritance to be *demnose*, i.e., to involve the heir in loss. Until Justinian's day this consequence could only be avoided by not accepting the inheritance, but Justinian made one of his most famous reforms by introducing the *beneficium inventarii*, i.e., the heir who, within a certain time after the acceptance, made an inventory of the deceased's assets, need not pay out more than he had received In addition to appointing an heir, the testator might also leave legacies, i.e., particular gifts which are a burden on the heir. Freedom of testation was, however, not complete, a man being obliged to leave a certain proportion of his property to his children and, in some cases, to ascendants, and brothers and sisters.

Octavian as a beneficiary under Caesar's Will.

2.11. (Octavian, whom we know as Augustus, became the first Roman Emperor. Caesar, in a codicil to his will, named Octavian as his adopted son and heir. The status which this appointment gave to Octavian, as well as the money which came with it, enabled him to become a member of the Triumvirate which came to power after Caesar's death, and later to make himself the sole ruler of the Empire)[4].

III. Wills in other countries during ancient times

Will in Germany and Greece in ancient times.

2.12. According to Tacitus, the will was not in use among the ancient German tribes. The will is, on the other hand, recognised by Sabbinical and

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[1]Encyclopaedia Britannica (1965), Vol. 19, page 453 (H.F. Jollowicz).

[2]Chamber's Encyclopaedia, Vol. II, pages 807, 808.

[3]Encyclopaedia Britannica (1965), Vol. 18, page 453 (H.F. Jollowicz).

[4]Rene A. Wormser, "Wills that made histroy" (1962) 48 A.B.A.J. 1148, 1149.

Mohammedan Law. At Athens, under the legislation of Solen, a will could be made only where the testator left no children. Eleven out of the twelve extant crations of Isacus are on claims to an inheritance. In some cases, Isacus argues in favour of the validity of the will, in others, he argues against it. (The Romans were essentially a will making people. An immense space in the Corpus Juris is occupied with testamentary will. The whole of part V of the Digest (Books XXVIII (28)—XXXVI (36) deals with the subject).

Aristotle's will, we are told[1], shows his concern for every relative and dependant, not the least for the emancipation of his slaves.

Wills in countries under Roman influence.

2.13. [History furnishes many examples of wills executed by distinguished persons in countries under Roman influence. The Egyptian dynasty of the Ptolemies was founded by a Greek, one of the generals of Alexander the Great. Ptolemy X was the last legitimate descendant of the line. Having no legitimate progeny of his own he left a will in which he bequeathed his kingdom to Rome. Caesar and some other Roman senators wanted to accept the bequest and to actually annex Egypt, but the political opposition was strong and the project had to be abandoned[2].]

Will of Louis the Pious.

2.14. [Nearer to our times, Louis the Pious divided his realm *by will* among his three surviving sons,—Lothair, Charles ("the Bold") and Louis ("the German").] Unhappy about the division which their father had made, the three sons immediately broke into armed conflict at his death. When the dust settled, the final division of the Empire presaged the permanent separation of France, Italy and Germany and created a borderland which (including Alsace) was to become a source of strife for centuries. Louis ("the German") got what is substantially West Germany now: Charles ("the Bold") got France; and Lothair received the imperial title. Northern Italy and the Frankish heartland, the Central Area to the North Sea[3].

IV. Wills in Hindu and Muslim law

Wills amongst Hindus and Muslims.

2.15. (In Hindu law, there was, originally, no concept of wills. No synonym for the word "will" was to be found in the whole of Sanskrit literature. But the institution of wills in all its aspects (as applicable to Hindus) was brought into being by judicial decisions[4] during the British period). In the latter half of the 19th century, the Privy Council could observe[5], "It is too late to contend that because the ancient Hindu treatises make no mention of wills, a Hindu cannot make a testamentary disposition of his property."

Hindu wills, before and after 1870.

2.16. A Hindu will executed before 1870, could be in writing or oral, and no attestation or other formalities were required[6]. Even signature was not necessary in law. In 1870, the Hindu Wills Act introduce various formalities for the execution of wills[7]. Later legislative developments on the subject are not material for the present purpose, since the sections of the Indian Succession Act which lay down the formalities for making wills apply to Hindus[8], and constitute the present law on the subject.

Muslim Law.

2.17. Amongst Muslims, the tradition of making wills goes at least as early as the Prophet[9]. The Indian Succession Act does not apply to wills executed by Muslims, an the law on the subject has developed on its own lines[10].

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[1]Encyclopaedia Britannica, Vol. 2, page 393.

[2]Rene A. Wormser, "Wills That Made History" (1962) 48 A.B.A.J. 1148.

[3]Rene A. Wormser, "Wills that made History" (1962) 48 A.B.A.J. 1148, 1149.

[4]Sarkar, Epochs in Hindu Legal History, pages 371 and 383.

[5]*Beer Partab.* v. *Rajendra Partab*, (1867) 12 M.I.A. 1, 37.

[6](*a*) *Maneharji v. Narayan*, 1. B.H.C.R. 77.

(*b*) *Srinivasa* v. *Vijayammal*, 2 MHER 224.

[7]*Vinayak* v. *Govindraj*, 6. B.H.C.R. 224.

[8]Sections 63-64, read with section 57.

[9]Sekaene, Muslim Law (1968), page 838,
Tyabji, Muslim Law (1968), page 764.

[10]See also para 2.11.

V. History of the statutory law of succession in India

History of the Succession Act.

2.18. This brings us to the statute law on the subject of succession in general in India. History of the general statutory law on succession may be conveniently dealt with under the following periods:—

(1) The period before codification

During the period upto 1865, Hindus and Muslims were governed by their personal law[1], and persons belonging to other groups were, in general, left to be governed by the English law[2]. This had been specifically held in relation to the right of exercise of testmentary power over lands held in the mofussil by a Frenchman having a British domicile[3]. There were, no doubt, some refined distinctions as between the Presidency towns and the Mofussil, but these need not detain us, not being material for the present purpose.

It may be stated that application of the English law to Parsis, at least in the Presidency towns, was well-settled.[4]

History of testamentary Jurisdiction.

2.19. With reference to history of the testamentary jurisdiction of the courts in India, it has been stated[5] :—

> "Testamentary jurisdiction was first given to the Supreme Court by these original charters printed in two Merley's Digest, p. 549, that in Bengal dated 1774 being the first. And it was then given as a branch of the ecclesiastical jurisdiction, as was to be administered according to the ecclesiastical law as in force in the Diocese of London. In the course of the series of events by which the British territories in India grew from a group of trading settlements into an empire, various branches of jurisdiction which sprang originally from an ecclesiastical origin, have come to be applied, by a number of legislative Acts, to new territories and new classes of persons, and administered by law tribunals. And in the process of this development ecclesiastical jurisdiction has been completely discarded and the Legislature has gradually evolved an independent system of its own, largely suggested, no doubt, by English law, but also differing much from that law, and purporting to be a self contained system. Even in the case of the High Courts, the successors of the Supreme Court (which alone possessed eccesiastical jurisdiction) the testamentary jurisdition, which the charters purport to confer upon them, is not given as a branch of ecclesiastical jurisdiction, and is not made dependent upon the law administered by English courts.
>
> "From an early date the Supreme Court granted probates of Hindu and Mahomedan Wills. (See *Babu Muttra's case,* Morton 75, also reported in Clark's Rules and Orders, page 119). The practice varied greatly from time to time, and it was never perhaps very satisfactorily determined upon what basis the jurisdiction rested. It was, however, established that such probate might issue. But the Supreme Court never applied the English rule as to the necessity for probate to Hindu and Mahomedan Wills, nor do they attribute to such probates, when granted, the English doctrines as to the operation of probate. Under the system a Hindu or Mahomedan executor took no title to properly merely as such by virtue of the probate. In the case of Mahomedan executors such a title was created for the first time by the probate and Administration Act"

(2) Period before 1865—Hindus and Muslims

2.20. In the period before 1865, considerable uncertainty prevailed as to the law applicable to persons belonging to communities other than Hindus and Muslims. Before 1865, the Hindus and Muslims were governed by their respective personal laws, in matters of inheritance and succession. The position was, however, obscure in relation to other persons,—for example, Anglo-Indians, Parsis, Jews, Armenians, Christians and others. In general, the English law was

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[1]Act of Settlement, 1781, section 17.

[2]*J.S. Jebb v. Lefebre and Carelline,* English decisions (old series), Vol. 1, page 92.

[3]*Mayor of Lyons v. East India Co.,* 1 M.I.A. 175.

[4]*Naoroji v. Rogers,* 4 Bombay High Court Reports.

[5]*Kurrutulain* v *Nuzhut-ud-Dowla,* I.L.R. 33 Cal. 117, 128 (Sir Arthur Wilson J.).

applied in the Presidency towns, but the position as regards the Moffussil was not very clear[1].

This obscurity of position was, in fact, referred to by Sir Henry Maine[2], when he introduced the Bill that led to the Succession Act of 1865. Efforts by the First Law Commission to clarify the law failed to yield fruit.

Obscurity in the first half of 19th century.

2.21 The law defining the rights and obligations of non-Hindus and non-Muslims was thus in an extremely obscure position in the first half of the nineteenth Century. In the presidency towns, the English law was applied to members of such communities, as stated above[3]. Outside the presidency towns, most of the courts in the Mofussil came to apply, under the phrase "justice, equity and good conscience", in all cases not provided for by the legislature, the substantive personal law of the particular person.

First Law Commission.

2.22. In 1935, the First Law Commission[4] recommended that the English law should be declared to be the law applicable to such persons, but this recommendation was not accepted[5].

Second Law Commission.

2.23. When the Second Law Commission was established under the Charter Act of 1853, it adopted a different approach. It did not fabour the introduction of English law, but it considered it desirable to assimilate the law prevalent throughout the country[6].

Third Law Commission.

2.24. A lot of legislative activity was witnessed during the period of the Third Law Commission. Amongst the enactments framed by the Third Law Commission was the Indian Succession Act, 1865. One of the objects of this Act was to regulate the position relating to inheritance of property after death in regard to persons other than Hindus and Muslims.

The draft of the Indian Succession Bill was submitted by the Third Law Commission in its First Report[7]. Originally, it was proposed as "the Indian Civil Code Chapter 1"—a title which was later altered as the Indian Succession Act of 1865. It may incidentally be stated that Third Law Commission did its work in England. Its Members were Sir John Romilly (Master of the Rolls), Sir William Erle (Chief Justice of the Common Pleas), Sir Edward Ryan, Mr. Robert Lowe (Lord Sherbrooke), Mr. Justice Willes and Mr. J. M. Macleod (who had been a Member of the First Law Commission also).

2.25. The Act of 1865 dealt with succession, both testamentary and intestate. However, the Act exempted Hindus and Muslims from its scope. Its utility lay in the codification of the law of succession as regards other persons. The draft Bill prepared in England by the Third Law Commission, as already stated, was well received in India. Rankin has described it as a "most valuable and distinguised piece of work"[8].

Speech of Sir Henry Maine.

2.26. It was mentioned in the speech of Sir Henry Maine, when he introduced the Bill which led to the Act of 1865, that "the rules which the Act included were, for the most part, so extremely simple as to be readily intelligible to a layman. The Act was to serve as the general law of testate and intestate succession governing all who were not expressly exempted from its operation. Europeans, Eurasians, Jews, Armenians and Indian Christians were made subject to the Act. Hindus, Mohammedans and Buddhists were excluded from the purview of the Act. The Governor-General-in-Council was given power to exclude any Indian races or tribes not falling within these classes. The Act applied to Parsis in cases of testamentary succession.

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[1]M.P. Jain, Indian Legal History (1972), pages 437, 490, 495, 556.

[2]Statement of objects and Reasons attached to the Indian Sucession Bill, which became the Act of 1865.

[3]Para 2.20, *supra*.

[4]First Law Commission, 'Lex Loci' Report, (31st October, 1835).

[5]Rankin, Background to Indian Law (1946), page 37.

[6]Second Report of the Second Law Commission, Cambridge History of India, Vol. 6, page 18.

[7]Third Law Commission, First Report, (1854-1855).

[8]Rankin, Background to Indian law (1946), page 47.

Post-1865 legislation.

2.27. In between 1865 and 1925, a number of other Acts relating to the law of Succession were passed. All these were incorporated in the Act of 1925, which was a consolidating measure in the true sanse.

(3) The period of consolidation

Act of 1925

2.28. The period of consolidation of the statutory law of succession in India thus begins in 1925. The various enactments consolidated by the Indian Succession Act, 1925, were :—

(1) The Succession (Property Protection) Act, 1841 (Act 19 of 1841).
(2) The Indian Succession Act, 1865 (Act 10 of 1865).
(3) The Parsi Intestate Succession Act, 1865, (Act 21 of 1865).
(4) The Hindu Wills Act, 1870 (Act 21 of 1870).
(5) The Married Women's Property Act, 1874 (Act 3 of 1874), Section 2.
(6) The Probate and Administration Act, 1881 (Act 5 of 1881).
(7) The District Delegates Act, 1881 (Act 6 of 1881).
(8) The Probate and Administration Act, 1889 (Act 6 of 1889).
(9) The Succession Certificate Act, 1889 (Act 7 of 1889).
(10) The Probate and Administration Act, 1890 (Act 2 of 1890).
(11) The Native Christians Administration of Estates Act, 1901 (Act 7 of 1901).
(12) The Probate and Administration Act, 1903, (Act 8 of 1903).

(4) The Period of reform

2.29. The amendments made from time to time in the Indian Succession Act of 1925 can be said to represent the period of reforms. This reform has been rather slow in its pace and therefore not perceptible. This slow pace is, in part, due to the fact that the law of intestate succession applicable to the two important communities in India—Hindus and Muslims—falls outside the ambit of the Indian Succession Act. The slow pace of reform is, in part, also due to the fact that the practice of executing Wills (a topic which forms the bulk of the subject matter of the Act), has only recently become widely prevalent in the Mofussil. However, to some extent, the slow pace of reform must also be attributed to the fact that no systematic attempt at a review of the Act in all its aspects has been undertaken since 1925. Such amendments as have been effected in the Act were due to some urgently felt need to deal with a particular problem or demand for reform that could not be postponed for a long time. This is understandable, because matters falling within the lawyer's law generally do not find priority on the legislative agenda.

VI. Parsis

Developments relating to Parsis.

2.30. Developments concerning the law of succession applicable to Parsis are, however, of interest and may be dealt with in some detail. As early as 1835, the Parsee community[1] had represented that they were subjcted to serious disadvantages in the absence of fixed written laws. The third Law Commission had, in its report expressed the view that the claim of the Parsees to have a separate law was not borne out. The Parsees, however, were not satisfied with this and, ultimately, in 1864 the Parsee Law Commission was appointed. That Commission made certain recommendations and the Government of India agreed with them.

Parsis in mofussil Scope

2.31. In the case of mofussil Parsees, it was almost impossible to ascertain with precision the Persee customs, because on many points the Parsees of Surat, Broach, Poona and Ahmedabad differed from each other and all of them differed from the Parsees in Bombay.[1] The Parsees in the Presidency Towns

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[1] Legal History (1972), page 560.

were subject to the English law. The English law of primogeniture was not allowed to them through[1] an Act of 1837. The English statute of distribution was, however, applied. The Privy Council had already held that in the Supreme Courts, the Parsees could not claim the benefit of the English Ecclesiastical law as to the matrimonial causes among them. On the whole, the position was extremely unsatisfactory. The Parsee Law Commission recommended that a separate law should be enacted for the entire Parsee community in the Presidency Town as well as in the mofussil, as different systems of law applicable to the same community led to perplexity. Consequently, a separate Act governing intestate succession amongst the Parsees was passed. This has now been incorporated in sections 50—56 of the Indian Succession Act, 1925.

CHAPTER 3

PRELIMINARY

I. Title and definitions

Scope.

3.1. This Chapter will deal with certain preliminary matters.

Section 1 short title.

3.2. Section 1 deals with the short title of the Act and, in accordance with the practice then in force, the word "Indian" occurs as a part of the short title. The practice in modern times is, however, different. We recommend that the word "Indian" should be omitted from the short title, in conformity with recent practice. It may be noted that when revising earlier Acts also recent legislative practice has been to delete the word "Indian" from the short title.

Suggestion received regarding Goa.

3.2A. In the comments received on the Working Paper, one of the comments forwarded with the letter of the Catholic Bishops Conference of India[3] raises certain issues and points concerning the application of Succession Act to Goa. It has, for example, been stated that in Goa, Christians, Hindus and Muslims are subject to the same law and if the Succession Act is made applicable to Goa, it will create unnecessary divisions on communal lines. In this context, we may mention that a proposal regarding the application of Succession Act to Goa is not being made in this Report, nor was any such proposal contained in the Working Paper issued by the Commission on the subject.

Definitions in section 2.

3.3. Section 2 contains definitions of certain important expressions used in the operative provisions of the Act. It would be of interest to classify them according to the subjects to which they relate. Two of the definitions—clauses (a) and (c)—deal with certain functionaries acting under a will. One of the definitions—clause (bb)—deals with a judicial functionary. Three of the definitions deal with certain fundamental concepts relating to wills—clauses (b), (f) and (h). Two deal with certain classes of persons—clauses (d) and (e). Two are territorial—clauses (cc) and (g).

Before discussing the existing definitions, it is necessary to consider certain points indicating the need for the insertion of new definitions.

II. New definitions to be inserted

Expressions denoting application of the Act and need to define them.

3.4. The persons to whom the Succession Act does not apply, are to be ascertained from several provisions of the Act[4] Expressions which have been used in various sections in this context have come up for judicial construction. While it is not practicable to codify all the propositions laid down in the judicial decisions, it seems to be advisable to consider codification of at least some of the important propositions, so that the Act may be self-contained in respect of the salient matters concerning its applicability. Some of these points are stated below, by way of illustration.

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[1]Central Act 9 of 1837. Succession to Parsis Immovable Property Act (9 of 1837).

[2]Compare the amendment made in the short title of the Sale of Goods Act, 1930, wherein the word 'Indian' has been omitted.

[3]Catholic Bishops Conference of India Letter dt. 3rd October, 1984.

[4]Sections 3, 29(1) 58(2) and 217 (The list is merely illustrative).

(1) *Hindus*—Most sections of the Act now apply to Hindus.

(2) *Indian Christians*—One of the sections of the Act[1] does not apply to 'Indian Christains'—an expression separately defined[2]. The expression seems to have come up for consideration before the Rangoon High Court,[3] which held that the court cannot inquire into the internal convictions of a person. We have received a comment on the Working Paper through a letter of the Catholic Bishops' Conference,[4] in which it is stated that the terms "Indian Christians" and "native Christians" should be avoided, and simply the expression "Christians" should be used in the Act. It is stated that Christians should be considered as an integral community in India. We have given the suggestion very careful consideration, but we find it impracticable to accept it. The adjective "Indian" had to be used, since certain rules applicable to Christians coming from outside India are intended not to apply to Indian Christians as defined in the Act. So long as this scheme is to be maintained—and this is a matter of substance not of mere phraseology—some berbal device will necessarily have to be employed to indicate the line of demarcation. If the formula "Indian Christian" is decided to be avoided, something similar will have to be substituted in its place. The use of the expression in question does not, so far as we can see, affect the integral character of the community, from the social angle.

Recommendation to insert a definition of 'Parsi'.

(3) *Parsis*—Some of the sections of the Act apply to Parsis. The expression 'Parsi' is not defined in the Act. The Parsi Marriage Act,[5] defines it as meaning a 'Parsis Zeroastrain'. The definition given in that Act is suitable for adoption for the purposes of the Succession Act also. We, therefore, recommend that it should be so adopted, by inserting[6] a new definition in the Act for the purpose.

(4) *Portuguese*—It seems to have been held by the Bombay High Court[7] that the Portuguese are not governed by the Act.

Recommendation to insert a definition of 'Hindu'

3.5. The expression 'Hindu' has not been defined at any place in the Indian Succession Act. Nice questions have arisen with reference to the meaning of this expression for the purposes of the Act. For example, the view has been expressed that the word 'Hindu' is a theological term, and denotes a person professing any form of Brahmanical religion or religion of the Puranas.

This view would exclude non-Aryan natives like Santhals, Kols, Nagas and Bhils.[8] [9] That the term 'Hindu' is used as a theological term, was also the view expressed in a Bombay case.[10]

Statutory definition of 'Hindu'

3.6. In this context, it is proper to refer to several statutory definitions of 'Hindu' that have now come into existence.

The following is an extract of section 2 of the Hindu Succession Act, 1956.

Application of Act.

"Section 2(1). This Act applies—

(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, Lingayat or a follower of the Brahme, Prarthana or Arya Samaj.

(b) to any person who is a Budhist, Jain or Sikh by religion.

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religin, unless it is proved that any such person would not have been governed by the Hindu Law or by any custom or usage as part of that law in respect of any of the matters, dealt with herein if this Act had not been passed.

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[1]Section 33A.

[2]Section 2 (d).

[3]*Ma Khin, Than* v. *Ma Ahma*, AIR 1934 Rang. 72.

[4]Catholic Bishops' Conference of India, letter dated 3rd October, 1984.

[5]Parsi Marriage & Divorce Act (3 of 1936).

[6]To be carried out in section 2, by inserting a definition of the expression 'Parsi'.

[7]*Antas* v. *Ardesir*, (1901) 2 Bombay Law Reporter 431.

[8]Stokes, Succession Act, page 201, cited by N.D. Basu, Succession Act (1957), page 31.

[9]Also Stokes, Anglo-Indian Codes, page 483.

[10]*Dagree* v. *Pacotti Sen Jao*, (1895) L.I.R. 19 Bom. 783, 789 (per Starling J.)

Explanation : The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be :—

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;

(c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in subsection (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the official Gazette, otherwise directs.

(3) The expression 'Hindu' in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is nevertheless a person to whom this Act applies by virtue of the provisions contained in this section".

In the same terms is section 2(1) of the Hindu Marriage Act, 1955.

Recommendation to insert definition of 'Hindu'.

3.7. In our opinion, it is desirable to adopt the above definition for the purposes of the Indian Succession Act also, so as to secure uniformity. A person to whom the Hindu Succession Act applies would then be regarded as a "Hindu" for the purposes of the Indian Succession Act also.

Accordingly, we recommend that a definition of 'Hindu' should be inserted[1] to the effect, that the expression 'Hindu' has (in this Act) the same meaning[2] as in the Hindu Succession Act, 1956.

Section 2(*aa*)—New Definition of "Child" recommended.

3.8. The Act does not, at present, define the expression 'Child'. For reasons which we shall state later,[3] it is necessary to add a definition of this expression as follows :—

"(aa) *'child' includes—*

(a) *an adopted child, in the case of any one whose personal law permits adoption.*

(b) *"an illegitimate child".*

III. Existing definition

Section 2(*a*) "administrator"

3.9. We now proceed to consider the existing definitions given in section 2.

Under Section 2(a), "administrator" means a person appointed by competent authority to administer the estate of a deceased person when there is no executor. The clause needs no change.

A definition of "child" may be added, for reasons already stated.[4]

Section 2(*b*) "codicil".

3.10. Section 2(b) provides that "codicil" means an instrument made in relation to a will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the will.

The definition needs no change.

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[1]To be carried out by amending section 2, by inserting a definition of "Hindu".

[2]In consequence, expressions referring to Buddhists, Sikhs and Jainas along with Hindus, wherever they occur, may be omitted.

[3]See para 8.18 *infra* (section 37).

[4]See para 3.8 *supra*.

Section 2(*bb*) "District Judge".

3.11. Under section 2(bb), inserted in 1929, "District Judge" means the Judge of a principal civil court of original jurisdiction. The main object of the definition was to cover the High Court in its ordinary original civil jurisdiction.

It has been held[1] that "District Judge" (in the Succession Act) includes an Additional District Judge.

The definition needs no change.

Section 2(*c*) "executor".

3.12. Section 2(c) defines "executor" as meaning a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided.

It needs no change.

Section 2(*cc*) (New Definition of "Hindu" to be inserted.

3.13. A definition of the expression "Hindu" should be inserted, on the lines already recommended.[2]

Section 2(*d*) "Indian Christian".

3.14. Under section 2(d), the expression "Indian Christian" means a native of India who is, or in good faith claims to be of unmixed Asiatic descent and who professes any form of the Christian religion.

The definition follows that given in an earlier Act[3] except that the phrase 'Indian Christian' has been used in place of the earlier, phrase 'Native Christian'.

The expression has been held to include converts to Christianity[4].

The Indian Marriage Act[5] appears to have been the first Central Act to use the expression "native christian". The terminology was, with one change, continued in the Indian Christian Marriage Act, 1872. The Indian Divorce Act, 1869 does not use the expression, since it does not make a distinction between native or Indian Christians and other Christians.

The definition in the present Act requires three ingredients (i) native of India, (ii) unmixed Asiatic decent and (iii) profession of the Christian religion.

Although, at the first sight, the requirement that the person concerned must be a native of India may recall to one's mind the days of foreign domination, the real intention is to emphasise that there must be some link with India and that mere religion is not enough.

As regards the requirement of *unmixed Asiatic descent,* the intention was apparently to demarcate such persons from those who were of Western descent for example Anglo-Indians. Thus, a link with India and descent from Asiatic stock, have some significance.

3.14A. In a comment received by us through the Catholic Bishops Conference,[6] a reservation is expressed about the qualification "unmixed Asiatic descent" which is required for an Indian Christian. The following criticism has been offered in the comment :—

"Anglo-Indians would not qualify to Indian Christians according to this definition. There would not be any difficulty if by their not coming under this section it would be advantageous to them, but it is not advantageous to them. Further the question of non-Anglo-Indian Christian marrying an Anglo-Indian girl would give rise to problems. Since the father is not an Anglo-Indian the children would not be Anglo-Indians. But since they are not of unmixed Asiatic descent they would not come under the Indian Succession Act. There is no law apparently under which the children would come. If the special provision for Anglo-Indians is to be retained could not the children follow the status of the father?"

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[1](*a*) *Sagar Chaudhury* v. *Nabin Ch. Chaudhury* AIR 1970 Assam 111, 113.
(*b*) *Ganpat* v. *Mahadeo,* AIR 1949 Nag. 408, para 7.

[2]See paragraphs 3.3. and 3.4., *supra.*

[3]Native Christians Administration of Estates Act (7 of 1901).

[4](*a*) *Dwarka Nath* v. *Raj Rani,* AIR 1932 Oudh 85;
(*b*) *Kamawati* v. *Digbijai Singh,* AIR 1922 P.C. 14.

[5]The Indian Marriage Act, 1865 (5 of 1865).

[6] Bishops' Conference of India, letter dated 3rd October 1984.

We find ourselves unable to accept the suggestion. We would like to point out that Anglo-Indians are not governed by provisions applicable to Indian Christians but by provisions applicable to other communities, that is to say, the residuary class from which are excluded the specified communities such as Hindus, Muslims, Buddhists, Sikhs, Jains, Parsis and Indian Christians. As regards the question of a non-Anglo-Indian Christian marrying an Anglo-Indian girl, it is to be pointed out that the problem of determining for legal purposes the religion of the child of such mixed parentage is a matter outside the purview of the Succession Act. In the circumstances, we do not think that any amendment is called for in the Succession Act, on the point in issue.

3.14B. The only improvement which can be possibly considered is as regards the word "native". But this will only be a verbal improvement. Some kind of link or association with India is of the essence of the concept of Indian Christians, and unless a better word can be found, it is not possible to change the definition in clause (d).

Section 2(e) "Minor".

3.15. Section 2(e) defines "Minor" as meaning any person subject to the Indian Majority Act, 1875 (9 of 1875), who has not attained his majority within the meaning of that Act, and any other person who has not completed the age of eighteen years and "minority" is defined as meaning the status of any such person.

The definition needs no change.

Definition of "parsi" to be added.

3.16. As already recommended[1], a definition of the expression "parsi" should be inserted.

Section 2(f)— "Probate"

3.17. In section 2 (f), "probate" is defined as meaning the copy of a will certified under the seal of a court of competent jurisdiction with a grant of administration to the estate of the testator. The form of probate is given in the Sixth Schedule to the Act. On a comparison of the definition with the form one finds that "probate" is defined inaccurately. "Probate" does not, in strictness, mean the copy of a will, *but the certificate* of the Court, to which a copy of the will is attached.

The distinctive characteristic of probate is that it establishes the validity of a particular will for all purposes and so as to bind all persons. The grant of a probate, makes it unnecessary for an executor to have to "prove" the will on every occasion on which he seeks to rely upon it[2]. In other words, probate and letters of administration with a will annexed, while un-revoked, are conclusive evidence of the due executions and validity of the will[3].

Defect in present definition of "probate".

3.18. We are not, at the moment, concerned with the view that the grant of probate is a "decree" of the court—a view expressed by Markby J. in a Calcutta case[4], or with the opposite view that a probate is not a judgment, order or decree—a view taken in a later Calcutta case[5] and also in a Patna case[6]. What is material for our purpose is the most important element of a probate—a *certificate of proof* issued by the proper officer of the court. This element is missing in the present definition, as contained in Section 2 (f), though it is indicated very clearly in the Form of Probate[7] prescribed by the Act in the Sixth Schedule.

In this sense, there arises a discrepancy between the definition and the Form, in so far as the essential feature of 'proof' and 'certificate' is left out in the definition.

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[1]Para 3.4, *supra*.

[2]Gareth Muller, Machinery of Succession (1977) page 75.

[3]*Whicker* v. *Hume*, (1858) 7 House of Lords Cases 124, 143, 156, 165.

[4]*Komollochun* v. *Niruttan*, (1879) ILR 4 Cal. 360.

[5]*Rajib Panda* v. *Lakhan Sendh*, (1900) ILR 27 Cal. 11.

[6]*Raj Kishor* v. *Promode Bihari* (1943), ILR 22 Pat. 756, (Section 296 relied on).

[7]Sixth Schedule, read with section 289.

Recommendation to amend the definition of "Probate".

3.19. It appears to us that this discrepancy between the definition in section 2(f) and the Form of Probate as given in the Sixth Schedule should be removed. With that object in view, we recommend that the definition of "probate" in Section 2(f) should be revised as a *"document issued in respect of a will under the signature of the proper officer of the court, certifying that the original will was proved on a certain date and attaching a certified copy of the will,* with a grant of administration to the estate of the testator."

Section 2—other points if any.

3.20. No other points need to be made concerning section 2.

IV. Exempted persons

Section 3—Power to grant exemption

3.21. This takes us to section 3. Section 3 gives power to the State Government to exempt the members of any race, sect or tribe in the State from the operation of the specified sections. The power is to be exercised where the State Government considers it impossible or inexpedient to apply such provisions to them. Such persons are called "exempted persons".

We have no comments on this section, which appears still to possess some utility in view of the peculiar social and economic conditions prevailing amongst certain groups or in certain local areas.

CHAPTER-4

CONFLICT OF LAWS[1]

(Section 3 A et seg.)

I. Section 5—Placing

Separate part in the Act to deal with conflict of laws.

4.1. At this stage, we would like to interrupt our consideration of the substantive sections of the Act and refer to one matter which is of considerable practical importance. The Act, in section 5, deals with the law applicable to succession. This provision is included in Part II entitled 'Domicile'. In fact, however, the section deals with a basic principle of conflict of laws. "Domicile" is mentioned in the section as only one of the criteria for determining the law applicable. Essentially, the section deals with the law applicable. To bring out this essential character of section 5, the section should really appear in a separate Part which can be placed, say, (after Part I), as Part IA. That Part could be given the heading "Conflict of Laws" and section 5 included therein.[2] If any other rules[3] of conflict of laws related to testamentary and intestate succession are considered appropriate for being codified, they can also be conveniently included in the same Part.

II. Formalities in respect of wills

The aspect of private international law and formalities in wills.

4.2. We may state that apart[4] from section 5, there are certain other specific topics[5] relating to the law of succession which have an interest from the point of view of private international law. To cite one example, the question of formalities in relation to the execution of wills has important international aspects. The formalities prescribed by law for the execution of a will often differ from country to country. Cases may conceivably occur where a person in country X executes a will which comes up for probate in country Y. When a testator domiciled in one country makes a will abroad or dies abroad or disposes of property situated in more than one country, the question then arises, what would be the set of rules that apply ? The situation creates some difficulty in the absence of a definite rule on the subject in municipal legislation. This is not a mere hypothetical question. There have been actual situations in which such anomalies have arisen.

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[1]To be introduced as Part IA in the Act.

[2]For the concrete recommendation, see para 4.20, *infra.*

[3]For an illustration see para 4.4 to 4.8 *infra.*

[4]Para 4.1, *supra.*

[5]See also paragraphs 4.19 and 4.20, *infra.*

For example, in one of the leading English cases on the subject[1], a will of movable property made in the English form (outside the UK) *by a British subject* who died domiciled in France was held to be invalid, since it neglected the formalities prescribed *by French law* (the law of domicile), even though it complied with the requirements of English law. In England[2], the position has been modified by statute, but in India, there being no such legislation this would be the position even today under Section 5.

4.3. In the field of conflict of laws, formalities in relation to wills are governed by certain connecting factors[3]. These connecting factors depend on the judicial or legislative approach to the subject as adopted in the country concerned. Under the Indian Succession Act however, the only connecting factors, applicable for determining questions as to the formalities of wills are those mentioned in section 5, sub-section (1) and (2). The section makes applicable the law of India in the case of immovable property, and the law of the country of domicile in the case of movable property. There has, so far, been no elaborate development of the concept of "proper law" of the "will" in India.

Although section 5 does not, in so many words, specifically enact that it applies to formalities as to wills, that seems to follow from the wide language of the section, namely, "succession to the ... property of a person deceased is regulated by ..." It has, for example[4], been held that the validity of a will which purported to dispose of immovable property in British India must be tested by the rules applicable in India as to the execution of wills.

The section seems to cover not only the law of intestate succession, but also the law of wills in all its aspects, namely, their formal validity, essential validity (including capacity of testators ond validity of dispositions) and questions of interpretation and legal effect of wills.

Formal validity anomalies likely to arise from section 5.

4.4. Since section 5 disregards (i) nationality of the testators or his domicile *at the time of execution of the testament* (known as *domicile tempore testamente*) and (ii) the law of the place of execution, certain anomalies could arise[5] in regard to the formal validity of wills.

III. Legislation in England as to formalities

Wills Act, 1861.

4.5. To remedy some of these anomalies, in England, the Wills Act, 1861 (Lord Kingsdowne's Act) was passed. It enacted a provision that a will of *personal property made out of the United Kingdom by a British subject* should be admissible to probate, if it satisfied the formalities required by the *lex loci actus* or by the law of the testator's domicile *tempore testmente* or by the law of the domicile of origin if such domicile was in Her Majesty's Dominions. These creteria should be a substitute for the traditional test of domicile. If the will was made within the UK, the only permissible substitute was the *lex loci actus*.

Position in England before 1861.

4.6. Before 1861, a will, according to English law, had to be made in the form prescribed by the law of the testator's domicile at the time of death, at least in relation to movables. Neither the law of his domicile at the time of the execution of the will, nor that of the place where he made the will, sufficed. The situation was highly unsatisfactory. A domiciled Englishman who fell ill while travelling abroad and wished to make will immediately might have difficulty in finding a lawyer who could assist him in making *a will in the English form*, while it would be easy to use the local form[6].

The Act of 1861 remedied[7] the situation to some extent.

4.7 The English Act of 1861, though welcome as an improvement, did not effect an adequate reform in the Law. In 1963, the Wills Act was passed[8] which

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[1]*Sremer* v. *Freeman*, (1857) 18 Moore P.C. 306; 14 E.R. 508.

[2]Paragraphs 4.5 to 4.8 *infra*.

[3]Morris in (1946) 62 L.Q.R. 170, 173, 176.

[4]*Bhaurao* v. *Laxmibai*, (1896), ILR 20 Bom. 607, 610.

[5]Para 4.2, *supra*.

[6]Wolff, Private International Law (1950), page 584, para 559.

[7]Para 4.5, *supra*.

[8]Cf. Fourth Report of the Private International Law Committee (1958) comd. 491

(while repealing the Act of 1861), has made comprehensive provisions by increasing the relevant connecting factors. Nationality and habitual residence are now added to the factors earlier recognised (by the common law and by the Wills Act, 1861), namely, domicile and *locus actus*[1—2].

Summary of English Act of 1963.

4.8. It may be useful to give, at this stage, some idea of the scheme of the Wills Act, 1963. Leaving aside provisions not material for our purpose, the subject dealt, within the Act sectionwise are as follows :—

Section 1 : enacts a general rule as to formal validity of wills. A will shall be treated as properly executed if its execution conformed to the "internal law" in force in the territory where it was executed or in the territory where at the time of its execution or at the time of testator's death, he was domiciled or habitually resident, or in a state of which, at either of these times, he was a national.

The phrase "internal Law" is defined as the law which would apply in a case where no question of the law in force in any other country or place arose. It thus avoids the possibility of application of the doctrine of *renvoi*.

Provision is made to determine "internal law" in regard to a country where more than one system is in force.

Section 2(1) : Provides additional rules (i.e., in addition to section 1), to deal with—

(a) wills executed on board a vessel or aircraft,

(b) wills disposing of immovable *property* (the law in force in the territory where the property was situated is adopted),

(c) a will, revoking an earlier will, and,

(d) a will exercising a power of appointment (the law governing the essential validity of the power is adopted).

The important provisions in this regard are—

(a) a will executed on board a vessel or aircraft of any description, if it complied with the law of the place with which the vessel or aircraft may be taken to have been most closely connected having regard to its registration (if any) and other relevant circumstances, is properly executed.

(b) a will disposing of immovable property, if it complies with the law in force in the place where the property was situated, is properly executed.

(c) a will revoking a will which was executed under the Act if it complied with the same law as the revoked will did, is properly executed.

Section 2(2) : Provides, in effect, that in regard to a will exercising a power of appointment, non-compliance with formal requirements contained in the instrument creating the power would not render the will inoperative.

Section 3 : Provides that any requirements of a foreign law (that is, the foreign law which would become relevant under the tests adopted in the Act), prescribing special formalities to be observed by "testators answering a particular description" or prescribing certain qualifications to be possessed by witnesses to wills, are to be treated as formal requirements only[3].

Section 4 : Provides that the construction of a will shall not be altered by reason of any change in the testator's domicile after the execution of the will. This re-enacts section 3 (in part) of the Wills Act, 1861.

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[1]Cheshire, Private International Law (1970), page 591.

[2]The Act of 1963 has been noted on by Morris (1964) 13 I.C.L.Q. 684; Kahn Fraund 1(1964) 27 Modern Law Review 55.

[3]See illustrative hypothetical cases, *infra*. (Para 4.15).

Section 5 : Relates to Scotland.

Section 6 : Contains provisions for interpretation.

Section 7(1), (2) and (3) : contain certain provisions not of interest to India.

Section 7(4) : Makes provisions as to the operation of the Act from the point of view of time. It provides that the Act shall not apply to a will of a testator who died before the commencement of the Act, but shall apply to a will of a testator who dies after such commencement, whether the will was executed before or after that time.

Principle underlying Section 1 of the English Act of 1963.

4.9. So much as regards the scheme of the English Act of 1963. It may be useful now to state briefly the rationale underlying some of the important provisions. The principle underlying section 1 of the Act, which enumerates several alternative tests for determining the formal validity of wills, is that while only those documents should be accepted as valid wills, of which it can be said with reasonable certainty that they were executed by the testator with the intention of *disposing of his assets after his death,* a document which fulfils these conditions ought to be accepted as valid and ought not to be excluded because of some technical imperfections of which the testor might reasonably have been unware.

Accordingly, the Act seeks to secure that if the testator complies with the formal requirements of any system of law which *he may reasonably assume to be* applicable, his will should be treated as formally valid. The Act thus increases the possible systems of law to which reference may be made to establish the formal validity of wills. Validity by one of them is sufficient.[1]

Habitual residence.

4.10. One of the tests given in section 1 of the English Act of 1963 is "habitual residence". Cheshire's comments[2] as to the position resulting from the Act in regard to habitual residence are interesting :—

> "With this old adoption of the test of habitual residence, the frustration arising from the disparity between the Anglo-Saxon and Continental concepts of domicile will almost be a memory of the past in this limited field. At any rate, if a testator makes a will according to the law of the country where he has spent the greater part of his life, there will no longer be any occasion to counter the plausible argument that his domicile was elsewhere since he did not intend his residence to be permanent"[3].

It may be pointed out that under section 1 of the English Act, a will is to be treated as properly executed if its execution conformed to the law in force in the place—

(i) where the will was executed,

(ii) where the testator was domiciled,

(iii) where the testator had his habitual residence, or

(iv) of which the testator was a national.

The first of these choices (place of execution) can relate, in time and place, only to the execution itself, but the other three expressly refer to the relevant place either at the execution of the will or at the testator's death[4].

Section 2(1)(a), English Act, 1963.

4.11. The law of the place where the will was made, is given an extended definition in the case of wills made on board a vessel or aircraft "of any description". Section 2 (1) (a) of the English Act of 1963 allows (in addition to law of the place of execution), another alternative, namely, the internal law in force in the territory to which the vessel or aircraft may be taken to have been most closely connected. Normally, this would be the flag

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[1]Cf. Sykes & Pryles, Australian Private International Law (1979), page 449.

[2]Cheshire, Private International Law (1970), page 592.

[3]*Ch. Ramsay* v. *Liverpool Royal Infirmary,* (1938) A.C. 588.

[4]J.T. Farrand, "Foreign Wills and the Wills Act" (1963), 103 S.J. 686, 687.

state. In this context, the English Act does not require the vessel or aircraft to be in motion when the will is executed. Hence a holograph will made on board a French ship alongside in London docks, or on board a French aircraft grounded at London airport, might be admissible to probate[1].

View of Cheshire as to vessels.

4.12. Cheshire[2] thus explains the position as to vessels:—
"Where a will is made on board a vassel or aircraft whether civil or not, the identity of the *lex loci actus* receives special statutory treatment. If at the time of execution the aircraft is grounded in a particular territory or the vessel is within territorial waters, the testator may comply with the internal law of that territory. Alternatively, he may comply with the internal law of the territory with which, having regard to its registration and other relevant circumstances, the vessel or aircraft, whether in course of transit or not, has the closest connexion[3]. Judged by this test, the *lex loci* will normally be the law of the flag, which is represented by the law of the territory where the ship or aircraft is registered if the flag is common to a political unit containing a variety of legal systems"[4].

Principle as to the law of ship.

4.13. Mention may, in this context, be made of the principle that the "local law" operating on board a ship is the law of the flag flown by the ship[5] and that the law governs transactions on board, including marriages to the same extent as they would be governed by the *lex loci* if they took place elsewhere.[6]

Main tests adopted in the English Act.

4.14. By way of a very brief summary of the main tests adopted in sections 1-2 of the Wills Act, 1963, it may be stated that a will of movables or land is taken as properly executed[7] if its execution conforms to the internal law in force in the territory where it was executed, or in the territory where at the time of execution of the will or at the time of the testator's death the testator was domiciled, or had his habitual residence or in a State of which at either of these times he was a national.[8]

In addition, a will of immovables is to be treated as properly executed if its execution conforms to the internal law in force in the territory where the property is situated.

Operation of section 3, 1963 Act, illustrated.

4.15. So much as regards sections 1 and 2 of the English Act of 1963. The operation of section 3 of the English Act of 1963 could be illustrated by taking hypothetical cases involving the application of statutory provisions in force in Netherlands[9] and in France.[10]

(i) Dutch law allows a holograph will by a Dutchman, *but not outside Netherlands*. It appears that there are similar provisions in Greece, Portugal and Uruguay[11]. A Dutchman domiciled in England executes such a will. The will does not acquire any validity by virtue of the Act of 1963, because the English law (law of domicile) does not allow a holograph will, and Dutch law (law of nationality) does not allow it outside Netherlands. This prohibition in Dutch law, being regarded as a "matter of form"—section 3—would continue to apply.

(ii) By German law, a will can be made by a person above 16 years, but only a person above 21 years can make a holograph will. A German above

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[1]Morris, "The Wills Act, 1963, 13 I.C.L.Q. 684, 688.

[2]Cheshire, Private International Law (1970) p. 591.

[3]Section 2(1) (*a*).

[4]Cf. Cheshire, Private International Law (1970), page 282.

[5]J.D. White , "Marriages at Sea" 17 L.Q.R. 283, 292.

[6](*a*) Halsbury, 4th Ed., Vol. 7., page 101.

(*b*) Jackson, Formation and Annulment of Marriage, page 226.

(*c*) Marriage on the "High Seas" (1928-29) 38 Yale L.J. 1129, 1135.

[7]Section 1, Wills Act, 1963.

[8]Section 2 (1) (*b*), Wills Act, 1963.

[9]Article 992, Dutch Civil Code, referred to by Kahn-Fraund in note on the Wills Act, 1963 (1964) 27 Modern Law Rev. 55, 58, 59, . Also see Wolff, Private International Law (1950), page 589.

[10]Articles 969 and 970, French Civil Code referred by to Kahn-Fraund in note on the Wills Act, 1963 (1964) 27 Modern Law Review 55, 58, 59.

[11]Wolff, Private International Law (1950), page 589.

16 makes a holograph will in France (French law allows holograph wills). The will is valid, because French law (the law of place of execution) permits it. The fact that German law prohibits it to persons under 21 becomes immaterial, since section 3 provides that it is a matter of form.

Effect of section 4 of the English Act.

4.16. According to section 4 of the English Act of 1963, no will becomes invalid by reason of any subsequent change of the testator's domicile. This rule applies not only to the formalities of a will, but also to the testator's capacity to make one. It applies not only to British subjects, but also to any testator of whatever nationality and whatever domicile. The result of this is that if the testator, when making the will, was capable of doing so under the law of his domicile at that time, the will remains, valid, even though, under the law of his last domicile, it would have been void on the ground of his incapacity. In the example given above,[1] therefore, the will made by a sixteen year old German testator in Germany should be regarded as valid, even if the testator dies domiciled in England.

Wide scope of the Act.

4.17. The impression one gains from the Act is that all the choices likely to be hit upon in practice have been put in, on the principle that no will should be invalid for want of form, provided that it complies with some law which the testator has at least had a temporary connection.[2]

Recommendation—Need for addition of suitaable provisions adapting the English Act of 1963.

4.18. This, in brief, is the scheme of the English Act, whose most important effect is the widening of the connecting factors in relation to the formal validity of wills. It appears to us that having regard to the considerations mentioned at the outset in this Chapter[3], the connecting factors that could possibly operate in relation to the formal validity of wills should be made more liberal than at present, in order to avoid anomalies of the nature that arose in England in the last century[4] and similar other anomalies that could possibly arise. To avoid such anomalies, the (English) Wills Act, 1963 was passed. As that Act furnishes a good precedent, we recommend the adoption of its provisions with appropriate adaptations and modifications.

To avoid a possible inconsistency in the legislation, it will, as a consequential change, be necessary to modify[5] suitably the test of section 5. We shall make a recommendation for its amendment at the appropriate place.

Amendment of Section 5 also recommended.

4.19. It will be noticed that some of the tests that will become operative under the proposed new provision[6] are not mentioned in section 5. That section provides for *only two criteria* (law of domicile of a person at the time of his death or the law of India). On the addition of the proposed tests, the restrictive rule contained in section 5 would, to that extent, become inaccurate.

VI. Recommendation as to as to new sections

Draft section to be inserted to deal with conflict rules as to formal validity.

4.20. In the light of the above discussion, we recommend the insertion of the following new sections to deal with the rules of conflict of laws as to the formal validity of wills :

General as to formal validity.

[cf. s. 1 Wills Act, 1963].

"3A. *A will shall be treated as properly executed if its execution conformed to the internal law in force*—

(a) *in the territory where it was executed, or*

(b) *in the territory where, at the time of its execution or of the testator's death, he was domiciled or had his habitual residence, or*

(c) *in a state of which, at either of those times, he was a national*[7].

[1]Para 4.14, *supra*.

[2]Compare J.T. Farrand, "Foreign Wills and the Wills Act" (1963) 107 S.J. 686, 687.

[3]See para 4.2, *supra*.

[4]Para 4.6, *supra*.

[5]See recommendation as to section 5, para 4.19, *infra*.

[6]Para 4.14, *supra*.

[7]See proposed sedtion 3E(1)(*a*),for a definition of "internal law".

Additional rules. [Cf. s. 2, Wills Act, 1963]

"3B. (1) *Without prejudice to the provisions of section 3A, the following shall be treated as properly executed—*

(a) *a will executed on board a vessel or aircraft of any description, if the execution of the will conformed to the internal law in force in the territory with which, having regard to its registration (if any) and other relevant circumstances, the vessel or aircraft may be taken to have been most closely connected;*

(b) *a will so far as it disposes of immovable property, if its execution conformed to the internal law in force in the territory where the property was situated;*

(c) *a will so far as it revoked a will which under this Act would be treated as properly executed or revoked a provision which under this Act would be treated as comprised in a properly executed will, if the execution of the later will conformed to any law by reference to which the revoked will or provision would be so treated;*

(d) *a will so far as it exercises a power of appointment, if the execution of the will conformed to the law governing the essential validity*[1] *of the power.*

S. 3B. Cf. S. 2 (2) English Act of 1963.

S. 3B. (2) *A will so far as it expresses a power of appointment shall not be treated as improperly executed by reason only that its execction was not in accordance with any formal requirements contained in the instrument creating the power.*

Certain requirements to be treated as formal.

Cf. S. 3 English Act of 1963.

3-C. *Where (whether in pursuance of this Act or not) a law in force outside India, falls to be applied in relation to a will, any requirement of that law whereby special formalities are to be observed by testators answering a particular description or witnesses to the execution of a will are to possess certain qualifications shall be treated notwithstanding any rule of that law to the contrary, as a formal recuirement only.*

Construction of wills. [Cf. s. 4, Wills Act 1963, reenacting section 3, Wills Act, 1861]

"3D. *The construction of a will shall not be altered by reason of any change in the testator's domicile after the execution of the will*[2].

"3E. (1) *in this Chapter—*

(a) *"internal law" in relation to any territory or state means the law which would apply in a case where no question of the law in force in any other territory or state arose;*

(b) *"state" means a territory or group of territories having its own law of nationality;*

(c) *"will" includes a testamentary instruments or act, and "testator" shall be construed accordingly.*

"(2) *Where, under this Chapter, the internal law in force in any territory or state is to be applied in the case of a will, but there are in force in that territory or state two or more systems of internal law relating to the formal validity of wills, the system to be applied shall be ascertained as follows :—*

(a) *if there is in force throughout the territory or state a rule indicating which of those systems can properly be applied in the case in question, that rule shall be followed : or*

(b) *if there is no such rule, the system shall be that with which the testator was most closely connected at the relevant time, and for this purpose the relevant time is—*

(i) *the time of the testator's death where the matter is to be determined by reference to circumstances prevailing at his death, and*

(ii) *the time of execution of the will, in any other case.*

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[1]The expression "essential validity", though not found in Indian Legislative usage so far, is convenient.

[2]Compare, *in the Estate of Grees,* (1904) Probate 269.

"(3) *In determining for the purposes of this Act whether or not the execution of a will conformed to a particular law, regard shall be had to the formal requirements of that law at time of execution, but this shall not prevent account being taken of an alteration of law affecting wills executed at that time if the alteration enables the will to be treated as properly executed.*"

"(6) *This chapter shall not apply to a will of a testator who died before the commencement of the Indian Succession ..... (Amendment) Act ..... and shall apply to a will of a testator who dies after such commencement, whether the will was executed before or after such commencement.*"

V. Other aspects of conflict of laws

4.21. There may be other aspects of conflict of laws concerning the validity of wills, such as capacity to make or revoke testamentary dispositions, the permissible types of dispositions, the right to contest them and the legal consequences of defective execution in general. Legal thinking on these matters is still in the process of crystalisation. We do not, at present, therefore, recommend any provision on these subjects. Other aspects.

4.22. It may, finally, be mentioned as a matter of interest, that several sections of the Succession Act deal with the "international" aspects of succession. The following is an illustrative list : List of sections dealing with international aspect of succession.

Section 5[1]

(Law regulating succession to deceased person's immovable and movable property respectively)

Section 218

(To whom administration may be granted, on intestacy)

Section 219 (g)

(Rules for the grant of administration in respect of property in India, though the law of domicile is different)

Section 232

(Grant of administration to universal or residuary legatees)

Sections 270-271

(Basis of jurisdiction of the district Judge under the Act)

Section 324

(Application of movable property to the payment of debts, where domicile not in India)

Section 367

(Transfer of assets from India)

Recommendations for amendment, wherever needed in these sections, would be made the appropriate place.

CHAPTER 5

DOMICILE

(Sections 4 to 19)

I. Importance of the concept of domicile, and its meaning.

5.1. The next few sections are concerned with the law applicable to succession (section 4). The most important doctrine dealt with in those sections is that of domicile (Sections 5—19). Scope.

[1]Cf. paras 4.10, to 4.19, *supra*, for recommendation for amending section 5.

Domicile in private international law

5.2. The importance that the concept of domicile possesses in common law jurisdictions is primarily due to the fact that domicile is a basic concept in private international law as administered in those jurisdictions.[1] In Indian law, the competence of Indian courts to grant divorce[2] and the law applicable to succession to movables[3] are illustrations of fields of private international law in respect of which domicile is paramount by statute.[4]

We shall consider later certain points of detail which arise out of the sections dealing with this subject in the Succession Act. The present place, however, seems to be appropriate for making a few general observations as to domicile, which is central to the core of many legal systems.

5.3. The status of a person, the matrimonial and family relation and many other important questions are governed by domicile. The principle of domicile is, in fact, the core of the system of private international law. At the present day, the plaintiff's domicile or residence is a basis of jurisdiction in the majority of countries.[5]

Domicile the essence.

5.4. In the elegant phrasing of Cheshire,[6] "Domicile is to status what local space is to a tangible thing".

Domicile in Indian Legislation.

5.5. That domicile is an important concept is as much true of the Indian Legal system as it is of others. By way of illustration, we may mention certain enactments in force in India in which domicile has been recognised as sufficient for courts to assume jurisdiction or as relevant for the purposes of determining the applicable law.

For example, the Special Marriage Act,[7] which extends to the whole of India except the State of Jammu and Kashmir, applies also to citizens of India domiciled in the territories to which the Act extends, if those citizens are in the State of Jammu and Kashmir. The Hindu Marriage Act,[8] which extends to the whole of India except the State of Jammu and Kashmir, applies also to *Hindus domiciled* in the territories to which the Act extends, who are outside the said territories.

Further, while the Act applies to Hindus, it also applies to any other *person domiciled* in the territories to which the Act extends being a person who is not a Muslim, Christian, Parsi or Jew by religion.

It may be mentioned that as early as 1856, the Indian Legislature recognised domicile as a basis of jurisdiction[9] in regard to certain proceedings concerning family law in Indian Courts.

Indian decisions in the field of private international law.

5.6. These are examples relevant to the application of Indian law or the jurisdiction of Indian courts. Correspondingly, Indian courts recognise that certain matters relating to status are governed by the law of the country of domicile. For example, in one case[10] which went upto the Privy Council, deed of adoption had been executed by a Hindu widow domiciled in Pondicherry (then in French India). It was held by the Privy Council that the widow's capacity to adopt a son to herself, and the status of the child so adopted as her adoptive son, are matters to be determined according to French Law (the law of domicile).

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[1]See Law Commission of India, 65th Report (Recognition of foreign divorces).

[2]E.G. section 2, Indian Divorce Act, 1869.

[3]Section 5(2), Indian Succession Act, 1925.

[4]Para 5.5, *infra*.

[5]T.M.C. Asser Institute, Statutory Private International Law (1971), pages 36, 110, 131, 170 190, 199; Rabel, Conflict of Laws (1958), Vol. I, pages 429, 432, 434, 453, A.L.I., Restatement Second Conflict of Laws, Sec. 71; (1972) 20 American Journal of Comparative Law, pages, 1, 16, 22-2; (English) Domicile and Matrimonial proceedings Act, 1973, s. 5.

[6]Cheshire, Private International Law (1947) 3rd. Ed. page 147, cited in Levontine, Choice of Law and Conflict of Laws (1973) page 58, footnote 130.

[7]Section 1(2), Special Marriage Act, 1954.

[8]Section 1(2), and 2(1)(c), Hindu Marriage Act, 1955.

[9]Section 3, Hindu Widow's Re-marriage Act, 1856.

[10]*Nataraja* v. *Sivaraya*, A.I.R. 1950 P.C. 34.

ining the meaning of "domicile", judicial construction plays Domicile meaning
, and this remains true even of countries where the rules have
a part.

anworth in *Whicker* v. *Hume*[1] said that domicile meant "home,
ome, and if you do not understand your permanent home, I'm afraid
strations drawn from foreign writers will very much help you to it".
generally regarded as a workable description. But even this is not
accurate. A person may be domiciled in a country which is not, and
as been, his home, as in the case of married women in countries where
w on the subject is not altered by statute. By allowing a married woman to
re her own domicile, one obvious cause of this anomaly goes. Again, a
on may have more than one "home", but only one "domicile". Conversely,
person may be homeless, but never lacking a domicile. English law attaches
excessive importance to the domicile of origin,—such that the domicile of origin
revives to fill the gap left when a domicile of choice as abandoned and before
another is acquired. Further, English law requires a heavy burden of proof before
it admits that a domicile of origin has been thrown off. One must note also the
excessive emphasis on animus, (intention), as a factor in the acquisition of a
domicile of choice.

5.8. Domicile is thus "an idea of law".[2] But, in the words of Morris,[3] Complexity.
although "originally a good idea ..... the once simple concept has been so
overloaded by a multitude of cases that it has been transmitted into something
further and further removed from the practical realities of life".

We are referring to this aspect in order to explain why, in some of the
succeeding sections, we have made an attempt to see that the provisions of the
law reflect the practical realities of life.

5.9. While, as stated above, domicile is, an important concept both in internal The common law
legislation and in regard to the recognition of certain foreign legal adjudications, system.
it is a peculiarity of the common law system that the concept of domicile is
underscored by certain rules which almost assume the form of categorical imperatives. These are—

(1) Every person has a domicile[4]

(2) There is no period during the life of a human being at which he may not have a domicile. No gaps are recognised by law, in this regard.[5]

(3) A person can have only one domicile at a time.[6]

Holmes announced that[7] domicile "in its very nature is one, and if in any
case two are recognised for different purposes, it is a doubtful anomaly".[8]

5.10. The combined operation of these rules accounts for the tenacity with Tenacity of the law.
which the law clings to the domicile of origin and the rigidity with which some
of the rules are formulated. To some extent, this rigidity is reflected in the attitude
of the law as to the domicile of minors and married women.

II. Domicile in the scheme of the Act.

5.11. It is in this background that the provisions of sections 5—19 relating Background of sections 5-19 and scheme.
to domicile were framed. These sections would appear to be almost the first
attempt in the common law world to codify a difficult and elusive branch of law.

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[1] *Wicker* v. *Hume*, (1858) 7 H.L.C. 124, 160.

[2] *Bell* v. *Kenny*, (1868) L.R. 1 Sec. & Div. 307, 320 (Lord Westbury).

[3] Morris, Conflict of Laws (1971), page 13.

[4] *Cf.* section 7, Succession Act.

[5] *Cf.* sections 9 and 13, Succession Act.

[6] *Cf.* section 5, Succession Act.

[7] *Williamson* v. *Osenton*, (1914) 232 U.S. 619, 624.

[8] See now Second Restatement on Conflict of Laws, Section 11(2), (1971).

In the Indian Succession Act, the concept of domicile i. in the Part with which we are now concerned (sections 4 to 19). defined the application of this Part, section 5 enacts the basic r. "conflicts" law, namely, that succession to immovable property situ is regulated by the law of India, while succession to movable prop lated by the law of domicile. Various general modes of acquiring d dealt with in sections 6 to 13, followed by provisions applicable to certa situations or to particular classes of persons—such as determination of in the case of minority, marriage and insanity. Finally, a practical rule is in rated in section 19, namely, succession to movable property is governe Indian law, in the absence of proof of domicile elsewhere.

III. Section 4.

Section 4 Recommendation to extend Part II to persons at present excluded (Hindus etc.).

5.12. By virtue of section 4, Part II of the Act (Sections 4 to 18), which relates to domicile, does not apply, to Hindus, Mohammadans, Budhists, Sikhs or Jains. Under the Special Marriage Act,[1] however, this part would apply to persons whose marriage is solemnised under that Act. A study of the sections contained in this Part does not reveal any particularly weighty reason why the sections contained in this Part should not apply to the persons excluded at present form their scope. In fact, the principle of these sections has been adopted in various decisions[2] relating to the persons so excluded—that is to say, Hindus, Muslims, Bhudhists and others.

Possible explanation of section 4.

5.13. There is an historical explanation of the British concept of domicile, and that may perhaps explain why section 4 excludes Hindus etc. The oddities of the British domicile of origin can be understood only against the background of the historical context in which this concept was developed.

This was, in the main, in the mid-Victorian age when Britain was the centre of a world-wide Empire, the different parts of which were heterogeneous in regard to civilisation, ways of life and law. There was then need for a device allowing British settlers in the various parts of the Empire to remain subject to their own law in personal matters and in matters of succession, even when they spent a long time away from home, there being in most cases no question of their assimilation to the local conditions. As it has been put, the tenacity of the domicile of origin "reflects the habits of the English upper classes of the last century when younger sons went to the colonies to make a fortune and retired home afterwards" as well as "a reluctance on the part of the courts in mid-Victorian England to admit that a gentleman could never lose all connection with the country of his birth and his ancestral estates".[3—4]

Case law as to domicile of Hindus etc.

5.14. This is perhaps the reason why the sections relating to domicile were made applicable only to non-Indians, since, at that time, the need felt was confined to them However, on general principles, what has been enacted in section 4 is, in substance, applicable to Hindus also.—a position resulting broadly from a decision of the Supreme Court.[5] There are decisions also of High Courts following this principle. For example, in a Kerala case,[6] the High Court decided that the sale proceeds of immovable property in Sheffield (U.K.) would be governed by English law. This point was not, on appeal, disputed before the Supreme Court.[7] The dispute in the appeal before the Supreme Court was as regards the law which governed the succession to movable properties and monies left by the deceased. On this point, the Supreme Court held—"If Krishnan (the deceased) had acquired a domicile of choice in England, there can be no doubt that English law would govern the succession to them."

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[1]Section 21, Special Marriage Act, 1954.

[2]*Viswanathan* v. *Abdul Wasid*, A.I.R. 1963 S.C. 1.

[3]Palson, Marriage and Divorce in the conflict of Laws (1974), page 63.

[4]Nygh, Conflict of Laws, pages 74, 81, 82.

[5]*Vishwanathan* v. *Abdul Wasid*, A.I.R. 1963 S.C. 1.

[6]*Sankaran* v. *Lakshmi*, A.I.R. 1964 Kerala, 244.

[7]*Sankaran* v. *Lakshmi*, A.I.R. 1974 S.C. 1764, 1767, para 13.

Recommendation to delete section 4.

5.15. In this position, we recommend that Part II of the Act should be extended to the persons at present excluded from its scope. This will only clarify the present position. It would not introduce any change of substance. The object could be achieved by deleting section 4, which, at present reads—

"This Part shall not apply if the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jain .....".

IV. The choice of Law : Section 5.

5.16. This takes us to section 5. The section reads as under :—

Section 5.

"5. (1) Succession to the immovable property in India of a person deceased shall be regulated by the law of India, wherever such person may have had his domicile at the time of his death.

(2) Succession to the moveable property of a person deceased is regulated by the law of the country in which such person had his domicile at the time of his death.

ILLUSTRATIONS

(i) A, having his domicile in India, dies in France, leaving movable property in France, movable property in England, and property, both movable and immovable, in India. The succession to the whole is regulated by the law of India.

(ii) A, an Englishman, having his domicile in France, dies in India, and leaves property, both movable and immovable, in India. The succession to the movable property is regulated by the rules which govern, in France, the succession to the movable property of an Englishman dying domiciled in France, and the succession to the immovable property is regulated by the law of India."

Principle underlying Section 5 and analysis of Section 5(2).

5.17. Sub-section (1) of section 5 is based on the principle of private international law, that all rights over immovable property are governed by the law of the country where the property is situated.[1] It would appear that in England, not only succession, but also the execution, attestation and interpretation of wills disposing of immovable property, and all questions relating thereto, are governed by the law of the locality where the property is situated.[2]

Section 5(1), and 5(2).

5.18. Section 5(1) needs no detailed discussion. The effect of section 5(2) may be analysed. Where a person domiciled in foreign country, but living in India, leaves property movable and immovable in the foreign country and also immovable property elsewhere, the various important situations would be then dealt with according to the rules of Private International Law.[3] The position is as follows :—

(i) Immovable property in India would be distributed according to the internal law of India, and the foreign domicile is not of any relevance.

(ii) Immovable property in the country of domicile (or in any other country) is to be distributed according to the law of the *lex situs*.

(iii) Movable property in India would be distributed in accordance with the law of domicile.

(iv) Movable property in the country of domicile would, of course, be distributed in accordance with the law of that country.

(v) Movable property in any other country (other than the country of domicile or India) would also presumably be distributed according to the law of the country of domicile.[4]

V. Choice as to national law.

Question whether deceased should be allowed to opt for national law.

5.19. An important question to be considered in connection with section 5 is this. Should there not be a provision permitting a person to choose the national

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[1] *Bonnaud* v. *Emile Charriol*, (1905) I.L.R. 32 Cal. 631, 640.

[2] *Studd* v. *Cook*, 8 Appeal Cases 577.

[3] Adapted from Levontin, Choice of Law and Conflict of laws (1976), page 66.

[4] Cf. *Re Ross*, (1930) 1 Ch. 377.

law as the law of succession governing his movables ? In this connection, we note that in the French Code on Conflict of Laws (proposed), the following provision appeared :

> 2307—"*Unless by his last testament the deceased expressly opted for his national law,* succession shall be governed by the law of his domicile.
>
> However, successions concerning immovables and *fonds de commerce,* shall be governed by the law of the situs of the immovable or of the fonds, which shall also govern their transmission.
>
> Obligations of the heirs regarding the debts of the succession shall be governed by the law of the domicile of the deceased or (where appropriate under paragraph one, above), by his national law.
>
> The obligation to contribute to the payment of the debts of the estate is always in proportion to the value of the share of the assets going to the heir[1]."

Recommendation for creating an exception in section 5 for cases where testator chooses national law as regards movable property.

5.20. On principle, it appears to be desirable to create in section 5 an exception—for cases where the deceased, by his will, expressly opted for his national law in relation to movable property, as in the first and third paragraphs of draft article 2307 of the French proposal quoted above[2].

5.21. This change in section 5 should be carried out even if our recommendation[3] for the addition of liberal provisions generally in regard to the execution of wills is not accepted.

5.22. If that recommendation is accepted, the change in section 5 proposed in the present paragraph will be without prejudice to the change resulting from the proposed provisions, making other tests applicable in relation to the execution of wills

Recommendation to amend Section 5 in view of suggested liberal provisions as to law governing execution of wills.

5.23. We are separately recommending the insertion of several provisions[4] which seek to render applicable certain tests additional to those mentioned in section 5. In view of this recommendation, section 5 will require consequential amendment. Accordingly, we recommend the addition, at the end of section 5, of the following new sub-section :—

"(3) The provisions of this section shall be subject to those of Part IA.

VI. Domicile of Origin.

Section 6—Recommendation to add specific Explanation to Section 21.

5.24. This takes us to section 6. Section 6 provides that a person can have only one domicile for the purpose of the succession to his movable property. The proposition laid down in the section seems to have been based on an earlier English case[5]. As enacting a general rule, the section is unobjectionable. However, the section assumes that a person will have in mind a definite place as his domicile. Domicile is generally linked with permanent residence. Now the question that arises in this position is that, if a person has two or more permanent residences—a rare but not inconceivable situation—and the issue of domicile becomes material for the purpose of the law of succession, how is his domicile to be determined ?

Recommendation amend section 19.

5.25. Though section 6 does not address itself to this aspect, yet it is an aspect which cannot be overlooked. Our recommendation in this context would be to provide that where it is difficult to determine the domicile of a person by reason of the fact that he has two or more places of permanent residences, the place where he last permanently resided shall be the place of his domicile. Section 19 seems to be the appropriate place[6] for carrying out this object, and we recommend that an Explanation should be added to that section for the purpose.

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[1] Article 2307, Draft French Code on Conflict of Laws (1970), 18 A.J.C.L. at page 619.

[2] Para 5.19, *supra.*

[3] Chapter 4, *supra.*

[4] Chapter 4, *supra.*

[5] *Somerville* v. *Somerville,* 5 Ves. 750, 786.

[6] Section 19 to be amended.

VII. Domicile of child at birth.

Section 7.

5.26. Section 7 reads—

"The domicile of origin of every person of legitimate birth is in the country in which at the time of his birth his father was domiciled; or, if he is a posthumous child, in the country in which his father was domiciled at the time of his father's death.

ILLUSTRATION

At the time of birth of A, his father was domiciled in England. A's domicile of origin is in England, whatever may be the country in which he was born."

Section 7—latter half posthumous child—English law.

5.27. We have a comment on the latter half of section 7, which provides that the domicile of origin of a posthumous child is that of the father at the time of the father's death. The English law on the subject,—at least according to the general understanding,—is that the domicile of a posthumous child follows that of the mother. The rule has in substance, been so stated by Cheshire[1] and Dicey[2].

In fact, Dicey, in an earlier edition[3], (1928) gave the following illustration of the English rule on the subject :—

"D is a person posthumous whose father was domiciled at the time of his death in England. At the time of D's birth his mother has acquired the domicile in France. D's domicile of origin is French".

The illustration given by Dicey in his 1973 edition is[4]—

"H and W are married and domiciled in Scotland. H dies and W immediately acquires a domicile of choice in England. After she has done this she gives birth to D, who is H's son. D's domicile of origin is (semble) English".

Demerit of present section 7.

5.28. In our opinion, the English rule on the subject represents a just approach. The present Indian rule does not accord with reality, and may even create an anomaly. The present provisions—i.e. section 7, latter half, when read with section 9 (which provides that the domicile of origin prevails until a new domicile has been acquired),—would lead to the position that for about eighteen years, the child would continue to have the father's domicile, even though the mother with whom he is living might have, after the father's death, migrated to another country. To force the child to hold on to the father's domicile in such circumstances is to introduce a fiction which goes too far. There is, therefore, need to substitute in section 7, latter half, the mother's domicile in place of the father's.

Section 14 considered.

5.28A. Of course, if section 7, latter half, is amended as recommended above, it would follow that the domicile of the posthumous child would (by virtue of section 14) automatically follow the domicile of the mother during minority. In certain very exceptional circumstances, this rule might not be beneficial to the child, say, for example, when the mother deliberately and *mala fide* makes a change in domicile so as not to benefit the child. However, this problem can be avoided by amending section 14 also[5], to the effect that, where the change of domicile effected by the mother is not for the welfare of the minor, the change in the domicile of a minor which may follow from a change of domicile on the part of the mother is not to be regarded as a necessary consequence of a change of the mother's domicile.

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[1]Cheshire, Private International Law (1970), page 17.

[2]Dicey, Conflict of Laws (1973), page 93, Rule 9 (2), and page 94 (illustration 2).

[3]Dicey, Conflict of Laws, quoted by Henderson, Succession Act (1928), page 20.

[4]Dicey, Conflict of Laws (1973), page 94, Illustration 2.

[5]To be considered under section 14.

Recommendation to amend section 7 latter half and section 14.

5.29. In the light of the above discussion, we recommend that section 7, latter half, as well as section 14,[1] should be amended as indicated below: —

"7. The domicile of origin of every person of legitimate birth is in the country in which at the time of his birth his father was domiciled; or, if he is a posthumous child, in the country in which his *mother* was domiciled at the time *of his birth.*

Illustration (i) At the time of the birth of A, his father was domiciled in England, A's domicile of origin is in England, whatever may be the country in which he was born.

Illustration (ii) *H and W are married and domiciled in England. H dies and W immediately acquires a domicile of choice in India*[2]*. After she had done this, she gives birth to S, who is H's son. S's domicile of birth is in India*[3]".

The following words should be added at the end of the Exception to section 14 :

"*or if the parent has changed his domicile mala fide*[4]."

Section 8—domicile of origin of illegitimate child.

5.30. This takes us to section 8, which provides that the domicile of origin of an illegitimate child is in the country in which at the time of his birth, his mother was domiciled.

The section needs no change.

VIII. Acquisition of domicile.

Section 9—Continuance of domicile of origin.

5.31. Section 9 provides that the domicile of origin prevails until a new domicile has been acquired. This is a rule of convenience based on the implicit postulate that a person must at all times during his life have a domicile.

Section 10—Acquisition of new domicile.

5.32. Connected with section 9 is section 10, which provides that a man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin. The emphasis is on the words "fixed habitation". The general principle in this regard was best put by Lord Westbury, who observed that the domicile of choice must be a "residence freely chosen and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors or the relief from illness"[5].

Section 10—Explanation.

5.33. Faithful to this general principle, the Explanation to section 10 provides that a man is not to be deemed to have taken up his fixed habitation in India, merely by reason of his residing "there" (i.e. in India) in "the Civil, Military, Naval or Air-borne Service of Government, or in the exercise of any profession or calling".

Analysis.

5.34. The main paragraph of the section thus deals with a wide area of acquisition of domicile by choice. A narrow area of the subject is dealt with by the Explanation. The acquisition of domicile of choice by service personnel has, in the past, presented many vaxatious problems in the field of law in England. At the beginning of the nineteenth century, the view has obtained that the servants of the East India Company could acquire a domicile of choice in India through residence there. The doctrine was defined by Leach V.C. in the following terms :—[6—7]

"A residence in India for the purpose of following profession there in the service of the East India Company creates a new domicile".

Developments in England as to servicemen.

5.35. But this doctrine, which came to be known as that of "Anglo-India" domicile, was found to be anomalous, and English courts began to be unwilling

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[1]To be carried out under section 14 also.

[2]Compare section 10.

[3]Compare Dicey, Conflict of Laws (1973), page 94, Illustration 2[para 5.27 *supra*].

[4]To be carried out under section 14 also. See para. 5.52, *infra*.

[5]*Udny* v. *Udny*, (1869) L.R. 1 Scottish Appeals 441, 458 (H.L.).

[6]*Munrow* v. *Douglas*, (1820) 3 Mad. 379.

[7]See Note, "Domicile of Serviceman" (1950) 228 Law Times 4.

to recognise the capacity of a British soldier to acquire a domicile of choice. Thus, in 1884, Cotton L.J. held,[1] "a soldier or sailor in the service of a sovereign retains the domicile which he had on entering the service, wherever he may be stationed".

The doctrine of "Anglo-Indian domicile" was finally disapproved in 1930 in England.[2]

However, in 1949[3], it was first recognised in England that a serviceman could acquire a domicile of choice in the country where he was stationed. The matter was elaborated in 1957, in a case[4] which related to proof of acquisition of domicile of choice in the country where a soldier is stationed.

Later case.

5.36. The position was further clarified in a later case.[5] This was an action of divorce on the ground of desertion at the instance of an American serviceman whose domicile of origin was in the United States. His marriage took place in England in 1950, and the parties lived in Durham until 1951 when the plaintiff was posted abroad. After service in Korea, the petitioner was posted to France and, in 1957, he visited England with the intention of making his permanent home in England. He obtained a room in Miteham (England) and kept his belongings there. It was held that the petitioner had in 1957 formed an intention to remain in England and that by his residing in England while on leave, the qualification of (present) residence was satisfied. He had, therefore, acquired an English domicile by choice. Since a serviceman could normally acquire a domicile of choice in the country where he was serving, a *fortiori,* he can acquire such a domicile at the place where he was on leave.

Section 10—Verbal change in the main paragraph.

5.37. We first turn to certain drafting improvements required in the main paragraph of section 10.

The expression used in section 10 is "man". This is a departure from the expression "person" used in most of the other sections in this Chapter. We see no reason why the wording should differ. Of course, under the General Clauses Act[6], words in the masculine gender include females, and this rule would apply to section 10 also.. However, it is better to introduce uniformity in the matter of drafting. Accordingly, we recommend that section 10 should be revised by substituting "person" for "man", with consequential changes[7].

In view of the above reasoning, the main paragraph of section 10 should be revised as under :—

> "A *person* acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin."

Explanation to section 10.

5.38. To revert to the Explanation to section 10, we may state that the Explanation, though seemingly inconsistent with some of the modern trends, is not really so, if due regard be had to the word "merely."

However, it may be added, by way of clarification, that if a person, having gone to another country for the purpose of service etc. intends to remain there, he may acquire a domicile in that country[8].

Explanation incomplete

5.39. Also, we find the Explanation to section 10 incomplete in two respects. First, it leaves out the case of private service and, secondly, it does not cover service elsewhere than in India. The reason for this would appear to be mainly historical. The Explanation was taken word by word from an English

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[1] *Ex parte* : *Cunningham,* (1884) 13 Q.B.D. 418, (See after paragraph 5.39, *infra*).

[2] *Peal* v. *Peal,* (1930) 143 Law Times Reports 768.

[3] *Douglas* v. *Douglas,* (1949) Probate 363.

[4] *Cruickshanks* v. *Cruickshanks,* (1957) 1 All E.R. 889.

[5] *Stone* v. *Stone.* (1959) 1 All E.R. 194.

[6] Section 13, General Clauses Act, 1897.

[7] As to the Explanation to section 10, see *infra.* (Paragraph 5.39).

[8] Compare section 10, illustration (ii).

case[1] (except for the later additions regarding air force etc.). It was laid down in the English case that a man is not to be considered as having taken up his fixed habitation in British India, "merely by reason of his residing there in His Majesty's Civil or Military Service, or in the exercise of any profession or calling." At the present day, there is no need so to confine the Explanation. The Explanation to section 10 should therefore be suitably widened (i) to cover private service, and (ii) to embrace all countries (and not merely India).

Provision in Quebec.

5.40. In this connection, we may refer[2] to the very simple provision in the Quebec Civil Code on the subject which declares that[3]—

> "A person appointed to fill a temporary or revocable office, retains his former domicile, unless he manifests a contrary intention."

Although the word "temporary" is used in the Quebec provision cited above, it does not[4] mean that a person appointed for life acquires a domicile of choice where he is appointed.

Recommendation to revise the Explanation to section 10.

5.41. In view of what is stated above, we recommend that the Explanation to section 10 should be revised as follows :—

> *"Explanation.*—A person is not deemed to have taken up his fixed habitation in India *or in any other country* merely by reason of his residing there in service of *any Government, authority or person or* in the exercise of any profession or calling, *but if a person, having gone to another country for the purpose of service or the exercise of any profession or calling intends to remain there, he may acquire a domicile in that country*[5].

Section 10, Illustrations—Recommendations.

5.42. Certain verbal changes are also needed in the illustrations to section 10. In illustration (i), the expression "as a barrister" should be replaced by the words "as an Advocate", for obvious reasons.

Illustrations (vi) and (vii) to the section relate to the case of a person whose domicile is in the French Settlement of Chandernagore. These two illustrations are now obsolete, and should be omitted.

We, therefore, recommend that illustration (i) to section 10, should be amended as indicated above, and illustrations (vi) and (vii) should be deleted.

IX. Aquisition of Domicile

Section 11.

5.43. This takes us to section 11, which provides a special mode of acquiring domicile in India. This provision does not seem to do great violence to the already accepted rules as to the acquisition of a domicile of choice. It does not, however, make clear that an intention of "permanent" residence does not have to be looked for.

Acquisition of new domicile—New Zealand.

5.44. It may be stated, as a matter of interest, that according to the New Zealand Domicile Act,[6] "a person acquires a new domicile in a country at a particular time if, immediately before that time[7], (a) he is not domiciled in the country; and (b) he is capable of having an independent domicile; and (c) he is in that country; and (d) he intends to live indefinitely in that country." A "country" is defined by section 2 of the Act as meaning (unless the context otherwise requires) "a territory of a type in which, immediately before the commencement of this Act, a person could have been domiciled."

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[1] *Re Macrieght*, 30 Ch. Div. 165 [See also paragraph 5.35 *supra*].

[2] Castel, Private International Law (1960), page 60 and footnote 41.

[3] Article 82, Quebec Civil Code.

[4] Castel, Private International Law (1960), page 60.

[5] Compare section 10, illustration (ii).

[6] Section 9, New Zealand Domicile Act.

[7] See "Domicile" (20 September ,1977) New Zealand Law Journal 375—379.

This is a sound rule[1], and has been made because the situations where a person can be found *to have irrevocably and positively stated that he means to live out all his days in a particular country must indeed be few.*

Section 11 Declaration before prescribed office.

5.45. Reverting to section 11 of our Act, a special mode of acquiring domicile in India is provided by the section, under which a person may acquire such domicile by making a declaration and depositing it in the prescribed office. Apparently, the provisions of this section are designed only to confer a limited domicile for the purpose of regulating succession to movable property, and not for any other purpose. This view was taken by a majority of the Chief Court of Sind[2], though the minority view (Tyabji J.) was different.

Recommendation to amend section 11 so as to define its scope.

5.46. Having regard to the setting in which the section is placed and the limited scope of the Act, it is, in our opinion, advisable to give effect to the majority view of the Sind Chief Court[3] referred to above[4], by adding suitable words in section 11. We recommend that the section should be so amended.. An Explanation should be added as under, to section 11 :—

> *"Explanation.—The provisions of this section confer a limited domicile only for the purpose of regulating succession to movable property, and not for any other purpose.*

Section 11 Recommendation to amend section 11 in relation to minors.

5.47. Another point arises under section 11 in relation to minors. Under the section, "any person" may acquire a domicile in India by making and depositing in some office in India appointed by the State Government a specified declaration. Though the words used are 'any person', it is presumed that this section does not contemplate a minor or other person under legal disability in relation to the capacity to contract. To bring out this aspect, it appears to be desirable to limit the section expressly to a person competent to contract by the law of the country in which he was domiciled immediately before such declaration.

Accordingly, we recommend that section 11 should be amended by adding, after the words "any person", the words *"competent to contract by the law of the country in which he was immediately before such declaration domiciled."*

Section 12.

5.48. This takes us to section 12, which reads:—

> "A person who is appointed by the Government of one country to be its ambassador, counsel or other representative in another country does not acquire a domicile in the latter country by reason only of residing there in pursuance of his appointment; nor does any other person acquire such domicile by reason only of residing with such first mentioned person, as part of his family, or as a servant."

The section deals really with a situation analoguous[5] to that dealt with in section 10, Explanation. It needs no change.

Section 13 Continuance of new domicile.

5.49. Section 13 provides that a new domicile continues until the former domicile has been resumed or another has been acquired.

The circumstances in which a domicile is "resumed" are not dealt with in the section. But determination of such a question, if it arises, will depend on the facts to which the principles of section 10—12 would apply.

The section needs no change.

X. Domicile of dependence of minors

Domicile of dependence.

5.50. The provision so far discussed are mainly concerned with domicile independently acquired by a person. In certain cases, the domicile of a person

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[1] "Domicile" (20 September, 1977) New Zealand Law Journal 375-379.

[2] *Weston* v. *Weston*, A.I.R. 1945 Sind 152 (Majority view).

[3] *Weston* v. *Weston*, A.I.R. 1945 Sind 152.

[4] Para 5.42. *supra*.

[5] Para 5.38, *supra*.

follows that of another person. One such case is that of a minor. Section 14, in the main paragraph, provides as follows as regards minors:

"14. The domicile of a minor follows the domicile of the parent from whom he derived his domicile of origin".

According to the Exception to the section, the domicile of a minor does not change with that of his parent, if the minor is married or holds any office or employment in the service of Government, or has set up, with the consent of the parent, in any distinct business.

Children of parents living apart.

5.51. There are certain points arising out of sections 7 and 14, in regard to children whose parents are living apart at the time of the birth of the child, whether or not the parents have been divorced in law. Under section 7, the domicile of origin of every person of legitimate birth is the same as the domicile of the father at the time of birth—leaving aside the very special situation of a posthumous child, which has been dealt with separately.[1] Under section 14, the domicile of origin is fixed by the operation of law. The section gives effect to the primary rule that the domicile of a legitimate child automatically changes with any change that occurs in the domicile of the father.. (There are other situations to which also 14 applies, but they may be kept aside for the present). Thus, in both the cases—the domicile of origin and the domicile of dependence—the domicile of the child is compulsorily linked with that of the father.

Defect of the rule of unity when applied to parties living apart.

5.52. This doctrine of the unity of domicile with the father of the child may not, however, yield a proper rule in certain situations where the parents are living apart at the time of the birth of the child.

(a) The parties to the marriage may be separated with or without a decree of judicial separation, or

(b) The parties to the marriage may be living apart with or without a decree of divorce. In all these cases, if the child has his home with the mother and no home with the father, the present provisions in sections 7 and 14 would not reflect the reality of the situation. To necessarily link the domicile of the child with that of the father is likely to lead to hardship, anomaly and injustice in such cases.

English Act of 1973.

5.53. In England, the rule has to some extent been altered by the Domicile and Matrimonial Proceedings Act, 1973[2], stated in brief, the position in England under the Act of 1973 is as follows :—

(i) Where both the parents are alive but are living apart, the domicile of the child is that of the mother, if the child has his home with her and no home with his father, or if the child has acquired the domicile of his mother in this way and has not, since then, had a home with his father. (Thus, a child having a home with his mother keeps the mother's domicile even though he ceases to live with her even if he had not a home with his father.)[3]

(ii) A child who has his home with the mother, continues to retain it after the death of the mother, unless and until he has a home with his father.

(iii) These rules apply to legitimate as well as to adopted children.

English provision as to children.

5.54. The statutory provision in England as to domicile of a child not living with his father is as follows[4]:—

"*Dependent domicile of child not living with his father.*

4(1). Sub-section (2) of this section shall have effect with respect to the dependent domicile of a child as at any time after the coming into force of this section when his father and mother are alive but living apart.

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[1]Para 5.26, *supra*.

[2]Section 4(2) (a), 4 (2) (b), 4 (3) and 4 (4), Domicile and Matrimonial Proceedings Act, 1973 read with paragraphs 1(2), 1 (4) and 3 of the First Schedule to the Children Act, 1975 in regard to adopted children.

[3]Cheshire and North, Private International Law (1979), page 180.

[4]Section 4, Domicile and Matrimonial Proceedings Act, 1973.

(2) The child's domicile as at that time shall be that of his mother if—

(a) he then has his home with her and has no home with his father; or

(b) he has at any time had her domicile by virtue of paragraph (a) above and has not since had a home with his father.

(3) As at any time after the coming into force of this section, the domicile of a child whose mother is dead shall be that which she last had before she died if at her death she had her domicile by virtue of sub-section (2) above and he has not since had a home with his father.

(4) Nothing in this section prejudices any existing rule of law as to the cases in which a child's domicile is regarded as being, by dependence, that of his mother."

View of Cheshire.

5.55. The view has been expressed[1] that these provisions apply only for the determination of the dependent domicile of a child, and do not appear to affect the determination of domicile of his origin. Thus, a child born of parents who are married but living apart at the time of his birth would acquire the father's domicile as a domicile of origin, but immediately thereafter acquire a domicile of dependence with his mother where his home is[2].

Children of divorced parents.

5.56. One question that might arise—and a question that is of practical importance because of the increasing rate of divorce in all countries, including India—is this : what happens to a child whose parents are divorced at the time of birth? In England, the expression 'living apart' would cover the situation[3]. But in India there is no specific provisions on the point, with the result that sections 7 and 14 would apply to the case. Now, under section 7, the child would acquire the domicile of the father, even though, in fact, the child is totally separated from the father. With reference to the position in England[4], it has been suggested that a child born to parents who have been divorced takes his mother's domicile at his birth. If the capacity of a father to change the domicile of his infant child is a manifestation of parental authority and responsibility[5], then there is no reason why that doctrine should apply where the father has never accepted his responsibility for the child.

Need for amendment, and recommendation.

5.57. It appears to us that in regard to all these cases, there is need for a change in the present statutory provisions in sections 7 and 14. In framing the revised provision, assistance can, to a large extent, be derived from the English Act[6] of 1973.

Section 14 Suggestion regarding domicile of child, considered.

5.57A. We note that in an article in the Statesman[7], a writer (commenting on the Law Commission's Working Paper on the subject) has stated that the commission, while recommending changes regarding the domicile of married women (section 15) and domicile of a posthumus child (sections 7—9), has not recommended that "the domicile of origin of either parent should be that of the child and that if the child is living with the mother, the latter's country of origin should be the child's." The criticism quoted above from the article seems to imply that in the writer's view, the Law Commission should have so recommended. Analysing the matter, one finds that two ideas are involved in the above criticism—

(i) The child's domicile should follow that of *either* parent.

(ii) The child's domicile, when the child is living with the mother, should follow that of *the mother*.

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[1]Cheshire and North, Private International Law (1979), page 180.

[2]Cheshire and North, Private International Law (1979), page 180.

[3]See. *supra*.

[4]Dicey and Morris, Conflict of Laws (1973), page 93.

[5]Compare *Re B(S)* (an infant) (1967) 3 All. E.R. 629.

[6]Section 4, Domicile and Matrimonial Proceedings Act, 1973 (C. 45).

[7]Shahnaz Anklesaria, "Laws which discriminate against women" (29 June, 1984) Statesman, page 6

It appears that the first of these two points is meant for the generality of cases, while the second is meant for the special case where the child is actually living with the mother.

Rule providing for two alternatives not practicable.

5.57B. As to the first situation, we do not think that a rule of law which is intended to determine, *in the first instance,* a particular question so as to avoid controversies on the subject can be appropriately framed so as to lead to *two alternatives* becoming applicable. If both the alternatives yield the same conclusion in a particular case, the suggested rule is not needed. If both the alternatives yield different results the rule may create confusion. We do not therefore find the suggestion acceptable. The object of rules fixing domicile is to maintain a measure of certainty. That object will be defeated if two alternatives become applicable which would be the case if the domicile of origin of *either* parent is to become the child's domicile as is the suggestion.

Whether present rule violates equality of the sexes.

5.57C. It may be argued that the present rule giving predominance to the father is violative of the equality of sexes. But that would not be so, in reality. So long as members of the family are not separated, the child would, in fact, be living with the parents and the present rule would not violate any right of the mother.

Child living with separated mother.

5.57D. If the members of the family are separated, what should be the position? This brings us to the second point arising out of the suggestion now under consideration, namely, that if the child is living with the mother, then the child's domicile should follow that of the mother. We do not find anything wrong in such an approach. Where a matrimonial court has awarded the custody of the child to the mother, the case for making such a rule is fairly strong.

In fact, the amendment which we are recommending[1] in section 14 will take care of this and similar situations.

Amendment of section 14 recommended.

5.58. In the light of the above discussion, we recommend the insertion in section 14 of the following new sub-sections[2] :—

New Sub-sections to be added in section 14—

(2) *The domicile of a minor at any time after the commencement of the Indian Succession [Amendment Act ..... when his father and mother are alive but living apart shall be governed by sub-section* (3)].

(3) *The minor's domicile as at that time shall be that of his mother if—*

(a) *he then has his home with her and has no home with his father; or*

(b) *he has at any time had her domicile by virtue of clause (a) above and has not since had a home with his father.*

(4) *As at any time after the coming into force of the Indian Succession (Amendment) Act ..... the domicile of a minor whose mother is dead shall be that which she last had before she dies, if at her death the minor had her domicile by virtue of sub-section* (3) *and he has not since had a home with his father.*

(5) *Nothing is sub-section* (2) *to* (4) *shall prejudice any existing rule of law as to the cases in which a minor's domicile is regarding as being, by dependence, that of his mother."*

Recommendation to amend section 14.

5.59. We may also mention that while discussing an earlier section[3], we have made a recommendation to amend the Exception to section 14 :—

"or if the parent has mala fide changed his domicile".

XI. Minor Without Parent

Domicile of minor without parent.

5.60. We now propose to consider a matter on which a specific provision is not, at present, contained in the Act, namely, domicile of a minor who has

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[1]Section 14, as proposed to be amended. See paragraph 5.58.

[2]Present section 14 to be renumbered as section 14(1).

[3]See discussion as to section 7, para 5.27, *supra.*

no parent, but has only a guardian. One writer[1], dealing with the subject, has expressed his views thus :—

> "It is submitted that no cogent reasons have been advanced why, as in the case of a parent, a change with the domicile of a guardian should not also bring about a change in the ward's domicile, unless by virtue of the change of domicile the guardian ceased to be guardian and the relation of guardian and child thereby disappeared. The discrimination between parent and guardian for the purposes of the resulting change of the minor's domicile overlooks the nature of both domicile and guardianship. If domicile means the legal centre of a person's contacts and activities, could there be any better domicile in the case of a minor without parents than that of his or her guardian? If guardianship is a substitute for the relation of parent child, which substitute cannot be dispensed with in the interests of the child, why should the former not have the same range as the latter in respect of strictly legal issues such as those involved by the concept of domicile ?"

Recommendation to insert new section as to minor who has no parent.

5.61. We see considerable force in this reasoning and recommend that a suitable provision on the lines suggested by the writer quoted above[2], should be inserted in the Act.

The new section could be in the following terms :

> *"14A. A change in the domicile of a guardian other than a parent brings about a change in the domicile of the ward, unless, by virtue of the change of domicile, the guardian ceases to be guardian and the relationship of guardian and ward thereby ceases."*

XII. Marriage

Section 15.

5.62. This takes us to section 15. Section 15 provides that by marriage a woman acquires the domicile of her husband, if she had not the same domicile before. How far the section should be retained in its present form depends on the view to be taken on section 16, therefore, we proceed to consider[3].

Section 16 wife's domicile.

5.63. Section 16, in its main paragraph, provides that the wife's domicile during her marriage follows the domicile of her husband. The Exception to the section is in these terms :

Exception : The wife's domicile no longer follows that of her husband if they are separated by the sentence of a competent court or if the husband is undergoing a sentence of transportation."

Query as to section 16; Exception.

5.64. Let us first dispose of a possible query arising out of the last ten words of the Exception. The last ten words raise the question if a sentence of transportation would, in itself, change the (husband's) domicile. Now this may not be always the case, at least if the country of transportation is the same political unit—or "legal district"— as the country from which the husband is transported. However, there is a sense in which this part of the Exception may be useful. If, the husband, after undergoing transportation in X country, settles down in country Y, the wife should not necessarily be burdened with the domicile of country Y. This would be a result flowing from the Exception. The assumption seems to be that a sentence of transportation would snap the emotional ties between the parties and that the possibility of the wife resuming her cohabitation with the husband on the latter's return from transportation would be very faint.

Unity of spouses.

5.65. We may now deal with certain other points requiring consideration in connection with the section. The first point arises from the main paragraph, which is based on the doctrine of unity of the spouses and makes the wife's domicile *dependent* on that of the husband. A strict application of the doctrine of unity of the spouses as to domicile may at times, result in injustice to the wife.

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[1]See Sprio, 'Domicile of Minors without parents' Vol. 5 International & Comparative Law Quarterly, 196.

[2]Para 5.60, *supra*.

[3]See discussion as to section 16, *infra*.

Common law rule.

5.66. The common law rule is that a married woman's domicile is the same as that of her husband and that, if his domicile changes, her domicile changes with it, whether she likes it or not.[1] Lord Denning M. R. has described the rule as "the last barbarous relic of a wife's servitude."[2]

5.67. In England, the view that domicile ought to be the sole ground for jurisdiction in divorce seems to have been first advanced by Sir Cresswell in 1963[3], but has been considerably modified by statute The Law Commission of India in its Report on the Recognition of Foreign divorces has recommended a modification of this rule[4]. However, we are not, at present, concerned with domicile in the context of jurisdiction in divorce. Our present concern is with the subject of domicile as relevant to the law of succession.

Criticism of present law.

5.68. The doctrine that the domicile of the wife is that of the husband is founded on the duty of the wife to live with the husband[5]. This was the rule of the common law. To the extent that a married woman is under a disability in the matter of domicile, it is artificial.

Lord Denning's criticism of this rule as "the last barbarous relic of a wife's servitude" has, by now, become famous. In fact, the law on the subject has been substantially altered in England[6] and in certain other western countries.[7] The current English statutory provision (which came into force on the 1st January, 1974) reads—

"*Abolition of wife's dependent domicile*

1. (1) Subject to sub-section (2) below, the domicile of a married woman as at any time after the coming into force of this section[8] shall, instead of being the same as her husband's by virtue only of marriage, be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile.

(2) Where immediately before this section came into force a woman was married and then had her husband's domicile by dependence, she is to be treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of origin) unless and until it is changed by acquisition or revival of another domicile either on or after the coming into force of this section.

(3) This section extends to England and Wales, Scotland and Northern Ireland."

This section abolishes the rule of unity of the spouses for the purposes of domicile and provides for a married woman's domicile to be ascertained independently of her husband.

However, a woman already married on January 1, 1974, will retain her existing domicile (but as one of origin or choice, not of dependence) unless and until her actions and intentions are such as to change it.

Criticism of rule of unity of spouses

5.69. The rule of unity of spouses[9] in this context has been universally condemned. Simon P. called it a 'completely outmoded legal concept[10]. In 1952, the Private International Law Committee in England, in its first report, recommended a very limited change, viz. that a married woman separated from her

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[1]See, e.g. *Lord Advocate* v. *Jaffrey*, (1921) 1 A.C. 146 (H.L.) : *Attorney General for Alberta* v. *Cook*, (1926) A.C. 444 (P.C.) *De Reneville* v. *De Reneville* (1948) P. 100 (C.A.).

[2]*Gray* v. *Formosa*, (1963), Probate 259, 267 (C.A.).

[3]*orester* v. *Forester*, (1863) 9 T.L.R. 148, 149. See 'Jurisdiction of the English Divorce Court' (1951) 212 L.T. 197, 198.

[4]Law Commission of India, 65th Report, Recognition of Foreign Divorces, pages 95—99, para 15.5 and page 138, Appendix I, clause 13. (Three alternative drafts).

[5]*Gray* v. *Farmosa*, (1963) Probate 259, 267.

[6]Section 1, Domicile and Matrimonial Proceedings Act, 1973 (C. 45).

[7]E.g. (a) New Zealand see para 5.62, *supra*.

(b) U.S.A.

[8]1st January, 1974.

[9]Para 5.57, *supra*.

[10]*Adams* v. *Adams*, (1971) Probate 188, 216.

husband by order of a competent court should be treated as a single woman. In 1956, the Morton Commission (Royal Commission on Marriage and Divorce) made a slightly different proposal, namely, that for the purposes of divorce jurisdiction a married women should be entitled to claim a separate domicile[1]. The recommendation of the English Law Commission was to similar effect.

5.70. But the English Act of 1973 goes further and allows a married woman to acquire a separate domicile as any independent person can. The Act is thus in accordance with the spirit of sex equality, embodied in article 16(1) of the Universal Declaration of Human Rights[2], which reads :—

> *Article* 16. (1)Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and its dissolution.
>
> (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
>
> (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

Anomaly of old rule.

5.71. It has been realised that by virtue of the common law rule, it may happen that a woman becomes "domiciled" in a country which she has never seen, and to the courts of which she must resort in matters affecting her status as a married woman.

Law in New Zealand.

5.72. In New Zealand, section 5(1) of the (New Zealand) Domicile Act, 1976, provides as follows[3] :—

> "5 (1) Every married person is capable of having an independent domicile; and the rule of law whereby upon marriage a woman acquires her husband's domicile and is thereafter during the subsistence of the marriage incapable of having any other domicile is hereby abolished.
>
> (2) This section applies to the parties to every marriage, wherever and pursuant to whatever law solemnised, and wherever the domicile of the parties at the time of the marriage."

U.S.A.

5.73. In the U.S.A. the common law did not at first, recognise the separate domicile of the married woman. "Although the wife may be residing in another place, the domicile of the husbasd is her domicile[4] .....". Today, however, in the United States[5] the wife may acquire a separate domicile.

Recommendation to amend section 16, main paragraph.

5.74. Having regard to current social notions, the need for reform of the law relating to domicile of the wife in the Indian Succession Act cannot be denied. After careful consideration, we have come to the conclusion that the law on the subject should be reformed and that for that purpose in place of the main paragraph of section 16, the following sub-sections should be substituted.

> "16. (1) *For the purposes of this Act, and subject to the provisions of sub-section* (2), *any rule of law whereby a woman on her marriage acquires her husband's domicile shall not be taken into account after the commencement of the Indian Succession* (*Amendment*) *Act*.....
>
> (2) Where, immediately before the commencement of the Indian Succession (Amendment) Act....., a woman has married and then had her husband's domicile by dependence, she shall be treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of origin) unless and until it is changed by acquisition or revival of another domicile either on or after the commencement of the said Act"[6]

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[1]Royal Commission on Marriage and Divorce, Report (1956) Cmnd. 9768, Para 825 and Appendex IV, para 6.

[2]Article 16, Universal Declaration of Human Rights.

[3]Section 5(1) (New Zealand) Domicile Act, 1976 quoted by P.R.H. Webb, "The Domicile Act, 1976". (20 September 1977) N.Z.L.J. 374, 375.

[4]*Anderson* v. *Watt*, (1891) 138 U.S. 694, 706.

[5]Weintraub, Commentary on the Conflict of Law (1971) page 13, referred to in Peter Hay. Introduction of United States Law (1976), page 119, footnote 291.

[6]Compare Law Commission of India, 65th Report (Recognition of Foreign Divorces), Chapter 15 and Appendix I.

A comment considered.

5.74A. We may note that a comment[1] forwarded by the Catholic Bishops Conference of India agrees that there could be circumstances where it is obviously desirable that the wife's domicile should be determined by rules other than the (present) rigid rule that her domicile follows that of her husband's.

Recommendation as to the Exception to section 16.

5.75. The amendment recommended[2] above would render the Exception to section 16 unnecessary. But if the section is not amended as recommended above, it will be necessary to deal with one verbal point which arises in connection with the Exception. The Exception contains words referring to the "sentence of a competent court", which are not appropriate. This part of the Exception should, having regard to current usage, really refer to a *decree of judicial separation*. Further, there is a reference in the Exception to "transporation" which, is now inappropriate. India has abolished transportation as a punishment. A few foreign countries still have the punishment of "exile". To cover these rare cases, this part of the Exception should be suitably re-worded. We, therefore, recommend that (if the main paragraph of section 16 is to be retained in the present form), the Exception should be revised, somewhat on the following lines :—

> "*Exception*—The wife's domicile no longer follows that of her husband if they are separated by a *decree of judicial separation* or if the husband is undergoing a sentence *analogous to transportation*".

XIII. Unmarried women and Widows

Section 16A (New) Widow's domicile.

5.76. It is necessary at this stage to discuss one question concerning the domicile of unmarried women. The sections in the Act deal with *married women*. The position of *widows*, as regards domicile, is not dealt with in any specific provision of the Act. In England, it is well-settled that a widow retains her late husband's domicile (after his death), until she changes it.[3=4]

A similar rule should be introduced into our Act, the soundness and practical utility of such a rule being obvious. The situation is outside sections 9 and 16, though falling partly within section 13. A new section on the subject,, say, as section 16A, could be inserted, if the present scheme of sections 15-16 is to be retained.

Divorced women.

5.77. A similar rule could be made applicable in relation to divorcee also, since the same reason applies, in substance, to divorce.

Recommendation to insert section 16A.

5.78. Accordingly, we recommend that (if the present scheme of sections 15-16 is retained) section 16A should be inserted in these terms :—

> 16A. (1) *A widow retains, after the death of her husband, her late husband's last domicile, until she changes it in accordance with the provisions of this Act.*
>
> (2) *A divorced woman retains, after the divorce, her former husband's last domicile until she changes it in accordance with the provisions of this Act.*"

XIV. Continuance of domicile of minor

Section 17.

5.79. Section 17 provides that "save as hereinbefore otherwise provided in this part," a person cannot, during minority, acquire a new domicile. The other provisions which the section has in mind are sections 14 to 16. Th section needs no change.

XV. Insane persons

Section 18 Analysis.

5.80. Section 18 provides as follows :—

> "An insane person cannot acquire a new domicile in any other way than *by his domicile following the domicile of another person.*"

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[1]Catholic Bishop's Conference of India letter dated 3rd October, 1984.

[2]Para 5.74, *sppra.*

[3]*Re Wallace,* (1950) 1 All E.R. 199 and case law discussed in *Re Schullard's Estate,* (1956) 3 All E.R. 898, 902 to 904.

[4]See also note by P.B. Carter in (1957) B.Y.I.L. 329, 332.

The words "by his domicile following the domicile of another person" in the section could be thus illustrated—

(a) If the insane person is a minor[1], his domicile follows that of his parent from whom he derived his domicile of origin.

(b) If the insane person is a married woman, her domicile follows that of her husband, under the present law[2].

(c) If the insane person is a major unmarried male, his domicile cannot be changed by his own act: His domicile remains what it was at the commencement of his insanity[3].

A lunatic may not be able to acquire a domicile of choice, because of his inability to form the necessary animus.

Domicile unchangeable by act of person having custody.

5.81. In England, it seems[4], the domicile of the insance person cannot be changed even by the act of the person having care or custody of the person. Is India, section 18 does not deal specifically with this situation; apparently, the English rule on the subject would be followed.

Need for change in present rule.

5.82. However, this position does not appear to be satisfactory and is often likely to lead to anomalies in practice. In our view, the better course would be to provide that the domicile of an insane person is the same as that of the person in whose care and protection he is for the time being. Of course, the provision to be so inserted will be subject to the other sections of the Act, e.g. the special provisions for minors. But barring such special cases, it is the domicile of the person in whose care and protection the insane person is for the time being, that should govern the domicile of the insane person.

Recommendation to revise section 18.

5.83. We, therefore, recommend that section 18 should be revised as follows :—

"18. *The domicile of an insane person follows that of the person in whose care and protection he is for the time being.*"

It is not considered appropriate, in this case, to make any exception for cases where the insane person is married.[5]

XVI. Domicile—Uncertainty of

Section 18A (New).

5.84. We have already recommended[6] the insertion of a provision to meet cases where domicile cannot be determined[7]. This may be inserted as section 18A. The new section could be somewhat on these lines :—

"18A. *Where it is difficult to determine the domicile of a person by reason of the fact that he has two or more places of permanent residence, the place, being one of the two or more places aforesaid, where such person last resided permanently shall be deemed to be the place of his domicile.*"

XVII. Applicable law, and proof of foreign law

Section 19: India law when to apply.

5.85. Section 19 provides that if a person dies leaving movable property in India, in the absence of proof of any domicile elsewhere, succession to the property is regulated by the law of India. The section is to be read with section 5 (2), under which succession to movable property is governed by the law of domicile[8]. The section needs no change.

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[1]Section 14.

[2]Sections 15 and 16.

[3]*Urquhart* v. *Butterfield*, 37 Ch. D. 357: *Par* v. *Crispin*, 1 P & D 611, cited in Paruck, Indian Succession Act, (1977), page 38.

[4]Cheshire, Private International Law (1970), page 179.

[5]Contrast section 14, Exception.

[6]See *supra*.

[7]Contrast section 14, Exception.

[8]Para 5.21. *supra*.

Section 19A (New)—Presumption as to foreign law.

5.86. At this stage, it would be convenient to deal with one matter which may necessitate the insertion of a new section in the Act. Under section 5(2), succession to the movable property of a deceased person is regulated by the law of the country in which such person had his domicile at the time of his death. This necessitates proof of foreign law. Ordinarily, foreign law is proved[1] by the opinions of experts[2]. Sometimes, however, it is difficult to get in India experts in foreign law. It would, therefore, be useful to have a statutory presumption to the effect that the law of the foreign country, unless proved otherwise, is the same as the Indian law. While such a provision would create only a tentative presumption, it would be of great practical use. The object would be to avoid the inconvenience which might result if competent foreign experts cannot be summoned without delay or expension which might be disproportionate.

Burden of proof of foreign law.

5.87. Even now, the burden of proof rests on the party asserting that foreign law differs from the law[3] of the country. Hence, the proposition suggested above[4] will not introduce a radical change, but will make the statement of the law self-contained.

In England[5], in the absence of proof to the countrary, the position is that the court must give a decision according to the law of its own country[6]. There are, no doubt, one or two anomalous cases where the English court has not assumed the foreign law to be the same as the English statute law[7]. But in general, it is understood that foreign law is the same as English law, and the onus of proving that it is different, and of proving what it is, lies upon the party who pleads the difference[8].

Recommendation as to foreign law.

5.88. In the light of the above discussion, we recommend that a new section should be inserted somewhat on the following lines :

> "19A. *The court may, for the purpose of this Chapter, presume that the law of a foreign country is the same as that of India".*

CHAPTER 6

MARRIAGE : SECTIONS 20 TO 22

Scope of the Chapter and rule at common law.

6.1. The Succession Act, though concerned mostly with succession on death, also contains a few provisions dealing with "succession" to property on marriage. The effect of marriage on proprietary rights is dealt with in three sections—sections 20, 21 and 22. For a proper appreciation of their singnificance, it is necessary to have a look at the common law.

At common law, apart from death, there was one other event in the life of a human being which could affect proprietary rights, namely, marriage. Marriage affected the legal capacity or proprietary rights of women in several respects, by virtue of rules of the common law that touched subjects so diverse as torts, contracts, property, bankruptcy and even the criminal law.

Relationship with legislation relating to married women's property.

6.2. In course of time, these rules of the common law were considered anachronistic and they have been gradually abrogated by reforms effected by statute in almost all countries in the common law fold. In India, such a reform

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[1]Section 45, Indian Evidence Act, 1872.

[2]See Law Commission of India, 69th Report (Evidence Act), Chapter 18, pages 342, 348.

[3]Cross, Evidence (1979), page 634.

[4]Para 5.86, *supra.*

[5]Halsbury, 3rd Ed., Vol. 7, page 176, para 31.5.

[6]*Cresington-court* v. *Marinero,* (1955) 1 All E.R. 676, 679 (Willmer, J.).

[7](*a*) *Ry. Brixton prison Governor, Ex-Parte* Colding, (1961) 1 All E.R. 606.

(*b*) *De Reneville* v. *De Reneville,* (1948) Probate 100; (1948) 1 All E.R. 56, 61 (C.A.).

[8]*The King of Spain* v. *Machado,* (1827) 4 Rules 225, 239. *Male* v. *Roberts,* (1800) 3 Esp. 163.

was effected by the Married Women's Property Act[1]. The sections under consideration also represent a statutory reform of the law on the same subject. The underlying object being the same, namely, to provide that marriage, as such, shall have no effect on proprietary rights, this part of the Succession Act should therefore be read in conjunction with legislation relating to the property rights of married women[2].

Section 20.

6.3. In the succession Act, section 20 constitutes the principal provision. No person shall, by marriage, acquire any interest in the property of the person whom he or she marries or become incapable of doing any act in respect of his or her own property which he or she could have done if married.

There are two exceptions to this rule—first, the section does not apply to any marriage contracted before the first day of January 1866; secondly, it does not apply to any marriage one or both the parties to which profess at the time of the marriage the Hindu, Mohammaden, Buddhist, Sikh or Jain religion.

The first mentioned exception is historical, and needs no comment. As to the second exception, it may be explained that the object of the section is to abrogate the common law rule (which might otherwise have applied) to the effect that on marriage the married woman becomes subject to certain incapacities or that her property comes, to any extent, to be vested in her husband. Since this rule of the common law was never applicable to Hindus and other persons mestioned above[3], there was no need to extend the provision to them. Hence the second exception.

Further, comments on the section will be offered[4] in the discussion on section 21, which deals with connected matters.

Section 21.

6.4. According to section 21, if a person whose domicile is not in India marries in India a person whose domicile is in India, neither party acquires by the marriage any rights in respect of any preporty of the other party not comprised in a settlement made previous to the marriage, which he or she would not acquire thereby if both were domiciled in India at the time of the marriage.

Sections 20-21 Significance.

6.5. The significance of section 20 and 21 has been thus explained[5] by Markby J. —

> "The *lex loci* of India, like the *lex loci* of all other countries, is applicable to the immovable property of foreigners sojourning but not domiciled here, but not to their movable property. It was not necessary for the legislature, when laying down the *lex loci,* to reserve in express terms a principle of law which is universally recognised. That this general principle was not intended to be disturbed is clearly shown by section 4 (present section 20) which resolves in a particular way an old standing dispute as to the application of the principle. The preponderance of authority had been in favour of making the domicile of the husband, or at least that of the marriage, govern the rights of parties where the domiciles of the husband and wife are different. The Succession Act, where either of the parties had an Indian domicile, very reasonably submits all their rights both as to movables and immovables, to the territorial law of India. To that extent, the *jus gentium* or common law of nations, has been set aside or modified.
>
> "From this point of view, it is easy to see why section 4 (section 20) and section 44 (section 21) are kept apart. The two sections deal with different subjects. The former declares the general *lex loci* of India, the second lays down a special role to govern a particular case. It is not a modification of *lex loci,* but a declaration of the law in a particular case."

In a later case[6], Mr. Justice Sale has given the following interpretation of the provisions in question :

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[1]Law Commission of India, 66th Report (Married Women's Property Act, 1874).

[2]Married Women's Property Act, 1874.

[3]For a detailed discussion, see Law Commission of India, 66th Report (Married Women's Property Act, 1874).

[4]Para 6.4 to 6.6. *infra.*

[5]*Miller* v. *The Administrator General of Bengal* (1874) I.L.R. 1 Cal. 412, 420, 421 (Markby J.)

[6]*Hill* v. *The Administrator-General of Bengal,* (1896) I.L.R. 23 Cal. 506, 512.

"In my opinion section 4 (present section 20) and 44 (present section 21) read together should be understood as laying down a general rule as to the immediate effect of marriage in respect of movable property belonging to each or other of the married persons not comprised in ante-nuptial settlement and not as laying down a rule intended to affect the law of succession."

Application of sections 20-21 illustrated.

6.6. Application of these sections could be thus illustrated :

"If a man domiciled in England marries an Indian woman possessed of land and money in India, she acquires his domiclie (section 15), and (in the absence of section 21) her unsettled movables would, according to the law of England, immediately become the absolute property of the husband, while her immovable property would go according to that of India, the *lex loci rei sitae* i.e. this Act. To prevent this evil of land and "movable becoming subject to different rules in such a case, this section was introduced."[1]

No change proposed in the section.

6.7. We have carefully examined the sections in the light of such case law as exists thereon. We do not see any need to recommend any amendment in the sections.

Section 22.

6.8. This takes us to section 22 which provides that the property of a minor may be settled in contemplation of marriage, subject to the approval of the minor's father, or, if the father is dead or absent from India, with the approval of the High Court. The Section is based on an earlier English statute[2], which has now been repealed in England.

Position in common law.

6.9. At common law, a court had no power to make a binding settlement on behalf of an infant. The Infants Settlement Act, 1855 was passed in England to enable male infants over 20 and female infants over 17 to make a binding settlement with the consent of the court of chancery. The Act was particularly needed in view of the fact that when infants were wards, the court could not sanction marriage without a proper settlement.

This was at a time when the age of majority in England was 21 years. As the age has now been reduced to 18 years, the Act has been repealed.[3]

Right to be given to mother also.

6.10. While section 22 contemplates approval of proposed settlement by the father, it is totally silent as to the right of the mother in this regard. The result is that if the father is dead or absent or under a disability, an application under the section must necessarily be made to the High Court. Having regard to present day notions, we are of the view that the section should be amended, so as to provide that if the father is dead or absent from India or under disability, the mother can approve of the settlement of the minor's property.

Accordingly, we recommend that section 22(1) should be revised as under :—

Re-draft of section 22(1)

(1) The property of a minor may be settled in contemplation of marriage, provided the settlement is made by the minor—

(a) with the approbation of the minor's father, or

(b) *if the father is dead or absent from India or under disability, with the approbation of the minor's mother, or*

(c) if both the *father and the mother are* dead or absent from India or under disability, with the approbation of the High Court.

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[1]Adapted from Stokes, Succession Act, page 24, as cited in N.D. Basu, Succession Act (1957), under sections 20-22.

[2]Infants Settlement Act, 1855 (Eng.) (18 & 19) V c. 43 (Repealed by the Family Law Reform Act, 1969).

[3]Family Law Reform Act, 1969.

6.10A. We note that in an article[1] published in the Statesman which is written by way of comment on the Law Commission's Working Paper on the subject, the writer has suggested that in section 22, for the word "father", the words "either parent" should be substituted. She adds : "It need no longer be presumed that all mothers are incapable of deciding issues like property. They must be given the same right as fathers to act in this matter." If this suggestion is accepted[2], the relevant portion of section 22 would read as under :— Section 22 a suggestion to substitute "either parent" considered.

> "The property of a minor may be settled in contemplation of marriage, provided "the settlement is made by the minor with the approbation of *either parent of the minor.*"

We have considered the suggestion carefully. We must, however, note that the section is, in a way, linked up with the general law of guardianship of property of minors, as applicable to those to whom section 22 applies (broadly speaking, persons other than Hindus, Sikhs, Buddhists, Jains and Muslims). It would not be correct to view this part of the section in isolation from that general law. The limited amendment that we ourselves are recommending in the section would take care of hard cases. It would not be feasible to go further, having regard to the integral link of the section with the law of guardianship as pointed out above. We should record here that the fact that we are not going further should not be taken as implying that we regard mothers as less capable, than fathers, of looking after the proprietary affairs of their children.

CHAPTER 7

CONSANGUINITY (SECTIONS 23 TO 28)

7.1 Sections 23 to 28 deal with the concept of consanguinity. The scheme of the sections is logical. The applicability of the provisions of the Part having been defined in section 23, a definition of "kindred or consanguinity" is given (section 24), the basis of consanguinity being descent from the same stock or common ancestor. The connection or relation arising from such descent could be either lineal (section 25), or collateral (section 26). Certain rules as to the persons who, for the purpose of succession, are similarly related to the deceased, are similarly enacted in section 27. To facilitate the computation of degrees of kindred, the First Schelule provides a table, to which legislative authority is given by section 28. Sections 23- 28.

It is obvious that consanguinity, being based on relationship by blood, cannot exist as between husband and wife. It is, therefore, surprising that any such argument could have been advanced[3] before the Madras High Court.

The provisions in these sections are not applicable to Hindus, Mohammedans, Buddhists, Sikhs, Jains and Parsees (section 23).

7.2. So much by way of introduction. We may now take the sections contained in this Part. Section 23 provides that nothing in this Part shall apply to any will made or intestacy occurring before the first day of January, 1866, or to intestate or testamentary succession to the property of any Hindu, Mohammadan, Buddhist, Sikh, Jain or Parsi. Section 23—Application of Part.

The section needs no change.

7.3. Section 24 defines kindred or consanguinity as "the connection or relation of persons descended from the same stock or common ancestor." It may be noted that the expression "kindered" occurred in several substantive sections Section 24 kindred or consanguinity.

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[1]Shahnaz Anklesaria, "Laws which discriminate against women" (20 June ,1984) Statesman page 6.

[2]This concerns paragraph 6.10.

[3]*Administrator General* v. *Simpson Joshi* (1902) I.L.R. 26 Mad. 532, 534.

of the Act, including the various provisions laying down the order of succession on intestacy.

The section does not seem to need any change.

Section 25 Lineal consanguinity.

7.4. Section 25 defines the expression "lineal consanguinity". The essence of such consanguinity is *direct descent or ascent*. Sub-section (1) of the section provides that lineal consanguinity *one of whom is descended in a direct line*[1] *from* the other, as between men and his father, grandfather and great-grandfather, and so upwards in the direct ascending line, or between a man and his son, grandson, great-grandson, great-great-grandson and so onwards in the direct descending line.

Sub-section (2) provides that every generation constitutes a degree, either ascending or descending. This is illustrated by sub-section (3). A persons's father is related to him in the first degree, and so likewise is his son; his grandfather and grandson are related to him in the second degree; his great-grandfather and great-grandson in the third degree, and so on.

The section needs no change, having created no controversy or difficulty.

Section 26 Collateral consanguinity.

7.5. Section 26 (1) defines "collateral consanguinity" as that which subsists between two persons who are descended from the same stock or ancestor, but neither of whom is descended in a direct line from the other.

Sub-section (2) of the section deals with the mode of commutation of degrees.

The section needs no change.

Persons held for purpose of succession to be similarly related to deceased.

7.6. Section 27 provides as follows :—

"27. For the purpose of succession, there is no distinction—

(a) between those who are related to a person deceased through his father, and those who are related to him through his mother; or

(b) between those who are related to a person deceased by the full blood, and those who are related to him by the half-blood; or

(c) between those who were actually born in the lifetime of a person deceased and those who at the time of his death were only conceived in the womb, but who have been subsequently born alive."

The section needs no change.

Section 28 Mode of computing of degrees of kindred.

7.7. Section 28 provides as follows —

"28. Degrees of kindred are computed in the manner set forth in the table of kindred set out in Schedule I.

ILLUSTRATIONS

(i) The person whose relatives are to be reckoned, and his cousin-german, or first cousin, are, as shown in the table related in the fourth degree; there being one degree of ascent to the father, and another to the common ancestor, and the grandfather; and from him one of descent to the uncle, and another to the cousin-german, making in all four degrees.

(ii) A grandson of the brother and a son of the uncle i.e. a great-nephew and a cousin-german, are in equal degree being each four degrees removed.

(iii) A grandson of a cousin-german is in the same degree as the grandson of a great-uncle, for they are both in the sixth degree of kindred."

The section needs no change.

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[1]Contrast section 26—Collateral Consanguinity.

CHAPTER 8

INTESTATE SUCCESSION : SECTIONS 20-30
PRELIMINARY

Introductory (section 28 and 30)

8.1. Intestate succession is a topic extending over several sections of the Act, but two of the sections—sections 29 and 30 deal with certain preliminary matters.

Section 28 deals with the applicability of this part of the Act. As certain problems have arisen on the construction of section 29, it will be necessary to discuss in some detail the relevant points[1]. As to section 30, that section is really in the nature of a definition of the expression 'intestate', though, in form, it does not purport to be a definition.

Section 29—Scope.

8.2. Part V of the Act lays down the rules of succession to the property of a person dying intestate. Section 29, which occurs in Chapter I of this Part, provides that Part V shall constitute "the law of India in all cases of intestacy", except as provided in that section. Chapter 2 of this Part lays down the rules of succession in cases of intestates other than Parsis, and Chapter 3 lays down the rules of succession for Parsi intestates.

The scheme of this Part is simple enough, but the very first section (section 29) has created certain problems. The section reads as follows :—

> "29. (1) This Part shall not apply to any intestacy occurring before the first day of January, 1866, or to the property of any Hindu, Mohammadan, Buddhist, Sikh or Jain.
>
> (2) Save as provided in sub-section (1) or any other law for the time being in force, the provisions of this Part shall constitute the law of India in all cases of intestacy."

Controversy on two points under sub-section (2).

8.3. It is sub-section (2) of section 29 that requires some discussion. On two questions concerned with this sub-section, there is a conflict of judicial opinion—

(a) Whether, by virtue of section 6 of the Part B States (Laws) Act, 1950, the Travancore Christian Succession Regulation II of 1092 stood repealed with effect from 1st April, 1951, or whether that Regulation is saved[2] by the words "save as provided in ..... any other law for the time being in force" which occur in section 29(2); and

(b) Whether customary law of succession is saved[3] by section 29(2).

Travancore Christian Succession Regulation-Conflict of decisions as to its subsistence.

8.4. The first question[4] requires consideration of the Part B States Laws Act, 1950. That Act was enacted to extend certain Central Acts to Part B States, and among the Central Acts extended was the Indian Succession Act, 1925. Section 6 of the Part B States Laws Act provided that any existing law in a State, "corresponding" to the Central enactments extended to the State, shall stand repealed. The question on which a conflict of views has arisen is, whether the Travancore—Christian Succession Regulation (2 of 1092) is a law "corresponding" to the Indian Succession Act, 1925, and if so, whether it stands repealed on the enactment of the Part B States (Laws) Act, 1950.

Madras case of 1974.

8.5. On this point, the Madras view and the Travancore-Cochin view are in conflict. In a Madras case, [5]the High Court held that the Travancore Christian Succession Regulation was a law "corresponding" to the Indian Succession Act, 1925. It also held that the Travancore Succession Regulation of 1092 did not fall within the purview of section 29(2), Succession Act, and would not be saved by it.

Travancore case of 1957.

8.6. The erstwhile Travancore Cochin High Court, however, had held[6] that the Travancore Regulation of 1092(i) was saved by section 29(2) of the Indian

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[1]Paragraphs 8.3 to 8.10, *infra*.

[2]See paras 8.4 to 8.9, *infra*.

[3]Para 8.11, *infra*.

[4]Para 8.3, *supra*.

[5]*Solomon* v. *Mathiah* (1974) 1, M.L.T.

[6]*Kurien Angusty* v. *Devassey Aley*, A.I.R. 1957 Travancore Cochin 1.

Succession Act, 1925, and (ii) was not repealed by the Part B States Laws Act, 1950, as it could not be considered a law "corresponding" to the Indian Succession Act, 1925.

The Travancore Cochin High Court has construed the expression "save as provided in ..... or any other law for the time being in force" in section 29(2), as including an existing State law, i.e., the Travancore Christian Succession Regulation, 1092. It found support for this view in two decisions[1] which had held that section 29(2) saved the customary law of intestate succession among certain communities. It also observed that the effect of section 29(2) of the Indian Succession Act on the Travancore Regulation was to adopt that Regulation by 'reference' and to make it part of the 1925 Act itself. In this view, it could not be considered a "corresponding law" repealed by section 6 of the Part B States Laws Act, 1950.

Madras view.

8.7. The Madras High Court has disagreed with the reasoning of the Travancore-Cochin High Court, as well as with the earlier decisions relied on by it. According to the Madras High Court, section 29(2) was in *pari materia* with section 2 of the Indian Succession Act, 1865 on the point under consideration. Relying on three decisions[2] on the Act of 1865 which had held that the section should be deemed to have universal application, and that, any saving of any law had to be specifically provided for in the Act, the Madras High Court ruled out the saving of any customary law by section 29(2). It placed emphasis on the words "save as provided in any other law" [in section 29(2)]. This, according to the Madras High Court, clearly showed that the Act which is sought to be saved should itself contain a clear provision to this effect.

The Madras High Court found additional support in section 3 of the Succession Act. If the idea of saving any customary law under the Indian Succession Act, 1925, was in the mind of the legislature, it could be done under section 3 of the Act, by which the Government was empowered to notify and exempt the operation of the Act in respect of any race, sect or tribe. Certain communities had, in fact, been notified under the section, such as the Christians in the (erstwhile) Province of Coorg and the Khasis and Syntengs in Assam.

The Madras High Court also found it impossible to accept the view of the Travancore. Cochin High Court that the Travancore Regulation (of 1092) was adopted by 'reference' by section 29(2). It observed that in such a case the wording of the section should have been entirely different.

Dr. Derrett's comment.

8.8. It is unfortunate that Syrian Christians, whose homes and lands were transferred from Kerala to Tamil Nadu by the re-organisation that took place in 1956, should (as to succession) be governed by a law different from that of Syrian Christians (or, indeed, any other Christian) domiciled and having lands in other talukas of Tamil Nadu. As observed by Dr. Derrett[3] this kind of chaos, fruitful for lawyers, is anachronistic.

Position regarding Travancore and Cochin areas.

8.8A. In the Working Paper on the Act, the Law Commission had occasion to point out the anomalous position that now prevails on the question whether the Indian Succession Act, 1925, applies to the areas that formed part of the State of Travancore-Cochin-itself a successor to the princely States of Travancore and Cochin respectively. The conflict of views that exists on the subject makes the position very awkward and the Commission had drawn attention to the need for settling the position in this respect. Case law on the subject relates to the Travancore Christian Succession Regulation; but the same uncertainty would seem to prevail regarding the Cochin Christian Succession Act also.

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[1](*a*) *Nabujan* v. *Paushiomoni*, 54 Cal. W.N. , 2D.R. 14.

(*b*) *Prem Chand* v. *Lilawati*, A.I.R. 1950 H.P. 17.

[2](*a*) *De Souza* v. *Secretary of State for India*, (1874) 12 Beng. L.R. 423.

(*b*) *Dagree* v. *Pacotti San Jao*, (1895) I.L.R. 19 Bom. 783.

apenbala Debi v. *Siti Kanta Banerjee*, (1911) 15 Cal. W.N. 158.

[3]Derrett, 'The Personal Law of Syrian Christians in Tamil Nadu' in (1974)2 M.L.J. (Journal).

8.8B. Apart from the question of uncertainty in the law, there is the need to consider the merits of the case. The legislation enacted in the two princely States on Christian succession fails to give equal rights to women, and its provisions are heavily weighted against women, as contrasted with the provisions of the Indian Succession Act, 1925, as applicable to Christians dying intestate. In this situation, Government may well consider whether it should not straightaway adopt the course of specifically repealing the Travancore and Cochin legislation, and of making it clear that the Indian Act etxends to the areas in question—of course, with such consequential and transitional provisions as may be appropriate. The Commission has an apprehension that the present position, if challenged in the courts on the scope of conflict with the right to equality under article 14 of the Constitution, may not stand scrutiny. Incidentally, it may be mentioned that the Commission has also come across an article in a women's magazine[1] which has drawn attention to the discrimination against women arising from the situation mentioned above in Travancore and Cochin[2]. **Discriminatory treatment against women.**

8.9. The inconvenience of succession to a single individual taking place under different laws, according as his lands lie in different territories, has been pointed out in another learned article[3]. **Inconvenience.**

8.9A. In a Madras case of 1978, the matter was considered at some length but, with respect, the judgement does not satisfactorily clarify the position. It was held that the Christian Succession Act of Travancore was a law "corresponding" to the Indian Succession Act, 1925. However, at the same time, it was held that the Act did not stand repealed by section 29(2), because by its very terms, that provision did not cover this particular enactment[4]. **Madras case of 1978.**

8.10. Having given our anxious thought to the case law and the comments thereon as discussed above, we have come to the conclusion that the present situation is most unsatisfactory. The applicability of the Act to Indian Christians in the areas to which the Travancore Regulation[5] applies should not be allowed to continue to be a matter of controversy. We shall, later in this Chapter[6], make appropriate recommendation on the above point, as to the Tranvancore Act (and also as to the Cochin Act on the subject). **Need for amendment.**

We may mention that the need for abrogating the Travancore Act and the Cochin Act has been emphasised in a comment on our Working Paper forwarded by the Catholic Bishops' Conference of India[7].

8.11. We should also like to mention that section 29(2) has raised another controversy, namely is the customary law of succession saved by the section? Is custom a "law" within the meaning of section 29(2)? Conflicting views have been expressed on the subject. According to one view[8-9], the expression "any other law for the time being in force" in section 29(2) would cover customary law also. **Customary law**

It is, however possible to argue that the expression "law for the time being in force" in section 29 cannot appropriately cover a custom. Since the very object of section 29 is to provide *what shall be the law of intestate succession for the person concerned,* an amendment is required, so that no controversy may arise on the above point also.

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[1]Shri C.A. Achutha Menon's article in *Eve's Weekly* (Bombay), 21-27 July, 1984.

[2]See also M. Stanley Fernandez "Christian Women in Kerala"A.I.R. 1984 Journal (October).

[3]R.S. Venkatachari in (1974) K.L.T. (Journal) 42-48.

[4]*D. Chelliah Nadar* v. *Lalitabai,* A.I.R. 1978 Mad. 65 (Kailasam C.J. and Balasubramanian J.).

[5]Travancore Christian Succession Regulation 2 of 1092 (1916 A.D.).

[6]Para 8.12, *infra.*

[7]Catholic Bishop's Conference of India, letter dated 3rd October, 1984.

[8](*a*) *Nabujan* v. *Paushinoni,* 54 Cal. W.N. 12., D.R. 14 (Customary Law of Garos).
(*b*) *Prem Chand* v. *Lilawati,* A.I.R. 1956 H.P. 17.

[9]*Solomon* v. *Muthiah,* (1974) 1 M.L.J. 53.

Recommendation as to section 29 and the Travancore Regulation.

8.12. To clarify the position on the two points discussed above, we make the following recommendations :

(a) The Travancore Christian Succession Regulation 2 of 1092 should be repealed by an express provision. This course may be adopted if, as a matter of social policy, it is considered that the Indian Succession Act should apply to the persons governed by the Travancore Regulation, referred to above.

If, on the other hand, it is considered that as a matter of social policy, the provisions of the Travancore Christian Succession Regulation should govern succesion to the persons concerned, then there should be inserted a provision in section 29 of the Indian Succession Act to the effect that the Travancore Regulation would apply to Christians governed by that Regulation in respect of intestate succession—

(i) in the State of Kerala, and

(ii) the adjoining areas in the State of Tamil Nadu (in the district of Kanyakumari and Shencottah taluk).

(b) Besides the above amendment, an Explanation should be added to section 29(2) of the Indian Succession Act, to the effect that "law" in this section does not include custom.

(c) What we have recommended in sub-paragraph (a) above in relation to the Travancore Act, applies with necessary adaptations, to the Cochin Christian Succession Act also.

In this context, we should mention that it is customary in the Christian community (in the areas covered by the above recommendation) for fathers to make a suitable provision for the daughter during their lifetime. The practice of making such provision must have had its genesis in the consideration that the rights of the females in the father's property are less favourable than the rights of males standing in the same degree of relationship. If the Indian Succession Act, 1925 becomes applicable to the persons in question, it will be just and fair that provisions made for daughters by the fathers should be taken into account when the succession opens on intestacy. The reason is, that the consideration in which this custom has its genesis would no longer subsist. It is therefore recommended that if the Indian Succession Act, 1925 becomes applicable to the persons in question, suitable provision should be made to the effect that from the share to be distributed to a daughter on intestacy, the amount or value of the property so provided by the father during his lifetime should be deducted, provided that following conditions are fulfilled :—

(a) the making of such gift is evidenced in writing, whether or not the writing is stamped or registered; and

(ii) the amount of the gift or provision or its value on each individual occasion is not less than five hundred rupees.

Point regarding tribal law and Christianity.

8.12A. In a comment[1] on the Working Paper forwarded to the Commission by the Catholic Bishop's Conference of India, the query has been raised about tribals who have their customary law. It is stated that if it is advantageous to them, they should not lose their benefit, merely by profession of the Christian religion. This point really does not arise out of any proposal put forth by us. The effect of conversion on the law applicable is outside this Report, and, in fact, is outside the Act. In any case, if it is considered proper to preserve any rule of tribal law, necessary action can be taken under section 3.

Section 30.

8.13. This takes us to section 30, which provides that a person is deemed to die intestate in respect of all property of which he has not made a testamentary disposition capable of taking effect. The illustrations to the section spell out the significance of various ingredients of the section. The section needs no change.

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[1]Catholic Bishop's Conference of India, letter dated 3rd October, 1984.

8.13A. The Government of Nagaland[1], in its comment on the Working Paper of the Law Commission, has stated that the provisions of the proposed legislation will attract the provisions of article 371A of the Constitution and will not apply automatically to the State of Nagaland. The comment suggests that section 30 should be amended to provide accordingly. We may, in this context, point out that any legislation that may be passed to implement our proposals in this Report will be an amending Act. If the principal Act does not apply to a particular State, the textual amendments will naturally remain inapplicable to that State. Hence there is, in our opinion, no need to amend section 30 for the purpose. **Section 30-a suggestion considered.**

CHAPTER 9
RULES IN CASES OF INTESTATES OTHER THAN PARSIS (SECTIONS 31 TO 49)

I. Preliminary

9.1. Rules of succession in cases of intestates other than Parsis are dealt with in sections 31 to 49. The scheme of this group of sections may be briefly stated. The first section in this group (section 31) excludes Parsis; and it may also be noted that section 29(1) has already excluded, from the entire Part, Hindus, Muhammadans, Buddhists, Sikhs and Jains. Devolution of property of an intestate governed by this Part is in the order, and according to the rules, contained in the succeeding sections. Section 32 so provides. The rules differ according as the intestate has left a lineal descendant-section 33(a) and sections 36 to 49-or has not left a lineal descendant-sections 33(b), 33(c) and 33A. The rules also differ in their content if the intestate has left a widow (sections 33 and 33A and section 36, portion in parenthesis), as distinguished from the situation where he has not left a widow (section 36, portion outside the parenthesis). As between the lineal descendants themselves, the order of preference is governed by sections 36—41. **Scope of the provisions and general scheme.**

The rules apply whether or not there is a widow, but after deducting her share-section 36. Where there are no lineal descendants, the position is governed by sections 42 to 48, which apply whether there is or there is not a widow, but after deducting her share-section 41. What has been stated above as to the widow applies also in relation to the widower-section 35.

The last section in this group-section 49 is a special rule meant for a special situation, namely, that of "advancement", and dispenses with the need to bring the "advancement" into the "hotchpot".

9.2 Coming to a detailed consideration of each section, section 31 defines the scope of Chapter 2 of Part 5, by providing that this Chapter shall not apply to Parsis. This was necessary because section 29(2), which is also in Part 5, would otherwise have the effect of applying the provisions of this Chapter, inter alia, to Parsis also. **Section 31.**

The section needs no change.

II. Order of succession where spouse survives.

9.3. Under section 32, the property of an intestate devolves upon the wife or husband or upon those who are the kindred of the deceased, in the order and according to the rules contained in the Chapter. The Explanation to the section deals with the special case of a widow who, by a valid contract made before her marriage, has been excluded from her distributive share of her husband's estate. This provision is based on the English doctrine of pre-nuptial settlement. While two views can be taken as to the soundness of such a provision, we will **Section 32-pre-nuptial settlement.**

[1]Law Commission File No. F. 2(6) 84-LC, S. No. 13 (Government of Nagaland).

[2]See the marginal note to section 49, for these expressions.

not recommend a change in the absence of a specific demand or suggestion for change.

Section 33.

9.4. Where the intestate has left a widow section 33 governs the matter. The section makes detailed provisions for three possible situations, namely, (i) wherea lineal descendant also survives, (ii) where no lineal descendant surviwes but persons who are kindred (other than lineal descendants) survive, and (iii) where no kindred survives. The position is brifly as under :

(i) In the first situation, the widow gets one-third of the estate, and the remaining two-third goes to the lineal descendants, in accordance with detailed rules contained in later sections[1].

(ii) For the second situation, section 33A (introduced in 1926) makes a special provision, giving certain rights to the widow[2]. Subject to that special provision, one half of the property belongs to the widow, and the other half to the kindred, in accordance with rules contained in later sections.

(iii) In the third situation, the whole of the property belongs to the widow.

Position in England where lineal descendants do not survive.

9.5. With reference to the second situation mentioned above[3], namely, the situation where lineal descendants do not survive, the change made in the law in England should be noticed. Under section 46 of the Intestates' Estates Act, 1952, on the death of a husband intestate, *If he leaves no surviving issue,* parent, brother or sister of the whole blood or issue of such brother or sister, *his whole estate* will pass to the widow[4].

Recommendation to amend section 33 where no lineal descendant survives.

9.6. The English provision[5] is, in our opinion, worth adopting, as it is more in consonance with present day sentiments. We recommend that section 33 should be amended accordingly.

9.6A. We should mention that an article published in the Statement[6], commenting on the Law Commission's Working Paper on the Act, has stated that if a husband (belonging to the communities governed by sections 33 to 49) dies leaving no lineal descendants, but has kindred, then, at present, only one half goes to the widow, and the distant relatives take the rest. She suggests that the widow should get the whole of the property in such cases. We may, in this connection, point out that this is precisely what we had proposed in regard to section 33 in the Working Paper, and it is also what we are recommending in this Report[7]. The changes which we are recommending in section 33A are, of course, in addition to the change recommended in section 33.

Section 33A.

9.7. This takes us to section 33A. This is a lengthy section, but it is enough to quote the first two sub-sections :

"33A. (1) Where the intestate has left a widow but no lineal descendants and the net value of his property does not exceed five thousand rupees, the whole of his property shall belong to the widow.

(2) Where the net value of the property exceeds the sum of five thousand rupees, the widow shall be entitled to five thousand rupees thereof and shall have a charge upon the whole of such property for such sum of five thousand rupees, with interest thereon from the date of the death of the intestate at 4 per cent per annum until payment".

[The rest of the section is concerned with matters of details].

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[1]Sections 36 to 40.

[2]Paragraph 9.7, *infra.*

[3]Paragraph 9.4, (ii), *supra.*

[4]Section 46, Intestates' Estates Act, 1952 .(Eng.).

[5]Paragraph 9.5, *supra.*

[6]Shahnaz Anklesria, "Laws which discriminate against women" (20 June, 1984) Statesman, page 6.

[7]Section 33, as recommended to be amended.

9.8. We are of the opinion that the amount of Rs. 5,000 mentioned in section 33A(1) should[1], having regard to the fall in the value of the rupee, be increased to Rs. 35,000. We may note that the value of the rupee has certainly fallen seven times since the section was inserted. We recommend that section 33A should be amended accordingly. In our proposal in the Working Paper, we had suggested an increase upto Rs. 20,000, But, on further consideration, we have reached the above conclusion. We may mention that[2] one of the suggestions forwarded to us by the Catholic Bishops' Conference would even favour substitution of Rs. 50,000.

Recommendation to amend section 33A, so as to increase the amount and the rate of interest.

The rate of interest under section 33A should also, in our opinion, be suitably increased, to, say, 9 per cent, having regard to present conditions.

We recommend that section 33A should be amended, so as to substitute the above increased figure of Rs. 35,000 for Rs. 5,000 [in both the sub-sections] and also the increased rate of interest of 9 per cent in [sub-section (2)].

III. Where spouse does not survive

9.9. We now proceed to section 34, which reads as under :—

Section 34.

"34. Where the intestate has left no widow, his property shall go to his lineal descendants or to those who are of kindred to him, not being lineal descendants, according to the rules hereinafter contained; and, if he has left none who are of kindred to him, it shall go to the Government".

9.10. The first part of the section creates no problems.

Position of illegitimate child.

As to the second part of the section (under which the property goes to the Government) certain observations appear to be in order.

The most usual cases that fall within the latter part of section 34 are those relating to the estates of illegitimate persons who leave no wife or children. In strict theory, in such cases the property goes by escheat to the State. If there is no widow, no lineal descendants and no kindred, the Government will, under section 34, take the whole. At one time, if an illegitimate person died leaving no wife or children, the Crown took the whole property[3], but it was customary for the Crown to re-grant the property to the persons who, if the deceased had been legitimate, would have been entitled to it as next-of-kin. It is in regard to such cases that a very early notification of the Government of India[4] is of great relevance.

9.11. We have in mind certain notifications issued on the subject under the Government of India Act, 1853—a British statute which applied in India[5]. The "Governor-General" had, under that statute, power to make any grant or disposition of any property accruing to the Crown by forfeiture, escheat or otherwise, to or in favour of, any relative or connection of the persons from whom the same shall have accued[6].

Notifications issued by the Governor-General.

It appears that a notification[7] was issued under the Indian Succession Act of 1865, giving effect to the practice of re-granting the property to certain relatives in cases of illegitimate persons. From the property to be-re-granted, expenses of administration as well as certain shares were deducted[8].

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[1]Paragraph 9.7, *supra*.

[2]Catholic Bishops' Conference of India, letter dated 3rd October 1984.

[3]*Secretary of State* v. *Girdhari Lal*, I.L.R. 54 All 226.

[4]See Para 9.11, *infra*.

[5]Government of India Act, 1853 (16 and 17 Vict. c. 95). section 27.

[6]Henderson, Testamentary Succession and Administration of Estates in India (1928), page 43.

[7]Government of India, Notification dated 31-3-1873; Gazette of India, 5th April, 1873 Part 4 page 334.

[8]Henderson, Testamentary Succession and Administration of Estates in India (1928), page 43.

By a further notification of the Home Department[1], the following scale was fixed as to the Crown's share[2]:—

When residue amounts to less than Rs. 5,000—1/8.

When residue not less than Rs. 5000 but less than Rs. 10,000—1/6.

When residue not less than Rs. 10,000 but less than 50,000—1/3.

When residue not less than Rs. 50,000 but less than 1,10,000—1/4.

When residue not less than Rs. 1,10,000 and onwards—1/3.

Recommendation to consider suitable arrangements, in case of escheat etc.

9.12. We have not been able to ascertain whether these arrangements still continue. However, social justice requires that the need for some such arrangements should be considered in the context of section 34.

Section 34, Succession Act compared with section 29, Hindu Succession Act.

9.13. There is also a point of drafting pertaining to section 34, apart from the point of substance which has been mentioned above. What we wish to point out is that the corresponding provision in the Hindu Succession Act is more precise than the provision in the Indian Succession Act. The Hindu Succession Act[3] provides that the Government takes the property subject to all the obligation of the heir.

For ready reference section 29 of that Act is quoted below :—

> "29. *Failure of heirs.* If an intestate has left no heir qualified to succeed to his or her property in accordance with the provisions of this Act, such property shall devolve on the Government; and the Government shall take the property subject to all the obligations and liabilities, to which an heir would have been subject."

This seems to be an improvement on the wording of section 34 in the Succession Act.

Section 34-Recommendation.

9.14. In view of what is stated above, we recommend that in section 34, for the last six words "it shall ..... the Government", the words "*such property shall devolve on the Government and the Government shall take the property subject to all the obligations and liabilities* to which an heir would have been subject", should be substituted.

Section 35-Recommendation.

9.15. This takes us to section 35. It provides that where a husband survives his wife, he has the same rights in respect of her property, if she dies intestate, *as a widow has* in respect of her husband's property if he dies intestate. The operation of this section, read with section 33(b), is illustrated by a Madras case[4], where it was held that, in the absence of any next of kin, the husband would be entitled to the whole of the property of the deceased wife. One important consequence of the general rule in section 35 is that the special provision, inserted in 1926 in the form of section 33A to provide especially or the wife[5] (wodow) applies to the husband also. Whether this was intended by the legislature when it inserted section 33A is arguable. However, on the merits, and having regard to notions current at the present day, there is no harm if section 33A also applies to the surviving husband, by virtue of section 35.

The section does not seem to need any change, either of subtance or of form.

Scheme of Sections 36—40.

9.16. Rules of distribution where there are lineal descendants are provided for in sections 36 to 40. The broad principle is that the children share equally *per capita* (section 37), and (where there are not children) the same principle applies to grand-children, (section 38). Some is the position where there are no children or grand-children, but there are great-grandchildren or lineal descendants in a more remote degree (section 39).

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[1]Supplement to the Gazette of India, November, 5, 1898, page 1923.

[2]Henderson, Testamentary Succession and Administration of Estates in India (1928), page 44.

[3]Section 29, Hindu Succession Act, 1956.

[4]*Ganta Daniyelu* v. *Yasu*, A.I.R. 1925 Mad. 1110, 1111

[5]Section 33A, inserted in 1926; see para 9.7, *supra*.

However, a different provision has been made for cases where the intestate leaves lineal descendants who do not all stand in the same degree of kinship to him. Here, *per capita* distinction (sections 37 to 39) is replaced by distribution *per stirpes* (section 40), i.e. the grandchildren, great-grandchildren or remoter lineal descendants take equally, between them, their deceasd parents' (notional) share.

Section 37-*per stirpes* scheme recommended.

9.17.In our opinion, even in cases governed by sections 37—39, there should be succession *per stirpes,* as that would be more in consonance with the general sense of the community. We recommend that section 37 should be revised as under, to carry out this object :

Revised section 37

"37. Where the intestate has left surviving him a child or children, but no more remote lineal descendant through a deceased child, the property shall

(a) belong to his surviving child, if there is only one, or

(b) shall be divided among all his surviving children as *if section* 40 *applied to the case.*"

Section 37-Adopted and illegitimate children.

9.18. Apart from this point of substance concerning section 37, it may also be stated that according to judicial construction, an adopted child is not a 'child' within the meaning[1] of the section. Nor does the word 'child' in this section, include an illegitimate child[2].

In our opinion, however, this view does not reflect modern socio-legal thinking in the matter of the rights of adopted and illegitimate children. An amendment in the law is required in order to widen its scope in this respect, so as to cover both adopted and illegitimate children.

Section 125 (1), Cr. P.C. 1973-meaning of 'mother'.

9.19. In this context, it is of interest to note that the expression 'mother'[3] in the Code of Criminal Procedure, 1973 (in the provision for maintenance of wives and children), has been held to include an adoptive mother[4]. It was expressly held that the fact that the General Clauses Act does not define the expression 'mother' does not necessarily mean that the expression should be taken in the restrictive sense. An expansion of the scope of section 37 of the Succession Act would, therefore, be in harmony with general judicial trend.

Recommendation to amend section 37, or to insert definition of "child.

9.20. To implement the above point, two alternatives are open—(i) the addition of a suitable Explanation to section 37, so as to include adopted and illegitimate children within the expression "child", (ii) or, in the alternatives, inserting a definition of the expression "child" as including adopted and illegitimate children, in section 2 (which is the general defining section). The second alternative is preferred, as it would settle the point in regard to all provisions of the Act.

If the second alternative mentioned above is adopted, the following definition[5] may be added in section[6] 2 :—

"'*Child' includes*—

(a) *an adopted child, in the case of any one whose personal law permits adoption.*

(b) *an illegitimate child.*"

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[1]*Ma Khun* v. *Ahma,* I.L.R. 12 Rang. 184. *Ranbir Singh* v. *Bhattacharji,* I.L.R. (1940) All 100.

[2]*In the Goods of Sarah Ezra,* A.I.R. 1931 Cal. 560, 562 (case of Jews), following *Smith* v. *Massey* (1906) I.L.R. 30 Bom. 500.

[3]Section 125 (1) , Cr. P.C. 1973.

[4]*Baban* v. *Parbatibai* (1973) Cr. L.J. 1436, 1437, para 10 to 13 (Bombay).

[5]To be carried out under section 2.

[6]Compare (a) section 3(57), General Clauses Act, 1897 (Definition of 'son').

(*b*) Law Commission of India, 60th Report (General Clauses Act), page 17, para 3.24 (proposed definition of 'daughter').

A comment received from the Catholic Bishop's Conference considered.

9.20A. Before proceeding to the next section, we would like to refer to a comment forwarded to us by the Catholic Bishop's Conference of India[1]. The point relates to our recommendation to the effect that the expression "child" should be defined as including an adopted child in the case of anyone whose personal law permits adoption[2]. It is stated in the comment that amongst Christians there is no personal law permitting adoption and that the recommendation would amount to discrimination against the child who is a Christian and who is sought to be adopted by a Christian. The suggestion is that "Either Christians should be allowed to legally adopt children or this amendment should be further amended". We would like to point out, however, that the question of permitting adoption in communities in respect of whom it is not allowed at present is outside the scope of the Succession Act, with which this Report is concerned. The Act primarily deals with the devolution and distribution of property on death. Assuming that the law applicable to any group of persons permits adoption, the Succession Act, wherever it uses the expression "child", should ensure that the expression will cover an adopted child. In other words, there should be maintained a consistency and harmony between the verbal usage in the Succession Act and the law outside the Succession Act. That is the only object of the definition of "child" recommended by us. How far the law outside the Succession Act should permit adoption, and whether that law should be widened, is a matter which cannot be dealt with in the Succession Act.

Where intestate has left no child, but grandchild or grand-children.

9.21. This takes us to section 38, which reads—

"38. Where the intestate has not left surviving him any child, but has left a grandchild or grandchildren and no more remote descendant through a deceased grandchild, the property shall belong to his surviving grandchild if there is only one, or shall be equally divided among all his surviving grand-children".

Illustrations

(i) A has three children, and no more, John, Mary and Henry. They all die before the father, John leaving two children, Mary three and Henry four. Afterwards A dies intestate, leaving those nine grandchildren and no descendant of any deceased grandchild. Each of his grandchildren will have one-ninth.

(ii) But if Henry has died, leaving no child, then the whole is equally divided between the intestate's five grandchildren, the children of John and Mary."

Section 38-Rights of issue of predeceased child.

9.21A. Section 38 thus applies where there are no children, but there are grandchildren. Comments are required on one point which arises out of the section. Under the section, lineal descendants of the second degree take equally *per capita*. It is a matter for consideration whether this position should continue. It would appear that in England[3], where a child predeceases the intestate, but leaves issue surviving at the date of the intestate, then the issue, if they attain the age of 18 years or marry under the age of 18 years, take the share in the residuary estate of the intestate which *the parent would have taken* if he had attained a vested interest. In this sense, the issue takes *per stirpes* in England.

Need for amendment.

9.22. It appears to us that on the merits, the English rule on the subject is better than the Indian section. It should be pointed out that in the case of Parsis[4], even the Inlian Succession Act provides distribution *per stirpes* (in the corresponding situation). No doubt, some distinction is, in regard to Parsis, made between cases where the predeceased child was a son and cases where the predeceased child was a daughter. But that distinction is not material for the present purpose. Further, even for Indian Christians and others, where[5] descendants of varying degrees survive, succession *per stirpes* is the rule.

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[1]Catholic Bishop's Conference of India, letter dated 3rd October, 1984.

[2]Paragraph 4.8, *supra*.

[3]Section 47(1) (iii), Administration of Estates Act, 1925.

[4]Section 53, Indian Succession Act, 1925.

[5]Section 40.

9.23. It may be pointed out that section 38 applies, *inter alia,* to Indian Christians, and presumably they would like to be governed by the rule of distribution *per stirpes,* rather than by the present rule of distribution (per capita). If this assumption is correct, then section 38 should be amended so as to substitute succession 36 *per stirpes* instead of the present rule of succession *per capita.*

9.24. We, therefore, recommend that section 38 should be revised as under :— **Recommendation as to section 38.**

Revised section 38

"Where the intestate has not left surviving him any child, but has left a grandchild or grandchildren and no more remote descendant through a deceased grandchild, the property shall— **Where intestate has left no child, but grandchild or grand children.**

(a) belong to his surviving grandchild, if there is only one, or

(b) shall be divided among all his surviving grand-children, *as if section* 40 *applied to the case.*"

Illustrations

(i) A has three children, and no more, John, Mary and Henry. They all die before the father, John leaving two children Mary three and Henry four. Afterwards A dies intestate, leaving those nine grandchildren and no descendant of any deceased grandchild. Children of *John, Mary and Henry will have one third, and will divide that one third equally amongst themselves.*

(ii) *But if Henry has died, leaving no child, then the children of John will have one half and the children of Mary will have one half, and the children of each divide that one half equally amongst themselves.*"

9.25. This takes us to section 39, which reads— **Section 39.**

"In like manner the property shall go to the surviving lineal descendants who are nearest in degree to the intestate, where they are all in the degree of great-grandchildren to him, or are all in a more remote degree."

This section needs no change.

9.26. Section 40 reads as under :— **Section 40.**

"40 (1) If the intestate has left lineal descendants who do not stand in the same degree of kindred to him, and the persons through whom the more remote are descendants from him from him are dead, the property shall be divided into such a number of equal shares as may correspond with the number of the lineal descendants of the intestate who either stood in the nearest degree kindred to him, died before him, leaving lineal descendants who survived him."

(2) One of such shares shall be allotted to each of the lineal descendants who stood in the nearest degree of kindred to the intestate at his decease; and one of such shares shall be allotted in respect of each of such deceased lineal descendants; and the share allotted in respect of each of such deceased lineal descendants shall belong to his surviving child or children or more "remote lineal descendants. as the case may be; such surviving child or children or more remote lineal descendants always taking the share which his or their parent or parents would have been entitled to respectively if such parent or parents had survived the intestate."

The section needs no change.

IV. No lineal descendants

9.27.Section 41 provides that rules of distribution where the intestate has left no lineal descendants shall be those contained in sections 42 to 48, "after deducting the widow's share, if he has left a widow" Presumably, where a female intestate has left surviving her husband, the husband's share will also be deducted by virtue of section 35, and the expression "widow" in section 41 will, accord- **Section 41.**

ingly, be read as including the widower, husband. Section 41 need not be amended on this point.

Sections 42-46.

9.28. An important social question is raised by sections 42 to 46, which apply where the intestate has left no lineal descendant. These sections do not apply to Hindus, Muslims and Parsis, but as regards other persons, they constitute the general law of succession on intestacy[1]. How, in the first place, the sections give a perference to the father[2], so that if the father is alive, the mother has no share in the estate of the deceased. This is not in conformity with current thinking as to the status of women. The law is in need of reform on this point.

Secondly, where the mother is alive, but there is also brothers or sisters of the intestate living, the mother has to share with the brother or sister, (as also with the children of any pre-deceased brother or sister).

As is evident from section 46, it is only when the father is dead, and there is neither brother nor sister nor child of any brother or sister of the intestate, that the property belongs to the mother.

English law.

9.29. It would appear that in England, the law on the subject is different[3]. Even where brothers and sisters of the intestate are alive, the father and the mother take the property. They share equally, and if only one of them survives he or she takes the whole.

Recommendation to amend sections 43-46.

9.30. We are of the view that the provision in England is more in consonance with the wishes of a person dying intestate and belonging to the communities to whom sections 43 to 46 apply.

We, therefore, recommend that sections 43—46 should be so amended.

Position amongst Parsis.

9.31. It may also be noted that amongst Parsis, the position is different[4] in regard to the situation with which we are now concerned. In the first place, amongst Parsis, the father and the mother exclude the brother and sister. Secondly, the father does not totally exclude the mother but takes double her share, there being a general provision[5] to the effect that "each male shall take double the share of each female standing in the same degree of propinquity."

Section 47.

9.32. Section 47 reads as follows :—

"47. Where the intestate has left neither lineal descendant, nor father, nor mother, the property shall be divided equally between his brothers and sisters and the child or children of such of them as may have died before him, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death."

Recommendation for amendment

9.33. It should be noted that this section does not apply until there is *at least one brother or sister alive*. We are of the view that this should be made clear, in order to maintain symmetry[6] with the wording of section 46 and section 48. The object could be achieved by adding, after the words "nor mother", the words *"but has left a brother or a sister"* We recommend that section 47 should be amended as above.

Revised section 47 will read as follows :—

"47. Where the intestate has left neither lineal descendant, nor father, nor mother, *but has left a brother or a sister,* the property shall be divided equally between his brothers and sisters and the child or children of such

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[1]Section 29.

[2]Section 42.

[3]Section 46, Administration of Estates Act, 1925 (England).

[4]Section 54(d), read with the Second Schedule, Part I ,and section 55 read with the Second Schedule, Part II.

[5]Section 54(d) and section 55.

[6]Note the words "and there is neither brother nor sister....." in section 46 and almost similar words in s. 48.

of them as may have died before him, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death."

Section 48.

9.34. Section 48 reads as follows :—

"Where the intestate has left neither lineal descendant nor parents, nor brother, nor sister, his property shall be divided equally among those of his relatives who are in the nearest degree of kindred to him."

[Illustrations not quoted].

These relatives take *per capita,* as is shown by illustration[1] (iv) to the section.

Need for change as to succession per stirpes.

9.35. Now, this position (distribution *per capita*) may be satisfactory as a general rule, but there is one particular situation in regard to which some discussion is necessary. Where there are no brothers or sisters, but only children of brothers and sisters, they also take *per capita* under the present law. This seems to be unjust. The better course, in our opinion, would be to provide that *the succession should be per stirpes in such cases.* The accident of the death of one issue should not affect the share of his or her descendants.

Contrast between section 48 and section 47.

9.36. The position under present section 48 may be contrasted with the rule applicable[2] under section 47 where there are brothers or sisters and also children of brothers or sisters. In such a case, the succession is *per stirpes,* under section 47. There appears to be no justification for having a different rule under section 48, at least where the persons entitled are the children of brothers and sisters.

Recommendation to amend section 48 and illustration (iv).

9.37. We, therefore, recommend that section 48 should be amended so as to provide for succession *per stirpes.*

Revised Section 48 will read as under—

"48. Where the intestate has left neither lineal descendant nor parents, nor brother, nor sister, his property shall be divided equally among those of his relatives who are in the nearest degree of kindred to him."

Explantion.—Where such relatives are children of brothers or sisters of the intestate, they shall take stirpes."

Illustration (iv) to section 48 should be revised accordingly.

Section 49.

9.38. This takes us to section 49, quoted below :—

"49. Where a distributive share in the property of a person who has died intestate is claimed by a child, or any descendant of a child, of such person, no money or other property which the intestate may, during his life, have paid, given or settled to, or for the advancement of, the child by whom or by whose descendant the claim is made shall be taken into account in estimating such distributive share."

Briefly speaking, the object of this section is to preclude any argument that money given by way of "advancement" should be brought into the hotchpotch

Parsis—position regarding.

9.39. Section 49 does not, in terms, apply to Parsis[3].

But the Bombay High Court has held[4] that the English law would be applicable to parties who were Parsis with regard to the disposal of immovable property situated in the Island of Bombay. The High Court referred to the opinion of Mr. Roper, (Then Acting Advocate General of Bombay) who, after examining the authorities on Parsi usages, which he found very indefinite and inconclusive, said that it would be difficult to assert that there was "any system

[1]See section 48, illustration (iv).

[2]Section 47.

[3]*Dhunjibhai* v. *Navazbai,* (1881) I.L.R. 2 Bom. 75, 82.

[4]*Naoroji* v. *Rogers* (1867) 4 B.H.C.R. 1, 97, 118 (traces history).

of law peculiar to Parsis", subject to the English law. This opinion was laid before the Indian Law Commission, and later the Parsi community also accepted it.

In later cases also, the Bombay High Court seems to have allowed the application of the common law doctrine of advancement to Parsis in India. Coyajee J. has observed[1], "I may say that as regards the theory of advancement being made applicable to Parsis it has become such a well-settled law by this time that several recent decisions on Originating summons have been answered by the learned judges without finding any necessity to deliver judgements on those questions."

No change.

9.40. The above discussion does not, of course, lead to any amendment of the section.

CHAPTER 10

SPECIAL RULES FOR PARSI INTESTATES (SECTION 50 TO 56)

Scope.

10.1. There are certain special rules for Parsi intestates, contained in sections 50 to 56.

The scheme of the seven sections devoted to this topic is simple. Certain general principles relating to intestate succession among Parsis are first set out. Of special interest is the provision for a relative's widow who re-marries. The next two sections—51 and 52—deal with division of the intestate's property where the inteestate leaves children, there being separate provisions for male intestates and famale intestates.

Points of differences. (males and females).

10.2. Two important points of difference arise between males and females. Where the intestate was a male, the share of each son (and the widow if alive) is double the share of each daughter, but where the intestate was a female, the children (and the widower if alive), share equally[2]. Secondly, where the intestate was a male who left children, the father is entitled to a share equal to half the share of a son and the mother is entitled to a share equal to half the share of a daughter. There is no such provision in the case of a female who has left children. Section 53 provides for the division of share of a predeceased child of the intestate where that child has left any 'lineal descendant'.

The situation where the intestate dies without leaving any lineal descendant but *leaving a widow or widower (of the intestate)* or widow of a lineal descendant, is first dealt with (section 54). The persons mentioned in the preceding sentence do not necessarily take the entire estate, but only the specified portion of the estate. The residue is to be distributed among the relatives specified in the Second Schedule, Part I. Each male takes double the share of each female standing in the same degree of propinquity.

Next is dealt with the situation where the intestate has left no widow, widower or widow of a lineal discendant (section 55). The next of kin set out in the Second Schedule, Part II, becomes entitled to the property in such case, each male taking the share of each female standing in the same degree of propinquity (section 55).

Where there is no relative entitled to succeed under the section so far referred to, the property is to be divided equally among those of the intestate's relatives who are in the nearest degree of kindred to him (section 56).

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[1] *Darsha Bharucha* v. *Dr. Edi Phiro Bharucha* (unreported) suit No. 271 of 1952 (O.S.) (Coyajee J.) quoted in Paruck, Succession Act, (1966), page 52.

[2] For further comments see para 10.5, *infra*.

10.3. The provisions as to intestate succession to Parsis, disclose, on an analysis, certain rules which seem to have their foundation in sociological factors. Thus, a male gets double the share of a female standing in the same degree of propinquity[1]. The provisions also recongise the doctrine of representation[2]. Basic sociological factors.

These sections were extensively revised in 1939. The amendments of 1939 were made at the instance of the trustees of the Parsi Panchayat, who had prepared a draft Bill which was finally approved by the Council of the Parsi Central Association in 1933[3].

10.4. An important aspect to which reference may be made is that the Amendment Act of 1939, which came into force on 12th June 1939,[4] does not seem to apply to agricultural land, because, in the Government of India Act, 1935, devolution of agricultural land was exclusively a provincial subject. The position under the Constitution[5] is different; succession to agricultural land appears to stand on the same footing as succession to any other property[6]. Amendment of 1939.

After these general observations, a few matters of detail may be dealt with.

10.5. Section 51 deals with the division of the property of a *male Parsi* intestate among his widow, children and parents. Clauses (a) and (b) of sub-section (1) of the section provide that the share of each son shall be double the share of each daughter on such intestate succession. In cases where the intestate succession is in respect of the property of a *female Parsi,* section 52 provides that (1) the widower and each child receive equal shares and (2) where there is no widower, the children get equal shares. Thus, on the father's death, the son is entitled to double the share of each daughter of the property but, on the mother's death, the children (which, of course, means sons and daughters) get equal shares. The discrimination made in the firest situation between sons and daughters does not seem to be reasonable at the present day. Section 51.

It may be noted that under the Hindu Seccession Act[7], the property of an intestate shall be divided among the heirs specified in that regard, which (*inter-alia*) include the surviving sons and daughters, and each heir takes one share, *irrespective of sex.* In contrast, the Indian Succession Act appears to be discriminatory.

10.6. The discrimination found in the Indian Succession Act is opposed to the spirit of article 14 of the Constitution, if not to its letter. Recommendation to amend section 51.

For the reasons given above, we recommend that section 51 should be so amended as to provide that the daughter and son should get an equal share of the property of their deceased father. This would also bring section 51 in line with the provisions of section 52, wherein children get equal share in the deceased mother's property.

10.6A. Sections 52 and 53 need no further comments. Sections 52-53.

10.7. In sections 54(d) and 55, it is provided that in cases falling under these sections, the property shall be so distributed that each male shall take double the share of each female standing in the same degree of propinquity. For the reasons given by us in regard[8] to Section 51, we recommend that section 54(d) and 55 should also be amended so as to remove the disparity in shares based solely on sex. It is interesting to note that under section 56, where there is no relative entitled to succeed under the other provisions of this Chapter, the property shall be divided equally among those of the intestate's Recommendation to amend sections 5 and 55.

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[1]Sections 51(1)(a) and (b), 51(2), 53(a), 54(d) and 55.

[2]Sections 53(a), (c) and (d), contrasted with section 51(b).

[3]Paruck, Succession Act, (1966), page 60.

[4]Gazette of India, 20th May, 1939, Part I, page 854.

[5]Constitution, 7th Schedule, State List, Entry 18.

[6]*Laxmi Devi* v. *Surendra Kumar,* A.I.R. 1957 Orissa 1, 4, para 14.

[7]Section 10, Rule 2, Hindu Succession Act, 1956.

[8]See recommendation as to section 51 (Paragraph 10.6, *supra*).

'relatives' who are in the nearest degree of kindred to him. "Relatives" will undeniably include relatives of either sex.

Section 56.

10.8. Section 56 reads as follows :—

"56. Where there is no relative entitled to succeed under the other provisions of this Chapter to the property of which a Parsi has died intestate, the said property shall be divided equally among those of the intestate's relatives who are in the nearest degree of kindred to him."

In section 56, the word used is 'relative', whereas in section 55, the word used is 'next-of-kin'. But both the words are synonymous[1]. Although the brother's widow mentioned in Part II of Schedule II (which is referred to in section 55) is not a 'next-of-kin', being not "related" to the deceased *by blood,* she would succeed under section 55 as the next-of-kin of the intestate.

CHAPTER 11

TESTAMENTARY SUCCESSION—INTRODUCTORY (SECTIONS 57 and 58)

Scope.

11.1. The topic of testamentary succession is introduced by sections 57 and 58, which deal with the application of the provisions of Part VI to various classes of persons.

The structure of sections 57 and 58(1), latter half, is elaborate. This is primarily because of the way in which the law has developed historically[2].

Section 57.

11.2. Section 57 reads as follows :—

"57. The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply—

(a) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such wills and codicils made outside those territories and limits so far as relates to immovable property situated within those territories or limits; and

(c) to all wills and codicils made by any Hindu, Buddhist, Sikh and Jaina on or after the first day of January, 1927, to which those provisions are not applied by clauses (a) and (b).

"Provided that marriage shall not revoke any such will or codicil."

It may be noted that in course of time, only clause (c) will retain its importance.

Certain sections of the Act not applicable at present to Hindus etc. may require a second look from the point of view of the need to apply them to Hindus etc. We shall deal with the matter under the relevant sections.

Section 58.

11.3. Section 58 reads as follows :—

"58. (1) The provisions of this Part shall not apply to testamentary succession to the property of any Muhammadan nor, save as provided by section 57, to testamentary succession to the property of any Hindu, Buddhist, Sikh

[1] *Hiribai* v. *Barjorji*, I.L.R. 22 Bom. 909.

[2] See historical discussion, *supra*.

or Jaina; nor shall they apply to any will made before the first day of January, 1866.

(2) Save as provided in sub-section (1) or by any other law for the time being in force, the provisions of this Part shall constitute the law of India applicable to all cases of testamentary succession."

The exclusion of Muhammadans in section 58(1), in earlier half, is explained by the fact that the Muslim law of wills, which is a part of the personal law of Muslims, had already developed on its own lines when the Act came to be enacted, and it was not considered expedient to abrogate its doctrines and substitute new ones in their place.

The more important provision is really sub-section (2), which, because of its peremptory language, has the effect of emphasising the "codifying" nature of this Part of the Act.

CHAPTER 12

WILLS AND CODICILS

(SECTIONS 59—62)

I. Introductory

Scope and history

12.1. Wills and codicils, as a general subject, find place in sections 59 to 62. A brief history of the position in England as to testamentary dispositions may be helpful, as it throws interesting light on some of the concepts and expressions employed in Indian legislation also.

Association with religion.

12.2. It was by steps that the fee simple in land became freely devisable by will in England. Bequests of personal property (including lease-holds) have had a longer history, though the true will did not become prevalent in England until the revival of Roman Law studies in the early Middle Ages. Thereafter, wills because general in classes of society, largely because of the encouragement given to them by the Church which wished to ensure that some part of the dead man's property should be distributed for the good of his soul.[1]

Role of the Church.

12.3. No doubt, it was this association with religion and its consequence that the Church was an invariable beneficiary under every will that induced the common law, from the thirteenth century onwards,[2] to leave all disputes concerning the validity of wills to the ecclesiastical courts and this jurisdiction led to the general rule that all wills must be produced before the tribunal of the Ordinary (generally, the Bishop of the Diocese) and receive the authentication of a grant *of probate* before they could be acted upon. The probate jurisdiction remained exclusively with ecclesiastical courts until it was transfered to the new court of Probate in 1857.

English law relating to formalities requisite for wills is partly statutory and partly non-statutory.[3] Indian law on the subject is statutory, but the concepts and expressions, largely borrowed as they are from England, are reminiscent of the ecclesiastical practice that constituted the nucleus of the English rules on the subject.

II. Scheme of Section 59—62

Scheme.

12.4. The scheme of sections 59—62 is simple. Section 59 deals with the persons who are capable of making wills. In general, testamentary capacity

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[1]Stephen, Commentaries on the Laws of England (1950), Vol. I , Pages 499, 500.

[2]Stephen, Commentaries on the Laws of England (1950), Vol. I, pages 499, 500.

[3]Paragraph 12.8, *infra*.

requires a sound mind and attainment of the age of majority[1]. The age of majority is not, however, expressly mentioned in section 59[2].

Marriage is no disqualification as regards testamentary capacity.[3] Physical incapacity as such is also not regarded as an incapacity for making a will, if the persons concerned are able to know what they do by it".[4] Here the test is one of *ability to know*, and not *actual* knowledge, in contrast with the provision relating to "state of mind". Even an insane person can make a will during an interval in which he is of sound mind.[5] These propositions are laid down in three Explanations to section 59.

But a person in a "state of mind" in which he does not know what he is doing cannot make a will. And this is so irrespective of the cause that has led to such a state a mind.[6] Here the test is of *actual knowledge*. By and large, this requirement corresponds to the English notion of a "sound disposing state of mind".

Other functions of a testamentary document.

12.5. Though the principal object of a will is the disposition of property (section 59), there are certain other incidental functions of a testamentary document. Thus, section 60 provides[7] that a father, whatever his age may be, may by will appoint a (testamentary) guardian for his minor children.

It is elementary that a will must be the result of the free exercise of the will of its maker.

Certain factors adversely affecting the freedom of will in this context are dealt with in a separate section[8].

Finally, it is provided that a will is liable to be revoked or altered by the maker at any time when he is competent to dispose of his property by will.[9] This brings out the ambulatory character of a will.

The sections in the group, taken together, thus codify the position in respect of certain aspects connected with wills, namely, the will as a dispositive document taking effect on death (and only on death), the ambulatory character of a will, and the will as a voluntary and revocable instrument.

Analysis of the sections.

12.6. It may be stated that three sections (69—61) are concerned with capacity to make a will, including in particular, the relevance or irrelevance of certain factors connected with the condition or status of the testator, such as—

(a) sound mind[10],
(b) age[11],
(c) physical incapacity[12],
(d) married status (in the case of a women[13], and
(e) free will [14].

One section (section 62) deals with the revocable character of a testamentary disposition.

We may now take up the provisions, section by section.

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[1]Section 59, main paragraph.
[2]Contrast section 65.
[3]Section 59, Explanation I.
[4]Section 59, Explanation II. Contrast section 59, Explanation IV.
[5]Section 59, Explanation III.
[6]Section 59, Explanation IV.
[7]Section 60.
[8]Section 61.
[9]Section 62.
[10]Section 59. main paragraph and Explanations 3 and 4.
[11]Section 59. main paragraph as qualified by section 60.
[12]Section 59. Explanation 2.
[13]Section 59. Explanation 1.
[14]Section 61.

Section 59—Capacity to dispose of property by will.

12.7. Section 59 reads as follows :—

"59. Every person of sound mind not being a minor may dispose of his property by will.

Explanation 1.—A married woman may dispose of by will any property which she could alienate by her own act during her life.

Explanation 2.—Persons who are deaf or dumb or blind are not thereby incapacitated for making a will if they are able to konw what they do by it.

Explanation 3.—A person who is ordinarily insane may make a will during an interval in which he is of sound mind.

Explanation 4.—No person can make a will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing."

English provision.

12.8. The English statutory provision[1] on the subject enacts that "it shall be lawful for every person to devise, bequeath or dispose of by his will..... all real estate and all personal estate which he shall be entitled to at the time of his death". The legal requirements of sound mind and majority are not expressly mentioned in the English section, but are left to be governed by the common law. In contrast, section 59 of the Succession Act, as already mentioned in the above analysis,[2] makes elaborate provisions spelling out this concept, in various Explanations added to the section.

Minimum age in England before 1837.

12.9. In England, prior to the Wills Act, 1837, a person could dispose of leaseholds or other personal property—

(a) at the age of 14 years, if a male or

(b) at the age of twelve, if a female.

But a person could not devise freeholds before the age of 21 years.

An infant cannot make an irrevocable disposition of interest in real property.[3]

In 1837 the British Parliament fixed a uniform age—21 years—as the minimum age for wills of all property[4]. There was made an exception for soldiers in actual military service or mariners or seamen at sea.

The age of 21 years fixed in 1837 for the general community was reduced to 18[5] in 1969 in England.

Mental capacity.

12.10. The requirement of mental capacity—soundness of mind—is one common to wills and non-testamentary dispositions. The earlier theory was that such a person has no will or no "mind". But later it was recognised[6] that the only legitimate and rational ground for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will, and to influence his decision as to the disposal of his property.[7]

Initially it was described as a requirement of 'sound mind, memory and understanding'. As has been observed,[8] the phrase 'sound mind' covers the whole subject—there must be memory to recall the persons supposed to become fitting objects of testamentary bounty. And there must be understanding by the testator to comprehend their relations to himself (the testator) and their claims upon him.

Section 59—amendment regarding property that can be disposed of by will.

12.11. Reverting to section 59, the first point to be noticed in regard to the section concerns the main paragraph, which provides that a person may dispose of "his" property. There is, at present, no provision in the Act specifically

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[1]Section 3, Wills Act, 1937.

[2]Para 12.4, *supra*.

[3]Cheshire, Modern Law of Real Property (1976), page 920, citing Coke and Littleton.

[4]Sections 3 and 7, Wills Act, 1837.

[5]The Family Law Reform Act, 1969, (England).

[6]*Banks* v. *Goodfellow*, (1870) L.R. 5 Q.B. 549. (1861—1873) All E.R. Rep. 47.

[7]*Banks* v. *Goodfellow*, (1870) L.R. 5 Q.B. 549, (1861—1873) All E.R. Rep. 47.

[8]*Boughten* v. *Knight*, L.R. 3 P & D 64 : (1861—1873) All E.R. Rep. 40, 41.

providing that a person can (by will) dispose of property *over which he* has a disposing power though it is not "his" property. It is desirable that some provision covering property over which there is a disposing power exerciable by will should be contained in the Indian Succession Act[1]. Such a provision would be useful, for example, in regard to the interest of a Hindu in coparcenary property, which is now disposable by will[2]. It may not be quite correct to say that such an interest is "his" property during his lifetime, and it may, therefore, fall outside section 59.

To achieve the object mentioned above, we recommend an amendment revising the first paragraph of section 59 so as to read as under :—

> "Every person of sound mind, not being a minor, may, by will, dispose of his *property or any property over which he has disposing power which he can exercise by will*".

ecommendation amend section in regard to re- cation or altera- n of appointment guardian.

12.12. We may now refer to another point arising out of section 59. This concerns the test enacted by the words 'competent to dispose of his property by will. The phraseology is, in one respect, inaccurate. Competence to dispose of property is governed by section 59, under which every person of sound mind *not being* a minor may dispose of his property by will. Disposition of property thus requires majority. But under section 60, the appointment of a guardian by will is permissible to a father, 'whatever his age may be'.

It stands to reason that if a person can appoint a testamentary guardian at any age, he should also be competent to revoke or alter the appointment, whatever his age may be. We, therefore, recommand that the following proviso should be added to section 59 :—

> *"Provided that any person, whatever his age may be, may, by will, revoke or alter any will appointing a guardian or guardians for his child during minority.'*

xplanation.

12.13. Explanation 1 to section 59 is not intended to affect the general requirements laid down in the body of the section, namely, (i) full age (majority), and (ii) sound mind[3]. One would have thought that this is clear enough. However, in a Calcutta case[4] (decided under the earlier Act), an attempt was made to persuade the court to read the Explanation apart from the section, i.e., to regard the Explanation as a self-contained provision dispensing with the requirement of full age (majority). The attempt failed.

ecommendation amend Section), Explanation I.

12.14. In order to put the position beyond doubt, we recommend that the first Explanation to section 59, should be revised as follows :—

> "*Explanation* 1.—A married woman, *if otherwise, competent to make a will,* may by will dispose of any property which she could alienate by her own act during her life."

ction 59, Explaation II.

12.15. Explanation II to section 59 provides that persons who are deaf, dumb *or* blind are not to be incapacitated from making a will, if they are able to know what they do by it. One commentator,[5] emphasising the use of the conjunction "or", has stated that the Explanation omits the case of a person who is deaf *and* dumb *and* blind. We do not, however, share this doubt. Such a person falls in each category. As the language of the section is clear enough, no change is needed.

IV. Persons mentally incompetent

eed for provision to person menlly incompetent.

12.16. At this stage, we may mention one matter on which an amendment appears to be needed. At present, there is no provision in the Succession Act whereby the property of a person who is mentally incompetent can be disposed of by a will to be made by the court or any other authority. Now, a situation

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[1]Compare section 7, Transfer of Property Act, 1882.

[2]Section 30, Hindu Succession Act, 1956.

[3]*In re : Caroline Miranda*, A.I.R. 1924 Cal. 644 (Buckland J.).

[4]*In re : Caroline Miranda*, A.I.R. 1924 Cal. 644.

[5]Paruck, Succession Act,Commentary on Section 59.

can possibly arise rendering the existence of such a power desirable. For example, a person of charitable disposition becomes mentally incompetent and has no near relatives. In the absence of a will, his estate goes either (by intestacy) to a very distant relative, or (by escheat) to the State. It would be convenient if a part of the estate could be given to charity. There may also arise cases where justice requires that an earlier will made by a person who subsequently has become mentally incompetent should be modified or revoked[1], or a new executor appointed. The testator, in view of his mental incapacity, cannot do it now. There should, then, be some authority vested with such a power.

In such cases, social injustice may result by virtue of the present position. The matter does not seem to be specifically covered by the law relating to lunacy[2].

12.17. In this context, it may be noted that in England, a judge has power[3] to make certain orders or to give certain directions for the disposal of property of mentally incompetent persons and to execute a "statutory will" in regard to persons who are mentally incompetent[4-5], if the judge has reason to believe that the patient does not have testamentary capacity[6]. **Power of the judge in England.**

The relevant provision is contained in section 103(1), Mental Health Act, 1959 (inserted by section 17(i) (dd) of the Administration of Justice Act, 1969), relating to statutory wills. Amongst the powers of the judge as to the patients' property and affairs, the following is now mentioned in section 103(1) :—

> "(dd) the execution[7], for the patient, of a will making any provision (whether by way of disposing of property or exercising a power or otherwise) which could be made by a will executed by the patient if he were not mentally disordered, so, however, that, in such cases as a nominated judge may direct, the powers confered by this paragraph shall not be exercisable except by the Lord Chancellor or a nominated judge[8];

12.18. Section 103(3) of the Mental Health Act, 1959, (as amended in 1969) further provides :—

> "any power of the judge to make or give an order, direction or authority for the execution of a will for a patient—
>
> (a) shall not be exercisable at any time when the patient is an infant, and
>
> (b) shall not be exercised unless the judge has reason to believe that the patient is incapable of making a valid will for himself".

In a fairly recent English case[9], this section (section 103, Mental Health Act, 1959) was applied and, on the facts of the case, the Court chose to give notice to legatees under the earlier will. The facts of the case also illustrate how there may arise a need for a court to modify a will, if a person who has made certain testamentary dispositions[10] shows later (after becoming mentally incompetent), an interest in the surviving members of the family.

12.19. We are of the view that it is desirable to insert a new section on the subject. As to the placing of the proposed new section, there are two alternatives. It could be placed in the Succession Act (for which we are giving a draft below)[11], or, in the alternative, the appropriate amendment may be made **Recommendation to amend the law.**

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[1] *Cf. Re H.M.F.*, (1975) 2 All E.R. 795.

[2] Indian Lunacy Act, 1912.

[3] See para 1.10, *supra*.

[4] Sections 103 and 103A, Mental Health Act, 1959 (Eng.).

[5] Section 17(1) and (2), Administration of Justice Act, 1969 (Eng.).

[6] See *Re. H.M.F.* (1976), Ch. 33, (1975) 2 All E.R. 795.

[7] Commas added to facilitate understanding.

[8] This means the Judge of the Chancery Division.

[9] *Re. H.M.F.* (Mental Patient Wills), (1975) 2 All E.R. 795, 799 (Coulding J.).

[10] Charities in this case.

[11] *See infra*, (Paragraph 12.20).

by adding a section in the Indian Lunacy Act, 1912 in the Chapter[1] of that Act dealing with the management of the person and property of lunatics.

Recommended section 59A. (Succession Act).

12.20. If the amendment is to be made in the Succession Act, we recommend that new section 59A may be inserted in that Act on the following lines :

"59A. (1) *The court exercising jurisdiction under the Indian Lunacy Act, 1912 in relation to the property of a lunatic shall have power to make an order, direction or authority for the execution, for the lunatic, of a will making any provision (whether by way of disposing of property or exercising a power or otherwise) which could be made by a will executed by the lunatic if he were a person of sound mind.*

(2) *An order, direction or authority for the execution of a will for a lunatic—*

(a) *shall not be exercisable at any time when the lunatic is a minor, and*

(b) *shall not be exercised unless the judge has reason to believe that the lunatic is incapable of making a valid will for himself.*

(3) *A will executed in accordance with such order, direction or authority shall have the same effect as a will made by the lunatic if he were a person of sound mind.*

(4) *Any such order, direction or authority may be revoked or modified by the court referred to in sub-section* (1), *which may also issue an order for revoking or modifying a will already made by the lunatic or a will made under this section for the lunatic."*

Lunacy Act.

12.21. The scheme of the Indian Lunacy Act, as it stands at present, is that one set of provisions deals with the jurisdiction of the High Court in the Presidency Towns, while another set deals with the jurisdiction of the District Court outside the Presidency Town. If that Act is to be amended for the purpose discussed above[2], two sections—say, section 49A and section 71A—would have to be inserted in that Act to deal with these two areas respectively. The expression to be used would be "the court" in relation to other areas, having regard to the phraseology already used in the Lunacy Act.

Recommended section 49A. (Lunacy Act) (Alternative recommendation).

12.22 If, therefore, the amendment is to be made in the Indian Lunacy Act, 1912, we recommend that a new section may be inserted in that Act on the following lines :

"49A. (1) *The court shall have power to make an order, direction or authority for the execution, for the lunatic, of a will making any provision (whether by way of disposing of property or exercising a power or otherwise) which could be made by a will executed by the lunatic if he were a person of sound mind*[3].

(2) *An order, direction or authority for the execution of a will for a lunatic—*

(a) *shall not be exercisable at any time when the lunatic is a minor, and*

(b) *shall not be exercised unless the judge has reason to believe that the lunatic is incapable of making a valid will for himself.*

(3) *A will executed in accordance with such order, direction or authority shall have the same effect as a will made by the lunatic if he were a person of sound mind.*

(4) *Any such order, direction, or authority may be revoked or modified by the court referred to in sub-section* (1), *which may also issue an order*

[1]To be considered under the Indian Lunacy Act, 1912, (Paragraph 12.22).

[2]Paragraph 12.19, *supra*.

[3]Similar provision with appropirate adaptations to be made in regard to the District Court as section 71A.

for revoking or modifying a will already made by the lunatic or a will made for the lunatic under this section."

V. Guardian appointed by will

Section 60-scope.

12.23. Section 60 reads—

"A father, whatever his age may be, may by will appoint a guardian or guardians for his child during minority".

This section does not apply to Hindus, Buddhists[1] [2], etc. The section really belongs to the law of testamentary guardianship. It finds a place in the Act because it also touches upon the sphere of wills.

Question of mother's right.

12.24. While section 60 has created no problems, we are of the view that a similar right should be conferred on the mother, at least in the absence of the father, or, where the father is under disability. It appears to us that an amendment conferring such a right would be in conformity with present day thinking. At the time when the section was enacted, social opinion, in general, regarded the father as the only person primarily concerned with the future of the child. That is hardly the situation now.

English law.

12.25. In this connection it may be noted that in English law, *either parent may*, by will, appoint a guardian of a minor child. The relevant statutory provisions (which contain certain other matters of detail also) are quoted below :—[3]

"4. *Power of father and mother to appoint testamentary guardians*

(1) The father of a minor may by deed or will appoint any person to be guardian of the minor after his death.

(2) The mother of a minor may by deed or will appoint any person to be guardian of the minor after her death.

(3) Any guardian so appointed shall act jointly with the mother or father, as the case may be, of the minor so long as the mother or father remains alive unless the mother or father objects to his so acting.

(4) If the mother or father so objects, or if the guardian so appointed considers that the mother or father is unfit to have the custody of the minor, the guardian may apply to the court, and the court, may either—

(a) refuse to make any order (in which case the mother or father shall remain sole guardian); or

(b) make an order that the guardian so appointed—

(i) shall act jointly with the mother or father; or

(ii) shall be the sole guardian of the minor.

(5) Where guardians are appointed by both parents, the guardians so appointed shall, after the death of the surviving parent, act jointly.

(6) If, under section 3 of this Act, a guardian has been appointed by the court to act jointly with a surviving parent, he shall continue to act as guardian after the death of the surviving parent, but, if the surviving parent has appointed a guardian, the guardian appointed by the court shall act jointly, with the guardian appointed by the surviving parent."

Section 60-suggestion for radical change considered.

12.25A. We have taken note of the suggestion[4] of one writer (in an article published in the Statesman), that "either parent" should, under section 60, have the right to decide what is best for their child in the event of their death. We are not inclined, for the present, to go beyond what we have already recommended.

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[1]See Third Schedule read with section 57(c).

[2]See section 9, Hindu Minority and Guardianship Act, 1956.

[3]Sections 4(1) and 4(2), Guardianship of Minors Act, 1971 (Eng.).

[4]Shahnaz Anklesaria, "Laws which discriminate against women" (20 June, 1984) Statesman, page 6.

Recommendation.

12.26. We are not sure whether public opinion in India—even amongst persons governed by section 60—would welcome such a radical change. However, we are of the view that the mother's right should, as a first step[1], be given recognition, at least for cases where the father is absent or incompetent to act.

Requirement of sound mind.

12.27. Apart from this point, which is of substantial imporance, there are certain matters of detail also requiring attention. It is obvious that under section 60, a person ought not to be allowed to make an appointment of a testamentary guardian unless he (the person appointing) is of sound mind. It is appropriate that this requirement should find a place in section 60, on the lines of section 59 which relates to ability to dispose of property by will. We recommend that section 60 should be amended to carry out the above object.

Minority.

12.28. Incidentally, the "minority", mentioned at the end of the section, is of the child, and not of the father. Opportunity could also be taken of making that clear.

Recommendation to revise section 60.

12.29. In the light of the above discussion, we recommend that section 60 should be revised as under :—

"60. (1) A father, whatever his age may be, *if of sound mind*[2] may, by will, appoint a guardian or guardians for his child during the minority *of the child*[3].

(2) *A mother*[4], *whatever her age may be, if of sound mind, and if the father is dead or incapable of acting by reason of mental incapacity, may by will appoint a guardian or guardians for her child during the minority of the child*".

VI. Flaws in a will affecting the reality of consent

Analysis of section 61.

12.30. Section 61 reads—

"61. A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void."

(Illustrations to the section have not been quoted).

The section deals with three vitiating factors in a will—

(i) fraud,

(ii) coercion,

(iii) such importunity as takes away the free agency of the testator.

Section 61-Free choice in testamentary dispositions.

12.31. In order that a will may be valid, a person must not only possess testamentary capacity (age and sound mind), but also exercise his genuine free choice in the making of the will. Lack of free will is the subject matter of section 61.

In England, it is stated that where a will is accompanied by force, fraud, fear or undue influence, the will or the affected part which is produced in this way, is not regarded as the act of the testator, and so probate is refused to such a will[5].

Fraud.

12.32. In the case of fraud, the mind is not overborne, but is misled. Cases relating to fraud broadly fall into two categories, namely, first, where the fraud is as to the nature of the relationship existing between the testator and the beneficiary[6], and secondly, where the fraud creates a false impression in the mind of the testator about the natural objects of his bounty, thereby leading to the exclusion of those natural objects of bounty or some of them[7].

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[1]Cf. section 9, Hindu Miniroty and Guardianship Act, 1956.

[2]See para 12.27, *supra*.

[3]See para 12.28, *supra*.

[4]See para 12.26, *supra*.

[5]Mellows, The Law of Succession (1977), page 64.

[6]*In Re. Posner*, (153) Probate 277; (1953) 1 All E.R. 1123 (reviews case law).

[7]*Boyes* v. *Rossborough*, (1857) 10 English Reports 1192, 1213.

12.33. Fraud is not easy to define and the definition in the Contract Act is not generally regarded as very satisfactory[1].

12.34. So far as the substance of the matter goes, courts have, in general, given a wide meaning to that part of the section which deals with 'importunity', and it may not be wise to introduce any rigid definition of that expression. Some of the judicial decisions have mixed up "coercion"[2] and 'importunity', but there is nothing to which any such mixing up can be attributed. In India, the sole question to be considered in this context is, whether the testator was "able to know" what he did by the will. This is precisely what illustraction (ii) to the section provides. No change needed as to "improtunity".

12.35. In an Orissa case[3], it was contended that the will had been executed under undue influence, because for some time the testator (father) had been living in the house of the legatee (daughter), and during that period the will was brought into existence. The High Court, holding that there was no case of undue influence here, and after considering illustration (viii) to section 61, observed :— Orissa case.

> "It is very natural that a father would live with his daughter. The mere fact that the father resided with the daughter, or he had affection for her, or that the daughter treated the father with hospitality and cordially, would not amount to undue influence."

12.36. In the Contract Act[4] "coercion' is defined as committing or threatening to commit any act forbidden by the Indian Penal Code or the unlawful detaining or threatening to detain any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. It is not clear whether that definition will apply also to section 61, Succession Act. Coercion in the Contract Act.

12.37. As regards 'importunity' mentioned in section 61, it must be such as takes away the free agency of the testator. Beyond this, the exact scope of that concept is not defined in the section. It would cover that kind of influence which the Indian Contract Act has described as "undue influence"[5] but it seems to be wider in its scope than undue influence. While illustration (v) to section 61 (which illustrates the concept of importunity), does not go beyond what the Contract Act has described "as undue influence", illustration (vi) to the section seems to go beyond that concept. According to that illustration, if a person, *"being in so feeble a state of health as to be unable to resist importunity"*, is pressed by another person to make a will of certain purport, and does so merely to purchase peace and in submission to that other person, then the will is invalid. Meaning of 'importunity'.

2.38. In England, "duress' is a vitiating factor in regard to wills. The common law conception of duress (threat of physical harm), however, was so limited that injustice could result, since a person could be imposed upon by subtle methods which lay outside the scope of duress. The Court of Chancery, therefore, formulated the doctrine of "undue influence", whereby a transaction could be set aside in equity on that ground and money paid or property transferred thereunder could be recovered[6]. Duress in England

12.39. In an appeal heard by the Privy Council from the Supreme Court of New South Wales[7], Lord Wilberforce and Lord Simon of Glaisdale, in their dissenting opinions, analysed the various concepts vitiating consent. The observations were made in the context of the defence of duress, but the analysis is of general applicability and reads as follows :— Analysis in Privy Council case.

> "The basis of the plaintiff's claim is, thus that though there was apparent consent there was no true consent to the agreement : that the agreement was not voluntary."

[1]Section 16, Indian Contract Act, 1872.

[2]*Gajendra Naik* v. *Chowdhri Birabar*, I.L.R. (1967) Cuttack, 563.

[3]*Gajendra Naik* v. *Chowdhury Birabar*, I.L.R. (1967) Cut. 563, 568 (D.B.)

[4]Section 15, Indian Contract Act, 1872.

[5]Section 16, The Indian Contract Act, 1872.

[6]Goff and Jones, Law of Restitution (1978), page 192.

[7]*Barton* v. *Armstrong*, (1975) 2 W.L.R. (P.C.) 1050, 1063.

"This involves consideration of what the law regards as voluntary, or its opposite; for in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law; for this, the pressure must be one of a kind which the law does not regard as legitimate. Thus, out of the various means by which consent may be obtained—advice, persuasion, influence, inducement, reresentation, commercial prersure—the law has to come to select some which it will not accept a reason for voluntary action : fraud, abuse of relation of confidence, undue influence, duress or coercion. In this the law, under the influence of equity, has developed from the old common law conception of duress—threat to life and limb and it has arrived at the modern generalisation expressed by Holmes J.—"subjected to an improper motive for action"[1].

Probate doctrine of undue influence.

12.40. However, it must be noted that the probate doctrine of undue influence is more circumscribed than that of equity. In probate law, the undue influence must "amount to force and coercion, destroying of free agencies—it must not be the influence of affection and attachment—it must not be the mere desire of gratifying the wishes of another; for that would be a very strong ground in support of a testamentary act"[2].

Undue influence in England and India.

12.41. It was said in one of the English cases[3]—

"The law bearing on this subject is uncontested .... undue influence is the control of another's will over a person whose faculties have been so impaired as to submit to the control of such another person, so that the party making the will has ceased to be a free agent, and has adopted the will of the controlling party."

In India, it is needless to say, the wording of section 61 should govern the matter.

Indian case law-use of the expression "undue influence".

12.42. Unfortunately, judicial decisions in India on the expression 'importunity' do not adhere to the precise language of section 61. Many of the judgements speak also of "undue influence"—an expression which does not occur in section 61, though it is used in this context in English case law. For example, one comes across decisions which emphasise that 'undue influence' must have been exercised in relation to the will itself[4], or that religious influence may sometimes amount to undue influence[5], or that the burden of proving that the will was executed under 'undue influence' is on the party making that allegation[6].

In one reported case[7]—which, however, was not governed by the Act—testamentary documents were challenged on the ground of *undue influence* and it was stated that there must be evidence to show coercion.

Privy Council case.

12.43. In the leading Privy Council case of *Bur Singh* v. *Uttam Singh*[8], the test laid down to ascertain undue influence was as follows :—

"In order to set aside a will there must be clear evidence that the undue influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property."

Reported cases as to importunity.

12.44. A few reported cases which illustrate the scope of the section in regard to importunity may be referred to.

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[1] *Fairbanks* v. *Snow*, 13 N.E. Reporter 596, 598.

[2] *Williams* v. *Goude* (1828) 1 Hag. Ecc. 577, 581 (Sir John Nicholl).

[3] *Lovetty* v. *Lovetty*, (1857) F and F 581.

[4] *Nabagopal* v. *Sarala*, A.I.R.1933 Cal. 574, 577.

[5] *Shrimati Basini* v. *Krishan Lal*, 51 I.C. 1007 (Calcutta).

[6] (*a*) *Naresh* v. *Paresh*, A.I.R. 1955 S.C. 363, 364 on appeal from I.L.R. (1952) 2 Cal. 56;
(*b*) *Ajit Chandra* v. *Atul Chandra*, A.I.R. 1963 Cal. 551, 552.

[7] *Sala Mahomed* v. *Dame Janbai*, I.L.R. 22 Bom. 17, 28 (P.C.), (Case outside Succession Act, relating to Khojas).

[8] *Bur Singh* v. *Uttam Singh*, (1911) I.L.R. 38 Cal. 355 (P.C.).

In a Bombay case, on the death of a person issueless, his widow brought a suit for the possession of his properties. The defendant resisted the claim of the widow, on the basis of a will in favour of the defendant. From the evidence on record, the Court came to the conclusion that it was the defendant who got the will prepared, and he was the largest beneficiary under it. The question for consideration before the Court was whether the will was duly executed by the testator, as set up by the defendant. Citing an English case[2], the Court said that the principles of law on which a Court should rely were as follows :—

> "The first, that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court and calls upon it to be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the suspicion is removed and is judicially satisfied that the paper propounded does express the true will of the deceased."
>
> "Every influence exercised is not undue influence."

The High Court quoted with approval the observations in a Privy Council case[3], where it was said that the burden of proving undue influence is not discharged by merely establishing that a person has the power unduly to overbear the will of the testator. It must be shown that in the particular case the power was exercised, and that it was by means of the exercise of that power that the will was obtained. The High Court held that "undue influence, in order to invalidate a will, must amount to coercion or fraud. Its existence must be established as a fact and it must also appear that it was actually exercised on the testator."

On this reasoning, it was held that undue influence was not proved.

12.45. The above discussion of the case law was intended to indicate the precise scope of the section, no change in the law being intended. No change needed

VII. Mistake

12.46. At this stage, we would like to discuss one matter in regard to which the Succession Act is silent, but which appears to be fundamental. The intention to make a will, described by lawyers as *animus testandi,* may be lacking, not only owing to the circumstances mentioned in section 61, but also because of a mistake on the part of a person executing a document as his will. Thus, when a person duly executes a document believing it to be his will, whereas, in fact, it is a document prepared as the will of another person, the document cannot be admitted to probate[4] as his will. Of course, such a situation might also arise as a result of fraud. But the same situation arising because of mistake cannot be ruled out[5]. Mistakes in will

12.47. There is also the situation where a testator executes a document into which words, or wrong words, have been inserted without his knowledge, or from which words have been omitted without his knowledge. Here again, in England[6], it has been held that while the court cannot include words omitted by mistake except in certain cases, it can delete certain words[7]. Insertion of words without knowledge.

12.48. It is a general principle of law that deeds of contracts may be avoided for duress at the instance of the coerced party and if it can be proved General principle of law.

[1] *Rangavva* v. *Sheshappa*, A.I.R. 1927 Bom. 228.

[2] *Tyrrell* v. *Painton*, (1894) Probate 151; 70 L.T. 453; 42 W.R. 343.

[3] *Craig* v. *Lamoureux*, A.I.R. 1919 P.C. 32.

[4] *In the Estate of Meyer*, (1908) Probate 353.

[5] See Henry, Summerfield, "Knowledge and Approval" (1956) 106 L.J. 694.

[6] *Re Cory*, (1955) 1 Weekly Law Reports 725. Discussed in Lee, "Correcting Testator's Mistakes : Probate Jurisdiction" (1969) Vol. 33, Conveyancer (New Series), page 322.

[7] See *Pulton* v. *Andrews*, 7 H.L. 448; (1874-1880) All E.R. 1240.

that the document is not his, then the document is rendered void by reason of duress[1].

Any deed, contract or transaction entered into under duress is voidable by the person concerned[2].

Provision in Germany.

12.49. This brings us to the question of mistake. The German Civil Code[3] has taken a new and much simplified course on the whole matter. Any kind of "declaration of intention" is voidable on the ground of *fundamental error*, even if the mistake is unilateral; but it is voidable only, and subject to the duty of compensating any party for damage incurred by relying on the validity of the act.

Our law, following the traditional common law, does not go so far.

Non est factum.

12.50. In certain cases, a person may deny that a written document is his : *non est factum*. To sustain this plea, he must be able to prove that he was mistaken as to the very nature and character of the document; a mistake merely as to *the contents of* the document will not be sufficient. If the plea is established, then any contract embodied in the written document is void. No title to land or chattels will pass to the transferee, and money paid under the contract will be recoverable on grounds of total failure of consideration.[5-6]

Need for amendment regarding mistake.

12.51. It would in our view be a proper course if, when it is discovered that mistakes have occurred in drafting wills, the courts are given a power to correct mistakes. At least where a clerical error is made in the drafting of the will or where there has been mis-interpretation of the instructions of the testator by the draftsman, such a power may furher the cause of justice. If the language is to be made to conform, in substance, to what the testator really intended, some such power is desirable.

Recommendation as to mistake. (Amendment of section 61 recommended).

12.52. The situation is really analogous to that described in section 59, Explanation 4, which (so far as is material) provides that no person can make a will while he is in such "state of mind" that he does not know what he is doing. The second illustration to section 59 takes a case where a person executes an instrument purporting to be his will, but does not understand the nature of the instrument or the effect of its provisions. The instrument, it says, is not a valid will. However, the words "state of mind" in section 59, Explanation 4, may not literally cover the situation now under discussion. The matter could be placed on a sounder footing by adding, in section 61, after the words "the free agency of the testator", the words "*or by mistake*"[7]. We recommend that section 61 be amended accordingly.

VIII. Ambulatory character of a will

Section 62.

12.53. Section 62 provides as follows :—

"62. A will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will".

As we have already pointed out[8], this section brings out the abmulatory character of a will. The section needs no change.

[1]Goff and Jones, law of Restituion (1978), page 163.

[2]*Barton v. Armstrong*, (1975) 2. W.L.R. 1050.

[3]D.G.B. ss. 119-122, cited in Pollock, Contracts (1950), page 381.

[4]Goff & Jones, Restitution (1978), page 318.

[5]*Gallie v. Lee*, sub nom. *Saunders v. Anglia B.S.* (1971) A.C. 1004, followed in *Union Domi-* [illegible]

[illegible]

[7]For the text of Section 61, see paragraph 12.30, *supra*.

[8]See para 12.5, *supra*.

CHAPTER 13

EXECUTION OF UNPRIVILEGED WILLS : SECTIONS 63-64.

I. Persons entitled to execute unprivileged wills.

Sections 63 and 64—Privileged and unprivileged wills.

13.1. For the validity of a will, it is necessary that not only the will must have been made by a person competent to do so[1], but also that the formalities laid down by law must have been complied with. These formalities, in the scheme of the Act, are dealt with separately under "unprivileged wills" and "privileged wills". The category of "privileged wills" is meant exclusively for wills executed by certain members of the armed forces in certain situations. For others, it is obligatory to comply with the provisions prescribed for unprivileged wills.

The principal formalities in case of unprivileged wills are—a written statement (of testamentary intentions), signature by the testator (section 63) and attestation by at least two witnesses (section 63); but incorporation of papers by reference in a will is permitted (section 64).

In the case of privileged wills, many of these formalities are dispensed with by two sections (sections 65 and 66), to be discussed later.

Section 63—Various aspects of execution of unprivileged wills.

13.2. Of the two classes of wills—unprivileged and priviledged wills-unprivileged wills are dealt with first, in sections 63 and 64.

The requirements for the execution of unprivileged wills are elaborately stated in these sections. Barring a soldier employed in an expedition or engaged in actual warfare or an airman so employed or engaged or a mariner at sea, every testator shall, according to the section, execute his will, according to the requirements set out in the section in its three clauses. The first requirement relates to the signature or mark of the testator—clause (a). The second requirement relates to the *placing* of the signature or mark of the testator—clause (b). The third requirement is concerned with attestation—clause (c).

Convenience requires that the various aspects of execution of unprivileged wills should be discussed separately. Before doing so, however, we would like to deal with a question which touches the scope of the entire section.

II. Persons entitled to make privileged wills.

Exclusion of soldiers from section 63.

13.3. The first point relates to soldiers and other persons in the armed forces. Section 63 expressly excludes from its application "a soldier employed in an expedition or engaged in actual war or airman so employed or engaged or a mariner at sea". The exclusion of soldiers from the scope of this section is understandable, because the persons excluded by section 63 are dealt with in section 65, which deals with privileged wills. *But section 65 does not apply*[2] *to Hindus*[3]. The position, therefore, is that Hindu soldiers etc. are governed neither by section 63 nor by section 65. Apparently, in their case, the unenacted law of wills (as applicable to Hindus) would still be applicable. This is not a very satisfactory position. The process of ascertaining this unenacted law requires research that is beyond the capacity of a layman—and even beyond the resources of some lawyers.

Recommendation to amend the Third Schedule so as to include sections 65-66.

13.4. If this be so, then the present position is not very satisfactory. There appears to be no reason why, at least at the present day, it should be necessary, in the case of wills of *Hindu soldiers,* etc., to conduct such research, when no such research is expected in the case of *Hindu civilians, or non-Hindu soldiers.* We, therefore, recommend that the Third Schedule to the Act should be amended[4], so as to mention therein the sections relating to privileged wills, namely, sections 65 and 66 also, as applicable to Hindus etc.

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[1]Sections 59 to 61.

[2]Third Schedule.

[3]Point concerning section 65 also.

[4]To be carried out under the Third Schedule.

III Formalities—signature

Section 63 clause (a) Signature.

13.5. We now come to the formalities required for the execution of wills. The first requirement, indicated by clause (a) of section 63, is that the testator "shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his directions". It should be noted that while the formality of signature can—to use a loose but expressive word—be delegated, the formality of affixing the mark cannot be delegated[1]. The testator himself must affix his mark.

No particular form of signature required.

13.6. No particular form of signature or mark is, however, required. Thus—contrary to the popular belief—affixation of a thumb mark is not necessary, and there could even be a pen mark[2]. A rubber stamp mark by the testator would also be valid, if the testator is in the habit of using such a mark[3].

Completeness of signature.

13.7. In England, interesting questions seem to have arisen as to the completeness of the signature. For example, if the testator attempts to sign, but fails to complete the signature and dies, it can be shown that the person was capable of executing the document and fully appreciated its contents, and that what he wrote was intended to be his signature and that the will was duly attested[4].

Meaning of "Some other person".

13.8. The provision in section 63, clause (a) for signature by any other person under the directions of the testator raises an interesting question as to the precise scope of the words "other person". In England, any of the attesting witnesses may (where the testator directs him to do so) also sign on behalf of the testator in his presence "and by his direction". In India, however, the words "some other person" in section 63(a) have been interpreted as meaning *a person other than the testator and other than the attesting witnesses*[5-6]. In India, therefore, if the testator himself does not sign the will, then, besides the "other person" signing under section 63(a), there must, under section 63(c), be two witnesses who should sign the will in the presence of the testator[7].

Recommendation to amend section 63(a) so as to allow attestation by persons signing on behalf of testator.

13.9. This position creates unnecessary complications and the double formality is not really required on any principle.

Accordingly, we recommend that the law should be made simple by adding an Explanation to section 63(a) as follows :—

> *"Explanation.—The other person signing for the testator under clause (a) is competent to attest the will under clause (c)."*

Section 63(b)—Placing of signature.

13.10. The placing of the signature in a will is dealt with in clause (b) of section 63. It reads :

> "(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will."

English Law, (1837 Act).

13.11. It will be noted that section 63(b) contains no rigid rules as to the place where the signature must appear on the will. In England, on the other hand, statutory provisions on the subject are more rigid[8]. The Wills Act, 1837, lays down that the will must be signed "at the foot or end thereof."

Section 9 of the Wills Act, 1837[9], so far as is material, reads as under before its recent amendment :—

> "No will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say), it shall be *signed at the foot or end thereof* by the testator ..... and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses *present at the same time*, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary".

[1] *Radhakrishna* v. *Subraya*, I.L.R. 40 Mad. 550.
[2] *Ram Nath* v. *Ram Nagina*, A.I.R. 1962 Pat. 481.
[3] *Nirmal Chander* v. *Sarat*, (1898) I.L.R. 25 Cal. 911.
[4] *In the Goods of Chalcraft*, (1948) 1 All E.R. 700.
[5] *Avabai* v. *Pestonji*, 11 Bombay High Court Reports 87.
[6] *Radhakrishna* v. *Subraya*, I.L.R. 40 Mad. 550, 556.
[7] *In re Hemlota*, (1883) I.L.R. 9 Cal. 226, 229.
[8] Section 9, Wills Act, 1837, as amplified by section 1, Wills Act, Amendment Act, 1852.
[9] Section 9, Wills Act, 1837 (Eng.).

13.12. Section 1 of the Wills Act Amendment Act, 1852, gave a considerable extension to the above words, "at the foot or end thereof, by providing : "Every such will shall, so far only as regards the position of the signature of the testator ..... be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite, to the end of the will that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will". Act of 1852.

The section goes on to provide that the enumeration therein of certain circumstances by which no such will shall be affected shall not restrict the generality of the above enactment, but that no signature under the earlier Act (1837) or this Act (1852) shall be operative to give effect to any disposition or direction which is underneath the signature or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.

13.12A. In England, by sections 17—28 of the Administration of Justice Act, 1982 (Chapter 57), certain amendments have been made in the law of wills. These cover the formalities for signing and attestation, effect of marriage and divorce on wills, effect of bequests to children etc. who pre-decease the testator, rectification and interpretation of wills, and international wills. Such of the amendments made as are relevant in the context of Indian law will be referred to in the discussion in the Report, at the appropriate place. At this stage, it would be convenient to mention, in brief, certain important points. Recent English reform as to formalities.

Section 9 of the Wills Act, 1837, concerned with the formal requirements for making wills, has been revised in England by the Administration of Justice Act, 1982, implementing the recommendations of a Report of the Law Reform Committee[1]. The signatures on a will (under the revised section) will not appear "at the foot or end" of the will, provided the testator intended by his signatures to give effect to the will. Further, it is not now necessary that each witness should sign the will. This requirement of the earlier law is relaxed to allow the witness either to sign or *to acknowledge his signature* in the testator's presence. Revised section 9, Wills Act, 1837 reads as under :—

"*Signing and attestation of wills.*

9. No will shall be valid unless—

(a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and

(b) it appears that the testator intended by his signature to give effect to the will; and

(c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(d) each witness either—

(i) attests and signs the will; or

(ii) acknowledges his signature, in the presence of the testator

(but not necessarily in the presence of any other witness).

but no particular form of attestation shall be necessary".

13.13. In India, all that is required is that the signature should be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.[2]-[3] Indian Law.

In fact, in India, documents are sometimes signed by the parties on the top. As the section does not lay down any positive rule as to the place where

[1]Law Reform Committee, 22nd Report (Making and Revocation of Wills) 1980 cmd. 7902 paras 2.01 to 2.13.

[2]W.C. Banerjee , Hindu Wills Act, page 6, cited in N.D. Basu's The Law of Succession (1957) page 132.

[3]See also *Sabitri* v. *Savi*, (1892), 19 C.W.N. 1297.

the signature is to be put, that practice may be regarded as sanctioned. The signature must, of course, have been made with the object of *authenticating the instrument.*

Further signature contemplated.

13.14. What is paramount is the 'intention'. It would seem that if the testator contemplated a further signature which he never made, the will must be considered as unsigned. But a signature originally made without such object may afterwards be adopted by the testator as his final signature; such would be the presumed intention, if the testator acknowledged the instrument to the attesting witnesses that the instrument was his will without alluding to any further act of signing; and under the present Act, which omits the words "on the face of the will", extrinsic evidence of such intention would seem to be admissible[1]. A testator's signature at the commencement of the will, when the witnesses signed the same, and the fact of his admission to several of the witnesses that the papers signed by them was his last will and testament, amounts to sufficient 'acknowledgement' of his signature to his will[2].

Unsigned portion of a will.

13.15. The question of the effect of unsigned portion of a will came up in England for consideration in 1960. Among the various points which arose for decision in *Re Little*[3] (decreased), one was : "In what circumstances will the court admit to probate an *unsigned portion* of a will as forming part of the signed portion of the will ?"

The answer, according to the decided cases[4], would be that the courts will not allow any document to form part of a will which was not *physically* or otherwise connected to the signed portion of the will at the moment of its signature.

No change needed in section 63(b).

13.16. The above discussion, though not necessitating any amendment of clause (b) of the section, elucidates several important points.

IV. Attestation.

Section 63(c)-Attestation.

13.17. After signature, the next important formality is of attestation, Clause (c) of section 63 deals with attestation of a will in these terms.

> "(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

Reasons in support of attestation.

13.18. Before entering into a discussion of points of detail concerning clause (c), we must deal with a basic question concerning the requirement of attestation. Is the requirement of attestation of wills really needed ?

A discussion of the reasons for attestation is appropriate for properly dealing with the question. The principal reasons advanced in support of the requirement of attestation are, first, that, thereby forgery is made more difficult; secondly, that there can be no doubt as to the identity of the testator when there is attestation; and thirdly, that the likelihood of the will being signed under coercion is reduced. However, the validity of each of these reasons has been questioned. It is stated[5] that if a person is determined to prove a forged will, he can also forge the signature of a bogus witness.

Even in the case of a genuine will, if the witnesses have disappeared, a will may still be proved otherwise, so that there may be little difference in

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[1]Stoke's Succession Act, page 31, cited by N.D. Basu, The Law of Succession(1957), page 132.

[2]*Amarendra* v. *Kashi*, (1900) I.L.R. 27 Cal. 169.

[3]In *re Little*, (1960) 1 All E.R. 387.

[4]See note in (1960) 230 Law Times 33.

[5]Mellows, The Law of Succession (1977), pages 70—72.

practical effect between a will with two genuine witnesses who have disappeard and a will with signature of two invented witnesses who are totally fictitious.

In regard to the identity of the testator, it is stated[1] that in a society where there is rigid documentation and recording, such a rule is no longer required.

13.19. Then, as regards the possibility of coercion, it is stated that if a will is made under coercion, there is nothing to prevent that testator from revoking it as soon as the coercion ceases, unless he had died in the meantime. While, in certain circumstances, the formal requirements may be useful to prevent coercion, it is hardly a sound reason by itself to justify the retention of these formalities. Safeguard against coercion.

13.20. There is, no doubt, some force in the arguments against attestation as summarised above[2]. Nevertheless, we think that on a balancing of considerations, a change dispensing with the attestation of wills might prove to be unwise in the long run. Attestation at least has the merit of ensuring that the document was signed after some reflection. In addition, it may often be useful as securing witnesses to the execution of the will. These advantages could well outweigh the other arguments. Attestation to be retained.

13.21. The requirement of attestation need not, therefore, be done away with. Certain matters of detail concerning attestation may now be considered. Under section 63, clause (c), attestation must be in the 'presence' of the testator. One of the questions to which the English case of *Chalcraft*[3] gave rise was whether the document had to be duly attested in the 'presence' of the deceased. Willmer, J., recalled that he had been referred to cases which established the proposition that a testamentary document must be attested not only in the physical, but also in the mental, presence of the deceased. The testatrix wrote "E. Chal" and could not go further, apparently because of the influence of a drug which had been prescribed. Attestation in presence of testator physical and mental presence.

Willmer J., observed that once the court had been satisfied that the document was intended to be a testamentary document and had been properly signed, the court would allow a certain latitude in construing the word "presence".

The operation of the drug would be inconsistent with the sudden departure of mental faculties, and the proper inference to draw was that, since the document was attested immediately after the deceased wrote what she did write, she was still mentally 'present' in sufficient degree to comply with the requirements of the Wills Act, 1837. The court accordingly pronounced in favour of the codicil.

13.22. While attestation must comply with the detailed provisions in clause (c), simultaneous presence of both the witnesses is not necessary in India, whether the attestation is direct (by actually witnessing the signature) or indirect (by acknowledgement of signature by the testator). Section 63(c) is specific on the point. On the other hand, the English law is different[4—5], in-as-much as both the witnesses must be present when receiving the acknowledgement. Simultaneous presence not necessary.

A recent English case illustrates the difficulty caused by the stringent provisions of the law. It was held in that case[6] that the testator should sign the will or acknowledge his signature in the presence of both the witnesses *before* either of them has attested and subscribed the document. Thus, the requirement of oral evidence becomes embedded in the section, causing injustice[7].

As stated above, the Indian section is more specific on the point.

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[1]Mellows, The Law of Succession (1977), pages 70—72.

[2]Para 13.19, *supra*.

[3]In *Re. Chalcraft*, (1948) 1 All E.R. 700.

[4]See Wills Act, 1837, section 9 (Para 13.11, *supra*).

[5]*In Re Colling*, (1972) 1 W.L.R. 1440.

[6]*In Re Colling*, (1972 1 Weekly law Reports 1440.

[7]See comment in (1975) New L.J. 115.

Recommendation to amend section 63(c).

13.23. There is, however, need for clarification on one point concerning section 63(c). The requirement that the attesting witness must see "some other person" sign would require amplification, having regard to our comments on clause (a) of the section.

In our discussion of clause[1] (a), we have recommended that it should be made clear that the "other person" signing under clause (a) is competent to attest the will under clause (c). This clarification, to be made under clause (a), should naturally be made to govern clause (c) also, in so far as it requires that the attesting witness must see "some other person" sign. Accordingly, we recommend that below clause (c) of section 63 an Explanation should be inserted as follows :—

"Explanation.—The provisions of clause (c) are subject to those of clause (a) and the Explanation thereto".

V. Incorporation by reference.

Section 64 incorporation of papers by reference.

13.24. This takes us to section 64, which deals with what is known in England as the incorporation of papers by reference. The section is concerned with a situation where a testator refers, in a will, to any other document then actually written, as expressing any part of the will in which it is referred to. From the wording of the section, it is obvious that the document must be in existence at the time of the will, must be referred to in the will and must be clearly identified in the will. These conditions are necessary, because otherwise, it would be possible for the testator to make a will in outline, reserving to himself the power to alter the incorporated document *at some future date.*

The doctrine of incorporation under section 64 would apply only if the reference to another document is *for the purpose of incorporation.*[2].

The document so incorporated is normally included in the probate, unless it is unwieldy.

No change of substance.

13.25. Indian case law on the section is scanty. There are, no doubt, cases relating to secret trusts, but they are concerned with questions pertaining to the law of trusts, rather than with the language of section 64.

The subject of secret trusts is dealt with in the case law relating to section 5 of the Indian Trusts Act, 1882. This matter, is, strictly speaking, outside the scope of section 64 of the Succession Act, since the testator intending a secret trust, does not, in the will, refer to any other document, either expressly or by implication.

Recommendation to amend section 64.

13.26. However, it is necessary that the document must be described in the will as actually in existence. In order that this important requirement may find a mention in the section, we recommend that in section 64, after the words "actually in existence", the words, *"and described as actually in existence"* should be inserted.

CHAPTER 14

PRIVILEGED WILLS : SECTION 65-66

I. Privilege : Justification

Scope.

14.1. Sections 65 and 66 deal with "Privileged wills", that is to say, wills executed by certain persons who are allowed to excute wills with formalities that are less rigid than those prescribed for ordinary wills. Strictly speaking, the "privilege" is of the persons who are, by the law, given a right to execute

[1]Para 13.9, *supra.*

[2]*Bai Gangabai* v. *Bhugwan Das*, I.L.R. 29 Bom. 530.

a will without undergoing some of the formalities ordinarily required for wills. Broadly stated, the privileged persons (as the law in India stands at present) are members of certain armed forces employed in an expedition or engaged in actual warfare, and mariners at sea.

The special provisions as to privileged wills (sections 65-66) are primarily intended to relax the stringent formal requirements for the validity of wills laid down in the Act for the execution of unprivileged wills (sections 63-64). In particular, there is relaxation of the requirement of—

(a) writing,[1]

(b) Signature,[2] and

(c) attestation.[3]

An oral privileged will, however, has only limited validity in point of its duration, inasmuch as, if the testator, being still alive, has ceased to be entitled to make a privileged will, the will "shall be null" at the expiration of one month after he has so ceased.[4]

14.2. These special provisions laid down for armed forces are justified on the ground of necessity. When combat is actually in progress or expected to start at any moment, it is not possible to undergo elaborate testamentary formalities—or, if the formalities have been already commenced,—to complete them. Non-completion of formalities is strikingly illustrated by the situation where a soldier has proceeded to prepare a will but execution of the will in the manner intended by him cannot be completed, by reason of external factors, even though the intention to make a will has not been abandoned.[5] This may, for example, happen where the soldier is killed by enemy action before completing the execution of the will. The law takes care of the situation by a special provision of the nature under consideration. Necessity constituting a justification.

II. History

14.3. It is of interest to note that the Indian statutory provision as to privileged wills, though immediately derived from the corresponding English statute[6], really owe their ultimate origin to the Roman law. The military will was introduced in Roman law by Emperor Julius Ceaser as a temporary concession, but it became an established institution in the early Empire[7]. In Roman law, a soldier on active service might make his will as he pleased, and as he could. The will might be a written instrument; it might be by an oral declaration in the presence of two or three comrades; it might be by tracing characters in his blood on a scabbard or shield, or with a sword in the dust. Such a will, if the testator survived, remained valid for a year after honourable discharge from service[8] Origin in Roman Law.

14.4. Thus, emergency gave birth to more liberal rules of law. This aspect of the matter has been discussed in a number of English cases. Among the many of the earlier English authorities dealing with the point, attention should be drawn to two decisions of Sir Francis Jenunc, President.[9-10] In the first case, the president indicated that the test which commended itself to him was—had the solider done something—had he taken some step—at the time when he made his will, to bring himself within the words of the section? "This brings us very close to the Roman concept of *in expenditions* if indeed, not actually, to the same point that the Romans meant by *in expeditione* for, when a Roman English cases.

[1]Section 66(1) and section 66(2) (g) and (h).

[2]Section 66(2) (a), (c), (d), (e) and (f).

[3]Section 66(2) (a) and (b).

[4]Section 66(2) (h).

[5]Lee, Roman Law (1955), page 190.

[6]Section 11, Wills Act, 1837 (Para 14.6, *infra*).

[7]Lee, Roman Law (1955), page 190.

[8]Lee, Roman Law (1955), page 190.

[9]*In the Good of Hiscock*, (1901) Probate 78, 83; (1900—1903) All E.R. Rep. 63.

[10]*Cattward* v. *Knee* (1902) Probate 99 (Order for active service).

did anything towards fighting the enemy, he would have been considered under the law of his time as being *in expeditione*".[1]

14.5. In saying that that was the test which commended itself to him as the correct one, the President indicated that he was not aware that it had ever actually been laid down by any judicial authority; but, on the other hand, he did not known of any reported case that was against it. In *Gattward* v *Knee*[2] he suggested that he might be "going to a step further" than in the earlier decision; but he had no doubt that mobilisation—giving to that word the effect which he understood it to convey—might fairly be taken as the commencement of that which, in Roman law, is expressed by the words *in expeditione*. Those words, he said, meant something more than the English words "on an expendition", because it was quite clear that when a force begain, in a sense, to engage in or to enter upon active service, it would be *in expeditione*. The judgement goes on: "I thought, when deciding the case cited, and I still think, that it is fair to ask whether or not the person whose testamentary dispositions are in question has done anything; but I am of the opinion that if the order for mobilisation has been received, although the men himself may have done nothing under it, yet that order so alters his position as practically to place him *in expeditione*. Such an order goes beyond a mere warning. I do not think a mere warning for active service would be sufficient; but when a fore is mobilised I understand this to be that it is placed under military orders with a view to some step being taken forthwith for active service". That was what had happened in the case of Wingham,[3] in which the document in question was held to be a soldier's will under the Wills Act.[4]

Meaning of "actual military service" in section 11, Wills Act, 1837 and comparison with Roman Law.

14.6. So much as regards the history of the privilege, and some of the essential ingredients of the privilege. The statutory provision in England on the subject may now be referred to. Section 11 of the Wills Act, 1837, provides that "any soldier being in actual military service" may dispose of his personal estate without the formalities required by the Act.[5] The material words in this section are the same as those in section 23 of the Statute of Frauds. The courts in England have, from time to time, experienced considerable difficulty in construing these words, owing to tht fact that conditions of military service and of warfare generally have changed completely since the words in question found their way into the Statute Book. It is now generally accepted that the words, wher first inserted into the Statute of Frauds, were intended to confer on British soldiers the same testamentary rights as had been enjoyed by Roman soldiers under Roman law.[6]

In *Drummond* v. *Parish*,[7] the provisions of the Roman Law as expounded by subsequent commentators, were reviewed at considerable length. It was observed—

> It is quite clear from these passages from the Digest, the Code and the commentators, generally, that the privilege did not extend to soldiers of every description; they must be soldiers *expeditionibus occupati,* or called out to defend the city; this last case was of itself an exception, for it could not strictly be said to be "*expeditio.*"

Later, the following passage in Swinburne on Wills[8] was referred to :—

> "Concerning the first sort, either they be such as lie safely in some castle, or place of defence, or besieged by the enemy, only in readiness to be employed in case of invasion or rebellion, and then they do not enjoy these

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[1] *In the Good of Hiscock*, (1901) Probate 78, 83; (1900-1903) All E.R. Rep. 63.

[2] *Gattward* v. *Knee*, (1902) Probate 99.

[3] *Re Wingham*, (1948) 1 All E.R. 208, 209.

[4] See D.C. Potter, "Soldier's Wills" (1949) 12 Modern Law Review 183.

[5] *Re. Wingham*, (1948) 1 All England Reports 208, 209.

[6] *Re. Winghams*, (1948) 1 All England Reports 208, 209.

[7] *Drummond* v. *Parish*, (1843) 3 Curt. 522, 536, 537, 538, 542, referred to in *Re Wingham*, (1948) 1 All E.R. 208, 209.

[8] Swinburne on Wills, 7th Ed. (1803), Vol. I, pages 95-96.

military privileges, or else they be such as are in expedition or actual service of wars, and such are privileged at least during the time of their expedition.....".

"Being of opinion from the result of the investigation of the authorities that the principle of exemption, contained in the 11th section of the Act, was adopted from the Roman law: I think it was adopted with the limitations to which I have adverted, and that, by the insertion of the words "*actual military service.*" the privilege, as respects the British soldier, is confined to those who are *on an expedition.*"[1]

Some of the authorities ralating to the circumstances in which privileged wills could be executed in England were reviewed in a recent English case in the Family Division.[2] The deceased was a soldier in service in Northern Ireland in 1978 at a time of armed and clandestine insurrection against the Government. His unit was stationed in Northern Ireland as a part of the armed forces which were deployed there at the request of the civil authorities to assist in the maintenance of law and order. While on patrol, the deceased was shot and mortally wounded by an unknown gunman. *En route* to the hospital, he stated to an officer and warrat officer of his battalion. "If I don't make it, make sure Anne gets all my stuff." Anne was his fiancee. The deceased died the next day. Under a written will made previously, the deceased had left everything to his mother. On a Summons taken out by the fiancee applying for the deceased's oral declaration to be admitted as his last will and testament on the basis that it was a privileged will under section 11 of the Wills Act, 1837, the question arose whether the deceased had been 'in actual military service' at the time of making the declaration and was, therefore, entitled to make a non-cupative will.

It was held that whether the deceased was in actual military service for the purposes of section 11 of the Act of 1837 depended on the nature of the activities of the deceased and the unit or force to which he was attached, and not on the character of the opposing operations. The fact that there was not a state of war or that the enemy was not a uniformed force engaged in regular warfare or an insurgent force organised on conventional lines, was irrelevant in deciding whether the deceased was in actual military service. Nor was it relevant whether the deceased's military service took place in the context of a foreign expedition or invasion or a local insurrection. On the facts, the deceased had clearly been in actual military service at the time of making the declaration and the declaration would, therefore, be admitted as a valid non-cupative will.

New South Wales case.

14.7. In a case decided by the New South Wales Court of Appeal,[3] one of the questions that came up for consideration was whether privilege was available to the deceased testator who was a British subject domiciled, in New South Wales, and who had, during 1944 and 1945, while employed by the U.S. Army in the South-West Pacific as a civilian engineer, made a privileged will. The question arose having regard to the fact that he was acting on behalf of the U.S. Government. Following an early decision on the will of a soldier in the employ of the East India Company[4] the New South Wales Court of Appeal held that the privilege was not restricted to members of the forces of her Majesty.

IV. Privileged Wills in India—Applicability to Hindus.

Section 65-Privileged Wills.

14.8. It is now time to turn to the text of section 65, quoted below:—

"65. Any soldier being employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or any mariner being at sea, may, if he has completed the age of eighteen years, dispose of his property by a will made in the manner provided in section 66. Such wills are called privileged wills.

[illegible]

[illegible]

[3] *In the application of White* (1975) New South Wales Law Report 125; **Annual Survey of Commonwealth Law** 1979, page 203.

[4] *In the Case of Donaldson*, (1840) 2 Curt. 1.

ILLUSTRATIONS

(i) A, a medical officer attached to a regiment, is actually employed in an expedition. He is a soldier actually employed in an expedition, and can make a privileged will.

(ii) A is at sea in a merchant-ship of which he is the purser. He is a mariner, and, being at sea, can make a privileged will.

(iii) A, a soldier serving in the field against insurgents in a soldier engaged in actual warfare, and as such can make a priviledged will.

(iv) A, a mariner of a ship, in the course of a voyage, is temporarily on shore while she is lying in harbour. He is, for the purposes of this section, a mariner at sea, and can make a privileged will.

(v) A, an admiral who commands a naval force, but who lives on shore, and only occassionally goes on board his ship, is not considered as at sea, and cannot make a privileged will.

(vi) A, a mariner serving on a military expedition, but not being at sea, is considered as a soldier, and can make a privileged will".

Non-combatants.

14.9. It may be noted that section 65, illustrations (i) and (ii), seem to imply that non-combatants attached to fighting forces can also execute privileged wills and fall in the category of "soldiers" etc.

Recommendation to extend section 65 to Hindus, etc.

14.10. We have already discussed certain points[1] concerning privileged wills in connection with section 63. As has been pointed out in that discussion, the defective drafting of sections 63 to 66 has led to the position that, at present, the capacity of soldiers professing the Hindu, etc. religion to make wills has become extremely doubtful. We use the short term "soldirs" to mean "a soldier employed in an expedition or engaged in actual warfare or an airman so employed or engaged or a mariner at sea." Section 63, which deals with unprivileged wills, excludes soldiers from its fold by its express terms. Section 65, which deals with privileged wills, excludes Hindus, etc. from its fold by virtue of the Third Schedule. The result is that Hindu soldiers are, as regards the execution of wills, governed at present neither by sections 65 and 66 (Privileged Wills) nor by section 63 (unprivileged wills)—but by the unenacted law of wills as applicable to Hindus.

Case law on section 65.

14.11. There is no reported case discussing the applicability or non-applicability of the section to soldiers who belong to the exempted categories, including, in particular, Hindus. There is a Bombay case[2] and an Andhra Pradesh case[3] under the section, but they do not throw any light on the matter under discussion. However, the Andhra Pradesh case does contain a dictum to the effect *that section 66 does not apply to Hindus.*

In any case, the present position is hardly satisfactory.

It is, therefore, necessary to extend section 65 to Hindus etc. by amending the Third Schedule.[4]

Revocation of privileged wills.

14.12. Reverting to section 65, it is to be noted that the revocation of a privileged will also does not require elaborate formalities.[5] The Explanation to section 72 expressly makes it clear that it is not necessary that at the time of revocation, the testator should be in a situation which entitles him to make a privileged will.

[1]See discussion relating to section 63, chapter 12, *supra.*

[2]*Bhagubai* v. *Appaji*, I.L.R. 47 Bom. 552: A.I.R. 1923 Bom. 260.

[3]*Ratnammal* v. *Thilaimmal*, A.I.R. 1957 A.P. 336, 337, para 6.

[4]To be considered under the Third Schedule.

[5]Section 72, Explanation.

In England, the point arose and was argued.[1] in a case where an alteration had been made in a privileged will by an unattested writing.[2] The matter was, however, decided on the basis of a presumption that the alteration was made at a time when the testator was in a position entitling him to make such a will.

Age of person making priviged will Amendment recommended in section 65.

14.13. Finally, it should be noted that, in England,[3] persons below 18 can make a privileged will. A person making an unprivileged will must be above the age of 18 years, but that requirement does not, in Englands, apply[4] to those entitled to make a privileged will. The question to be considered is whether the same facility should not be available in India. It is true that persons below the age of eighteen years are not ordinarily recruited to the armed forces in India but the possibility of such a recruitment cannot be legally ruled out, at least in the Navy. On the whole, there is a case for adopting the English rule.

We, therefore, recommend that section 65 should be amended[5] for the purpose so as to allow soldiers etc. *who are minors* to make privileged wills.

The object could be achieved by substituting, in section 65 for the words "if he has completed the age of eighteen years" the words *"whehter or not he has completed the age of eighteen years"*.

We recommend accordingly.

V. Persons involved in Calamities—proposed new section.

Section 65A-suggested provision for calamities.

14.14. This disposes of section 65. Before proceeding to the next section, it is convenient to deal with one matter on which an amendment of the Act by inserting a new provision seems to be called for. The point relates to the persons who can make privileged wills. At present, the provisions of the Act (as to privileged wills) are confined to persons belonging to the armed forces and mariners at sea. The rest of the citizens must comply with section 63 which lays down elaborate formalities for making unprivileged wills.

Now, even in the case of civilians. one could conceive of many situations where it may be extremely difficult to comply with the strict legal formalities imposed by section 63—as, for example, in the case of persons affected by accident, earthquake, fire, flood or other similar calamity. These are all situations wherein the persons concerned reasonably believe that death is imminent. They may wish to make a declaration of their testamentary intentions, in view of the anticipated imminence of death. But, at present, there is no legally effctive way of doing so. The law should enable persons so placed to make a will with less stringent formalities than those imposed by section 63. What "less stringent" formalities should be permitted can be formulated on the basis of section 66, (privileged wills). For example, the provisions of section 66, clauses (a) to (d) and (h), (at present confined to armed forces) could be made applicable to such persons without much substantial change. Section 66, clauses (e), (f) and (g) could also be made applicable to them, though with suitable adaptations.

Need

14.15. The Succession Act does not provide for this contingency, presumably because attention has not so far been devoted to it. The matter, however, appears to be one for which there is need for a suitable provision.

It may be of interest to note that in one respect, the Roman law did think of this situation as a special one, by providing that while, ordinarily, the witnesses to a will should all be present together at the same time, it need not be so where a will is made in the time of pestilence.[6] This special treatment given to wills made in epidemics seems to survive in some civil law countries.[7]

[1] *In the Estate of Newland*, (1952) 1 All England. Reports, 841, 851.

[2] See Halsbury, 3rd Ed., Vol. 39, page 890, para 1355.

[3] Section 7 of the Wills Act, 1837, as amanded by the Family Law Reform Act, 1969.

[4] Section 1, Wills (Soldiers and Sailors) Act, 1918, as amended by the Family Law Reform Act, 1969.

[5] Section 65 to be amended.

[6] Lee, Roman Law (1955), page 190.

[7] J. Gareth Miller, Machinery of Succession (1977), page 157, f.n. 22.

Position in Japan

14.16. It would also be of interest to note that the Japanese Civil Code[1] has, by a number of provisions, provideed for "exceptional forms" of wills, applicable in special cases where ordinary forms of making a will cannot be acted on. In Japan, it is permissible to make a will in a special form by virtue of these provisions. There are seven special forms answering to seven different special circumstances. It is unnecessary to enumerate all of them, but by way of illustration, it may be mentioned that provision exists for the making of a will in special form by a person "on the verge of death"[2] or by a person in a place cut off from communication on account of infectious disease. Ordinarily, Japanese law does not require attestation if the will is a holograph. To this general rule, an exeption is created by the provisions relating to certain special situations, of which two are quoted below[3] :—

On verge of death Article 1076.

1. *On the Verge of death.* When a person on the verge of death through sickness or any other cause desires to make a will, he may do so, in the presence of at lease three witnesses by making an oral declaration of its purport to one of them. In such case the person to whom the oral declaration was made must write it down and read it over to the testator and the other and witnesses and thereupon all the witnesses must sign and seal the writing after having acknowledged its correctness (Art. 1076, 1).

A will made under the foregoing provision is void unless, within twenty days from the date of the will, one of the witnesses or a person interested applies to the Local Court (of the place of domicile of the testator if he is still alive, or of the place of the commencement of the succession if he is dead) and have it confirmed (Art. 1976). Confirmation (kaku-nin of a will is a judgement by which the will is publicly certified to be in due order and genuine; therefore, the court must not confirm a will unless it is satisfied that it is in due order and represents the true intention of the testator (Art. 1076, 3).

In a place isolated by administrative measure.

2. *In a plea cut off from communication on account of an infections disease.* A person in a place which by an administrative measure is isolated from the outer world on account of cholera, or any other officially recognised infectious disease, may make a will in the presence of a police officer and at least one witness (Article 1077), because in such a place it may ed infectious disease, may make a will in the presence of a police officer witnesses.

Article 1082. Article 1083.

In this case the testator need not write the whole document himself, but the document must be signed and sealed by the testator, the draftsman, the person required to be present, and the witnesses (Article 1082). If there is a person who is unable to sign or "seal, the persons present or the witnesses must make an additional explanatory statement of the fact in writing (Art. 1083)".

Position in countries in Eastern Europe—Hungary.

14.17. We may also refer to the position in Eastern European countries. While, in some countries in Eastern Europe, privileged wills are limited[4] in scope, in several other countries, special provisions exist for certain special situations (apart from the privilege given by the legal system to members of the armed forces).

Thus,[5] in Hungary, oral wills may be made in extraordinary situations in which the life of the testator is in danger and in which the testator cannot make a written will, or can make a written will only with considerable difficulty.[6] The oral will is to be made by the testator reciting the contents of the last will in

[1]Articles 1076 to 1086 Japanese Civil Code Becker, Principles and Practice of the Civil Code of Japan (1921), pages 756 to 759.

[2]Article 1076, Civil Code of Japan.

[3]Article 1076 and 1077, Civil Code of Japan.

[4]Szirmai (Ed.) Law of Inheritance in Eastern Europe and in the People's Republic of China (1961), page 58 (Bulgaria), page 125 (Czechoslovakia).

[5]Szirmai, (Ed.) Law of Inheritance in Eastern Eurppe and in the People's Republic of China (1961), page 168 (Hungary), page 196 (Poland), page 236 (Romania) and page 258 (Yugoslavia).

[6]Section 634, Hungarian Civil Code.

the simultaneous presence of two witnesses and, on the same occasion, declaring that the statement contains his will.[1]

An oral will made under the above provisions loses its force if the situation of emergency has ceased to exist and the testator was, for a continuous period of three months, in a position to make a will by an instrument.[2]

14.18. Under the Polish Civil Code,[3] in cases where the making of an ordinary will would be impossible or very difficult owing to exceptional circumstances, i.e. disruption of transport, epidemics, military operations, illness or accident of the testator, justifying a fear of his death, the testator may make an oral will in the presence of three witnesses, present at the same time. (If the testator is ill or wounded, the witnesses need not be present simultaneously). Poland.

This will should be committed to writing as soon as possible by one of the witnesses, who must state the date of the will and the date of committing the will to writing; the will must then be signed by two out of the three witnesses. However, failure to write out the will immediately or lack of signature does not invalidate it. It may be signed later.

If the last will is not committed to writing, its contents can be established by sworn and identical statements of the two witnesses out of the three before whom the testator so declared his testamentary intentions.

14.19. (a) In Romania, members of the Armed forces and civilians attached to armed forces may, in exceptional circumstances, make a will with fewer formalities than ordinary wills, i.e. in the presence of the commander or field officer, assisted by two witnesses. If the testator is sick or wounded, it can be executed in the presence of the doctor of the unit and such wills have temporary force and lose their validity after six months when the testator returns to the place where he can make an ordinary will. During epidemics, a will in the presence of city council assisted by two witnesses is volid.[4] The physical condition of the testator is irrelevant, and only the place should be under quarantine. Romania and Yugoslavia and R.S.F.S.R. Civil Code.

(b) In Yugoslavia, the law allows oral wills, (though exceptionally[5],) where an emergency due to war or epidemic is created and the testator is not in a position to make a written will. The validity of such a will is upto 30 days from the end of emergency. The will should be made before two witnesses and any provision for the benefit of the witnesses or their ascendants or descendants and collaterals upto the 4th degree or spouses of them, shall be null and void.

(c) In the Civil Code of one of the States forming part of U.S.S.R., there occur the following provisions[6].

Article 540. *Notarial Form of a Will.*

A will should be drawn up in writing, indicating the place and time of its compliation, and be personally signed by the testator and notarially certified.

Article 541. *Wills equivalent to Notarially Certified Wills.*

There shall be equivlent to notarially certified wills :

(1) wills of citizens being treated in hospitals, other in-patient medical institutions, sanatoriums or residing in homes for the aged and disabled, which are certified by the chief doctors, their medical deputies, or duty doctors of these hospitals, medical institutions, sanatoriums, as well as directors and chief doctors of the said homes for the aged and disabled;

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[1]Section 635, Hungarian Civli Code.

[2]Section 651, 3rd paragraph, Hungarian Civil Code.

[3]Article 82—84, Polish Civil Code.

[4]Romanian Civil Code, Article, 872.

[5]Yugoslavia Civil Code, Article 80 and 81.

[6]Articles 540-541, R.S.F.S.R. Civil Code (1964) Quoted in Hazard, Butler and Magg's Soviet. Legal System (1977), pages 398-399.

(2) wills of citizens on sea-going vessels of internal navigation sailing under the flag of the USSR which are certified by the masters of these vessels;

(3) wills of citizens in prospecting, aretic, and other similar expeditions which are certified by the heads of these expeditions;

(4) wills of military servicemen and other persons being treated in military hospitals, sanatoriums, and other military medical institutions which are certified by their heads sanatoriums and other military medical institutions;

(5) wills of military servicemen and at points where military units, formations, institutions, and military training institutions are situated where there are no state notarial offices or other agencies performing notarial activities, also the wills of workers and employees, members of their families, and family members of military servicemen, which are certified by the commanders (or heads)of these units, formations, institutions, and educational institutions;

(6) wills of persons in places of deprivation of freedom which are certified by the heads of the places of deprivation of freedom.

Article 542 *Signing of a Will by Another Person.*

If a testator, by virtue of physical defects, illness, or other reasons, can not personally sign a will, it may be signed at his request in the presence of a notary or other official (Article 541) by another citizen, indicating the reasons by virtue of which the testator could not sign the will personally.

Section 65A.

14.20. On a careful consideration of the pros and cons of the matter, we are of the view that a new section, say, as section 65A, should be inserted[1] to deal with the situation now under consideration. It is true that if death occurs after a long time, it may be difficult to determine factually if there had been a flood etc. But the balance of convenience justifies the insertion of a specific provision as mentiond above. Accordingly, we recommend that a new sectson should be inserted, somewhat on these lines.

"65A. *A person affected by accident, earthquake, fire, flood or other similar calamity in circumstances wherein he has reasonable apprehension of immediate death, may make a privileged will*".

Section 66, clauses (e), (f) and (g), may, in consequence, be slightly amended so as to replace the words "soldier, airmen or mariner" by the words "*the person entitled to make a privileged will.*"

V. The formalities

Section 66.

14 21. We may now resume consideration of the existing sections. Section 66 reads :

"66. (1) Privileged wills may be in writing or may be made by word of mouth.

(2) The execution of privileged wills shall be governed by the following rules :—

(a) The will may be written wholly by the testator, with his own hand. In such case it need not be signed or attested.

(b) It may be written wholly or in part by another person and signed by the testator. In such case it need not be attested.

(c) If the instrument purporting to be a will is written wholly or in part by another person and is not signed by the testator, it shall be deemed to be his will, if it is shown that it was written by the testator's directions or that he recognised it as his will.

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[1]Para 14.8, *supra.*

(d) If it appears on the face of the instrument that the execution of it in the manner intended by the testator was not completed, the instrument shall not, by reason of that circumstance, be invalid, provided that his non-execution of it can be reasonably ascribed to some cause other than the abandonment of the testamentary intensions expressed in the instrument.

(e) If the soldier, airman, or mariner has written instructions for the preparation of his will, but has died before it could be prepared and executed, such instructions shall be considered to constitute his will.

(f) If the soldier, airman or mariner has, in the presence of two witnesses, given verbal instructions for the preparation of his will, and they have been reduced into writing in his lifetime, but he has died before the instrument could be prepared and executed, such instructions shall be considered to constitute his will, although they may not have been reduced into writing in his presence, nor read over to him.

(g) The soldier, airman or mariner may make a will by word of mouth by declaring his intentions before two witnesses present at the same time.

(h) A will made by word of mouth shall be null at the expiration of one month after the testator, being still alive, has ceased to be entitled to make a privileged will."

Departure from English Law.

14.22. It is unnecessary to discuss at length the contents of this section, as the matters dealt with are mostly matters of detail. But it may be useful to point out that the provision in sub-section (2) clause (h) (under which an *oral privileged will* becomes null at the expiration of one month after the testator, being still alive, has ceased to be entitled to make a privileged will), is one which, though not found in English law, is a salutary one. In fact, some writers consider that even *written privileged wills* should cease to be valid one year after the testator has ceased to be entitled to make a privileged will.

Changes required in section 66 to cover persons affected by calamity.

14.23. It may be mentioned that if the provisions of the Act related to privileged wills are to be extended to persons affected by calamity as recommended by us, section 66 will also require consequential changes.

Section 66(2) to be amended.

14.24. We have separately recommended[1] the insertion of a new section to the effect that a person affected by accident, earthquake, fire, flood, or other similar calamity in circumstances wherein he has a reasonable apprehension of immediate death, may also make a privileged will. This recommendation, if accepted, will expand the scope of privileged wills. In consequence, section 66(2) clauses (e), (f) and (g) should be slightly amended, so as to replace the words "soldier, airman or mariner" by the words *"the persons entitled to make a privileged will."*

CHAPTER 15

ATTESTATION, REVOCATION (INCLUDING EFFECTS OF SUBSEQUENT EVENTS), ALTERATION AND REVIVAL OF WILLS. SECTIONS. 67—73.

1. Attestation.

Scope.

15.1. The attestation, revocation (including effects of subsequent events), alteration and revival of wills are matters dealt with in sections 67 to 73—

The rules comprised in section 67 to 73 could be broadly classified as follows :—

(a) effect of a benefit given by the will to an attesting witness on its validity (section 67) or on competence to prove (section 68);

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[1]See para 14.20, *supra* (recommendation to insert section 65A).

(b) effect of marriage (section 69);

(c) revocation of unprivileged wills (sections 70-71) and their revival (sections 73);

(d) revocation of privileged wills (section 72).

Section 67—Request to attesting witness.

15.2. Section 67 deals with the effect of a gift given by a will to an attesting witness or to his spouse. The rule enacted is that the mere fact that the beneficiary is a person attesting the will (for a spouse of the attesting witness) does not affect the validity of the attestation, but the bequest in favour of the person attesting (or his or her spouse) is void. The same rule applies to a power of appointment conferred by the will.

English rule.

15.3. This provision broadly corresponds to section 15 of the (English) Wills Act, 1837[1]—a provision itself derived from an earlier English statute.[2]

Section 15 of the Wills Act, 1837 reads :—

> "If any person shall attest the execution of any will to whom or to *whose wife or husband any beneficial devise,* legacy, estate interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment shall so far only as concerns such persons attesting the execution of such will, *or the wife or husband of such person,* or any person claiming under such person or wife or husband, *be utterly null and void* and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will."

Exceptions carved out in English law by judicial decisions.

15.4. It should, however, be noted that in England, to this general rule, certain exceptions have been carved out by case law, and (on one particular point) by statute.[3]

Position of spouse in England.

15.5. As regards section 15 of the Wills Act of 1837 (which provides that a beneficial gift to the *wife or husband* of an attesting witness shall also be void), the English courts have sought to construe it as narrowly as possible. For example, in one of the English cases[4] the testator had left property to a woman beneficiary. She married one of the attesting witnesses after the *execution of the will,* but before the testator's death. It was held that the gift to her remained effective and was not avoided by section 15, since the policy of the section required a consideration only of the position *at the time of execution.*

Exception in English law.

15.6. The position in England in this respect as regards exceptions carved out judicially[5] has beeen stated[6] :—

Statements of the position by Halsbury.

> "1314. *Exceptions to general rule* :—
>
> Where by means of a parol trust a beneficial interest is conferred upon an attesting witness who is, at the time of attestation, unaware of the secret trust in his favour, the gift is valid. *The marriage of a donee to an attesting witness after attestation does not affect the validity of the gift.* A beneficiary's interest is not rendered void if it could not be predicted that he was a donee at the time when the will was attested (or possibly at the time of the testator's death)."

Secret trusts in England.

15.7. As to the position where one of the witnesses to the will is to take a benefit under a secret trust, the English cases are not consistent. In an early[7]

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[1]Section 15, Wills Act, (English) 1837.

[2]Wills Act, 1751 (English).

[3]Section 1, Wills Act, 1968, see para 15.9, *infra.*

[4]*Thorpoe* v. *Bestwick,* (1881) 6 Q.B.D. 311. See Tiley, "Attesting Witness : Some remaining problems" (1968) 112 Sol. Jour. 994.

[5]See also section 1, Wills Act, 1968.

[6]Halsbury, Laws of England, 3rd Edition, Vol. 39, page 870, paragraph 1317.

[7]*Re Fleetwood, Sidgreaves* v. *Brewer,* (1880) 15 Ch. D. 594.

English case of 1880 it was held that the beneficiary under the secret trust could not take a gift under the will, but this was not followed in a comparatively more recent case[1]. The later decision is more in keeping with the generally liberal approach adopted in modern times. A beneficiary under a secret trust does not take "under the will", and is not, therefore, affected by section 15, Wills Act, 1837.

Origin of the general rule.

15.8. The origin of the general rule is of interest. At common law, the general rule of evidence was that persons "interested" in the outcome of litigation were incompetent to testify, and the courts took the view that persons taking any benefit under a will were not, therefore, credible witnesses as required by the Statute of Frauds. The effect was to render the whole will invalid if at least one of the witnesses received a benefit under the will. The Wills Act, 1752 qualified the harshness of this view by providing that such person should be credible witnesses, *but that the gifts to such* person were void[2]. Any creditor of the deceased whose debt is charged by the will on any real or personal property of the deceased is not prejudiced by attesting the will (s. 16) and (s. 17) makes it permissible for an executor to be an attesting witness, since an interested person is competent to testify, the original reason is gone.

Wills Act, 1968.

15.9. By the Wills Act, 1968[3] a further exception is provided for the purposes of section 15 of the Wills Act, 1837.

Section, 1 Wills Act, 1968 provides as follows :—

"1 (1) For the purpose of section 15 of the Wills Act 1837 (avoidance of gifts to attesting witnesses and their spouses) the attestation of a will by a person to whom or to whose spouse there is given or made any such disposition as is described in that section *shall be disregarded if the will is duly executed without his attestation and without* that of any other such person.

(2) This section applies to the will of any person dying after the passing of this Act, whether executed before or after the passing of this Act."

Provision in Uniform Probate Code.

15.10. It may be noted that USA section 2—505 of the Uniform Probate Code eliminates the presence and in competency requirements. It provides as under :

"s. 2—505. (who may witness).

(a) Any person generally compeent to be a witness may act as a witness to a will.

(b) No will or any provision thereof is invalid because the will is signed by an interested witness."[4]

Reason of the Prohibition.

15.11. This naturally raises the question—why is section 67 needed at all? The original reason of the prohibition in section 67 is incompetence to give evidence on the ground of interest. Interest as such, has, however, long since ceased to be a disqualification in regard to giving evidence, but the "suspicion or rather the charge of possible collusion with benefit,"[5] still survives.

Unity of interests.

15.12. The extension of the above prohibition to the wife seems to be based on the assumed unity of interest between husband and wife.[6]

Criticism of present provision in India.

15.13. It remains now to consider the propriety of the present provision. While one may agree that the fact that a person may derive some benefit under a will is a ground for scrutinising the validity of the will with more than ordinary care, a rigid rule virtually prohibiting the attesting witnesses from taking under

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[1] *Re Young, Young* v. *Young*, (1951) Ch. 344; (1950) All E.R. 1245, 1250, 1251.

[2] Miller, Machinery of Succession (1977), page 145, f.n. 5.

[3] Section 1, Wills Act, 1968.

[4] Section 2-505, Uniform Probate Code, Miller, Machinery of Succession (1977) page 146.

[5] *Administrator General* v. *Lazar Stenben*, (1882) I.L.R. 4 Madras 244, 246.

[6] *Administrator General* v. *Lazer Stenhon*, (1882) I.L.R. 4 Madras 244, 246.

the will seems to be rather harsh. The hardship would be more pronounced in cases where all the attesting witnesses available with reasonable effort are beneficiaries under the will.

Judicial decisions.

15.14. Realising the harshness of this provision and of the corresponding provision in section 19 of the Oudh Talukdars Act, 1869, courts[1] in India have been astute to construe the signature of the beneficiary as a signature made not in the capacity of an attesting witness, but in some other capacity. That the statutory rule of law may be a source of hardship in a particular case[2] has not gone unnoticed judicially.

Present provision wrong in principle.

15.15. The present provision in India is thus harsh and is wrong in principle. The position, therefore, seems to be in need of reform. We have already referred to the reform effected on the subject in England.[3] To improve upon the present law in India we have the following alternatives before us :—

(a) (i) It can be provided that a witness to a will may still inherit under the will, if the will has also been witnessed by at least two other disinterested witnesses.

(ii) Alongwith the above amendment, it should be provided that the section does not apply in certain exceptional cases. We have in mind those special cases for which English law makes an exception.[4]

(b) In the alternative, the section could be modified by reversing that part thereof which invalidates the bequest.

Perhaps, alternative (b) may appear to be too drastic. But alternative (a) would certainly be fair and unobjectionable.

On a careful consideration, we favour the adoption of alternative (a) mentioned above.

Amendment of section 67 recommended.

15.16. Accordingly, we recommend that section 67 should be amended by inserting the following exception in the section before the Explanation :—

"Exception.

For the purposes of this section, the attestation of a will by a person to whom or to whose spouse there is given any such benefit as is described in this section shall be disregarded—

(a) *where the means of an oral trust, a beneficial interest is conferred upon an attesting witness who at the time of attestation is unaware of the secret trust in his favour; or*

(b) *where the marriage to an attesting witness of a person taking a beneficial interest under the will takes place after the attestation; or*

(c) *where at the time of the attestation it could not be predicted that the attesting witness was a person taking a beneficial interest under the will; or*

(d) *where the will has been witnessed by not less than two other witnesses, to whom no such benefit as is described in this section is given by the will."*

II. Executor as Witness.

Section 68—Proof by executor.

15.17. This takes us to section 68. According to that section, no person, by reason of interest in or of his being an executor if, a will shall be dis-

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[1] *Shiam Sunder* v. *Jagan Nath*, A.I.R. 1926 Oudh 465, 467, confirmed by the Privy Council in 32 Calcutta Weekly Notes 305.

[2] *Admn Gen.* v. *Lazer*, (1882) I.L.R. 4 Mad. 244, 246.

[3] Paras 15.4 to 15.8, *supra*.

[4] Para 15.6, *supra*.

qualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.

The Section needs no change.

III. Revocation by subsequent events : Section 69.

Section 69—Revocation by marriage.

15.18. Events subsequent to the execution of a will are sometimes regarded as affecting the subsistance of the will; the most important of such events is marriage. Section 69 provides that every will shall be revoked by the marriage of the maker, except in the special case of a will made in exercise of a power of appointment. The provision may appear to be simple enough, but a few points—some of principle, others of detail—need to be noticed in this connection.

In the first place, there seems to be need for a saving applicable to wills made in contemplation of marriage, and so expressed. Where a will is *expressed to be made in contemplation of marriage,* it should not stand revoked by the solemnisation of the contemplated marriage. The object of the rule providing for revocation is to protect the interests of the new family[1] of the testator, against accidental survival of the old will. Where there is a deliberate decision that the will shall survive the marriage, the law need not upset that intention.

Secondly, where a marriage is not valid, there should be no revocation of the will by virtue of the marriage.

Thirdly, "marriage" in this context should include a second (or subsequent) marriage, and need not be confined to the first marriage.

Indian commentaries on the Succession Act usually make a statement of the position as to some of the points brought out above, without, however, expressing any opinion as to the desirability of amending the section on one or more of these points.

Need to provide against automatic revocation of will on marriage.

15.19. There can hardly be any doubt that if a will is *expressly made in contemplation of marriage,* the subsequent marriage should not amount to a revocation of that will. This principle should find a place in the Act, and should be elaborated as above[2]. An express provision regarding mutual wills would also be justified, for obvious reasons.

Marriage and divorce : effect on wills : recent reform in England.

15.19A. Provision has been made in England by the Administration of Justice Act, 1982 for the revocation of a will by marriage, except in certain cases. This has been achieved by revising section 18 of the Wills Act, 1837. This implements the recommendations of the Law Reform Committee[3] on the subject.

As to the effect of dissolution or annulment of marriage on wills, there was disagreement among the members of the Law Reform Committee which considered the subject. Now, section 18A, inserted in the Wills Act, 1837 by the Administration of Justice Act, 1982, makes an appropriate provision under which (except where a contrary intention appears in the will), divorce or annulment of a marriage or recognition that a marriage is voidable has the following effects on the wills of the former spouses :—

(i) any appointment of a former spouse as an executor or executris/trustee is ineffective and a grant of letters of administration with the will annxed may be necessary (section 18A(1));

(ii) any devise or bequest to the former spouse will lapse and the relevant property will fall into residue or (if there is no residuary bequest) pass on intestacy [section 18A(1)], unless it is a life interest, as to which see (iii) below;

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[1] *Cf.* Mitchell, "Revocation of Testamentary Appointments on Marriage" (1951) 67 L.Q.R. 351.

[2] Paragraph 15.18, *supra.*

[3] Law Reform Committee, 22nd Report (Making and Revocation of Wills) 1980 cmd. 7902· paragraphs 3.10, 3.11 and 3.18.

(iii) any interest in remainder (vested or contingent) dependent on the termination of a spouse's life interest will be acclerated by the lapse of the life interest under (ii) above [section 18A(3)].

The former spouse, affected by (ii) or (iii) above, may still make a claim for "reasonable financial provision" under the Inheritance (Provision for Family and Dependents) Act, 1975 [section 18A(2)].

Marriage—meaning of.

15.20. According to judicial interpretation, "marriage" means a valid marriage. That is the ordinary legal understanding of the expression and need not be codified. The same comment applies to a second marriage, which seems to be included within 'marriage'.

Conflict of laws concerned with subsistence of a will.

15.21. Sometimes, an interesting question of conflict of laws concerned with the subsistence of a will arise under such a provision as is contained in section 69. In an English case,[1] a French woman, while residing in England, executed in England a will which was valid according to French law. Subsequently, she married a French man, but continued to reside in England till her death. It was held that on her marriage, the woman acquired the domicile of her husband which was French and the will was governed by French law and *was not revoked by her marriage,* since the French law did not provide for automatic revocation of the will on marriage.

Law of domicile applicable.

15.22. That the revocation of a will on marriage is governed by the law of domicile is recognised in another English case.[2] In that case, a foreigner had made a will which was valid according to the law of his native country, he afterwards married in accordance with the law of England, having at that time an English domicile. It was held that the marriage revoked the will.[3] There is, however, one aspect of the English rule (as laid down in the judicial decisions) which requires some comment. That marriage revokes a will is regarded by English case law as a part of the domain of matrimonial law. The result is that the positive rule of the English law on the subject applies only (and always) if the spouses have an English domicile at the time of marriage.[4] Since the validity or the nullity of will does not operate until the testator dies (i.e. until the marriage itself comes to an end), the English theory has been regarded by some authors as inappropriate.[5] Although Cheshire[6] would seem to approve of the rule as adopted in England, there is much to be said for the opposite view.

In our opinion, while revising the section, it is desirable to make a clear statement of the position as to the law that will apply for determining the effect of marriage as revoking a will. As to the content of the provision in that regard, we are of the view that it should be the law which was the law of the domicile of the testator at the time of *death* that should govern the matter. This would be more practicable, for the reasons stated above.

Recommendation to revise section 69.

15.23. In the light of the above discussion, we recommend that section 69 should be revised as under :—

Revised section 69.

Revocation of will by testator's marriage.

69. (1) Every will, *not being a mutual will,* shall be revoked by the marriage of the maker, except a will made in exercise of a power of appointment, when the property over which the power of appointment is exercised would not, in default of such appointment, pass to his or her executor or administrator, or to the person entitled in case of intestacy.

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[1] *Loustelan* v. *Loustelan*, 81 Law Times 459, cited by Paruck, Succession Act (1966), page 121.

[2] *Re Hartin*, (1900) Probate 211 (C.A.).

[3] *Cf.* Sykes & Prytes, Australian Private International Law (1979), page 461.

[4] Wolff, Private International Law (1950), page 594.

[5] Wolff, Private International Law (1950), page 594.

[6] Cheshire, Private International Law (1970), page 602.

Explanation.—Where a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property.

Exception.—A will expressed to be made in contemplation of a marriage or indicating an intention that it was so made shall not be revoked by the solemnisation of the marriage contemplated; and such an intention may be inferred from any portion of the will showing that marriage was thought of.

(2) *Where the law of domicile of the maker of the will at the time of death has different rule that rule shall prevail, and the provisions of sub-section* (1) *shall not apply to the extent to which there is inconsistency between the two.*

IV. Effect of Divorce.

Divorce.

15.24. We may, at this stage, take up the question of the effect of divorce on a will. While, by section 69, a will is deemed to be revoked by the marriage of the maker, there is no similar provision in relation to divorce of the maker of the will.[1] The matter seems to require examination, particularly because divorce is now much more common than it was before. Marriage is regarded as relevant to the continued subsistence of the will, in as much as it *introduces in the life* of a man or woman a new person who is going to be an equal partner in life. On the same logic,divorce should be regarded as equally relevant, because it *removes* from his or her life, a person who was, so far an equal partner in life. Annulment of marriage also stands on a similar footing for this partiular purpose.

Present law.

15.25. Under the present law, of course, the general rule is that the subsequent divorce of a testator will have no effect on his will, unless he has made an express provision for that contingency. Recently, however, the lack of any rules in this area has been criticised in many countries.[2]

In England, there is no provision for the automatic revocation on a subsequent marriage. So, it is only if the testator either marries again, or has made the gifts in his will conditional on widowhood, that the former wife is barred from taking her interest under the will. The question is : Should the law automatically revoke gifts to former spouses on the assumption that the majority of testators would wish to disentitle them, or should the law remain as it is and leave it to testators to expressly revoke such testamentary disposition ?

Case for reform .

15.26. There certainly seems to be plenty of evidence that in the majority of cases the law would best serve the interests of testators by revoking provisions to former spouses.[3] Take, for example, the case of a testator who has been divorced from his former wife twenty years earlier at the time of his death. If he has not altered his will, the whole estate would (on his death) pass to the former wife, though this could not be his intention.

Assumption about testator's intention.

15.27. The present law unrealistically assumes that a divorced testator would still wish to benefit his ex-spouse, no matter how long it is since they separated. This would surely not be the testator's intention in the majority of cases where, in the emotional stress of a divorce, the will is often forgotten. In the absence of a conscious testamentary dispdsition, and bearing in mind the increase in the rate of divorce, and the unavoidable emotional turmoil of such proceedings, the law should step in to reflect more adequately, the wishes of the vast majority of testators. The present assumption should, therefore, be reversed and some form of statutory revocation of testamentary gifts on divorce should be provided.

There will, of course, be exception, and provisions could be made for these by permitting evidence of, say a later memorandum or codicil confirming the will or even of extrinsic evidence of surrounding circumstances. But in most cases testators would not wish to benefit ex-spouses once they are divorced.

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[1] As to birth of a son after execution of a will, see para 15.31, *infra.*

[2] G.M. Bates, "Revocation of Wills on Divorce" (7th June 1979) 129 N.LJ. 556, 557.

[3] G.M. Bates, "Revocation of Wills" (7 June, 1979) 129 N.L.J. 556, 557.

Alternatives open for reform.

15.28. Given that there is a need for law reform in this area, then the next question to consider is, how this should be done.

Alternatives for reform.

15.28A. There are basically three ways in which reform of the law might be effected, all having, in practice, different consequences.[1]

(1) Providing for an automatic revocation of a will or divorce, in the same way that a will is generally revoked on marriage.

This solution, however, goes too far, since the effect would be to revoke not only all dispositions in favour of an ex-spouse, but also specific gifts to all other beneficiaries. Such a result would probably not reflect the testator's true intentions. Legacies to children, friends or charities, would probably be intended to survive the divorce, and to strike down the whole will would probably cause more hardship and injustice than the present law.

(2) Provision that where a testator has subsequently divorced his wife, then only gifts to her alone in the will shall be void.

The difficulty with this alternative is that problems would arise where the gift to the wife contains an *alternative provision* in case the wife predeceases the testator. The alternative substitutionary gift would also fail, and the subject matter would then be distributed as on intestacy.

Further, such a provision can deal only with beneficial interests. There is no reason to belive that a testator would wish to retain an ex-wife, as say, executor or trustee, any more than as a deserving beneficiary.

This solution can be supported only if it is made clear that the revocation of gifts to an ex-spouse will not defeat *substitutionary gifts*.

(3) Provision that where a testator is subsequently divorced, his will shall be read as if his former spouse had pre-deceased him. This would avoid the difficulties foreseen in the first two alternatives. No doubt, if the ex-spouse is also named as an executor, this solution might interfere with the due administration of the estate. But an alternative administrator can be sought.

It may be that such a solution could adversely affect (i) secret trusts accepted by the wife; (ii) devises to beneficiaries given *pur autre vie*, where the other life is that of the divorced spouse; and (iii) alternative provisions in the will to cover a situation where the wife predeceases the testator. Other problems might arise in the rule of perpetuities, where the divorced spouse is a measuring wife, and with regard to the acceleration of gifts.

However, it might create less difficulties than other solutions. It may, therefore, be preferred.

Recommendation to insert new section 69A.

15.29. In the light of the above discussion, we recommend that the Succession Act should be amended to provide that where after a will the marriage of the testator is dissolved or his (or her) marriage has been annulled, the will should for all purposes, be read as if the former spouse (that is to say, the spouse whose marriage is dissolved or annulled) had died before the testator, unless the will expressly provides otherwise. A new section should be added to carry out the above subject.[2]

Provision in Uniform Probate Code.

15.30. In this connection, we may refer to the provision in the Uniform Probate Code.[3]

"S.2-508. *Revocation by Divorce : No Revocation by other Changes of Circumstances.*

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[1]G.M. Bates, "Revocation of Wills" (7th June ,1979) 129 New, L.J. 556, 557.

[2]Section 69A to be added. See para 15.32, *infra.*

[3]Section 2—508, Uniform Probate Code reproduced in Martindale Hubble, Law Directory, Vol. 7, page 430.

If, after executing a will, the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the descendant, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse faild to survive the desendant. If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse. For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse within the meaning of Section 2—802(b). A decree of separation which does ot terminate the status of husband and wife is not a divorce for purpose of this section. No change of circumstances other than as described in this sction shall revoke a will."

Move for reform in England.

15.31. It may also be mentioned[1] that in England, the problem was considered by the Royal Commission on Marriage and Divorce,[2] which thought that a substantial proportion of those spouses who have made a will in favour of the other spouse would not wish that spouse to receive a benefit if that marriage was subsequently dissolved. A testator may be unable to alter his will after divorce, because he lacks mental capacity. The Royal Commission, therefore, considered it desirable that, on the death of a person whose marriage has been dissolved, his former spouse should not take any benefit under his will unless it is clear that he desires her to take a benefit notwithstanding the divorce.

They suggested two ways in which this result could be achieved. It could either be provided that divorce revokes a will just as marriage revokes a will, so that the testator (unless he makes another will) would be regarded as dying intestate. The objection to this approach was that it revoked a will whether or not it conferred any benefit on the former wife, and it might defeat gifts to another person. They preferred the second possibility, which is similar to the provision in the Uniform Probate Code.[3] This would invalidate, on divorce or nullity, a bequest to, or appointment in favour of the former spouse, but would leave the will to take effect in all other aspects. No action has been taken in England on these proposals, but some Commonwealth jurisdictions have introduced, or are in the course of introducing, provisions to deal with the problem.[4]

Recommendation to insert section 69A.

15.32. Having given our careful consideration to the matter, we are of the view that, for reasons already stated,[5] there is need for inserting a specific provision as to the effect of divorce on wills. We recommend the insertion of a new section (section 69A) somewhat on the following lines :—

"69*A*. (1) *Where, after making a will, the marriage of the testator is dissolved or has been annulled, the will shall, for all purposes be read as if the former spouse (that is to say, the spouse whose marriage is dissolved or annulled) had died before the testator, unless the will expressly provides otherwise.*

(2) *The provisions of this section shall, unless the will expressly provides otherwise, operate—*

(a) *to revoke all dispositions of beneficial interest in favour of the former spouse.*

(b) *to revoke provisions conferring a general or special power of appointment on the former spouse.*

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[1]Miller, Machinery of Succession (1977), page 183.

[2]The Modern Commission (1953) Command, 0678, paras 1187-1191.

[3]Section 2—508, Uniform Probate Code. See Martindale Hubbell, Law Directory, Vol. 7, pages 4302, 4303.

[4]New Zealand and Queensland.

[5]Paras 15.24 to 15.28, *supra.*

(c) *to revoke provisions naming the former spouse as executor or trustee*[1] *and*

(d) *to invalidate the appointment of the former spouse to act as trustee for a secret trust, established before the testator's divorce or before annulment of the marriage, as the case may be, so however as not to affect the subsistance of the trust.*

(3) *The provisions of this section apply to all wills of persons dying after the commencement of the Indian Succession (Amendment) Act,* 19.....

VI. Act of Revocation by Testator.

Section 70- revocation of unprivileged Wills.

15.33. Circumstances in which a will can be revoked by an act of the testator are dealt with in section 70, which reads—

> "70. No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is herein before required to be executed, or by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction of revoking the same."

Section 70- Recommendation for change regarding divorce.

15.34. If, as rcommended by us, the case of divorce or annulment is added[2] in the Act, consequential change will be required in section 70 also, by adding, after the words "marriage", the words *"or dissolution or annulment* of marriage." We recommend accordingly.

Will not found at the time of death- whether presumption of divorce can be drawn.

15.35. A question often debated in the context of revocation of wills is this—Where a will has been executed and registered, but is not found at the time of the testator's death, can a presumption of revocation of the will be drawn? The answer depends on the facts of each case. Such a presumption is permissible in England.[3-4] In India, however, it has to be drawn cautiously.[5]

The law on the subject in India needs no amendment.

Section 70A (New)- Birth of son.

15.36. Another interesting question concerned with the subsequent birth of a son to a Hindu testator also requires to be considered. Under the present law, the fact that a son is born to a Hindu testator who has, by will, disposed of his ancestral property does not, in itself, amount to revocation[6] of the will. Having regard to Indian conditions, and, in particular to the fact that the power of disposition of ancestral property has now been enlarged,[7] it is a matter for consideration whether this should continue to be the law.

The question is not whether, after the birth of the son, the will remains operative as regards *ancestral property*. The will cannot be operative to defeat the rights of the son in the ancestral property as at the death of the testator. The son on birth, acquires an interest in that property.[8] The question to be considered is, whether the *will as a testamentary disposition* should retain its operation in such circumstances, unless it contains an express provivsion indicating a contrary intention.

Present law and need for change.

15.37. Under the present law, the will remains operative in the circumstances mentioned above, so that at least as regards self-acquired property, it takes effect. If the son born after the will dies before the testator's death, then it would take effect as regards ancestral property also. In favour of changing this position by

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[1]This amendment is in addition to the amendment of section 69 on certain points, already recommended.

[2]See recommendation to insert section 69A, para 15.32, *supra.*

[3]*Halsbury*, 3rd Ed. Vol. 39, page 897, para 1366 and foot-note (q).

[4]*Allen* v. *Morrison*, (1900) A.C. 604 (P.C.).

[5]*Durga Prasad* v. *Debt Charan* (1979) 1 S.C.J. 61, (1st January, 1979).

[6]*Bodi* v. *Venkatasami Naidu*, (1913) I.L.R. 38 Mad. 369, 373, following *Subba Reddi* v. *Doraiswami*, (1906) I.L.R. 30 Mad. 629 and *Shib Savitri* v. *Collector of Meerut.* (1906) I.L.R. 29 All. 82.

[7]Section 30, Hindu Succession Act, 1956.

[8]*Bodi* v. *Venkatasami Naidu*, (1913) I.L.R. 38 Mad. 369, 373.

amendment, it could be stated that the birth of a son in such cases—coupled with the fact that the testamentary disposition of coparcenary property becomes void—is an important factor which may ordinarily be presumed to result *in a change of intention* on the part of the testator.

Where such a situation arises, dispositions made in the will may, in the majority of cases, be regarded as obsolete, that is to say, they would no longer be representing the testator's present wishes. No doubt, the testator would, in due course, take account of the subsequent event and alter the will. But what is to happen if he does not expressly do so, or if he delays doing so? There seems to be need for a specific provision to deal with the problem.

15.38. Having taken all aspects into consideration we recommend that the following section should be inserted as section 70A :— **Recommendation to insert new section 70A.**

> "70*A*. *Where, after the execution of the will by a Hindu testator who has, in the will, purported to deal with co-parcenary property, a son is born to that testator, the will shall stand revoked as regards all property, unless the will contains an express provision indicating a contrary intention*"

VII. Alteration.

15.39. This takes us to section 71, dealing with the effect of obliteration, interlineation or alteration in unprivileged wills. The section reads as under :— **Section 71 Obliteration etc. in unprivileged wills.**

> "71. No obliteration, intelineation or other alteration made in any unprivileged will after the execution thereof shall have any effect, except so far as the words or meaning of the will have been thereby rendered illegible *or undiscernible*, unless such alteration has been executed in like manner as hereinbefore is required for the execution of the will :
>
> Provided that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or in some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will."

The section is based on section 21 of the (English) Wills Act, 1837. It does not appear to need any change.

VIII. Revocation of Privileged Wills.

15.40. As to the revocation of a privileged will or codicil, section 72 contains certain provisions. In the main paragraph, it provides as under :— **Section 72- Revocation of Privileged Wills.**

> "72. A privileged will or codicil may be revoked by the testator by an unprivileged will or codicil, or by any act of expressing an intention to revoke it and accompanied by such formalities as would be sufficient to give validity to a privileged will, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction with the intention of revoking the same."

The Explanation to the section reads as follows :

> *"Explanation.* In order to constitute the revocation of a privileged will or codicil by an act accompanied by such formalities as would be sufficient to give validity to a privileged will it is not necessary that the testator should at the time of doing that act be in a situation which entitles him to make a privileged will".

15.41. The structure of the section is somewhat complicated and is capable of considerable improvement. It may be useful to simplify the main paragraph by splitting it up into clauses. We recommend that the section should be restructured on the following lines: **Recommendation to recast section 72.**

Revised section 72.

"72. A privileged will or codiel may be recoked by the testator—

(a) by an unprivileged will or codicil, or

(b) by any act expressing an intention to revoke it and accompanied by such formalities as would be sufficient to give validity to a privileged will, or

(c) by the burning, tearing or othedwisd destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

(Explanation as at present.)

IX. Rectification.

Rectification of Wills : recent reform in England.

15.41A. It may be mentioned that in England, on the subject of rectification of wills, section 20 of the Administration of Justice Act, 1982 has been enacted in accordance with the recommendations of the Law Reform Committee[1]. Leaving aside minor matters of detail, the important part is contained in sub-section (1) and (2) of section 20, quoted below"[2] :

"20. (1) If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence—

(a) of a clerical error; or

(b) of a failure to understand his intentions, it may order that the will shall be rectified so as to carry out his intentions.

(2) An application for an order under this section shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out."

X. Revival of will.

Section 73—Revival of unprivileged will.

15.42. The revival of an unprivileged will forms the subject-matter of section 73 of the Succession Act, which is in these terms :

"73. (1) No unprivileged will or codicil, nor any part thereof, which has been revoked in any manner, shall be revived otherwise than by the re-excution thereof, or by a codicil executed in manner hereinbefore required and showing an intention to review the same.

(2) When any will or codicil, which has been partly revoked and afterwards wholly revoked, is revived, such revival shall not extend to so much thereof as has been revoked before the revocation of the whole thereof, unless an intention to the contrary is shown by the will or codicil."

The section needs no amendment.

CHAPTER 16

CONSTRUCTION OF WILLS : SECTIONS 74 TO 111

I. Introduction

Scope of Chapter and essence of the process of construction.

16.1. Detailed rules for the construction of wills are contained in sections 74—111. The scheme of these sections will be better understood if certain general aspects are borne in mind.

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[1]Law Reform Committee, Report on the Interpretation of Wills (1973), cmd. 5301.

[2]Section 20(1) and 20(2), Administration of Justice Act, 1982 (Eng.).

In the construction of documents recording the voluntary acts of parties to a legal transaction, three elements generally play an important part. These are—the intention of the author (or authors) of the instrument, the terms of the instrument as recording that intention, and the external reality to which that document is intended to apply. Since a document is supposed to record the intention of its author and to operate on persons or facts outside the instrument (the external reality), the relevance of all these three is obvious. The document is the medium through which the author speaks, so as to affect the external reality.

16.2. So long as the three are in harmony with one another, no question of construction of the document would, in general, arise. The document speaks for itself, and if it is faithful to the intentions of its author, as well as to the external reality, effect can be easily given to it—assuming, of course, that no special rules of law or public policy have been infringed by its terms. But where harmony of the nature referred to above is wanting, a court of law concerned with the document is faced with the problem—the problem of seeking that harmony. In its efforts to do so, the three elements mentioned above play a part. But the relative importance of each is not the same. In general, the law gives the pride of place to the first element—intentions of the author, if they can be ascertained with reasonable certainty. The second element—the text of the document—may, if necessary, be moderated in the light of the result of such search by the Court of the intentions of the testator. mony.

Similarly, occasion may arise for moderating that element, if the external reality so demands. This, then, is the essence of "construction", namely, to ascertain the intention of an author and to moderate everything else according to that intention where the intention can be ascertained with reasonable certainty. The Court creates a "construct" not entirely of its own, but the result of its search for the intentions of the author.

16.3. The general rule is that a document is to be construed according to its ordinary meaning, since the court is to give effect to what the author of the document has expressed in it. General rule.

16.4. Language, however, has its limitations. It is a system of symbols. No draftsman, whether of legislation or of private documents, can rise above the imperfections inherent in language as a medium of thought. In order to prevent the will of the testator from failing by reason of such imperfections, the legislature has considered it proper to insert certain rules for the construction of wills, to be found in sections 74—111. Imperfections in herent in a language.

The thirty-seven sections relating to the construction of wills may, at the first sight, appear to be heterogeneous in character, but a common thread can be discerned as running through most of them, namely, that the intention of the testator is paramount and that all reasonable efforts should be made to ascertain that intention and to give it due effect. It is this principle which finds expression in the very first section in the Chapter—section 74—which provides that "it is not necessary that any technical words or terms of art be used in a will, but only that the wording be such that *the intentions of the testator* can be known therefrom". It is, again on this principle that section 75 imposes on the court the duty of *making* inquiries to determine questions as to the object or subject of the will.

Again, it is on this principle that section 76(1) provides that where the words used in a will to designate or describe a legatee or a class of legatees sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect.

The specific provisions as to the supplying of omissions in wills (section 77), the rejection of erroneous particulars in a description of the object (section 78), the prohibition against rejecting an erroneous words which can be given effcet to (section 79), and the admission of extrinsic evidence in case of latent[1] ambiguities (section 80), are all expressive of the legislative policy referred to above, and make it clear that what matters is the intention of the testator, which must not be allowed to be thwarted by this or that trivial defect in the expression of that intention.

[1]Misprinted as 'patent' in the marginal note to section 80.

It is, finally, for this reason that under section 83 words may be understood in a restricted or wider sense, where it can be collected from the will that the testator meant to use them in that sense.

Legislative Policy of giving effect to the will.

16.4. Since the legislative policy is that effect is to be given to the will, sections 84, 85, 87 and 88 contain detailed rules intended to implement that policy. Of two possible constructions of a clause, that which gives some effect to the clause is preferred (section 84); no part of the will is to be rejected as destitute of meaning, if a reasonable construction can be placed upon it (section 85).

Where effect cannot be given to the testator's intention to the full extent, effect is to be given to it as far as possible (section 87). Of two or more inconsistent clauses in a will, the last prevails (section 88).

It is only where the will or bequest is not expressive of any definite intention that is void for uncertainty (section 89).

All this is, in fact, faithful to the very definition of "will",[1] as given in the Act : a "will" means the legal declaration of the *intentions* of testator with respect to his property which he *desires* to be carried into effect after his death.

Another principle, now well established, is that a will speaks from the date of death of the testator (sections 104 and 105—111).

Rules for construing particular kinds of bequests are also needed, either to solve an apparent internal inconsistency in testamentary dispositions (section 101) or in order to work out the will in the light of subsequent events or for other reasons. Although such fastidiousness on the part of the legislature may appear to be productive of complexity, in practice it leads to smoothness of working.

Grouping of the rules.

16.5. The rules in the Chapter fall under the following groups :

(a) Language of wills, section 74.

(b) Inquiries by the court, section 75.

(c) Misdescriptions, deficiencies and uncertainties, sections 74—89.

(d) Rules implementing the principle that will speaks from the date of death of the testator; sections 90, 104 and 105—111.

(e) Rules based on the principle that the will extends to all property over which the testator has a disposing power—section 95.

(f) Rules for construing a power of appointment conferred by a will—section 92.

(g) Rules concerned with the extent of interest intended to be conferred by a will—sections 91 to 95.

(h) Bequest in the alternative—section 96.

(i) Bequest to a class of persons—section 93 and also section 111.

(j) Construction of certain terms indicative of relationship : sections 99—100.

(k) Two bequests to the same person—section 101.

(l) Residuary legacies—sections 102-103.

(m) Vesting of legacies given in general terms—Section 104.

(n) Lapse of legacies—sections 105—111.

Extrinsic evidence in England: recent reform.

16.5A. In England Section 21 of the Administration of Justice Act, 1982, implementing the recommendations of the Law Reform Committee,[2] provides, in effect, for the admission of extrinsic evidence (including evidence of the intention

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[1]Section 2(h).

[2]Law Reform Committee, Report on the Interpretation of Wills (1973), cmd. 5301.

of the testator) to assist in the interpretation of wills. This section applies to a will in the following cases enumerated in section 21(1) :—

"(a) in so far as any part of it is meaningless;

(b) in so far as the language used in any part of it is ambiguous on the face of it;

(c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances."

After these introductory observations, we proceed to a consideration of the sections proper.

II. Ascertaing the intention

16.6. Section 74 makes it clear that it is not necessary that any technical words or terms of art be used in a will, but only that the wording be such that the intentions of the testator can be known therefrom.[1] Section 74

No change is necessary in the section.

16.7. Section 75 provides that for the purpose of determining questions as to what person or what property is denoted by any words used in a will, a Court shall inquire into every material fact relating to the persons who claim to be interested under such will, the property which is claimed as the subject of disposition, the circumstances of the testator and of his family, and into every fact a knowledge of which may conduce to the right application of the words which the testator has used. Section 75—Inquiries by court.

The section needs no change.

III. Mistake, Misdescriptions and omissions—External reality

16.8. One of the great problems of the construction of documents is that of applying its provisions to external reality. The problem mainly arises where there is disharmony between the terms of the document and the external reality. In such cases, if the intention of the author of the document can be gathered, then defects in the expression of that intention are permitted by the law to be rectified. Section 78—erroneous particulars.

16.9. Erroneous particulars in the description of the subject of bequest do not, therefore, matter in themselves. Since the policy of the law is to give effect to the substance of the matter, it permits the court to disregard errors, omissions and misdescriptions in a will. Section 76—misnomer or misdescription.

An error in the name or description is dealt with by section 76, in these terms :

"76 (1) Where the words used in a will to designate or describe a legatee or a class of legatees sufficiently show what is meant, an error in the name of description shall not prevent the legacy from taking effect.

(2) A mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name".

The section needs no change.

16.10. Section 77 concerns the omission of material words in a will—that is to say, words material to the full expression of the will. The section provides that the context may supply words so omitted. The section is rather widely expressed. It does not, however, apply where, in regard to material particulars, there is a *blank* in the will because, in such a case, the bequest would be void for uncertainty.[2] Section 77—Omission of material words in a will.

[1]In quoting or summarising the gist of some of the sections, ilustrations have been omitted for brevity.

[2]Section 81, Illustrations (ii) and (iii).

The section needs no change.

Section 78—Misdescription when to be regarded.

16.11. Section 78 provides that if the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the will, but some parts of the description do not apply, such parts of the description shall be rejected as erroneous, and the bequest shall take effect. This is on the pinciple (already explained)[1] that where there is disharmony between the text of a document and the external reality and the intention of the author of the document can be gathered with some reasonable certainty, the disharmony can be rectified, so as to give effect to the intention rather than to the fault in the description.

Section 79—description applicable in all respects.

16.12. While, as stated above, section 78 pemits a rejection of parts of the description where some parts do not apply, there are limits to such a rejection. Section 79 in this regard, provides as follows :—

> "79. If a will mentions several circumstances as descriptive of the thing which the testator intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest shall be considered as limited to such property, and it shall not be lawful to reject any part of the description as erroneous, because the testator had other property to which such part of the description does not apply. "Explanation—In judging whether a case falls within the meaning of this section, any words which would be liable to rejection under section 78 shall be deemed to have been struck out of the will."

The section does not seem to need any change.

Section 80—latent ambiguity.

16.13. Under section 80, extrinsic evidence for the construction of will is admissible in cases of latent[2] ambiguity. The section reads as under :

> "80. Where the words of a will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended."

The principle here is that if circumstances external to a will create problems, then it is legitimate to seek a solution to those problems in the external circumstances also.

The section needs no change.

Section 81—Patent ambiguity.

16.14. In contrast with the above provision, the Act disallows extrinsic evidence in case of patent ambiguity or deficiency. This is made clear by section 81, quoted below :

> "81. Where there is an ambigugity or deficiency *on the face of a will* no extrinsic evidence as to the intentions of the testator shall be admitted."

The section needs no change.

Section 82—Entire instrument to be looked into.

16.15. The elementary rule that the meaning of a clause is to be collected from the entire will is found in these terms in section 82.

> "82. The meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other".

No change appears to be needed in the section.

IV. Construction of words and clauses

Section 83—General words.

16.16. Sometimes, general words in a will may be understood in a restricted sense, and restricted words may be understood in a sense wider than usual. The test is the intention of the testator. Section 83 deals with both these aspects in these words—

> "83. General words may be understood in a restricted sense where it may be collected from the will that the testator meant to use them in a restricted

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[1]See para 16.8, *supra*.

[2]Misprinted as 'patent' in the marginal note to Sec. 80.

sense; and words may be understood in a wider sense than that which they usually bear, where it may be collected from the other words of the will that the testator meant to use them in such wider sense."

The rule enacted in the section is reasonable enough. And though it may not be easy to apply it in a particular case, there is no method of making it more precise.

We do not, therefore, recommend any amendment in the section.

Section 84—Two meanings.

16.17. Where a clause in a will is susceptible of two meanings according to one of which it has some effect, and according to the other of which it can have none, the former shall be preferred, under section 84.

The principle here is that effect must be given, as far as possible, to a will. As Lord Talbot said[1]—

"Where words are capable of a two-fold construction, even in the case of a deed, and much more of a will, it is just and reasonable that such construction should be received as tends to make it good."

The section needs no change.

Section 85—reasonable construction.

16.18. Section 85 provides as follows :—

"85. No part of a will shall be rejected as destitute of meaning if it is possible to put a reasonable construction upon it."

The section is based on the legislative policy[2] of giving effect to the testator's intentions—of course, within reasonable limits.

The section needs no change.

Section 86—Words used in different parts of same will.

16.19. A will—or, for that matter, every legal instrument—is expected to bear internal consistency. Interpretation of words reported in different parts of the will should therefore be harmonious. Accordingly, section 86 provides that if the same words occur in different parts of the same will, they shall be taken to have been used everywhere in the same sense, unless a contrary intention appears.

The section need not be disturbed.

V. Deficiencies and Vagueness

Section 87—Effect to be given to testator's intention.

16.20. Section 87 provides that the intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible. We have already indicated how[3] it is the policy of the Act to give effect to the testator's intention, as far as possible. The same policy is reflected in section 87.

The section needs no change.

Section 88—Introductory.

16.21. Inconsistency in a will is dealt with by a simple rule in section 88, in these terms :

"88. Where two clauses or gifts in a will are irreconciliable, so that they cannot possibly stand together, the last shall prevail."

If it is not possible at all to give effect to two clauses of a will, there can be only two alternatives :—

(i) disregard both, or

(ii) prefer one of the two.

The legislature has adopted the second alternative, so that at least effect will be given to one of the clauses of the will. The reason why the last clause shall

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[1] *Atkinson* v. *Hutchinson*, 3P. W.s. 250, Henderson (1928), page 161.

[2] See paras 16.2 to 16.4 *supra*.

[3] See discussion as to s. 84 *supra* (Para 16.17).

prevail is that the last clause may be taken as expressing the considered opinion of the testator.

We recommend no change in the section.

Section 89—Wills void for uncertainty-Case law on Dharma".

16.22. Section 89 reads—

"89. A will of bequest not expressive of any definite intention is void for uncertainty."

The section applies to Hindus etc.

One of the most important classes of bequests held to be void for uncertainty under this section comprises bequests for "Dharma" (or similar purposes). It was held by the Privy Council[1] long ago, that the word, "Dharma" is void for uncertainty. This decision had, naturally, to be followed by the High Courts, but it was not whole-heartedly welcomed in India.

The earliest pronouncement on the point is that of Sir Brakine Perry and S. M. Yardley[2]. This was followed in *Pranjivan Das* v. *Dev Kuvarbai*.[3] The question was elaborately considered by Farran, C.J. and Tyabji,[4] J. in a succession case. In that case, the testator, after giving certain properties to his two wives, left the residue to his trustees who were to apply the same for "Dharma". It was held that the trust was void for uncertainty.

Judicial decisions in India.

16.23. From time to time, there were judicial expressions of view favouring a different approach. [5-6] Many eminent Hindu Judges who had occasion to consider this matter[7] were of the opinion that the contrary view was the correct one. However, because the Privy Council was not prepared to reconsider the view expressed by it in earlier decision, the decision[8] was held to be binding on Indian courts.

B. K. Mukherjea in his Tarore Law Lectures[8-a] has called for a re-consideration of this view.

Bill of 1938.

16.24. It is understood that in order to give effect to the popular view, a Bill to amend the law was introduced in the Central Legislative Assembly in 1938. However, the Bill was dropped,[9] as it was thought that the subject fell under the legislative entry relating to "religious and charitable endowments which (under the Government of India Act, 1935 which was then in force) fell in the Provincial List.

Bombay Public Trusts Act, 1950.

16.25. In 1950, the erstwhile State of Bombay passed the Bombay Public Trusts Act, which not only enacts a general rule that a public trust is not void on the ground that the purposes of the trust are unascertained or unascertainable, but also specifically provides[10] that a public trust created for such objects as "dharma, dharmada, punyakarya or punyadan" shall not be void only on the ground that the objects for which the trust is created are not ascertained. This provision is more in consonance with the notions of Indian society than the view laid down judicially.

[1] *Runchordas* v. *Parvati* (1899) I.L.R. 28 Bom. 725 (P.C.).

[2] *Advocate-General* v. *Damothar, Perry's Oriental Cases* 526.

[3] *Pranjivan Das* v. *Dev Kuvarbai*, 1 B.H.C.R. p. 130 (Note).

[4] *Vundraban Das* v. *Curzon Das*, (1897) I.L.R. 21 Bom. 646.

[5] *Parthasarthy* v. *Theruvengade*, (1907) I.L.R. 30 Madras 340 (judgements of Subramania Ayyer J.).

[6] *Advocate General* v. *Jimbai*, (1917) I.L.R. 41 Bom. 281, 282, 283, 284 (Beaman J.).

[7] See the observations of Mookerjee, J. in *Bhupti* v. *Ram Lal* (1910) I.L.R. 37 Cal 13728 (FB) and of Jailal J. in *Brijlal* v. *Narainbas* (1933) I.L.R. 14 Lahore 827.

[8] *Runchordas* v. *Parvati*, (1899) L.R. 26 I.A. 71 (1899) I.L.R. 28 Bom. 725 (P.C.).

[8a] Mukherjee Hindu Law of Religious and Charitable Trusts (1979) page, 118, para 3.16 and p. 119 para 3.16A.

[9] Bill No. 10 of 1938, Gazette of India, Part 5, dated 17.9, 1938, Paruck, Succession Act, commentary on section 89.

[10] S. 10, Explanation, Bombay Public Trusts Act, 1950.

Section 10 of the Bombay Public Trusts Act, 1950, is quoted below[1] ;

"10. Notwithstanding any law, custom or usage a public trust shall not be void only on the ground that the persons or objects for the benefit of whom or which it is created are unascertained or unascertainable."

Explanation : A public trust created for such objects as dharma, dharmada or punyakarya, or punyadan shall not be deemed to be void, only on the ground that the objects for which it is created are unascertained or unascertainable.".

16.26. Having regard to what is stated above, it is, in our opinion, desirable to add an Explanation to section 89, Succession Act on the same lines as has been done[2] in the Bombay Public Trusts Act, 1950. We recommend accordingly. Recommendation to amend section 89.

VI. Application of description to external reality

16.27. Illustrating the general principle that a will speaks from the moment of death of the testator, section 90 provides that the description contained in a will of property, the subject of gift, shall, unless a contrary intention appears by the will, be deemed to refer to and comprise the property answering that description at the death of the testator. Section 90.

The section needs no change.

16.28. Section 91 provides that unless a contrary intention appears by the will, a bequest of the estate of the testator shall be construed to include any property which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power; and a bequest of property described in a general manner shall be construed to include any property to which such description may extend, which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power. Section 91.

No amendments are needed in the section.

16.29. This takes us to section 92, which reads as under :— Section 92.

"92. Where property is bequeathed to or for the benefit of certain objects as a specified person may appoint or for the benefit of certain objects in such proportions as a specified person may appoint and the will does not provide for the event of no appointment being made; if the power given by the will is not exercised, the property belongs to all the objects of the power in equal shares."

The section needs no change.

16.30. Certain words and expressions commonly used in wills are dealt with in section 93 quoted below : Section 93.

"93. Where a bequest is made to the 'heirs' or 'right heirs' or 'relations' or 'nearest relations' or 'family' or 'kindred' or 'nearest of kin' or 'next of kin' of a particular person without any qualifying terms, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person and he had died intestate in respect of it, leaving assets for the payment of his debts independently of such property."

No amendment is needed in this section. The significance of the section lies in the provision contained in the words "as if it had belonged to such person and he had died intestate", which practically make the heirs of such person the beneficiaries, rendering further inquiries unnecessary. It applies only if the class is the direct object of bequest. Contrast section 97.

16.31. Continuing the method of spelling out the meanings of words commonly used in wills, section 94 deals with the case where a bequest is made to Section 94.

[1]S. 10, Bombay Public Trusts, Act, 1950.

[2]Section 10, Explanation, Bombay Public Trusts Act, 1950 (Para 16.25 *supra*).

the 'representatives', 'legal representatives', 'personal representatives' or 'executors or administrators' of a particular person. If such class so designated forms the direct and independent object of bequest, the property bequeathed shall be distributed as if it had belonged to such person and such person had died intestate in respect of it.

The section needs no change. The principle is the same as that explained under section 93.

VII. Quantum of Interest

Section 95.

16.32. Under Section 95, where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him. With this provision, section 8 of the Transfer of Property Act, 1882, may be compared. Previously, there used to be scope for controversy as to whether a particular bequest to a Hindu female was intended to give her an absolute estate, or whether there was to be read into the bequest a limitation of a life interest or the like. But this controversy could not survive after it was laid down by the privy Council that there was no need to read any such limitation in a will. This interpretation has been re-affirmed by the Supreme Court.[1].

Kania J. in a Bombay case,[2] made an exhaustive survey of the decided cases on the subject upto 1943. Section 14 of the Hindu Succession Act, 1956, now provides as under as regards Hindus :—

> "14. *Property of a female Hindu to be her absolute property* : (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.
>
> *"Explanation* : In this sub-section 'property' includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.
>
> "(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

Provisions in the Hindu Succession Act.

16.33. What section 95 of the Succession Act and section 8 of the Transfer of Property Act lay down is in substance, also enacted in section 14 of the Hindu Succession Act.[3] If a "restricted interest" was intended for a legatee in general (section 95, Succession Act) or if a "restricted estate" is intended for a female Hindu (Section 14, Hindu Succession Act), it must "so appear from the will (section 95, Succession Act) or the terms of the will must "prescribe a restricted estate" (section 14, Hindu Succession Act). Notwithstanding the verbal differences in the various provisions, it may be presumed that there is no intention to lay down substantially different rules.

No change in section 95.

16.34. In this position, section 95 needs no change.

Section 96

16.35. This takes us to section 96, quoted below :

> "96. Where property is bequeathed to a person with a bequest in the alternative to another person or to a class of persons, then, if a contrary intention does not appear by the will, the legatee first named shall be entitled to the legacy if he is alive at the time when it takes effect; but if he

[1] *Ram Gopal* v. *Nand Lal*, A.I.R. 1951 S.C. 139.

[2] *Bai Bhuri Bai D. Gurmukhrai* v. *Advocate General*, AIR 1943 Bom. 377; 45 Bombay Law Reporter 669

[3] Para 16.32, *supra*.

is then dead, the person or class of persons named in the second branch of the alternative shall take the legacy."

No amendment is needed in the section. It re-emphasises the principle (section 90) that the will speaks as from the death of the testator.

VII. Bequest to a Class

16.36. According to section 97, where property is bequeathed to a person, and words are added which describe a class of persons but do not denote as the direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the will. Section 97.

The section needs no change. It may be contrasted with section 93.

16.37. Section 98 reads as under :— Section 98.

"98. Where a bequest is made to a class of persons under a general description only, no one to whom the words of the description are not in their ordinary sense applicable shall take the legacy".

No amendment is needed in the section. The emphasis here is on excluding persons not belonging to the class in the ordinary sense of the descriptive words.

IX. Rules of construction

16.38. Section 99 contains nine rules of construction of wills. These are as follows :— Section 99—Construction of terms.

"99. (a) The word "children" applies only to lineal descendants in the first degree of the person whose "children" are spoken of; (Thus, remoter descendants are excluded):

(b) the word "grandchildren" applies only to lineal descendants in the second degree of the person whose "grandchildren" are spoken of;

(c) the words "nephews" and "nieces" apply only to children of brother or sister;

(d) the words "cousins" or "first cousins" or "cousins-german" apply only to children of brothers or of sisters of the father or mother of the person whose "cousins" or "first cousins" or "cousins-german" are spoken of;

(e) the words "first cousins once removed" apply only to children of cousin-german, or to cousin-german of a parent of the person whose "first cousins once removed" are spoken of;

(f) the words "second cousins" apply only to grandchildren of brothers or of sisters of the grandfather or grandmother of the persons whose "second cousins" are spoken of;

(g) the words "issue" and "descendants" apply to all lineal descendants whatever of the person whose "issue" or "descendants" are spoken of; (Thus remote descendants are included—contrast cl. (a);

(h) words expressive of collateral relationship apply alike to relative of full and half-blood; and

(i) all words expressive of relationship apply to a child in the womb who is afterwards born alive."

16.39. The various rules in section 99 are stated in categorical terms, but not much argument is needed to show that they should be applied only where there is no different intention disclosed by a will. We are of the view that this aspect should be brought out by explicit words to be introduced in the section. For this reason, it appears to be desirable to insert, at an appropriate place in the section, some such words as "in the absence of any intention to the contrary".[1] Need for excluding contrary intention.

[1]See paragraph 16.46, *infra*.

Section 99(a) meaning of "child".

16.40. That the section is subject to a different intention could be illustrated from clause (a). While the words[1] 'child' or 'children' dealt with in clause (a) primarily mean only "issue in the first generation", to the exclusion of grand-children or remote descendants,[2] yet the context may show that these words have been used for 'descendants' (or for something else) and so they would sometimes receive another construction than the ordinary one.[3-4]

Meaning of "Children" in general.

16.41. The legal construction of the word 'children' is nothing more than what it is popularly understood to mean, namely, as designating the immediate offspring of a marriage—unless the context otherwise requires or the law otherwise provides. Generally speaking, the word does not extent to grant-children,[5] and the primary meaning to be given to the word is the first generation.[6]

Extended construction.

16.42. But the word can, in the context, be extended to "grand-children". This point is well illustrated in an English case,[7] in which there was a gift to the 'children' of a sister named in the will. At the date of the will, it was known that the sister in question had no children, but had certain grand-children. The expression 'children' was accordingly construed as meaning 'grandchildren'.

Later decisions.

16.43. In a later English case,[8] it is stated that theres is no rule of construction on this question, and each will must be construed on its particular words (see various cases referred to in this case). It has also held in various other cases that the word 'children' under certain circumstances may be extended, and the word has, in fact, been held to mean, 'descendants'. The word has also been interpreted as meaning 'heirs of the body'.[9]

Principle that a will may furnish dictionary.

16.44. The principle that a document may furnish a dictionary from which an extended meaning of 'child' or 'children' may be gathered has been judicially recognised[10] in England. In fact, in England, the Fatal Accidents Act, 1846, sections 2 and 5 (as amended in 1934) expressly provide that 'child' shall include son and daughter and grand-son and grand daughter and step-son and step-daughter.[11]

Where an appointment under a power contained in a will to "any widow of W born in testator's lifetime" was in issue, a widow of W who was in the womb at the time of the death of testator was held to be entitled.[12]

This principle is also incorporated in section 99(i).

Section 99(i) Child in womb—English law.

16.45. Some comment is needed on clause (i) of section 99, dealing with children in the womb. In England, it has been held that a person who is in the womb on a particular date is included in the description of children born or living at a particular date, if it is to the child's own benefit to be so included.[13]

Recommendation as to Sec. 99, main paragraph.

16.46. Having taken into consideration various aspects relevant to the meaning of the expression "child", we have come to the conclusion that cases where a different intention appears from the will should, for reasons already

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[1]See cases cited in Stroud, Judicial Dictionary (1971) Vol. 1, pages 454 to 455.

[2]*Bowen* v. *Lowis*, 54 L.J.Q.B. CB; 9 Appeal Cases 890 (Lord Blackburn).

[3]*Norgan* v. *Thomas*, 51 L.J.Q.B. 556 (Also see paragraph 16.42, *infra*).

[4]*Hardy* v. *Mitford*, 21 Ren. 280.

[5]*Radcliffe* v. *Buckley*, 10 Ves. 195; Henderson, Testamentary Succession and Administration of Eststes in India (1925) page 209.

[6]*Gibson* v. *Gibson* (1901) 1 Ch. 49.

[7]In re : *Smith Lord* v. *Hayward*, 35, Ch. D. 658; Henderson, Testamentary Succession and Administration of Estates in India (1928) p. 209.

[8]In *re; Hovd* v. *Hovd*. 27 L.J. Ch. 505.

[9](*a*) *Bvng* v. *Bvng*. 10 H.L. Ca. 171.

(*b*) *Clifford* v. *Koe*, 5 App. Cas. 447.

[10]*Hill* v. *Crook*, 42, Law Journal Chancery, 702 (Per Lord Cairns).

[11]Section 2 and 5, Fatal Accidents Act, 1846 (as amended in 1934).

[12]Halsbury, 3rd Ed. Vol 39, p. 1075-1076, paragraph 1603.

[13]Re : *Starn's Will Trusts* (1962) Chancery 732; (1961) 3 All ER 1129.

stated,[1] be expressly excluded from section 99. This could be achieved by inserting in the section, before the opening words 'In a will' the words *'In the absence of any intention to the contrary'* (of course, with consequential lettering of the 'I' in the present word 'In'. We recommend that section 99 should be amended as above.

Section 99(i) Child in womb Recommendation to insert a presumption.

16.47. Section 99, clause (i), in so far as it goes, is sound. Though the section is confined to the construction of wills, a similar principle would also apply to intestacy. But often it may be difficult to prove that a child was in *womb at a particular time*. Cases where the child is born within, say six months or so of the death of the father, present no difficulty. But borderline cases involving a longer period of gestation may create problems. Taking up a suggestion made by a learned writer[2] with reference to the corresponding provision in the Hindu Succession Act,[3] we would state that it would be *useful if an Explanation is inserted to section 99, creating a presumption applicable to cases where the birth takes place within a particular period*. As to the precise period, we suggest 315 days.[4]

Effect of section 112 Evidence Act.

16.48. Here it may be noted, that though the Evidence Act[5] contains a presumption as to legitimacy, that does not *directly* deal with the factum of the child being in the womb at a *particular time*. It merely provides that, subject to certain conditions, a child born of a woman within *280 days of the death of the husband* shall be presumed to be the child of the husband of the woman. It is a presumption as to paternity, and as to the date of conception. It does not even directly provide that the child shall be presumed *to have been in the womb at a particular time*. (There was no need to deal with the matter). In the Succession Act, on the other hand, time is crucial, and there is therefore, need to introduce a presumption on the subject in the Act.

We suggest a period of 315 days in this context, as already stated.

Period under section 112.

16.49. The fact that section 112 of the Evidence Act provides a practically conclusive presumption where the birth takes place within 280 days does not mean that a child born after that period should be regarded necessarily as illegitimate. It means merely that there is no presumption in such cases and that the burden of proof may lie on the person who claims legitimacy. In some cases that burden may not be so placed, because one cannot overlook the presumption permitted under section 114 of the Evidence Act.

This is particularly so for the reason that the question of legitimacy is of grave importance, as it is a matter of social status and affects the whole status of the child. The onus which is governed by the rules briefly stated above in such a case is founded on the interest of the child and the interest of the State in matters of legitimacy.[7]

If, having to the common course of natural events and human conduct (section 114), the child is born within a reasonably possible period, the court can raise a presumption of legitimacy,[8] and the burden of proof would then shift. In such a case, the burden of proving illegitimacy would be on him who so alleges it.

Case Law on period of gestation.

16.50. In this position it would, in our view, be permissible to specify a period longer than that mentioned in section 112. The period of 315 days has been suggested by us,[9] having regard to the realities as disclosed in judicial decisions and medical evidence referred to therein.[10]

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[1]Paras 16.39 to 16.44, *supra*.

[2]Cf. section 100.

[3]Dr. Derret, A Critique of Hindu Law (1970) page 249

[4]Section 20, Hindu Succession Act, 1956.

[5]For the draft, see para 16.53, *infra*.

[6]Section 112, Indian Evidence Act, 1872.

[7]*Uttamrao* v. *Sita Ram*, AIR 1963 Bombay 165, 167, paragraph 6.

[8]*Cf. Uttamrao* v. *Sita Ram*, AIR 1963, Bom. 165, 167, para 6 (308 days).

[9]Paras 16.47 and 16.48, *supra*.

[10]*Uttamrao* v. *Sitaram* (1962) 64 Bom. L.R. 752, 757, 761 : A.I.R. 1963 Bom. 165.

It may be noted that in a Madhya Pradesh[1] case, a period of 305 days was held to be permissible.

There are other cases where courts have refused to declare against the legitimacy of the child, where the period that elapsed between the last coitus and the birth of the child was more than the normal period. In the case of *P.* v. *P.*[2] the period was 330 or 333 days. Evidence was led to show what can be the maximum period in such cases of prolonged gestation.

English cases.

16.51. In certain English cases, the period was 346 days[3] or 340 days,[4] or 331 days.[5] Of course, in these cases, the wife had given evidence that the child was legitimate and there had been no adultery.

It is obvious that there is a power in the court to take judicial notice of the fact that there is a normal gestation period.[6] At the same time, judicial notice must also be taken of the fact that in an actual case the period may be longer or shorter than the normal period which is generally given as 270 to 280 days.

Rule of canon law considered.

16.51A. With reference to the proposal (as put forth in the working paper) regarding the child in the womb born within 315 days, the working Paper, forwarded with the letter of the[7] Catholic Bishop's Conference of India, states that canon law presumes children to be legitimate if born within 300 days. The commont raises the apprehension that the "proposed amendment might give rise to fraudulent claims". We do not share this apprehension. The presumption will be rebuttable one, and will be in conformity with the general trend of the case law, referred to above.

Reason for taking a liberal view.

16.52. It was because of the serious disabilities of the illegitimate child that courts have taken a liberal view of the period. In countries where the rights of illegitimate children have been widened,[8] there may be justification for not taking the same liberal view of the presumption of legitimacy. Since we have not yet reached that stage,[9] it would be desirable to make the change recommended above.

Recommendation as to section 99.

16.53. In view of what is stated above,[10] we recommend that the following explanation should be inserted in section 90 on the subject of a child in the womb :

> *"Explanation : For the purposes of this section, a child is presumed to have been in the womb at the time of the death of a person if the child was born within three hundred and fifteen days of such death".*

Section 100 and the question of legitimacy.

16.54. This takes us to section 100.[11] It provides that in the absence of any intimation to the countrary in a will, the word "child", the word "son", the word "daughter" or any word which expresses relationship, is to be understood as denoting only a legitimate relative, or where there is no such legitimate relative, a person who has acquired, at the date of the will, the reputation of being such relative.

An analysis of the section shows that it consists of two parts. The restrictive provision in the first part confines the expressions in question to legitimate relationship. This, however, is modified by the latter half: where the modifying provision—though of a very limited character—covers a person who has, at the time of the will, acquired the reputation of being "such relative". The first part is illustrated by illustrations (i) and (vii).

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[1] *Dhedu Sheoram* v. *Malhanbai*, AIR 1966, MP 252 (305 days).

[2] *P.* v. *P.*, (1911) 12 I.C. 946 (330 or 333 days).

[3] *Wood* v. *Wood* (1947) 2 All R.R. 95, 96.

[4] *Hadlum* v. *Hadlum* (1949) Probate 197; (1948) 2 All E.R. 412.

[5] *Gaskill* v. *Gaskill*, (1921) Probate 425; (1921) All E.R. 365; 126 Law Times 115.

[6] *Preston Jones* v. *Preston Jones*, (1951) 1 All E.R. 124, 127, 135, 136, 139

[7] Letter of the Catholic Bishop's Conference of India, dated 3rd October, 1984.

[8] Compare section 26, Family Law Reform Act, 1969 (Eng.)

[9] Section 100.

[10] Paras 16.45 to 16.47, *supra*.

[11] It is applicable only where there is no legitimate relative.

The second part relating to reputation is illustrated by illustration (iii), (iv), (v) and vi).

The opening words relating to a contrary intention are illustrated by illustrations (iii) and (viii).

16.55. The illustrations to section 100 are mostly based on English cases as will be clear from the following chart[1] : **Illustration to section 100.**

Illustration ( ) *Cartwright* v. *Vawdry*, [illegible] Ves. 590.
Illustration ( ) *Walker* v. *Lunn* [illegible] 233.
Illustration ( ) *K*[illegible] 90. *Gaili*[illegible] v. *Flizard*, 4 Jur. N.S. 652.
Illustration (iv) *Lord Woodhouselee* v. *Dalrymple*, 2 Mer. 417; *Gill* v. *Shelvey* 2 R & M 336.
Illustration (v) *Mortimer* v. *West*, 3 Res. 370.
Illustration (vi) may also be compared with an English Case.[2-3]
Illustration (vii) and (viii) will be considered later.[4]

16.56. Some discussion is necessary as to the position of illegitimate children in the context of section 100. At common law,[5] there is no bar to an illegitimate child as such taking a gift under a will or a deed. But there is a principle of interpretation which, in effect, creates a disability. The principle is that any gift to children as a class, *prima facie* means "legitimate" children. This presumption can be rebutted by proof that the author intended to benefit illegitimate children. Such an intention can be proved if, for example, the testator names the illegitimate children or expressly includes them as a class. The presumption can also be rebutted by showing that at the time of execution of the deed or will it was possible only for illegitimate children to take under it[6]. **Position in common law of illegitimate children.**

There is another disability in illegitimate children in view of the rather curious rule that a gift to illegitimate children to be born in the future is void as against public policy as it has a tendency to encourage immorality.[7]

16.57. The law on the subject has been reformed in many jurisdictions. The provision in South Australia,[8] for example, reads as under :— **Reforms in certain jurisdiction**

"(1) So far as regards succession to any estate under any will or under the total or partial intestacy of a woman, her illegimate child shall have the same right and title as if he were legitimate."

16.58. Section 100, in so far as it deals with the rights of illegitimate children, raises certain important questions of social policy, namely, whether the law should discriminate against illegitimate children even by a presumptive rule of the nature enacted in the section. Our own preference would be for reversing the rule contained in the section, for reasons to be stated in due course.[9] However, in case such a radical reform is found to be not acceptable, there is still scope for certain modifications of substance. If even these modifications are not found to be acceptable, some verbal changes should, in any case, be made in the section. **Section 100-various alternatives recommended.**

16.59. We may now take up section 100 proper, assuming for the time being, that it is to be retained. The first part of the section raises no serious problem of interpretation. It does, of course, raise a question of policy, which we shall discuss later.[10] **Section 100, first part.**

16.60. The second part of the section provides that *where there is no such legitimate relative*, the words enumerated above are to be understood as denoting **Section 100, second part.**

[1]Sec M. N. Basu, Succession Act (1957), commentary on section 100, page 310.

[2]Sec *infra*.

[3]Cf. *Hill* v. *Crook* (1873) LR 6 H. L. 265.

[4]Paragaraphs 16.62 to 16.65 and 16.66 *at. sec. infra*.

[5]Hill v. Crook (1873) Law Reports 6 House of Lords, 265.

[6]Re Eve. (1909) 1 Chancery 796.

[7]Hills v. *Crook*, (1873) Law Reports 6 House of Lords, 265.

[8]Section 55(1), Administration and Probate Act 1919-1966 (South Australia), quoted in Saccville and Lanteri, "Distabilities of illegitimate children in Australia "(1970) 44 Australian Law Journal 55, 58.

[9]See *firna*. (Para 16.65 et. seq. *infra*)

[10]See *infra* 27 (Para 16.65 *et seq. infra*).

a person who has, at the date of the will, acquired the reputation of "being such relative." How, the words "being such relative" are ambiguous, in as much as either they may mean persons having the reputation of being *legitimate relatives*, or they may also mean persons who have the reputation of *relatives simplicitor*. The first construction is supported by the marginal note to section 100, which speaks of "relatives reputed legitimate."

The second construction is supported by the general sense of the section and it may be noted that illustrations (ii) to (iv), to the section, which are relevant to the latter half of the section, do not require that the reputation must be of being a *legitimate relative*. The rule of English law also is that where there are legitimate relatives, the persons who have acquired the reputation, *not necessarily of legitimacy*, of being the child, son, or daughter, etc. as the case may be, of the particular person, will take under the description of son, child or daughter.

Recommendation to amend section 100.

16.61. In the light of what is stated above as to the ambiguity arising from section 100, we recommend that section 100 should be suitably redrafted *so as to refer to a reputation of relationship, but not necessarily a reputation of legitimacy*. The object could be achieved by substituting, in place of the words "being such relative", the words *"being a child, son or daughter or otherwise standing in the relationship in question"*.

(This recommendation is to be carried out only if our alternative recommendation to delete the section[1] is not accepted).

Revised section 100 would then read thus—

"100. In the absence of any intimation to the contrary in a will, the word "child", the word "son", the word "daughter", or any word which expresses relationship is to be understood as denoting only a legitimate relative, or, where there is no such legitimate relative, a person who has acquired, at the date of the will, the reputation of being *a child, son or daughter or otherwise standing in the relationship in question.*"

Section 100, illustrations (vii) and (viii).

16.62. We may now deal with illustrations (vii) and (viii) to section 100, which read as follows :

"(vii) A makes a bequest in favour of his child *to be borne* of a woman who never becomes his wife. The bequest is void".

(viii) A makes a bequest in favour of the child of which a certain woman, not married to him *is pregnant*. The bequest is valid".

In-completeness of sec.100 illustrations (vii) and (viii).

16.63. Illustrations (vii) and (viii) to the section exhibit some incompleteness, inasmuch as their rationale is not manifest from the language used. It appears that some facts basic to the proposition of law are assumed in the illustration, but they are not stated in so many words. Thus, the seventh illustration assumes (without, however, stating so) that a bequest to an illegitimate child, *not yet begotten*, is against public policy. This was the rule in English law, according to earlier cases.[3] We shall discuss the present position on the point later.[4]

Then, the eighth illustration assumes that there is an evidence of a countrary intention, and also that the child is in the womb. For this reason, the bequest is regarded as valid. However, the illustration does not clearly state these important facts.

Change needed in the Illustrations.

16.64. This aspect should be brought out more clearly, by suitably amending the illustrations so as to incorporate the reason on which the view taken in illustrations is based. In illustration (vii), the words *'since it would be against public policy'* should be added at the end—if the illustration is to be retained at all.[5] In illustration (viii), the words *'since there is evidence of contrary intention'* could be added at the end.

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[1] *Kurla* v. *Wilson*, 17 Vessoy 523.

[2] See *infra* (Para 16.65 *et. seq.*)

[3] Cf. (a) Paruck, Succession Act (977), p. 243.

(b) Halsbury, 34th Ed. Vol. 39, page 1074, para 1602, second sub-para.

[4] See paragraphs 16.65 and 16.66, *infra*.

[5] See paragraph 16.65, *infra*.

We may recommend that illustrations (vii) and (viii) to section 100 should be suitably amended as above.

Section 100 -Illustration (vii) -criticism.

6.65. The more important question, however, is whether illustration (vii) to section 100[1] should be retained at all. It has to be noted in this context that the English law, as it developed in the course of the latter half of the 19th century, has taken a different approach in the matter of bequests to illegitimate children of the testator, begotten or both after the date of the will. In the early English cases[2], two reasons were usually given for excluding such children—

(i) uncertainty of determining paternity; and

(ii) the bequest being against public policy.

Uncertainty.

16.65A. A gift to future illegitimate children, expressed by reference to the paternity of a particular person, was regarded,.. in England, as failing for want of certainty, on the ground that in order to ascertain the persons entitled under such a bequest, inquiries might be necessary which the law forbids. This consideration, however, has no applicability in India where the law of evidence does not recognise any prohibition against an inquiry into paternity.

Public policy in England.

16.66. As regards the aspect of public policy, the later English view has been that while illegitimate children *to be begotten* after the death of the testator cannot be provided for by will (nor can future illegitimate children be provided for by deed), yet, so long as the clause is limited to children *in esse* when the document takes effect, it is more, in accordance with the public policy that a suitable provision should be made for them, than that such a clause should be regarded as beyond the scope of the law and that the unfortunate offspring should become a burden on public funds.[3]

Even in one of the earlier English cases,[4] the position was thus stated :

"As to the rest of the gift to the children 'to be begotten'. Every gift to an illegitimate child, the begetting of which is a thing contemplated, must fail. It is against the policy of the law to permit any provision for unbegotten illegitimate children; but it is not against the policy of the law to permit a provision or gift to an illegitimate child begotten, but unborn. I apprehend there is no doubt that a gift to the child of which a woman is enceinte at the time of the gift, is a valid gift, although that child be an illegitimate child. It is a valid gift, because there can be no doubt about the object intended to be benefited."

Occleston's case.

16.67. In Occleston's case,[5] James L. J. Said :

"I will follow the example of Lord Cairns in that case, and suppose a will to be written out at a full length, expressing the testator's intention and meaning, and motives or grounds. Assume the will to be thus written : "Whereas I am living in a connection unhallowed and illicit with A. B. and there have been, *and in the course of nature it is probable there may be offspring born of her body,*[6] *the fruit* of our inter-course, and I do not think it right such offspring should be a burden upon the community, and I desire that, notwithstanding the misfortune of their birth, they should not be left without sufficient means for their maintenance, education, and future welfare. Now, therefore, I do make the following provision for all children born of her body while she is cohbiting with me."

Now what is there against morality, or religion, or public policy in such a provision?

Need for reconsideration of illustration (vii).

16.68. In the circumstances, illustration (vii) to section 100 seems to be anachronstic. On a careful consideration, we see no reason for retaining it in the Indian Statute book. It is inappropriate in India, whichever, way one

[1]Paragraph 16.62, *supra.*

[2]Cf. *Hill* v. *Crook* (1873), L.R.6 HL 265.

[3]*Loveland,* in re. (1906) 1 Ch. 542, 548.

[4]*Holt* v. *Sindrey*, (1869), 28 W. CH. 126, 131, 132.

[5]*Occleston* v. *Fullalove* (1874) 9 Ch. 147, 160.

[6]Emphasis added.

views the matter. So far as proof of paternity is concerned, the law in India has never fought shy of any kind of evidence on the subject.

As to the aspect of public policy, there is considerable force in the approach in later English cases[1], where the matter has been discussed at length and in passages which give convincing reasons for the views expressed.

Proper approach.

16.69. In our opinion, both from the juristic point of view and on wider considerations of social justice, a bequest to an illegitimate child, whether already begotten or otherwise, should not be regarded as against public policy. There is no provision in the Transfer of Property Act corresponding to section 100, Illustration (vii), and we see no reason for retaining any such provision in the law of testamentary succession.

Wider question of policy **as** to legitimacy.

16.70. This discussion is, however, concerned only with the illustration to section 100. The major question of policy which arises out of the section is, how far the law should, at this day, bar illegitimate relatives from claiming under a will by raising an adverse assumption. This question is concerned with section 100 as a whole. Of course, the section does not totally exclude them from so claiming, but entitles them to do so if, and only if, they have acquired the reputation of being 'such relative.' It is a matter for consideration whether, at the present day, the law ought not to be more liberal.

Reform in England

16.71. In this connection, reference may be made to the statutory reform effected in England as to the position of illegitimate children.

The relevant English provisions read as follows[2] :—

"15.(1) In any disposition made after the coming into force of this section—

(a) any reference (whether express or implied) to the child or children of any person shall, unless the contrary intention appears, be construed as, or as including, a reference to any illegitimate child of that person; and

(b) any reference (whether express or implied) to a person or persons related in some other manner to any person shall, unless the contrary intention appears, be construed as, or as including, a reference to anyone who would be so related if he, or some other person through whom the relationship is deduced, had been born legitimate.

(2) "The foregoing sub-section applies only where the reference in question is to a person who is to benefit or to be capable of benfiting under the disposition or for the purpose of designating such a person, to someone else to or through whom that person is related; but that sub-section does not affect the construction of the word 'heir' or 'heirs' or of any expression which is used to create an entailed interest in real or personal property."

Recommendation as to section 100 and to insert sec. 100A.

16.72. It seems to us that the time has come when a similar provision should be introduced in India *in substitution of the rule in section* 100. Testators will, of course, be free to express a contrary intention. But, in the absence of expression of such a contrary intention, the law should now take a bold step and regard illegitimate children as *prima facie* included within the scope of relationship. This would be in consonance with social justice. If a person begets an illegitimate child, it would not, in general, be unrealistic to presume that he would in making a testamentary disposition like to benefit his illegitimate children as well. There will be no interference with his freedom of disposition, as there will still remain scope for the expression of a contrary intention by him.

But, subject to this safeguard, it would, in our view, be proper, as a matter of social justice, to reverse the present rule which was framed at a time when the

[1]See *supra*.

[2]See Occleston, para 16.67, *supra*.

[3]Section 15(1) and 15(2), Family Law Reform Act, (1969)Chapter).

notions of society on the subject under consideration were much more rigid than they are now.

16.73. If the reasoning put forth above is accepted, present section 100 should be deleted and in its place the following inserted : Recommendation as to section 100.

100(1) In any disposition made after the coming into force of the Indian Succession (Amendment) Act—

(a) any reference (whether express or implied) to the child or children of any person shall, unless the contrary intention appears, be construed as, or as including, a reference to any illegitimate child of that person: and Cf. 15 Family Law Reform Act, 1969 (c. 46).

(b) any reference (whether express or implied) to a person or persons related in some other manner to any person shall, unless the contrary intention appears, be construed as, or as including, a reference to anyone who would be so related if he, or some other person through whom the relationship is deduced, had been born legitimate."

"(2) Sub-section (1) applies only where the reference in question is to a person who is to benefit or to be capable of benefiting under the disposition or, for the purpose of designating such a person as is entitled to succeed to someone else to or through whom that person is related; but that subsection does not affect the construction of the word 'heir' or 'heirs' or of any expression which is used to create a limited interest in property."

16.74. As a drafting alternative, section 100 should be revised as under :—

"100. In the absence of any intimation to the contrary in a will, the word 'child' the word 'son', the word 'daughter', or any word which expresses relationship is to be understood, *not as denoting only a legitimate relative but also as including an illegitimate relative.*" Alternate draft.

16.75. We have, in the preceding discussion, made three alternative recommendations[1] as to section 100. This is because the subject-matter of section 100 is somewhat controversial from the social point of view. While we ourselves would like to go to the utmost and replace section 100 by a provision reversing the present rule, we appreciate that there would be many who think that Indian Soceity is not yet prepared for such a change in the law, laudable though the principle of such a reform might be. If some such approach finds favour with those concerned—that is to say, if the most radical alternative of replacing section 100 by the opposite rule cannot be accepted—then certain other improvements that are required in the present section should not be lost sight of. Alternatives recommended as to section 100.

It is for these reasons that we have suggested more than one alternative for consideration.

16.76. Let us now explain, in brief, the purport of each alternative recommended by us and how it differs from the others. Of the three alternatives, the first one is the mildest[2] and involves only a verbal improvement. According to this alternative, section 100, main paragraph, and the seventh and eighth illustrations to that section, would be amended, primarily to leave scope for a contrary intention expressed by the testator and to bring out more clearly the rationale underlying the two illustrations. Merits of each alternative.

The second alternative is somewhat stronger than the first, but is still a moderate one. The substance of section 100 would be left in tact in its main paragraph, the principal change of substance being (by deletion of the seventh illustration), abrogation of the rule that a bequest to an unborn person to be born in the future out of lawful wedlock is void.[3]

The third alternative is the most radical one. It would mean not only a change in the rule contained in the seventh illustration which, after all, is of a

[1] See paras 16.63 to 16.74, supra.
[2] Paragraphs 16.63, 16.64, supra.
[3] See paras 16.65 to 16.67, supra.

limited application), but also a radical change in the rule in the main paragraph of the section which enforces the wider field of rights of illegitimate children under testamentary dispositions. In effect, it would mean the total removal of the disabilities—presumptive though they may be—of illegitimate children provided in the present section 100.

Constitutional questions concerning legitimacy.

16.77. It will be noted that our recommendations relating to the position of illegitimate children under section 100 are based on sociological considerations relevant to the subject. We have not discussed the question whether the present provision in section 100 is, on the ground of undue discrimination, hit by article 14 of the Constitution. The matter has arisen in the United States—though in a slightly different context,[2] and, in general, courts have regarded such provisions as void as violating the constitutional requirements of equal protection of the law.

However, for the purposes of the present discussion, we do not propose to consider that aspect, since even if section 100 is constitutionally valid, there are, as stated above, other considerations which on the merits justify a change in the present position.

Earlier Report on Workmen's Compensation Act.

16.78. We may note that the matter received consideration at some length in the Report of the Law Commission on the Workmen's Compensation Act in the context of the scope of the expression 'dependant'. Some of the foreign precedents and constitutional provisions are also cited in that Report.[3]

Complications whether likely to be created.

16.78A. In a comment on our Working Paper (forwarded through the letter[4] of the Catholic Bishops' Conference of India), it has been stated that the proposal regarding section 100, concerning illegitimate children as beneficiaries under a will may create complications. The comment says : "Anybody can make such a claim on the pretext of being an illegitimate child. On the other hand, should we put legitimate children on a par with illegitimate (children) ?" We have not found ourselves in agreement with the approach shown in this comment. We do not think that claims to willed property on the score of the claimant being an illegitimate child will be put by "anybody". There would be a natural reluctance to put forth such claims, if not honestly believed in. We would also point out that section 100 is confined to only one facet of the topic of illegitimate children's position—namely, the construction of wills. The section, as recommended by us, introduces only a rebuttable presumption.

Section 101.

16.79. This disposes of section 100. Section 101 deals with the rule of construction that is to be applied where a will purports to make two bequests to the same person. Under clause (a) of the section, where the *same specific thing* is given to the legatee twice in the same will, or in the will and again in a codicil, the legatee is entitled to take only once.

Under clause (b), where one and the same will or codicil purports to make to the same person two bequests of the *same quantity or amount* of anything, he shall be entitled to one such legacy only. These *two* clauses are obviously based on the presumption *prima facie* a reasonable one—that in the circumstances dealt with in the two clauses, the second bequest is merely a repetitive one and not a new one.

Under clause (c), where legacies of *unequal amount* are given to the same person in the same will or in the same codicil, he is entitled to both the legacies.

In the remaining cases, under clause (d) the legatee is entitled to both the legacies.[5] The rule is that legacies given by different instruments are ***prima facie*** cumulative.

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[1]Paragraphs 16.63 to 16.74, *supra*.

[2](*a*) *Levy* v. *Louisiana*, (1968) 391 U.S. 68.

(*b*) *Gowez* v. *Perez*, (1973) 109 U.S. 535.

[3]Law Commission of India, 62nd Report (Workmen's Compensation 1923) (October, 1974), pages 33,34, paragraphs 24 & 2.8.

[4]Letter of the Catholic 'Bishops' Conference of India, dated 3rd October, 1984.

[5]*Cf.* Re. *Davis*, (1957) 3 All E.R. 52, 54 (Vaisey J.).

16.80. The rules as given in section 101 could have been expressed in a better way. However, it appears unnecessary to disturb the language of the section at this stage. No change in S. 101.

XII. Residuary Legatee

16.81. One of the more usual types of legacies is a residuary legacy. In brief, it is a legacy whereunder everything that is not otherwise disposed of is given to the residuary legatee. What amounts to a residuary legacy is a matter of great practical importance. How a residuary legatee may be constituted by a will is provided for in section 102. Such a legatee will be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus residue of the property. The basic test is one of the intention, and no particular words are necessary. The reported cases on the section have been gone through, and disclose no need for amending the section. Section 102.

16.82. The rights of a "residuary legatee" (an expression already defined in section 102) are dealt with in section 103. Under a residuary bequest, the legatee is entitled to all property belonging to the testator at the time of his death, of which he has not made by testamentary disposition which is capable of taking effect. This section corresponds to an English statutory provision[1] on the subject. Section 103.

The case where the residue lapses is dealt with later.[2]

16.83. It appears from the case law that there is some obscurity on the question whether, by virtue of section 103, property whose existence was not known to the testator passes under a residuary bequest. The wide language of the section justifies an affirmative answer to this query. In fact, such an answer has been given in a Calcutta case[3]. But in later decision[4-5], it was held that the wider rule should not be applied in construing the wills of Hindu testators. Property not known to the testator.

16.84. In view of this conflict of decisions, we have considered the question whether an amendment by way of clarification is needed, in section 103 in regard to property not known to the testator. Context as disclosing different contention.

In dealing with this question one has to bear in mind certain rules of construction. As is provided[6] by section 83, general words in a will may be understood in a restrictive sense, where the will discloses such an intention. This is illustrated by an English case also,[7] on which section (ii) is based. The provisions of the Indian Succession Act relating to the construction of wills—sections 74 to 90, and particularly section 83—would be material in answering the question, "What passes under a residuary bequest?".

16.85. This position, it seems to us cannot be remedied by any specific statutory provision. The decision in each case will depend on the facts. No attempt will, therefore, be made to suggest any amendment of section 103 on the point under discussion (i.e. on the question how far property whose existence is not known to the testator, passes under a residuary bequest). No change suggested in section 103.

XIII. Time of vesting of legacies

16.86. Having disposed of rules concerning the property over which a will operates, the legislature now turns to the question of time of vesting of legacies. Section 104 deals with the time of vesting of legacy in cases when *there is no postponement* of payment or possession. The case where possession or payment *is postponed,* is dealt with later[8]. Section 104 provides that if a legacy is given Section 104.

[1] Section 25, Wills Act, 1837 (Eng.)

[2] Section 108.

[3] *Fanindra* v. *Administrator General,* (1905) 6 CWN 321.

[4] *Subodh Chandra* v. *Bhubalik,* (1933), I.L.R. 60 Cal. 1406.

[5] *Kunthalammal* v. *Suryaprakasaroya,* ILR 33 Mad. 1906, 29 Mad. L.J. 682.

[6] Section 83, Illustration (*ii*).

[7] *Cook* v. *Oakley,* I.P. Williams, 302.

[8] Section 119.

in general terms, without providing for the specific time when it is "to be paid", the legatee has a vested interest in it from the day of the death of the testator, and if he (the legatee) dies without having it, it shall pass to his representatives.

Section applicable to all properties.

16.87. The underlying principle is that the law favours the vesting of property. Although section 104 uses the words "to be paid"—words which are not appropriate for denoting movable property—there is no doubt that the section is to be read as applicable to devises of *immovable property,* as well as to bequests of movable property[1]. In this position we have no change to recommend in this section.

Section 105—lapse of legacy.

16.88. This takes us to section 105. It provides as follows: —

"105. (1) If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the will that the testator intended that it should go to some other person.

(a) In order to entitle the representative of the legatee to receive the legacy, it must be provd that he survived the testator.

ILLUSTRATIONS

(i) The testator bequeaths to B "500 rupees which B owes me". B dies before the testator. The lekacy lapses.

(ii) A bequest is made to A and his children. A dies before the testator, or happens to be dead when the will is made. The legacy to A and his children lapses.

(iii) A legacy is given to A, and, in case of his dying before the testator, to B. A dies before the testator. The legacy goes to B.

(iv) A sum of money is bequeathed to A for life, and after his death to B. A dies in the lifetime of the testator; B survives the testator. The bequest to B takes effect.

(v) A sum of money is bequeathed to A on his completing his eighteenth year, and in case he should die before he completes his eighteenth year, to B. A completes eighteenth year and then dies in the lifetime of the testator. The legacy to A lapses, and the bequest to B does not take effect.

(vi) The testator and the legatee perished in the same shipwreck. There is no evidence to shows, which dies first. The legacy lapses."[2]

Illustrations to section 105 analysed.

16.89. The six illustrations to the section may now be analysed. Illustration (i) takes a simple case of lapse of bequest. Illustration (ii) is also a case of lapse, and rightly assumes that a bequest to "A and his children" is not to be treated as a *separate gift* to the children of A, but merely connotes' the quality of A's interest. Illustrations (iii) and (iv) are cases where a different intention appears from the will, so that the thing bequeathed does not go as residue. They also illustrate the operation of the rule in sub-section.

Illustration (v) illustrates the first sub-section of section 105, namely, that if the legatee does not survive the testator, the legacy cannot take effect. The alternative bequest to B does not take effect in this case, because the gift to B *is conditional* on A's death before completing his enghteenth year— a condition not fufilled on the facts in this case, as put in the illustration.

Illustration (vi) to the section relates to the very interesting situation described in juristic writings as "commorientis."[3]

Exceptions to the rule in section 105.

16.90. Section 105 states the rule as to lapse of legacy in general terms, but there are certain other provisions also in the Act, constituting exceptions to

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[1]Stokes. Succession Act, page 73, cited by M.N. Basu, Succession Act, (1957), page 329.

[2]This is the situation of *commorientis*. See paragraph 16.91, *infra*.

[3]For detailed discussion of illustration (*vi*), See paragraph 16.91, *infra*.

this rule, or qualifying or explaining its operation. For example, according to section 96, if an alternative bequest is provided for in the event of the legatee pre-deceasing the testator, the person or class of persons named in the second branch of the alternative shall take the legacy. Illustration (iv) to section 105 also provides that in the case of legacy to a legatee for life with remainder to another legatee, the legacy would not lapse, if the tenant for life dies before the testator. The legacy then goes to the other legatee. Section 106 lays down that if a legacy is given to two persons jointly, and one of them dies before the testator, the other legatee takes the whole. Then, under section 109, in the absence of a contrary intention in the will, a bequest to a child or other lineal descendant of the testator does not lapse, if the child or other lineal descendant dies before the testator. Section 110 provides that where the bequest is to a trustee for the benefit of another and the trustee dies before the testator, the bequest does not lapse.

Lastly, under section 116, where a bequest is made to a class of persons, the thing bequeathed shall go only to such of them as are alive at the testator's death. These provisions are all in the nature of qualifications of the general rule in section 105.

Section 105-illustration (vi), commorientes.

16.91. Illustration (vi) to section 105 possesses the greatest juristic interest, dealing, as it does, with the situation of 'commorientes'. It reads as follows :

"(vi) The testator and the legatee perished in the same ship-wreck. There is no evidence to show which dies first. The legacy lapses."

Presumption regarding the 'younger' surviving the 'elder'.

16.92. It is the situation that requires some comment. The case law on the point may first be briefly stated. In a Bombay case[1], the question regarding the survivorship of the 'younger' to the 'elder' came up. Two persons—the uncle aged 60 years and his nephew aged 18 years—had died on the same day. There was no positive evidence as to who died earlier. The High Court held that the probabilities were in favour of the younger man surviving the elder.

This question also came up before the Oudh Chief Court in 1934.[2] Two brothers died in a fire. The widow of one of them claimed the entire property on the ground that her husband, being the younger of the two, must be deemed to have survived the other. It was held that there was no such presumption in the absence of direct evidence and that the onus of proof was on her. Since she failed to prove it, her suits was dismissed.

Sind case.

16.93. This question also came up before the Chief Court of Sind in 1939.[3] A woman and her daughter had died together in an earthquake. There was no evidence as to which of them died first. It was held that there was no presumption in law that older died before the younger.

Calcutta case.

16.94. The question also came up before the Calcutta High Court in 1944.[4] Several persons had died in a common boat disaster and the question arose who had survived. The High Court held it was a question of fact. There was no presumption of law in this respect. The evidence in the case did not establish the survivor-ship of either the husband or the wife.

Privy Council Case.

16.95. A similar question also arose before the Privy Council in 1944.[5] A man and his wife had died together in an earthquake. The wife was younger than her husband.. The Privy Council held that there was no presumption in law that the younger had survived the elder.

Case law under Hindu Succession Act.

16.96. So much as regards the cases under the general law. It may be mentioned that section 21 of the Hindu Succession Act, 1955, provides a presumption in this regard. Some questions that arose after the Act was passed in

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[1] *Y.N.Kulkarni* v. *Laxmi Bai*, AIR 1922 Bombay, 347.

[2] *Mt. Nekshi Kaur* v. *Mt. Jawala Kaur*, A.I.R. 1934 Oudh 101.

[3] *Smt. Copibai* v. *Chunhermal Mulchand*, A.I.R. 1939 Sind 234.

[4] *Disendra Kumar* v. *Kuti Mian*, A.I.R. 1944 Cal. 132.

[5] *Agha Mir Ahmed* v. *Mudassir Shah*, A.I.R. 1944 P.C.100.

1956 may be noted. In all the reported cases [1-3] close relations like husband and wife (and, in two cases, mother and daughter) had died in circumstances where no evidence of survivorship was available. In all the cases, the courts relied upon the presumption enacted in section 21 of the Hindu Succession Act to the effect[4] tha it shall be presumed, until the contrary is proved, that the younger survived the elder. As already stated,[5] the Report of the Law Commission on the Evidence Act deals with this point specifically.[6]

American Law.

16.97. Besides the material mentioned above or referred to in the Report of the Law Commission on the Evidence Act,[7] reference may be made to the (American) Uniform Simultaneous Death Act.[8]

The principal provisions of the Uniform Simultaneous Death Act read as under :—

"1. *No sufficient evidence of survivorship.*

Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died oherwise than simultaneously, the property of each person shall be disposed of as if he had survived except as provided otherwise in this Act."

2. (*Survival of Beneficiaries*).

If property is so disposed of that the right of a beneficiary to succeed to any interest therein is conditional upon his surviving another person, and both persons die, and there is no sufficient evidence that the two have died otherwise than simultaneously, the beneficiary shall be deemed not to have survived. If there is no sufficient evidence that two or more beneficiaries have died otherwise than simultaneously and property has been disposed of in such a way that at the time of their death each of such beneficiaries would have been entitled to the property if he had survived the others, the property shall be divided into as many equal portions as there were such beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each of such beneficiaries had survived."

XV. **Joint legacies and distinct legacies.**

Section 106-Joint legacy.

16.98. Under section 106, if a legacy is given to two persons jointly and one of them dies before the testator, the other legatee takes the whole under the section. This section is understood as dealing with a bequest to two or more persons as 'joint tenants', in contrast with section 107, which is understood as dealing with a bequest as 'tenants in common.' These expressions do not occur in the section, but they are convenient for indicating the two categories contemplated by sections 106-107. Under section 107, if a legacy is given to legatees in words which show that the testator 'intended to give them distinct shares of it', then, if any legatee dies before the testator, his share falls into the residue.

Case law on joint tenancies.

16.99. Section 106, has, however, given rise to a considerable amount of case law on the above point, and in each case, the court has had to determine, after some controversy and effort, whether the bequest was intended to be joint or sveral. It has even been held,[9] that if a gift does not, in any way, indicate an intention to create a tenancy in common, the presumption will be in favour

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[1] *In the matter of Mahabir Singh*, AIR 1963 Punjab 66 (Hindu Succession Act).

[2] *Jayantilal* v. *Mehta Chhanalal*. A.I.R.1968 Gujarat 212 (Hindu Succession Act).

[3] *D.Fadmarla Setty* v. *Gyanchandrappa*, A.I.R. 1970, Mysore 87 (Hindu Succession Act).

[4] Compare section 184, Law of Property Act, 1925 (English).

[5] Para 16.91, *supra*.

[6] Law Commission of India, 69th Report (Evidence Act)—Ch. 50.

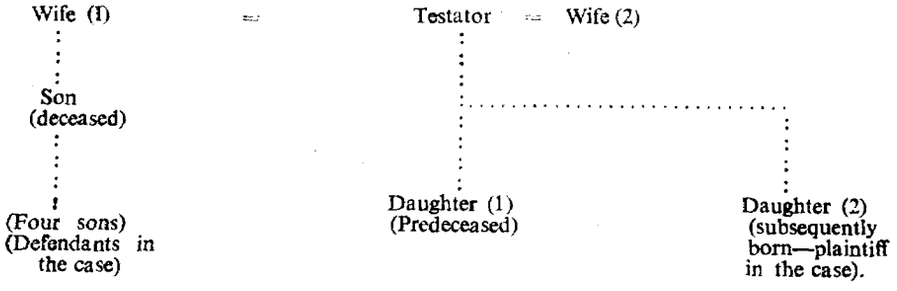
[7] Law Commission of India, 69th Report (Indian Evidence Act).

[8] Sections 1-2, Uniform Simultaneous Death Act.

[9] *Araokl* v. *Damineo* (1910) I.L.R. 34 Mad. 80 (S.B.) (case on section 93 of the 1865 Act) contrast.

of a joint tenancy. It was also observed that the same principle is applicable to wills as to gifts, unless there are special rules justifying a deviation.[1]

16.100. To illustrate what is stated above, it may be useful to refer to the facts of a reported Madras case.[2] A person made a registered will, bequeathing certain properties to his second wife and her only daughter. The daughter predeceased the testator. After the death of the testator, a second daughter was born to the second wife. She was the plaintiff in this case. The defendants were the sons of the son of the testator by his first wife. The following pedigree will make the facts clear : Illustration from reported case.



Prior to this will, the testator had divided himself from his sons, and they were living separately, the properties comprised in the will being the separate properties of the testator.

The plaintiff, (second daughter born to second wife) alleged that on the death of the testator, the second wife had taken possession of all the properties. She (the second wife) left a will, bequeathing all the properties to the plaintiff. The suit was for preventing the defendants from trespassing on the property in dispute.

The contention of the defendants was that as the first daughter predeceased the testator, her half share fell into the residue of the testator's properties and that the defendants were entitled to the same as their father's heirs.

The trial court accepted the plaintiff's claim that the mother became the sole legatee of the entire property on the death of her first daughter. On first appeal, the subordinate judge, and in second appeal the High Court affirmed the findings of the trial court. Hence the present Letters Patent Appeal.

16.101. The first question considered by the High Court was whether the rule of English conveyancing that gift to two persons with words of limitation *prima facie* constitutes a joint tenancy between them, should be imported into the construction of a Hindu will. On a review of cases, the court came to the conclusion that the principle of joint tenancy was unknown to Hindu law, except in the case of joint property of an undivided Hindu family governed by the Mitakshara Law which, under that law, passes by survivorship.[3] However, relying on some cases, the court held that this did not mean that because the principle of joint tenancy is unknown to Hindu Law outside the coparcanary, there can never be a bequest to be taken by two persons jointly.[4] Therefore, there could be a joint gift in favour of two persons, even when the parties are Hindus. But, in this particular case, on an interpretaton of the will, the High Court came to the conclusion that the parties were tenants-in-common.

16.102. Relying on an unreported case, the court held that though section 106 occurs under the chapter headed "of construction of wills", it is not a rule of construction of a will, but is a provision for devolution.

Mankamma Kunwar v. *Balkishan Das*, (1906) I.L.R.28 All .38.

[1]There is no case law on section 106 in 1970 to 1982, laying down any new point.

[2]*Sinnarai* v. *Ramayee Ammal*, A.I.R. 1969 Mad. 96.

[3](*a*) *Mt. Reoti Devi*, v. *Rajandra Paksh Singh*, A.I.R. 1933 P.C.72, 75.

(*b*) *Bhagwan* v. *Reoti Devi*, A.I.R. 1962 S.C. 787.

[4]*Nandi Singh* v. *Sitaram*, (1889) I.L.R.16 Cal. 677 P.C.

Regarding section 107, a plea was raised that if specific expressions providing for the legatees taking distinct shares were not found in the will, the will can be interpreted as amounting to a joint gift and section 106 should be applied. The court refused to accept this argument.

In construing the will, the High Court relied on the following principle :

"Equity favours the construction that *legatees were to take separate shares as tenants-in-common* and hence the court would utilise even a very slight indication of such an intention, to draw that inference."[1]

Ultimately, the court came to the conclusion that the legattes were tenants-in-common. The case was, however, remanded to the trial court for recording extra evidence on a matter not relevant for the present purpose.

Criticism of section 106 as unrecalistic.

16.103. Reverting to section 106, it appears to us that the section, and some of the judicial decisions thereon,[2] somehow appear to proceed on an unrealistic basis,—unrealistic so far as Indian society is concerned. Indian testators hardly, if ever, contemplate that if a legacy is given to two persons, and one of them died before the testator, the other should take the whole. Courts in India lean against joint tenancies.[3-4] Oridinarily, the intention of an Indian testator in India would be not to benefit the other person in such a situation, but to allow his share to fall in the residue.

In fact, in most of the reported decisions on the subject, courts have ultimately regarded the case as falling under section 106, and have construed the words of the will as showing that the testator "intended to give them distinct share". But this conclusion has been reached after considerable amount of debate in each case. In our view, there is no reason why some simple method of reducing the scope for such controversy should not be devised.

Recommendation to. amend section 107.

16.104. In view of what we have stated above, we recommend that the presumption should be the other way, namely, if the will does not, in any manner, indicate an intention that the two persons are to take it jointly the presumption should be in favour of a tenancy in common. We recommend that the law should be amended, by adding an Explanation to section 107 somewhat in these terms :

"Explanation—If the will does not, in any way indicate an intention that the legacy is given to two persons jointly, it shall be presumed that the testator intended to give them distinct shares of it.[5]

16.105. Section 107 reads as under :

"If a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then, if any legatee dies before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.

ILLUSTRATION

A sum of money is bequeathed to A, B and C, to be equally divided among them. A dies before the testator. B and C will only take so much as they would have had if A had survived the testator."

Section 107 is dependent on it being first established that the testator intended to give two or more legatees *distinct* shares—in contrast with the case dealt with in section 106, where a legacy is given to two persons jointly. Whether the one or the other section applies, depends on the view that the court takes as to the nature of the legacy i.e. whether it is held to be joint or several.

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[1] *Robertson* v. *Fraser*, (1871) Ch. A 606.

[2] *Arakal* v. *Demingo*, I.L.R. 34 Mad. 80.

[3] *Mt. Bahu Rani* v. *Rajendra*, A.I.R. 1933 P.C.72; 60 I.A. 75; 64 M.L.J. 365 (P.C.).

[4] See also *Jankibai* v. *Saha*, A.I.R. 1961 M.P. 139, 140.

[5] To be added to section 107.

16.106. We have, while discussing section 106, already[1] made a recommendation for amendment of section 107. No further, comments are needed, but it may be stated that fairly recent judicial decisions[2] show that the court more readily infers a tenancy in common than a joint tenancy.

XVI. Effect of lapse and analogous situations

16.107. According to section 108,[3] where a share which lapses is a part of the general residue bequeathed by the will, that share shall be treated as undisposed of. The illustration to the section states that the testator bequeathes the residue of his estate to A, B and C, to be equally divided between them. A dies before the testator, his one-third of the residue goes as undisposed of. **Section 108 : Laps of part of genera residue.**

Section 103 may be contrasted with section 108, while, under section 103, *a legacy that lapses* will form part of the residue and will go to the residual legatee, section 108 comes into operation when the *residue itself lapses* by the death of the residuary legatee before the testator or in any other manner. Where the residue is undisposed of or lapses, it will go as on intestacy.[4]

Where there are several residuary legatees, who are given the residue as tenants is common, the share of any one who dies in the lifetime of the testator will lapse, and will not augment the remaining parts of the residue, but will, by virtue of section 108,devolve as undisposed of.

No changes are needed in this section.

16.108. Under section 109, where a bequest has been made to any child or other lineal descendant of the testator, and the legatee dies in the lifetime of the testator, but any lineal descendant of his survives the testator, *the bequest shall not lapse*, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the will. Stated in a simplified form, the proposition intended to be enacted is that there is no lapse of the bequest if the legatee, being a child or other lineal descendant of the testator, himself leaves a lineal descendant who survives the testator. The legal fiction created is that the bequest shall take effect as if the legatee died immediately after the death of the testator. A notional distribution of the potential share of the legatee would then be made. This section is an exception to the general rule of 'lapse' in section 105. **Section 109-bequest to lineal descendant dying in lifetime of testator.**

The expression "child" in the section includes 'children" also.[5]

16.109. The expression 'lineal descendant' occuring in the opening part of section 109 includes male as well as female lineal descendants,[6] of the testator. No clarification is needed on this point. With reference to the same expression used for the second time (in relation to the lineal descendant of the *legatee*), it does not extend to any other heir,[7] but it should also be noted that once the condition of the existence of a lineal descendant is satisfied, then the benefit (under the last part of the section), is available to every heir of the legatee, and is not confined to heirs who are lineal descendants of the legatee. **Meaning of 'lineal descendant'.**

The above propositions are offered merely by way of elucidation. The section itself needs no change.

16.109A. By the Administration of Justice Act, 1982, the earlier English provision in section 33 of the Wills Act, 1837 has been revised in regard to gifts to children or other issues who leave issue living at the testator's death. **Gifts to children : recent reform in England.**

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[1]See discussion as to section 106.

[2]*Sanjeeva Reddy* v. *Akhilendamnal*, I.L.R. (1968) 1 Mad. 138.

[3]Paruck, Indian Succession Act, (1977), page 262.

[4]*Tolsevdas* v. *Premji*, I.L.R. 13 Bom.61.

[5]*Shanti* v. *Bhagwan*, AIR 1984 page 313; Para 10.

[6]*Bhim Nath* v. *Smt. Tara*, A.I.R. 1929 P.C. 162.

[7]*Mohammed* v. *Aziz-un-Nissa*, A.I.R. 1935 Oudh 437.

The most important provision is in section 33(1) (as revised), reading as under :—

"33.(1) Where—

(a) a will contains a devise or bequest to a child or remoter descendant of the testator; and

(b) the intended beneficiary dies before the testator, leaving issue; and

(c) issue of the intended beneficiary are living at the testator's death, then, unless a contrary intention appears by the will, the devise or bequest shall take effect as a devise or bequest to the issue living at the testator's death."

A similar provision has been made in section 33(2) regarding gifts to a class which consists of children. Other incidental provisions have also been made.

Section 110.

16.110. We now proceed to section 110, which provides that where a bequest is made to one person for the benefit of another, it does not lapse by the death (in the testator's life time) of the person to whom the bequest is made. The rationale of the section can be easily discerned. The principle is, that the law looks to the real beneficiary, and not to the nominal owner, who is merely the medium through which the gift is made. His death therefore (that is, the death of the nominal owner) should make no difference to the subsistence of the gift. The section does not appear to need any change.

Gifts to spouses : recent reform in England.

16.110A. In England, in regard to gifts to spouses, section 22 of the Administration of Justice Act, 1982, implementing a recommendation of the Law Reform Committee,[1] introduces a presumption. The object of the section is to cover cases where, for example, the testator makes a gift of all his property "to my wife and after her death to our children." This type of bequest, often found in home-made wills, would normally be interpreted as conferring only a life interest on the wife, because of the need to preserve the remainder to the children. Generally, however, this is contrary to the intention of the testator who really intends to give the property exclusively to his wife, but to have a say over its ultimate destination. Section 22 of the Administration of Justice Act, 1982 now provides as under :—

"22 Except where a contrary intention is shown, it shall be presumed that if a testator devises or bequeaths property to his spouse in turns which in themselves will give absolute interest to the spouse, but by the same instrument purports to give his issues an interest in the same property, the gift to the spouse is absolute notwithstanding the purported gift to the issue."

Section 111—Survivorship in case of bequest to described class.

16.111. This takes us to section 111. Section 111 reads as under :—

"111. Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as are alive at the testator's death.

Exception—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, the property shall at that time go to such of them as are then alive, and to the representatives of any of them who have died since the death of the testator.

ILLUSTRATIONS

(i) A bequeaths 1,000 rupees to the "the children of B" without saying it is to be distributed among them. B had died previous to the date of the will, leaving three children C, D, E.

E died after the date of the will, but before the death of A. C and D survive A. The legacy will belong to C and D, to the exclusion of the representatives of E.

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[1]Law Reform Committee, Report on the Interpretation of Wills (1973), cmd. 5301

(ii) A lease for years of a house was bequeathed to A for his life, and after his decease to the children of B. At the death of the testator, B had two children living, C and D, and he never had any other child. Afterwards, during the lifetime of A, C died, leaving E, his executor. D has survived A. D and E are jointly entitled to so much of the leasehold term as remains unexpired.

(iii) A sum of money was bequeathed to A for her life, and after her decease, to the children of B. At the death of the testator, B had two children living, C and D, and, after that event, two children E and F were born to B. C and E died in the lifetime of A, C having made a will, E having made no will. A had died leaving D and F surviving her.

"The legacy is to be divided into four equal parts, one of which is to be paid to the executor of C, one to D, one to the administrator of E and one to F."

(iv) A bequeaths one-third of his lands to B for his life, and after his decease to the sisters of B. At the death of the testator, B had two sisters living, C and D, and after that event another sister E was born. C died during the life of B, D and E have survived B. One-third of A's land belong to D, E and the representatives of C, in equal shares.

(v) A bequeaths 1,000 rupees to B for life and after his death equally among the childden of C. Up to the death of B, C had not had any child. The bequest after the death of B is void.

(vi) A bequeaths 1,000 rupees to "all the children born or to be born" of B to be divided among them at the death of C. At the death of the testator, B has two children living, D and E. After the death of the testator, but in the lifetime of C, two other children, F and G, are born to B. After the death of C, another child is born to B. The legacy belongs to D, E, F, and G, to the exclusion of the after-born child of B.

(vii) A bequeaths a fund to the children of B, to be divided among them when the eldest shall attain majority. At the testator's death, B had one child living, named C. He afterwards had two other children, named D and E. E died but C and D were living when C attained majority. The fund belongs to C, D and the representatives of E, to the exclusion of any child who may be born to B after C's attaining majority."

The section needs no change.

CHAPTER 17

Void Bequests: Sections 112 to 118

Scope.

17.1. Void bequests are dealt with in sections 112—118. Assuming that a will is formally valid and has been made by a testator competent to make it and raises no questions of construction, problems may still arise by reason of the fact that a particular bequest made by the will is void in law. A bequest may, for example, be void if the beneficiary contemplated by the description given in the will does not exist at the time of death or other material time (section 112 read with the Exception and the illustrations to the section). This is a case of impossibility or failure created *by external circumstances*. More frequent is the case where the bequest is void because it violates a *statutory mandate* laid down in the Act. On certain grounds of public policy, the law has inserted certain prohibitions concerned with remoteness, perpetuities, accumulations and hasty gifts to charities. These are to be found in sections 112 to 118.

17.2. Section 112 reads as under:—

Section 112-Bequests to person by particular description who is not in existence at testator's death.

"112. Where a bequest is made to a person by a particular description and there is no person in existence at the testator's death who answers the description, the bequest is void.

Exception:—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession

of it is deferred until a time later than the death of the testator, by reasons of a prior bequest or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or, if he is dead, to his representatives".[1]

This section needs no change.

Section 113-Bequest to person not in existence at testator's death subject to prior bequest.

17.3. This takes us to section 113. It reads as under:—

"113. Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the latter bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed."

The section broadly corresponds to section 13 of the Transfer of Property Act. Section 13 of the Transfer of property Act, 1882, provides as under:—

13. Where, on a transfer of property, an interest therein created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property".

Recommendation in the Law Commission Report on the Transfer of Property Act.

17.4. The Law Commission in its Report on the Transfer of Property Act, 1882[2] recommended that section 13 of that Act should be deleted, or, in the alternative, some changes (set out in the Report) should be made in the section. This recommendation[3] was made after a consideration of the difficulty created by the Privy Council judgment in *Sopher's case*[4] and after taking note of the legislation passed in the erstwhile State of Bombay on the subject, modifying the effect of *Sopher's case*.

17.5. The Law Commission noted that the language of section 113 of the Indian Succession Act, 1925 had been very restrictively construed by the Privy Council in *Sopher* v. *Administrator-General of Bengal*.[5] In that case, a testator bequeathed the income of his residuary estate to unborn grandchildren who should be born during his widow's lifetime, if they should survive their fathers, and also bequeathed to them the corpus of the residuary estate if they should attain the age of 18. The Privy Council held that both the gifts failed under section 113. The gift of income was void because since it was dependent upon the legatees surviving their father it did not comprise the whole of the testator's remainder in trust, and the gift of the corpus failed for the same reason, and for the additional condition that the legatees must attain their majority. This decision was regarded as a surprising one by the Indian legal profession.[6]

Viscount Maugham, in delivering the judgement of the Judicial Committee, made the following observations[7] :—

".....that if, under a bequest in the circumstances mentioned in section 113, there is a possibility of the interest given to a *beneficiary being defeated either by a contingency or by a clause of defeasance,* the beneficiary under the later bequest does not receive the interest bequeathed in the same unfettered form as that in which the testator held it and that the bequest to him does not therefore *comprise the whole of the remaining* interest of the testator in the thing bequeathed."

It was, therefore, held that the bequest, being not of the whole of the interest of the testator, was void.

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[1]Compare section 111, Exception.

[2]Law Commission of India, 70th Report (Transfer of Property Act) paras 21.8 to 21.13.

[3]See Para 17.6, *infra.*

[4]*Sopher* v. *Administrator General of Bengal,* (1944) L.R.71 I.A. 98 P.C.; AIR 1944 P.D. 67.

[5]*Sopher* v *Administrator General of Bengal,* (1944) L.R. 71 I.A. 98:A.I.R. 1944 P.C.67.

[6]*Framroze* v. *Tehmina,* A.I.R. 1948 Bombay 188.

[7]*Sopher* v. *Administrator General of Bengal* AIR 1944 P.C.67, 70.

17.6. This decision created certain problems, noted by the Law Commission in its Report on the Transfer of Property Act.[1] The following is an extract from that Report.[2] Discussion in earlier Report.

"21.8. *Effect of Sopher's case* : As has been pointed out by a writer on the Law of Succession,[3] the decision in *Sopher's case*[4] upset the view of the legal profession which, upto then held that if to an unborn person the whole of the remaining interest was given, that would be sufficient compliance with the provisions of section 13 and section 113 respectively, and the contingency of attaining majority or surviving a certain person or the conditions attached to the gift or bequest or any provision reserving power to revoke the trust, did not violate the law. Since this view was held to be erroneous by the Privy Council in *Sopher's case,* there was public agitation and, in fact, a Bill was introduced in the Central Legislative Assembly[5] "proposing to omit section 13 and section 113. The Bill did not become law, but the Bombay Legislature passed in 1947 an Act to validate dispositions made previously on the basis of previous understanding, of the Law."

"21.9. The application of section 113 of Succession Act to certain dispositions of property in the erstwhile State of Bombay is restricted by the Dispositions of property (Bombay) Validation Act, 54 of 1947 (an Act to validate certain dispositions of property in the Province of Bombay) which came into force on 16th January, 1948, as under :[6]

"2. This Act shall apply to all trusts made and to all wills and other testamentary dispositions of persons who have died, before the first day of January one Thousand nine hundred and forty-five.

"(a) Where such trusts, wills, or testamentary dispositions relate to immovable property situated within the Province of Bombay;

(b) Where such trusts, wills, or testamentary dispositions relate to property of every description other than immovable property and are declared, executed or made by a settlor or testator, as the case may be, in the Province of Bombay, notwithstanding anything to the contrary contained in Part II of the Indian Succession Act, 1925.

"3(1) *Validation of certain dispositions*—

The following provisions of law shall not apply and shall be deemed never to have applied to the dispositions of property contained in or made by the instruments mentioned in section 2, namely, (a) section 13 of the Transfer of Property Act, 1882, and (b) section 113 of the Indian Succession Act, 1925."

(2) The dispositions of property contained in or made by the instruments mentioned in section 2, the enactments mentioned in the first column of the Schedule to this Act shall apply, and be deemed to have always applied, with the omissions and modification specified in the second column of the Schedule.

"4. *Saving*—Nothing in this Act shall be deemed to affect or prejudice in any way any right, title or interest accrued to any person under a final decree" or order of a competent court or acquired by any person for valuable consideration before the coming into force of this Act.

(Schedule not reproduced)."

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[1]Law Commission of India, 70th Report (Transfer of Property Act).

[2]70th Report, paras 21.8 to 21.13.

[3]Paruck, Indian Succession Act (1966), page 238.

[4]*Sopher* v. *Administrator General of West Bengal,* A.I.R. 1944 P.C.67.

[5]Transfer of Property and Succession (Amendment) Bill, 1946 (Gazette of India, Part V, Page 92, dt. 16-2-1946).

[6]Dispositions of Property (Bombay) Validation Act (Bombay Act 54 of 1947).

The Commission further proceeded to observe:—

"21.10. *Recommendation to repeal section* 13—

We are of the view that having regard to the fact that there is also in force the rule against perpetuities, it is not necessary that the rule in section 13 should be continued on the statute book. This section seems to have been suggested by the "corresponding section in the Succession Act, and the Report of the Law Commission relating to the Succession Act, 1865, merely states that it has been provided that the interest to be given to the unborn child must extent to the whole of the interest. Having regard to the fact that the object of the law to prevent provisions fettering the free circulation or postponing the vesting of property is sufficiently achieved by section 14, we think that section 13 should be deleted. Even if the unborn person is allowed to take a limited interest, the subsequent interest must vest within the period allowed by section 14 and this, in our view, is enough as a safeguard".

"21.11. *Alternative recommendation*—However, if it is decided not to delete the section, it is, in our view, necessary to make it clear that conditions of the nature involved in *Sopher's case* which, while not restricting the quantum of interest of the unborn person, make it defeasible or affect the certainty of its vesting, are not to be construed as violating section 13. 21.12. *Child in the womb*—It is also necessary—if the section is retained—to add an Explanation to the effect that a child in the womb, if born alive, is not deemed to be an unborn person. Such an addition would be merely codifying the judicial construction."

Recommendation in earlier Report (T.P. Act).

17.7. The discussion in the earlier Report ends with the following recommendations:—

"Our recommendation, then, is that—

(a) Section 13 should be deleted;

(b) In the alternative, that is to say, if section 13 is retained, clarification as suggested above should be made on two points, namely :—

(i) the scope of the expression "extends to the whole of the remaining interest" should be explained; and

(ii) the case of child in the womb should be dealt with expressly".

Recommendation as to section 113, Succession Act.

17.8. We have quoted *in extenso* the discussion in the earlier Report of the Law Commission, as the reasoning is equally applicable to section 113 of the Succession Act. In fact, the decision in *Sopher's case*[1], which was one of the important background materials considered in the earlier Report, was rendered on a construction of section 113 of the Succession Act.

In the light of the above discussion, we recommend that section 113 should be amended on the lines stated above, if it is not deleted totally.

Section 114-Rule against perpetuity.

17.9. This takes us to section 114. Section 114 provides that no bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

Recommendations made in Report on Transfer of Property Act.

17.10. The section corresponds to section 14 of the Transfer of Property Act. The Law Commission has, in its Report on that Act, recommended[2] certain changes in section 14. Similar amendments should be made in section 114, Succession Act also, which is in *pari materia* with section 14.

The matter was put in that Report in the form of propositions as follows :—

"(1) *Proposition 1*

In applying section 14 to an interest in property limited to take effect at or after the termination of one or more life interest of persons in being

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[1] *Sopher* v. *Adm. General of Bengal*, A.I.R. 1944 P.C. 67.

[2] Law Commission of India, 70th Report (Transfer of Property Act) paras 22.50 to 22.65.

when the period mentioned in section 14, commences to run or on or after the termination of lives of persons in being when such period commences to run, the validity of the interest shall be determined on the basis of the facts existing at the termination of such one or more life estates or lives.

Explanation—For the purposes of this proposition, an interest which must terminate not later than the death of one or more persons is a life interest, even though it may terminate at an earlier time.[1] [2] Para 16.10

(2) *Proposition 2*

If an interest in property would be void under section 14 because it is contingent upon *any person* attaining or failing to attain an age in excess of majority, the contingency shall be reduced to the age of majority, as regards all persons subject to the same age contingency.

(3) *Proposition 3*

Propositions 1 and 2 shall not be construced as invalidating or modifying the term of any limitation which would have been valid under section 14 apart from those propositions.[3]

(Note : Propositions 1 and 2 are intended to validate certain gifts that would be invalid by reason of certain hardships arising from the present law. If, however, a gift is valid under the present law, then propositions 1 and 2 are not called into operation).

(4) *Proposition 4*

Propositions 1 to 3 shall apply to:—

(a) transfers taking effect on or after the date on which those propositions become operative.

(b) appointments made after that date in exercise of a power of appointment, including appointments made by an instrument under a power created before that date.[4]

"By way of explanation of paragraph (b) it may be stated that when a power has been created *before* the amended law becomes operative, and the appointment is made *after* that date, the new law is intended to apply to the interest created by the exercise of that power".

17.11. We now proceed to section 115. According to Section 115, if a bequest is made to a class of persons with regard to some of whom it is inoperative by reason of the provisions of section 113 or section 114 such bequest shall be void in regard to those persons only, and not in regard to the whole class. Section 115.

The section needs no change.

17.12. According to section 116, where, by reason of any of the rules contained in section 113 and 114, any bequest in favour of a person or of a class of persons is void in regard to such person or the whole of such class, any bequest contained in the same will and intended to take effect after or upon failure of such prior bequest is also void. Secton 116-Bequest to take effect on failure of prior bequest.

The section needs no change.

17.13. Section 117 provides as follows:—

"117. (1) Where the terms of a will direct that the income arising from any property shall be accumulated either wholly or in part during any period longer than a period of eighteen years from the death of the testator, such direction shall, save as hereinafter provided, be void to the extent to Section 117—Effect of direction for accumulation.

[1] 70th Report, para 22.56.

[2] For signifiance of the Explanation, see 70th Report, para 22.57.

[3] 70th Report, para 22.64.

[4] 70th Report, para 22.65.

which the period during which the accumulation is directed exceeds the aforesaid period, and at the end of such period of eighteen years the property and income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation for the purpose of :—

(i) the payment of the debts of the testator or any other person taking any interest under the will; or

(ii) the provisions of portions for children or remoter issue of the testator or of any other person taking any interest under the will, or

(iii) the preservation or maintenance of any property bequeathed ;

and such direction may be made accordingly."

The section needs no change.

Section 118.

17.14. Section 118 imposes certain restrictions in relation to bequests for religious or charitable uses. If the testator has a nephew or niece or any "nearer relative", he cannot bequeath any property to religious or charitable uses, except by a will (i) executed not less than 12 months before his death, and (ii) deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons. This section does not apply to Hindus, etc. The section has suffixed to it certain illustrations.

The illustrations to section 118 have been held to be merely enumerative.[1]

There is no definition, in the section, of the expression 'religious' or of the expression, 'charitable'. Accordingly, the expressions will have to be construed in conformity with such judicial decisions as may be applicable.

The object of imposing this restriction is to prohibit death-bed bequests to religious or charitable uses by persons having near relation.[2] Apparently, the assumption is, that there might be undue pressure in such circumstances.

History of Law in England

17.15. At one stage, in England, there were certain restrictions[3] in regard to bequests of land to charitable trusts by will. Initially, such bequests were even prohibited[4]. In 1925, when the Settled Land Act was passed[5], another provision was substituted on the subject. All such restrictions were, however, repealed in 1960[6], as anchronistic.[7]

Section inconsistent with social notions.

17.16. Prima facie, the section does not appear to be consistent with modern social notions. Whether a person should, or should not, prefer charity to near relatives, is a matter which may better be left to his discretion, rather than be restricted by rigid statutory provisions. The minimum interval of 12 months required by the section, and the compulsory formality of deposit of the will in safe custody could also cause hardship, in cases where death comes suddenly or without a prolonged illness. No doubt, the number of persons making charitable bequests of a considerable value may not be very large. Nevertheless, the above difficulties do require serious consideration.

Case for deleting section 118, and alternatives put in the Working paper.

17.17. Having regard to the above consideration, there is a plausible case for deleting section 118. Taking note of this aspect, we had included, in the Working Paper circulated on the subject, a proposal for deleting the section and invited views on the subject. However, appreciating that total deletion of section 118 may be regarded by some persons as too drastic a course, we had

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[1]*Commissioner of Income-Tax* v. *National Mutual Association,* I.L.R. 57 Bom. 519.

[2]Paruck, Succession Act, (1977), page 313.

[3]Mortmain and Charitable Uses Act, 1891 (repealed).

[4]Mortmain and Charitable Uses Act, 1891 (repealed).

[5]Section 29(4), Settled Land Act, 1925 (repealed).

[6]Charities Act, 1960.

[7]See criticism by Nathan Committee (Committee on Cheritable Trusts) Report (1952), pages 63.64 paragraps 262-276.

also put forth, in the Working Paper, an *alternative* proposal, whereunder, while the section would be retained, its rigour could be mitigated by making certain needed amendments.

Amendment as an alternative.

17.18. The rigour of the present section could be mitigated (a) by removing the provision for deposit, and (b) removing the minimum interval, and (c) by merely substituting a requirement that one of the near relatives must be an attesting witness. The expression "near relative" can be suitably defined[1] as meaning a nephew or niece or a nearer relative.

Section 118-'nearer relative'.

17.19. There is one more change, which is worth consideration with reference to section 118, if the section is to be retained. The words 'nearer relative' occurring in the section have raised a controversy. The Madras High Court has held[2] that a widow is not a 'nearer relative'. A bequest to charity by a person who dies two days after the making of the will, leaving a widow, was accordingly held to be valid, on the ground that this section had no application to any relationship[3] by marriage. In coming to this conclusion, the judges relied on the word 'nearer', which they regarded as conclusive. That word, in their opinion, postulated a relationship which could be measured *by degrees*. There could not be any question of measuring 'nearness' (or distance) *by comparison* between the wife and other relatives.

A contrary view has, however, been taken by the Bombay High Court,[4] holding that the widow is included in the term 'nearer relative'.

We are not concerned with the question as to which is the true construction of the section as it stands as present. But the Bombay view[5] appears to be preferable in order to protect the interests of the widow. If the section is to be retained, it appears to be desirable to incorporate that view.

Section 118 thus needs to be amended so as to ensure that a bequest to charity shall not be valid if the testator's spouse is alive, unless the will be executed in accordance with certain special requirements. The object could be achieved by inserting the following Explanation below the section:—

> *"Explanation: The spouse of a person shall be deemed to be the nearest relative of that person for the purposes of this section."*

Views on the Working Paper, and recommendation

17.20. Of the comments received by us on the Working Paper on the subject, only on one—a suggestion forwarded through the Catholic Bishops' Conference of India[6]—has dealt with section 118, and the view expressed is that deletion of section 118 would be too radical a course, and that it would be better to amend the section rather than delete it.

Although our own inclination is for deleting the section, we think that, at least for the present, it would suffice if section 118 is amended on the lines already indicated in the preceding discussion.[7] We recommende that the section should be so amended.

Section 118—the question of legitimacy.

17.21. The relations contemplated by section 118 are, according to judicial construction, legitimate relations flowing from lawful wedlook. In a Bombay case, where it was so held,[8] Batchelor J. held that the Indian Succession Act was based on English Law, and defined relationship flowing from lawful wedlock only. A bastard, in the eye of the law, was *nullius filius*.[9]

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[1]Illustrations to section 118 will need consequential modifications.

[2]*Administrator General* v. *Simpson*, (1902) I.L.R.26 Mad. 532.

[3]Contrast section 25(1), Indian Contract Act, 1872.

[4]*Dinbai* v. *Pestonjee*, O.S. No. 997 of 1917 (Bombay) referred to in Paruck, Indian Succession Act, (5th Ed.), page 259.

[5]Para 17.19, *supra*.

[6]Catholic Bishop's conference of India, New Delhi, letter dated 3rd October, 1984.

[7]Paragraphs 17.18 and 17.19, *supra*.

[8]*Erma Agnes Smith* v. *Thomas Massey*, I.L.R.30 (1906) Bom.500.

[9]Compare judicial decisions on section 37.

Section 118A-Provision in regard to charities as recommended in.

17.22. There is another point concerning charities which needs to be considered. The Transfer of Property Act[1] provides, in effect, that the restrictions imposed by the Act with respect to (i) the rule against perpetuity, (ii) the rule as to a transfer which is to take effect on failure of prior (invalid) interest, and (iii) the rule as to direction for accumulation, do not apply in the case of transfer of property (*inter-vivous*) for the benefit of the public for certain specified purposes (broadly, charitable purposes). We may also add that the Law Commission in its Report on the Act has suggested some changes. Section 18 of the Transfer of Property Act as recommended (to the revised)[2] is as follows:—

> "18. The restrictions in sections 14, 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public, *in the relief of poverty*, the advancement of religion, *education*, commerce, health, safety, or any other object beneficial to mankind."

17.23. The Succession Act does not make any such concession in the case of charities. We however, see no reason why such concessions ought not to be provided in the Succession Act also. Accordingly, we recommend that a new section—say, as section 118A—should be inserted as follows, to provide that the corresponding provisions of the Succession Act shall not apply to bequests.

> "118A. *The restrictions contained in sections* 114, 116 *and* 117 shall not *apply in the case of a bequest for the benefit of the public, for the relief of proverty or the advancement of religion, education, commerece, health, safety or any other object beneficial to mankind.*"

CHAPTER 18

VESTING OF LEGACIES (SECTIONS 119 TO 121)

Sections 119 to 121.

18.1. Certain fundamental rules as to the vesting of legacies are enacted in sections 119 to 121.

Where a legacy is given in general terms, without specifying the time when it is to be paid, the legatee has a vested interst in it from the day of death of the testator. This principle, already enacted in the Chapter[3] realing with rules for the construction of wills, finds re-iteration in section 119, which provides, in effect, that this rule applies even if the legatee is not entitled to immediate possession of the thing bequeathed, unless a contrary intention appears from the will. The date of vesting when the legacy is contingent upon a specified uncertain event is dealt within section 120. Under section 121, where the bequests are made to members of a class who attain a particular age, a person who has not attained that age cannot have a vested interest in the legacy.

Section 119-Date of vesting of legacy when payment or possession postponed.

18.2. Section 119 reads:

> "119. Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest.
>
> *Explanation*: An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision

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[1]Section 18, Transfer of Property Act, 1882.

[2]See Law Commission of India, 70th Report (Transfer of Property Act).

[3]Section 104.

whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person".

The section needs no change.

Section 120.

18.3. Section 120 deals with the date of vesting when a legacy is contingent upon a specified uncertain event. The legacy may be dependent either on the happening of the event, or on the non-happening of the event. In the former case, the legacy does not vest until the event happens. In the latter case, the legacy does not vest until the event becomes impossible. Until vesting, the interest of the legatee is called a "contingent".

Section 120 Exception.

18.4. There is an Exception dealing with the case where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs that the income, or so much of it as may be necessary, is to be applied for his benefit. In such a case, the bequest is not contingent. This negative provision in the Exception, of course, really means that the bequest vests at the time at which it would otherwise vest. Illustrations (xi) and (xiii) to the section bring out the applicability of the Exception.

It should however, be noted that the scope of the Exception is somewhat cut down by the provision in section 121, where a bequest is made to members of a class attaining a particular age.[1] It is clear from the illustration to section 121[2], that where a bequest is made to only such members of the class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy, (this is the provision in the section), and this rule applies even where the income of the share to which a particular child would be eventually entitled, is directed to be applied for his maintenance and education till he attains a particular age. (This is contained in the illustration to section 121).

Thus, section 121 overrides the provision contained in the Exception to section 120. It appears to be desirable to bring out this aspect, i.e., the overriding effect of section 121 (as construed in the light of the illustration to that section) more clearly, by amending the Exception to section 120. Scuh an amendment seems to be advisable in order to avoid any apparent misconception that might otherwise be caused by the wide language of the Exception to section 120.

Recommendation.

18.5. Accordingly, we recommend that in section 120, Exception, the following proviso should be inserted at the end:

"Provided that nothing in this Exception shall affect the provisions of section 121."

18.6. Section 121 reads:—

Section 121-Vesting of interest in bequest to such members of a class as shall have attained particular age.

"121. Where a bequest is made only to such members of a class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy.

Illustration

A fund is bequeathed to such of the children of A as shall attain the age of 18, with a direction that, while any child of A shall be under the age of 18, the income of the share, to which it may be presumed he will be eventually entitled, shall be applied for his maintenance and education. No child of A who is under the age of 18 has a vested interest in the bequest."

The section needs no change. The relationship of this section to the Exception to section 120 has been already dealt with.[3]

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[1]Sectoon 121.

[2]Para 18.6 *infra.*

[3]Para 18.4, *supra.*

CHAPTER 19

ONEROUS BEQUESTS (SECTIONS 122 AND 123)

Scope.

19.1. Onerous bequests form the subject matter of two sections—sections 122 and 123, which are simple and self-explanatory.

Sections 122-Onerous Bequests.

19.2. Section 122 reads as under:—

"122. Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully.

ILLUSTRATION

A, having shares in (X), a prosperous joint stock company and also shares in (Y), a joint stock company in difficulties, in respect of which shares heavy calls are expected to be made, bequeaths to B all his shares in joint stock companies; B refuses to accept the shares in (Y). He forfeits the shares in (X)".

Principle analogous to election.

19.3. The underlying principle is to some extent analogous to the doctrine of election. If you take a benefit, then you also take the burden. In an onerous bequest, the testator bequeaths the property with an obligation annexed to it; in the case governed by election, the testator confers a benefit on the legatee, *depriving him* simultaneously of some other interest belonging to the legatee. In both the cases, something not beneficial is tagged on to the benefit.

Application.

19.4. A Calcutta case illustrates[1] the application of the section. The plaintiff (appellant) had claimed partition of two houses and certain movable property in the possession of his step mother and other three half-brothers. It was alleged by the step-mother and her sons that the property had been gifted to the step mother by her husband (i.e. the appellant's father). The applellant's father had stipulated a condition in the gift deed that a maintenance allowance of Rs. 5 must be paid by the donee (step-mother) and she was not aware of this condition. It was held that the appellant's father handed over the document and she accepted it as a gift, without thinking of doing anything contrary to its terms, and constituted acceptance. It was not necessary that there should be acceptance of the onerous condition alongwith the acceptance of the gift. Assent of the donee is presumed until and unless he disclaims.

The section does not seem to need any change.

Section 123-One of two separate and independent bequests to same person may be accepted, and other refused.

19.5. Section 123 reads:—

"123. Where a will contains two separate and independent bequests to the same person, the legatee is at liberty to accept one of them and refuse the other, although the former may be beneficial and the latter onerous.

ILLUSTRATION

A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is higher than the house can be let for, bequeaths to B the lease and a sum of money. B refuses to accept the lease. He will not by this refusal forfeit the money."

The section needs no change.

CHAPTER 20

CONTINGENT BEQUESTS : SECTIONS 124 AND 125

1. Introductory

Contingent bequest-

20.1. Contingent bequests are dealt with in sections 124 and 125. A bequest may be contingent upon a specified uncertain event, (section 124) or on

[1] *Sarba Mohan* v. *Manmohan*, A.I.R. 1933 Cal. 488.

survivorship (section 125). Where no time is mentioned for the occurrence of the unecertain event, the material time for such occurrence is the time of payment or distribution. That is the gist of section 124. Where no time is specified for the survivorship, the material time, again, is the time of payment or distribution, according to section 125. But that section is expressly made subject to a contrary intention—a provision which is not found in section 124.

Section 124—Bequest contingent upon uncertain event— no time being specified.

20.2. Of these two sections, section 124, because of its rigidity and because of certain other defects, needs discussion. The setion reads as under:—

"124. Where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable."

ILLUSTRATIONS

"(i) A legacy is bequeathed to A, and, in case of his death, to B. If A survives the testator, the legacy of B does not take effect.

(ii) A legacy is bequeathed to A, and in case of his death without children, to B. If A survives the testator or dies in his lifetime leaving a child, the legacy to B does not take effect.

(iii) A legacy is bequeathed to A when and if he attains the age of 18, and, in case of his death, to B. A attains the age of 18. The legacy to B does not take effect.

(iv) A legacy is bequeathed to A for life, and, after his death to B, and "in case of B's death without children", to C. The words "in case of B's death without children" are to be understood as meaning "in case B dies without children during the lifetime of A."

(v) A legacy is bequeathed to A for life, and, after his death to B, and, "In case of B's death", to C. The words "in case of B's death" are to be considered as meaning "in case B dies in the lifetime of A."

English cases.

20.3. Section 124, as has been pointed out by the Privy Council,[1] is based on the English case of *Edwards* V. *Edwards*[2]. The English case, has however, been partly overruled by the House of Lords.[3] The House of Lords Judgment[4] was described by the Privy Council (in another appeal from India) as "one which emerged through a thicket of technical decisions to a ground of plain and pre-eminent good sense."

Defects in Section 124.

20.4. Our examination of setion 124 reveals that the section suffers from certain serious defects. If these defects are to be rectified, a modification of the text of the section, as well as of illustrations two and four to the section, will be needed. Details of the needed amendment will be indicated in the course of the discussion in the succeeding paragraphs.

Section 124 second illustration.

20.5. Let us first dispose of the second illustration to Section 124. The facts presented in the second illustration are as under: A legacy is bequeathed to A and, in case of his death without children, to B. If A survives the testator or dies in his lifetime leaving a child, the legacy to B does not take effect, according to the illustration. The illustration does not, however, seem to be in conformity with English law, nor with realities. In fact, even the earlier English case[5] on which the main part of the section is based, did not lay down any such proposition applicable in all cases. Lord Romilly M. R. in that case, taking up

[1] *Bhupendra* v. *Amarendra*, (1916) I.L.R. 43 Cal., 432, 440 (P.C.)

[2] *Edwards* v. *Edwards*, (1852) 15 Beav., 357; 51 E.R. 576.

[3] *O' Mahenv* v. *Burdett*, (1874) L.R., 7 H.L., 388. See para 20.11, *infra*.

[4] *Chunilal* v. *Bai Samrath*, (1914) I.L.R. 38 Bom. 399, 413 (P.C.).

[5] *Edwards* v. *Edwards*, (1852) Law Journal (Chancery) 324.

the second class of cases, namely, gifts to A for life and if he shall die without children, then a gift over, observed as follows:—

> "In the second of the supposed cases, there is a manifest distinction. There the event spoken of on which the legacy is to go over is not a certain, but a contingent event. It is not in case of the death of A but in case of his death without children ..... In these cases, it has always been held that if at any time, *whether before or after the death of the testator,* A died without leaving a child, the gift over takes effect, and the legacy vests in B .....".

Second illustration partly inaccurate.

20.6. In view of these observations in the judgment in the earlier English case, it is surprising that the second illustration to section 124 states that the gift to B does not take effect where A (the first holder) "survives the testator". A may survive the testator, but may die without leaving a child. In such a case, according to the earlier English case, the gift over takes effect. The second illustration is thus different from the English position.

Need for amendment of the second illustration.

20.7. In our view, the English rule correctly reflects the testator's intentions in the generality of cases. The second illustration should, therefore, be revised as under:—

> "(ii) A legacy is bequeathed to A, and in case of his death without children, to B. If A survives the testator *and dies leaving a child,* or dies in his lifetime leaving a child the legacy to B does not take effect. *But if A dies without leaving a child, whether before or after the death of the testator, the legacy to* B *takes effect.*"

Section 124—fourth illustration.

20.8. The fourth illustration to section 124 also requires detailed comment. Under the illustration as given in the Act,[1] the words referring to B's death without children are to be understood as meaning "in case B dies without children during the life time of A."

Earlier English case now overruled.

20.9. The section here gives statutory effect to the earlier English case[2]. In fact, the fourth illustration to the section actually reproduces the fourth rule enunciated in that case.[3] However, this particular rule has, in England, been overruled by two decision[4-5] of the House of Lords.[6]

Present position in England.

20.10. According to the present English law, where the legacy is given in the circumstances specified in section 124, "death" would mean (unless the will indicates an intention to the contrary), death at any time, and not merely death in the life time of the prior holder.

Later developments in England.

20.11. In this connection, it may be of interest to note that section 124 reproduces section 111 of the Indian Succession Act of 1865, which was itself based (in part) on the English law *as then understood.* (However, the second illustration to section 124, taken over from the earlier Act, does not follow even the earlier English[7] law). The law on the subject was altered by two judgments of the House of Lords pronounced in 1874, which are very much material to a consideration of section 124, particularly the fourth illustration. In the House of Lords, there was an executory bequest whose vesting depended upon the "death" of the previous holder without issue. The question to be considered was, whether the contingency of 'death' referred to death of the previous holder before the preceding life estate came to an end, or whether it referred to his death taking place at any time, that is to say, death before or after the life-time of the holder of the preceding life estate. The earlier English judgement—*Edwards* v. *Edwards* 4th Rule,—would have supported the first construction,

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[1] Paragraph 20.2., *supra.*

[2] *Edwards* v. *Edwards,* (1852) 15 beav. 357.

[3] S.M. Shah, "Law of Executory Bequests" (1936) 38 Bombay Law Reporter (Journal) 1.

[4] *O'Mahoney* v. *Burdett,* (1874) Law Reports 7 House of Lords 388.

[5] *Ingram* V. *Soutten,* (1874) Law Reports 7 House of Lords 408.

[6] See paragraph 20.11, *infra.*

[7] See para 20.5., *supra.*

but the House of Lords overruled[1] that part of the earlier judgment and held that unless the will indicated a contrary intention, the contingency in question (death without issue) referred to the death of the previous holder without leaving issue *at any time* and not necessary to his death before the termination of the preceding life estate. As a result, the first person to whom an absolute estate is given under the will would take it, subject to the defeasance clause in favour of the executory bequest operating in the manner mentioned above.

Lord Heatherly suggested that the fourth rule enunciated in the earlier English case would be better stated thus[2] :—

> "The period to which the executory devise will be referred will be the period of death of the first taker, unless there are directions in the will inconsistent with that supposition".

Observation in Madras case.

20.12. Thus, the forth illustration incorporates a rule now discarded in England. It has also been pointed out[3] that Hindu law as it was administered in India (before the statutory law of succession was extended to Hindus) was precisely the same as the English rule established by the House of Lords in its decisions of 1874.

20.13. It is further proper to point out that, with reference to section 111 of the Succession Act of 1865, (i.e. the predecessor of the present section 124) Wallis C. J. had in a Madras case[4] observed that section was "rather an unfortunate section" which was enacted to give statutory effect to the decision in *Edwards* v. *Edwards* which was, in part over-ruled after the passing of the Indian Succession Act by the House of Lords.

Earlier rule whether defensible.

20.14. Let us now examine if there is any theoretical reason for adhering to the old English rule on the point discussed above. *Prima face*, the old English rule would.

(B) The fourth illustration to section 124 should also be revised in conformity with the above recommendation. The object could be achieved by reframing the last eleven words of the illustration as under:—

"in case B dies without children during *or after* the lifetime of A."

Change recommended in second illustration to section 124.

20.17. The second illustration to section 124 should also be revised, as already recommended[5].

Section 125—Bequest to such of certain persons shall be surviving at some period not specified.

20.18. This takes us to section 125. It reads as under:—

"125. Where a bequest is made to such of certain persons as shall be surviving at some period, but the exact period is not specified, the legacy shall go to such of them as are alive at the time of payment or distribution, unless a contrary intention appears by the will."

Four illustrations appearing below the section are quoted below :—

"(i) Property is bequeathed to A and B to be equally divided between them, or to the survivor of them. If both A and B survive the testator, *the legacy* is equally divided between them. If A dies before the testator, and B survives the testator, it goes to B.

(ii) Property is bequeathed to A for life, and, after his death, to B and C, to be equally divided between them, or to the survivor of them. B dies during the life of A, C survives A. At A's death the legacy goes to C.

(iii) Property is bequeathed to A for life, and after his death to B and C, or the survivor, with a direction that, if B should not survive the testator, his

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[1] *Cf.* paragraph 20.3, *supra*.

[2] *O'Mahony* v. *Burdett*., (1874) L.R.7 H.L. 388, 404.

[3] (*a*) *Soorjeemoney Dosee* v. *Denobundoo Mullick*, (1862) 9 M.I.A. 123 (P.C.).

(*b*) *Bhoobun Mohini*, v. *Hurrish Chander*, (1878) I.L.R. 4 Cal. 23.

[4] *Sounderrajan* v. *Natarajan*, (1920) I.L.R. 44 Madras 446.

[5] Para 20.17., *supra*.

children are to stand in his place. C dies during the life of the testator; B survives the testator, but dies in the lifetime of A. The legacy goes to the representatives of B.

(iv) Property is bequeathed to A for life, and after his death, to B and C, with a direction that, in case either of them dies in the lifetime of A, the whole shall go to the survivor. B dies in the lifetime of A. Afterwards C dies in the lifetime of A. The legacy goes to the representative of C".

The section has created no problems and we have no changes to recommend in the section.

CHAPTER 21

CONDITIONAL BEQUESTS—SECTIONS 126—137

I. Introductory

Conditional Bequests.

21.1. The power of the testator to dispose of his property by will[1] implies that he has power to make a disposition which is (i) absolute or (ii) conditional.[2] The power to impose conditions in regard to dispositions made in a will, though not enacted in so many words, is implicitly recognised by a number of sections of the Act.[3]

Conditions precedent and subsequent.

21.2. The position in this respect is substantially the same in India as in England,[4] namely, a testator may, by his will, freely attach conditions to his gifts, provided the conditions do not conflict with certain recognised restrictions and are not inconsistent with the other provisions of the will. Conditions are either "precedent", i.e., precedent to the vesting of the bequest on which the condition is imposed or subsequent, i.e., conditions which divest the estate already vested. In the later case, again, there may or may not be a bequest to another person. Conditions must, however, be such that their performance is not illegal.

Sections 126-137 grouped under broad categories.

21.3. Certain aspects of conditional bequests form the subject matter of section 126 to 137. The provisions relating to conditional bequests can be grouped under these broad categories:—

(a) Conditions which are impossible, or contrary to law or to morality: Sections 126-127.

(b) Conditions precedent—compliance therewith, and the effect of non-compliance : sections 128 to 130.

(c) Conditions subsequent with a bequest over-compliance therewith, and the effect of non-compliance: sections 131—133.

(d) Conditions subsequent with no ulterior bequest : sections 134 to 137.

(e) Time for performance of condition precedent and condition subsequent, section 137.

II. Void bequests.

Section 126—Bequest upon impossible condition.

21.3A. Section 126 reads:—

"126. A bequest upon an impossible condition is void.

ILLUSTRATIONS.

(i) An estate is bequeathed to A on condition that he shall walk 100 miles in an hour. The bequest is void.

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[1]Section 59.

[2]*Cf.* section 8, Transfer of Prooerty Act, 1882.

[3]e.g., secti9ns 119-137.

[4]Halsbury, 3rd Ed. Vol. 39, page 914, page 1386.

(ii) A bequeaths 500 rupees to B on condition that he shall marry A's daughter. A's daughter was dead at the date of the will. The bequest is void." The section needs no change.

Section 127—Condition contrary to law or morality.

21.4. Section 127 reads—

"127. A bequest upon a condition, the fulfilment of which would be contrary to law or to morality, is void.

ILLUSTRATIONS.

(i) A bequeaths 500 rupees to B on condition that he shall murder C. The bequest is void.

(ii) A bequeaths 5,000 rupees to his niece if she will desert her husband. The bequest is void."

Section 127—Condition contrary to law or morality.

The section needs no change.

21.4. Section 127 127 reads—

"127. A bequest upon a condition, the fulfilment of which would be contrary to law or to morality, is void.

ILLUSTRATIONS.

(i) A bequeaths 500 rupees to B on condition that he shall murder C. The bequest is void.

(ii) A bequeaths 5000 rupees to his niece if she will desert her husband. The bequest is void".

Public policy a wider concept.

21.5. While section 127 mentions "law and morality", it does not mention "public policy". It is elementary that transactions **inter vivos** are void if opposed to public policy, and bequests should stand on the same footing. Public policy is a wider concept than 'law or morality'. It may cover, for example, interference with the administration of justice, restraint of marriage and other matters which may not be embraced by "morality". Questions have, in particular, arisen as to the validity of restraints on marriage, inserted in contracts and wills. As to wills, in a Bombay case,[1] the testator had put a condition whereunder if a legatee married a non-Zoroastrian, the property would pass to another. Chagla C. J. held that such a condition would not be considered as contrary to "law or morality" under section 127 of the Indian Succession Act. Discussion of the aspect of restraint on marriage as violating public policy was held to be irrelevant, having regard to the fact that section 127 concerns itself only with "law and morality".

Transfer of Property Act.

21.6 It may be noted that the Transfer of Property Act[2] is more specific on the subject. Under that Act, no transfer can be made for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872. Section 23 of the Contract Act, *inter-alia*, renders void agreements the consideration or object whereof is opposed to "public policy".

Recommendation to add 'Public policy'.

21.7. In our view, section 127 should be amended by specifically adding 'public policy'. On principle, bequests contrary to public policy should not be regarded as valid. Moreover, as already stated,[3] there is no reason why the rule applicable to bequests should be different from the rule applicable to gifts. We, therefore, recommend that in section 127, after the words 'or morality', the words *"or to public policy"* should be inserted.

After the proposed amendment, the section will read as under:—

"127. A bequest upon a condition, the fulfilment of which would be contrary to law or to morality or *to public policy, is void"*.

Section 128—Fulfilment of precedent to vesting of legacy.

21.8. Section 128 reads:—

"128. Where a will inposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed, the condition shall be considered to have been fulfilled if it has been substantially complied with.

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[1] *Khurshed Maneck* v. *The Official Trustee of Bombay*, A.I.R. 1948 Bom. 319.
[2] Section 6(h) (2), Transfer of Property Act, 1882.
[3] Para 21.5, *supra*.

ILLUSTRATIONS

(i) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C, D and E. A marries with the written consent of B, C is present at the marriage. D sends a present to A previous to the marriage. E has been personally informed by A of his intentions, and has made no objection. A has fulfilled the condition.

(ii) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. D dies, A marries with the consent of B and C. A has fulfilled the condition.

(iii) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries in the lifetime of B, C and D, with the consent of B and C only. A has not fulfilled the condition.

(iv) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C & D. A obtains the unconditional assent of B, C and D, to his marriage with E. Afterwards B, C and D capriciously retract their consent. A marries E. A has fulfilled the condition.

(v) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries without the consent of B, C and D, but obtains their consent after the marriage. A has not fulfilled the condition.

(vi) A makes his will whereby he bequeaths a sum of money to B if B shall marry with the consent of A's executors. B, marries during the lifetime of A, and A, afterwards expresses his approbation of the marriage. A dies. The bequest to B takes effect.

(vii) A legacy is bequeathed to A if he executes a certain document within a time specified in the will. The document is executed by A within a reasonable time, but not within the time specified in the will. A has not performed the condition, and is not entitled to receive the legacy."

The section needs no change.

III. **Successive bequests.**

Sections 129 to 133.

21.9. The same property may be the subject matter of successive bequests. Subject to certain conditions, bequest of the same thing to one person, and thereafter to another person, is not prohibited. However, it becomes necessary to provide rules for working out the exact operation of such bequests. These rules are contained in sections 129 to 133. Such rules, are needed in order to deal with a variety of situations :—for example,

(a) where there is a failure of the prior bequest (sections 129 and 130), or

(b) the subsequent bequest is dependent on a condition (sections 131 and 132), or

(c) the subsequent bequest itself is not valid (section 133).

No changes appear to be needed in these sections. But it would be convenient to draw attention to a few salient points, though of minor importance.

Section 131—Bequest dependent on a condition.

21.10. Taking, first, section 231 which deals with a bequest dependent on a condition, it would appear that if non-satisfaction of the condition (to be satisfied under the will for retaining a bequest) is no account of duress or other circumstances beyond the control of the legatee, then the bequest is not forfeited[1-2].

The following passage from a judgment of Lord Campbell[3] was cited in a Calcutta case[4]:—

"Had the Children been included in the arrest, I conceive that their residence abroad under continued duress would not have worked a forfeiture, and if their residence abroad moy be fairly ascribed to the imprisonment of

[1] *Tin Couri* v. *Krishna Bhabini*, (1894) I.L.R. 20 Cal. 15, 17.

[2] Trevelyan, Hindu Wills (2nd Ed.), pages 125, 126.

[3] *Clavering* v. *Ellison*, 7 H.L. Cas., 707, 723.

[4] *Tin Couri* v. *Krishna Bhabini*, (1894) I.L.R. 20 Cal. 15, 17.

their father by Napoleon, the forteiture might he saved on this ground, were there a necessity to resort to it."

21.11. As regards section 132, it is based on the rule that conditions sub- Section 132.
sequent which tend to the destruction of an estate already vested should be construed strictly.

21.12. Under section 133, if the ulterior bequest is not valid, the original Section 133.
bequest is not affected "by it", i.e., by the invalidity of the ulterior bequest. The principle here is that specific estates which are good in themselves are not invalidated by a subsequent illegal disposition of the residue or remainder,[1-2] and an interest is not taken away unless the gift over takes effect.

The first illustration to section 133 deals with the case of impossibility of fulfilling the condition on which the ulterior bequest would take effect. The second illustration deals with the case of illegality of that condition. The third illustration deals with the case of lapse.[3] Invalidity could also arise by reason of vagueness and uncertainty of the bequest—though these situations are not illustrated in the illustrations[4] to the section.

IV. Bequests ceasing to have effect.

21.13. The testator may make a bequest with a condition that it shall cease Sections 134 and
to have effect in specified cases, without ordering a subsequent disposition 135.
to have effect in specified cases, without ordering a subsequent disposition of the property. This subject is dealt with in sections 134 and 135.

Section 134 gets rid of the English rule[5] under which, in the case of personal property, certain conditions were void if there is no gitf over. This is known as gifts, *in terrorem.*

The sections need no change.

V. Conditions Subsequent

21.14. The conditions super-added on a bequest may be in the form of the Section 136—Conditions in the nature of performance of acts by legatee.
performance of an act by the legatee. In such a case, if no time is specified for the performance of the Act, and the legatee takes any step which renders impossible or *indefinitely postpones* the performance of the required act, the legacy shall go as if the legatee had died without performing such an act, according to section 136. The first illustration to the section deals with a case where performance of the condition is rendered impossible. The second illustration illustrates the case where performance of the condition, though not rendered impossible, is indefinitely postponed. The illustration says that if a bequest is made to A, with a proviso that it shall cease to have effect if the legatee does not marry B's daughter, and the legatee A marries a stranger, then the bequest ceases to have effect. This illustration raises the interesting question whether such conditions should take notice of the fact that the legatee has his whole life to perform the condition. As the section stands, this is not permissible.

21.15. English cases on the subject take a different view, so that if the English Law as indefinite postponement.
testator has not prescribed a particular period, then the period during which the condition can be performed, *is the entire life time of the donee.*

Under English law, the idefinite postponement of the fulfilment of a condition does not work as a forfeiture of the estate. Thus, in a case similar to that

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[1]*Khetter* v. *Gunganarain*, 4 C.W.N. 671, footnote discussing the case law, including *Tagore* v. *Tagore.*

[2]*Dhanlaxmi* v. *Hariprasad*, I.L.R. 45 Bom. 1038, 1044.

[3]Some commentators regard it as a case of remoteness but it may be noted that section 105 is mentioned.

[4]Halsbury, 3rd Ed., Vol. 30, page 923, para 1396.

[5](*a*) *Evanturel* v. *Evanturel*, Law Reports 6 Privy Council 11.

(*b*) *Baths* v. *Public Trustee*, (1925) 1 Ch. 377.

in illustration (ii) to section 136, it was held[1-2] that in spite of the girl marrying into another family, the performance of the condition was not rendered impossible, since she might survive her first husband, and she would not be divested as the performance of the condition was still possible during her whole life.

Recommendation to revise section 136.

21.16. We are of the view that the present English position[3] on the subject is more just and is in consonance with the general approach of the law which favours the vesting of estates and discourages divesting. We therefore recommend that illustration (ii) to section 136 should be revised in view of what we have stated above, and the portion in the main section referring to indefinite postponement be also deleted.

Revised section 136 may read as under:—

"136. Where a bequest is made with a condition super-added that, unless the legatee shall perform a certain act, the subject-matter of the beqest shall go to another, or the bequest shall cease to have effect, but no time is specified for the performance of the act; if the legatee takes any step which renders impossible ..... the performance of the act required, and legacy shall go as if the legatee had died without performing such act.

ILLUSTRATIONS

(i) A bequest is made to A, with a proviso that, unless he enters the Army, the legacy shall go over to B. A takes Holy Orders, and thereby renders it impossible that he should fulfil the condition. B is entitled to receive the legacy.[4]

(ii) A bequest is made to A, with a proviso that it shall cease to have any effect if he does not marry B's daughter. A marries a stranger. Though A *may thereby* indefinitely postpone the fulfilment of the condition. *he does not render impossible its fulfilment.* The bequest *does not cease to* have effect."

Section 137.

21.17. This takes us to section 137, which provides that where the performance of a condition is to be done within a specified time under the will, the act must be performed within the specified time, the only exception being in the case of fraud.

Requirement as to fraud.

20.18. In relation to fraud, it is to be noticed that in principle the fraud should be of the person who would be benefited by non-performance of the condition. In this connection, if may be noticed that in the Transfer of Property Act,[5] the corresponding provision contains the words "of a person who would be directly benefited by non-fulfilment of the condition". *These words ought to appear in section* 137 *of the Succession Act also*[6], to improve it in point of precision.

English law as to fraud and other cases.

21.19. The proviso relating to fraud seems to have been suggested by an opinion expressed in an early English case[7], to the effect that if, in that case, there had been fraud on the part of the trustees, or, possibly, such laches on their part as the Court would consider to have been the sole cause of the donee of the right of pre-emption not having complied strictly with the condition/enforced by the will, then the donee is entitled to relief.

Forfeiture against time limits in England.

21.19A. Incidentally, it appears that in England, in some cases where a legatee is required to perform a certain act within a certain time, courts have

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[1](a) *Randal* V. *Payne*, 1 Bro. C.C. 55;

(b) *Lester Y. Garland*, 15 Ves. 248.

[2]Halsbury, 3rd Ed., Vol. 39, page 930.

[3]Para 21.15, *supra.*

[4]Illustration (i) as proposed reproduces the existing illustration. It may be that the present doctrine does not go so far.

[5]Section 34, Transfer of Property Act, 1882.

[6]See para 20.20, *infra.*

[7]*Brooke* V. *Gerrod*, 3K & J 608.

jurisdiction to grant relief against forfeiture and the legatee is allowed a *reasonable time* within which to perform the condition.[1-3] There was no gift over in those cases, so that the interests of any alternative legatee were not involved[4].

2120. In view of what we have stated avobe,[5] we recommend that section 137 should be amended by adding, after the word "fraud", the words "*of a person who would be directly benefited by non-fulfilment of the condition.*" **Recommendation to amend Section 137.**

CHAPTER 22

BEQUESTS WITH DIRECTIONS AS TO APPLICATION OR ENJOYMENT
(Sections 138 to 140)

22.1. Provisions as to bequests with directions as to application or enjoyment of the property bequeathed are to be found in sections 138 to 140. The principal object of these sections is to define the circumstances in which such directions can be validly incorporated in the will. **Scope.**

If there is an absolute bequest,[6] directions restrictive of application or enjoyment are void: sections 138 and 139. This is known as the Rule in *Lassence* V. *Tierney*.[7] But if there is no absolute bequest, they are valid: section 140. This general principle underlies the three sections—though, of course, it is not so simply stated.

22.2. Section 138 provides that where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction. Under the illustration, a sum of money is bequeathed towards purchasing a country residence for A or to purchase an annuity for A or to place A in any business. A chooses to receive the legacy in money. He is entitled to do so. **Section 138.**

The corresponding section of the Transfer of Property Act is section 11. In addition, as has been pointed out by one commentator,[8] section 10 of the Transfer of Property Act also declares to be void a condition in restraint of transfer or alienation of property. The Succession Act does not contain a similar section, but the word "enjoyment" in section 138 would include a restraint on alienation.

As to the word "absolutely" in section 138, it qualifies not only the word "bequeathed", but also the words "for the benefit of any person". Hence the section does not apply to a life interest.[9]

22.3. Section 139 provides that where a testator absolutely bequeaths a fund so as to sever it from his own estate, but directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified benefit for the legatee, then, if that benefit cannot be obtained for the legatee, the fund belongs to him as if the will had contained no such direction. **Section 139.**

22.4. There are two illustrations to the section. According to the first illustration, A bequeaths the residue of his property to be divided equally amongst his daughters, and directs that the shares of the daughters shall be settled upon **Illustration.**

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[1]*Pain*[2] V. *Hyde*, 4 Beav, 468.

[2]*Simpson* V. *Vickers*, 14 Ves. 341.

[3]See, for example, *Re-Packard* V. *Waters*, (1920) 1 Chancery 596; (1918-1919) All E.R. 365.

[4]See further Halsbury, 3rd Ed., Vol. 39, page 930-31, paras 1406-1407.

[5]Para 21.18, *supra*.

[6]See marginal note to section 138 and *Hancock* V. *Watson*, (1902) A.C. 14 ("absolute gift").

[7]*Lassence* V. *Tierney*, (1849) 1 M. & G. 551.

[8]Paruck Succession Act (1977), page 428.

[9]*Kidar Nath* V. *Gaya Nath*, A. I. R. 1930 Calcutta 731.

themselves respectively for life, and be paid to their children after their death. All the daughters die unmarried. The representatives of each daughter are entitled to the share of the residue.

According to the second illustration, A directs his trustees to raise a sum of money for his daughter and he then directs that they (the trustees) shall invest the fund and pay the income arising from it to her during her life and divide the principal amongst her children after her death. The daughter dies without having ever had a child. Her representatives are entitled to this fund.

At the first sight, it may be difficult to link up the illustration with the main section, but it appears that in the main section the words "so as to secure a specified benefit for the legatee" are taken as including a benefit for the children of the legatee. In the illustrations, the benefit "cannot be obtained for the legatee", because there were no children. The result is that the fund belongs to the legatee (daughter or daughters), as if the will had contained no reason why their representatives take the entire interest.

Scope of Section 139.

22.5. The section would not apply where there is no intention to confer an absolute estate on the daughters.[1]

Section 140—Bequest of fund for certain purposes, some of which cannot be fulfilled.

22.6. Section 140 reads:—

"140. Where a testator does not absolutely bequeath a fund, so as to sever it from his own estate, but gives it for certain purposes, and part of those purposes cannot be fulfilled, the fund, or so much of it as has not been exhausted upon the objects contemplated by the will, remains a part of the estate of the testator.

ILLUSTRATIONS.

(i) A directs that his trustees shall invest a sum of money in a particular way, and shall pay the interest to his son for life, and at his death shall divide the principal among his children. The son dies without having ever had a child. The fund, after the son's death, belongs to children. The daughters have no children. The fund belongs to the estate of the testator.

(ii) A bequeaths the residue of the estate, to be divided equally among his daughters, with a direction that they are to have the interest only during their lives, and that they at their decease the fund shall go to their chidren. The daughters have no children. The fund belongs to the estate of the testator."

Recommendation to amend sections 138—140.

22.7. We have one recommendation to make with reference to these sections, which is common to all the sections. The word used in these sections is 'fund', which would seem to suggest only movables. In our opinion, there is no reason[2-3] why the sections should not apply to immovable as well as to movable property. It is desirable to incorporate this change in the sections by substituting, in place of the word 'fund' the word 'property' (with necessary consequential changes). We recommend that sections 138 to 140 should be amended accordingly.

CHAPTER 23

BEQUESTS TO AN EXECUTOR : SECTION 141

Section 141.

23.1. The special topic of bequests to an executor is governed by section 141.

Under section 141, if a legacy is bequeathed to a person who is named an executor of the will, be shall not take the legacy, unless he proves the will or otherwise manifests an intention to act as executor.

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[1] *Soundarrajan* V. *Natarajan*, (1921) I. L. R. 48 Mad. 906 (P.C.) overruling I.L. R.44 Mad. 446.

[2] *Anantha* V. *Nagamuthu*, (1881) I. L. R. 4 Mad. 200. (Hindu Law).

[3] See also *Mokoondo Lal* V. *Gonesh*, (1876) I. L. R. 1 Cal. 104 (Hindu Law).

The illustration to the section is as follows :—

"A legacy is given to A, who is named an executor. A orders the funeral according to the directions contained in the will, and dies a few days after the testator, without having proved the will. A has manifested an intention to act as executor".

Rationale.

23.2. The rationale of this section is that when bequests are given to individuals in the character of executors and not as marks of personal regard only, the implied condition is that the persons named must clothe themselves with the character in respect of which the benefits were intended.[1-2] Whether the legacy is expressed in lieu of 'care and pains' or not, the donee must, in order to entitle himself to the legacy "clothe himself with the character of executor"[3]

Contrary intention in English law.

23.2A. This is a principle of English law which has been followed in section 141. There is, however, one important point in respect of which this section differs from the English law, and the difference does not appear to be justified. In England, it is permissible[4] to prove a *contrary intention;* circumstances which indicate that the legacy was intended for the executor personally, and not annexed to the office of the executor, can always be shown.[5] For example, a difference either in the nature or in the amount of legacies given to persons named as executors is itself sufficient to show that the gift is not attached to the office.[6-7]

Again, in English law, the presumption does not arise where the gift is of the residue or of a part of the residue.[8]

Indian section preemptory.

23.3. Unfortunately, section 141 is expressed in preemptory language, and not in words that would operate merely as a presumption. The section categorically assumes that every legacy is given to the executor as given in the character of executor, thereby disallowing parol evidence to rebut the assumption.[9] Hence, it is not possible to read, in the section, as it now stands, any proviso to the effect that it shall operate only if no contrary intention is expressed in the will.[10]

Recommendation to amend section 141.

23.4. For obvious reasons, it is desirable that the section should be subject to an intention to the conrrary, as in English law.[11] We, therefore, recommend that section 141 should be amended for the purpose, by adding, at the end, the words *"unless a different intention appears from the will."*

CHAPTER 24

SPECIFIC LEGACIES—SECTIONS 142 TO 149

Types of legacies.

24.1. Legacies given by a will could be of various types—general[12], specific,[13] demonstrative,[14] or residuary.[15] General legacies have been briefly adverted

[1] *Brydges* V. *Wotton,* Vol. 171 Ves. & B. 135.
[2] Halsbury, 4th Ed., page 65, para 1246.
[3] *Harrison* V. *Rawley,* (1798) 4 Ves. 212 (Lord Alvanley M.R.).
[4] Halsbury, 4th Ed., Vol. 17, page 638, para 1246.
[5] *Slaney* V. *Watney,* L. R. (1886) 2 Enquiry 418.
[6] *Re-Appleton,* (1885) 29 Ch. Div. 983.
[7] Halsbury, 4th Ed., Vol. 17, page 638, para 1246.
[8] *Griffith* V. *Pruen,* 11 Simon 202.
[9] *Prosono* v. *Administrator* General (1888) I.L.R. 15 Cal. 83.
[10] *T.S. Rajam* V. *Pankajam,* A.I.R. 1944 Mad. 335.
[11] Para 23.2., *supra.*
[12] Section 104.
[13] Sections 142-149.
[14] Sections 150-151
[15] Sections 102-103.

to in th Act, in an earlier section.[1] Specific legacies are now more particularly dealt with. The sections concerned with specific legacies, begin with a definition, but a pretty large part of the sections is really concerned with what are *not* specific legacies. Apparently, this over-elaboration was considered necessary in view of two important legal consequences of a legacy being specific, namely, (i) non-abatement,[2] and (ii) possibility of ademption.[3]

Specific legacies are legacies of a specific part of the testator's property which is distinguished from all other parts of his property—section 142. Sections 143—146 provide what are not specific legacies. Property specifically bequeathed must be retained in the form left by the testator and does not abate—sections 147 and 149. The remaining section in the Chapter—section 148—is concerned not with specific bequests, but with property comprised in a bequest to two or more persons in succession which is not specifically bequeathed. Ademption of specific legacies is governed by sections 152—156, contained in a later chapter of the Act.

ection 142—pecific legacy.

24.2. Section 142 defines a 'specific legacy' thus—

"Where a testator bequeaths to any person a specified part of his property, which is distinguished from all other parts of his property, the legacy is said to be specific". It may be mentioned that in this definition that words "specified part" are crucial. In a specific legacy, the identity of the thing bequeathed must be indicated in some specific way.[4]

As Dixon C.J. put it[5] :—

> "What marks a bequest as specific is that its subject matter is designated as something that it does, at the time of the will, or shall at the time of the death of the estator, form an identifiable part of his property and is so to speak, distinguished by the intention of the testator as ascertained from his will to *scparate it in his disposition from* the rest of his property for the purpose of bequeathing it as the *distinct subject* of a testamentary disposition."

In contrast to a specific bequest, a general legacy amounts to a direction to the executors either to procure the property designated or to pay the legatee the value of the property.

A demonstrative legacy stands midway between the two. It is one denoted by words of the will which indicate that a gift is to be made primarily out of a particular fund or from the proceeds of the sale of particular property, but the gift is not to fail if the fund goes out of existence or proves inadequate.[6]

So much by way of general observations. So far as section 142 is concerned, it does not seem to have presented serious difficulties and does not, therefore, need change.

ection 143—Be-uest of certain sum here stocks etc., in which invested re described.

24.3. What are *not* specific legacies is a matter to which the Act devotes a large number ot sections. The intention to distinguish a property must be clear. On this principle, section 143 provides as under:—

> "143. Where a certain sum is bequeathed, the legacy is not specific merely because the stock, funds or securities in which it is invested are described in the will."

ILLUSTRATION

A bequeathes to B.—

"10,000 rupees of my funded property;"

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[1]Section 104.

[2]Sections 152—166.

[3]Sections 152—166.

[4]Stephen, Commentaries on the laws of England (1950), Vol. I, page 505.

[5]*Mc Bride* v. *Hudson*, (1961) 107 Commonwealth Law Reports 604 at p. 617, High Court of Australia.

[6]*Paget* v. *Huish*, (1863) 71 English Reports 291, 294.

"10,000 rupees of my property now invested in shares of the East Indian Railway Company".

"10,000 rupees, at present secured by mortgage of Rampur Factory:"

No one of these legacies is specific.

The illustrations make amply clear the purport of the section, and no change appears to be needed in the section.

24.4. Another instance of a legacy which is not specific is dealt with in section 144, which provides that where a bequest is made in general terms of a certain amount of any kind stock, the legacy is not specific merely because the testator was, at the date of his will, possessed of stock of the specified kind, to an equal or greater amount than the amount bequeathed. Section 144.

The illustration to the section is as follows:—

"A bequeaths to B, 5,000 rupees five per cent Government securities. A had at the date of the will five per cent Government securities for 5,000 rupees. The legacy is not specific."

This section also needs no change.

24.5. This takes us to section 145, which provides as follows:— Section 145.

"145. A money legacy is not specific merely because the will directs its payment to be postponed until some part of the property of the testator has been reduced to a certain form, or remitted to a certain place."

Thus, as per the illustration to the section, where A bequeaths to B 10,000 rupees and directs that this legacy shall be paid as soon as A's property in India shall be realised in England, the legacy is not specific.

The section needs no change.

24.6. Section 146 provides as follows:—

Section 146—Residuary bequest with enumeration.

"Where a will contains a bequest of the residue of the testator's property along with an enumeration of some items of property not previously bequeathed, the articles enumerated shall not be deemed to be specifically bequeathed".

The section needs no change, not having created any problems.

24.7. According to section 147, where property is specifically bequeathed to two or more persons in succession, it shall be retained in the form in which the testator left it, although it may be of such a nature that its value is continually decreasing. The rule is different where property is not specifically bequeathed (Section 148). Section 147—property specifically bequeathed to two or more persons in succession.

The illustrations to the section read as under:—

"(i) A, having lease of a house for a term of years, fifteen of which were unexpired at the time of his death, has bequeathed the lease to B for his life, and after B's death to C. B is to enjoy the property as A left it, although, if B lives for fifteen years, C can take nothing under the bequest.

(ii) A, having an annuity during the life of B, bequeathes it to C, for his life, and after C's death, to D. C is to enjoy the annuity as A left it, although, if B dies before D, D can take nothing under the bequest".

The section is clear in its purport and the rule is fair enough, having regard to the expressed intention of the testator.

It needs no change.

24.8. Section 148 reads as under:— Section 148.

"148. Where property comprised in a bequest to two or more person in succession is not specifically bequeathed, it shall, in the absence of any direction to the contrary, be sold, and the proceeds of the sale shall be

invested in such securities as the High Court may by any general rule authorise or direct, and the fund thus constituted shall be enjoyed by the successive legatees according to the terms of the will."

ILLUSTRATION

"A, having a lease for a term of years, bequeaths all his property to B for life, and, after B's death, to C. The lease must be sold, the proceeds invested as stated in this section and the annual income arising from the fund is to be paid to B for life. At B's death, the capital of the fund is to be paid to C."

The section needs no change. It may be pointed out that the rule is different where there is a specific bequest.[1]

Section 149—No abatement of specific legacies.

24.9. Section 149 provides that if there is a deficiency of assets to pay legacies, a specific legacy is not liable to abate with the general legacies. As already mentioned,[2] non-liability to abatement is one of the distinguishing features of specific legacies The section reflects this principle and we have no change to recommend in the section.

CHAPTER 25

DEMONSTRATIVE LEGACIES: SECTIONS 150-151

Scope.

25.1. Besides general and specific legacies, there is a third kind of legacy[3] which consists of a pecuniary legacy payable out of a particular fund. Such legacies are not "adeemed"[4] by failure of the particular fund. These are known as "demonstrative" legacies, and are governed by sections 150 and 151.

"Demonstrative legacy" can, in brief, be explained as a lagacy directed to be paid *out of specific property*.[5]

Section 150—Demonstrative legacy defined.

25.2. Section 150 defines a demonstrative legacy as follows :—

"150. Where a testator bequeaths a certain sum of money, or a certain quantity or any other commodity, and refers to a particular fund or stock so as to constitute the same the primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative."

By the Explanation to the section the distinction between a specific legacy and a demonstrative legacy is thus explained :—

(a) Where specified property is given to the legatee, the legacy is specific.[6]

(b) Where the legacy is directed to be paid out of specified property, it is demonstrative. There are three illustrations to the section.

"(i) A bequeaths to B 1,000 rupees, being part of a debt due to him from W. He also bequeaths to C, 1,000 rupees to be paid out of the debt due to him from W. The legacy to B is specific, the legacy to C is demonstrative.

(ii) A bequeaths to B—

"ten bushels of corn which shall grow in my field of Green Acre";

"80 Chests of the indigo which shall be made at my factory of Rampur";

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[1]Section 147, *supra*.

[2]Para 24.1, *supra*.

[3]Halsbury, 4th Edition, Vol. 17, page 632, para 1230.

[4]Section 153.

[5]*Cf.* Section 150, Explanation.

[6]Letters (a) and (b) have been added for convenience of analysis.

"10,000 rupees out of my five per cent promissory notes of the Central Government";

"An annuity of 500 rupees from my funded property";

"1,000 rupees out of the sum of 2,000 rupees due to me by C";

an annuity, and directs it to be paid "out of the rents arising from my taluk of Ramnagar."

(iii) A bequeaths to B—

"10,000 rupees out of my estate at Ramnagar", or charges it on his estate at Ramnagar";

"10,000 rupees, being my share of the capital embarked in a certain business."

Each of these bequests is demonstrative."

The section has raised no difficulties in its practical application and may be left as it is.

Section 151- Order of payment when legacy directed to be paid out of fund, the subject of specific legacy.

25.3. According to section 151, where a portion of a fund is specifically bequeathed and a legacy is directed to be paid out of the same fund, the portion specifically bequathed shall first be paid to the legatee, and the demonstrative legacy shall be paid out of the residue fund and, so far as the residue shall be deficient, out of the general assets of the testator.

The illustration to the section reads as under :—

"A bequeaths to B, 1000 rupees, being part of a debt due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. The debt due to A from W is only 1500 rupees; of these 1,500 rupees, 1,000 rupees belongs to B, and 500 rupees are to be paid to C. C is also to receive 500 rupees out of the general assets of the testator."

The illustration makes it clear that a specific legacy takes precedence over a demonstrative legacy. At the same time, the demonstrative legacy can, if necessary, claim participation in the residue.

We are making in a subsequent Chapter[1], a recommendation to combine sections 151 and 157.

CHAPTER 26

ADEMPTION : SECTIONS 152 TO 266

I. Introductory

Scope of Chapter

26.1. The topic of ademption of legacies is dealt with in sections 152 to 166. Where property specifically bequeathed does not belong to the testator at the time of his death or has been converted into property of a different kind, the legacy cannot take effect by reason of withdrawal of its subject-matter from the operation of the will. This is "ademption"—section 152. The rationale is disappearance of the property in *specie*. In contrast, a demonstrative legacy is not adeemed—section 153. Ademption essentially rests on the presumed intention of the testator. That at least, is the approach adopted by the Indian legislature.

The concept of ademption is simple, but certain detailed provisions contained in sections 153 to 159 and 162—were considered necessary in order to provide for various situations in regard to which controversies could possibly arise.

[1]Paras 26.13, 26.14., *infra*.

Similarly, a few provisions—section 160, 161 and 164 to 166—deal with cases in which a specific bequest is not adeemed.

Ademption - Introductory.

26.2. In general, ademption arises where an asset bequeathed by the will ceases to conform to the testator's power of disposition, or ceases to conform to the description given in the will, ademption may thus arise by reason of non-existence of the subject matter bequeathed or by reason of change in its nature. Non-existence of the asset, in its turn, might arise either from external factors, (for example, destruction by the forces of nature), or from acts of the testator (for example, by sale of the thing bequeathed by the testator between the date of the will and the date of his death). A change in the nature of the asset may arise, again, by external factors (for example, earthquake) or by acts of the testator (for example, when the testator converts a golden chain into a cup of gold). The common thread is withdrawal of the subject-matter from the operation of the will (S. 152). Sometimes, the change arises by reason of legislative action. This aspect will be discussed in detail when dealing with the definition of "ademption"[1].

Ademption - the concept.

26.3. Indian case-law on the subject of ademption is rather scanty. The theoretical interest of the topic is, however, considerable and one or two sections[2] require a detailed discussion. As the sections on the subject are rather large in number, it will be convenient to refer first to a few general aspects and also to the scheme of arrangement, so as to facilitate a better understanding of the inter-relationship between various sections.

The heading of Chapter 17 indicates that the topic dealt with in these sections is "ademption". The expression "ademption" is not directly defined. However, it is indirectly explained in the latter part of section 152, which provides that (in the circumstances dealt with in the section), the legacy is "adeemed", that is to say, it cannot take effect by reason of the subject matter having been withdrawn from the operation of the will. This explanaion is, in substance, the same as the definition of "ademption" given in some of the English cases—such as, "a failure of a specific bequest owing to the subject of the bequest not being in existence *in specie* as a part of the testator's estate at the time of his death".

Scheme of the Sections.

26.4. This general principle is dealt with in section 152, which applies where there is a "specific" legacy. Section 153 rules out ademption in the case of "demonstrative" legacies. Sections 154 to 157 and 166 deal with cases where the testator, having bequeathed the "right to receive a thing", himself receives the thing bequeathed. Sections 158-159 and 165-166 relate to a particular kind of property—"stock". Sections 160-161 deal with the effect of removal of goods between the date of the will and the date of the death of the testator. Sections 163-164 deal with the effect of a change in the situation of the goods. Sections 165-166, as already stated, deal with 'stock'.

The sections proper may now be dealt with.

II. Ademption

Section 152 - Ademption explained.

26.5. Section 152 reads :

"152. If anything which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the legacy is adeemed; that is, it cannot take effect, by reason of the subject-matter having been withdrawn from the operation of the will.

ILLUSTRATION :

(i) A bequeaths to B—

"the diamond ring presented to me by C";

"my gold chain";

"a certain bale of wool";

"a certain piece of cloth";

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[1]See discussion as to section 152, para 26.6., *infra*.

[2]For example, section 166.

"all my household goods which shall be in or about my dwelling-house in M. Street in Calcutta, at the time of my death".

A in his lifetime,—

sells or gives away the ring;

converts the chain into a cup;

converts the wool into cloth;

makes the cloth into a garment;

takes another house into which he removes all his goods.

Each of these legacies is adeemed.

(ii) A bequeaths to B—

"the sum of 1,000 rupees in a certain chest",

"all the horses in my stable".

At the death of A, no money is found in the chest, and no horses in the stable. The legacies are adeemed.

(iii) A bequeaths to B certain bales of goods.

"A takes the goods with him on a voyage. The ship and goods are lost at sea, and A is drowned. The legacy is adeemed."

26.6. In connection with section 152, it should be noted that the conversion of an asset by legislative action falls within section 163, and is outside section 152. Thus, compulsory changes in the nature of the asset when effected by an Act of Parliament—for example, by nationalisation or otherwise,—do not fall within section 152. We consider it desirable that the case should be excluded from section 152 *by express words*. For this purpose, we recommend that in section 152, after the words "has been converted into property of a different kind", the words *"by act of parties"* should be inserted. **Amendment recommended.**

It is further to be noted that even as regards converted property, the section leaves no scope for a different intention. We are of the view that it should be made subject to a proviso[1], whereunder the will should govern the converted property as it would have governed the original property, if such an intention can be inferred.

26.7. Section 153 deals with a demonstrative legacy, and its main object is to provide that there is no ademption in the case of a demonstrative legacy. **Section 153- No ademption in case of demonstrative legacy.**

The essential distinction between specific legacy and demonstrative legacy is one born of the intention of the testator. In the case of the former, the testator shows an intention that the beneficiary should receive only a specified thing, while, in the case of the latter, the testator indicates an intention that the thing shall be taken primarily for the specified fund, but that any balance can be taken from the residue in the event of deficiency[2].

The section does not seem to need any change. It may, however, be noted that the rule has been judicially construed as subject to a contrary direction in the will[3].

26.8. Section 154 deals with the ademption of a specific bequest of a right to receive something from a third party. To state in simple terms the proposition enacted in the section[4], where the right to receive is bequeathed and the specific legacy is *received by the testaor*, the legacy is adeemed[5]. The relationship of this particular situation with the general concept of ademption as explained in **Section 154.**

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[1]This is not a draft of the amendment.

[2]*Re-Webster, Goss Vs Webster*, (1937) 1 All E.R. 602.

[3]*Chiunam* V. *Tadikonda*, I.L.R. 29 Mad. 155.

[4]*Cf.* section 153.

[5]For contrast with section 162, see para 26.18, *infra*.

section 152, requires brief discussion. Ademption, as explained in section 152, arises when there is a change either in the legal ownership or in the nature of the property. This is the general concept. In the situation dealt with in section 154, though there is no physical change of the thing, the legal categorisation of the thing is changed. What was an actionable claim—"right to receive"—(a species of intangible property) is replaced by something tangible. There is no alteration of the physical nature of the property, but its legal complexion does change; and it is this altered legal complexion that causes ademption—the presumption being that the testator did not bequeath, and had no intention of bequeathing, a thing with such changed legal complexion.

III. Ademption of part of bequest

Sections 155 and 156 - Receipt of a part.

26.9. Section 155 and 156 deal with the situation where a part of the thing bequeathed is received and may be considered together. They read as follows :

> "155. The receipt by the testator of a part of an entire thing specifically bequeathed shall operate as an ademption of the legacy to the extent of the sum so received."
>
> "156. If a portion of an entire fund or stock is specifically bequeathed, the receipt[1] of a portion of the fund or stock shall operate as an ademption only to the extent of the amount so received; and the residue of the fund or stock shall be applicable to the discharge of the specific legacy".

Recommendation to amend section 155 and section 156.

26.10. The two sections seem to overlap, but do not, in fact, overlap. There is a distinction between the two sections, though it is not apparent at the first reading. Section 155 applies where an *entire thing* is specifically bequeathed and then *the testator receives a part of it,* while section 156 applies where the thing bequeathed itself is a *quotient of the stock,* and the testator receives a *portion of the fund,* or stock. This should be made more clear; it is also desirable to introduce symmetry between sections 155 and 156—a symmetry which, in certain respects, is lacking at present.

Accordingly, we recommend the following re-drafts of sections 155 and 156. (Revised section 155-156)

> "155. *If an entire thing is specifically bequeathed,* the receipt by the testator of a part *of the thing* specifically bequeathed shall operate as an ademption of the legacy to the extent of the sum so received."
>
> "156. If a portion of an entire fund of stock is specifically bequeathed, the receipt *by the testator* of a portion of the fund or stock shall operate as an ademption only to the extent of the amount so eceived; and the residue of the fund or stock shall be applicable to the discharge of the specific legacy".

Section 157.

26.11. Section 157 deals with the order of payment where a portion of a fund is specifically bequeathed to one legatee and another legacy charged on the same fund is bequeathed to another legatee, and the testator receives a portion of that fund and the remainder is insufficient to pay both the legatees. In certain respects, the same topic is dealt with in section 151, which deals *generally* with the order of payment when a legacy is directed to be paid out of the fund and a portion of that fund is also specifically bequeathed. In other words, competition between a specific legacy and a demonstrative legacy is a common ingredient of both section 151 and section 157, and a specific provision for cases where the residue of the fund is deficient is also another common ingredient of the two sections. However, the distinction between the two sections lies in this, namely, that while section 151 deals with the generality cases section 157 deals with the *specific* cases where the problem arises because it is the *testator* who receives a portion of the fund in his life time. So far as can be gathered from the terms of the two sections, there is no difference in the actual rule to be applied. The propotion enacted in section 157 is that from the fund in question, the portion specifically bequeathed is to be paid first to the legatee; the

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[1] i.e. the receipt by the testator.

residue of that fund is to be applied to the demonstrative legacy, and if there is a deficiency, the rest of the legacy is to be paid out of the general assets of the testator. The last mentioned provision[1] is in conformity with the general principle that there is no ademption of a demonstrative legacy, and it shall be paid out of the general assets of the testator where necessary.

Recommendation to delete section 151.

26.12. This overlapping between sections 151 and 157 raises the question whether it is at all necessary to have both the sections in the Act. The law should, in our view, be simplified by deleting one of the sections and combining the gist of the two sections in the other section—omitting, of course, matter which is repeated in both. Deficiency under section 151 may arise because of *initial* inadequacy of the fund, while deficiency under section 157 may arise out of *subsequent* inadequacy of the fund by receipt by the testator himself of a portion thereof.

But the effect is the same. It would therefore be more convenient to omit section 151, and to deal with the matter in section 157[2].

Redraft of section.

26.13. On the above assumption[3], the following redraft of section 157 is recommended :—

"157(1) Where—

(a) a portion of a fund is specifically bequeathed to one legatee, and

(b) a legacy is directed to be paid out of the same fund to another legatee,

then—

(i) the portion specifically bequeathed shall first be paid to the legatee, and

(ii) the demonstrative legacy shall be paid out of the residue (if any), so far as it will extend, in payment of the demonstrative legacy.

"(2) If the remainder of the fund is insufficient to pay the demonstrative legacy, so much of the demonstrative legacy as remains unpaid shall be paid out of the general assets of the testator".

Illustration to section 151 to be transferred to section 157, after deleting section 151.

26.14. The illustration to section 151 may be transferred to section 157 as illustration 1, and the present illustration to section 157 may be re-numbered as illustration 2.

IV. Stock

Sections 158 and 159.

26.15. Two special provisions relating to legacies of stock are contained in sections 158 and 159. If stock specifically bequeathed does not exist at the time of the death of the testator, the legacy is adeemed under section 158. Where stock specifically bequeathed exists only in part at the time of the death of the testator, the legacy is adeemed so far as regards that part of the stock which has ceased to exist. This is provided for in section 159, which, in reality, carries out the same principle as is the basis of section 158.

The expression "stock" is used in the two sections in a wide sense, as is shown by the illustrations, and is not confined to stock in a company. The sections need no change.

Sections 160 and 161

26.16. In the case of specific bequests, certain questions arise where the goods are described with reference to a certain place. The connection of the goods with that place might have disappeared at the time of death, and the court has then to decide whether the connection is treated as to be material so that the specific bequest is adeemed, or whether the connection is, in the circumstances of the case, to be disregarded. To deal with this problem, two general

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[1]Section 153.

[2]Section 151 to be omitted, if the above recommendation is accepted.

[3]The assumption is that section 151 shall be deleted.

rules have been enacted, in section 160. The first is that if the removal of the goods from the specific place is due to a temporary cause, or by fraud, or without the knowledge or sanction of the testator[1], then there is no ademption. This is to be found in section 160.

Secondly, section 161 provides that removal of the thing from the specified place does not constitute an ademption, where the place is referred to only in order to complete the description of what the testator meant to bequeath. The illustrations to the section explain its purport. But the third illustration seems to stretch the language of the section. It puts the facts as under :

> "(iii) A bequeaths to B all his goods on board a certain ship, then lying in the river Hoogli. The goods are removed by A's direction to a warehouse, in which they remain at the time of A's death."

The illustration then provides that the legacy is not revoked by ademption

Recommendation to amend section 161.

26.17. Now, although it could be said that here the mention of the place was, in a sense, necessary to complete the description of what the testator meant to bequeath, a more convincing reason for not allowing ademption in such a case is that, by the very nature of the case, the situation mentioned or the place mentioned could only be temporary. A more accurate way of expressing section, therefore, to cover such a case, would be to add, at the end of section 161, some such words as *"or where, by its very nature, the place is such that the thing bequeathed would remain at that place only for a temporary period."*

We recommend that section 161 should be amended as above.

V. Receipt by testator

Section 162.

26.18. Section 162 provides that where the "thing bequeathed"—which really means *"the thing specifically bequeathed"*,—is not the right to receive something of value from a third person, but the money or other commodity which may be received from the third person by the testator himself or by his representatives, the receipt of such sum of money or other commodity by the testator shall not constitute an ademption; but if he mixes it up with the general mass of his property, the legacy is adeemed. This section is to be contrasted with section 154, whereunder[2] there is ademption where the thing specifically bequeathed is *the right to receive* something of value from the third party, and the testator himself receives it. The reason why section 154 provides for ademption is that the thing bequeathed is itself the subject to be extinguished, while the reason why section 162 prohibits ademption is that the amount received retains its separate identity.

In practice, it may not always be easy to determine, on the language of the will, whether the case falls under section 154 or section 162. In the absence of concrete Indian cases raising questions, however, it is not considered to disturb the two sections on this point.

Recommendation to amend section 162.

26.19. However, it should be made clear that section 162 applies only to "specific bequests", since the expression "thing bequeathed", in this context means the thing *specifically bequeathed*. This is clear from the later reference to "mixture with the general mass". We recommend that section 162 should be amended for the purpose, by substituting, for the words "the thing bequeathed", the words *"the thing specifically bequeathed."*

VI. Change in the thing bequeathed by operation of law.

Section 163- in a thing specifically bequeathed.

26.20. Under section 163, where a thing specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change takes place by operation of law, or in the course of execution of the provisions of any legal instrument under which the thing bequeathed was held, the legacy is not adeemed by reason of such change.

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[1]Compare Section 154.

[2]Para 26.8., *supra.*

26.21. It should be noted that this is not the rule in England, even though some of the commentators in India state that the Indian section is based upon the English law. In England, ademption takes place even in such circumstances, unless the statute which brought about the change in the nature of the property makes a contrary provision[1]. The situation has been described as one of "statutory disappropriation of property rights in favour of the state[2]." Often, however, statutes do make a provision preventing ademption. **Position in England.**

26.22. However, the legislature in India has adopted a different rule, perhaps on the assumption that since the change in question takes place without the will of the testator, one can presume that he had not changed his intentions as to affect the destination of the subject matter. **Rule in India.**

26.23. At this stage we should refer to a Delhi case relevant to change by operation of law. A Hindu executed a will according to which, on his death, his property was to go to the second wife for her life time and, after the death, equally to his son's sons from the first wife and the sons from the second wife. The property was in the N. W. Province (now in Pakistan). After the partition the family moved to India. On his death the widow claimed and obtained compensation for the property left in Pakistan *on the basis of the* will. She later purchased some property in India from out of the compensation so received. On the death of the widow, the son's sons from the first wife claimed half share in the property so purchased out of the compensation, relying on the will[3]. **Delhi case.**

It was held that the claimants were not entitled to the half share. The compensation received was in the form of money. By no stretch of imagination it could be treated as property "situated in Pakistan". Once the property had ceased to exist in its original form, the limitation on the rights of enjoyment no longer applied. It would be too much to say that this compensation money had to be preserved for ever in whatever form it goes and treated as if it was the property referred to in the will. The widow could not be treated as being a trustee under the terms of the will. She had no right to sell at all, being a limited owner, If by accident, the property is sold either through legislation or through other circumstances, then there is no obligation on her to live on the income of that compensation and leave the corpus to the persons entitled to the residue of the estate. Therefore, the doctrine of conversion could not be invoked in the present case.

26.24. The High Court further held that there was no direction in the will that any compensation received in respect of that property would go to the persons who would otherwise have got the property. This meant that the gift had been adeemed[4], because it cannot be given effect to. It was observed that this was unfortunate, because if this situation had at all been in the mind of the testator, he could have made a direction regarding the same. The testator could have made a codicil or a new will regarding the compensation. But the will was silent regarding the compensation and it could not be made operative *qua* the compensation. In the circumstances, the suit was dismissed.

26.25. The judgment does not discuss section 163, and attention of the court was perhaps not drawn to the section.

26.26. We may discuss another aspect of section 163. Where a change in the thing bequeathed takes place by an order of the court, it should apparently be regarded as a change by 'operation of law' within section 163. Here again, the common law was different, as illustrated by English cases[5] where, by an order in lunacy proceedings, certain shares specifically bequeathed were directed **Change by order of court.**

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[1]Mellows, Law of Succession (1977), pages 523, 524.

[2]*Sea; Re-Viscount Galway's Will,* (1950) Ch. 1; (1950) 2 All E.R. 419.

[3]*Chaman Lal* v. *Kundan Lal,* A.I.R. 1979 Delhi 240, paras 11 to 14 (D. K. Kapur J.) (November-December).

[4]Halsbury, 3rd Ed., Vol. 39 p. 934, Article 1412, cited.

[5](*a*) *Jones* v. *Green,* Law Reports 5 Eq. 555.

(*b*) *Re-Freer,* 22 Chancery Division 622.

to be sold, and the proceeds were to be invested in other securities. The bequest of such shares was held to be adeemed. The position in England was later altered by statute[1].

Section 164- Change without knowledge of testator.

26.27. This takes us to section 164, which provides that where a thing specifically bequeathed undergoes a change without a knowledge or sanction of the testator, there is no ademption. This situation is analogous to that under section 160, whereunder removal of the goods from the place described in the *will without knowledge or sanction* of the testator does not lead to ademption. No change is required in this section.

Section 165 - Stock replaced after loan.

26.28. Section 165 provides that where stock which has been specifically bequeathed is lent to a third party on condition that it shall be replaced, and it is replaced accordingly, the legacy is not adeemed. This section also does not seem to require any change.

Section 166.

26.29. Section 166 reads as follows :

> "166. Where stock specifically bequeathed is sold, and an equal quantity of the same stock is afterwards purchased and belongs to the testator at his death, the legacy is not adeemed".

This section is based on the dictum of Lord Talbot in an early case[2-3]. Lord Talbot said in that case : "If the selling out the stock is an evidence to presume an alteration of the intention of the testator, surely his buying in again is as strong an evidence of his intention that the legatee should have it again". It should be noted, however, that later it has been held[4] that in England a legacy is adeemed by the sale of the stock, and *will not be revived* by a new purchase of similar stock by the testator.

There is, perhaps, some thing to be said for both the views. It can, on the one hand, be said that the testator would not have intended to remove a benefit already conferred. On the other hand, it can be said that he would not have sold the stock if he wished to continue the benefit. In this position, it is better not to change the section, leaving it to the testator to make an express modification of his will, if he so desires.

CHAPTER 27

PAYMENT OF LIABILITIES IN RESPECT OF THE SUBJECT OF A BEQUEST : SECTION 167 TO 170

Scope.

27.1. Payment of liabilities in respect of a bequest is regulated by sections 167 to 170. Two of the sections (167-168) deal with apportionment as to persons who shall bear a particular liability or burden attaching to the subject of a bequest, while two are concerned with the approtionment of liability in point of time.

Section 167- Non-liability of executor to exonerate specific legatees.

27.2. Section 167 reads as under :

> 167. (1) Where property specifically bequeathed is subject at the death of thetestator to any pledge, lien or incumbrance created by the testator himself or by any person under whom he claims, then, unless a contrary intention appears by the will, the legatee, if he accepts the bequest, shall accept it subject to such pledge or incumbrance, and shall (as between himself and the testator's estate) be liable to make good the amount of such pledge or incumbrance.

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[1]. Section 123, Lunacy Act, 1890.

[2]*Partridge* v. *Partridge*, cas. Temp. Talb. 226. Paruck, Succession Act, (1977) p. 459.

[3]For comment, see *Avelyn* v. *Ward*. 1 Ves. Sen. 420.

[4]*Pattison* v. *Pattison*, 1 My. & K. 12.

(2) A contrary intention shall not be inferred from any direction which the will may contain for the payment of the testator's debts generally.

"*Explanation.* A periodical payment in the nature of land-revenue or in the nature of rent is not such an incumbrance as is contemplated by this section.

ILLUSTRATIONS

"(i) A bequeths to B the diamond ring given to him by C. At A's death the ring is held in pawn by D, to whom it has been pledged by A. It is the duty of A's executors, if the state of the testator's assets will allow them, to allow B to redeem the ring."

"(ii) A bequeaths to B a zamindari which at A's death is subject to a mortgage for 10,000 rupees; and the whole of the principal sum, together with interest to the amount of 1,000 rupees, is due at A's death. B, if he accepts the bequest, accepts it subject to this charge, and is liable, as between himself and A's estate, to pay the sum of 11,000 rupees thus due."

The section needs no change.

27.3. This takes us to section 168, quoted below :

Section 168- Completion of testator's title to thing bequeathed to be at cost of his estat

"168. Where anything is to be done to complete the testator's title of the thing bequeahed, it is to be done at the cost of the testator's estate."

ILLUSTRATIONS

(i) A, having contracted in general terms for the purchase of a piece of land at a certain price, bequeaths it to B, and dies before he has paid the purchase- money. The purchase-money must be made good out of A's assets.

(ii) A, having contracted for the purchase of a piece of land for a certain sum of money, one-half of which is to be paid down and the other half secured by mortgage of the land, bequeaths it to B, and dies before he has paid or secured any part of the purchase-money. One-half of the purchase-money must be paid out of A's assets'.

The section needs no change.

27.4. Section 169 is as follows :

"169. Where there is a bequest of any interest in immovable property in respect of which payment in the nature of the land-revenue or in the nature of rent has to be made periodically, the estate of the testator shall (as between such estate and the legatee) make good such payments or a proportion of them, as the case may be, upto the day of his death. Section 169.

ILLUSTRATION

"A bequeaths to B a house, in respect of which 365 rupees are payable annually by way of rent. A pays his rent at the usual time, and dies 25 days after. A's estate will make good 25 rupees in respect of the rent."

27.5. The principle is that in case of bequests of an immovable property, the rents and taxes in respect of that property *upto the time of the testator's death,* should be paid out of the testator's estate, and the taxes etc. after the death of the testator should be paid by the legatee. The same rule of apportionment is laid down in the Transfer of Property Act, 1882[1].

Under the section in the Succession Act, it is the land revenue and rent that are directed to be apportioned. Under the Transfer of Property Act, the apportionment applies to rent, *annuities, pensions, dividends and other periodical payments.*

[1]Section 36, Transfer of Property Act, 1882.

Liability for tax.

27.6. These sections are silent as to tax on income. As regards the liability of the legal representative to pay income-tax, the law is that where tax has already been assessed as payable by a person and he dies, his executor, administrator or other legal representative is liable to pay the same out of his estate so far as the estate is capable of meeting the charge of income-tax[1].

The Income Tax Act[2] casts a liability upon the executor or administrator to pay the tax *which the testator would have been liable to pay*. This obviously relates to the liability relative to the period before death. As section 169 has not so far created any problems, we would leave the section as it is.

Section 170 calls on shares.

27.7. Section 170 deals with liability in respect of call or other payment on stock in a joint stock company, and is as follows :—

> "In the absence of any direction in the will where there is a specific bequest of stock in a joint stock company, if any call or other payment is due from the testator at the time of his death, in respect of the stock, such call or payment shall, as between the testators estate and the legatees be borne by the estate; but, if any call or other payment becomes due in respect of such stock after the testator's death, the same shall, as between the testator's estate and the legatee, be borne by the legatee, if he accepts the bequest." There are five illustrations to the section, as follows :—
>
> "(i) A bequeaths to B his shares in a certain railway. At A's death there was due from him the sum of 100 rupees in respect of each share, being the amount of a call which had been duly made, and the sum of five rupees in respect of each share, being the amount of interest which had accrued due in respect of the call. These payments must be bore by A's estate.
>
> (ii) A has agreed to take 50 shares in an intended joint stock company, and has contracted to pay up 100 rupees in respect of each share, which sum must be paid before his title to the shares can be completed. A bequeaths these shares to B. The estate of A must make good the payments which were necessary to complete A's title.
>
> (iii) A bequeaths to B his shares in a certain railway. B accepts the legacy. After A's death, a call is made in respect of the shares. B must pay the call.
>
> (iv) A bequeaths to B his shares in a joint stock company. B accepts the bequest. Afterwards the affairs of the company are wound up, and each share-holder is called upon for contribution. The amount of the contribution must be borne by the legatee.
>
> "(v) A is the owner of ten shares in a railway company. At a meeting held during his lifetime a call is made of fifty rupees per share, payable by three instalments. A bequeaths his shares to B and dies between the day fixed for the payment of the first and the day fixed for the payment of the second instalment, and without having paid the first instalment. A's estate must pay the first instalment, and B, if he accepts the legacy, must pay the remaining instalments".

Defect in the terminology of section 170.

27.8. The terminology of section 170 seems to suffer from a serious dificiency, inasmuch as it uses the words "stock in a joint stock company", and omits to mention 'shares', though illustrations (ii) to (iv) to the section do mention shares. To an ordinary person, the word 'stock would not include 'shares'. *Prima facie*, it appears desirable that shares should be continued specifically in the section.

The legislative usage in the Companies Act may be referred to in this context. Under that Act[3], 'stock' is the aggregate of fully paid up shares legally consolidated, portions of which agreegate may be transferred to split up into fractions of any amount of shares. 'Share' means share in the share capital of

[1]Section 159, Income Taxt 1961.
[2]Section 159, Income Tax Act, 1961.
[3]Section 566, Companies Act, 1956.

the company and includes stock, except when a distinction between stock and share is expressed. Where the shares have been fully paid up, they may be turned into stock, and notice must be given to the Registrar.

The term 'Joint Stock Company' is defined by the Companies Act[1], as a company having a permanent paid up or a nominal share capital of a fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in the one way and partly in the other, and formed on the principle of having, for its members the holders of those shares or that stock, and no other person.

Decision of House of Lords as to Meaning of 'stock',

27.9. Reference may also be made in this connection to a decision of the House of Lords[2]. In that case, the testator had bequeathed to his wife *'leasehold estates and all such stocks* in the public funds, or *shares* in any Railway of which I may die possessed,' and, on failure of issue, he gave to his brother the same leashold estate, stock, shares, moneys and securities". The question was whether the 'shares' and 'stocks' were two different things, in view of the fact that the testator consciously used both these terms in his will. It was held that manifestly, for every purpose, share and stocks were alike share when paid up, grew into stock, and were put upon a special Register for the convenient management of business, but, in substance, they continued to be the same thing, and may well pass by the same words unless there be a clear difference made between them.

Recommendation as to section 170

27.10. It appears to us that instead of driving the reader to deriving the meaning of 'stock' from the illustrations under section 170 or to other sources, the Act should expressly mention the word 'shares' in the body of the main section. The layman is more frequently concerned with 'share' than with stock. We, therefore, recommend that section 170 should be suitably amended, so as to add an express mention of 'shares'. The following is a suggested re-draft of the section for the purpose :

Revised section 170

"170. In the absence of any direction in the will, where there is a specific bequest of stock in a joint stock company or *shares in a company with limited liabilities,*

(a) if any call or oher payment is due from the testator at the time his death in respect of the stock *or shares,* such call or payment shall, as between the testator's estate and the legatee, be borne by the estate; but

(b) if any call or other payment becomes due in respect of such stock *or shares* after the testator's death, the same shall, as between the testator's estate and the legatee, be borne by the legatee, if he accepts the bequest".

Illustrations as at present.

CHAPTER 28

BEQUESTS OF THINGS

Scope.

28.1. Bequests of things "described in general terms" form the subject matter of a chapter comprising two sections. The problems that these sections address themselves to are such as arise out of the generality (or vagueness) of the description of the thing bequeathed. Because of the implicit vagueness a certain elasticity of action is provided (section 171) and a bequest of interest can be construed as bequest of the principal also (section 172).

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[1]Secton 566, Companies Act, 1956.

[2]*Frederick F. J. Morrice* v. *George E. Aylmer,* (1875) 7 H. L. 717.

Section 171- Bequest of thing described in general terms.

28.2. Section 171 reads—

"171. If there is a bequest of something described in general terms, the executor must purchase for the legatee what may reasonably be considered to answer the description.

ILLUSTRATIONS

(i) A bequeaths to B a pair of carriage—horses or a dimond ring. The executor must provide the legatee with such articles if the state of the assets will allow it.

(ii) A bequeaths to B "my pair of carriage-horses". A had no carriage-horses at the time of his death. The legacy fails."

The section needs no change[1].

Section 172.

28.3. Section 172 reads—

*172. Where the interest or produce of a fund is bequeathed to any person, and the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration, the principal, as well as the interest, shall belong to the legatee.

ILLUSTRATIONS

(i) A bequeaths to B the interest of his 5 per cent promissory notes of the Central Government. There is no other clause in the will affecting those securities. B is entitled to A's 5 per cent, promissory notes of the Central Government.

(ii) A bequeaths the interest of his 5½ per cent promissory notes of the Central Government to B for his life, and after his death to C. B is entitled to the interest of the notes during his life, and C is entitled to the notes upon B's death.

(iii) A bequeaths to B the rents of his lands at X. B is entitled to the lands".

Recommendation to amend section 172.

28.4. Judicial decisions[2] take the view that the section applies to immovable property[3]. The view requires support from the third illustration.

In our opinion, it would be useful to alter the language of the section by making this position more explicit. The word 'property' should be added in the section, since the word 'fund' is not quite appropriate for immovable property. Accordingly, we recommend that section 172 should be revised as under :

"172. Where the interest or produce of a *fund or property* is bequeathed to any person and the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration, the principal *of the fund or the property, as the case may be,* as well as the interest *or produce,* shall belong to the legatee".

(Illustrations as at present).

CHAPTER 29

BEQUESTS OF ANNUITIES : SECTIONS 173 TO 196

Scope.

29.1. Bequests of annuities are dealt within sections 173 to 176. The provisions are of a miscellaneous character. Incidentally, secton 176 has nothing

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[1]Compare section 104.

[2](*a*) *Hemangini* v. *Nabin Chandra,* (1882) I. L. R. 8 Cal. 788.

(*b*) *Administrator General* v. *Hughes,* (1913) I. L. R. 40 Cal. 192, 214.

[3]See also illustration (iii).

to do with annuities, but provides that no bequest is adeemed by a subsequent provision made by the testator for the legatee.

29.2. Sections 173 and 174 can be considered together. Section 173 reads— Sections 173-174

"173. Where an annuity is created by will, the legatee is entitled to receive it for his life only, unless a contrary intention appears by the will, *notwithstanding that the annuity is directed to be paid out of the property generally, or that a sum of money is bequeathed to be invested in the purchase of it.* Annuity created by will payable for life only unless contrary intention appears by will.

ILLUSTRATIONS

"(i) A bequeaths to B 500 rupees a year. B is entitled during his life to receive the annual sum of 500 rupees.

(ii) A bequeaths to B the sum of 500 rupees monthly, B is entitled during his life to receive the sum of 500 rupees every month.

(iii) A bequeaths an annuity of 500 rupees to B for life, and on G's death to C. B is entitled to an annuity of 500 rupees during his life. C, if he survives B, is entitled to annuity of 500 rupees from B's death until his own death."

Section 174 reads—

"174. Where the will directs that an annuity shall be provided for *any person out of the proceeds of property, or out of property generally, or where money is bequeathed to be invested in the purchase of any annuity for any person*, on the testator's death, the legacy vests in interest in the legatee, and he is entitled at his option to have an annuity purchased for him or to receive the money appropriated for that purpose by the will. Period of vesting where will directs that annuity be provided out of proceeds of property or out of property generally or where money bequeathed to be invested in purchase of annuity

ILLUSTRATIONS

(i) A by his will directs that his executors shall, out of his property, purchase an annuity of 1000 rupees for B. B' is entitled at his option to have an annuity of 1000 rupees for his life purchased for him or to receive such a sum as will be sufficient for the purchase of such an annuity.

(ii) A bequeaths a fund to B for his life, and directs that after B's death, it shall be laid out in the purchase of an annuity for C. B and C survive the testator. C dies in B's lifetime. On B's death the fund belongs to the representative of C.

29.3. There is an inconsistency[1] between sections 173 and 174. Under section 173 *even if a fund is set apart for the payment thereof,* an annuity is to be taken as for life only (and not as a perpetual one). Under section 174, however, *where a fund is set* apart for the payment of the annuity, the annuitant has the option to claim the capital asset (fund) so set apart and the section (174) is widely expressed *so as to cover even life annuities.* Thus, where a fund is set apart for payment of an annuity, there arises a conflict between the two sections. The conflict can be reconciled by excluding, from section 174, cases where the annuity is for life only or where it otherwise appears that it is not intended to be perpetual. Inconsistency.

29.4. On this basis, we recommend the following changes in the two sections :— Recommendation to revise sections 173-174.

(i) *Section* 173.

The latter half of section 173, beginning with the words 'notwithstanding that .....", should be replaced by the reverse rule, namely, that in cases where the annuity is directed to be paid out of a property etc. there will be a rebuttable presumption that the annuity is perpetual[2].

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[1] *Cf.* Paruck, Session Act (1966), page 393.
[2] For draft of the revived Section, see below.

(ii) *Section* 174.

Section 174 should be qualified by confining it to cases of perpetual annuity. The revised sections will read as follows :

Revised section 173

"173. (1) *Subject to the provisions of sub-section* (2), where an annuity is created by will, the legatee is entitled to receive it for his life only, unless a contrary intention appears by the will.

(2) Where the annuity is directed to be paid out of the property generally, or a sum of money is bequeathed to be invested in the purchase of it, *it shall be presumed, until the contrary is proved, that the annuity is perpetual.*"

Revised section 174

"174. (1) *Subject to the provisions of sub-section* (2), where the will directs, that an annuity shall be provided for any person out of the proceeds of property, or out of property generally or where money is bequeathed to be invested in the purchase of any annuity for any person, on the testator's death, the legacy vests in interest in the legatee, and he is entitled at his option to have an annuity purchased for him or to receive the money appropriated for that purpose by the will.

(2) *The provisions of sub-section* (1) *shall not apply where the annuity is for life only or where it otherwise appears that it is not intended to be perpetual.*"

Section 175 abatement of annuity.

29.5. Section 175 reads :—

"175. Where an annuity is bequeathed, but the assets of the testator are not sufficient to pay all the legacies given by the will, the annuity shall abate in the same proportion as the other pecuniary legacies given by the will." The section needs no change.

Section 176: Gift of annuity coupled with residuary gift.

29.6. Section 176 reads—

"176 where there is a gift of an annuity and a residuary gift, the whole of the annuity is to be satisfied before any part of the residue is paid to the residuary legatee, and, if necessary, the capital of the testator's estate shall be applied for that purpose."

The section also needs no change.

CHAPTER 30

LEGACIES TO CREDITORS AND PORTIONERS (SECTIONS 177 TO 179)

Scope of the chapter and departure from English law.

30.1. Legacies to creditors and portioners form the subject matter of section 177 to 179. Before discussing the gist of sections 177 to 179, it would be worthwhile to point out that the provisions of these sections depart from the English law, and that the departure is deliberate and justified. The rule in England is that where a bequest is given to a person who is a creditor of the testator, then, in the absence of an intention to the contrary, the bequest is regarded as given in "satisfaction" of the pre-existing debt, that is to say, it is regarded as an extinguishment of the existing claim, and not as a separate legacy. This rule of equity is known as "satisfaction of debts by legacies". Similarly, in England, where a "portion" or part of a person's estate agreed to be given to a child is followed by a legacy to that child, the rule that equity leans against *double portions* is attracted. In the absence of an intention to the contrary, the presumption of equity is that the bequest is in satisfaction of the portion agreed to be given to the child. The presumption is based on the improbability of a parent intending a double portion for one child to the prejudice of other children.

Rule of "Satisfaction" in England

30.2. To make the discussion comprehensive, it should be pointed out that in England, the equitable rule of "satisfaction", considered in all its aspects, arises[1] in four classes of cases, namely, (i) satisfaction of debts by legacies[2], (ii) satisfaction of legacies by subsequent legacies, (iii) satisfaction of portions by legacies[3], and (iv) satisfaction of legacies by portions or advancements[4].

In India, sections 177 to 179 of the Act make a clean sweep of the doctrine of "satisfaction" in regard to all the four cases mentioned above. The first case is dealt with in section 177; the second case is dealt with in section 179;

The third case is dealt with in section 178, and the fourth case is dealt with in section 179, vide the words "by settlement or otherwise' which occur in that section.

Departure from subject law deliberate

30.3. This departure from English law was deliberate, as is evident from the Report of the Law Commission[5]. The Law Commissioners regarded the English rule as objectionable and inapplicable to India, and wished to avoid the difficult enquiry as to the intentions of the testator which has to be undertaken according to the English rule.

We are now in a position to discuss the section proper.

Sections 177 and 178.

30.4. This takes us to section 177. Sections 177 and 178 may be considered together. They read—

"177. Where a debtor bequeaths a legacy to his creditor, and it does not appear from the will that the legacy is meant as a satisfaction of the debt, the creditor shall be entitled to the legacy, as well as to amount of the debt."

178. Where a parent, who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child, and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy, as well as the portion.

ILLUSTRATION

A, by articles entered into in contemplation of his marriage with B, covenanted that he would pay to each of the daughters of the intended marriage a portion of 20,000 rupees on her marriage. This covenant having been broken, A bequeaths 20,000 rupees to each of the married daughters of himself and B. The legatees are entitled to the benefit of this bequest in addition to their portions."

Sections 177 & 178 Need for specific rule as to bequest to debtor.

30.5. The sections, so far as they go, are satisfactory and judicial decisions do not seem to have created any serious problems. There is one situation, however, about which a specific rule appears to be desirable. There is no provision in the Act as regards bequest to a debtor, though a bequest *by a debtor* is covered by section 177. It appears that in England, where the legatee of a general legacy of a share or a residue is a debtor to the estate, he is not entitled to receive the legacy without first bringing his debt into account; and, for this purpose, it makes no difference whether the debt is alive or is barred by limitation. A similar rule has been judiciallyapplied in India. In a Calcutta, case[6], A and B were indebted to the estate, and died *without satisfying* their debt (the

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[1]Pomeroy, Equity Jurisprudence, paragraph 521, referred to in N.D. Basu, Law of Succession (1957), pages 551,552.

[2]*Talbot* v. *Shrewsbury*, (1714) Pr. Ch. 394.

[3]*Exp. Pye*., 18 Ves 140.

[4]*Re pollock*, 28 Ch. D. 552.

[5]Report of the Law Commission, 23rd June, 1863, Gazette of India—Ist July, 1864, page 54.

[6]Loke Nath Mullick V.Gdoyachwar, (1881) I.L.R. 7 Cal. 644.

debts were barred by limitation). Their descendants claimed a share in the estate of the testator, apparently under a will. It was held that they could not be allowed to receive the share without first satisfying the debts due from them to the estate.

This is really analogous to setting off the debt against the legacy. Justice and the presumed intention of the testator support such a course.

ecommendation. 30.6. It may be worthwhile to codify this judicial interpretation. We recommend that for this purpose a new section 177A should be inserted as follows :—

> "177A. *Where a creditor bequeaths a legacy to his debtor, and it does not appear from the will that the legacy is to be paid even if the debt is not repaid by the debtor, the debtor shall not be entitled to the legacy unless so much of the debt as has become due and payable has been repaid.*"

CHAPTER 31

ELECTION : SECTIONS 180 TO 190

I. Principle of election

cope. 31.1. The topic of election is dealth with in eleven sections (180 to 190).

A person on whom a benefit is conferred by a will must adopt the whole contents of the instrument, conform to all its provisions and renounce every right inconsistent with it. This in brief, is the gist of the doctrine of election which forms the basis of this Chapter. The basic section is section 180, the rest being concerned with particular applications of the doctrine or qualifications thereof.

ection 180—Circumstances in which ection takes place. 31.2. Section 180 formulates the principle in these terms.

> "180. Where a person, by his will, professes to dispose of something which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and, in the latter case, he shall *give up any benefits which may* have been provided for him by the will"[1].

octrine of approbate and reprobate. 31.3. In Douglas *Benzies* v. *Upphelby*[2], Lord Robertson referred to the principle of election as being the same as the doctrine[3] of "approbate and reprobate", and observed :

> "In considering the merits of the decision appealed against, it is well to remember what is the doctrine of approbate and reprobate invoked by the appellant. Although the name is different, the principle as was laid down by Lord Eldon in *Ker* v. *Wauchope*[4], is the same as that of the English law of election. It is against equity that any one should take against a man's will and also under it. This rests on no artificial rule, but on plain fair dealing. If any one has the right by law to take a share of a testator's estate, which the testator has not given but has otherwise disposed of, that person takes it against the will and cannot go on to found on the will and claim its benefits".

In a later case[5] Lord Atkinson quoted with approval the passage above cited from the judgment of Lord Robertson.

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[1]Emphasis adopted.

[2]*Douglas Menzies* v.*Upphelby*, (1908) A.C. 224, 232.

[3]See also para 31.2. *supra*

[4]*Ker* v. *Wauchope*, (1819) 1 Bligh 1.

[5]*Pitman* v. *Grum Ewing*, (1911) A.C. 217.

31.4. The principle that a person cannot both "approbate and reprobate" (to use terms used in Scottish Law)[1], finds expression in the law of Wills[2] as also in the law of deeds[3]. The principle is discussed by the Editor of Swanston's Reports, in a very learned note on the leading English case on the subject[4].

31.5. The principle is of universal application, and is not peculiar to English law. As the Privy Council observed long ago[5], it is "common to all law which is based on the rules of justice, viz., the principle that a party shall not at the same time affirm and disaffirm the same transaction—affirm it as far as it is for his benefit and disaffirm it, as far as it is to his prejudice". Universal application.

If, therefore, a testator has purported to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee, *accepting* the benefit so given to him, must make good the testator's attempted disposition. But, if on the contrary, that person choses to enforce his proprietary rights *against* the testator's disposition, then equity will sequester the property given to him, for the purpose of *making satisfaction* out of it to the person whom he has disappointed by the assertion of those rights. This is the broad position in England, resulting from the principle referred to above.

With a very important difference (to be presently noticed)[6], section 180 also carries out the principle referred to above.

II. Juristic basis

31.6. At this stage, an examination of the juristic basis of the principle of election is necessary. Historically speaking, there have been three suggestions as to the basis of the rule of election, namely, (a) implied condition, (b) presumed intention of the testator, and (c) equity. Juristic basis.

(a) In the beginning, the view prevailed that the testator gave his property to the recipient *on the implied condition that* the recipient would give his property to the third party[7]. This explanation, however, is not accepted now.

(b) Later, a theory was advanced that the doctrine of election was based on the *presumed intention* of the testator; but this theory was also rejected by the House of Lords[8].

(c) The explanation now accepted is that of equitable basis. Lord Cairns expressly observed[9] in 1874 that the rule of election was not based either on the testator's intention, or on his presumed intention. It is based on considerations of equity. This view was reiterated in 1920[10].

31.7. It is now generally accepted that in order to achieve a *just result* in the circumstances of the case equity imposes this rule as a matter of conscience. Presest understanding in England.

To quote Viscount Haldane's observations in Brown v. Gregson[11]:

> "The doctrine of election rests on a different foundation. It is a principle which the courts apply in the exercise of an equitable jurisdiction enabling them to secure a just distribution in substantial accordance with the general scheme of the instrument. It is not merely the language used to which the

[1] *Cf. Douglas Menzies* v. *Upphelby*, (1908) A.C. 224 (Lord Robertson).

[2] See also para 31.5, *infra*.

[3] Compare section 35, Transfer of Property Act, 1882.

[4] *Dillon* v. *Parker*, 1 Swan 359, particularly, notes at pages 381, 384.

[5] *Rungamma* v. *Atchmma*, 4 M. I. A. 1, 10 (P.C.).

[6] See para 31.6, *infra*.

[7] y. *Nos Mordaunt*, (1706) 2 Vern. 581.

[8] *Cooper* v. *Cooper*, (1874) Law Reports 7. H. L. 53; (1874-80) All E.R. Rep. 307.

[9] *Cooper* v. *Cooper*, (1874) L. R. 7 H. L. 53; (1874-80) All. E. R. Rep. 307.

[10] *Brown* v. *Gregson*, (1920) A.C. 860, (1920) All E.R. Rep. 730, 734 (H. L.).

[11] *Brown* v. *Gregson*, (1920) A.C. 860, (1920) All E.R. Rev. 730, 734 (H. L.).

court looks. A testator may, for instance, have obviously failed to realise that any question could arise."

"But the court will nonetheless hold that a beneficiary who is given a share under the will in assets, the total amount of which "depends on the inclusion of property belonging to the beneficiary himself which the testator has ineffectively sought to include, ought not to be allowed to have a share in the assets effectively disposed of excepting on terms. He *must co-operate to the extent requisite*[1] to provide the amount necessary for the division prescribed by the will, either by bringing in his own property, erroneously contemplated by the testator as forming part of the assets, or by submitting a diminution of the share to which he is prima facie entitled to an extent equivalent to the value of his own property if withheld by him from the common stock. As was said by Cairns, L.C., in *Cooper* v. *Cooper*[2], this condition arises not as on a "conjecture of a presumed intention, but .....on a rule of equity founded on the highest principles of equity, and as to which the court does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the will."

Whether forfeiture just and fair.

31.8. This juristic basis—the basis of equity—directly leads to a consideration of certain aspects of the section in our Act. The precise question to be examined is, whether considerations of equity[3] necessitate total *forfeiture of the benefit* which the will proposes to give to the unwilling legatee (as is the present law in India), or whether it is enough if the disappointed legatee is compensated (as is the law in England). In our view, it is enough if the unwilling legatee is permitted to retain what the testator has left to him, on condition of compensating the disappointed legatee for the loss of the benefit which the testator intended for the disappointed legatee. The present English law compels the refractory legatee (the legatee who does not comply with the will), merely to compensate the disappointed legatee. The Indian law lays down forfeiture of the legacy proposed to be given to the legatee who does not comply with the will; and, in effect, the balance goes to the residuary legatee of the testator. This is clear from illustration (i) to section 182[4].

III. Emphasis on intention misplaced

31.9. When the matter is viewed in the above light, it becomes a question for srious consideration whether the law in India, as incorporated in section 180, should not be changed. The present law appears to be unduly harsh. It places too much emphasis *on the testator's intention*. The emphasis might have been derived from the Roman law[5], but there is no reason why we should now adhere to that old doctrine. Perhaps, the Indian section still sticks to the old position because, at the time when (in 1865) the statutory provision on the subject was introduced[6] in India for the first time in the law of succession, the position in England was not very definitely settled, that is to say[7], whether there should be compensation or there should be forfeiture, was

[1]Emphasis supplied.

[2]*Cooper* v. *Cooper*, L. R. 7 H. L. 53, 67; (1874-80) All E.R. Rep. 307.

[3]Para 31.7, *supra*.

[4]Para 31.13, *infra*.

The illustrations are wrongly placed under section 102, and should, have been placed under section 180 or sectin 181.

[5]See Buckland, Equity in Roman Law, pages 95-100 referred to by Hanibury, Modern Equity (1957), pages 502, footnote 6.

[6]Section 167, Indian Succession Act, 1865.

[7]See para 30.6, *supra*.

not very clear. Possibly, some misunderstanding of the position was also caused by Swantston's note to one of the cases which reads :

> "It is a maxim not of morality but of logic, which compels election between claims in respect not of the injustice, but of the technical incompatibility of their contemporaneous assertions."

Ambiguity of the expression "election".

31.10. It also appears that some ambiguity is inherent in the expression "election", which may either mean a right of *choice between two bequests* (on the one hand), or a right to make a choice *in favour of retaining his own* property, on terms of compensation. Apparently, in civil law, the refractory donee could not retain the property belonging to him on terms of compensation to the disappointed claimant. He forfeited the benefit. But this does not appear to be a just course of action.

The present English rule[1] is more fair and should be adopted. Compensation does justice to both the parties and the law need not compel forfeiture of the benefit given to the refractory donee.

Recommendation to revise section. 180.

31.11. In the light of the above discussion, we recommend that section 180 should be revised as under :—

> "180. Where a *testator*, by his will, professes to dispose of some thing which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it; and in the latter case, he shall *compensate any person who has, by virtue of such election, lost the benefits provided for him by the will, such compensation not to exceed the benefits which may have been provided by the will for the person so dissenting.*"

V. Effect of election

Section 181—Delection recommended.

31.12. According to section 181, an interest relinquished in the circumstances stated in section 180 shall devolve as if it had not been disposed of by the will in favour of the legatee, subject, nevertheless, to the charge of making good to the disappointed legatee the amount or value of the gift attempted to be given to him by the will. The section should be deleted, if section 180 is amended[2] as recommended above, since there will be no "relinquishment by the legatee", after such amendment of section 180.

We recommend accordingly.

Section 182.

31.13. Section 182 reads :—

> "The provisions of sections 180 and 181 apply whether the testator does or does not believe that which he professes to dispose of by his will to be his own.
>
> ILLUSTRATIONS
>
> (i) The farm of Sultanpur was the property of C. A bequeathed it to B, giving a legacy of 1,000 rupees to C. C has elected to retain his farm of Sultanpur, which is worth 800 rupees. C forfeits his legacy of 1,000 rupees, of which 800 rupees goes to B, and the remaining 200 rupees falls into the residuary bequest, or devolves according to the rules of intestate succession, as the case may be.
>
> (ii) A bequeaths an estate to B in case B's elder brother (who is married and has children) shall leave no issue living at his death. A also bequeaths to C a jewel, which belongs to B. B must elect to give up the jewel or to lose the estate.
>
> (iii) A bequeaths to B 1,000 rupees, and to C an estate which will, under a settlement, belong to B if his elder brother (who is married and has

[1]Para 31.8, *supra*.

[2]See para 31.11, *supra*.

children) shall leave no issue living at his death. B must elect to give up the estate or to lose the legacy.

(iv) A, a person of the age of 18, domiciled in India but owning real property in England, to which C is heir at law, bequeaths a legacy to C and, subject thereto, devises and bequeaths to B "all my property whatsoever and wheresoever", and dies under 21. The real property in England does not pass by the will. C may claim his legacy without giving up the real property in England."

(As already pointed out[1] the illustrations should really have been placed under section 180 or 181).

31.14. The reference in section 182 to section 181 should be deleted, if section 181 is deleted as recommended[2]. The illustrations to the section will require change, if our recommendation[3] to substitute compensation for forfeiture is accepted.

Illustration (iv) has become obsolete in view of present English law as to the age of majority, and should be deleted.

On the above basis, the illustrations to section 182 may be revised as under :

"(i) The farm of Sultanpur was the property of C. A bequeathed it to B, giving a legacy of 1,000 rupees to C. C has elected to retain his farm of Sultanpur, which is worth 800 rupees, *C must pay B compensation of* 800 *rupees.*

(ii) A bequeaths an estate to B in case B's elder brother (who is married and has children) shall leave no issue living at his death. A also bequeaths to C a jewel which belongs to B. B must give up the jewel (thus *confirming the disposition*) or (*if he elects to retain it*) *pay compensation to C to the extent of the value of the jewel, but not exceeding the value of the estate.*

(iii) A bequeaths to B 1,000 rupees, and to C an estate which will, under a settlement, belong to B if his elder brother (who is married and has children) shall leave no issue living at his death. B must give up the estate or (*if he elects to retain it*) *pay compensation to C to the extent of the value of the estate, but not exceeding one thousand rupees.*

(Present illustration (iv) to be omitted).

Section 183.

31.15. Section 183 reads as under :—

"183. A bequest for a person's benefit is, for the purpose of election, the same thing as a bequest made to himself.

ILLUSTRATION

The farm of Sultanpur Khurd being the property of B, A bequeathed it to C; and bequeathed another farm called Sultanpur Buzurg to his own executors with a direction that it should be sold and the proceeds applied in payment of B's debts. B must elect whether he will abide by the will, or keep his farm of Sultanpur Khurd in opposition of it".

The section needs no change, not having created any problems.

Section 184—person deriving benefit indirectly not put to election.

31.16. Section 184 reads—

"184. A person taking no benefit directly under a will, but deriving a benefit under it indirectly, is not put to his election.

ILLUSTRATION

The lands of Sultanpur are settled upon C for life, and after his death upon D, his only child. A bequeaths the lands of Sultapur to B, and 1,000 rupees

[1]Para 31.8, *supra.*

[2]See para 31.12, *supra.*

[3]See para 31.12, *supra.*

to C. C dies intestate shortly after the testator, and without having made any election. D takes out administration to C, and as administrator elects on behalf of C's estate to take under the will. In that capacity he receives the legacy of 1,000 rupees and accounts to B for the rents of the lands of Sultanpur which accrued after the death of the testator and before the death of C. In his inidividual character he retains the lands of Sultanpur in opposition to the will."

This section also may be left as it is.

31.17. Section 185 reads— **Section 185.**

"185. A person who in his individual capacity takes a benefit under a will may, in another character, elect to take in opposition to the will.

ILLUSTRATION

The estate of Sultanpur is settled upon A for life and after his death, upon B. A leaves the estate of Sultanpur to D, and 2,000 rupees to B and 1,000 rupees to C, who is B's only child. B dies intestate, shortly after the testator, without having made an election. C takes out administration to B, and as administrator elects to keep the estate of Sultanpur in opposition to the will, and to relinquish the legacy of 2,000 rupees. C may do this, and yet claim his legacy of 1,000 rupees under the will."

The section needs no change, being based on the sound principle that the capacity in which a person takes a benefit is distinct from that in which he opposes the will.

31.18. Section 186 gives effect to a specific expression of intention by the testator. It reads— **Section 186.**

"186. Notwithstanding anything contained in sections 180 to 185, where a particular gift is expressed in the will to be in lieu of something belonging to the legatee which is also in terms disposed of by the will, then, if the legatee claims that thing, he must relinquish the particular gift, but he is not bound to relinquish any other benefit given to him by the will.

ILLUSTRATION

Under A's marriage—settlement, his wife is entitled, if she survives him, to the enjoyment of the estate of Sultanpur during her life. A by his will bequeaths to his wife an annuity to 200 rupees during her life, in lieu of her interest in the estate of Sultanpur which estate he bequeaths to his son. He also gives his wife a legacy of 1,000 rupees. The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity, but not the legacy of 1,000 rupees."

The section needs no change.

31.19. Acceptance of a benefit given by a will constitutes an election by the legatee to take under the will, if he had knowledge of his right to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances. This is the provision in section 187, illustrated as under : **Section 187.**

ILLUSTRATIONS

(i) A is owner of an estate called Sultanpur Khurd, and has a life interest in another estate called Sultanpur Buzurg to which upon his death his son B will be absolutely entitled. The will of A gives the estate of Sultanpur Khurd to B, and the estate of Sultanpur Buzurg to C. B, in ignorance of his own right to the estate of Sultanpur Buzurg, allows C to take possession of it, and enters into possession of the estate of Sultanpur Khurd. B has not confirmed the bequest of Sultanpur Buzurg to C.

(ii) B, the elder son of A, is the possessor of an estate called Sultanpur. A bequeaths Sultanpur to C, and to B the residue of A's property. B

having been informed by A's executors that the residue will amount to 5,000 rupees, allows C to take possession of Sultapur. He afterwards discovers that the residue does not amount to more than 500 rupees. B has not confirmed the bequest of the estate of Sultanpur to C*.

The principle underlying the section is obviously that of a choice made with full knowledge of the facts. The section need not be disturbed.

Section 188.

31.20. The next section (section 188) is really a rule of evidence, but finds a place in the Succession Act as a matter of convenience. It reads as under ;

"188 (1) Such knowledge or waiver of inquiry shall, in the absence of evidence to the contrary, be presumed if the legatee has enjoyed for two years the benefits provided for him by the will without doing any act to express dissent.

(2) Such knowledge or waiver of inquiry may be inferred from any act of the legatee which renders it impossible to place the persons interested in the subject-matter of the bequest in the same condition as if such act had not been done.

ILLUSTRATION

A bequeaths to B an estate to which C is entitled, and to C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the bequest of the estate to B."

The section needs no change. It may incidentally be mentioned that the illustration illustrates the second sub-section.

Section 189.

31.21. This takes us to section 189. It provides that if the legatee does not, within one year after the death of the testator, signifify to the testator's representaives his intention to confirm or to dissent from the will, the representatives shall, upon the expiration of that period, require him to make his election, and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the will.

We have no change to recommend in the section.

Section 190– Postponement of election in case of disability.

31.22. The special case of disability is dealt with (in the context of election) by section 190 which reads as under :—

"190. In case of disability the election shall be postponed until the disability ceases, or until the election is made by some competent authority."

The section hardly needs any further comment.

CHAPTER 32

GIFTS IN CONTEMPLATION OF DEATH (SECTION 191)

Scope.

32.1. Gifts in contemplation of death constitute a subject analogous to the law of succession and are governed by the detailed provisions laid down in section 191.

Section 191.

32.2. Section 191 reads as under :—

"191 (1) A man may dispose, by gift made in contemplation of death, of any moveable property which he could dispose of by will.

(2) A gift is said to be made in contemplation of death where a man, who is ill and expects to die shortly of his illness, delivers to another the possession of any moveable property to keep as a gift in case the donor shall die of that illness.

(3) Such a gift may be resumed by the giver; and shall not take effect if he recovers from the illness during which it was made; nor if he survives the person to whom it was made.

ILLUSTRATIONS

(i) A, being ill, and in expectation of death, delivers to B, to be retained by him in case of A's death—

"a watch;

"a bond granted by C to A;

"a bank note :

"a promissory note of the Central Government endorsed in blank;

"a bill of exchange endorsed in blank; certain mortgage-deeds.

"A dies of the illness during which he delivered these articles.

B is entitled to—

the watch;

the debt secured by C's bond :

the bank-note :

the promissory note of the Central Government :

the bill of exchange :

the money secured by the mortgage-deeds.

(ii) A, being ill, and in expectation of death, delivers to B the key of a trunk or the key of a warehouse in which goods of bulk belonging to A deposited, with the intention of giving him the control over the contents of the trunk or over the deposited goods and desires him to keep them in case of A's death. A dies of the illness during which he delivered these articles. B is entitled to the trunk and its contents or to A's goods of bulk in the warehouse.

(iii) A, being ill, and in expectation of death, puts aside certain articles in separate parcels and marks upon the parcels respectively the names of B and C. The parcels are not delivered during the life of A. A dies of the illness during which he sets aside the parcels. B and C are not entitled to the contents of the parcel".

The illustrations may be thus explained.

Illustration (*i*) takes cases where there has been actual delivery in contemplation of death.

Illustration (*ii*) takes cases of constructive delivery.

Illustration (*iii*) is a case of no delivery.

Nature and Origin

32.3. Story in his Equity Jurisprudence points out that a gift of the nature provided in section 191 is a sort of amphibious gift between a gift during the life time and a legacy[1].

The origins of the concept of *donatio mortis causa* are to be found in the Roman Law. The concept was found to be useful, and was adopted in English law. Following observations of Lord Cooper[2] show the original rationale for the rule.

> "Where a man lies in extremity, or being surprised with sickness *and not having an opportunity of making his will, but lest he* should die before he could make it, *it gives by his own hands his goods* to his friends about him. This, if he dies, shall operate as a legacy, but if he recovers, then does the property revert to him".

Thus, delivery takes the place of a formal will. Incidentally, at present, it is not necessary that the donor must be *in extremis* at the time when the gift *mortis causa* is made[3].

[1]Story, Equity Jurisprudence (1919), page 256, Para 606.

[2]Lord Cooper in *Hedges* v. *Hedges*, (1908) Precedents In Chancery 269; J. Gareth Miller Machinery of Succession (1977), page 275.

[3]Note in (1965) 81 L.Q.R. 21. See paragraph 32.4. (*a*) *infra*.

English law as to donations *mortis-cause*.

32.4. Three conditions must be satisfied for a donation *mortis causa*, as at present understood in English law;

(a) the gift must be made in contemplation of death (though not necessarily in expectation of death by *suicide*[1], [2].

(b) the gift must be made upon the condition that it is to be absolute and complete only on the *donor's death*, and is to be revocable during his life. (Death need not, however, occur from *the very cause* contemplated by the donor).

(c) the subject-matter of the gift must be delivered to the donee. Delivery may be before or after the words of gift[3], and may even be to an agent[4]. Delivery of a key to a box or drawer is enough, if the property is identified[5], [6].

Delivery of document.

32.5. Certain controversies have arisen in England as to how far the delivery of *a document* is enough to constitute a gift of the *thing to which* the document relates, particularly shares. However, these are not material for the present purpose. The essence of the requirement is transfer of possession (*delivery by the donor to the donee by way of a conditional gift*).

Section 191-Applicability to Hindus.

32.6. It may be noted that section 191 does not, at present, apply to Hindus etc[7]. The matter, would as regards Hindus, be governed by uncodified law. The position is, in this regard, at present, obscure. The case law[8] on the subject is scanty and does not throw much light. We propose to consider the question of extending the section to Hindus and, in that context, to deal with Hindu Law on the subject.

Hindu Law, as to gifts in contemplation of death.

32.7. Traditional Hindu law[9], [10] deals with the situation as one of gift, and accordingly requires "giving" (with the requisite intention) and acceptance.

A *donatio mortis causa* of movable property is recognised in Hindu law. West and Buhler[11] state that "a father's promises are looked on as binding, unless the performance of them would prevent the fulfilment of some still more sacred duty. But that the courts will not enforce such obligation except subject to the conditions of the statute law where that is in force."

In a Bombay case[12], A promised lands to his daughter, but never executed a deed of transfer. On his death-bed, he asked his son to give the lands to the daughter and the son agreed. After his death, A's will was found to contain a bequest of all his property to the son and C. It was held that the daughter could compel the son to transfer the lands to her, notwithstanding the will, since A constituted himself a trustee for the daughter in respect of them and had constituted his son his trustee to transfer the lands to D. C had no interest in the lands under the will.

Calcutta case.

32.8. We may here also notice a Calcutta case[13]. A Hindu, while on his death-bed, caused certain government papers for the sum of Rs. 30,500 to be

[1] *Re Dudman*, (1925) Ch. 553.

[2] *Re wilkes* v. *Halington*, (1834) Ch. 104.

[3] *Cain* v. *Moan*, (1896) Q.B. 283.

[4] *Moore* v. *Darton*, (1851) 4 De and G. 51.

[5] *Cf.* Re Lillington, (1952) 2 All E. R. 184, 191 for comment, see (1952) 96 Solicitors Journal.

[6] Barlow in (1956) 19 Modern Law Review 394, 471.

[7] *Bhaskar* v. *Saraswati Bai*, (1892) I.L.R. 17 Bom. 486.

[8] See Third Schedule.

[9] See infra.

[10] See (a) *Bhaskar* v. *Saraswati Bai*, I. L. R. 17 Bom. 486.

(b) *Visalatchmi* v. *Subbu*, 6. M.H.C.R. 270.

[11] West & Buhler, Hindu Law, 3rd Ed. Vol. 2, page 219, and 747, footnote (a), cited in *Bhaskar* v. *Saraswati Bai*., I.L.R. 17 Bomb. 486, 495.

[12] *Bhaskar* v. *Saraswatibai*, (1892) I.L.R. 17 Bom. 486.

[13] *Kumara Upendra* v *Nabin Krishna Bose*, 3 Beng. L.R.O.C.J., 113, 122, 123, summarised in *Bhaskar* v. *Saraswatibai*, I.L.R. 17 Bom.486.

given to his son in his presence, saying : "Bring out the papers and give them to my son", but he did not make or direct any endorsement thereon. Subsequently, on being asked to endorse them, he said, "I am very weak, how can I sign so many papers : When I get a little strength I will sign them, what cause have you for being ....." Phear J. decided that it was a good *donatio mortis causa*, which had not the same signification in India as in England. The decree was affirmed on appeal, Sir Barnes Peacock, C. J. holding that the gift was not governed by the strict principles of English law, but by the Hindu law. By English law, there was a valid *donatio mortis causa*, but assuming it to be a gift *intevivos*, it was a valid gift by Hindu law. Sir Barnes Peacock observed : "If the gift were to be governed by the English law, and treated as a voluntary gift without condition, and not as a *donatio mortis causa*, I think the relation of trustee and *cestui que trust* was created between the donor and the donee". He also observed that the donor, if he had lived, or his representatives after his death, could not, at law, have compelled the dones to have returned the government papers.

Recommendation to extend section 191 to Hindu etc.

32.9. On a consideration of the position, it appears to us that there are two weighty reasons, one theoretical, the other practical, why section 191 should be extended to Hindus etc.—

(1) on principle, there seems to be no reason why the section should not apply to them;

(2) if the section is so extended, citizens would be able to locate and ascertain the law easily from codified provisions.

We, therefore, recommend that section 191 should be extended to Hindus etc. This will, of course, require amendment of the Third Schedule[1].

CHAPTER 33

PROTECTION OF PROPERTY OF DECEASED (SECTIONS 192 TO 210)

Scope.

33.1. Protection of the property of the deceased forms the subject matter of sections 192 to 210, which create a machinery for such protection. Under section 192, proceedings for the purpose can be initiated by a person claiming a rightful succession, either after actual possession has been taken by another person or when forcible means of seizing possession are apprehended. An application for the purpose has to be made to the District Judge who, after inquiry under sections 193-194, has power, under section 194, to determine summarily the right to possession and shall deliver possession accordingly. The order of the District Judge is subject to the right of the aggrieved party to bring a suit under section 208. Pending determination of the summary proceedings, the District Judge has power to appoint a curator of the property. The rest of the chapter deals mainly with matter connected with the Curator.

33.2. The basic section in the entire scheme is section 192, which reads—

Section 192—person claiming right by Succession to property of deceased may apply for relief against wrongful possession.

"192. (1) If any person dies leaving property, movable or immovable, any person claiming a right by succession thereto, or to any portion thereof, may make application to the District Judge of the district where any part of the property is found or situate for relief, either after actual possession has been taken by another person, or when forcible means of seizing possession are apprehended.

(2) Any agent, relative or near friend, or the Court of Wards in cases within their cognizance, may in the event of any minor, or any disqualified or absent person being entitled by succession to such property as aforesaid, make the like application for relief."

[1]To be carried out under the Third Schedule.

Recommendation to amend section 192.

33.3. The term 'succession' in section 192 is not confined to intestate succession, but applies also to testamentary succession[1-2]. The provisions of section 192 are not, however, applicable to a case where the property passes by survivorship—as in the case of a joint Hindu family[3].

It would be useful to codify judicial interpretation of the word 'succession' in section 192, by adding the words "*testementary or intestate*" after the word "succession", wherever it occurs in the section. We recommend accordingly.

Section 193. Inquiry made by judge.

33.4. Section 193 reads—

"193. The District Judge to whom such application is made shall, in the first place, examine the applicant on oath, and may make such further inquiry, if any, as he thinks necessary as to whether there is sufficient ground for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the applicant, or the person on whose behalf he applies, is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a suit, and that the application is made *bona fide*."

Section 194.

33.5. Section 194 reads—

"194. If the District Judge is satisfied that there is sufficient ground for believing as aforesaid but not otherwise, he shall summon the party complained of, and give notice of vacant or disturbed possession by publication, and, after the expiration of a reasonable time, shall determine summarily the right to possession (subject to a suit as hereinafter provided) and shall deliver possession accordingly.

"Provided that the Judge shall have the power to appoint an officer who shall take an inventory of effects, and seal or otherwise secure the same, upon being applied to for the purpose, without delay, whether he shall have concluded the inquiry necessary for summoning the party complained of or not."

The section needs no change.

Section 195.

33.6. Section 195 reads—

"195. If it further appears upon such inquiry as aforesaid that danger is to be apprehended of the misappropriation or waste of the property before the summary proceeding can be determined, and that the delay in obtaining security from the party in possession or the insufficiency thereof is likely to expose the party out of possession to considerable risk, provided he is the lawful owner, the District Judge may appoint one or more curators whose authority shall continue according to the terms of his or their respective appointments, and in no case beyond the determination of the summary proceeding and the confirmation or delivery of possession in consequence thereof;

Provided that, in the case of land the Judge may delegate to the Collector, or to any officer subordinate to the collector, the powers of a curator :

Provided, further, that every appointment of a curator in respect of any property shall be duly published".

The section needs no change.

Section 196. Powers conferable on curator.

33.7. Section 196 reads—

"196. The District Judge may authorise the curator to take possession of the property either generally, or until security is given by the party in possession, or until inventories of the property have been made, or for any other purpose necessary for securing the property from misappropriation or waste by the party in possession :

[1] *Binode Bhari* v. *Rai Sundari*, A.I.R. 1926 Cal. 779.
[2] *Champi Devi* v. *Puran Bal* A.I.R. 1934 Lahore 930.
[3] *Bua Ditta* v. *Sahib Dival*, A.I.R 1938 Lahore 753.

Provided that it shall be in the discretion of the Judge to allow the party in possession to continue in such possession on giving security or not, and any continuance in possession shall be subject to such orders as the Judge may issue touching inventories, or the securing of deeds, or other effects."

The section needs no change.

33.8. Section 197 reads—

Section 197. Prohibition of exercise of certain powers by curators.

"197. (1) Where a certificate has been granted under Part X or under the Succession Certificate Act, 1889, or a grant of probate or letters of administration has been made, a curator appointed under this Part shall not exercise any authority lawfully belonging to the holder of the certificate or to the executor or administrator.

Payment of debts etc. to curator.

(2) All persons who have paid debts or rents to a curator authorised by a Court to receive them shall be indemnified, and the curator shall be responsible for the payment thereof to the person who has obtained the certificate, probate or letters of administration, as the case may be."

The section needs no change.

33.9. Section 198 reads—

Curator to give security and may receive remuneration.

"198. (1) The District Judge shall take from the curator security for the faithful discharge of his trust, and for rendering satisfactory accounts of the same as hereinafter provided, and may authorise him to receive out of the property such remuneration, in no case exceeding five per centum on the moveable property and on the annual profits of the immoveable property, as the District Judge thinks reasonable.

(2) All surplus money realized by the curator shall be paid into Court, and invested in public securities for the benefit of the persons entitled thereto upon adjudication of the summary proceeding.

(3) Security shall be required from the curator with all reasonable despatch, and, where it is practicable, shall be taken generally to answer all cases for which the person may be afterwards appointed curator; but no delay in the taking of security shall prevent the Judge from immediately investing the curator with the powers of his office."

The section needs no change.

33.10. Section 199 reads as under :—

Section 199. Repor from Collector where state include revenue paying law.

"199. (1) Where the estate of the deceased person consists wholly or in part of land paying revenue to government, in all matters regarding the property of summoning the party in possession, of appointing a curator, or of nominating individuals to that appointment, the District Judge shall demand a report from the Collector, and the Collector shall thereupon furnish the same :

Provided that in cases of urgency the judge may proceed, in the first instance, without such report.

(2) The Judge shall not be obliged to act in conformity with any such report, but, in case of his acting otherwise than according to such report, he shall immediately forward a statement of his reasons to the High Court, and the High Court, if it is dissatisfied with such reasons, shall direct the Judge to proceed conformably to the report of the Collector.

The Section needs no change.

33.11. This takes us to section 200, which in the main paragraph provides that the curator shall be subject to all orders of the District Judge rgarding the institution or the defence of suits, and all suits may be instituted or defended in the name of the curator on behalf of the estate.

Section 200. Suits by curators.

Under the proviso, an express authority shall be requisite in the order of the curator's appointment for the collection of debts or rents : but such

express authority shall enable the curator to give a full acquittance for any sums of money received by virtue thereof.

Recommendation to clarify the position as to authority of curator.

33.12. The section is derived from an Act of 1841[1]. The principle underlying the section is simple. A curator is an officer of the court, and suits instituted by him are subject to control of the court. The question, however, is whether, before a suit is instituted by the curator, he must obtain the leave of the court. The section provides that a suit should be *instituted or defended in the name of the curator*. But, according to judicial interpretation, it is not necessary[2] that the curator must be specifically authorised by the District Judge to institute or defend the suit. The position, in this regard, should be codified by adopting the judicial interpretation.

The proviso to section 200 requires that if a curator is appointed to collect debts or rents of property, the order appointing him as curator must confer express authority to give discharge for the moneys received. The proviso does not relate to the institution or defence of suits, but to the collection of debts and rents.

Recommendation to clarify the position as to succession certificate.

33.13. Another matter on which the law could be suitably codified relates to the need for a succession certificate when the curator takes proceedings. It has been held[3] that it is not necessary for the curator to obtain a succession certificate before instituting a suit to recover the debt. This position also should be made clear by an amendment of section 200. An Explanation could be added for the purpose.

Suggested ammendment of section 200.

33.14. In the light of what we have stated above, we recommend that the following Explanations should be added below section 200 :—

"*Explanation* 1 : *It is not necessary that the curator must be specifically authorised by the District Judge to institute or defend the suit.*

Explanation 2 : *It is not necessary for the curator to obtain a succession certificate before instituting a suit to recover the debt.*"

Section 201.

33.15. Section 201 provides as follows :

"201. Pending the custody of the property by the curator, the District Judge may make such allowances to parties, having a *prima facie* right thereto as upon a summary investigation of the rights and circumstances of the parties interested he considers necessary, and may, at his discretion, take security for the repayment thereof with interest, in the event of the party being found, upon the adjudication of the summary proceeding not to be entitled thereto."

The section needs no change.

Section 202

3.16. Section 202 provides that the curator shall file monthly accounts in the abstract, and shall, on the expiry of each period of three months, if his administration lasts so long, and, upon giving up the possession of the property, file a detailed account of his administration to the satisfaction of the District Judge.

The section needs no change.

Section 203.

33.17. Section 203 provides that the accounts of the curator shall be open to the inspection of all parties interested; and it shall be competent for any such interested party to appoint a separate person to keep a duplicate account of all receipts and payments by the curator. If it is found that the accounts of the curator are in arrear, or that they are erreneous or incomplete, or if the curator does not produce them whenever he is ordered to do so by the District Judge, he shall be punishable with fine not exceeding one thousand rupees for every such default.

The section needs no change.

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[1]Section 9, Succession (Property Protection) Act, 1841 (19 of 1841).

[2]*Lakshmi Chand* v. *Ram Lal*, A.I.R. 1931 All. 423.

[3](*a*) *Babasab* v. *Narasappa*, I.L.R. 20 Bom. 437.

(*b*) *Benode Behary* v. *Rai Sundari*, 30 C.W.N. 500.

33.18. Section 204 provides :—

Section 204.—Bar to appointment of second curator for same property.

"204. If the Judge of any district has appointed a curator, in respect of the whole of the property of a deceased person, such appointment shall preclude the Judge of any other district within the same State from appointing any other curator, but the appointment of a curator in respect of a portion of the property of the deceased shall not preclude the appointment within the same State of another curator in respect of the residue or any portion thereof :

Provided that no Judge shall appoint a curator or entertain a summary proceeding in respect of property which is the subject of a summary proceeding previously instituted under this Part before another Judge :

"Provided, further, that if two or more curator are appointed by different Judges for several parts of an estate, the High Court may make such order as it thinks fit for the appointment of one curator of the whole property."

The section needs no change.

33.19. Section 205 provides that an application under this Part to the District Judge must be made within six months of the death of the proprietor whose property is claimed by right in succession. Section 205.

The section needs no change.

33.20. Section 206 provides :

Bar to enforcement of Part against public settlement or legal directions by deceased.

"206. Nothing in this Part shall be deemed to authorise the contravention of any public act of settlement or of any legal directions given by a deceased proprietor of any property for the possession of his property after his decease in the event of minority or otherwise, and, in every such case, as soon as the Judge having jurisdiction over the property of a deceased person is satisfied of the existence of such directions, he shall give effect thereto."

The section needs no change.

33.21. Section 207 provides :— Section 297.

"207. Nothing in this Part shall be deemed to authorise any disturbance of the possession of a Court of Wards of any property; and in case a minor or other disqualified person, whose property is subject to the Court of Wards, is the party on whose behalf application is made under this Part, the District Judge, if he determines to summon the party in possession and to appoint a curator, shall invest the Court of Wards with the curatorship of the estate pending the proceeding without taking security as aforesaid; and if the minor or other disqualified person, upon the adjudication of the summary proceeding, appears to be entitled to the property possession shall be delivered to the Court of Wards."

The section needs no change.

33.22. Section 208 provides— Section 208.

"208. Nothing contained in this Part shall be any impediment to the bringing of a suit either by the party whose application may have been rejected before or after the summoning of the party in possession, or by the party who may have been evicted from the possession under this part."

The section needs no change.

33.23. Section 209 provides— Section 209.

"209. The decision of a District Judge in a summary proceeding under this Part shall have no other effect than that of settling the actual possession; but for this purpose it shall be final, and shall not be subject to any appeal or review."

The section needs no change.

Section 210. Public Curators. - 33.24. Section 210 provides that the State Government may appoint public curators for any district or number of districts; and the District Judge having jurisdiction shall nominate such public curators in all cases where the choice of a curator is left discretionary with him under this Part.

The section needs no change.

CHAPTER 34

REPRESENTATIVE TITLE TO THE PROPERTY OF THE DECEASED ON SUCCESSION, SECTIONS 211 TO 216

I. Introductory

Scope of the Chapter. 34.1. Representative title to the property of the deceased on succession is an important topic of the law of succession, dealt with in sections 211 to 216.

The Chapter begins with a positive provision in section 211, which enacts that the executor or administrator of a deceased person is his legal representative for all purposes, and all property of the deceased vests in him as such. In case of an administrator, the very definition of that expression[1] requires that he must be appointed by a competent authority. As regards an executor, section 213(1) provides, *inter alia*, that (in cases where that section applies) no right as executor can be established in a court without obtaining probate or letters of administration with the will annexed. Thus, in some form or other, the court enters into the picture in most cases.

Executors and administrators. 34.2. The position in India under the Act offers a contrast to the continental system. In most countries of Europe, where, in modern times, the influence of Roman law has been predominant, property passes on immediately to the beneficiaries, who by their acceptance of the benefit become directly liable for the payment of the deceased's debts. In England, however, this is not the case[2]. "With us, the property must first vest in personal representatives whose duty it is to administer the estate by paying debts and distributing the residue amongst the persons beneficially entitled. Moreover, their authority to administer must be ratified or created by what is in fact and in law an order of court, and this order of court (either probate or letters of administration) becomes an essential link in the title of the beneficiaries."

Origin of executor and administrator. 34.3. The conception of the personal representative is founded upon the position of the executor appointed by the testator's will to execute its terms, an institution prevalent throughout Europe in the Middle Ages and perhaps traceable to the ancient German Salman to whom property was transferred in order that he might carry out the wishes of the transferer. Where no executor was appointed, the medieval Church claimed the right to administer, though in practice the Bishop appointed some member of the deceased's family (by granting to him letters of administration) to act as administrator in his place. This practice was (in England) made compulsory by statute as early as 1357, and thereafter the position and functions of the administrator have been practically assimilated to those of the executor.[3]

Scheme of sections 212-214. 34.4. The scheme of these sections is that where those sections apply, it becomes necessary to obtain the appropriate document conferring or recognising the representative title, before a right can be established to the property of the deceased.

II. Survivorship and the question of shares

Section 211(1) 34.5. We may now take up the sections for detailed consideration. Section 211(1), provides that the executor or administrator of a deceased is his legal

[1] Section 2(*a*) : "Administrator".

[2] Stephen, Commentaries on the Law of England (1950) Vol. 1, page 520.

[3] Stephen, Commentaries on the Law of England (1950), Vol. 1, page 520.

representative for all purposes, and all the property of the deceased person vests in him as such. But, as regards Hindus, Mohammadans, Buddhists, Sikhs, Jains, Parsees and other persons, sub-section (2) provides that nothing in the section shall vest in the executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

Survivorship in respect of shares.

34.6. This naturally raises the question whether letters of administration can be obtained in respect of property *passing by survivorship* to coparceners in a Hindu undivided family. Much of the case law on the subject relates to shares in companies[1]. In general, property passing by survivorship is distinguished from property passing by succession. The distinction, in fact, is elementary and sound. But this theoretical distinction creates certain practical difficulties, because of the fact that under the statutory provisions applicable[2] to shares in companies, shares are registered only in the name of a particular person, and only the person registered is recognised as the "legal owner" of those shares so far as the company is concerned. This does not, of course, mean that the rights of the other persons against the 'legal' owner are affected as between the 'legal' owner and those other persons. But, as between the company and the shareholders, this is the position.

Shares standing in the name of the manager.

34.7. Now, these statutory provisions create some problems in regard to shares belonging to the coparceners of a Hindu undivided family and standing in the name of one coparcener—the manager. When the registered "legal" owner—i.e. the manager—dies, how is the title of the surviving coparceners to be established on his death ?

Applicability of sections 211-213 to shares.

34.8. Where, as a matter of general law, the right to shares passes by survivorship, the provisions of sections 211 to 213 would not, if construed literally, be applicable to the situation. But if such a rigid view of the law is taken, then there remains no machinery for establishing, to the satisfaction of the company, the title of the persons succeeding by survivorship. By and large, courts have, taking a realistic view, construed sections 211 to 213 widely for the purpose. There is, no doubt, some conflict of views on the question as to the basis on which court fees are to be calculated[3] in respect of petitions for latters of administration filed by the surviving coparceners. That conflict, however as it pertains to the Court Fees Act, is not material for our purpose.

Letters of administration regarding shares.

34.9 Our primary concern is with the question whether letters of administration can be granted in respect of shares in joint stock companies where the shares stand in the name of the karta of a Mitakshara Joint Hindu family. On that question, most High Courts take the view[4] that in the case of such shares the Companies Act, (and usually, the Articles of Association of the Company), make it abundantly clear that vis-a-vis the company, the local title in the shares is in the registered holder of the shares, viz. the karta of the joint family in whose name the shares stand. He is the only person recognised by the company as having the shares. The position, therefore, is that on the death of the karta who was the registered holder of the shares, the title to the shares vis-a-vis the company, does not, on death of the karta, without the grant of letters of administration, pass by *survivorship* to the surviving members of the coparcenary of which the deceased was the karta. *So far as the company is concerned,* the exceptions in cases of Hindu dying intestate, provided in Section 211(2) and 212(2) of the Indian Succession Act, 1925, do not, therefore, apply in such cases. At the same time, neither the principles of Hindu law nor the provisions contained in the Succession Act, stand in the way of the grant of the Letters of Administration limited to the shares held by the karta of a joint Mitakshara Hindu family, in the event of his dying intestate.

[1] Paras 34.8 and 34.9, *infra.*

[2] The Companies Act, 1956.

[3] Section 19D, Court Fees Act.

[4] The case law is reviewed in.

(*a*) *Sri Ram* v. *collector, Lahore,* A.I.R. 1942 Lahore 173:

(*b*) *In re ; the goods of Sew Praasad Saraf,* A.I.R. 1954 Calcutta 444, 445, 446.

View of most High Courts.

34.10. The conclusion on the question, as expressed in a Calcutta case[1], represents, in broad terms, the view of the most High Courts, namely, that where shares in a joint stock company belonging to an undivided family governed by the Mitakshara school of Hindu law stand in the name of the karta of the family, letters of administration limited to the shares can be granted to legal representatives in the event of the karta dying intestate, and, in particular, to the next karta of the family.

Need to add an Explanation to section 211 regarding shares

34.11. It is desirable that this interpretation, which takes a practical view of the matter, should be incorporated in the section by adding a specific Explanation[2].

Section 211: Disposal by will of property which would pass by survivorship.

34.12. In connection with section 211, the next important point is concerned with the Explanation to section 30 of the Hindu Succession Act 1956. To state the gist of that Explanation broadly, it confers, for the first time[3], a right to dispose of (by will) property in the nature of the interest of a male Hindu in a Mitakshara Coparcenary property or the interest of the specified persons in the specified property.

Section 6, Hindu Succession Act.

34.13. Section 6 of the same Act also provides that such interest shall, in certain cases, pass by succession, and not by survivorship[4]. The scope of sub-section (2) of section 211 of the Succession Act has thus become limited. Customary law prohibiting the disposition by will of certain property, of course, still continues in force, section 30 of the Hindu Succession Act having no application in such a case. The Punjab case of Jat Hindu belonging to an agricultural tribe and governed by Punjab Customary Law may be cited[5-6] in this context, as an illustration of the judicial view as to customary law. This position does not, of course, necessitate any amendment in the section in the Succession Act.

Survivorship.

34.14. It was decided in a Madras case[7] that the expression "legal representatives" and "successors" may not be applicable to persons taking by survivorship, but it does not necessarily follow that such persons are not entitled to obtain a succession certificate by calling themselves" legal representatives.[8-9]

We are of the view that not only is there need for a specific provision[10] to cover shares in the context of *letters of administration*, but there is also need to cover[11] all cases of survivorship in the context of *succession certificate*.

Recommendation as to section 211.

34.15. In the light of what we have stated above[12], we recommend that the following Explanation should be added to section 211.

> *"Explanation.—Where shares in a joint stock company belonging to an undivided family governed by the Mitakshara school of Hindu law stand in the name of the karta of the family, letters of administration limited to the shares may, in the event of the karta dying intestate, be granted to the legal representatives of the karta (including, in appropriate case, the next karta of the family)*[13].

This amendment will cover letters of administration. The amendment as to Succession Certificate will be dealt with later[14].

[1] *In the goods of Sew Prasad Saraf*, A.I.R. 1954 Cal. 444, 445, 446, para 24 (G.N. Das and S.R. Das and S.R. Das Gupta JJ).

[2] See para 34.75, *infra*.

[3] Section 30(1), Explanation, Hindu Succession Act, 1956.

[4] Section 6, Hindu Succession Act, 1956.

[5] *Kaur Singh* v. *Jaggar Singh*, A.I.R. 1961 Punjab 489.

[6] *Joginder Singh* v. *Kehar Singh*, A.I.R. 1965 Punj. 407 (Full Bench).

[7] *Krishnammal* v. *Laxmi Ammal*, I.L.R. (1950) Mad. 718, 726, 727, 728, 735.

[8] *Compare Banwari Lal* v. *Maksudan Lal*, (1929) I.L.R. 52 All. 252 : A.I.R. 1930 All.99

[9] See para 48.8 (section 370), *infra*.

[10] See para 34.15, *infra*.

[11] See para 49.3 (section 370), infra.

[12-13] Para 34.14, *supra*.

[14] Para 48.8, *infra*.

III. Establishment of right to property of deceased

Section 212

34.16. Section 212(1) provides that no right to any part of the property of a person who dies intestate can be established in any court of justice unless letters of administration have first been granted by a court of competent jurisdiction. Sub-section (2) provides that this section shall not apply in the case of intestacy of a Hindu, Mohammadan, Buddhist, Sikh, Jain, Indian Christian or Parsee.

The section needs no change.

Section 213—Establishment of title, 'executor'.

34.17. Section 213 provides that before title (as an executor) can be established, probate of the will must be obtained. There seems to be some uncertainty as to whether, in cases where probate is not obtained, (though-required by the section), the provisions of the section merely bar the passing of a decree on the basis of a right claimed under the will, or whether they bar the very institution of the suit to enforce that right.

The Madras and Patna High Courts take the former view[1], namely, only the passing of the decree is prohibited. The Andhra and Calcutta High Courts[2] take the latter view, namely, the very institution of the suit is barred.

It should be noted that in the case of an executor, the title depends on the will, and not on the probate. Probate is needed only to prove title[3].

Recommendation to amend section 213.

34.18. Whatever be the correct construction of the present wording of section 213, it seems to us that on practical considerations it is desirable to adopt the former view[4], which would bar only the passing of a decree. It reflects a less technical approach than the contrary view. We therefore recommend that section 213 should be amended by providing that where probate has not been obtained, what is barred is only the passing of a decree[5], and not the institution of a suit.

Section 213- exclusion of Indian Christians recommendations.

34.18A. It has been represented to us, in one of the comments received on the Working Paper[6] that while Hindus and Muslims can get relief from the court on the basis of a will, Christians have to get a probate or letters of administration for getting relief on the basis of a will. It has been suggested in that communication that Christians should be excluded from section 213. This is a suggestion forwarded to us along with the letter of the Catholic Bishop's Conference of India. We accept the suggestion, though the point was not contained in our Working Papers. We recommend that (a) section 213 should be amended as above; and (b) consequential changes be made, wherever necessary, in other sections of the Act.

IV. Debts—need for succession certificate

Section 214. Phrase 'on succession'.

34.19. This takes us to section 214, with reference to which a number of points require consideration. The first question is concerned with the significance of the phrase 'on succession'.

Sub-section (1), clause (a) of the section prohibits the courts from passing a decree against a debtor of a deceased person for payment of his debt to a person claiming, *'on succession'*, to be entitled to the effects of the deceased person or to any part thereof, except on the production, by the person so claiming, of the requisite document covering the specified amount. The phrase did not occur in the earlier Act of 1865, but was added by the Joint Committee that considered the Bill which led to the present Act.

The significance of these words will be soon realised when we consider the cases where a claim is made against the 'debtor of a deceased person' on the

[1](*a*) In *re Ramchand* A.I.R. 1956 Mad. 274, 276.

(*b*) *Bhude* v. *Chandra* x. Bhishakar, A.I.R. 1942 Pat. 120.

[2](*a*) *Venkata Subramaniam* v. *Andhra Bank*, A.I.R. 1960 A.P. 273, 280.

(*b*) *Bibhuti Bhusan* v. *Narendra*, A.I.R. 1951, Cal. 228.

[3]*Meyappa* v. *Subramanian*, A.I.R. 1916 P.C. 202, 204.

[4]Para 34.17, *supra*.

[5]Compare section 214 (1) (*a*).

[6]Letter of the Catholic Bishops' Conference of India, dated 3rd October, 1984.

basis *not of succession, but on some other basis*. The other basis could be survivorship—for example, in the case of Hindu coparcenary property or in the case of debts due to a partnership firm.

Claim on Insurance policy.

34.20. More frequently, the claim could be for money due on an insurance policy, the rights wherein have been transferred[1] to the claimant, or in respect of which a nomination has been made. A claim for money so due is, in its essence, based not on *succession* on death, but on a demand which merely materialises on death. It can be stated that a person claiming insurance money under a policy assigned to him does not *claim as a successor*, but in his or her own right.

There seems to be a conflict of decisions on the question whether amount due under an insurance policy is a 'debt'. The need for a precise definition of the word 'debt' is obvious.

When the Succession Bill was discussed, the matter seems to have been raised. Sir Hari Singh Gour, in his speech of the 18th March, 1925 in the Legislative Assembly on the Bill, made a pointed reference to the nebulous state of judicial interpretation of 'debt' in the different High Courts, and pleaded for a statutory provision which could preclude the possibility of a further conflict of authorities[2]. Apparently, his suggestion was not accepted. But the point is really of considerable practical importance. It appears to be desirable to provide that a succession certificate can be issued in respect of an amount due under an insurance policy.

Section 6, Married Women's Property Act.

34.21. In particular, with reference to section 6(1) of the Married Women's Property Act, 1874, it may be of interest to note that a succession certificate is not required when a trust is created under that section[3-4]. The section constitutes a specific statutory provision which creates a trust. On such a trust coming into being, the policy of insurance ceases to form part of the estate of the deceased. The concluding words of section 6(1) of the above mentioned Act, in fact, so provide. Although the point does not necessitate any amendment of section 214 of the Succession Act, it is worth noting in the context of the subject under discussion.

Practical problem created by section 214.

34.22. The most important problem created by section 214(1) is a practical one. The section has been resorted to by banks and other persons for refusing payment of a debt or a claim owed to a deceased person where a succession certificate is not produced. It was never intended that the section should, in this manner, come in the way of the heirs of the deceased person. The object of the section is merely to make it clear that no debt due to a deceased person can be recovered *through court except* by a holder of a document of the category[5]. However, practical experience shows that a provision which was intended to have application mainly in relation to litigation has had the unintended effect of causing hardship to the heirs of deceased persons.

Hardship caused to widows and children

34.23. Presumably, it was not the intention to lay down a rule of law that a bank or other debtor *can ever make* a payment to the person who claims to be the heir unless he produces the succession certificate or other document specified in the section. Common experience, however, shows that banks and other institutions do take such a stand, causing immense hardship to the heirs, particularly to poor widows and children of deceased persons.

Absence of nomination.

34.24. Where the debt or claim is of such a nature that there is a statutory provision for nomination and that provision has been actually utilised by the deceased persons, then, in practice, the banks and other institutions make payment to the nominee. But in the absence of such a statutory nomination, great hardship is caused to the heirs.

Heir of owner or tenants.

34.25. The position is anomalous in another respect also, inasmuch as the law imposes no such restriction in the case of title to immovable property.

[1] Section 38, Insurance Act, 1938.

[2] P.V. Subramania, 'Is Insurance a debt'', A.I.R. 1927 Journal 14.

[3] *Pameshwari Bai* v. *Nihal Chand*, A.I.R. 1938 Sind. 20.

[4] *See* also in *Re Asha Lata Desai*, A.I.R. 1940 Cal. 217.

[5] *Kissen Lal* v. *Tilak Chandra*, A.I.R. 1940 Cal. 24.

A person claiming to be the heir of a deceased owner of immovable property can continue as owner of the immovable property of the deceased, without producing a succession certificate, but he cannot withdraw moneys but by the deceased in a bank account—and this is so even where there is no doubt that he is the heir. Same is the position regarding tenant. Of course, a tenant has also to bear the liability to pay rent, but the fact remains that he gets a valuable advantage without being required to produce a document establishing his right to succeed. It is understandable that a bank may like to have some evidence of death and of the claimant's right before it makes payment, but there could be other evidence—i.e. evidence other than a succession certificate.

It seems, therefore, desirable to recommend some reform that would solve the above problem. While it cannot be provided that the claim must in every case be paid without a succession certificate, it would be reasonable at least to provide that a payment without such certificate is not illegal.

Recent amendments made in banking laws as to nomination.

34.25A. We note that by a recent amendment[1] made in the Banking Regulation Act, 1949, it is now possible to make a nomination in respect of deposits in banks. Where such nominations are made, the hardship otherwise experienced by the relatives of a deceased depositor would be alleviated to some extent, since the bank would be protected and would get a full discharge on making payment to the nominee. But, in cases where no such nomination has been made, the difficulties felt by virtue of the practice of banks to which reference has been already made[2] will survive. An amendment of the Succession Act would, therefore, possess considerable utility, even after the amendment of the banking laws.

Effect of nomination.

Incidentally, it may be mentioned that a nomination does not affect the rights of the other heirs, and, as between the nominee and the rival heirs, the nominee does not get any higher or preferential status. The new sections inserted in banking laws provide so expressly.

Section 214, and small claims.

34.25B. We may also note that in a Kerala case reported recently[3], the widow of a person who had been killed in an accident caused by the driver of a truck, claimed compensation against the Kerala State Road Transport Corporation, which owned the truck. Presumably the claim was under the Fatal Accidents Act read with the Motor Vehicles Act. Resisting the claim, the State Road Transport Corporation insisted that the widow should produce a succession certificate before payment could be made to her. The widow thereupon moved the High Court of Kerala by a letter, which was treated as a petition. The High Court pointed out that no succession certificate was required in this case, as the widow was claiming *in her own right*, and not as an heir, As regards the cases where the widow (or other relative) claims *as an heir*, the High Court made the following observations, which are relevant to the provisions of the Succession Act :—

> *"It is for the legislature to* deal with the matter by enabling payments to be made, at least *in respect of small sums of money without a succession certificate being required* to give immunity to the debtor. We are not going into that question in this case, for, even, otherwise, we think we will be able to give relief to the petitioner herein."

Recommendation to add an Explanation to section 214 as to payment of debt.

34.26. For these reasons, in our opinion, the appropriate course would be to add to section 214, an Explanation in suitable terms so as to ensure that the section will not—as is the practice at present—be utilised as a shelter in every case for deceased.

We recommend that the section should be amended accordingly[4].

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[1]The Banking Laws Amendment Act, 1983.

[2]Paragraph 34.22, *sppra*.

[3]*Kocbupennu Lakshmi* v. *Chairman, K.S.R.T. corporation*, A.I.R. 1984 Ker. 97, 99, para 4 (June).

[4]See para 34.45, *infra*, for a suggested re-draft of the section.

VI. Scope of the expression "Debt".

Meaning of "debt" Bombay and Patna view.

34.27. There seems to be a conflict of decisions on the exact scope of the expression "debt" in sections 214, 370, 372(1)(f) and 381. The conflict is apparent from a Bombay judgment[1], which has discussed the matter at length, dissenting from an Allahabad case[2], and agreeing with a Patna case[3].

In the Patna[4] case, the appellant applied, under section 370, for a succession certificate in respect of certain ornaments pledged with the Punjab National Bank at Darbhanga. The High Court dismissed the application, holding that the expression "debts and securities" (in sections 370 and 381)[5] did not cover pledged ornaments.

Allahabad view.

34.28. In the Allahabad case[6], one lady had died in the Kumbha Mela tragedy and the district authorities had taken possession of certain cash and ornaments from the body of the deceased. When the petitioners, as her heirs, asked for the return of valuables, the authorities insisted on the production of a succession certificate. Consequently, the petitioners approached the court for the purpose. The question arose whether "debt" would cover pledged movables. The High Court held that the term "debt" meant a liability owing from one person to another whether in cash or kind, secured or unsecured, whether ascertained or ascertainable, arising out of any obligation, express or implied. The refund of ornaments recovered from the dead body became an obligation of the authorities who were bound to hand over the same to the person entitled. Accordingly, a succession certificate was granted.

Bombay case.

34.29. The Bombay case[7] discusses the problem of interpretation of the term 'debt' at great length. In that case, one lady had died in 1963, leaving behind her husband and three sons. Her husband died in 1966, leaving behind his three sons. The lady had taken a demand loan of Rs. 3,000 from the State Bank of India on the security of certain ornaments. The sons paid off the loan amount with interest to the Bank, and claimed return of the gold pledged. The Bank informed them that it could not reurn the jewellery in the absence of a succession certificate. The sons made an application for a succession certificate. The High Court, construing the term 'debt' narrowly, held that a certificate could not be granted in respect of the *ornaments pledged with the Bank*. Thereupon, the petitioner sought leave of the court to withdraw the application, which was allowed.

Recommendation to settle the law.

34.30. In this position, it is desirable to settle the law on the subject. Although, in general, "debt" could be taken as confined to a monetary obligation for a liquidated amount, practical considerations require that the expression "debt" should, for the purposes of sections 214, 370(1) and 381, be defined as including any actionable claim.

We recommend that the law should be amended on the above lines.

Of course, the effect of the proposed amendment would be to extend the restrictive as well as the beneficial provisions of the Act to actionable claims. But that would be the only logical course.

Gist of the relevant sections summarised.

34.31. It may be mentioned for ready reference that section 370(1) provides that a succession certificate shall not be granted with respect to any "debt" or security to which a right is required by section 212 or section 213 to be established by letters of administration or probate. Section 372(1)(f) provides, *inter alia*, that an application for succession certificate shall set forth the "debts" and securities in respect to which the certificate is applied for. Section 381 provides that the succession certificate shall, with respect to the "debts" and

[1] *Ranchoddas* v. *Govind Das*, (1976) 78 Bom. L.R. 219 (Madon J.)

[2] *Dinanath* v. *Balkrishna*, A.I.R. 1963 All. 46 (Mithan Lal,J.).

[3] *Shyam Sundari Devi* v. *Sarla Devi*, A.I.R. 1962 Patna 220.

[4] *Shyam Sundari Devi* v. *Sarla Devi*, A.I.R. 1962 Pat. 220 (Untwalia, J.).

[4a] For gist of the sections see para 34.31, *infra*.

[5] *Dina Nath* v. *Balkrishna*, A.I.R. 1963 All. 46 (Mithan Lal J.).

[6] *In Re : Ranchobdas*, (1976) 78 Bom. L.R. 219.

securities specified therein, be conclusive as against the persons owing such debts or liable on such securities, and shall afford full indemnity to all persons who in good faith make payment to the person to whom the certificate was granted.

VII. State for obtaining succession certificate.

Stage for obtaining grant.

34.32. The stage at which probate or succession certificate should be obtained has also become the subject of controversy. In one Allahabad case[1], the question for consideration was whether a probate or succession certificate was required to be obtained by the plaintiffs, before a decree could be granted in their favour. The High Court, applying section 213(2), held that probate will not be required to be obtained by a Hindu in respect of a will made regarding immovable properties situated in Uttar Pradesh.

As to the applicability of section 214 at the stage of institution of proceedings, the High Court held—

> "The purpose of section 214 is to make clear that no debt to a deceased person can be recovered *through the court* except by a holder of one of the documents specified, the only exception being either whether the claim is made on survivorship, or whether it is in respect of rent, revenue or profits payable in respect of land used for agricultural purposes. It may, however, be pointed out that section 214 does not debar the filing of the suit. It merely debars a *court from passing a decree*. If a suit has been filed, the court is *forbidden from passing a decree* on the basis of a debt against the debtor of the deceased."

Recommendation to add an Explanation as to institution of suit.

34.33. In our view, it is desirable that the matter should be put beyond possible controversies by codifying the Allahabad view[2]. An Explanation on the subject could be usefully added to the section[3], for the purpose.

VIII. Joint decrees.

Joint decrees.

34.34. Another question concerning the provisions of section 214 arises in connection with joint decrees. Where the decree was passed jointly in favour of more than one decree-holder, and each one of them in his own right could execute the decree (provided the execution is for the benefit of all), the bar in section 214 does not apply[4]. Section 214, it has been held, can apply only when there is one decree-holder. Where there is only one decree-holder, taken on the death of the decree-holder, the legal representatives have no right to take out execution proceedings unless they have stepped into the shoes of the decree-holder by obtaining a succession certificate. In a Rajasthan case[5], there was only one decree-holder, and in order to avoid future conflicts between rival claimants, the bar of section 214 was held to apply. An Assam case[6], is to the same effect.

IX. Continuation of proceedings.

Section 214 (1) (b)-Execution proceeding.

34.35. With reference to section 214(1)(b), a controversy has arisen whether it bars the continuation of an execution proceeding without obtaining a succession certificate. According to one view[7-10], the main purpose of section 214 is to protect the debtor from vexatious proceedings and from being harassed at different times by different persons claiming to be successors; *the continuation of an execution* proceeding by the legal representatives is not hit by the section, and a succession certificate need not be produced in such a case, according to this view.

[1] *Bhanja ji* v. *Jageshwar Dayal*, A.I.R. 1978 All. 268.

[2] See case law discussed, para 33.32, *supra*.

[3] Para 34.45, *infra*.

[4] *Nand Lal* v. *Mahavir Kumar*, A.I.R. 1974 Raj. 189.

[5] *Ganeshmal* v. *Smt. Anand Kanwar*, A.I.R. 1968 Raj. 273

[6] *Ramnibas Aggarwal* v. *Mt. Badumikalita*, A.I.R. 1967 Assam 27.

[7] *Ramanatha* v. *K.V.Kuppuswami*, A.I.R. 1971 Mad. 419, 421, para 7 (Ramanujam J.).

[8] *Raghubir Singh* v. *Rajeshwar Prasad Singh*, A.I.R. 1957 Pat. 435.

[9] *Lal Imari* v. *Fulmati Kaur*, A.I.R. 1965 Pat. 296, Para 2 (U.N. Sinha, J.).

[10] *Akula Mabukhan* v. *Rajamma*, A.I.R. 1963 Andh. 69 (D.B.).

The reasoning on which this view is based is that the bar of section 214 (1) (b) applies only when persons claiming on succession themselves apply to execute a decree against a debtor for payment or recovery of the debt owing to the deceased. But, *where no substantive* application is initiated by the legal representatives, mere continuation of the execution proceedings already initiated by the plaintiff decree-holder is not barred[1-3]. It has also been pointed out that under 0.22, r. 2, C.P.C. fresh application is not required.

According to a contrary view[4-6] an application by a legal representative to bring himself on record in a pending case should be treated as an application for fresh execution, and thtrefore attracts the provisions of section 214.

According to a recent Kerala judgment[7], section 214 applies to the continuation of execution proceedings.

Recommendation to add an Explanation as to continuation of execution proceedings.

34.36. Whatever be the true construction of the present wording, practical considerations require that the former view should be adopted, i.e. the continuation of execution proceedings by the legal representative should not be hit by the section. A suitable Explanation should be added to deal with the matter[8]. No doubt, the object of section 214(1) is to protect the interest of the debtor and to see that only the person entitled to succeed to the assets realises the debt owing to the deceased. Nevertheless, there is a limit to which one can give effect to this logic. Considerations of expeditious disposal must, at some stage, prevail. If a wrong person continues the execution, the rightful heir can claim the fruits of the recovery from him.

X. Mortgage decrees.

Secured debts position regarding mortgage decrees.

34.37. Certain questions have arisen as to whether a decree (preliminary or final) for the foreclosure or sale of property can be passed wthout a succession certificate where the mortgagee has died. Should the legal representative be asked to produce a succession certificate before obtaining such a decree? Section 214 does not expressly include within its scope a decree for the enforcement of the mortgagee's rights against the mortgaged property.

Foreclosure.

34.38. On a detailed examination of the case law, the position appears to be this. A decree for the foreclosure of a mortgage is not one for the payment of a "debt" so as to fall within the provision of section 214. The direction to pay within the period fixed in the decree, is given not to fix a personal liability for the debt, but to enable the defendants to save their right of redemption and to prevent its extinction by foreclosure[9].

Money due under usufructuary mortgage.

34.39. A suit to recover the money due under a usufructuary mortgage is also not a suit for "debt" or money due under a contract, but is, in reality, one for assessment in money of the value of the plaintiff's mortgage interest[10].

Redemption.

34.40. A suit for redemption (brought by the heir of the mortgagor) is also not a suit against a debtor to obtain a decree for payment of his "debt". The plaintiff is really the debtor, and not the creditor of the deceased mortgagor, Obviously, therefore, a person who, as heir of the mortgagor, is bringing a suit for redemption, is not suing to recover any debt, and a succession certificate is not required[11].

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[1] *Benode* v. *Purnendu*, A.I.R. 1973 Cal. 352, 353, (A.K. Sarkar, J.).

[2] *Srinath Khandelwal* v. *Biswanath Pd.*, A.I.R. 1972 All. 321, 323, 324, para 7-9 (M.N. Shukla J.).

[3] *Tejram Rajmal* v. *Rampyari Kundan Lal*, A.I.R. 1938 Nag. 538.

[4] *Tejram Rajmal* v. *Rampyari Kundan Lal*, A.I.R. 1938 Nag. 538.

[5] *Chacko* v. *Varghese*, A.I.R. 1956 Tra. Co. 183.

[6] *Ganeshamal* v. *Anand Kanwar*, A.I.R. 1968 Raj. 273.

[7] *Ramkrishnan Nair* v. *Easwari Amma*, (1979) K.L.T. 401 (June 4 and June 11, 1979), (1979) yearly Digest, Supplement, Col. 1994.

[8] Para 34.45, *infra*.

[9] (*a*) *Ammanna* v. *Gurunarthi*, (1893) I.L.R. 16 Mad. 64.

(*b*) *Marwant* v. *Mithrana*, (1900) A.W.N. 95.

[10] *Arumugan* v. *Valura Goundan* (1901) I.L.R. 24 Mad. 22

[11] *Zafer Ali* v. *Kanti Prakash*, A.I.R. 1929 All. 896 (Dalal J.).

34.41. According to the majority of the High Courts, a suit to recover money due on a simple mortgage, *by* sale of the mortgaged property, is also not a suit for the recovery of a 'debt'. It is a suit to enforce a charge on immovable property. and no succession certificate, therefore, need be obtained by the heirs of the mortgagee to recover the money[1]. Suits for sale of mortgaged property.

The mere fact that the remedy by personal decree for the debt is still available to the mortgagee would not also make any difference[2]. On this view, "debt" would not cover a decree for the enforcement of the mortgagee's rights against mortgaged property.

34.42. The Allahabad High Court, in its earlier cases, expressed the opinion that money lent on the security of a mortgage is a "debt" due from the mortgagor to the mortgagee, and the decree in a suit on such mortgage is a decree for the payment of "debt"—i.e. payment by sale of the mortgaged property. Consequently, a succession certificate is necessary[3] [4] for proceedings on such decrees.

But, in a later Allahabad case[5], where the personal remedy under the mortgage deed had become barred by limitation long before the suit was brought, and the mortgagee was simply entitled to a decree for sale of the mortgaged property, it was held that the application for the execution of the mortgage decree for realisation of the amount by sale of the mortgaged property was not an application to obtain an order for the payment of his "debt". No succession certificate was, therefore, necessary. The earlier Allahabad rulings are not cited in the judgment.

34.43. It seems to us that but for the early rulings of the Allahabad High Court, the position is well established that a decree for sale is not a decree for "debt". The later Allahabad judgment also discloses—if indirectly—a changed trend. In this position, a clarification of the law is not required. True position.

34.44. As regards personal decree, an application by the heirs of a mortgagee for a personal decree under section 90 of the Transfer of Property Act (0.34, r. 6, C. P. Code, 1908) requires a succession certificate[6]. Personal decree Succession certificate.

Thus, where, after a decree for sale had been made in a mortgage suit, the mortgagee died and his sons got themselves substituted on the record, but the proceeds of the sale of the mortgaged property proved insufficient, and the sons applied for a personal decree for the balance, it was held that until the applicants obtained a certificate, no such decree could be made in their favour[7]. These cases also do not necessitate any amendment of the law.

[1](*a*) *Nanchand* v. *Yenawa*, (1904) I.L.R. 28 Bom. 630, 632.

(*b*) *Raghu Nath* v. *Poresh Nath*, (1888) I.L.R. 15 Cal. 54, 57.

(*c*) *Kanchan* v. *Baij Nath*, (1892) I.L.R. 19 Cal. 336, 339, dissented from in 16 All. 259.

(*d*) *Baid Nath* v. *Shamanand*, (1895) I.L.R. 22 Cal. 143.

(*e*) *Mohmmed Yusuf* v. *Abdur Rahim*, (1899) I.L.R. 26 Cal. 839.

(*f*) *Subramanian* v. *Rakku*, (1897) I.L.R. 20 Mad. 232.

(*g*) *Pallamraju* v. *Bapanna*, (1899) I.L.R. 22 Mad. 380.

(*h*) *Palaniyandi* v. *Veerammal*, (1906) I.L.R. 29 Mad. 77.

(*i*) *Basu Devanand* v. *Raghubir Saran*, A.I.R. 1955 Pat. 284, 286, 287.

[2]*Ramasami* v. *Venkamma*, A.I.R. 1963 A.P. 135, 136, 137, paras 7 and 12 (reviews case law) dissenting from *Fateh Chand* v. *Muhammed Baksh*, (1894) I.L.R. 16 All. 259.

[3](a) *Fateh Chand* v. *Muhammad Baksh* (1894) I.L.R. 16 All. 259 (F.B.) (Case under section 4 Succession Certificate Act, 1880).

(b) *Allah Dad Khan* v. *Sant Ram* (1912) I.L.R. 35 All. 74, 77 (D.B.)

(c) *Azmat* v. *Sitla*, 9 A.L.J. 766, 16 I.C. 108.

[4]*Kasumari* v. *Mahku*, A.I.R. 1927 All. 227: (This was a suit for sale—see *Zafar Ali* v. *Kanti Prakash* A.I.R. 1929 All. 896.)

[5]*Mohammad Ibrahim* v. *Bhagwan Das*, A.I.R. 1935 All. 897, 898. (Sulaiman C.J. and Bennet J.).

[6]*Kulwanta Bewa* v. *Karam Chand*, (1942), 43 C.W.N. 4; A.I.R. 1983 Cal. 714. 5.

[7](*a*) *Nanchand* v. *Yenawa*, I.L.R. 28 Bom. 630.

(*b*) *Sahadev* v. *Sakhawat*, 10 C.W.N, 145, 149.

(*c*) *Abdul Sattar* v. *Satya Bhushan* (1908). I.L.R. 35 Cal. 767.

XI. Recommendation as to section 214.

Recommended amendments in section 214.

34.45. We have disposed of the various questions relating to section 214. For carrying out the points made so far in earlier paragraphs with reference to section 214, we recommend the insertion of the following Explanations to the section :—

"*Explanation* 1[1].—Nothing in this section shall be construed as precluding a debtor of a deceased person from making payment of a debt to a person (in this Explanation referred to as the 'payee") claiming, on succession, to be entitled to the effects of the deceased person or to any part thereof, where the debtor is satisfied that the payee is so entitled and has taken from the payee a bond indemnifying the debtor; and where a debtor makes such payment in good faith and after due care and attention, he shall not be bound to make payment of the debt again to the person entitled to the effects of the deceased person or to any part thereof, as the case may be, but nothing in this Explanation shall affect any remedy which the person so entitled may have against the payee who has received payment from the debtor[2]."

"*Explanation* 2.—In this section, in sections 212 and 370, in sub-sectoin (1) of section 372 and in section 379, 'debt' includes any actionable claim, and "debtor" and "payment" shall be construed accordingly[3-4].

"*Explanation* 3.—Nothing in this section shall be construed as precluding the institution of a suit for the recovery of any debt, but no decree shall be passed in a suit for such recovery unless the provisions of this section are complied with[5]."

"*Explanation* 4.—Nothing in this section shall be construed as barring the continuance by a legal representative of a proceeding for execution already initiated[6]."

XII. Miscellaneous.

Section 215.

34.46. This takes us to section 215, which reads as under :—

"215(1)—A grant of probate or letters of administration in respect of an estate shall be deemed to supersede any certificate previously granted under Part X or under the Succession Certificate Act, 1889, or Bombay Regulation No. VIII of 1827, in respect of any debts or securities included in the estate.

(2) When at the time of the grant of the Probate or letters any suit or other proceedings instituted by the holder of any such certificate regarding any such debt or security is pending, the person to whom the grant is made shall, on applying to the Court in which the suit or proceeding is pending, be entitled to take the place of the holder of the certificate in the suit or proceeding :

"Provided that, when any certificate is superseded under this section, all payments made to the holder of such certificate in ignorance of such supersession shall be held good against claims under the probate or letters of administration."

The section seems to need no change.

Section 216.

34.47. According to section 216, after any grant of probate or letters of administration, no person other than the person to whom the same may have been granted shall have power to sue or prosecute any suit, or otherwise act as

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[1]If so considered necessary, the first Explanation could be limited to claims for small amounts.

[2]See para 34.36, *supra*.

[3]The definition of "debt" should, besides being incorporated in section 214, also be made applicable to sections 212, 370, 372(1) and 379.

[4]See para 34.30, *supra*.

[5]See para 34.33, *supra*.

[6]See para 34.36, *supra*.

representative of the deceased, throughout the State in which the same may have been granted, until such probate or letters of administration has or have been recalled or revoked.

This section also needs no change, having created no serious problems.

CHAPTER 35

PROBATE, LETTERS OF ADMINISTRATION AND ADMINISTRATION OF ASSETS OF THE DECEASED

SECTION 217—236

35.1. Probate, letters of administration and administration of assets and liabilities of the deceased, form the subject matter of sections 217 to 236. The sections are mostly of a procedural character. Scope.

35.2. Section 217, the first section in this group, provides that save as otherwise provided by this Act or by any other law for the time being in force, all grants of probate and letters of administration with the will annexed shall be made and the administration of assets of the deceased in cases of intestate succession shall be carried out, in accordance with the provisions of this Part. Section 217.

The section needs no change, being a purely introductory provision.

35.3. The next section 218 reads as under :— Section 218.

"218(1) If the deceased has died intestate and was a Hindu, Muhammadan, Buddhist, Sikh or Jain or an exempted person, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.

(2) When several such persons apply for such administration, it shall be in the discretion of the court to grant it to any one or more of them.

(3) When no such person applies, it may be granted to a creditor of the deceased."

35.4. In the context of this section, we propose to consider one question that has arisen. Where joint family property passes by survivorship to the sole surviving co-parcener, the question arises whether the sole surviving co-parcener is entitled to apply for letters of administration under section 218. Is he a person 'who would be entitled to the whole or part of the estate of the deceased' within the meaning of the section? There seems to be a conflict of decisions on the subject. Joint family property passing by survivorship.

35.5. A Madras case[1] answers the above question in the affirmative, though the observations in the case may be regarded *as obiter*. But, according to the Punjab view, if the deceased person and the present petitioner were members of a joint family, then, immediately on the death of the deceased, his interest in the estate at once ceases and *the whole interest* in the estate belongs to the *petitioner by survivorship*, and there is no "estate of the deceased" to be administered : there is no "succession" to the deceased's estate, because he has left nothing to succeed to. Consequently, an application for letters of administration is not competent in such cases[2]. Conflict of views.

[1] In *re Desu Manavala*, (1910) I.L.R. 33 Mad. 93, 97; 10 M.L.J. 591 (case under Court Fees Act, construing section 23, Probate and Admn. Act).

[2](*a*) *Uttam Devi* v. *Dina Nath*, 5 P.R. 1919, 51 I.C. 651, 652, distinguishing in *re Desu Manavala*, I.L.R. 33 Mad. 93, on the ground that the remarks therein were *obiter*.

(*b*) *Ramagiri* v. *Govindammah*, A.I.R. 1924 Rang. 329, 330.

The Bombay practice, as is shown by some reported cases[1], is that when the court grants letters of administration, it is not concerned with inquiries about title. But the Bombay cases did not relate to claims *by survivorship*. The claimants (petitioners) had their claim on the basis of succession, and it was the opposite party that put forth a case that the property was joint family property. The court held that it was not concerned with the question whether the property was, or was not, joint family property. It was no part of the duty of the testamentary Judge to consider the question of title to property.

The real conflict is between the Punjab and Madras rulings, as stated above.

Recommendation to amend section 218.

35.6. We are of the opinion that it is desirable to clarify the position, in view of the conflict of decisions on the subject[2]. The Punjab view may, on a literal construction of the section, be correct. But if the law is to be clarified, the choice, we think, should be in favour of the Madras view, which is more practical and more convenient. We, therefore, recommend that the Madras view should be adopted, by amending section 218 in a suitable manner. This could be done by inserting an Explanation to section 218 in the following terms.

> *"Explanation—Where the property of a Hindu undivided coparcenary passes by survivorship to the sole surviving coparcener, the sole surviving coparcener shall, for the purposes of this section, be deemed to be a person entitled to the estate of the person on whose death the property so passes, and shall accordingly be entitled to apply for letters of administration under this section".*

Section 219.

35.8. This takes us to section 219. It provides that if the deceased has died intestate and was not a person belonging to any of the classes referred to in section 218, those who are connected with him, either by marriage or by consanguinity, are entitled to obtain letters of administration of his estate and effects in the order and according to the rules hereinafter stated, namely :—

(a) If the deceased has left a widow, administration shall be granted to the widow, unless the court sees cause to exclude her, either on the ground of some personal disqualification, or because she has no interest in the estate of the deceased.

There are two illustrations annexed to this clause, as under :—

"(i) The widow is a lunatic or has committed adultery or has been barred by her marriage settlement of all interest in her husband's estate. There is cause for excluding her from the administration.

(ii) The widow has married again since the decease of her husband. This is not good cause for her exclusion."

(b) Next, it is provided that if the Judge thinks proper, he may associate any person or persons with the widow in the administration who would be entitled solely to the administration if there were no widow.

(c) If there is no widow, or if the Court sees cause to exclude the widow, it shall commit the administration to the person or persons who would be beneficially entitled to the estate according to the rules for the distribution of an intestate's estate.

Provided that, when the mother of the deceased is one of the class of persons so entitled, she shall be solely entitled to administration.

(d) Those who stand in equal degree of kindred to the deceased are equally entitled to administration.

(e) The husband surviving his wife has the same right of administration of her estate as the widow has in respect of the estate of her husband.

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[1](a) *Oochavaram* v. *Dolatram*, I.L.R. 28 Bom. 644 (Jenkins, C.J.).

(b) *Parvati Bai* v. *Raghunath Laxman*, (1940) 42 Bom. L.R. 1053 (Kania, J.), A.I.R. 1941 Bom. 60.

[2]See paragraph 35.4, *supra*.

(f) When there is no person connected with the deceased by marriage or consaguinity who is entitled to letters of administration and willing to act, letters of administration may be granted to a creditor.

(g) Where the deceased has left property (in India), letters of administration shall be granted according to the foregoing rules, notwithstanding that he had his domicile in a country in which the law relating to testate and intestate succession differs from the law of India.

Recommendation to amend section 219 (a) Illustration (ii).

35.9. In this section, section 219, clause (a), illustration (ii)[1], needs some comments. Clause (a) provides that the court may exclude a widow on the ground of some personal disqualification or "because she has no interest in the estate of the deceased". In this connection, illustration (ii) to the clause provides that the fact that the widow has married again since the decease of her husband is not a good cause for her exclusion (from the preferential right conferred by the section). This illustration seems to require some modification. The widow who has remarried *may not, in every case, be a* suitable person to administer the property of her deceased husband. All that can be said is that *mere re-marriage* of the widow need not deprive her of the preferential right, Illustration (ii) to section 219(a) should, therefore, be revised as under :—

"(ii) The widow has married again since the decease of her husband. This, in itself, is not good cause for her exclusion."

We recommend accordingly.

Section 220—Effect of letters of administration.

35.10. Section 220 provides that letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death. The main object of the section is to make the grant of administration relate back to the date of death. The section has created no problems, and needs no change.

35.11. Section 221 reads as under :

Section 221—Acts not validated by administration

"221. Letters of administration do not render valid any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate."

The section needs no change.

Section 222.

35.12. Section 222 provides that probate shall be granted only to an executor appointed by the will. The appointment may be expressed or by necessary implication. There are three illustrations to the section, as under :

"(i) A wills that C be his executor if B will not. B is appointed executor by implication.

(ii) A gives a legacy to B and several legacies to other persons, among the rest to his daughter-in-law C, and adds "but should the within-named C be not living I do constitute and appoint B my whole and sole executrix". C is appointed executrix by implication.

(iii) A appoints several persons executors of his will and codicils and his nephew residuary legatee, and in another codicil are these words,—"I appoint my nephew my residuary legatee to discharge all lawful demands against my will and codicils signed on different dates". The nephew is appointed an executor by implication."

The section needs no change, not having created any serious controversies.

Section 222A (proposed)—Unfit executor.

35.13. There is one new point requiring consideration. As the law in India stands at present, a person appointed executor in the will must be given the grant of probate (if he applies for it), irrespective of his personal unfitness for the position[2]. He can be removed only if, after commencing the administration of the affairs of the deceased, he commits breach of trust, waste or other default.

[1]Para 35.8, *supra*.

[2]Section 2(1).

This seems to be English law[1] also. The question to be considered is whether this position requires modification in order to deal with certain special aspects.

In this context, we may refer to the suggestion that was made by one learned writer[2] a few years ago. His suggestion is that while the court should ordinarily have regard to the wishes of the testator, it should have a judicial discretion to exclude, from acting as executor, persons who, on the face of it, are unfit even to begin to administer the affairs of the deceased testator. The court should not have to wait to see whether the persons so unfit in fact commit waste or breach of trust and then remove them.

Present position criticised.

35.14. The pros and cons of the matter may be examined. On the one hand, the present position can be justified by stating that an executor is a person of the testator's own choice and the testator would not prefer someone else's judgment to his own—not even a judgment of the court. Apparently, on this principle, the law allows a testator to make the appointment of any person whom he likes as an executor and leaves the question of determining the fitness of that person absolutely to the choice of the testator.

As against this, one has to bear in mind the serious hardship which may possibly be caused if a person acts as an executor when he is not fit at all, and when (from the known facts), one can infer that the testator would not have continued the appointment. A situation may, for example, arise where there is some interval between the date of the will by which the appointment was made and the death of the testator. The person appointed as executor in the will might have become unfit after the will, the testator might have not been able to apply his mind to the question whether the appointment should be continued. The testator might even have mentally taken a decision to make another appointment, but might have found no time to effectuate it in a formal writing.

In a comment (on our Working Paper), forwarded to us[3] by the Catholic Bishops' Conference of India, a query has been raised as to how the court will form the opinion that a person is "definitely" unfit to work as executor. It has been stated, that the action of the court would be arbitrary. We do not, however, share this apprehension. No doubt, positive acts of past misconduct on the part of a person would be the best proof of his unfitness, but one need not rule out other situations where adequate material is placed before the court about the unfitness of a person to act as an executor. The court can be expected to act with judgment and discretion, and not arbitrarily, in all such matters.

)wer to be given.

35.15. Having regard to all aspects of the matter, we are of the opinion that it would be in the fitness of things if the court is given a power to exclude an executor who is definitely unfit. Evidence of actual commission of waste or breach of trust by an executor *after taking charge as executor*, should not be insisted on, in our opinion.

:commendation to sert new section 2A.

35.16. In the light of the above discussion, we recommend that the following new section should be inserted on the subject—

> "222A. *The court may by order exclude from acting as executor, a person who, in the opinion of the court, is definitely unfit to administer the affairs of the deceased, whether or not that person has committed waste or breach of trust after commencing administration of such affairs* :
>
> *Provided that no such order shall be passed without affording such person a reasonable opportunity of being heard.*"

ction 223 - Pro- te to minors and :orporations.

35.17. Section 223 prohibits the issue of probate to persons who are minor or of unsound mind and restricts the grant of probate as regards certain classes of corporations. We are primarily concerned with the portion relating to corporations. On a literal reading of the section, probate cannot be granted to any

[1] *R. v. Raines*, (1698) 1 Ld. Raym 361 : 91 E.R. 1138 Halsbury, 4th Ed., Vol. 17, para 720, page 381.

[2] F.C. Hutley, "Reconstruction of the law of Succession" (1973) Vol. 15, Journal of the Indian Law Institute, 420, 424.

[3] Catholic Bishops' Conference of India, letter dated 3rd October, 1984.

"association" of individuals unless it is a *company* satisfying the prescribed requirements.

Non-commercial corporations.

35.18. Some difficulty is created by the word "association", in relation to non-commercial corporations. For example, does this word cover a University ? This question arose before the Allahabad High Court a few years ago. The High Court held that the Banaras University was a "corporation", but was not an "association", because a corporation having a separate identity from its members cannot be called a mere "association" of individuals[1-2].

The Allahabad High Court also cited an English case[3], where James L. J. had regarded "company" and "association" as synonymous. The Allahabad case actually related to section 236, but is equally applicable to section 223, the wording in both sections (so far as is material) being the same.

A similar view seems to have been taken by the Oudh[4] Chief Court, and (impliedly), by the Calcutta High Court[5].

Law in England

35.19. It would appear that in England, the present law on the subject is somewhat more liberal. Under the statutory provisions now in force in England probate can be granted to a trust corporation[6], but judicial decisions and practice directions (or rules of court) permit a *corporation sole* also to be an executor[7], and further permit the grant of probate to a corporation aggregate which is not a trust corporation. In the latter case, however (i.e. in the case of a corporation aggregate which is not a trust corporation), the probate must be granted to its nominee. It must also be shown that the corporation has power to act as personal representative, and certain other safeguards are laid down[8].

In India, probate cannot be granted to a registered society[9], because of the restricted language of section 223. A registered society is an "association", but not a "company".

Need to amend th section.

35.20. We are of the view that the section should be made as comprehensive as possible. In any case, it appears to be desirable to revise the section so as to indicate specifically which corporate bodies can, or cannot, be granted probate. As regards companies, the existing restriction may continue. As regards other corporate bodies, it is enough if the corporate body applying for probate is competent to accept probate in law—a question primarily to be decided with reference to the law governing its consitution.

Section 223, an the point relating t the Church.

35.20A. In a suggestion forwarded to us by the Catholic Bishops' Conference of India[10], it has been stated that the Church will have to frame rules, if it is to be legally empowered to seek probate. The relevant paragraph in the letter is somewhat un-intelligible, but this seems to be its purport. In this connection, we may point out that the law can merely provide for the capacity of corporations as recognised in the legal system. Internal formalities, such as rules, will, of course, have to be observed by the concerned agencies or authorities within the Church, assuming that a particular Church is recognised as a corporation in law.

Recommendation to revise section 22

35.21. Accordingly, we recommend the following re-draft of section 223—

"223. Probate cannot be granted—

(a) to any person who is a minor or is of unsound mind, or

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[1] *Banaras Hindu Unversity* v. *Gauri Dutt*, A.I.R. 1950 All. 196.

[2] Bagchi, Principles of the Law of Corporations, Tagore Law Lectures, (1914), pages 253-259, referred to.

[3] *Smith* v. *Anderson*, (1880) 15 Ch. D. 247, 273.

[4] *Benaras Hindu University* v. *Sri Krishan Das*, A.I.R. 1920 Oudh 124 (Benaras Hindu Unversity).

[5] *Jitendra Nath Palit* v. *Lokendra Nath Palit*, A.I.R. 1916 Cal. 295.

[6] Section 161, Judicature Act, 1925, (Eng.).

[7] *Re Havnos*, (1842) 3 Curt. 75.

[8] Non-contentious probate Rules, 1954, rule 34(3), and Practice Direction in (1956) 1 W.L.R.127.

[9] *Mahashaya Krishna* v. *Maya Devi*, A.I.R. 1948 Lah. 54.

[10] Catholic Bishops' Conference of India, letter dated 3rd October, 1984.

(b) to any company unless it satisfies the conditions prescribed by rules to be made by the State Government in this behalf, or

(c) *to any corporation other than a company, if it is not legally competent to accept probate.*"

Section 224—Several executors.

35.22. According to section 224, when several executors are appointed, probate may be granted to them simultaneously or at different times.

The section needs no change.

Section 225.

35.23. Section 225 provides that if a codicil is discovered after the grant of probate, a separate probate of that codicil may be granted to the executor, if it in no way repeals the appointment of executors made by the will. It also provides that if different executors are appointed by the codicil, the probate of the will shall be revoked and a new probate granted of the will and the codicil together.

No amendment is required in the section, which has raised no problems.

Section 226.

35.24. According to section 226, when probate has been granted to several executors, and one of them dies, the entire representation of the testator accrues to the surviving executor or executors. No amendment is required in this section also.

ection 227.

35.25. Section 227 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.

This section also needs no change.

ection 228.

35.26. Section 228 provides that when a will has been proved and deposited in a court of competent jurisdiction situated beyond the limits of the State, whether within or beyond the limits of India, and a properly authenticated copy of the wlil is produced, letters of administration may be granted with a *copy*[1] *of such will* annexed.

Certain questions arise under this section, which concern section 241 also. Section 241 is as follows :—

"241. *When any executor is absent* from the State in which application is made, and there is no executor within the State willing to act, letters of administration, *with the will annexed*[2], may be granted to the attorney or agent of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to him."

Question to be considered—absent executor.

35.27. The question that needs to be considered regarding the precise scope of these two sections, is this. When a will has been proved and deposited in a court of competent jurisdiction situated beyond the limits of the State, which is the provision whereunder letters of administration (with the will annexed or with a copy of the authenticated copy of the will annexed), can be granted to the attorney of the absent executor? It may be noted that section 241 postulates production of *the original* will—note the words 'with the will annexed'[3]. In contrast, section 228 speaks of a copy of the will being annexed.

Case law.

35.28. It is necessary to refer to two cases—one decided by the Allahabad High Court and the other by the Madras High Court—dealing with the question.

In the Allahabad case[4], a person had died in Scotland leaving property both in India and in the U. K. By his will, he appointed an executor, who, in due course, obtained 'confirmation' of the will from the Court of Scotland. The executor then appointed the present applicant as his attorney for the purpose of applying to the proper court in India for letters of administration with an authenticated copy of the will annexed. The attorney accordingly applied to the High Court of Allahabad.

[1]Note the word 'copy'.

[2]Note the word 'will'.

[3]Para 35.26, *supra*.

[4]In *re Adwait Nath*, A.I.R. 1948 All. 351 (F.B.).

The High Court noted that the practice in Madras, Calcutta and Bombay had been to grant the letters of administration in such cases under section 241, but observed that, "the provisions of section 241, were not intended to apply, nor are they appropriate, to the case in *which a grant of probate has already been obtained in another court*. The section applicable in such case is section 228". The High Court took the view that it may, under section 228, grant letters of administration, with a copy of the authenticated copy of the will annexed, to the agent or attorney of the executor.

35.29. In the Madras case[1], a lady had died in England, leaving a will. By the will she appointed her two nieces to be the executrixes. They obtained probate in England and appointed the Lloyds Bank Ltd., Calcutta, as attorneys, who, in turn, appointed one of their officers, as Attorney, to obtain letters of administration with a copy of the will annexed, in respect of the property of the deceased in India. The officer of the Lloyds Bank filed a petition in the Madras High Court for the grant of letters of administration, to have effect only in the State of Madras, along with a certified copy of the probate.

The question for consideration before the High Court was whether the grant was to be a grant of letters of administration under section 241 or under section 228. The question was material, because the petitioner was unable to produce the will *in original*. The Court observed that section 241 did not require the production of the original will. Since the will had been proved and deposited in a court of competent jurisdiction in England, what can be produced here is only a properly authenticated copy of the will. Therefore, a case coming under section 228 would be an exception to the general rule[2] in section 276 as to the production of the *will in original*, though the exception is not mentioned in section 276.

The court said that in section 241, the expression "letters of administration with *the will annexed*' had been used in antithesis to letters of administration *granted on intestacy*. It was permissible to read section 241 along with section 228, and an attorney or agent of the executor can obtain letters of administration without producing the *original will*, if the will had been proved and deposited in a competent court and a properly authenticated copy of the will is produced.

35.30. The points of difference between the Allahabad and the Madras view can be thus summarised :

Points of difference between Allahabad and Madras view summarised.

(a) According to the Allahabad view, in a case under section 241 the will must be established. Not so, according to the Madras High Court;

(b) While the Allahabad view is that section 228 does not make provision for the grant of administration to an agent or attorney, according to the Madras High Court, this defect can be cured with the aid of section 241.

(c) The Madras High Court has put the case coming under section 228 as an exception to the rule provided in section 276. The Allahabad High Court has refused to accept this argument.

The controversy has a practical aspect also, concerned with the furnishing of a bond. In the kind of cases mentioned above, when the letters of administration were granted under section 228 by the Allahabad High Court, the petitioner had been asked to furnish an administration bond as required by section 291(1). Since the Madras High Court granted letters of administration under section 241, an administration bond under section 291(1) was not required to be furnished. The Madras High Court, expressing its disagreement with the above-mentioned Allahabad High Court decision, observed, "Sections 228 and 241 should not be read as if they provided for separate circumstances and they were mutually exclusive. On the other hand, they could be read together. It is true that the objects of these two sections differ. The real object of section 228 is to dispense with the production of the proof thereof, for the reason that it had already been proved and had been deposited in a court of competent jurisdiction. The real

[1]In *re L.C. Levack*, A.I.R. 1954 Mad. 898 (F.B.).

[2]Section 276.

object of section 241 is to dispense with an application by the executor himself when he is absent from the province in which the application is made."

According to the Allahabad High Court, these sections are mutually exclusive and deal with separate circumstances. The Madras High Court, however, holds that they are not mutually exclusive and do not provide for separate sets of circumstances.

Recommendation for amending section 241.

35.31. In our opinion, it is desirable that the controversy should be resolved by *amending section* 241 so as to add[1] an Explanation to the effect that (a) section 241 will apply also where the case falls under section 228 and (b) if the case falls under section 228, a copy of the will is to suffice and the original need not be produced.

Section 229 to 231.

35.32. Section 229 to 231 deal with renunciation. Although section 230 is applicable only in the case of an executor, and there is no corresponding provision in the act with regard to an administrator, still there is no reason why the principle of these sections should not apply to an administrator. In English law and practice, there is, as regards the right of renunciation, no distinction made between the case of an executor and that of an administrator, and the same rule should apply in India.

As regards the withdrawal of renunciation, the rule is that a renunciation by an administrator cannot be withdrawn without the leave of the court, and he can be allowed to withdraw only in a fit and proper case and not merely on the ground that he has changed his mind[2].

Section 232.

35.33. Section 232 reads :—

"232. When—

(a) the deceased has made a will, but has not appointed an executor, or

(b) the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the will, or

(c) the executor dies after having proved the will, but before he has administered all the estate of the deceased.

an universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered".

Universal and residuary legatees

35.34. Section 232 is concerned with two classes of legatees, namely the universal legatee and the residuary legatee. The universal legatee is one who, by virtue of the will, is entitled to the whole of the testator's property. In the absence of the executor, he has been given the right to prove the will and to obtain letters of administration with the will annexed. He cannot, however, obtain probate.

The residuary legatee is, it is said, the testator's choice; he is the next person in his election to the executor[3]. When the *residum* has been disposed of to another person, there would be no purpose in giving the administration to the next-of-kin, because no benefit can accrue to them by the grant of the Letters of Administration in such cases.

No change needed in section 232.

35.35. What words would create a universal or residuary legatee is not a matter with which we are concerned at the moment, that being a question of construction of the words of the will. It is enough to note that there are adequate reasons for the grant of letters of Administration to the universal legatee or the residuary legatee, in preference to the next-of-kin.

The section, therefore, needs no change.

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[1] To be carried out under section 241.

[2] *The Manchersa*, A.I.R. 1929 Bom. 33, 34 (Rangnekar J.).
Atkins v. *Bernard*, 2 Phill, C.18, cited in N.D. Basu, Law of Succession (1957), page 699.

35.36. Section 233 provides that when a residuary legatee who has a beneficial interest survives the testator, but dies before the estate has been fully administered, his representative has the same right to administration with the will annexed as such residuary legatee. Section 233.

The section needs no change.

35.37. According to section 234, when there is no executor and no residuary legatee or representative of a residuary legatee, or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly. Section 234.

The section needs no change.

35.38. According to section 235, letters of administration with the will annexed shall not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned, calling on the next-of-kin to accept or refuse letters of administration. Section 235.

The section also needs no change.

35.39. Section 236 provides as follows : Section 236.

"236. Letters of administration cannot be granted to any person who is a minor or is of unsound mind, nor to any association of individuals unless it is a company which satisfies the conditions prescribed by rules to be made by the State Government in this behalf."

35.40. In view of what has been stated[1] above under section 223, we recommend that section 236 should be revised as follows :— Recommendation.

"236. Letters of administration cannot be granted—

(a) to any person who is a minor or is of unsound mind, or

(b) *to any company unless* it satisfies the conditions prescribed by rules to be made by the State Government in this behalf, or

(c) *to any corporation other than a company, if it is not legally competent to accept letters of administration.*"

CHAPTER 36

LIMITED GRANTS : SECTIONS 237 TO 260

36.1 Limited grants are dealt with in some detail in sections 237 to 260. Limited grants.

The various types of such grants are as follows :—

I. grants limited in duration—sections 237 to 240;

II. grants for the use and benefit of others having a right—sections 241—246;

III. grants for special purposes—sections 247—254;

IV. grants with exception—sections 255-256;

V. grants of the rest—section 257;

VI. grants of effects un-administered—sections 258—260.

[1]See discussion as to section 223, *supra*.

1. **Grants limited in duration.**

Sections 237-238 Introductory.

36.2. Section 237 deals two situations. When a will has been lost or mislaid *since the testator's death,* probate may be granted of a copy or draft of the will. This is the first situation dealt with in the section. The second situation relates to the cases where a will, "has been destroyed by wrong or accident and not by any act of the testator". Here again, a copy or the draft may be utilised for the grant of probate. In both the cases, the probate is limited until the original will or a properly authenticated copy is produced.

Loss of will before death—applicability of section 237.

36.3. According to judicial construction of section 237, the words "since the testator's death" qualify only the word "mislaid", and have no referene to the word "lost"[1]. Thus, according to judicial construction, probate can be granted where the will is lost *before or* after the testator's death. In our opinion, it is desirable to codify this interpretation so as to make the section self-contained.

Of course, the general rule[2] that there is a rebuttable presumption that the testator destroyed the will where the will lost proved to be in his custody and is not forthcoming applies in India also. At least, it was so held in a Calcutta case[3].

But another case[4] seems to create a doubt in this regard, inasmuch as it holds that there is no rule of law that under certain circumstances a presumption should be made that the will was revoked. In our opinion, the earlier Calcutta case takes a more practical view, and that view should be incorporated in the section[5].

Section 238—Narrow scope.

36.4. Under section 238, probate can be granted if the will has been lost or destroyed and no copy has been made or draft preserved. Probate is then granted of the contents of the will "if they (the contents) can be established by evidence". "Evidence" here, of course, means secondary evidence. The topic was discussed in detail in the leading English case of *Sugden* v. *Lord St. Leonards*[6], where a will was established by parol evidence alone.

Defect in section 237 as to destruction otherwise than the act or mistake of testator.

36.5. Reverting to section 237, it would appear that section 237 is narrowly drawn. The words 'wrong or accident' do not, if taken literally, cover the cases where a natural calamity, such as a flood, destroys the will. The section is also defective, inasmuch as the language does not make it clear that the section applies only where the testator had no intention of revoking the will. If an act of the testator done with the intention of revoking the will result in "destruction of the will", it is obvious that the section should not be applicable. This situation should be exculded from the scope of the section[7].

Testator not mentally competent.

36.6 On the other hand, where, though the will is destroyed by the physical act of the testator, the testator is not a person in possession of his mental faculties, the situation should be included in the section. We are recommending to cover these points[8].

This criticism applies, in substance, to section 238 also.

Want of symmetry between sections 237 and 238.

36.7. With reference to section 238, it is further to be pointed out that it does not deal with the various situations so elaborately as the preceding section—section 237—does. The situations to which sections 237 and 238 apply are the same, the only difference being that if a copy or draft of the will is

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[1] *Sarat Chandra* v. *Golab Sundari,* (1913) 18 C.W.N. 527.

[2] For the English law, see *Welch* v. *Phillips,* (1836) 1 Moo. P.C. 299, 302. Halsbury, 3rd Ed. Vol. 39, page 897, f.n. (q) (b) (e).

[3] *Anwar Hossein* v. *Secretary of State,* (1904) I.LR. 31 Cal. 885, Halsbury, 4th Ed., Volume 17, page 449 para 448.

[4] *Efari* v. *Podai,* A.I.R. 1928 Cal. 307, 309 (The case cites *Allan* v. *Morrison,* (1900) A.C. 60 (P.C.) which, however, holds to the contrary).

[5] See para 36.10, *infra.*

[6] *Sugden* v. *Lord St. Leonards,* (1875-1880) All E.R. Reprint 21.

[7] Para 36.2, *supra.*

[8] See para 36.10, *infra.*

ailable, then *section 237 applies*, and in other cases *section 238 applies*. Logically *therefore*, the provisions in both the sections should as far as possible, be couched in the same language. At present, however, the wording of the two sections (237-238) differs creating an anomaly. This difference should be removed[1].

36.8. There also remains to be considered the situation of loss or destruction *of a part of the will*. Judicial decisions[2] have expressly held that probate can be granted if *a part of* the will is lost or destroyed. It is desirable that the point should be expressly dealt with[3]. Loss or destruction of part of the will.

36.9. Apart from these amendments of a verbal nature, as a matter of policy, it is also desirable that sections 237 and 238 should apply whether the will was lost or *mislaid before the death or after the death*. In fact, this is the position in English law[4], which permits the grant of probate of a copy or draft in such circumstances. Need to expand the scope of sections 237-238.

36.10. In the light of the above discussion, we recommend that sections 237 238 should be redrafted, and new sections should be inserted as follows :— Recommendation to revise sections 237 - 238 and to insert section 238A.

"237. When—

(a) a will has been lost or mislaid *before or after* the testator's death, or has been destroyed by a *natural event* and not by any act of the testator *amounting in law to revocation of the will*, and

(b) a copy of the will or the draft of the will has been preserved, probate may be granted of such a copy or draft, limited until the original or a properly authenticated copy of it is produced."

"238. When a will has been lost or mislaid *in the circumstances mentioned in section* 237, and no copy of draft of the will has been preserved, probate may be granted of its contents if they can be established by evidence".

"238A. *In sections* 237 *and* 238, *"will" includes a part of a will.*

"238B. *Where a will proved to have been lost in the custody of the testator before his death is not forthcoming after his death, the court may presume that it was destroyed by an act of the testator amounting in law to its revocation*".

36.11. This takes us to section 239. According to section 239, when the will is in the possession of a person residing out of the State in which application for probate is made, who has refused to or neglected to deliver it up, but a copy has been transmitted to the executor, and it is necessary for the interests of the estate that probate should be granted without waiting for the arrival of the original, probate may be granted of the copy so transmitted, limited until the will or an authenticated copy of it is produced. Section 239.

The section needs no change.

36.12. According to section 240, where no will of the deceased is forthcoming, but there is reason to believe that there is a will in existence, letters of administration may be granted, limited until the will, or an authenticated copy of it is produced. Section 240.

The section needs no change.

[1]For the concrete recommendation, see para 36.10, *infra*.

[2]*Kedar Nath* v. *Sarojini*, (1899) I.L.R. 26 Cal. 634 (case under section 25, Probate and Administration Act, 1881).

[3]For concrete recommendation, see para 36.10, *infra*.

[4]*Re. Webb, Smith* v. *Johnson*, (1964) 2 All E.R. 91, 92 (Faulks J.) (Probate granted of completed draft). There was evidence that later on, the testatrix said that it was her will).

II. Grants for the benefit of others

Section 241.

36.13. Section 241 reads—

"When any executor is absent from the State in which application is made, and there is no executor within the State willing to act, letters of administration, with the will annexed, may be granted to the attorney or agent of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself."

In connection with this section, certain question arise by reason of secton 273. Section 273 reads—

"273. Probate or letters of administration shall have effect over all the property and estate, movable or immovable, of the deceased, throughout the State in which the same is or are granted and shall be conclusive as to the representative title against all debtors of the deceased and all persons holding property which belongs to him, and shall afford full indemnity to all debtors, paying their debts and all persons delivering up such property to the person to whom such probate or letters of administration have been granted:

Provided that probates and letters of administration granted—

(a) by a High Court, or

(b) by a District Judge, where the deceased at the time of his death had a fixed place of abode situate within the jurisdiction of such Judge, and such Judge certifies that the value of the property and estate affected beyond the limits of the State does not exceed ten thousand rupees,

shall, unless otherwise directed by the grant, have like effect throughout the other States".

"The proviso to this section shall apply in India after the separation of Burma and Aden from India to probates and letters of administration granted in Burma and Aden before the date of the separation, or after that date in proceedings which were pending at that date.

"The proviso shall also apply in India after the separation of Pakistan from India to probates and letters of administration granted before the date of the separation, or after that date in proceedings pending at that date, in any of the territories which on that date constituted Pakistan."

Need to amend section 241 so as to exclude cases under section 273.

36.14. It should be noted that section 273 empowers the court (in certain cases) to make a grant effective *beyond the limits* of the State. In order that the full benefit of this wider jurisdiction of the court under section 273 may be available, it is desirable that section 241 should also be relaxed. We, therefore, recommend that suitable words excluding from section 241, the case, where an order is passed under stction 273 proviso should be added.

Non-resident attorney.

36.15. Thre is some obscurity on the question whether the "attorney" (agent) should be a resident of the State. It appears, however, that the attorney may reside anywhere in India, if the grant is by the High Court.[1] This interpretation can be suitably codified.

Recommendation to revise section 241.

36.16. In the light of the above discussion we recommend that section 241 should be revised as below;

"241, When any executor is absent from the State in which application is made, and there is no executor within the State willing to act letters of administration, with the will annexed may be granted to the attorney or agent of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself.

[1] *In the goods of Cautly,* 28 P.R. 1883.

Exception: Nothing in this section applies to a case falling within the proviso to section 273.

Explanation : Where the grant is by the High Court, it is not necessary that the attorney or agent should be residing within the State, provided he resides within India."

36.17. Section 242 provides as follows :— Section 242.

"242. When any person to whom if present, letters of administration, with the will annexed, might be granted is absent from the state, letters of administration, with the will annexed, may be granted to his attorney or agent, limited as mentioned in section 241."

The section needs no change.

36.18. Section 243 reads— Section 243.

"243. When a person entitled to administration in case of intestacy is absent from the State and no person equally entitled is willing to act, letters of administration may be granted to the attorney or agent of the absent person, limited as mentioned in section 241."
The section needs no change.

36.19. Section 244 reads as follows :— Section 244.

"244. When a minor is sole executor or sole residuary legatee, letters of administration with the will annexed may be granted to the legal guardian or such minor or to such other person as the Court may think fit until the minor has attained his majority, at which period, and not before, probate of the will shall be granted to him."

It has been held that the expression "legal guardian", in this section, means a guardian appointed under the Guardians and Wards Act, 1980. If the natural guardian wants to apply under this section, he must first take proceedings (under the Guardians and Wards Act) to be appointed legal guardian.[1] If there is a legal guardian of the person of the minor and another of the property of the minor, the latter is entitled to the grant[2] (compare section 246, where the words "care of his estate" are used).

A guardian appointed by the father under section 69 of the Succession Act would appear to be a "legal guardian" within the meaning of this section.

It appears desirable to codify the law on the subject, as laid down in the above decisions.

36.20. In the light of the above, the following Explanation should be inserted below section 244 :— Recommendation to amend section 244.

Explanation : In this section, "legal guardian" means a guardian of the property appointed by a person or authority having power to do so, whether within or outside India, but does not include a natural guardian."

36.21. Section 245 deals with administration during the minority of *Several executors or several residuary legatees.* An administration during minority is, under the section, limited until one of the executors attains majority. It is obvious that the section deals with the case dealt with in section 244 and, is indeed, a kind of Explanation to that section. This should be brought out by adding, after the words "the grant", the words and figures "*under section* 244". Section 245.— Recommendation.

We recommend that section 245 should be amended accordingly.

36.22. Section 246 reads as follows :— Section 246.

"246. If a sole executor or a sole universal or residuary legatee, or a person who would be solely entitled to the estate of the intestate according to the

[1](*a*) *Arumilli Viramma* v. *Arumilli Seshamma*, A.I.R. 1931 Mad 343, 344;
(*b*) *In the goods of Nirojini Debi*, (1907) I.L.R. 34 Cal. 706.
[2]*Ganjasur Koer* v. *The Collector of Patna*, I.L.R. 25 Cal. 795.

rule for the distribution of intestates' estate applicable in the case of the deceased, is a minor or lunatic, letters of administration, with or without the will annexed, as the case may be shall be granted to the person to whom the care of his estate has been committed by competent authority, or, if there is no such person, to such other person as the Court may think fit to appoint, for the use and benefit of the minor or lunatic until he *attains majority or becomes of sound mind, as the case may be*".

Overlapping with section 244.

36.23. There is some overlapping between this section and section 244, as regards a minor sole executor or a minor sole residuary legatee. In section 217 of the Succession Act of 1865 (corresponding to present section 246), the word 'minor' did not occur, but the word occured in section 33 of the Probate and Administration Act. The effect was that as regards persons governed by the Succession Act of 1865 in the case of intestacy, if the minor was solely entitled to the estate of the intestate, there was no provision for the grant of letters of administration to his guardian on his behalf. If the minor was the sole executor or sole universal or residuary legatee, grant could be made under section 215 (present section 244). The insertion of the word "minor" in section 246 (in 1925) was intended to supply this omission. But it has created overlapping[1] *so far as the minor sole executor or minor sole residuary legatee is concerned,* as section 244 has already provided for this contingency. So far, therefore, as section 246 is concerned, the word "minor" should be read as confined to the case of *intestacy*.

Recommendation to revise section246.

36.24. In our opinion, it is desirable to amend section 246 to bring out that point.

To carry out the above object, we recommend that section 246 should be revised as follows :—

"246. If—

(a) a sole executor or a sole universal or residuary legatee is a lunatic, or

(b) a person who would be solely entitled to the estate of the intestate, according to the rule for the distribution of intestates' estate applicable in the case of the deceased, is a minor or a lunatic,

letters of administration, with or without the will annexed as the case may be, shall be granted to the person to whom the care of his estate has been committed by competent authority, or, if there is no such person, to such other person as the Court may think fit to appoint, for the use and benefit of the minor or lunatic until he attains majority or becomes of sound mind, as the case may be".

III. Grants for special purposes.

Section 247—Administration pendente lite.

36.25. *Administration pendente lite* is dealt with in section 247, which reads as follows :—

"247. Pending any suit touching the validity of the will of a deceased or for obtaining or revoking any probate or any grant of letters of administration, the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the court and shall act under its direction".

Section 247 (1)—who can apply.

36.26. A question that requires to be considered is—Who can make an application under this section ? In a Calcutta case[2], it was held that an application under section 247 can be made only by the parties to the suit. According to the

[1]See Paruck, Succession Act, Commentary on section 246.

[2]Nirod v. *Chamkarini*, (1892) 19 C.W.N. 205.

English practice, however, such an application may be made by any person interested in the estate, and even by a creditor of the deceased.[1]

Appointment.

36.27. The appointment[2] of an administrator *pendente lite does not follow* as a matter of course whenever litigation is pending. Before granting administration *pendnte lite,* the Court must be satisfied *as to the necessity of* such an administrator. The applicant is required to show, for instance, that it is necessary for the preservation of the estate, for receiving rents, interest or dividends on shares, and that no fit and proper person is in a position to discharge these offices[3].

Recommendation to amend section 247.

36.28. Having considered the present position, we are of the view that it is desirable to amend the section so as to provide that an application for the appointment of an administrator under the section can be made by any person interested in the estate, and even by a creditor of the deceased. Such a widening of the section is likely to increase the utility of the section, in cases where the parties to the suit do not take any initiative[4]. An Explanation to the above effect can be added. We recommend accordingly.

Section 248.

36.29. Section 248 reads—

"248. If an executor is appointed for any limited purpose specified in the will, the probate shall be limited to that purpose. and if he should appoint an attorney or agent to take administration on his behalf, the letters of administration, with the will annexed, shall be limited accordingly".

The section needs no change.

Section 249.

36.30. Section 249 reads—

"249. If an executor appointed generally gives an authority, to an attorney or agent to prove a will on his behalf, and the authority is limited to a particular purpose, the letters of administration, with the will annexed, shall be limited accordingly".

This section also needs no change.

Section 250.

36.31. Section 250 reads—

"250. Where a person dies, leaving property of which he was the sole or surviving trustee, or in which he had no beneficial interest on his own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property may be granted to the beneficiary, or to some other person on his behalf".

The section needs no change.

Section 251.

36.32. Section 251 reads—

"251. When it is necessary that the representative of a person deceased be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nomnee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the said course or suit, and until a final decree shall be made therein and caried into complete execution".

The section needs no change.

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[1] *Tichborne* v. *Tichborne*, L.R.1/I.P.& D. 730. cited by Mitra, commentary on the Succession Act under section 247.

[2](*a*) *Horrel* v. *Witts*, (1866) I.P. & D. 103.

(*b*) *Bhuban Mohini* v. *Kiranbala*, 13 C.L.J. 47 ; 9 I.C. 215, 216 (Cal).

(*c*) *Jogendra* v. *Atindra*, 13 C.L.J. 34 ; 2 I.C. 638, 639.

(*d*) *Pandurang* v. *Dwarkadas*, A.I.R. 1933 Bom. 342, 344.

(*e*) *In the Estate of Dav*, (1940) 2 All E.R. 544.

[3]See *In the Goods of Borendra Nath*, A.I.R. 1952 Cal. 418.

[4]Compare the English practice in para 36.26, *supra*.

Section 252.

36.33. Section 252 reads—

"252. If, at the expiration of twelve months from the date of any probate or letters of administration, the executor or administrator to whom the same has been granted is abent from the State within which the Court which has granted the probate or letters of administration exercises jurisdiction, the Court may grant, to any person whom it may think fit, letters of administration limited to the purpose of becoming and being made a party to a suit to be brought against the executor, and carrying the decree which may be made therein into effect".

The section needs no change.

Section 253.

36.34. Section 253 reads—

"253. In any case in which it appears necesary for preserving the property of a deceased person, the court within whose jurisdiction any of the property is situate may grant to any person, whom such Court may think fit, letters of administration limited to the collection and preservation of the property of the deceased and to the giving of discharges for debts due to his estate, subject to the directions of the Court".

The section needs no change.

Section 254.

36.35. Section 254 reads—

"254. (1) When a person has died intestate, or leaving a will of which there is no executor willing and competent to act or where the executor is, at the time of the death of such person, resident out of the State, and it appears to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof, other than the person who, in ordinary circumstances, would be entitled to a grant of administration, the Court may, in its discretion, having regard to consanguinity, amount of interest, the safety of the estate and probability that it will be properly administered, appoint such person as it thinks fit to be administrator.

"(2) In every such case letters of administration may be limited or not as the Court thinks fit."

The section needs no change.

Section 255.

36.36. Section 255 reads—

"255. Whenever the nature of the case requires that an exception be made, probate of a will, or letters of administration with the will annexed, shall be granted subject to such exception."

Section 256.

36.37. Section 256 provides that whenever the nature of the case requires that an exception be made, letters of administration shall be granted subject to such exception

Case law on the section.

36.38. An important point concerning sections 255-256 arises out of a Madras case.[1] In that case, the appellant, the widow of one S.R., had applied for grant of letters of administration in respect of a bank account and death benefit payable by a company (apparently, the employer of the deceased). S.R. had died at Madras, leaving a will dated 14-1-1964. He had an account in the United Commercial Bank jointly with the appellant (the wife) and her daughter. The respondent claimed to be the senior wife of the deceased and contended that the assets left by the deceased amounted to much more than the value mentioned in the affidavit of assets. She contended that it was necessary that *all the assets of the deceased* should be valued and brought into the affidavit of assest of the deceased, for granting letters of administration.

[1] *Hapzinab Annathai Rangachari* v. *R. Ananthalakshmi Rangachari*, A.I.R. 1975 Madras 342 (Veeraswami C.J. and Natarajan J.).

The High Court, dealing with this contention, first noted that the general rule is that the entire assets should be disclosed in the affidavit of assets[1], which will count for valuation for the purposes of court fees. But where it is a case of joint account in a bank and the amount is payable to either or survivor, the nature of the case requires that it should be treated *as an exception* to the above rule that the entirety of the assets of the deceased should be disclosed in the affidavit of assets. The High Court also held that it might not even be necessary to obtain letters of administration. for there was, in this case, little to administer, and the wife's right to draw the amount could be independently of the will.

However, since the bank had been insisting on letters of administration, the High Court held that the application should be granted, the case being treated as one falling within the "exception" clause in section 255.

36.39. The facts of this case, when examined closely, disclose need for amending the law. If, in such cases, obtaining letters of administration becomes necessary by reason of the practice of banks, should it not be covered *specifically* in section 255 (and also in section 256)? **Recommendation as to joint account in a bank.**

36.40. As the language of section 255 stands at present, the proposition that the grant can be limited to a particular item is not so evident from the section. It appears to be desirable to amend[2] section 255, so as to make this clear. The object could be achieved by adding the following exception to section 253 : **Recommendation to amend section 255.**

Exception to be added to section 255.

Exception—Notwithstanding anything contained in this section or in section 256, *where moneys have been deposited in joint account in a bank and the amount thereof is payable to either or any survivor of the persons depositing the money, the application for letters of administration in respect of those moneys may, on the death of either or any of such persons, be made by the survivor.*

V. **Grants of the rest**

36.41. This takes us to section 257, which provides that whenever a grant, with exception, of probate or of letters of administration with or without the will annexed, has been made, the person entitled to probate or administration of the remainder of the deceased's estate may take a grant of probate or letters of administration, as the case be. of the rest of the deceased's estate. The section has created no serious problems and may be left as it is. **Section 257.**

VI. **Grants of effects unadministered.**

36.42. Section 258 provides that if an executor to whom probate has been granted has died, leaving a part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate. The section does not appear to need any change. **Section 258.**

36.43. In the next section 259, it is provided that in granting letters of an estate not fully administered, the Court shall be guided by the same rules as apply to original grants, and shall grant letters of administration to those persons only to whom original grants might have been made. **Section 259.**

The section needs no change.

36.44. Section 260 deals with the situation where a limited grant has expired by efflux of time, or by the happening of the event of contingency on which it was limited. If there is still some part of the deceased's estate unadministered, then letters of administration shall, according to the section, be granted to those persons to whom original grants might have been made. The section needs no change, having created no difficulties. **Section 260.**

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[1] *T.K. Parthasarthy Naidu in re* : A.I.R. 1955 Mad. 411 was referred to.

[2] Point is relevant to section 256 also, which may need consequential changes.

CHAPTER 37

ALTERATION AND REVOCATION OF GRANTS : SECTIONS 261—263

Scope.

37.1. Alteration and revocation of grants form the subject matter of sections 261 to 263, which do not need any introductory comments.

Section 261.

37.2. Section 261 provides that errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the Court, and the grant of probate or letters of administration may be altered and amended accordingly.

The section needs no change.

Section 262.

37.3. Section 262 provides that if, after the grant of administration with the will annexed, a codicil is discovered, it may be added to the grant on due proof and identification, and the grant may be altered and amended accordingly.

The section needs no change.

Section 263—Revocation or annulment for just cause.

37.4. Under section 263 the grant of probate or letters of administration may be revoked or annulled for just cause. The Explanation provides that just cause shall be deemed to exist where—

(a) the proceedings to obtain the grant were defective in substance; or

(b) the grant was obtained fraudulently by making a false suggestion or by concealing from the Court something material to the case; or

(c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or

(d) the grant has become useless and inoperative through circumstances; or

(e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

The following illustrations are appended:

(i) the Court by which the grant was made had no jurisdiction;

(ii) the grant was made without citing parties who ought to have been cited;

(iii) the will of which probate was obtained was forged or revoked;

(iv) A, obtained letters of administration to the estate of B, as his widow, but it has since transpired that she was never married to him;

(v) A has taken administration to the estate of B, as if he had died intestate, but a will has since been discovered;

(vi) since probate was granted, a later will has been discovered;

(vii) since probate was granted, a codicil has been discovered which revoked or adds to the appointment of executors under the will;

(viii) the person to whom probate was, or letters of administration were, granted, has subsequently become of unsound mind.

It may be stated with reference to the second illustration that the absence of citation on a person who[1] was interested, being a *transferee* from the heirs at law, would be a defect of substance which is "just cause" within the meaning of section 263, Explanation.

The case may be different, where the parties themselves have led evidence.[2-3]

The section seems to need no change, as no serious difficulties have arisen in its application.

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[1] *Banwari Lal* v. *Ku. Kusum Bai*, A.I.R. 1973 M.P. 69, 70, para 7.

[2] *Bal Govind* v. *Shri Ram*, A.I.R. 1947 All. 372.

[3] *Anil Behari* v. *Latika Bala*, A.I.R. 1955 S.C. 566.

CHAPTER 38

PRACTICE IN GRANTING AND REVOKING PROBATES AND LETTERS OF ADMINISTRATION (SECTIONS 264 TO 302)

38.1. Practice in granting and revoking probates and letters of administration being a matter of some detail, occupies about 40 sections of the Act—sections 264 to 302. The sections could be grouped as under :— **Scope.**

I. Jurisdiction and connected matters.

264. Jurisdiction of District Judge in granting and revoking probates, etc.

265. Power to appoint Delegate of District Judge to deal with non-contentious cases.

266. District Judge's power as to grant of probate and administration.

267. District Judge may order person to produce testamentary papers.

268. Proceedings of District Judge's Court in relation to probate and administration.

269. When and how District Judge to interfere for protection of property.

270. When probate or administration may be granted by District Judge.

271. Disposal of application made to Judge of district in which deceased had no fixed abode.

272. Probate and letters of administration may be granted by Delegate.

273. Conclusiveness of probate or letters of administration.

274. Transmission to High Courts of certificate of grants under proviso to section 273.

275. Conclusiveness of application for probate or administration if properly made and verified.

II. The petition and immediate steps thereon

276. Petition for probate.

277. In what cases translation of will to be annexed to petition. Verification of translation by person other than Court translator.

278. Petition for letters of administration.

279. Addition to statement in petition, etc., for probate or letters of administration in certain cases.

280. Petition for probate etc to be signed and verified.

281. Verification of petition for probate, by one fitness to will.

282. Punishment for false averment in petition or declaration.

III. Procedure for hearing

283. Powers of District Judge.

284. Caveats against grant of probate or administration. Form of caveat.

285. After entry of a caveat, no proceeding taken on petition until after notice to caveator.

286. District Delegate when not to grant probate or administration.

287. Power to transmit statement to District Judge in doubtful cases, where no contention.

IV: **Disposal of Petitions.**

288. Procedure where there is contention, or District Delegate thinks probate or letters of administration should be refused in his court.

V. **Grant of Probate.**

289. Grant of probate to be under seal of Court.

290. Grant of letters of administration to be under seal of Court.

291. Administration-bond.

292. Assignment of administration-bond.

293. Time for grant of probate and administration.

294. Filing of original wills of which probate or administration with will annexed granted.

295. Procedure in contentious cases.

296. Surrender of revoked probate or letters of administration.

297. Payment to executor or administrator before probate or administration revoked.

VI. **Miscellaneous.**

298. Power to refuse letters of administration.

299. Appeals from orders of District Judge.

300. Concurrent jurisdiction of High Court.

301. Removal of executor or administrator and provision for successor.

302. Directions to executor or administrator.

I. **Jurisdiction and connected matters.**

Section 264—Jurisdiction of District judge in granting and revoking probates, etc.

38.2. Section 264 reads—

"264(1) The District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his district.

(2) Except in cases to which section 57 applies, no Court in any local area beyond the limits of the towns of Calcutta, Madras and Bombay, shall, where the deceased is a Hindu, Muhammadan, Budhist, Sikh or Jain or an exempted person, receive applications for probate or letters of administration until the State Government has, by a notification in the official Gazette, authorised it so to do."

The section needs no change.

Section 265—District Delegates-Recommendation.

38.3. Section 265 reads—

"265(1) The High Court may appoint such judicial officers within any district as it thinks fit to act for the District Judge as Delegates to grant probate and letters of administration in non-contentious cases, within such local limits as it may prescribe;

Provided that, in the case of High Courts not established by Royal Charter, such appointment shall not be without previous sanction of the State Government.

(2) Persons so appointed shall be called "District Delegates."

We are of the view that the proviso to sub-section(1) should be deleted as unnecessary at the present day, and recommend its deletion.

Section 266 District Judge's powers as to grant of probate and administration.

38.4. Section 266 reads—

"266. The District Judge shall have the like powers and authority in relation to the granting of probate and letters of administration and all matters

connected therewith, as are by law vested in him in relation to any civil suit as proceedings pending in his Court".

The section needs no change.

Section 267.

38.5. Section 267 reads—

"Section 267(1) The District Judge may order any person to produce and bring into Court any paper or writing, being or purporting to be testamentary, which may be shown to be in the possesson or under the control of such person.

(2) If it is not shown that any such paper or writing is in the possession or under the control of such person, but there is reason to believe that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined respecting the same.

(3) Such person shall be bound to answer truly such qeustions as may be put to him by the Court, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like punishment under the Indian Penal Code, in case of default in not attending or in not answering such questions or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit and had made such default.

(4) The costs of the proceeding shall be in the discretion of the Judge".

We have no comments on the section.

Section 268.

38.6. Section 268 provides that the proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, save as hereinafter otherwise provided, be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908.

We have no comments on the section.

Section 269.

38.7. Section 269 reads—

"269(1) Until probate is granted of the will of a deceased person, or an administrator of his estate is constituted, the District Judge, within whose jurisdiction any part of the property of the deceased person is situate, is authorised and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he thinks fit, to appoint an officer to take and keep possession of the property.

(2) This section shall not apply when the deceased is a Hindu, Mohammadan, Budhist, Sikh or Jain or an exempted person, nor shall it apply to any part of the property of an Indian Christian who has died intestate".

We have no comments on the section.

Section 270—When probate or administration may be granted by District Judge.

38.8. Section 270 provides that probate of the will or letters of administration to the estate of deceased person may be granted by a District Judge under the seal of his Court, "if it appears by a petition, verified as hereinafter provided, of the person applying for the same, that the testator or intestate, as the case may be, at the time of his decease, had a fixed place of abode, or any property, movable, or immovable within the jurisdiction of the Judge".

A similar power is conferred on the High Court acting on the original side, since "District Judge"[1], as defined in the Act, includes such a High Court.

Person not domiciled in India.

38.9. It appears that section 270 would cover a case even where the testator or intestate was a *person not domiciled in India*—say, a foreign national—who left property most of which was outside India, while leaving some movable property in India. Of course, section 270 is not concerned with the question dealt with in section 4 and 5,—the law applicable regarding succession. The section is

[1]Section 2 (bb).

concerned only with the jurisdiction of Indian courts. It would appear—though there is no case law on this point—that, in so far as a non-domiciled person has left property in India, the section would apply. The law applicable will, of course, be governed by sections 4—5.

For the present, and, in the absence of case law raising any concrete questions, we have no further comments on this point.

Section 270-Assets in India.

38.10. The foundation of the jurisdiction of a Court to grant probate or letters of administration is that there is property of the deceased to be administered with the country and section 270 does not, in any way, provide an alternative basis for a grant[1].

Thus, the section cannot be understood as dispensing with the necessity of existence of *Indian* assets before probate, etc. can issue from an Indian Court.

Origin.

38.11. Section 270 has its origin in section 46 of the Court of Probate Act, 1857 (20 and 21 Vict. C. 77).

English cases.

38.12. English decisions from the earliest time have insisted on English assets as a condition precedent to an English grant. For example Sir C. Cresswell held[2]—

> "It does not appear from the affidavits that the deceased left any property in this country. Unless he did so, there is nothing upon which the grant asked for would operate and I should have no jurisdiction to decree letters of administration to be granted".

Sir J.P. Wilde observed in another case[3] :

> "It is not one of the functions of this Court to determine as an abstract qustion who is the proper representative of a deceased person. The foundation of the jurisdiction of this Court is, that there is personal property of the deceased to be distributed within its jurisdiction. In this case the deceased has no property, within this country, and the Court has, therefore, no jurisdiction".

Other decisions to the same effect are '*In Goods of Pittock*' where, administration was refused because the deceased left no personal property in England and—*In Goods of Coode*[5] where it was held that a will disposing only of property in a foreign country was not entitled to an English probate.

It should, however, be pointed out that what section 270 requires is not **the existence of assets in India in every case. Two criteria are given, of which** one is enough.

Section 271.

38.13. This takes us to section 271, which reads—

> "271. When the application is made to the judge of a district in which the deceased had no fixed abode at the time of his death, it shall be in the discretion of the Judge to refuse the application if in his judgement it could be disposed of more justly or conveniently in another district, or, where the application is for letters of administration, to grant them absolutely, or limited to the property within his own jurisdiction".

The section needs no change.

Section 272—Probate and letters of administration may be granted by delegate.

38.14. Section 272 reads—

> "272. Probate and letters of administration may, upon application for that purpose to any District Delegate, be granted by him in any case in which there is no contention, if it appears by petition, verified as hereinafter

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[1] *Kalyanikutty* v. *Gourikutty*, A.I.R. 1953 T.C. 352, para 3 (Koshi C.J. and M.S. Menon J.).
[2] *Evans* v. *Burrel*, (1859) 4 Sw. & Tr. P. 185, 154 E.R. 1487.
[3] *The Goods of Hannah Tucker*, (1864) 3 Sw. & Tr. 585, 164 ER 1402.
[4] *In Goods of Fittock*, (1863) 32 J.L.P. M & A 157.
[5] *In Goods of Coode*, (1867) 1 P & D. 449.

provided, that the testator or intestate, as the case may be, at the time of his death had a fixed place of abode within the jurisdiction of such Delegate".

No changes are required in the section.

38.15. Section 273 reads as under—

Section 273 - Conclusiveness of probate or letters of administration.

"273. Probate or letters of administration shall have effect over all the property and estate, movable or immovable, of the deceased, throughout the State in which the same is or are granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors, paying their debts and all persons delivering up such property to the person to whom such probate or letters of administration have been granted:

Provided that probates and letters of administration granted—

(a) by a High Court, or

(b) by a District Judge, where the deceased at the time of his death had affected, beyond the limits of the State does not exceed ten thousand and such Judge certifies that the value of the property and estate effected, beyond the limits of the State does not exceed ten thousand rupees, shall, unless otherwise directed by the grant, have like effect throughout the other States.

"The proviso to this section shall apply in India after the separation of Burma and Aden from India to probates and letters of administration granted in Burma and Aden before the date of the separation, or after that date in proceedings which were pending at that date.

"The proviso shall apply in India after the separation of Pakistan from India to probate and letters of administration granted before the date of the separation, or after the date in proceedings pending at that date, in any of the territories which on that date constituted Pakistan".

The amount of ten thousand rupees should now be increased to rupees fifty thousand in view of fall in the value of the rupee. We recommend accordingly.

38.16. Section 274 reads as under :—

Section 274—Transmission to High Courts of certificate of grants under proviso to section 273.

"274 (1) Where probate or letters of administration has or have been granted by a High Court or District Judge with the effect referred to in the proviso to section 273, the High Court or District Judge shall send a certificate thereof to the following courts, namely:—

(a) when the grant has been made by a High Court, to each of the other Courts:

(b) when the grant has been made by a District Judge, to the High Court to which such District Judge is subordinate and to each of the other High Courts.

(2) Every certificate referred to in sub-section(1) shall be made as early as circumstances admit in the form set forth in Schedule IV, and such certificate shall be filed by the High Court receiving the same.

(3) Where any portion of the assests has been stated by the petitioner, as hereinafter provided in sections 276 and 278, to be situate within the jurisdiction of a District Judge in another State, the Court required to send the certificate referred to in sub section (1) shall send a copy thereof to such District Judge, and such copy shall be filed by the District Judge receiving the same."

II. The petition and immediate steps thereon.

38.17. Section 275 reads—

Section 275.

"275. The application for probate or letters of administration, if made and verified in the manner hereinafter provided, shall be conclusive for

the purpose of authorising the grant of probate or administration; and no such grant shall be impeached by reason only that the testator or intestate had no fixed place of abode or no property within the district at the time of his death, unless by a proceeding to revoke the grant if obtained by a fraud upon the Court."

The section needs no change.

Section 276.

38.18. Section 276 reads—

"276(1) Application for probate or for letters of administration, with the will annexed, shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Courts in which the application is made, with the will or, in the cases mentioned in sections 237, 238 and 239 a copy, draft, or statement of the contents thereof, annexed, and stating—

(a) the time of the testator's death,

(b) that the writing annexed is his last will and testament,

(c) that it was duly executed,

(d) the amount of assets which are likely to come to the petitioner's hands, and

(e) when the application is for probate, that the petitioner is the executor named in the will.

(2) In addition to these particulars, the petition shall further state,—

(a) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and

(b) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(3) Where the application is to the District Judge and any portion of the assests likely to come to the petitioner's hands is situate in another State, the petition shall further state the amount of such assets in each State and the District Judge within whose jurisdiction such assets are situate."

The section needs no change.

Section 277.

39.18. Section 277 reads—

"277. In cases wherein the will, copy or draft, is written in any language other than English or than that in ordinary use in proceedings before the Court, there shall be a translation thereof annexed to the petition by a translator of the Court, if the language be one for which a translator is appointed; or, if the will, copy or draft, is in any other language, then by any person competent to translate the same, in which case such translation shall be verified by that person in the following manner, namely :—

"I (A.B.) do declare that I read and perfectly understand the language and character of the original and that the above is a true and accurate translation thereof."

The section needs no change.

Section 278— Petition for letters of administration.

38.20. Section 278 reads—

"278 (1) Application for letters of administration shall be made by petition distinctly written as aforesaid and stating—

(a) the time and place of the deceased's death;

(b) the family or other relatives of the deceased, and their respective residences;

(c) the right in which the petitioner claims;

(d) the amount of assets which are likely to come to the petitioner's hands;

(e) When the application is to a District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and,

(f) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(2) Where the application is to the District Judge and any portion of the assets likey to come to the petitioner's hands is situate in another State, the petition shall further state the amount of such assets in each State and the District Judge within whose jurisdiction such assets are situate."

The section needs no change.

38.21. Section 279 reads—

Section 279—Particulars to be entered in application under section 273 proviso.

"279. (1) Every person applying to any of the courts mentioned in the proviso to section 273 for probate of a will or letters of administration of an estate intended to have effect throughout India shall state in his petition, in addition to the matters respectively required by section 276 and section 278, that to the best of his belief no application has been made to any other court for a probate of the same estate, intended to have such effect as last aforesaid.

Or, where any such application has been made, the court to which it was made, the person or persons by whom it was made and proceedings (if any) had thereon.

(2) The Court to which any such application is made under the proviso to section 273 may, if it thinks fit, reject the same."

The section needs no change.

38.22. Section 280 provides that the petition for probate or letters of administration shall in all cases be subscribed by the petitioner and his pleader, if any, and shall be verified by the petitioner in the manner laid down in the section. Section 280.

The section needs no change.

38.23. Section 281 reads— Verification of petition for probate by one witness to will.

"281. Where the application is for probate, the petition shall also be verified by at least one of the witnesses to the will (when procurable) in the manner or to the effect following, namely :—

"I (C.D.), one of the witnesses to the last will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (or mark) thereto (or that the said testator acknowledged the writing annexed to the above petition to be his last will and testament in my presence)".

The section needs no change.

38.24. Section 282 reads— Section 282.

"282. If any petition or declaration which is hereby required to be verified contains any averment which the person making the verification knows or believes to be false, such person shall be deemed to have committed an offence under section 193 of the Indian Penal Code." 45 or 1860.

The section needs no change.

38.25. Section 283 reads— Section 283.

"283. (1) In all cases the District Judge or District Delegate may, if he thinks proper,—

(a) examine the petitioner in person. upon oath

(b) require further evidence of the execution of the will or the right of the petitioner to the letters of administration, as the case may be;

(c) issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.

(2) The citation shall be fixed up in some conspicuous part of the court-house, and also in the office of the Collector of the district and otherwise published or made known in such manner as the Judge or District Delegate issuing the same may direct.

(3) Where any portion of the assets has been stated by the petitioner to be situate within the jurisdiction of a District Judge in another State, the District Judge issuing the same shall cause a copy of the citation to be sent to such other District Judge, who shall publish the same in the same manner as if it were a citation issued by himself, and shall certify such publication to the District Judge who issued the citation."

Meaning of "interest."

38.26. The "interest" in the estate, mentioned in section 283(1)(c), is only that interest which, by citation, a person called upon may claim to have in the estate of the deceased. It is not the interest which the deceased did not own, but which the claimant, coming into the picture by citation, claims to be vested *in himself* .The title of the testator to the property which is the subject-matter of disposition is entirely and necessarily outside the scope of probate proceedings; that question will have to be settled separately. By citation, a party cannot be allowed to convert a probate proceeding into a suit for resolving title. This is the gist of a Madras judgment.[1]

The section needs no change.

Section 284—Form of Caveat.

38.27. Section 284 reads—

"284 (1) Caveats against the grant of probate or administration may be lodged with the District Judge or a Disrict Delegate.

(2) Immediately on any caveat being lodged with any District Delegate, he shall send copy thereof to the District Judge.

(3) Immediately on a caveat being entered with the District Judge, a copy thereof shall be given to the District Delegate, if any, within whose jurisdiction it is alleged the deceased had a fixed place of abode at the time of his death, and to any other Judge or District Delegate to whom it may appear to the District Judge expedient to transmit the same.

(4) The caveat shall be made as nearly as circumstances admit in the form set forth in Schedule V".

The section needs no change.

Section 285.

38.28. Section 285 reads—

"285. No proceeding shall be taken on a petition for probate or letters of administration after a caveat against the grant thereof has been entered with the Judge or District Delegate to whom the application has been made or notice has been given of its entry with some other Delegate, until after such notice to the person by whom the same has been entered as the court may think reasonable".

The section needs no change.

Section 286.

38.29. Section 286 reads—

"286. A District Delegate shall not grant probate or letters of administration in any case in which there is contention as to the grant, or in which

[1] In the : *Narasimhan*, A.I.R. 1975 Mad. 330, overruling *Java Kumar* v. *Ramaratham*, A.I.R. 1972 Mad. 212 : (1972) 1 M.L.J. 4.

it otherwise appears to him that probate or letters of administration ought not to be granted in his Court.

Explanation—"Contention" means the appearance of any one in person, or by his recognised agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding."

The section needs no change.

38.30. Section 287 reads— Section 287.

"287. In every case in which there is no contention, but it appears to the District Delegate doubtful whether the probate or letters of administration should or should not be granted, or when any question arises in relation to the grant, or application for the grant, of any probate or letters of administration, the District Delegate may, if he thinks proper, transmit a statement of the matter in question to the District Judge, who may direct the District Delegate to proceed in the matter of the application, according to such instructions as to the Judge may seem necessary, or may forbid any further proceeding by the District Delegate in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Judge."

The section needs no change, having raised no problems.

IV. Disposal of Petition

38.31. Section 288 provides that in every case in which there is contention, or the District Delegate is of opinion that the probate or letters of administration should be refused in his court, the petition, with any documents which may have been filed therewith, shall be returned to the person by whom the application was made, in order that the same may be presented to the District Judge unless the District Delegate thinks it necessary, for the purpose of justice, to impound the same, which he is hereby authorised to do, and, in that case, the same shall be sent by him to the District Judge. Section 288.

We have no comments on the section.

V. Grant of Probate.

38.32. Section 289 provides that when it appears to the District Judge or District Delegate that probate of a will should be granted, he shall grant the same under the seal of his Court in the form set forth in Schedule VI. Section 289.

The section needs no change, having created no problems.

38.33. According to section 290 when it appears to the District Judge or District Delegate that letters of administration to the estate of a person deceased, with or without a copy of the will annexed, should be granted, he shall grant the same under the seal of his Court in the form set forth in Schedule VII. Section 290.

The section needs no change.

38.34. Section 291 reads as under— Section 291—Administration bond.

"291. (1) Every person to whom any grant of letters of administration, other than a grant under section 241, is committed shall give a bond to the District Judge with one or more surety or surities, engaging for the due collection, getting in, and administering the estate of the deceased, which bond shall be in such form as the Judge may, by general or special order, direct.

(2) When the deceased was a Hindu, Muhammadan, Bhudhist, Sikh or Jaina or an exempted person—

(a) the exception made by sub-section (1) in respect of a grant under section 241 shall not operate;

(b) the District Judge may demand a like bond from any person to whom probate is granted".

Need for giving discretion to court.

38.35. As the section stands at present, there is no discretion given to the court to dispense with the taking of the bond. If sub-section (1) applies, then the only matter in respect of which the court has a discretion is as regards the amount of the bond. Now, cases do arise in practice where a bond might become an idle formality—for example, where the applicant for the grant of letters of administration is the sole legatee or the sole heir. Under the present section, even in the case of a sole legatee, the only matter in the direction of the court is the amount of the bond.[1] But subject to the above discretion and apart from cases specifically execluded by statute,[2] the provision as to security in sub-section (1) is mandatory.

Rationale for taking security bond.

38.36. Security is required for guarding against possible malpractices by the grantee. If there is reasonable protection against a malpractice arising from the special circumstances of the case, the taking on an administration bond is an unnecessary formality. It may even cause hardship. For example, the conditions imposed or the amount fixed may make it impracticable for the applicant to furnish the security demanded and consequently no letters of administration can be taken out. In such circumstances the safety of the estate may be seriously imperilled if letters of administration are not granted.[3]

English law.

38.37. It may be noted that in England, while a bond is generally taken from an administrator, the court has a discretion to dispense with sureties by reason of special circumstances. For example, where all the debts had been paid and the persons applying were entitled to the whole of the residue, sureties were dispensed with.[4] Again,[5] where the applicant had no means, surities were dispensed with, to enable the applicant (widow of the deceased) to carry on the business of the deceased.

Need of giving discretion to the court.

38.38. On a careful consideration of the matter, it seems to us that the Court should be given a discretion to dispense with the taking of the administration bond or with the need for sureties in the following cases :—

(i) where the person to whom the grant is to be made is a sole legatee or a sole heir, or

(ii) where, for reasons to be recorded, the Court in the circumstance of the case thinks it proper to dispense with the bond or sureties.[6]

History of sub-section (2).

38.39. As to sub-section (2) of section 291, its history is of interest. In the case of probate, a bond can be demanded only from the special classes of persons mentioned in sub-section (2). The reason for the difference is thus stated in the Statement[7] of Objects and Reasons of the Probate and Administration Act, 1881: "The Indian Succession Act, 1865 provided for the taking of security for the due discharge of this office only from an administrator, it being considered that in the case of an executor, who was selected by the testator himself, such security can safely be dispensed with. But amongst the classes to which this Act will apply, cases will, it is apprehended, *occasionally occur, in which it may be expedient to take security even from an executor and accordingly a section has been inserted in the Bill* amending section 256 of the seccession Act in such a manner as to give a power to the court to require an executor to give security."

Recommendation to amend section 291.

38.40. In the light of the above disussion, we recommend that the following sub-section should be added in section 291 :

"(3) *Notwithstanding anything contained in this section, the Court may dispense with the taking of a bond thereunder or with the need for sureties to such a bond where—*

[1] *Mohan Mohini*, v. *Tara Mohini*, A.I.R. 1920 Cal. 733, 734.

[2] For example, the Administrators Gernerals Act, 1963.

[3] *Amir Chandra* v. *Mahanundbibi*, 6 Cal. Law Journal 453.

[4] *In the goods of Panton*, (1901) Probate 188.

[5] *Re Cory*, (1903) Probate 62.

[6] For a draft see para 37.40, *infra*.

[7] *Cf.* Section 78, Probate & Administration Act, 1881 (Repealed).

(a) *the person to whom the grant of probate or letters of administration is to be made is the sole legatee or the sole heir of the deceased, or*

(b) *where, for reasons to be recorded, the Court in the circumstances of the case thinks it proper to dispense with such bond or sureties, as the case may be.*"

38.41. This takes us to section 292, which provides that the court may, on application made by petition and on being satisfied that the engagement of any such bond has not been kept, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as the Court may think fit, assign the same to some person, his executors or administrators, who shall thereupon be entitled to sue on the said bond in his or their own name or names as if the same had been originally given to him or them instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustees for all persons interested, the full amount recoverable in respect of any branch thereof. Section 292.

The section needs no change, having created no difficulties.

38.42. Section 293 provides that no probate of a will shall be granted until after the expiration of seven clear days, and no letters of administration shall be granted until after the expiration of fourteen clear days, from the day of the testator or intestate's death. Section 293.

This section also needs no change.

38.43. Section 294 provides that every District Delegate shall file and preserve all original wills, of which probate or letters of administration with the will annexed may be granted by him, among the records of his Court, until some public registry for will is established. It further provides that the State Government shall make regulations for the preservation and inspection of the wills so filed. Section 294.

The section needs no change of substance. However, the regulation to be made by the State Government should be published in the official Gazette and we recommend that a sub-section to that effect be added in section 294. Recommendation.

38.44. This takes us to section 295. It lays down that in any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant. Section 295.

The section needs no change.

38.45. Section 296 reads— Section 296.

"296(1) When a grant of probate or letters of administration is revoked or annulled under this Act, the person to whom the grant was made shall forthwith deliver up the probate or letters to the court which made the grant.

(2) If such person wilfully and without reasonable cause omits so to deliver up the probate or letters, he shall be punishable with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to tree months, or with both."

This section also needs no change.

38.46. Section 297 provides :— Section 297.

"297. When a grant of probate or letters of administration is revoked, all payments *bona fide* made to any executor or administrator under such grant before the revocation thereof shall, notwithstanding such revocation, be a legal discharge to the person making the same; and the executor or administrator who has acted under any such revoked grant may retain and reimburse himself in respect of any payments made by him which the

person to whom probate or letters of administration may afterwards be granted might have lawfully made.

The section needs no change.

VI. **Miscellaneous**

Section 298.

38.47. According to section 298, notwithstinding anything hereinbefore contained, it shall, where the deceased was a Muhammadan, Buddhist, or exempted person, or a Hindu, Sikh or Jaina to whom section 57 does not apply, be in the discretion of the court to make an order refusing, for reasons to be recorded by it in writing, to grant any application for letters of administration made under this Act.

The section needs no change.

Section 299.

38.48. Section 299 provides that every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Code of Civil Procedure, 1908, applicable to appeals. Since every order is appealable, no revision is maintainable.[1]

The section needs no change.

Section 300—Concurrent jurisdiction of High Court.

38.49.Section 300 reads :—

"300. (1) The High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge.

(2) Except in cases to which section 57 applies, no High Court, in exercise of the concurrent jurisdiction hereby conferred over any local area beyond the limits to towns of Calcutta, Madras and Bombay shall, where the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, receive applications for probate or letters of administration until the State Government has, by a notification in the Official Gazette, authorised it so to do."

The section needs no change, having raised no problems.

Section 301 Suspension and removal of private executor.

38.50. Section 301 reads :—

"301. The High Court may, on application made to it, suspend, remove or discharge any private executor or administrator and provides for the succession of another person to the office of any such executor or administrator who may cease to hold office and the vesting in such successor of any property belonging to the estate."

The section needs no change.

Section 302—Direction to executor or administrator.

38.51. Section 302 reads :—

"302. Where probate or letters of administration in respect of any estate has or have been granted under this Act, the High Court may, on application made to it, give to the executor or administrator any general or special directions in regard to the estate or in regard to the administration thereof."

The section needs no change.

CHAPTER 39

EXECUTORS OF THEIR OWN WRONG (SECTIONS 303 AND 304)

Scope.

39.1. The special topic of "executors of their wrong" is dealt with in a separate Chapter—sections 303 and 304. Of these two sections, one defines the concept, and the other deals with the liability, of such an executor.

[1] *Ladu Lal* v. *Mahinder Kumar*, A.I.R. 1973 Raj 238.

39.2. Section 303 provides that a person who intermeddles with the estate of the deceased, or does any other act which belongs to the office of executor, while there is no rightful executor or administrator in existence, thereby makes himself an executor of his own wrong. Section 303—"Executor of his own wrong".

There are, however, two exceptions to this general provision :

(1) Intermeddling with the goods of the deceased for the purpose of preserving them or providing for his funeral or for the immediate necessities of his family or property, does not make an executor of his own wrong.

(2) Dealing in the ordinary course of business with goods of the deceased received from another does not make an executor of his own wrong.

Illustration (i) explains the scope of the main as follows :—

"(1) A uses or gives away or sells some of the goods of the deceased, or takes them to satisfy his own debt or legacy or receives payment of the debts of the deceased. He is an executor of his own wrong."

However, if there is no notice of death, there is no intermeddling: Thus, in illustration (ii), A, having been appointed agent by the deceased in his lifetime to collect his debts and sell his goods, continues to do so after he has become aware of his death. He is an executor of his own wrong in respect of acts *done after he has* become aware of the death of the deceased.

The section does not seem to need any change.

39.3. Under section 304, when a person has so acted as to become an executor of his own wrong, he is answerable to the rightful executor or administrator, or to any creditor or legatee of the deceased, to the extent of the assets which may have come to his hands after deducting payments made to the rightful executor or administrator, and payments made in due course of administration. Section 304—Liability of executor of his own wrong.

The section needs no change.

CHAPTER 40

POWERS OF AN EXECUTOR OR ADMINISTRATOR

(SECTIONS 305 TO 315)

1. **Preliminary**.

40.1. Sections 305 to 315 deal with powers of an executor or administrator. Scope.

Although contained in an enactment dealing with succession, some of the sections in this chapter (particularly, section 306 which deal with the survival of causes of action) have a much wider interest, and really the draftsman, in dealing with this topic, has entered the realm of torts. It is well-known that the topic of survival of causes of action has, during the last four or five decades, been the subject matter of much legal learning and of certain legislative developments in other countries: These legislative developments remedy, to some extent, certain anomalies arising from the earlier common law rule. In India, however, the section, not having been subjected to systematic review in the past, still suffers from a serious drawback. Accordingly, it will be necessary to suggest suitable reforms in this regard, when dealing with the section.

40.2. The general principle underlying the provisions in sections 305—315 is that the executor or administrator represents the deceased—though, until he obtains probate or letters of administration, no right can be established *in a court of justice*. This principle is worked out in relation to several matters dealt with in this Chapter, such as :— General principle.

(a) the survival of causes of action : sections 305—036.

[1]Section 212 and Section 213 (1).

(b) disposal of property and general powers of the executor or administrator—sections 307—325.

The executor or administrator cannot make a profit out of the office. Accordingly, sections 309—310 impose certain restrictions based on that principle.

The rest of the sections (311—315) deal with matters of detail.

II. Survival of Causes of Action.

Section 305—In respect of causes of action surviving deceased and debts due at death.

40.3. According to section 305, an executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same power for the recovery of debts as the deceased had, when living.

The section needs no change.

Section 306.

40.4. Section 306 reads as under :—

"306. All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Panel Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.

ILLUSTRATIONS

(i) A collision takes place on a railway in consequence of some neglect or default of an official, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having brought any action. The cause of section does not survive.

(ii) A sues for divorce. A dies. The cause of action does not survive to his representative.

The section relates to an important topic whose interest transcends the mere limits of "powers of an executor or Administrator". A number of aspects will require examination.

Position in Kerala

40.5. It should be noted at the outset that in Kerala.[1] a State Act contains provisions, *inter alia*, relating to the survival of causes of action and expressly repeals section 306 by providing that that section, so far as it relates to the right *of action in torts, shall* cease to apply in the State of Kerala. The Act seems to re-enact an earlier Travancore Act[2] on the subject.

Origin of the maxim

40.6. Consideration of section 306 of the Central Act may begin with the maxim—personal action dies with the person. Although somewhat obscure in its origin, the principle that a personal cause of action dies with the person. seems to have been linked with the criminal flavour of early tort remedies[3]

The maximum was originally introduced to prevent *actions of a penal character*, like trespass and its offshoots, from being brought after *the death of the* wrongdoer against his representatives.[4-5] The main reason was that the trespass was "drowned in the felony". Later, however, the maxim was applied to cases of death of the injured person, even though the reason[6] underlying the maximum had no application.[7]

[1]Kerala Torts (Miscellaneous Provisions) Act, 1976 (8 of 1977), /1977) K.L.T. Journal pages 37-39.

[2]Travancore Law Reform (Miscellaneous Provisions) Act (12 of 1124).

[3]Fleming, Torts (1965) page 695.

[4]Holdsworth H.E.L. Vol. 3, page 576.

[5]See also Street Torts (1977), page 407.

[6]Death of Wrongdoer in case *of penal action.*

[7] *Admiralty Commrs.* v. *S.S. America*, (1917) A.C. 38, 43, 44.

Thus, the wide scope that the rule came to acquire was more a product of the accidents of history than of any deliberate view taken as a matter of policy.

Position in England

40.7. In England, by the Law Reform (Miscellaneous Provisions) Act, 1934,[1] most causes of action survive on the death of a person. The relevant provision of the Act is as follows :—

"1. *Effect of death on certain causes of action* :—

(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against or, as the case may be, for the benefit of, his estate.

"Provided that this sub-section shall not apply to causes of action for defamation.....".

There is no exception in England for personal non-fatal injuries. Even as regards defamation, there is a section of opinion[2-3] that there should be no exception.

Position in Australia.

40.8. In Australia,[4] on the death of any person, all causes of action subsisting against or vested in him survive against or for the benefit of his estate; with the exception of causes of action for defamation, seduction, enticement of spouses and damage claims for adultery. Even as regards defamation, the cause of action survives in Tasmania.

Position in Canada

40.9. In Canada, in many States, the law relating to survival of personal causes of action has been reformed by statutes passed by the State Legislatures.[5] For example, under section 38(1) and (2) of the Trustee Act of Ontario,[6] causes of action survive as regards all torts or injuries to the person or to the property for breach of promise of marriage.[7]

Substantially to the same effect is the provision in sections 32 and 33 of the Trustee Act of Alberta.[8] To the same effect is section 71 of the administration Act of British Columbia.[9] Section 49 of the Trustee Act in Manitoba continues all actions of tort except action for libel and slander, malicious prosecution. false imprisonment or false arrest.

In New Bruswick, the Survival of Actions Act has followed the English Act of 1934. In Newfoundland, the Trustee Act, section 22, in effect, provides for actions by or against personal representatives of a deceased for wrong to the property. The Saskatchewan Trustee Act (sections 52 and 53) allows all actions to survive for wrongs "not resulting in death, except libel and slander". In Nova Scotia, the Survival of Actions Act provides that in the event of death of any person, all causes of action subsisting against or vested in him shall survive, except actions for adultery and actions for inducing a spouse to leave or remain apart from him or her spouse.

U.S.A.

40.10. In the U.S.A. in most States statutes have been enacted causing tort[10] actions to survive the death of either party. (In many statutes, exceptions are made as to actions for harm peculiarly personal, such as defamation and malicious prosecution). Such statutes are commonly known as "survival Statutes"; they transfer to the estate of the deceased person rights and liabilities which the deceased would had, if he or she had lived.

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[1]Section 1(1), Law Reform (Miscellaneous Provisions) Act, 1934 (24 and 25 Geo. 5 c. 41) as amended

[2]See para 40.18 *et seq., infra.*

[3]Also Salmond Torts (1981) page 416 Foot Note 57.

[4]Fleming, Torts (1965), pge 696.

[5]Wright, Cases on the Law of Torts (1967), pages 654-655

[6]Trustee Act, R.S.O. 1960, C. 408.

[7]*Smallman* V. *Moori*, (1948) S.C.R. 295 (Canada).

[8]Trustee Act, R.S.A. 1955 C. 346, Sections 32-33.

[9]R.S.B.C. (1960), C. 3, Section 71.

[10]Keeton & Keeton, Cases and Materials on Torts (1977), page 195.

We may quote the Texas Survival Statute[1] as one example of American legislation :—

> "All causes of action upon which suit has been or may hereafter be brought for personal injuries, or for injuries resulting in death, whether such injuries be to the health or to the reputation, "or to the person of the injured party, shall not abate by reason of the death of the person against whom such cause of action shall have accrued, nor by reason of the death of such injured person, but in the case of the death of either or both, all such causes of action shall survive to and in favour of the heirs and legal representatives and estate of such injured party and against the person, or persons liable for such injuries and his or their legal representatives, and may be instituted and prosecuted as if such person or persons against whom same accrued were alive."

Virtually all States in the U.S.A. allow survival of actions for damage to property. In slightly more than half the States, actions for such torts as defamation survive[2].

Recommendation to delete the exception for assault and personal injuries not causing death.

40.11.So much as regards the legislative developments elsewhere. We now proceed to consider the need for reform in the Indian law. In the fiirst place, we consider the exception in section 306 for assault and other personal injuries to be totally unsound in principle. It is an archaic survival of the rule[3] that a personal action dies with the person. The rule itself was unsound,[4] being a product more of historical accident than of any deliberate view of policy. Apart from this, justice requires that such causes of action should survive. The mere accident of the death of a person ought not to affect the survival of the cause of action, whether the person dying is the wronged person or the wrongdoer. In general, tortious liability arises because of certain harm caused by the tort. A subsequent event ought not to affect a liability that has already accrued because of harm already caused.

We, therefore, recommend deletion of the words "assault ..... or other personal injuries not causing the death of the party" from section 306.

Interpretation of the expression "personal injury".

40.12. In case, however, our recommendation[5] to delete from section 306 the exception regarding personal injury is not accepted, we would like to point out the need for a clarification in the light of certain problems raised by the case law on the subject,[6] which we proceed to deal with.

Conflict of views as to malicious prosecution.

40.13. Case law on section 306 shows that the expression "personal injuries" in the section has proved to be unfortunate and controversial. For example, the question whether the expression includes malicious prosecution, has been the subject of a conflict of decisions. The majority view on the subject would include malicious prosecution within this expression, the reasoning being that the word 'personal' in this section must mean all personal injuries in the commonly accepted use of the word 'personal', and cannot be restricted merely to *physical* injuries to the person. Hence a suit for malicious prosecution does not, according to the majority view, survive after death. This view has been taken by the Allahabad,[7] Bombay,[8] Madhya Pradesh,[9] Madras,[10] and Patna[11] High Courts, which hold that a suit for malicious prosecution is a suit for 'personal injury' within the meaning of section 306.

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[1] Tax. Rev. Civ. Stat. Ann. (1958) Art. 5525. Survival of Causes of Action. Reproduced in Shapiro, Tort and Compensation Law (1976), page 478.

[2] (*a*) Gregory & Kalven, Cases and Materials on Torts (1969). page 522.

(*b*) Note in (1953) 48 Harvard Law Review 1108.

[3] Para 40.10, *supra*.

[4] Para 40.5, *supra*.

[5] Para 40.11, *supra*.

[6] Para 40.13, et seq., *infra*.

[7] *Mehtab Singh* v. *Hab Lal*, A.I.R. 1926 All. 610, 612.

[8] *Motilal* v. *Harnaravan*, I.L.R. 47 Bom 716; A.I.R. 1923 Bom. 406.

[9] *Ratanlal* v. *Baboolal*, A.I.R. 1960 M.P. 200.

[10] *Murugappa* v. *Ponusami*, A.I.R. 1921 Mad. 405.

[11] *Punjab Singh* v. *Ram Autar Singh*, (1919) 52 Indian Cases 348 (Patna).

The Madras cases which discuss the matter at some length have specifically held that the words 'personal injuries' do not mean, bodily injuries only, but include injuries *ejusdem generis* with both *defamation and assault*, and therefore include injuries such as those by malicious prosecution.[1-3]

Relying on earlier cases, it has been held[4] in Madras that the maximum '*action personalis moritur cum persona*' is a part of the law of this country, except in so far as it has been modified by statute, and that in a suit for malicious arrest, if a defendant dies, the right to sue does not survive.[5]

Calcutta and Lahore view.

40.14. The Calcutta High Court has, however, held[6] that malicious prosecution is not a 'personal injury', and it is not covered by the exception in section 306 and, therefore, the right to sue for it survives. This was also the Lahore view,[7] which construed the words 'personal injury' as confined to bodily injuries. According to this view, it must be construed with the immediately preceding word 'assault'.

Recommendation to amend section 306—Malicious prosecution.

40.15. This brief resume of the case law on section 306 brings out the conflict of decisions as to the scope of the expression "personal injuries not causing death". Whichever be the correct construction of the present wording of the section, we are of the view that as a matter of policy, the exception for 'personal injuries' in the context of non-survival of causes of action (if at all any such exception is to be retained),[8] should be confined to *bodily injury*. Justice requires that a cause of action for malicious prosecution should survive. There are adequate reasons why it should be so. The deceased might, before his death have spent money on defending the prosecution. His estate should, for that reason, be allowed to recover the expenses. Apart from this pecuniary aspect, the harm caused by a malicious prosecution is of such a character that a remedy against it should continue to be available even after the death of the person so prosecuted.

For the reasons stated above, we recommend that if the exception for personal injuries not causing death in section 306 is not to be deleted,[9] an amendment should be made to section 306 by defining 'personal injury' as (i) including any disease and any impairment of a person's physical or mental condition,[10] and (ii) excluding injury caused by malcious prosecution.

Survival of actions for defamation.

40.16. We are also of the view that, on principle, causes of action for defamation should survive after death. Whatever be the thinking on the subject in the West at the time when the Act of 1865 (the predecessor of the Succession Act of 1925) was enacted, Indian social notions would rather favour an approach permitting survival of such causes of action. Reputation, in the eye of the Indian Society, is certainly as precious as property. It may sound odd to quote literary sources in a legal discussion, but the subject-matter is such that it would be proper to draw support from the thinking of great writers. Shakespeare, in Othello,[11] has thus described the value of reputation, in contrast with money :

"Good name in man and woman, dear my lord,

Is the immediate jewel of their souls;

Who steals my purse steals trash;

'tis something, nothing;

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[1] *Marwadi* v. *Samnaji*, 31 M.L.J. 772, 826, 827.

[2] *Rustomji* v. *Nurse*, I.L.R. 44 Mad. 357. 379, 380.

[3] *Murugappa* v. *Ponusami*, I.L.R. 1921 Mad. 405.

[4] *Arunachalam* v. *Subramanian*, A.I.R. 1958 Mad. 142.

[5] *Cf. D.K. Cassim* v. *Sara Bibi*, A.I.R. 1936 Rang. 17

[6] (*a*) *Krishna Behari Sen* v. *Corporation of Calcutta*, (1904) I.L.R. 31 Cal. 993.
(*b*) *Bhupendra* v. *Chandiramon*, A.I.R. 1927 Cal. 277.

[7] *People's Bank of Northern India* v. *Des Raj*, A.I.R. 1935 Lah. 705.

[8] See para 40.11, *supra*.

[9] Para 40.22, *infra* and paragraph 40.11, *supra*.

[10] *Cf.* Section 3, Law Reform (Personal Injuries) Act, 1948 (Eng.).

[11] Othello, Act III, scene 3, Line 155.

'Twas mine, 'tis his, and has been slave to thousands;

But he that filches from me my good name

Robs me of that which not enriches him,

And makes me poor indeed."

In another play,[1] Shakespeare has compared reputation to the "purest treasure" :—

"The purest treasure mortal times afford

Is spotless reputation; that away,

Men are but gilded loam or painted clay."

Views expressed in literature.

40.17. By many, reputation is ragarded as even more precious than life. Indian literature has beautiful sayings on the subject.[2]

We may mention that the Universal Declaration of Human Rights[3] also recognises the increasing importance of reputation. It provides :—

"ARTICLE 12. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, *nor to attacks upon his honour and reputation.* Everyone has the right to the *protection of the law* against such interference or attacks."

Move for reform in England as to defamation.

40.18. It may be mentioned that the principle that the cause of action for defamation should survive has been approved by the Committee recently appointed in England to report on the law of defamation.[4]

View of academic writers.

40.19. Editors of several leading books on torts have criticised the exclusion of defamation from the category of causes of action that survive. "Defamation may cause much more harm to the next of kin than an assault.[5] "... the exclusion or defamation from the provisions of the Act of 1934 is hard to justify. Not only does the victim of a libellous attack lose his rights to damages if his defamer dies, but he also loses the opportunity of vindicating his character in a court of law."[6]

Recommendation to delete exceptions for defamation.

40.20. For the reasons stated above, we recommend that the word "defamation' should also be deleted from section 306.

Applicability of section 306 to representatives.

40.21. The next point arising out of section 306 concerns the applicability of the section to representatives other than executors and administrators (who are expressly mentioned in the section). There is a conflict of judicial decisions on the subject.

According to the Allahabad High Court,[7] the word "executors or administrators" in this section mean persons who are appointed by the courts to administer the estate of the deceased person in the absence of a will or persons nominated by the testator in his will to administrater his estate. The section, therefore, does not give a right to continue proceedings by or against *heirs as representing an estate.*

According to the Lahore view,[8-8] however, there is no reason to hold that the liability of the heirs who have not taken out probate or letters of administration should stand on a different footing.

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[1]Richard II, Act I, scene 1, line 177.

[2]E.G. Bhagvadgeeta, Chapter 2, verse 34.

[3]Article 12, Universal Declaration of Human Rights.

[4]Committee on Defamation, Report (1975, March), page 116, para 423 and 5909.

[5]Heuston (Ed.), Salmond on Tort (16th Ed.) (1973), page 451, foot note 49. Also Salmond Torts (1981).

[6]J.A. Jollowicz and Ellis Lewis (ed) Winfield on Torts (1967), page 627.

[7]*Official Liquidators* v. *Jugal Kishore,* A.I.R. 1939 All. 1, 3, 4 (Harries J.).

[8]*Peoples Bank of Northern India Ltd.* v. *Des Raj,* A.I.R. 1935 Lahore 705.

[9]*People Bank of Northern India Ltd.* v. *Har Gopal,* A.I.R. 1936 Lahore 271.

We are of the view that section 306 should apply to the other persons—the heirs—also, there being no reason for having a different rule as to survival of actions for or against them.

40.22. In the light of the above discussion, we recommend that section 306 be revised as follows : Revised section 306

"306. All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators or *representatives, except* ..... in cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory."

ILLUSTRATION

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"A sues for divorce. A dies. The cause of action does not survive to his representative."

ALTERNATIVE SUGGESTION

If the words excluding "personal injuries" are not deleted, then the amendment[1] proposed to define the expression "personal injury" should be carried out, and "representative" should also be added.[2] The amendment should[3] define 'personal injury' as (i) including any disease and any impairment of a person's physical or mental condition,[4] and (ii) excluding injury caused by malicious prosecution.

For the purpose, an Explanation could be added to section 306.

III. Disposal of Property.

40.23. Section 307 reads :— Section 307.

"307. (1) Subject to the provisions of sub-section (2) an executor or administrator has power to dispose of the property of the deceased, vested in him under section 211, either wholly or in part, in such manner as he may think fit. Power of executor or administrator to dispose of property.

ILLUSTRATION

(i) The deceased has made a specific bequest of part of his property. The executor, not having assented to the bequest, sells the subject of it. The sale is valid.

(ii) The executor in his discretion mortgages a part of the immovable estate of the deceased. The mortgage is valid.

(2) If the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jain or an exempted person, the general power conferred by sub-section (1) shall be subject to the following restrictions and conditions, namely :—

(i) The power of an executor to dispose of immovable property so vested in him is subject to any restrictions which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order.

(ii) An administrator may not, without the previous permission of the Court by which the letters of administration were granted,—

(a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property for the time being vested in him under section 211, or

[1]Para 40.11, *supra*.

[2]Para 40.15, *supra*.

[3]Para 40.11, *supra*.

[4]*Cf.* section 3, Law Reform (Personal Injuries) Act, 1948 (Eng.).

(b) lease any such property for a term exceeding five years.

(iii) A disposal of property by an executor or administrator in contravention of clause (i) clause (ii) as the case may be, is voidable at the instance of any other person interested in the property.

(3) Before any probate or letters of administration is or are granted in such a case, there shall be endorsed thereon or annexed thereto a copy of sub-section (1) and clauses (i) and (iii) of subsection (2), as the case may be.

(4) A probate or letters of administration shall not be rendered invalid by reason of the endorsement or annexure required by sub-section (3) not having been made thereof or attached thereto, nor shall the absence of such an endorsement or annexure authorise an executor or administrator to act otherwise than in accordance with the provisions of this section.

Question of detail.

40.24. Various questions of detail have arisen under this section as to powers of the executor, such as the power to refer to arbitration the question of genuineness of the will, power to determine questions arising in administration when such a discretion is given to the executor by the will, power to employ agents and servants, power in regard to the performance of contracts, carrying on of businss, personal liability of the executor, unsecured loans and proper expenses for improvement of the property. The determination of such questions, however, depends on the facts of each case, and there is no need to amplify the section on this score.

Section 308—power of executor of administrator.

40.25. This takes us to section 308 :

The section deals with the general powers of administration of an executor or administrator. It provides that an executor or administrator may, in addition to and not in derogation of any other power of expenditure lawfully exercisable by him, incur expenditure—

(a) on such acts as may be necessary for the proper care or management of any property belonging to an estate administered by him; and

(b) with the sanction of the High Court, on such religious, charitable and other objects, and on such improvement, as may be reasonable and proper in the case of such property,

The section needs no change.

Section 309—Recommendation.

40.26. Section 309 provides that an executor or administrator shall not be entitled to receive or retain any commission or agency charges at a higher rate than that for the time being fixed in respect of the Administrator-General by or under the Administrator-General's Act, 1913. This should not be read as referring[1] to the Administrator-General's Act, 1963.

Background of Section 309.

40.27. The lagal background in which this section was considered necessary may be briefly explained. Ordinarily, at common law, a legal representative is not entitled to any allowance for this time and trouble spent by him. He is entitled only to out of pocket expenses.[2] In the absence of a special clause in the will authorising a charge for professional services, even a Solicitor-Executor or a Solicitor—Administrator is not allowed such remuneration.[3] It has, therefore, become a practice to insert in the will a clause authorising the Solicitor-Executor to charge and be paid the usual professional charges for the business done by him or his firm in relation to the execution of trusts, whether in the ordinary course of his profession or business or not, and although of a nature requiring the employment of a solicitor or other professional person. Even where such a clause is inserted, it is regarded itself as a legacy, and not as a debt[4] due from the estate to the executor.

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[1]Section 45 of the 1963 Act.

[2]*In the case of Akshay Kumar Ghose*, A.I.R. 1949 Cal. 462.

[3]*Robinson* v. Pett, (1734) 3 P. Williams 249.

[4]*Agha Mohmad* v. *Koolson Beebee*, (1897) Law Reports 24 India Appeals 196 (Privy Council).

40.28. This is the legal background of the section and the full scope of the section cannot be understood unless that background is kept in mind, However, there seems to be a certain amount of incompleteness in form, which arises from the fact that the section does not tell ls clearly whether such commission or agency can be claimed only if the will allows it, or whether it can be claimed unless the will prohibits it. The letter may be a more practical approach and we think that there should be a specific provision on the subject. **Incompleteness in form and also need for change in substance.**

40.29. Then, there is need for change in the substance of the section, arising from the fact that it is not clear whether a provision in the will allowing charges in excess of those allowed under the Administrator-General's Act[1] would be valid. Of course, it would be reasonable to take the view that it is valid, but the statement of the position could be made explicit in this regard also. **Charges in excess of those allowed under Administrator—General's Act.**

40.30. In this context, in particular, the case where a bank is appointed as an executor requires to be considered. Where the will itself provides for the payment of charges, the bank may be entitled to the ordinary charges for the work which is done in administering the estate.[2] However, it is possible that a bank may refuse to accept executorship if its charges, which may be more than those permitted under the Administrator-General's Act, are not paid. In order to meet such cases, the court should be given a power to relax the rule contained in section 309. **Bank as executor-position of.**

40.31. On a consideration of all aspects of the matter, it seems to us that section 309[3] should be modified on the following lines : **Recommendation to amend section 309.**

(1) Whether or not the will provides for the payment of remuneration, so long as the will does not prohibit such payment, an executor or administrator shall be entitled to receive or retain reasonable commission or agency charges.

(2) Unless the will otherwise provides or the court otherwise permits, those charges shall not be at a higher rate than that for the time being fixed in respect of the Administrator General by or under the Administrator General's Act, 1963.[4]

As already stated above,[5] the proposed relaxing power of the Court would be particularly useful where a bank is appointed an executor.

The following is a suggested draft.

Revised section 309.

"309. (1) *Whether or not the will provides for the payment of remuneration, if the will does not prohibit such payment, an executor or administrator shall be entitled to receive or retain reasonable commission or agency charges.*

(2) *Unless the will otherwise provides or the court otherwise permits, such commission or charges shall not be at a higher rate than that for the time being fixed in respect of the Administrator General by the Administrator General's Act,* 1963."

40.32. Section 310 provides that if any executor or administrator purchases, either directly or indirectly, and part of the property of the deceased, the will is voidable at the instance of any other person interested in the property sold. This section is based on the rule that a legal representative shall not derive any pecuniary benefit from his office.[6] With reference to this section, it is desirable to introduce an exception for the case where the purchase is done with the sanction of the court. At present, the section does not admit of any such exception. **Section 310—Recommendation.**

[1]Now see section 45, the Administrator-General's Act, 1963.

[2]*Gambell, in the estate of* (1934) All E.R. 448.

[3]Para 40.28, *supra.*

[4]Paras 40.28 and 40.29, *supra.*

[5]Para 40.30, *supra.*

[6]Paruck, Indian Succession Act (1977), Page 733.

but the reasonablenes of such an exception is obvious. We recommend that the section should be so amended.

40.33. Section 311 provides that where there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will or taken out administration.

There are six illustrations to the section. The gist of the first five may be represented by stating that one of several executors has power to realise a debt due to the deceased, surrender a lease, sell the property of the deceased (whether movable or immovable), assent to a legacy and endorse a promissory note payable to the deceased. But the powers of one of them may be restricted if the testator so directs—a situation illustrated in illustration (vi).[1]

In th illustration, the will appoints A, B, C, and D to be executors, and *directs* that two of them shall be a quorum. No act can then be done by a single executor.

Recommendation.

40.33. A matter of detail may now be dealt with. The section speaks of a "direction to the contrary", but does not specify where the direction is to be contained. The view expressed by one commentator[2] is that the restriction contemplated in the section must be either in the will or in the grant. It appears to be desirable to codify this position, and we, therefore, recommend that in section 311, after the words *"either in the will or in the probate"* should be inserted.

Section312.

40.34. This takes us to section 312, which lays down that upon the death of one or more of several executors or administrators, in the absence of any direction to the contrary in the will or grant of letters of administration, all the powers of the office become vested in the surviors or survivor.

The section does not appear to need any change.

Section 313.

40.35. Section 313 provides that the administrator of effects unadministered has, with respect to such effects, the same powers as the original executor or administrator.

This section also needs no change.

Section 314.

40.36. Section 314 provides that an administrator during minority has all the powers of an ordinary administrator. No changes are needed in the section.

Section 315—Powers of married executrix or administratrix.

40.37. Section 315 provides that when a grant of probate or letters of administration has been made to a married woman, she has all the powers of an ordinary executor or administrator.

This section also needs no change.

CHAPTER 41

DUTIES OF AN EXECUTOR OR ADMINISTRATOR SECTIONS 316 TO 331

I. Introductory.

Scope.

41.1. The duties of an executor or administrator are governed by sections 316 to 331, which need no introductory comment.

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[1] *Sanat Kumar* v. *Hem Chandra*, AIR 1961 Cal. 411,418.

[2] Paruck, Indian Sucession Act (1977), page 734.

II. Funeral Expenses.

41.2. According to section 316, it is the duty of an executor to provide funds for the performance of the necessary funeral ceremonies of the deceased in a manner suitable to his condition, if he has left property sufficient for the purpose. Section 316—provision of funds for funeral ceremonies.

The section needs no change.

III. Inventory.

41.3. Section 317 reads as under : Section 317—Inventory and account.

"317. (1) An executor or administrator shall within six months from the grant of probate or letters of administration, or within such further times as the Court which granted the probate or letters may appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character; and shall, in like manner, within one year from the grant or within such further time as the said Court may appoint, exhibit an account of the estate, showing the assets which have come to his hands and the manner in which they have been applied or disposed of.

"(2) The Court may prescribe the form in which an inventory or account under this section is to be exhibited.

"(3) If an executor or administrator, on being required by the Court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition he shall be deemed to have committed an offence under section 176 of the Indian Penal Code.

"(4) The exhibition of an intentionally false story or account under this section shall be deemed to be an offence under section 193 of that Code."

41.4. The object of the provision regarding the exhibition of accounts, etc. under section 317 seems to be to ensure that the accounts, etc. are available for inspection by the parties interested in the administration of the estate.[1] There is, however, no obligation to *maintain* accounts.[2] Object of the section.

41.5. The origin of section 317 has been thus described[3]— History of the section.

"The Statute 21 Hen. VIII c.5, provides for the making of inventories by executors and administrators of all the goods, chattels, wares, merchandise as well movable as not movable whatsoever that were of the deceased, and by Stat. 22 and 23 Car. II, c. 10, section 1, an administrator must have entered into a bond conditioned amongst other things for his exhibiting into the registry of the court, at or "before a day specified, a true and perfect inventory of the goods, chattels, and credits of the deceased that come to his possession. The bond given under the Court of Probate Act, 1857 (20 and 21 Vict. c.77), is conditioned to make the inventory when lawfully called on, and to exhibit the same whenever required by law so to do.[4] Sta. 22 and 23 Car. II c.10, required executors or administrators to exhibit inventories, as part of their duty, without any proceeding to call upon them to do so."

According to the practice of the Prerogative Court, an executor was bound to file an inventory before grant of probate.[5-6]

41.6. The provisions of section 317 are mandatory so that a provision in the will that the executor shall not be bound to render accounts is of no avail.[7] Section mandatory.

[1]See *Chheda Lal* v. *Dulari*, A.I.R. 1930 Oudh. 425, 426 (Srivastava J.).

[2]*R.K. Ashere* v. *Tempton Jehangir*, AIR 1961 Guj. 137, 140.

[3]Basu, Sucession Act, (1957), page 912).

[4]Williams on Executors, 11th Edn. page 733.

[5]*Phillips* v. *Bignell*, 1 Phill. 240.

[6]Williams on Executors, 11th Edn. page 733.

[7]*Peari Lal* v. *Bepin Behari*, AIR 1918 Cal. 107.

Consequences of non-compliance.

41.7. The consequences of non-compliance with section 317 are manifold. The executor has, under this section, statutory duties to perform, and until he has done that, he does not divest himself of the character of the executor. Non-filing of the inventory and accounts under section 317 leads to the following consequences[1] :

(1) The executor makes himself liable to punishment under section 176, Indian Penal Code, if the requirement of sub-section (3) of section 317 is fulfilled;

(2) the executor subjects himself, at the instance of an interested party, to an administration suit; and

(3) the grant is liable to be revoked,[2] i.e. if the executor has wilfully and without reasonable cause omitted to exhibit the inventory or account;[3-4] and

(4) it would be a breach of the bond also.[5]

41.8. A connected provision in the Act is section 291, under which an administration bond is required to be filed by every person to whom letters of administration are granted. It may, however, be noted that the Administrator-General is exempt from this requirement.[6]

Provisions in Administrator-General's Act.

41.9. The relevant provisions in the Administrator-General's Act, 1963[7] may now be considered. Under section 5 of that Act, the Administrator-General is a corporation sole, having perpetual succession. Under section 6, the High Court is deemed to be the Court of competent jurisdiction as regards the grant of probate or letters of administration to the Administrator-General under any law for the time being in force. Under section 26, no administration bond or other security is required from the Administrator-General. Under section 43, the accounts of the Administrator-General shall be audited by the prescribed person and in the prescribed manner.

Under section 49, interested persons are entitled to inspect the accounts of the Administrator-General. Section 53 provides that nothing contained in the Indian Succession Act, 1925, affects the rights, duties and privileges of any administrator-General. Under section 62, the State Government may make rules for carrying into effect the purpose of the Act and for regulating the proceedings of the Administrator-General.

corresponding provision in England.

41.10. The corresponding provision in England (relevant portion of section 25, Administration of Estates Act, is quoted below)—

"25. The personal representative of a deceased person shall, when lawfully required so to do, exhibit on oath in the court, a true and perfect inventory and account of the real and personal estate of the deceased, and the court shall have power as heretofore to require personal representative to bring in inventories."

Pactice in England regarding filing of inventories.

41.11. In actual practice, however, in England, the executor does not exhibit an inventory unless an application is made to the Registrar on summons for that purpose by some party interested.[9]

41.12. Having regard to the form of affidavit for Inlnad Revenue, an application for an order to exhibit an inventory is very seldom made,[10] in England. In

[1] *Gulati* v. *Reeves—Brown* A.I.R. 1939 Lah. 463, 464.

[2] *Santiram Das* v. *Prosad Das*, A.I.R. 1952 Cal. 358.

[3] Section 263, Explanation, clasue (e).

[4] As to section 263, see *Anil Behari* v. *Latika*, (1955) S.C.R. 1026.

[5] See *Lachman Das* v. *Chater*, (1888) I.L.R. 10 All. 29, 34.

[6] Section 24, Administrator-General's Act, 1963.

[7] The Administrator-General's Act, 1963 (45 of 1963).

[8] Section 25, Administration of Estates Act 1925 (15 Geo. 5 c. 23).

[9] Williams on Executors (1960), Vol. I, page 442.

[10] See Williams on Executors (1969), Vol. 1, page 442.

Jenkins,[1] an account was ordered to be delivered by the ex-administrator on the application of the executor under a will which was afterwards disclosed.

The English practice on the subject has been thus stated :—

"In practice, the representative never exhibits the inventory unless he is called upon to do so.[2] The place of inventory is taken by the accounts rendered by the personal representative to the Inland Revenue authorities for the purpose of assessing the Death Duties."

Position in England regarding public Trustee.

41.13. It may be stated that in England, the officer corresponding to the Administrator-General is the Public Trustee, governed by the Public Trustee Act, 1926. For our purpose, it is sufficient to refer to the relevant portion of section 11 of the Act quoted below[3] :—

"11. (4) Where any bond or security would be required from a private person upon the grant to him of administration, or upon his appointment to act in any capacity, the public trustee, if administration is granted to him or if he is appointed to act in such capacity as aforesaid, shall not be required to give such bond or security, but shall be subject to the same liabilities and duties as if he had given such bond or security."

Case Law.

41.14. Although there is considerable case law on the section, yet it is unnecessary to discuss it in detail[4] for the present purpose.

State Government to amend S. 317.

41.15. However, we must deal with a suggestion made by a State Government[5] for the amendment of the law. The suggestion is to amend section 317(1) so as to provide that when letters of administration are granted to the Administrator-General, it shall not be necessary for him to file[6] the inventory and accounts required to be filed by that section.

Merits of suggested amendment.

41.16. In our view, the suggested amendment has considerable merit, there being good reasons for exempting the Administrator-General from the operation of section 317. In the first place, he is already exempt from the major obligation to execute an administration bond,[7] and it is logical that he should be exempted from section 317 also. In the second place, his accounts are audited regularly[8] by the competent officers. Hence, no further security is required. In the third place, his position, being statutory, is quite different from that of a purely non-official executor. It would, therefore, be proper to exempt him from the duty to file an inventory of his own accord; though the power of the court to *require* him to do so may be preserved.

Recommendation to amend section 317.

41.17. For the reasons given above, we *recommend* that section 317 of the Indian Succession Act, 1925, should be amended by adding the following Exception to the section :

"*Exception—Where the Administrator-General is the executor or administrator, he shall not be bound to exhibit an inventory or an account of the estate under this sub-section, unless the court has directed him to do so, in which case he shall exhibit the inventory or the account, as the case may be, within such period as the Court may allow;* but copies of the accounts maintained by him shall be filed in court.

Section 318—Inventory in case of grant valid throughout India.

41.18. This takes us to section 318, which provides that where a grant has been made of probate or letters of administration intended to have effect throughout India, the inventory must include all property in India along with a state-

[1] *In the goods of Jenkins*, (1897) 76 L.T. 164; 23 Diglot 250, Case No. 3081).

[2] *Myddleton* v. *Ruhout*, (1797), 1 Phillim 244; *Phillips* v. *Bignell*, (1811), 1 Phillim, at page 240.

[3] Section 11, Public Trustee Act, 1906 (6 Edw. 7, c.5).

[4] Some of the cases are collected in *Santiram Das* v. *Prashad Das*, A.I.R. 1952 Cal. 358.

[5] Law Commission File No. 3 (2) 58-L.C. S. No. 93.

[6] As to the practice in Bombay, see *Bai Panbai Morarji*, A.I.R. 1927 Bom. 438, 349 (Mirza 2).

[7] Section 26, Administrator-General's Act, 1963.

[8] Section 43, Administrator-General's Act, 1963.

ment of its value in each state separately, and the probate fee shall be payable accordingly, i.e. on the entire amount of value in India.

The section needs no change.

Section 319.

41.19. Section 319 provides that the executor or administrator shall collect, with all reasonable diligence, the property of the deceased and the debts that were due to him at the time of his death.

The section does not require any change.

Section 320—priority for certain expenses.

41.20. Section 320 deals with the payment of funeral expenses and death bed charges, including fees for medical attendants, and fees for boarding and lodging for one month previous to the death of the deceased. These must be paid before all other debts.

We have no comments on this section.

Section 321.

41.21. Section 321 deals with the next category of expenses in the order of priority. We are concerned this time with the expenses of obtaining probate or letters of administration, including the cost of judicial proceedings necessary for administering the estate. These must be paid next, after the funeral expenses and death bed charges referred to in section 320.

The section does not require any change.

Section 322.

41.22. Section 322 provides that wages due for services rendered to the deceased within three months next preceding his death by any labourer, artisan or domestic servant shall next be paid, and then the other debts of the deceased according to their respective priorities (if any).

The section needs no change, not having created any problems.

Section 323.

41.23. This takes us to section 323, quoted below :

"323. Save as aforesaid, no creditor shall have a right of priority over another; but the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably as far as the assets of the deceased will extend."

This section also needs no change.

Section 324.

41.24. Section 324 reads as under :—

"324. (1) If the domicile of the deceased was not in India, the application of his moveable property to the payment of his debts is to be regulated by law of India.

(2) No creditor who has received payment of a part of his debt by virtue of sub-section (1) shall be entitled to share in the proceeds of the immovable estate of the deceased unless he brings such payment into account for the benefit of the other creditors.

(3) This section shall not apply where the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jain or an exempted person."

The illustration is as follows :—

ILLUSTRATION

"A dies, having his domicile in a *country where instruments under seal have priority over instruments not under seal, leaving* movable property to the value of 5,000 rupees, and immovable property to the value of 10,000 rupees, debts on instruments under seal to the amount of 10,000 rupees, and debts on instruments not under seal to the same amount. The creditors holding instruments under seal receive half of their debts out of the proceeds of the moveable estate. The proceeds of the immoveable estate are to be applied in payment of the debts on instruments not under seal until one-half of such debts has been discharged. This will leave 5,000 rupees which are to be distributed rateably amongst all the creditors without distinction, in proportion to the amount which may retain due to them."

41.25. The only part of the section that requires comment in sub-section (2), whose utility seems rather difficult to appreciate. The sub-section assumes *that by virtue*[1] *of sub-section* (1), the creditor has received some kind of *special rights*. This assumption is not, however, correct when one has regard to present sub-section (1). The situation seems to have arisen by reason of certain accidents of drafting. This point will be best understood if the history of the section is examined. Sub-section (1) of section 324 corresponds to section 283 of the Act of 1865 (10 of 1865). Sub-section (2) corresponds to section 284 of that Act. Before 1889, section 283 [i.e. the predecessor of present sub-section (1) was different from the present rule. In substance, it applied the law of the country *of domicile*. At that time, therefore, the provision contained in section 284 (which was the predecessor of sub-section (2)] made sense. In 1889 (by Act 6 of 1889), section 283 was amended so as to read (in substance) as section 324 (1) now reads. Crimination of sub-section (2).

In section 283 of the Succession Act (10 of 1865), (as originally enacted), the words "the country in which he was domiciled" were used. Subsequently, by Act 6 of 1889, the words "British India" were substituted for the words "the country in which he was domiciled" and the illustration originally attached to section 283 was repealed. This was really a change of substance, and not a mere verbal amendment.

At the time of the amendment of 1889,[2] however, section 284 was (apparently by slip) not amended. The unamended section was carried forward in present section 324 (2).

41.26. It may be mentioned that section 283 (as originally enacted in 1865) followed the English law as regards the priority of debts, as it then obtained in England.[3] The vexed question was, what rule was to govern in the administration of assets—the law of the domicile or the law of the situs? Sir J. Romilly, in *Wilson* V. *Lady Dunsay*,[4] held that the personal estate of the testator must be administered on the principle of the *law of his domicile*. In *Cooke* V. *Gregson*,[5] it was decided that an Irish judgment—creditor of a testator *domiciled in Ireland* was entitled in England to priority, *according to Irish* law, in respect of assets which had been brought from Ireland to Enland[6]. But the observations of Kindersley V.C., in that case, although not necessary, appeared to put the question as though it were rather dependent on the *situs of the assets* than on the domicile of the deceased. Original rule of English law.

41.27. Section 283, as it found place in the Indian Succession Act, followed the English law *as then understood*. Subsequently, in 1885, in England, it was laid[7] down[8] that if a man domiciled in England dies possessing *assets in France*, the French assets must be collected in France and distributed according to *the law of France*, but that, in the administration of assets in England, a creditor (of whatever nationality) is entitled to be paid equally with English creditors in the same class. In 1889, the Indian legislature by Act 6 of the 1889 (following the English law as laid down in 1885) amended section 283, by replacing the words *'the country in which he was domiciled;'* by the words *'British India'*. It is now well established that administration[9-10] is not governed by the law which governs succession (last domicile)—but by the law the country where administration takes place. Subsequent developments in English law.

41.28. The following illustration appended to the original section 283 corresponding to present sub-section (1) was also repealed in 1889 :

[1]Note the words "by virtue of".

[2]For details, see para 41.29, *infra*.

[3]M.N. Basu, Succession Act (1957), page 930.

[4]*Wilson* v. *Lady Dunsay*, (1854) 18 Beav. 293; 23 L.J. Ch. 492.

[5]*Cook* v. *Gregson*, (1854) 2 Drew . 286.

[6]Foot's Private International Jurisprudence, page 313.

[7]*Re Kloebe*, *Kannreuther* v. *Geiselbrecht*, (1895) 28 Ch. D. 175.

[8]Halsbury, 4th Ed. Vol. 17, pages 582-583, para 1128.

[9]Wolff, Private International law (1950) p. 605.

[10]*Cf.* Morris in (1950) Vol. 3 I.C.L.Q. 243.

"A dies, having his domicile in a country where instruments under seal have priority over instruments not under seal,[1] leaving moveable property to the value of 10,000 rupees, immoveable property to the value of 5,000 rupees, debts on instruments under seal to the amount of 10,000 rupees, and debts on instruments not under seal to the same amount. The debts on the instruments under seal are to be paid in full out of the moveable estate, and the proceeds of the immoveable estate are to be applied, as far as they will extend, towards the discharge of the debts not under seal. Accordingly, one half of the amount of the debts not under seal is to be paid out of the proceeds of the immoveable estate."

Anomaly how arising.

41.28. But, as stated already,[2] unfortunately section 284 [i.e. present section 324] was retained without any amendment at the time when sub-section (1) was amended in 1889. The words "no creditor who has received payment of a part of his debt by virtue of the last preceding section, etc." were retained, even though they were no longer appropriate after the amendment of sub-section (1). This is how the present anomaly has arisen.

Need for amendment in regard to section 324.

41.29. It is necessary that this anomaly should be rectified. Sub-section (2) has now become not only redundant, but also confusing.

Recommendation to amend section 324.

41.30. For these reasons, we recommend that section 324 (2), and the illustration to the section, should be deleted.

If the provisions of the Act relating to domicile are extended to Hindus etc. as recommended by us separately[3] sub-section (3) of section 324 will also have to be deleted.

Section 325—debts to be paid before legacies.

41.31. This disposes of section 324. Section 325 provides that debts of every description must be paid before any legacy. It seems to be based on the principle that a man must be just before he is generous.

It needs no change.

V. Legacies.

Section 326—contingent liabilities.

41.32. According to section 326, if the estate of the deceased is subject to any contingent liabilities, an executor or administration is not bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due.

The section needs no change.

Section 327—Abatement of general legacies.

41.33. Section 327 provides that if the assets, after payment of debts, necessary expenses and specific legacies, are not sufficient to pay all the general legacies in full, the latter shall abate or be diminished in equal proportions, and, in the absence of any direction to the contrary in the will, the executor has no right to pay one legatee in preference to another, or to retain any money on account of a legacy to himself or to any person for whom he is a trustee.

The section needs no change.

Section 328—No abatement of specific legacies.

41.34. Section 328 provides that where there is specific legacy, and the assets are sufficient for the payment of debts and necessary expenses, the thing specified must be delivered to the legatee without any abatement.

This section also needs no change.

Section 329—Preferential claim in respect of demonstrative legacy.

41.35. Section 329 provides as under :—

"329. Where there is a demonstrative legacy and the assets are sufficient for the payment of debts and necessary expenses, the legatee has a preferential claim for payment of his legacy out of the fund from which the legacy is directed to be paid until such fund is exhausted and if, after the fund is exhausted, part of the legacy still remains unpaid, he is entitled to rank

[1]Emphasis is added.

[2]Para 41.26, *supra*.

[3]See recommendation as to section 5-20, *supra*.

for the remainder against the general assets as for legacy of the amount of such unpaid remainders.

The section needs no change, having created no problems.

41.36. Section 330 provides that if the assets are not sufficient to answer the debts and the specific legacies, an abatement shall be made from the latter rateably in proportion to their respective amounts. The illustration reads as under :— Section 330, illustration to be revised.

ILLUSTRATION

"A has bequeathed to B a diamond ring valued at 500 rupees, and to C a horse, valued at 1,000 rupees. It is found necessary to sell all the effects of the testator; and his assets, after payment of debts, are only 1,000 rupees. Of this sum rupees 333-5-4 are to be paid to B, and rupees 666-10-8 to C."

The illustration to the section should be revised, so as to express the amounts in decimal coinage. We recommend accordingly.

41.37. Section 331 provides that for the purpose of abatement, a legacy for life, a sum appropriate by the will to produce an annuity, and the value of an annuity when no sum has been appropriated to produce it, shall be treated as general legacies. Section 331—A legacy for life.

The section needs no change.

CHAPTER 42

ASSENT TO A LEGACY BY EXECUTOR OR ADMINISTRATOR

(SECTIONS 332 to 337)

42.1. Sections 332 to 337 lay down the law relating to assent to a legacy of an executor or administrator. Scheme of the sections.

The general principle is that assent of the executor or administrator is necessary to complete the title of a legatee to his legacy; section 332. This, in fact, could be derived from the broader principle that it is the executor or administrator who represents the deceased,[1] and in whom the title vests until steps are taken to "divest his interest."[2] Once the assent is given, it takes effect from the death of the testator; section 336. Payment or delivery of the legacy, however, by the executor is not obligatory, until one year expires after death : sections 337 and 338.

The rest of the sections regulate certain matters of detail. We now proceed to a consideration of each section in detail.

42.2. Section 332 reads :— Section 332.

"332. The assent of the executor or administrator is necessary to complete a legatee's title to his legacy.

ILLUSTRATION

(i) A by his will bequeaths to B his Government paper which is in deposit with the Imperial Bank of India.[3] The Bank has no authority to deliver the securities, nor B a right to take possession of them, without the assent of the executor.

(ii) A by his will has bequeathed to C his house in Calcutta in the tenancy of B. C is not entitled to receive the rents without the assent of the executor or administrator."

[1]See sections 305-315, and discussion relating thereto.

[2]Compare section 333 (1), and section 211.

[3]Illustration (*i*) may be revised to substitute "State Bank of India" in place of the words "Imperial Bank of India".

The precise purport of this section remains obscure, until one turns to the remaining sections—particularly, section 336. Section 336 provides that an assent to the title relates back to the date of death.

Thus, it is not a case of "no title until assent", but "inchoate title until assent".

Want of assent — Recommendation.

42.3. It has been held by Bombay High Court[1] that even where it was expressly directed in the will that the legatee may take possession of his legacy *without the assent of the executor*, yet, if he does *take possession, the executor may maintain an action* for trespass.

The Calcutta High Court has held[2] that the legatee has a vested right to the legacy even though the assent of executor is not given, with the result that any alienation by the legatee before assent by the executor is not void, but merely inchoate until assent is given. It was explained that the section is meant to protect the executor, so that he may have money available for the payment of debts.

These rulings show that there is some obscurity as to the vesting of title, pending assent.

It appears to us that such an important matter as the vesting of title should not be left in doubt. The position should be improved by a suitable clarification, to the effect that nothing in this section shall be deemed to invalidate a transfer of the property (which is the subject-matter of the legacy) by the legatee before assent by the executor or administrator, but every such transfer shall be regarded as conditional on the assent of the executor or the administrator, as the case may be. We recommend that section 332 should be amended by inserting an Explanation on the above lines.

Section 333— Assent to a specific bequest.

42.4. Section 333 reads—

"333 (1). The assent of the executor or administrator to a specific bequest shall be sufficient to divest his interest as executor or administrator therein, and to transfer the subject of the bequest of the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way.

(2) This assent may be verbal, and it may be either express or implied from the conduct of the executor or administrator.

ILLUSTRATIONS

(i) A horse is bequeathed. The executor requests the legatee to dispose of it, or a third party proposes to purchase the horse from the executor, and he directs him to apply to the legatee. Assent to the legacy is implied.

(ii) The interest of a fund is directed by the will to be applied for the maintenance of the legatee during his minority. The executor commences so to apply it. This is an assent to the whole of the bequest.

(iii) A bequest is made of a fund to A and after him to B. The executor pays the interest of the fund to A. This is an implied assent to the bequest to B.

(iv) Executors die after paying all the debts of the testator, but before satisfaction of specific legacies. Assent to the legacies may be presumed.

(v) A person to whom a specific article has been bequeathed takes possession of it and retains it without any objection on the part of the executor. His assent may be presumed."

The section has created no problems and needs no change.

[1] *Hasnali* v. *Popatlal*, (1912) 14 Bom. L.R. 732; I.L.R. 37 Bom. 211.

[2] *Khagendra* V. *Khatranath*, (1922) I.L.R. 50, Cal. 171, 175 to 177 (Mookerjee and Cuming JJ).

42.5. Section 334 reads— Section 334.

"334. The assent of an executor or administrator to a legacy may be conditional, and if the condition is one which he has a right to enforce, and it is not performed, there is no assent.

ILLUSTRATIONS

(i) A bequeaths to B his lands of Sultanpur, which at the date of the will, and at the death of A, were subject to a mortgage for 10,000 rupees. The executor assents to the bequest, on condition that B shall within a limited time pay the amount due on the mortgage at the testator's death. The amount is not paid. There is no assent.

(ii) The executor assents to a bequest on condition that the legatee shall pay him a sum of money. The payment is not made. The assent is nevertheless valid".

The section needs no change.

42.6. Section 335 reads :— Section 335—Assent of executor to his own legacy.

"335. (1) When the executor or administrator is a legatee, his assent to his own legacy is necessary to complete his title to it, in the same way as it is required when the bequest is to another person, and his assent may, in like manner, be expressed or implied.

(2) Assent shall be implied if in his manner of administering the property he does any act which is referable to his character of legatee and is not referable to his character of executor or administrator.

ILLUSTRATION

"An executor takes the rent of a house or the interest of Government securities bequeathed to him, and applies it to his own use. This is assent."

The section needs no change.

42.7. Section 336 runs as follows :— Section 336—Effect of executor's assent.

"336. The assent of the executor or administrator to a legacy gives effect to it from the death of the testator.

ILLUSTRATION

(i) A legatee sells his legacy before it is assented to by the executor. The executor's subsequent assent operates for the benefit of the purchaser and completes his title to the legacy.

(ii) A bequeaths 1,000 rupees to B with interest from his death. The executor does not assent to his legacy until the expiration of a year from A's death. B is entitled to interest from the death of A".

This section also needs no change.

42.8. Section 337 reads as under :— Section 337—Executor when to deliver legacies.

"337. An executor or administrator is not bound to pay or deliver any legacy until the expiration of one year from the testator's death.

ILLUSTRATION

A by his will directs his legacies to be paid within six months after his death. The executor is not bound to pay them before the expiration of a year."

This section also needs no change.

CHAPTER 43

PAYMENT AND APPORTIONMENT OF ANNUITIES

(SECTIONS 338 TO 340)

Scope.

43.1. Payment and apportionment of annuities is dealt with in sections 338 to 340. The provisions deal with matters of detail, and need no introductory comments.

Section 338—Commencement of annuity when no time fixed by will.

43.2. Section 338 reads :—

"338. Where an annuity is given by a will and no time is fixed for its commencement, it shall commence from the testator's death, and the first payment shall be made at the expiration of a year next after that event."

The section needs no change.

Section 339—Commencement of periodical annuity.

43.3. Section 339 reads :—

"339. Where there is a direction that the annuity shall be paid quarterly or monthly, the first payment shall be due at the end of he first quarter, or first month, as the case may be, after the testator's death; and shall, if the executor or administrator thinks fit, be paid when due, but the executor or administrator shall not be bound to pay it till the end of the year."

The section needs no change.

Section 340—Dates of successive payments when first payment directed to be made within a given time or on a day certain; death of annuitant before date of payment.

43.4. Section 340 reads :—

"340 (1). Where there is a direction that first payment of an annuity shall be made within one month or any other division of time from the death of the testator, or on a day certain, the successive payments are to be made on the anniversary of the earliest day on which the will authorised the first payment to be made.

(2) If the annuitant dies in the interval between the times of payment, an apportioned share of the annuity shall be paid to his representative."

The section needs no change.

CHAPTER 44

INVESTMENT OF FUNDS TO PROVIDE FOR LEGACIES

(SECTIONS 341 TO 348)

Scope.

44.1. Investment of funds to provide for legacies is regulated by sections 341 to 348. The sections deal with investment of various classes of legacies, management of annuities and contingent bequests and bequests of residue for life, time and manner of conversion and investment, and certain special situations such as that of a minor entitled to immediate payment or possession of bequest with no direction to pay any person on his behalf.

Section 341.

44.2. Section 341 reads :—

"341. Where a legacy, not being a specific legacy, is given for life, the sum bequeathed shall at the end of the year be invested in such securities as the High Court may by any general rule authorise or direct, and the proceeds thereof shall be paid to the legatee as the same shall accrue due".

The section needs no change.

Section 342—Investment of general legacy to be paid at future time.

44.3. Section 342 reads :—

"342 (1) Where a general legacy is given to be paid at a future time, the executor or administrator shall invest a sum sufficient to meet it in securities of the kind mentioned in section 341.

(2) The intermediate interest shall form part of the residue of the testator's estate".

The section needs no change.

44.4. Section 343 reads as follows :—

Section 343—Procedure when no fund charged with, or appropriated to, annuity.

"343. Where an annuity is given and no fund is charged with its payment or appropriated by the will to answer it, a government annuity of the specified amount shall be purchased, or, if no such annuity can be obtained, then a sum sufficient to produce the annuity shall be invested for that purpose in securities of the kind mentioned in section 341."

The section needs no change.

44.5. Section 344 reads :—

Section 334—Transfer to residuary legatee of contingent bequest.

"344. Where a bequest is contingent, the executor or administrator is not bound to invest the amount of the legacy, but may transfer the whole residue of the estate to the residuary legatee, if any, on his giving sufficient security for the payment of the legacy if it shall become due."

The section needs no change.

44.6. This takes us to section 345. It reads :—

Section 345—Investment of residue bequeathed for life, without direction to invest in particular securities.

"345. (1) Where the testator has bequeathed the residue of his estate to a person for life without any direction to invest it in any particular securities, so much thereof as is not at the time of testator's decease invested in securities of, the kind mentioned in section 341 shall be converted into money and invested in such securities.

(2) This section shall not apply if the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person."

The section needs no change.

44.7. Section 346 reads :—

Section 346.

"346. Where the testator has bequeathed the residue of his estate to a person for life with a direction that it shall be invested in certain specified securities, so much of the estate as is not at the time of his death invested in securities of the specified kind shall be converted into money and invested in such securities".

The section needs no change.

44.8. Section 347 provides that such conversion and investment as are contemplated by sections 345 and 346 shall be made at such times and in such manner as the executor or administrator thinks fit; and until such conversion and investment are completed, "the person who would be for the time being entitled to the income of the fund when so invested shall receive at the rate of 4 per cent, per annum upon the market-value (to be computed as at the date of the testator's death) on each part of the fund as has not been so invested."

Section 347—Time and manner of conversion and investment.

44.9. Section 348 reads :—

Section 348—Procedure where minor is entitled to immediate payment or possession of bequest, and no direction to pay to person on his behalf.

"348. (1) Where, by the terms of a bequest, the legatee is entitled to the immediate payment or possession of the money or thing bequeathed, but is a minor, and there is no direction in the will to pay it to any person on his behalf, the executor or administrator shall pay or deliver the same into the Court of the District Judge, by whom or by whose District Delegate the probate was, or letters of administration with the will annexed were, granted, to the account of the legatee, unless the legatee is a yard of the Court of Wards.

(2) If the legatee is a ward of the Court of Wards, the legacy shall be paid to the Court of Wards to his account.

(3) Such payment into the Court of the District Judge, or to the Court of Wards, as the case may be, shall be a sufficient discharge for the money so paid.

(4) Money when paid in under this section shall be invested in the purchase of Government securities, which, with the interest thereon, shall be transferred or paid to the person entitled thereto or otherwise applied for his benefit, as the Judge or the Court of Wards, as the case may be, may direct."

The section needs no change.

CHAPTER 45

PRODUCE AND INTEREST OF LEGACIES

(SECTIONS 349 TO 355)

Scope.

45.1. Sections 349 to 355 contain provisions relating to the produce and interest of legacies.

The provisions in sections 349 to 355, though apparently dealing with matters of detail, are based on certain broad principles, namely, that :—

(i) The legatee's title (subject to the provisions as to assent of the executor or administrator) is effective from the date of the testator's death, so that the "clear produce" of the legacy belongs to him from the date of such death; sections 349-350.

(ii) the right to demand payment of the legacy, however, does not ordinarily arise unless one year has expired since such death—a principle that explains the provisions (section 351, main paragraph and section 354) as to commencement of interest;

(iii) in certain exceptional cases, however, interest may start running before the expiry of one year : Section 349, exception, section 352 and section 355. These exceptional cases are based on the existence of circumstances from which a contrary intention could be reasonably inferred.

The rate of interest is dealt with in section 353.

Section 349—Legatee's title to produce of specific legacy.

45.2. Section 349 reads as under :—

"349. The legatee of a specific legacy is entitled to the clear produce thereof, if any, from the testator's death.

Exception A specific bequest, contingent in its terms, does not comprise the produce of the legacy between the death of the testator and the vesting of the legacy. The clear produce of it forms part of the residue of the testator's estate.

ILLUSTRATION

(i) A bequeaths his flock of sheep to B. Between the death of A and delivery by his executor the sheep are shorn or some of the ewes produce lambs. The wool and lambs are the property of B.

(ii) A bqueaths his Government securities to B, but postpones delivery of them till the death of C. The interest which falls due between the death of A and the death of C belongs to B, and must, unless he is minor, be paid to him as it is received.

(iii) The testator bequeaths all his four per cent, Government promissory notes to A when he shall complete the age of 18. A, if he completes that age, is entitled to receive the notes, but the interest which accrues in respect of them between the testator's death and A's completing 18, forms part of the residue".

The section needs no change.

45.3. Section 350 provides that the legatee under a general residuary bequest is entitled to the produce of the residuary fund, from the testator's death. The exception to the section lays down that a general residuary bequest, contingent in its terms, does not comprise the income which may accrue upon the fund bequeathed between the death of the testator and the vesting of the legacy. Such income goes as undisposed of.

Section 350—Residuary Legatee's title to produce of residuary fund.

The illustrations are as under :—

(i) The testator bequeaths the residue of his property to A a minor, to be paid to him when he shall complete the age of 18. The income from the testator's death belongs to A.

(ii) The testator bequeaths the residue of his property to A when he shall complete the age of 18. A, if he completes that age, is entitled to receive the residue. The income which has accrued in respect of it since the testator's death goes as undisposed of."

This section also needs no change.

45.4. While the last two sections were concerned with the produce of property, the next four deal with interest. Section 351 provides as follows :—

Section 351—Interest when no time fixed for payment of general legacy.

"351. Where no time has been fixed for the payment of a general legacy, interest begins to run from expiration of one year from the testator's death.

Exception—(1) Where the legacy is bequeathed in satisfaction of a debt, interest runs from the death of the testator.

(2) Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, the legacy shall bear interest from the death of the testator.

(3) Where a sum is bequeathed to a minor with a direction to pay for his maintenance out of it, interest is payable from the death of the testator."

45.5. The second exception to section 351 requires some comments. According to the practice of the Chancery Division in England,[1] a minor who is entitled under the *will of* his parent, etc. to a legacy contingently on his attaining his majority is entitled, *during minority,* to maintenance out of the income of the legacy. This is the basis of the second exception to section 351.

Section 351—Second Exception-origin.

45.6. Unlike the third exception to section 351, the second exception to section 351 is not confined to minors. In this respect, the English Law is different, the corresponding exception being confined to minors.[2] It is also to be noted that the second exception to section 351, unlike section 352, does not exclude cases where :—

Section 351—second exception-scope.

"a specific sum is given by the will for maintenance or ... the will contains a direction to the contrary."

Some of the commentators have stated that the second exception is taken from an English case,[3] but that case was one of a minor.

45.7. The solicitude shown by the law for the case[4] dealt with in the second exception to section 351 should, we think, be extended also to the *spouse of the testator.* At present, the legacy to spouse does not carry interest until a year from the death, where no time is fixed for payment This is also the English law.[5] But justice requires that the law should be changed.

Position of spouse—Recommendations.

We recommend accordingly.

45.8. Section 352 reads :—

Section 352—Interest when time fixed.

"352. Where a time has been fixed for the payment of a general legacy, interest begins to run from time so fixed. The interest up to such time forms part of the residue of the testator's estate.

[1]Halsbury, 4th Ed. Vol. 17, page 641, para 1253.

[2]*Stent* v. *Robinson,* 12 *Ves.* 461.

[3]*Wilson* v. *Madison.* (1843) 2 Y & C Chancery cases 372.

[4]*Cf.* the facts in *Rajani Kant* v. *Kiko.* 34 Bombay Law Reporter 1124, A.I.R. 1932 Bombay 506.

[5]Halsbury, 4th Ed. Vol. 17, page 641, para 1256.

Exception[1]—Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee and the legatee is a minor, the legacy shall bear interest from the death of the testator, unless a specific sum is given by the will for maintenance, or unless the will contains a direction to the contrary."

The section needs no change.

Section 353—Rate of Interest.

45.9. Section 353 reads as under :—

"353. The rate of interest shall be four per cent per annum in all cases except when the testator was Hindu, Muhammadan, Budhist, Sikh or Jain or an exempted person, in which case it shall be six per cent per annum."

Recommendation to revise section 353.

45.10. The rates of interest laid down at present—four per cent and six per cent respectively—need to be revised in the light of present day conditions. The rate now should be *uniform and* at least twelve per cent in every case. Power may be given to the court to fix a different rate for special reasons, to be recorded. We recommend that section 353 should be revised accordingly. The following is a suggested redraft of section 353.

Revised Section 353 :

"353. The rate of interest shall be *twelve* per cent per annum in all cases, except when the court, *for special reasons to be recorded, fixes a different rate.*"

Section 354—No interest for first year.

45.11. This takes us to section 354, which provides that no interest is payable on the arrears of an annuity within the first year from the death of the testator, although a period earlier than the expiration of that year may have been fixed by the will for making the first payment of the annuity

This section also needs no change.

Recommendation.

45.12. The language of section 354 is slightly defective. Although (as provided in the section) annuities do not carry interest within the first year even though an earlier time may have been fixed for payment, it is not intended that no interest shall be paid, for *the subsequent years*. The position as regards the period after one year is governed by section 352. This point was settled after some debate in the Calcutta High Court[2], and is worth codification. To achieve this object, we recommend the addition of the following Explanation to section 354.—

"Explanation—Nothing in this section shall affect interest admissible under section 352."

Section 355—Interest on sum to be invested to produce annuity.

45.13. Section 355 lays down that where a sum of money is directed to be invested to produce an annuity, interest is payable on it from the death of the testator.

The section needs no change.

CHAPTER 46

REFUND OF LEGACIES (SECTIONS 356 TO 367)

1. Preliminary

Scope.

46.1. Sections 356 to 365 deal with the refund of legacies in case of assets proving insufficient to pay all the legacies or in certain other cases. Sections 366-367 deal with certain other matters pertaining to the distribution of assets.

[1] *Cf.* Halsbury, 4th Ed. Vol. 17, page 641, para 1255 and *Wilson* v. *Maddison*, (1843) 2 Y & C Ch. Cas 372.

[2] *Shrimati Balini Bala* V. *Administrator General of Bengal*. Reported in Times of India 22nd June, 1939, page 14, quoted in Paruck, Succession Act (1977), page 781.

It should be noted that section 367 (transfer of assets to a foreign executor)[1] stand in a class by itself and will require detailed discussion. As will appear from sections 356 and 357, there is a difference in the position as regards voluntary payments and other payments.

II. Refund

Section 356—Refund of legacy paid under Court's orders.

46.2. Section 356 provides that when an executor or administrator has paid a legacy under the order of a Court, he is entitled to call upon the legatee to refund in the event of the assets proving insufficient to pay all the legacies. The section thus confers power to call for refund in case of a payment under the order of a court. It needs no change, not having created any problems.

Section 357.

46.3. Section 357, presenting a contrast with section 356, provides that when an executor or administrator has voluntarily paid a legacy, he cannot call upon a legatee to refund, in the event of the assets proving insufficient to pay all the legacies.

The section needs no change.

Section 358—Refund when legacy has become due on performance of condition within further time allowed under section 137.

46.4. Section 358 provides that when the time prescribed by the will for the performance of a condition has elapsed, without the conditions having been performed, and the executor or administrator has thereupon, without fraud, distributed the assets, in such a case, if further time has been allowed under section 137 for the performance of the condition, and the condition has been performed accordingly, the legacy cannot be claimed from the executor or administrator, but those to whom he has paid it are liable to refund the amount.

The section needs no change, not having created any problems.

Section 359—when each legatee compellable to refund in proportion.

46.5. Section 359 lays down that when an executor or administrator has paid away the assets in legacies, and he is afterwards obliged to discharge a debt of which he had no previous notice, he is entitled to call upon each legatee to refund in proportion.

This section also needs no comments.

Section 360—distribution of assets.

46.6. Section 360 reads as under :

"360. Where an executor or administrator has given such notice as the High Court may, by any general rule, prescribe or, if no such rule has been made, as the High Court would give in an administration—suit, for creditors and others to send in to him their claims against the estate of the deceased, he shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets, or any part thereof, in discharge of such lawful claims as he knows of, and shall not be liable for the assets so distributed to any person of whose claim he shall not have had notice at the time of such distribution :

Provided that nothing herein contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, in the hands of the persons who may have received the same respectively".

The section needs no comment.

Section 361—Creditor may call upon legatee to refund.

46.7. Section 361 provides that a creditor who has not received payment of his debt may call upon a legatee who has received payment of his legacy to refund, whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies : and whether the payment of the legacy by the executor or administrator was voluntary or not.

The section needs no change. The contest here is between an unsatisfied creditor and satisfied legatees. The next two sections deal with a contest between legatees.

[1]Para 46.13, *et. seq. infra.*

Section 362—When legatee, not satisfied or compelled to refund under section 361 cannot oblige one paid in full to refund.

46.8. This takes us to section 362, which reads as under :—

"362. If the assets were sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy, or who has been compelled to refund under section 361, cannot oblige one who has received payment in full to refund, whether the legacy were paid to him with or without suit, although the assets have subsequently become deficient by the wasting of the executor."

The section needs a verbal change namely, the last four words should read "wasting on the part of the executor".

Section 363—when unsatisfied legatee must first proceed against executor, if solvent.

46.9. Section 363 provides that if the assets were not sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy must, before he can call on a satisfied legatee to refund, first proceed against the executor or administrator if he is solvent, but if the executor or administrator is insolvent or not liable to pay, the unsatisfied legatee can oblige each satisfied legatee to refund in proportion.

The principle underlying the section is that where assets are insufficient to pay all the legacies, the executor must satisfy the legacies proportionately[1]. So, if the legatee has been paid nil, he must have a right of action against the executor.

The section needs no change.

Section 364—Limit to refunding of one legatee to another.

46.10. Section 364 provides that the refunding of one legatee to another shall not exceed the sum by which the satisfied legacy ought to have been reduced if the estate had been properly administered.

The illustration to the section reads as under :—

"A has bequeathed 240 rupees to B, 480 rupees to C, and 720 rupees to D. The assets are only 12,00 rupees and, if properly administered, would give 200 rupees to B, 400 rupees to C, and 600 rupees to D. C and D have been paid their legacies in full, leaving nothing to B. B can oblige C to refund 80 rupees, and D to refund 120 rupees."

The section needs no change, not having raised any difficulties.

Section 365—refunding to be without interest.

46.11. Section 365 provides that the refunding shall in all cases be without interest. The section needs no change.

III. Distribution

Section 366—Residue after usual payments to be paid to residuary legatee.

46.12. According to section 366, the surplus or residue of the deceased's property, after payment of debts and legacies, shall be paid to the residuary legatee when any has been appointed by the will.

This section also needs no change.

IV. Transfer of assets to foreign executor or administrator

Section 367—Person not domiciled leaving assets.

46.13. With section 367, we enter an area somewhat different from that to which the preceding few sections belong. There is a foreign element introduced which gives the section a theoretical interest of its own. Let us quote the section :

"367. Where a person not having his domicile in India has died leaving assets both in India and in the country in which he had his domicile at the time of his death, and there has been a grant of probate or letters of administration in India with respect to the assets there and a grant of administration in the country of domicile with respect to the assets in that country, the executor or administrator, as the case may be, in India, after having given such notices as are mentioned in section 360 and after having discharged, at the expiration of the time therein named, such lawful claims as he knows of, may instead of himself distributing any surplus or residue of the deceased's property to persons residing out of India who are entitled thereto, transfer, with the consent of the executor or administrator, as the case

[1] *Cf.* s. 368.

may be, in the country of domicile, the surplus or residue to him for distribution to those persons."

'Main' and 'ancillary' administration.

46.14. The subject matter of the section is ordinarily dealt with in the text-books under "ancillary Administration."

The position regarding 'main and ancillary" administration has been lucidly stated by Wolff[1]—

> "The jurisdiction of the English court is not exclusive in respect either of administration or of succession. Administration may take place in more than one country. In such a case the main administration lies in the country where the deceased had his last domicile, or, in the case of renvoi from the domicile to the national law, in the country of which he was a subject. The administration in any other country is only 'ancillary'. Therefore, if the main administration is abroad, and there is ancillary administration in England, the duty of the English administration is only to administer the goods situate here, to collect the debts which are by English law deemed to have an English situs, to pay the English debts and all foreign liabilities of which he has notice, and ultimately to hand any surplus to the main administrator[2], unless the English court exercises its discretion to the effect that the payment has to be made direct to be beneficiaries."

Need for change—Executor appointed in country other than country of domicile.

46.15. Section 367 is substantially based on the same approach and is sound as far as it goes. But its scope should be expanded to cover cases where the foreign country is one other than the country of domicile.

At present, section 367 does not deal with the case where the foreign executor or administrator was appointed in a country *other than the country of domicile*. Theoretically, such a situation can arise if a foreign country has, in its law regulating the grant of probate or administration, a provision which confers jurisdiction on its courts if some property is situated within its jurisdiction[3]. Apparently, this situation has been considered to be too rare to deserve a specific provision in our Act.

It may be noted that with reference to section 270 the existence of property within the jurisdiction is enough, subject, of course, to the discretion of the court under section 271[4].

Need for amendment.

46.16. It appears to us that such a case should be provided for by an express provision, even though it may not be very frequent. In the absence of a specific provision, the executor or administrator may be at a loss to decide what to do with the balance. With the permission of the court, he should have power to take action under the section in such cases also.

Recommendation to revise section 367.

46.17. In the light of the above discussion, we recommend that section 367 should be revised as under :—

Revised Section 367.

"367. (1) Where—

> (a) a person not having his domicile in India has died leaving assets both in India and in the country in which he had his domicile at the time of his death, and
>
> (b) there has been a grant of probate or letters of administration in India with respect to the assets *in India* and a grant of administration in the country of domicile with respect to the assets in that country,

[1] Wolff, Private International Law (1950), page 606, para 583.

[2] *In re Achillopoulos*, (1928) 1 Ch. 433, 445.

[3] Compare section 270, Indian Succession Act.

[4] *In the matter of the Will of Ramchand*, A.I.R. 1956 *Mad.* 274.

[5] The existing word "there" really means in India".

the executor or administration, as the case may be, in India, after having given such notices as are mentioned in section 360 and after having discharged, at the expiration of the time therein named, such lawful claims as he knows of, may, instead of himself distributing any surplus or residue of the deceased's property to persons residing out of India who are entitled thereto, transfer, with the consent of the executor or administrator, as the case may be, in the country of domicile, the surplus or residue to him for distribution to those persons.

(2) *Where there has been a grant of administration in a country other than the country of domicile and other than India, the executor, or administrator may, with the permission of the Court, take the same action as he could have taken if there had been a grant in a country of domicile other than India and the provisions of this section shall, with necessary modifications apply to the case as they apply if there had been a grant in a country of domicile other than India.*"

Scope of section 367—after proposed amendment.

46.18. By way of anticipating certain possible objections to the proposed extension of the scope of section 367, we may state that the provisions of the section, even after the proposed amendment, would be confined to a person not domiciled in India. Secondly, the provision, in so far as its scope is to be extended, will apply only subject to the permission of the Court. The Court, in granting permission, will certainly satisfy itself that the transfer of assets to the foreign executor or administrator under the section would be in the interests of justice. It is better to keep the matter elastic as above, rather than tie down the hands of the Indian executor or administrator or fetter the discretions of the Court by insisting upon the requirement of reciprocity or other rigid criteria.

CHAPTER 47

LIABILITY OF AN EXECUTOR OR ADMINISTRATOR FOR DEVASTATION : SECTIONS 368 AND 369

Scope of sections 368 and 369.

47.1. Liability of an executor or administrator for devastation is dealt with in sections 368 and 369, which needs no introductory comments.

Liability of executor or administrator for devastation.

47.2. Section 368 reads :

"368. When an executor or administrator misapplies the estate of the deceased, or subjects it to loss or damage, he is liable to make good the loss or damage so occasioned.

ILLUSTRATIONS

(i) The executor pays out of the estate an unfounded claim. He is liable to make good the loss.

(ii) The deceased had a valuable lease renewable by notice which the executor neglects to give at the proper time. The executor is liable to make good the loss.

(iii) The deceased had a lease of less value than the rent payable for it, but terminable on notice at a particular time. The executor neglects to give the notice. He is liable to make good the loss".

The section needs no change, not having raised any serious difficulties.

Liability of executor or administrator for neglect to get any part of property.

47.3. Section 369 reads—

"369. When an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount.

ILLUSTRATIONS

(i) The executor absolutely releases a debt due to the deceased from a solvent person, or compounds with a debtor who is able to pay in full. The executor is liable to make good the amount.

(ii) The executor neglects to sue for a debt till the debtor is able to plead that the claim is barred by limitation and the debt is thereby lost to the estate. The executor is liable to make good the amount."

This section also needs no change.

CHAPTER 48.

SUCCESSION CERTIFICATES (SECTIONS 370 TO 390)

I. Preliminary

Sections 370-390—Scheme.

48.1. Sections 370—390 deal with succession certificates. Under section 370, a succession certificate cannot be granted in respect of any debt or security to which a right is, by section 212 or 213, required to be established by letters of administration or probate. There is an exception provided in the case of a deceased Indian Christian.

The procedure for making an application for a succession certificate, and the Court to which it should be made, are dealt with in sections 371 to 373 and (where applicable), in section 388. The contents of the certificate are provided for in secton 374. Under section 375, the Judge may require security from the grantee of the certificate.

The form of the certificate and "extensions" thereof are regulated by sections 376 to 377[1]. Amendment of the certificate in respect of powers of the holder as to securities is provided for in section 378. Fees on certificates are to be paid as laid down in section 379.

The extent and effect of certificates are dealt with in sections 380—382 and 387. The effect of previous certificate is dealt with in section 385, revocation in section 383 and appeals in section 384.

Section 386 validates certain payments made in good faith to the holder of an invalid certificate, which has to be delivered to the court as laid down in section 389. Section 390 deals with certain provisions regarding the exhibition of inventories and accounts with respect to Bombay Regulation VIII of 1827.

These sections will now be dealt with in detail below.

II. Succession Certificates—Grant of

48. 2. Section 370 reads—

Section 370. Restriction on grant of certificates under this Part.

"370 (1) A succession certificate (hereinafter in this Part referred to as a Certificate) shall not be granted under this Part with respect to any debt or security to which a right is required by section 212 or section 213 to be established by letters of administration or probate :

Provided that nothing contained in this section shall be deemed to prevent the grant of a certificate to any person claiming to be entitled to the effects of a deceased Indian Christian, or to any part thereof, with respect to any debt or security, by reason that a right thereto can be established by letters of administration under this Act.

[1]See Eighth Schedule.

(2) For the purposes of this Part, "security" means—

(a) any promissory note, debenture, stock or security of the Central Government or of a State Government;

(b) any bond, debenture, or annuity charged by Act of Parliament of the United Kingdom on the revenues of India;

(c) any stock or debenture of, or share in, a company or other incorporated institution;

(d) any debenture or other security for money issued by, or on behalf of, a local authority;

(e) any other security which the State Government may, by notification in the Official Gazette, declare to be a security for the purposes of this Part."

Recommendation as to section 370 (2)(b).

48.3. Sub-section (2), clause (b) of section 370 seems to be obsolete and should be deleted. We recommend accordingly.

Need for change of substance.

48.4. Section 370 bars the grant of a succession certificate, *inter alia,* in cases where letters of administration (or probate) are mandatory. Letters of administration are mandatory in the case of Christians other than Indian Christians dying intestate[1]—to mention the most usual situation. We are of the view that this restriction is not required except where probate is mandatory. The bar in section 370 should be limited only to cases where probate is mandatory. In the case of probate, the will has to be proved and it is understandable that without proof of the will, payment should not be made on the strength of a mere succession certificate. But this reasoning does not apply with the same force to letters of administration, where title is sought to be derived on the basis of a right of inheritance conferred by law and no formal writing is to be proved in general.

Recommendation as to section 370(1)

48.5. Accordingly, we recommend that section 370(1) should be revised as under :—

(1) A succession certificate (hereinafter in this Part referred to as a certificate) shall not be granted under this Part with respect to any debt or security to which a right is required by section 212 or section 213 to be established by ..... probate. (Existing Proviso to be omitted as a consequential change).

Survivorship under section 370.

48.6. We are also of the view that there should be a provision for the grant of certificate *on survivorship.*

By making this amendment, the legislature would be merely giving recognition to what is already the practice[2-3] in some parts of India.

48.7. Although a certificate, issued to certify survivorship should be described as "Survivorship certificate", we do not propose to chage the present nomenclature (succession certificate"), since it has, by now, become familiar to all concerned.

Recommendation to add further proviso to section 370(1).

48.8. Accordingly, we recommend that the following proviso should be added to section 370(1) :

"Provided that nothing contained in this section shall be deemed to prevent the grant of a certificate to any person claiming to be entitled to survivorship to the effects of a deceased Hindu, Mohammedan, Buddhist, Sikh, Jain or Parsi or to any part thereof, with respect to any debt or security by reason that the right thereto is claimed by survivorship and not be succession."[4]

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[1]Section 212 (1).

[2]*Banwari* V. *Maksuda*, A.I.R. 1930 All. 99.

[3]See also para 34.14, *supra.*

[4]Existing proviste is to be omitted; para 48.5, *supra.*

III. Jurisdiction

48. 9. This takes us to section 371, which reads as under : Section 371.

"371. The District Judge within whose jurisdiction the deceased ordinarily resided at the time of his death, or, if at the time he had no fixed place of residence, the District Judge within whose jurisdiction any part of the property of the deceased may be found, may grant a certificate under this part."

Section 371 thus lays down two alternative criteria for jurisdiction—(i) residence or (ii) existence of assets. But primacy is given to the first; the second applied only if the first is not satisfied. How far the present criterian should be retained, is one of the matters that will need consideration.

48.10. Although domicile determines the law applicable to succession to movables and situs determines the law applicable to immovables, the law does not follow the same principles in regard to jurisdiction to grant a certificate. Domicile not adopted as a test.

48.11. English textbook writers[1] state that the jurisdiction of the old eccelsiastical courts (of which the modern probate court is the successor) was universally founded upon the situation of movables belonging to the deceased. It would appear that jurisdiction in probate in other countries of the Commonwealth also mostly depends not on domicile, but on the existence of local assets[2-3] English and Commonwealth law.

48.12. Such a rule[4] is a direct descendant of the rules regulating the jurisdiction of church authorities under the old eccelsiastical law[5]. Genesis.

48.13. This aspect of the matters was considered by us whilst discussing[6] section 270, which deals with jurisdiction to grant probate, but no change in that section was recommended on this point, as no practical difficulty had been experienced. In regard to section 371, however, some obscurity has arisen because the words used in the section are—"if at that time he had no *fixed place* of residence," without indicating whether the fixed place of residence should be in India or may be anywhere in the world. Need for examination of the position.

Judicial decisions reveal a certain amount of conflict. According to the majority view, after the words, 'in question', the words 'in India' should be read. Thus, if a person is not domiciled in India, then his case would be covered and the District Court would have jurisdiction on the basis of assets within its local limits, notwithstanding that he has a fixed place of abode outside India.

This view has been taken by the High Courts of Allahabad[7] Calcutta[8], Lahore[9], and Madras[10].

48.14. The other view is taken in a Bombay case [11]. This was decided with reference to the Succession Certificate Act 27 of 1860. Section 3 of that Act contemplated the issue of a certificate for a British subject either resident in the district where the certificate is sought, or else, having no fixed place of residence. The deceased in that case was a resident of Baroda, (outside British India) and had died there. The High Court observed "the representation of Conflict of views.

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[1]Cheshire, Private International Law (1970), page 580.

[2]Wolffe, Private International Law (1950), page 657.

[3]Sykes and Pryles, Australian Private International Law (1979), page 442.

[4]*In the Goods of Tucker*, (1864) 3 Sw. & Tr. 585; 164 E.R. 1402.

[5]*In the Goods of Coode*, (1867) L.R. 1 P. & D. 449.

[6]See Chapter 34, *supra*.

[7]*Goswami Gopal Lalji* v. *Goswami Jai Lalji*, (1885) 5 Allahabad Weekly Notes.

[8]*Re. Kanju Abdul Rasool*, 54 C.W.N. 826.

[9]*Amar Nath Singh* v *Sham Singh*, A.I.R. 1935 Lahore 646..

[10]*Krishna Ammal* v. *Lakshmi Ammal*, I.L.R. (1950) Mad. 718, 726, 727, 728, 735.

[11]*Mir Abrahim* v. *Zialunissa*, (1888), I.L.R. 12 Bom. 150

such a person would properly be sought in the country he belongs to and the constituent he represented would then sue or empower someone to sue in the court. The Act does not make provision for the *administration of the effects of a foreigner domiciled abroad*".

Practical approach to be adopted.

48.15. For the present purpose, it is unnecessary to discuss which of the two views now summarised above is correct. Practical considerations, however, require that the first view should be adopted. That is the general practice in the Commonwealth also, and creates no serious problems as such.

Some writers have expressed the apprehension that this would mean that may be parallel proceedings in the two countries. This, however, is a rare possibility. Generally, the other country also would grant administration only where the assets are within the jurisdiction of the competent court of the country[1].

Moreover, it would be difficult for the court in one country to hold an enquiry into the truth or otherwise of an allegation that the deceased has had his ordinary residence in some remote corner of the world.

Sections 270 and 371 compared.

48.16. It may be noted that the corresponding provision regarding grant of probate etc.—section 270—is more specific. Under that section, the District Judge has jurisdiction if the deceased at the time of his death "had a fixed place of abode or any property movable or immovable within the jurisdiction of the District Judge". Disparity between section 270 and section 371 seems to have arisen because the two provisions are drawn from two different earlier Acts, relating to probate and succession certificate respectively. There is no need to have any such disparity.

Existence of assets-crucial point of time.

48.17. There does, of course, remain the question whether the assets should have been within the jurisdiction of the District Judge at the time of death or whether they should be within the jurisdiction at the time when the application for succession is made. At present, the second course seems to have been adopted in the section, while the re-draft recommended by us[2] adopts the first course following the pattern of section 270. We have deliberately made a departure in this regard, since we are of the view that there should, as far as possible, be uniformity in the provisions relating to jurisdiction to grant probate, etc. (section 270) and jurisdiction to grant a seccession certificate (section 371). In section 270, the first course has been already adopted, and we would prefer to follow the same pattern in section 371 also.

Existence of assets within India—whether necessary.

48.18. Another question that needs to be considered in connection with section 371—and also in connection with section 270—is whether[3], for the grant of succession certificate (or probate), it is necessary that some assets should be situated within India. The section does not, of course, so require, but a view[4] has been expressed that such a requirement is implicit in the section, having regard to the practice that existed in England before the passing of the Administration of Justice Act, 1932 which made a slight modification by giving a discretion to the court in certain cases[5]. It has also suggested judicially[5] that the position should be changed in India on the same lines as it has been done in 1932 in England.

Assets not necessary in India.

48.19. Having given our careful consideration to the matter, we are of the view that it is better not to make any verbal change in the section on this point. In general, where statutory provisions on a particular matter in codified law on a particular subject are specified, courts in India do not seem to superimpose any requirement on the basis of English practice or rules of private international law. So far as we have been able to gather from the other reported decisions on sections 270 and 371, a requirement that there should be assets in

[1] *Cf.* Para 48.12, *supra.*

[2] See para 48.20, *infra.*

[3] Point relevant to section 270.

[4] *Kalyani Kutti* v. *Gauri Kutti*, A.I.R. 1953 Travancore-Cochin 252.

[5] *Kalyani Kutti* v. *Gauri Kutti*, A.I.R. 1953 T.C. 253.

India has not been read into the section. In the circumstances, we do not consider it proper to make a change in the section, so as to throw a doubt on the width of jurisdiction exercisable under the section as it has been generally understood.

Recommendation as to section 371.

48.20. In the light of the discussion in the earlier paragraphs[1], we recommend that section 371 should be revised as follows :

"371. The District Judge within whose jurisdiction *the deceased, at the time of his death, had a fixed place of abode,* or any property, movable or immovable, may grant a certificate under this part."

IV. Procedure.

48.21. This takes us to section 372, which reads as under :—

Section 372—Application for certificate. 5 of 1908.

"372.(1) Application for such a certificate shall be made to the District Judge by petition signed and verified by or on behalf of the applicant in the manner prescribed by the Code of Civil Procedure, for the signing and verfication of a plaint by or on behalf of a plaintiff, and setting forth the following particulars, namely :—

(a) the time of the death of the deceased;

(b) the ordinary residence of the deceased at the time of his death and, if such residence was not within the local limits of the jurisdiction of the Judge to whom the application is made, then the property of the deceased within those limits;

(c) the family or other near relatives of the deceased and their respective residences;

(d) the right in which the petitioner claims;

(e) the absence of any impediment under section 370 or under any other provision of this Act or any other enactment, to the grant of the certificate or to the validity there of if it were granted; and

(f) the debts and securities in respect of which the certificate is applied for.

(2) If the petition contains any averment which the person verifying it knows or believes to be false, or does not believe to be true, that person shall be deeemed to have committed an offence under section 198 of the Indian Penal Code.

45 of 1860.

(3) Application for such a certificate may be made in respect of any debt or debts due to the deceased creditor or in respect of portions thereof".

Meaning of 'debt' in section 372.

48.22. With reference to this section (section 372), there seems to be a conflict of decisions on the question whether, the word "debt" includes movable property that has been pledged. In a Bombay case[2], the question arose whether a succession certificate could be granted in respect of gold or ornaments pledged by the deceased with a bank. It was held that the pledgee's obligation to return to the pledger's heirs the pledged movable property was not a 'debt', as it was not a specific or ascertained or liquidated sum of money. A similar view had been taken in a Patna case[3].

However, an Allahabad judgment[4] takes a different view in this regard.

We have discussed the matter under section 214[5], and need not repeat here the points made in that discussion.

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[1]Para 48.16. *supra.*

[2]*Ranchhoddas Govinddas Banatwala,* (1976) 78 Bom. L.R. 219. 233.

[3]*Sham Sundar Devv Sarti Devi,* A.I.R. 1962 Part 220.

[4]*Dina Nath* V. *Balkrishna,* A.I.R. 1963 All 46.

[5]Paragraph 34.14, *supra* (section 214)

Section 372(1)(f) Extending the facility of succession certifiacte to properties other than debts. (section 386A to be added).

48.22A. The Delhi Hindustani Mercantile Association, in its comment on the Working Paper of the Law Commission on the Act, has offered the following suggestion :—

> "We may suggest that succession certificates should not be limited to debts payable to the deceased, but should extend to all properties left by him without will. Similarly, pendnig the grant of such a certificate, an administration suit lies, but such a suit can be filed only by creditor. A suit like this should be permitted to be *filed by even the heirs*[1]."

The purport of the comment is not very clear, but it would appear that the intention is that the facility of succession certificate should be extended to properties other than "debts" also. At present, section 372(1) (f) confines succession certificates to debts. Although the suggestion does not say so, presumably the intention is this—in cases where "administration" of the estate is not contemplated, and all that is contemplated is that some kind of *judicial confirmation* of a person being the heir to the property is needed, the law should provide such a facility. Such a facility may be of use in connection with dealings with public offices, where the question of succession to a particular property is in issue and the public office concerned wants some such confirmation.

Utility of suggested amendment.

48.22B. We regard this as an important suggestion, if the reasons underlying the suggestion (which are not stated in the letter of the Association) are what we have surmised above. There do arise, in practice, occasions when title to property *other than debts* may have to be established before public authorities and if a court is given power to issue such a certificate, it would certainly prove to be of use. At present, the object can be achieved by the somewhat more cumbersome procedure of a declaratory suit in which the claimant can seek a declaration about his title-a title based on testamentary or intestate succession. Of course, the claimant filing a declaratory suit is expected to show that there is some kind of "cloud" on his title. If there is no controversy between "rival heirs", a declaratory suit may not be quite appropriate. The suggestion for extending the facility of succession certificate to property other than debts has therefore a practical utility. Theoretically also, there seems to be no objection in principle to such an amendment of the Act.

Section 386A to be inserted.

48.22C. No doubt, such an amendment would require extensive amendments in several sections of the Act. This task could be left to the draftsman—though we do have a suggestion which may probably avoid an amendment of too many sections of the Act. What we have in mind is the insertion of a short section, say, as section 386A—which will provide[2] that the provisions of section 370 to 385 shall, so far as may be, and with necessary modifications, apply, in relation to property other than debts, as they apply in relation to debts.

Section 372—application by a minor.

48.23. Another question, relevant to section 372, may be noted on the subject of the procedure to be followed regarding the grant of certificate to a minor. There is a conflict of views, which can be summarised as under :—

(i) First, there is the Allahabad view[3]—which was also the earlier Calcutta view[4]—that a succession certificate may be granted to a minor acting through his *next friend*. This is the most liberal view.

(ii) Secondly, we have the Madras view[5] holding that a succession certificate can be granted to the minor on the application of his *natural guardian*. This also appears to be the later Calcutta view[6]. Incidentally,

[1] Law Commission File No. F. 2 (6) 84 L.C. S. No. 6A. Hindustani Mercantile Association Delhi, Letter No. HMA/2241 dated 30th May, 1984.

[2] To be carried out by inserting section 386A.

[3] *Ram Kaur* v. *Sardar Singh*, (1898) I.L.R. 20 All. 352.

[4] *Kali Coomar* v. *Tara Prosunne*, 5 C.L.R. 517, referred to in *Ram Kaur* v. *Sardar Singh*, (1898) I.L.R. 20 All. 352

[5] *Krishnamma* v. *Venkata*, I.L.R. 36 Mad. 314

[6] *In Re--Sen Mohatta*, (1894) I.L.R. 21 Cal. 911.

it may be pointed out that this is a more rigid view than the first, since, according to it, only the *natural guardian* can apply and no other person can apply as the next friend on behalf of the minor. This may be called the middle view.

(iii) Thirdly, there is a Bombay ruling[1], according to which the certificate can be granted to the guardian only if he is appointed a guardian of the property of the minor under the Guardian & Wards Act, 1890. This is the narrowest view.

Grant to a minor.

48.24. It is noteworthy that there is no specific provision in section 372 prohibiting the grant of probate to a minor. In this respect, sections 223 and 236, which relate to the grant of probate and letters of administration respectively, may be contrasted. These sections prohibit grant to a minor. The reason why the two sets of provisions are differently framed appears to be this. Probate is granted to an executor appointed by the testator. Normally, the executor would not be a minor, but in the rare case in which he is a minor, the prohibition against grant of probate—and consequential refusal by the court to grant the probate to him—would not cause serious hardship, because letters of administration with the will annexed can still be obtained by another suitable person.

It may be noted that the law does not impose very rigid limitations as to the grant of letters of administration. In the case of a succession certificate, however, the position is different. Only the person who has the right to the debt in question can apply, so that the field of choice is limited and is determined, not by statutory provisions or by the testator's directions or by the orders of the court, but by external circumstances—the person who have survived the deceased and stand in the prescribed relationship to him. Apparently for this reason, the Act does not provide a total bar as such against the minor being granted succession certificate. Under section 372(1)(d), the right which the petitioner claims has to be specified in the petion, this indicating that the claimant must be a person who has some title or interest in the debt. If the person who has some title or interest happens to be a minor, only he can apply for a succession certificate.

Question of procedure—Recommendation.

48.25. The question that should really survive for practical consideration is only one as to the *procedure* to be followed by the minor. The grant of succession certificate to a minor as such cannot be denied as a matter of law, but safeguards could still be laid down. Of course, the safeguards should not impose very severe restrictions on the pursuit of the remedy for enforcing a right that is already vested in the minor.

Having regard to the above considerations, the proper course, in our view, would be to provide—by way of clarification and by way of indicating the correct procedure—that where the applicant for succession certificate is a minor, he may apply through a next friend as if he were a plaintiff in a suit and the provisions of the Code of Civil Procedure, 1908 should, so far as may be, apply in relation to such next friends as they apply in relation to a next friend suing under the Code[2].

We may add that the provision proposed would not only possess practical utility, but would also be consistent with the object underlying the provisions of the Act as to succession certificate. Incidentally, section 384(3), by mentioning section 141 of the Code of Civil Procedure, 1908 (though in a different context), assumes that the Code of Civil Procedure, as far as may be applies to proceedings for succession certificate. Thus, the amendment which we are recommending would be in harmony with the assumptions underlying the entire chapter.

Position of Guardian.

48.25A. It should be pointed out that the grant of a certificate only to a court—appointed guardian[3] would be highly inconvenient. It means that if the guardian is changed, a fresh succession certificate will have to be obtained.

[1] *In Re-Narvan Khanderao*, 35 Bombay Law Reporter 950; A.I.R. 1933 Bom. 436.

[2] For draft, see para 48.26, *infra*.

[3] *In Re-Narvan Khanderao*, A.I.R. 1933 Bom. 436.

Recommendation to amend section 372.

48.26. Accordingly, we recommend that an Explanation should be inserted as follows, below section 372.

"Explanation—Where the applicant for succession certificate is a minor, he may apply through a next friend as if he were a plaintiff in a suit, and the provisions of the Code of Civil Procedure, 1908, *shall, so far as may be, apply in relation to such next friend as they apply in relation to a next friend suing under the Code."*

Section 373—Procedure on application.

48.27. This takes us to section 373. It reads—

"373. (1) If the District Judge is satisfied that there is ground for entertaining the application, he shall fix a day for the hearing thereof and cause notice of the application and of the day fixed for the hearing—

(a) to be seved on any person to whom, in the opinion of the Judge, special notice of the application should be given, and

(b) to be posted on some conspicuous part of the court-house and published in such other manner, if any, as the Judge, subject to any rules made by the High Court in this behalf, thinks fit, and upon the day fixed, or as soon thereafter as may be practicable, shall proceed to decide in a summary manner the right to the certificate.

(2) When the Judge decides that the right thereto to belong to the applicant, the Judge shall make an order for the grant of the certificate to him.

(3) If the Judge cannot decide the right to the certificate without determining questions of law or fact which seems to be too intricate the difficult for determination in a summary proceeding, he may nevertheless grant a certificate to the applicant if he appears to be the person having *prima facie* the best title thereto.

(4) When there are more applicants than one for a certificate, and it appears to the Judge that more than one of such applicants are interested in the estate of the deceased the Judge may, in deciding to whom the certificate is to be granted, have regard to the extent of interest and the fitness in other respects of the applicants."

The section needs no change, having created no serious problems.

V. Form and Contents

Section 374—Contents of certificate.

48.28. Section 374 provides that when the District Judge grants a certificate, he shall therein specify the debts and securities set forth in the application for the certificate, and may thereby empower the person to whom the certificate is granted—

(a) to receive interest or dividends on, or

(b) to negotiate or transfer, or

(c) both to receive interest or dividends on, and to negotiate or transfer, the securities or any of them.

This section also needs no change.

Section 375—Requisition of security from grantee of certificate.

48.29. Section 375 reads:

"375. (1) The District Judge shall in any case in which he proposes to proceed under sub-section (3) or sub-section (4) of section 373, and may, in any other case, require, as a condition precedent to the granting of a certificate, that the person to whom he proposes to make the grant shall give to the Judge a bond with one or more surety or sureties, or other sufficient security, for rendering an account of debts and securities received by him and for indemnity of persons who may be entitled to the whole or any part of those debts and securities.

(2) The Judge may, on application made by petition and on cause shown to his satisfaction, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as he thinks fit, assign the bond or other security to some proper person, and that person shall thereupon be entitled to sue thereon in his own name as if it had been originally given to him instead of to the Judge of the court, and to recover, as trustee for all persons interested, such amount as may be recoverable thereunder."

The section needs no change, having raised no problems.

Section 376—Extension of certificate.

48.30. Section 376 reads:—

"376. (1) A District Judge may, on the application of the holder of a certificate under this Part, extend the certificate to any debt or security not originally specified therein, and every such extension shall have the same effect as if the debt or security to which the certificate is extended had been originally specified therein.

(2) Upon the extension of a certificate, powers with respect to the receiving of interest or dividends on, or the negotiation or transfer of, any security to which the certificate has been extended may be conferred, and a bond or further bond or other security for the purpose mentioned in section 375 may be required, in the same manner as upon the original of a certificate."

This section also needs no change.

Section 377.

48.31. Section 377 provides that certificates shall be granted and extensions of certificates shall be made, as nearly as circumstances admit, in the forms set forth in Schedule VIII.

The section needs no change.

Section 378—Amendment of certificate in respect of powers as to securities.

48.32. This takes us to section 378, which provides that where a District Judge has not conferred, on the holder of a certificate, any power with respect to a security specified in the certificate, or has only empowered on him to receive interest or dividends on, or to negotiate or transfer, the security, the Judge may, on application made by petition and on cause shown to his satisfaction, amend the certificate by conferring any of the powers mentioned in section 374 or by substituting any one for any other of those powers.

The section needs no change, having created no serious problems.

Section 379—Mode of Collecting Court-fees on certificates.

48.33. Section 379 consists of three sub-sections. Sub-Section (1) provides that every application for a certificate or for the extension of a certificate shall be accompanied by a deposit of a sum equal to the fee payable under the Court-fees Act, 1870, in respect of the certificate of extension applied for.

Sub-Section (2) lays down that if the application is allowed, the sum deposited by the applicant shall be expended, under the direction of the Judge, in the purchase of the stamp to be used for denoting the fee payable as aforesaid.

Finally, sub section (3) provides that any sum received under sub section (1) and not expended under sub-section (2) shall be refunded to the person who deposited it.

Controversy as to stage of refund.

48.34. The question has arisen as to the stage at which refund is permissible under section 379 (3). It is the stage before passing of the order for grant of a certificate, could it be any later stage? The nature of the controversy will be apparent on a consideration of selected cases on the section.

The case law.

48.35. In a Madras case[1], the District Judge, Tinnevelly, referred the following question to the High court :—

"Up to what stage in the proceeding for succession certificate is an applicant entitled to obtain a refund?"

[1] *Sankara Ayyar* v. *Nainar Mooppanar*, (1898) I.L.R. 21 Mad. 241.

The High Court held that, *if the application is allowed, i.e.*, if the order for the grant of a certificate has been made, the sum in deposit becomes at once legally appropriated, as duty, to the extent of the debt covered by the order, and cannot be refunded. In other cases, we think that refund can be made." This case was decided under section 14 of the Succession Certificate Act, 1889, to which section 379 of the present Act corresponds.

48.36. A Nagpur case[1], however, seems to have taken a different view. The applicant applied for a succession certificate and deposited the required fee. *The Court allowed the application for* succession certificate subject to the applicant's furnishing security, but the applicant failed to furnish it. Thereafter, the applicant applied for a refund of the sum deposited by him. The lower appellate court, relying on the Madras case mentioned above[2], rejected the application. The High Court, in revision, held that section 379 (3) lays down two conditions (i) the sum should be received under sub-section (1), and (ii) it should not be expended under sub-section (2). If these two conditions are satisfied, the sum should be refunded. Since in this case both the conditions were satisfied, the High Court ordered a refund.

The same view has been subsequently taken in a Lahore case[3].

Comment on case law.

48.37. It is, with respect, suggested that on the language of sub-section (2), refund is not permissible once the application is allowed. Under that sub-section the money can be spent only for purchase of the stamp. It thus impliedly bars refund, once the application is allowed.

The opening words of section 379(2) are "if the application is allowed", and not "when the certificate is granted". Therefore, once a court has *allowed an application* for succession certificate and has passed an order to that effect, whether with or without a condition, the sum can be appropriated only towards the payment of the stamp. If the applicant has failed to fulfil a condition, the State cannot be deprived of its legitimate dues, more particularly when the court has heard the parties, spent its time and exercised its mind on the problems.

Recommendation to insert sub-section (4) in section 379 and to amend, section 379(3).

48.38. We recommend that in order to make the position clear, a new sub-section should be inserted in section 379, as follows :—

"(4). *If the application is allowed with or without condition, the sum shall not be refunded, even if, by reason of breach of the condition, the certificate cannot be granted.*"

We also recommend that the provisions of sub-section (3) should be made subject to new sub-section (4) which is proposed to be inserted as above.

Section 379 (3) should, therefore, begin as follows :—

"(3) *Subject to the provisions of sub-section* (4) *any sum received* .....".

VII. Effect of certificate

Section 380—Local Extent of Certificate—recommendation.

48.39. Section 380 reads :—

"380. A certificate under this Part shall have effect throughout India.

This section shall apply in India after the separation of Burma and Aden from India to the certificates granted in Burma and Aden before the date of the separation, or after that date in proceedings which were pending at that date.

"It shall also apply in India after the separation of Pakistan from India to certificates granted before the date of the separation, after that date in proceedings pending at that date in any of the territories which on that date constituted Pakistan."

[1] In re : *Mt. Fatambi*, A.I.R. 1940 Nag. 65.

[2] *Sankara Ayyar* v. *Nainar Mooppanar*, (1898) I.L.R. 21 Mad. 241.

[3] *Smt. Parkash Wati* v. *Province of Punjab*, A.I.R. 1941 Lahore 399.

The second and third paragraphs of section 380 have spent their purpose and should now be deleted. We recommend accordingly. The section should, therefore, be revised, so as to read as under :—

"380. A certificate under this Part shall have effect throughout India."

Section 381.

48.40. Sction 381 provides that subject to the provisions of this Part the certificate of the District Judge shall, wth respect to the debts and securities specfied therein, be conclusive as against the persons owing such debts or liable on such securities, and shall, notwithstanding any contravention of section 370, or other defect, afford full indemnity to all such persons as regards all payments made, or dealings had, in good faith in respect of such debts or securities to or with the person to whom the certificate was granted.

The section needs no change, having raised no problems.

Effect of certificate granted or extended by Indian representative in foreign State.

48.41.Section 382 reads :—

"382. Where a certificate in the form, as nearly as circumstances admit, of Schedule VIII—

(a) has been granted to a resident within a foreign State by an Indian representative accredited to that State, or

(b) has been granted before the commencement of the Part B States (Laws) Act, 1951, to a resident within any Part B State by a District Judge of that State or has been extended by him in such form, or

(c) has been granted after the commencement of the Part B States (Laws) Act, 1951, to a resident within the State of Jammu and Kashmir by the District Judge of that State or has been extended by him in such form, the certificate shall when stamped in accordance with the provisions of the Court-fees Act, 1870, with respect to certificates under this Part, have the same effect in India as a certificate granted or extended under this Part.

The section needs no change.

VIII. Revocation

Section 383—Revocation of certificate.

48.42. Section 383 reads:—

"383. A Certificate granted under this Part may be revoked for any of the following causes, namely :—

(a) that the proceedings to obtain the certificate were defective in substance;

(b) that the certificate was obtained fraudulently by the making of a false suggestion, or by the concealment from the Court of something material to the case;

(c) that the certificate was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant thereof, though such allegation was made in ignorance or inadvertently;

(d) that the certificate has become useless and inoperative through circumstances;

(e) that a decree or order made by a competent court in a suit or other proceeding with respect to effects comprising debts or securities specified in the certificate renders it proper that the certificate should be revoked."

This section also needs no change.

Section 384.—Appeal.

48.43. Section 384 reads:—

"384. (1) Subject to the other provisions of this Part, an appeal shall lie to the High Court from an order of a District Judge granting, refusing or revoking a certificate under this Part, and the High Court may, if it thinks fit, by its order on the appeal, declare the person to whom the certificate

should be granted and direct the District Judge, on application being made therefor, to grant it accordingly, in supersession of the certificate, if any, already granted.

(2) An appeal under sub-section (1) must be preferred within the time allowed for an appeal under the Code of Civil Procedure, 1908. 5 of 1908.

(3) Subject to the provisions of sub-section (1) and to the provisions as to reference to and revision by the High Court and as to review of judgement of the Code of Civil Procedure, 1908, as applied by section 141 of 5 of 1908. that Code, an order of a District Judge under this Part shall be final".

The section needs no change, having created no problems.

Section 385—Effect on certificate of previous certificate probate or letters of administration.

48.44. Section 385 provides that save as provided by this Act, a certificate granted thereunder in respect of any of the effects of a deceased person shall be invalid if there has been a previous grant of such a certificate or of probate or letters of administration in respect of the estate of the deceased person and if such previous grant is in force.

The section needs no change.

IX. Miscellaneous

Validation of certain payments in good faith to holder of valid certificate.

48.45. Section 386 reads:—

"386. Where a certificate under this part has been superseded or is invalid by reason of the certificate having been revoked under section 383, or by reason of the grant of a certificate to a person named in an appellate order under section 384, or by reason of a certificate having been previously granted, or for any other cause, all payments made, or dealings had, as regards debts and securities specified in the superseded or invalid certificate, to or with the holder of that certificate in ignorance of its supersession or invalidity, shall be held good against claims under any other certificate."

The language is slightly involved, but the purpose is fairly clear. No change is therefore needed in the section.

Section 386A.

48.46. We have already recommended[1] the insertion of a new section to provide for the facility of succession certificate, even in regard to properties other than debts. The relevant section can be inserted as section 386A.

Section 387—Effect of decisions under this Act, and liability of holder of certificate thereunder.

48.47. This takes us to section 387, which provides that no decision under this part upon any question of right between any parties shall be held to bar the trial of the same question in any suit or in any other proceeding between the same parties, and nothing in this Part shall be construed to affect the liability of any person who may receive the whole or any part of any debt or security, or any interest or dividend on any security, to account therefor to the person lawfully entitled thereto.

The section needs no change, having created no difficulties.

Section 388—Investitute of inferior Courts with jurisdiction of District Court for purposes of this Act.

48.48. Section 388 reads:—

"388 (1) The State Government may, by notification in the Official Gazette, invest any Court inferior in grade to a District Judge with power to exercise the functions of a District Judge under this Part.

(2) Any inferior Court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Judge in the exercise of all the powers conferred by this Part upon the District Judge, and the provisions of this Part relating to the District Judge shall apply to such an inferior Court as if it were a District Judge:

Provided that an appeal from any such order of an inferior Court as is mentioned in sub-section (1) of section 384 shall lie to the District Judge, and not to the High Court, and that the District Judge may, if he thinks

[1]See discussion relating to section 372 (1) (f) for extending the facility of succession certificate to properties other than debts, *supra*.

fit, by his order on the appeal, make any such declaration and directions as that sub-section authorises the High Court to make by its order on an appeal from an order of a District Judge.

(3) An order of a District Judge on an appeal from an order of an inferior Court under the last foregoing sub-section shall, subject to the provisions as to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908, as applied by section 141 of that Code, be final.

5 of 1908.

"(4) The District Judge may withdraw any proceedings under this Part from an inferior Court, and may either himself dispose of them or transfer them to another such Court established within the local limits of the jurisdiction of the District Judge and having authority to dispose of the proceedings.

(5) A notification under-section (1) may specify any inferior Court specially or any class of such Court in any area.

(6) Any Civil Court which for any of the purposes of any enactment is subordinate to, or subject to the control of, a District Judge shall, for the purpose of this section, be deemed to be a Court inferior in grade to a District Judge."

The section needs no change.[1]

48.49. Section 389 provides that when a certificate under this Part has been superseded or is invalid from any of the causes mentioned in section 386, the holder thereof shall, on the requisition of the court which granted it, deliver it up to that court.

Section 389—surrender of superseded and invalid certificates.

If he wilfully and without reasonable cause omits so to deliver it up, he shall be punishable with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to three months, or with both.

The section needs no change, having created no problems.

48.50. Section 390 reads:—

"390. Notwithstanding anything in Bombay Regulation No. VIII of 1827, the provisions of section 370, sub-section (2), section 372, sub-section (1), clause (f) and sections 374, 375, 376, 377, 378, 379, 381, 382, 384, 387, 388 and 389 with respect to certificates under this Part and applications therefor, and of section 317 with respect to the exhibition of inventories and accounts by executors and administrators, shall, so far as they can be made applicable, apply, respectively, to certificates granted under that Regulation, and applications made for certificates thereunder, after the 1st day of May 1889, and to the exhibition of inventories and accounts by the holders of such certificates so granted."

Section 390—Provisions with respect to certificate under Bombay Regulation VIII of 1827.

This section also needs no change.

CHAPTER 49

SUCCESSION BY HOMICIDE

SECTION 390A

(Proposed)

I. Introductory

49.1. We are concerned in this Chapter with a fundamental principle of public policy, namely, that a man should not be allowed to derive a benefit

Scope of the Chapter.

[1]Information as to empowerment is being collected.

resulting from his own crime.[1] This principle, well-recognised in the legal systems of many countries,[2] including India,[3] has not yet been expressly enacted in the Indian Succession Act. The object of this Chapter is to consider the need for codification of the above principle in a suitable form in the Act, after a brief examination of the present position in this regard.

The higher law

49.2. All laws must conform to a higher law. An American case which is a good example of this approach is *Riggs* v. *Palmer,* where the New York Court of Appeals held that a legatee did not gain title to property which he would have received as the result of murdering his testator. Earl J. said that there are certain principles that "have their foundation in universal law administered in all civilised countries" and that "all laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law".

Motive immaterial.

49.3. Accordingly, where a person murders another he generally should not be allowed to enjoy the property he acquires as the result of that death. "A man shall not slay his benefactor and thereby take his bounty."[5] It is not considered relevant what the murderers' motive for the murder was.[6]

Positon under the Act.

49.4. At present, however, there is no express provision in the Indian Succession Act debarring a person who has committed homicide for his right to succeed to the estate of the person whose death he has caused. No doubt, this would be the position under the rules of the common law (to be dealt with later).[7] But it is appropriate that this important topic should be dealt with by a specific statutory provision in an Act which is a consolidating enactment.

In order to obtain a proper perspective of the matter, it would be useful first to deal briefly with the position in cases not governed by the Act, and then to recommend the amendment that could be appropriately made in the Act.

II. Hindu Law and Muslim law

Hindu Law.

49.5. According to Hindu law, even before the passing of the Hindu Succession Act,[8] no heirship to another person could be claimed by or through one who has been a privy to the murder of that person. This rule was one of public policy and had been given effect to by the Privy Council,[9-10] relying on ancient texts. Even before the Privy Council decision, substantially the same result had been reached by the High Courts in India.

A Madras case may be cited[11] in illustration. Defendant, the mother of S. had been charged, along with another accused, with having murdered S. Defendant was acquitted, though the other accused was convicted. Plaintiff, as the person next in succession to S. (after the defendant), now sued for a declaration of his right to the property of S *on the ground that the defendant was not entitled to the property,* inasmuch as she had, (as the plaintiff alleged) been party to the murder. The subordinate judge dismissed the suit without trying the question whether he defendant had been a party to the murder. On appeal it was held by the High Court that the question should have been tried. The reasoning was as follows:

[1] *Cleaver* v. *Mutual Reserve Fund Association,* (1982) 1 Q.B. 147, 156, (Fry L.J.).

[2] Para 49.8, *infra.*

[3] Section 25, Hindu Succession Act, 1956.

[4] *Riggs* v. *Palmer,* (1889) 115 N.Y. 506 ; 22 N.E. 188, 190 cited by Youdan in (1973) 89 L.Q.R. 235, 251.

[5] Youdan, "Acquisition of Property by Killing", (1973) 89 L.Q.R. 235, 237.

[6] *Inre Hall,* (1914) Probate 1, 7 (Hamilton L.J.)

[7] See par 49.8, *infra,*

[8] Para 49.5, *infra.*

[9] *Kenchaya* v. *Girimallappa,* A.I.R. 1924, P.C. 200.

[10] Narada, II-13.21, cited in Mitakashra, II-X.3.

[11] *Vedanayaga Mudaliar* v. *Vedammal,* (1904), I.L.R. 27 Mad. 591, 598 to 600. (This point was not challenged in appeal *Vedammal* v. *Vedanayaga,* (1908) I.L.R. 31 Mad. 100, 103, 104).

The principle that no one shall be allowed to benefit by his own wrongful act is of universal application. If the defendant was a party to the murder, her wrongful act, while not preventing the vesting in her of the inheritance, disentitled her to any beneficial interest in it. Such beneficial interest would vest in those who would be entitled to it if the guilty heir were out of the way.

Equity, Justice and good conscience

49.6. In *kenchava's case*,[1] it was held by the Privy Council that "the High Court has rightly decided that the principles of equity, *justice and good conscience* exclude the murders". The Privy Council also laid down the proposition that "statutes regulating heirship or descent, or giving force to wills, should be read as not intended to affect paramount question of public policy or depart from well-settled principles of purisprudence".

Provision in Hindu Succession Act.

49.7. The Hindu Succession Act[2] now provides as follows:—

"25. A person who commits a murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder".

Muslim law.

49.8. The rule under Muslim law is also substantially the same.[3] For example,[4] the Chief Court of Punjab held that a Muslim who had murdered his half-brother could not be allowed to claim the property of the deceased as his heir.

III. Common Law

Common law

49.9. There is enough authority in common law for such a bar. In England, as early as 1892,[5] it was laid down that murder forfeits all benefits under the will of his victim. In 1914, this principle was extended from murder to manslaughter.[6] In regard to intestacy, it was decided in 1935 that the same rule of public policy applies.[7]

49.10. The general rule[8] in England is that a person may not derive a benefit resulting from his own crime.[9]

The principle that no criminal can retain a benefit which acrues to him from crime[10] is now well accepted.[11-12]

The English cases all deal with direct inheritance of the murderer from the victim. The problem of indirect inheritance does not seem to have arisen in England.[13]

Public Policy

49.11. Some questions of proof have arisen[14] in England, but we are not, in the Succession Act, concerned with them. What requires to be emphasised is that the rule barring the murderer from succession is one of public policy, and

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[1] *Kenchava* v. *Girimallappa*, A.I.R. 1924, P.C. 209, 211.

[2] Section 25, Hindu Succession Act, 1956. See *Minote* v. *Sushil*, A.I.R. 1982 Bom. 68 for meaning of "murder".

[3] Tyabji, Muslim Law (1968), pages 762, 820, 865.

[4] *Shah* Khanam, v. *Kalahandhar Khan*, Vol. I Punj. Rep. 455, cited in *Vedanyada Mudaliar* v. *Vedamal*, I.L.R. 27 Mad. 591, 599.

[5] (*a*) *Cleaver* v. *Mutual Reserve Fund Life Association*, (1892), 1 Q.B. 147 (CA).

(*b*) Beresford (1938) A.C. 586.

[6] *Re Hall*, (1914) Probate 1.

[7] *Re Sigaworth*, (1935) Ch. 89.

[8] Halsbury (3rd Ed.), Vol. 1, page 10, para 15.

[9] (*a*) *Beresford* v. *Royal Insurance Co. Ltd.*, (1936) 2 All E.R. 1052; revsd. C.A. (1937) 2 All E.R. 243; affd. H.L., (1938) 2 All E.R. 602; (1938) A.C. 586.

(*b*) *Cleaver* v. *Mutual Reserve Fund Life Assn.*, (1892) 1 Q.B. 147. (C.A.).

(*c*) *In the Estate of Crippen*, (1911) Probate P. 108 (1911—13) All E.R. 207.

[10] *St. John Shipping Corporation* v. *Joseph Bank Ltd.*, (1957) 1 Q.B. 267, 292, per Devlin J.

[11] *Cf. Beresford's Case*, (1937) 2 K.B. 197, 220, *Cointat* v. *Myham & Sons*, (1913) 2 K.B. 220 *Marles* v. *Philip Trant & Sons Ltd.*, (1954) 1 Q.B. 29, 39—40, per Denning L.J.

[12] See also *Haseldine* v. *Hosken*, (1933) 1 K.B. 822; *Askey* v. *Golden Wine Co.*, (194) 2 All E.R. 35.

[13] See article by Professor Hahloin in 16 Modern Law Review 100.

[14] See note by Magary in 67 Law Quarterly Review 309.

has now been accepted in most countries. As Vaisey J. stated,[1] "the rule based on public policy is that no person is allowed to take any benefit arising out of a death brought about by the agency of that person acting felonious, whether it be a case of murder or of manslaughter."

IV. Law in certain other countries

Civil law (France and German).

49.12. In certain countries of the world, the legislature has enacted a rule preventing a person who kills the intestate from succeeding to his property.[2]

49.13. In the civil law system, for example, the murderer is not allowed to reclaim the legacy.[3]

The French law has been thus stated with reference to the French Civil Code.[4] "The heir must not be unworthy. The Code has three causes of unworthiness (indignite), all somewhat academic which may exclude an heir from the succession.[5]

These are: (1) if he has been condemned for having killed or attempted to kill the deceased; (2) if he has brought a complaint of a capital charge against the deceased; (3) if he is aware that the deceased has been murdered and does not inform the legal authors of the murder."

"The children of an unworthy heir cannot take as representing him, but are not excluded if they are the next heirs in their own right.[6] The unworthiness takes effect by operation of law, any judgment of the court being merely declaratory".

Russian law.

49.13. In the Russian Law of inheritance,[7] a citizen disqualifies himself from succession[8] under will or intestancy, if he has promoted his inheritance by unlawful acts directed against the deceased, against any of his successors, or against the carrying out of the wishes of the deceased as expressed in his will, provided such acts are established in judicial proceedings.

Of course, it is not necessary that the motive of the person sought to be disqualified must be to gain the inheritance *by his unlawful action.*

U.S.A.

49.14. In several States in the U.S.A., the principle had been recognised by statute as early as 1936. It is apparent[9-11] that "the social interest served by refusing to permit the criminal to profit by his crime is greater than that served by the preservation and enforcement of legal rights of ownership.[12]"

The Restatement on Restitution provides that a person shall not be allowed to acquire property by murdering another.[13]

Theory of Constructive Trust.

49.15. Commentators in the U.S.A. have suggested a constructive trust as the logical device for denying enjoyment of benefits to one who accelerates his interest by murdering the persons whose continued existence prevents acquisition. However, most courts which reject literal interpretation of an unequivocal statute of descent, have found it simpler to draw an exception sanctioned by public policy.[14-15]

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[1] *Re Callaway*, (1956) All E.R. 451, 452 (Vaisey J.) noted on in (1956) 72 L.Q.R. 475.

[2] See para 49.11, et. seq. *infra*.

[3] As to the civil law system, see references in *Vedanyada* v. *Vedamal* (1904) I.L.R. 27 Mad. 591, 600.

[4] Amos and Walton, Introduction to French Law, (1967) page 294.

[5] Code Civil (1804), Art. 727.

[6] Code Civil (1804), Art. 728 gives details.

[7] Main statutory authority seems to be Article 531 of the R.S.F.S.R. Civil Code which came into force on 1st October, 1964.

[8] Alice Tay, "The Russian Law of Inheritance", (1968) 17 I.C.L.Q. 472, 482 and Footnote 21.

[9] Wade, "Acquisition of Property by Wilfully killing another—statutory solution", (1936) 49 Harvard Law Review 715, footnote.

[10] See, further, "Development in the law-Trusts", (1935) 48 Harvard Law Review 1162, 1180.

[11] Scott on Trusts (3rd Ed.) Section 492.

[12] Cardozo, Nature of the Judicial Process.

[13] Restatement of Restitution, sections 187-189.

[14] Developments—Trusts, (1935) 48 H.L.R. 1162, 1179.

[15] See Amos, "Can a Murderer Acquire Title by His Crime and Keep It ?" in Lect. on Leg. Hist. (1913); 3 Pomeroy, Equity Jurisprudence, s. 1054, note b.

V. Need for Provision in the Indian Succession Act

Existing sections in the Act as to disability of murderer.

49.16. The Indian Succession Act is, however, lacking in a specific provision on the subject, as already stated.[1] At present, the only provision of the Act under which a murderer can possibly be debarred from taking advantage of his own wrong is section 263, by which the grant of probate or letters of administration could be revoked or annulled for a 'just cause'. This is not, however, a bar of *the right to succeed*, whether on intestacy or on testamentary succession. If any such bar is to be read, it has to be derived from the general principles of law which have been mentioned above in the context of a discussion of the law before the Hindu Succession Act[2] and the rule at common law.[3]

In this position, *prima facie*, there is need for inserting a suitable provision on the subject in the Succession Act, so as to make the Act comprehensive. On the merits, there can hardly be any doubt, as to the soundness of the principle.

Debate as to mens rea.

49.17. Certain questions of detail may, no doubt, require attention. There has, for example, been much debate in England whether the principle should have any application if the criminal has no *mens rea*, but is nevertheless found guilty of a criminal offence.[4]

This problem may, for instance, arise if the accused is convicted of a statutory offence of strict liability or (in England) is found guilty of man-slaughter by reason of diminished responsibility. In England, some Judges have repected any such distinction.

In their view, to accept it, would be to encourage sentimental speculation as to the motives and degrees of the moral guilt of a person who has been justly convicted.[5]

Decision in Re. Giles.

49.18. Thus, in Re. Giles,[6] Pennycuick V.C. refused to analyse the ground upon which the courts have established this rule of public policy. "It is suffiicent to say that the rule has been established and that the deserving of punishment and *moral culpability* are not necessary ingredients of the type of crime to which this rule applies, that is culpable homicide, murder or manslaughter". Consequently, he held that a person convicted of manslaughter could not benefit under his victims's will, even though he was found guilty through diminshed responsibility.

In the case referred to above,[7] Lilian Myra Giles struck her husband a single blow on the head with a domestic chamber pot, with the result that he dies ten days later. The deceased had made a will in favour of his wife.

49.19. But the decision referred to above[8] has not escaped criticism. Goff and Jones state their comments in this respect as follows[9] :—

> "It is to be hoped that these views will not prevail. Fears that the relaxation of Fry. L.J.'s principle would be "harmful and dangerous" are, in our opinion, misconcieved. There is much to be said for the view that the principle should have no application if the criminal has no *mens rea*, but is nevertheless found guilty."
>
> "It is hardly defensible that a person who is 'guilty but insane' can take a benefit under his victim's will, but a person who is guilty by reason of diminished responsibility cannot."

[1] Para 49.1., *supra*.
[2] Para 49.4, *supra*.
[3] Para 49.8, *supra*.
[4] Goff and Jones, Law of Restitution (1978), page 486.
[5] *In the Estate of Hall*, (1914) Probate 17, per Hamilton L.J.
[6] *Re Giles*, (1971) 3 W.L.R. 640; (1972) Ch. 544, 552.
[7] *Re Giles*, (1971) 3 W.L.R. 640.
[8] *Re. Giles*, (1971) 3 W.L.R. 640.
[9] Goff and Jones, Law of Restitution (1978), page 486.

Another writer has observed[1] :—

"The time seems ripe for a full consideration of the issues involved. The most that can be expected of the courts is to limit the rule to murder and manslaughter, and even to exclude manslaughter based on negligence would now call for much judicial valour. Beyond this, it seems necessary to look to Parliament."

Negligence not to be converted.

49.20. In India, the legislature has not had an opportunity of examining the pros and cons of the matter. Having considered the position carefully, we are of the view that the proposed disability in regard to succession should apply to cases of culpable homicide (whether or not amounting to murder), but should not extend to cases showing a lesser degree of *mens rea*—e.g. causing death by rash or negligent act.[2]

Public policy—and the principle that no man should profit by his own "wrong"—do not seem to necessitate the imposition of a disqualification in cases of rashness or negligence. It is true that for reasons of deterrence, the criminal law in most countries punishes rash or negligent conduct causing death (or certain other civil consequences). But such conduct does not attract the doctrine that no man should profit by his own "wrong". The emphasis that the doctrine places on "wrong" would seem to indicate that its demands would be amply met by confining the disability to cases where the mental element is of the quality described in section 299 of the Indian Penal Code.

Offence under section 304A, I.P.C.

49.21. In particular, the offence under section 304A, I.P.C. (causing death by rash or negligent act) is of infinite variety. It may cover even a situation where the morally culpable element is minimal. Serious cases of rashness would really fall under section 304 (read with section 299) of the Indian Penal Code.

Extreme cases of rashness would fall even under section 302 (read with section 300, fourth clause). These two sections, read together, cover a really "culpable homicide"—culpable in the moral sense. Only cases with a lesser degree of mental element would fall within section 304A. It is on this rationable that there is justification for not attaching a disqualification (in regard to succession) to mere rashness or negligence which does not indicate a quality of *mens rea* covered by sections 299 and 300 of the Indian Penal Code.

Cases under section 304A, I.P.C.

49.22. Some illustrative cases under section 304A of the Penal Code may be referred to in this context. In one Allahabad case,[3] the accused (a woman) received a powder from an enemy of her relative, took no precaution to ascertain whether it was noxious and mixed it with the relative's food, believing that by so doing she would become rich. It was held that her conduct was wanting in that prudence and circumspection which every human being is supposed to exercise, and as, by her rash and thoughtless act, she had caused death, she was guilty of an offence under section 304A, I.P.C.

In a Calcutta case,[4] the accused operated on another person for internal piles by cutting them out with an ordinary knife. The man died from haemorrhage. The Court held that he had no intention to casue the death of the patient. In the circumstances of the case, it was held that the conviction under section 304A was a proper one.

In another case,[5] the facts were as follows :—

The factory manufacturing fireworks etc. was situated in close proximity to residential quarters. An explosion in the factory resulted in injuries to, and death of, some persons. The explosives were of highly hazardous and dangerous nature and their possession was prohibited. They were stored in the premises at the time of the occurrence. It was held by the Supreme Court that the appellants who were licence holders for manufacturing explosives in the factory were

[1]Gareth Miller, Note : "Slaying a Testator", (1972) 35 Modern Law Review 426, 428.

[2]See draft in para 49.17, *infra*.

[3]*Emp.* v. *Somua*, (1909) I.L.R. All. 290.

[4]*Sukaroo Kobiraj* v. *The Empress*, (1872) I.L.R. 14 Cal. 566.

[5]*Bhalchandra* v. *State of Maharashtra*, A.I.R. 1968 S.C. 1319.

liable to be convicted under sections 304A and 337, although there was no direct evidence of the immediate cause of the explosion. The manufacturers undoubtedly displayed a high degree of negligence by allowing or causing to be used explosives of sensitive compositions and substances in the manufacturing of fireworks, which must be the efficient cause of the explosion.

In yet another case,[1] the accused, knowing that a pistol was loaded, was trying to unload it and while doing so, acted so negligently that the pistol went off and, as a result the complainant's son was killed. It was held that the accused was guilty under section 304A, I.P.C.

In a Bombay case,[2] the accused was out shooting with the deceased in the jungle. While separate from the deceased, the accused saw something moving in the jungle. Without waiting to see what it was, the accused fired and shot the deceased. It was held that the case fell within section 304, I.P.C.

We are citing cases to show the wide scope of section 304A.

VI. Recommendation

49.23. On a consideration of the material summarised above we have come to the conclusion that a new section on the subject discussed above should be inserted in the Act in the following terms:— **Recommendation to interest section 390A.**

"390A. (1) *A person who causes the death of any person by committing culpable homicide, whether amounting to murder or not, or abets the commission of such homicide, shall be disqualified from inheriting, or from taking as a legatee,—*

(a) *the property of the person whose death is so caused; or*

(b) *any other property in furtherance of the succession to which he or she*[3] *committed or abetted the commission of such homicide.*

(2) *Nothing in this section applies*[4] *to persons to whom section 25 of the Hindu Succession Act, 1955 applies.*

CHAPTER 50

MISCELLANEOUS PROVISIONS AND SCHEDULES

50.1. Miscellaneous matters are provided for in section 391, which reads as under:— **Section 391.**

"391. Nothing in Part VIII, Part IX or Part X shall:—

(i) validate any testamentary disposition which would otherwise have been invalid;

(ii) invalidate any such disposition which would otherwise have been valid;

(iii) deprive any person of any right of maintenance to which he would otherwise have been entitled; or

(iv) affect the Administrator-General's Act, 1913."

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[1] *Motan Ram*, (1930) 32 Cr. L.J. 463, referred to in Ratanlal, The Law of Crimes (22nd Ed. page 815.

[2] *Budhya*, (1888) Unreported Cr. C. 398, referred to in Ratanlal The Law of Crimes (22nd Ed.), page 813.

[3] The words "or she" are strictly speaking unnecessary, having regard to section 13, General Clauses Act, 1897. However, in the Succession Act, expressions indicating males do not at most places, include females. Hence it is better to use specific words covering females.

[4] The proposed section should apply in all cases where the section 25, Hindu Succession Act, does not apply.

Amendment of clause (iv) recommended.

50.2. No changes are needed in the substance of the section. But in clause (iv) of the section, the reference to the Administrator-General's Act, 1913 should be revised so as to refer to the later Act of 1963 on the subject. We, therefore, recommend that in clause (iv), for the figures "1913", the figures "1963" should be substituted.

Scope—First Schedule.

50.3. We now come to the Schedules. The first schedule to the Act contains the table of consanguinity. It needs no change.

Second Schedule.

50.4. The Second Schedule to the Act deals with the order of the next of kin. It also needs no change.

Third Schedule—Recomendation.

50.5. The Third Schedule to the Act contains a list of the provisions of Part VI of the Act that are applicable to certain wills and codicils which are described in section 61. In view of the points discussed by us under various sections,[1] certain changes will be needed in this schedule. Those changes should be carried out.

Administration suit by heir : suggestion of Hindustani Mercantile Association considered.

50.6. It has been suggested[2] by a mercantile association that an administration suit should be permitted to be filed even by the heirs. So far as we can see, such a suit is permissible even under the present law in appropriate cases and a change in the law as such is not needed. In any case, the matter does not pertain to the Succession Act, but rather to the law of procedure.

CHAPTER 51

SUMMARY OF RECOMMENDATIONS

The recommendations made in the preceding chapters are summarised below :—

Preliminary

(1) For the purpose of the Indian Succession Act, the definition of "Hindu" in Hindu Succession Act, 1956, section 2, should be adopted, so as to secure uniformity. A person to whom the Hindu Succession Act applies would, then, be regarded as a "Hindu" for the purposes of the Indian Succession Act also. This should be carried out by amending section 2 of the Indian Succession Act, by inserting a definition of the expression "Hindu" after section 2(c). As a consequential change, expressions referring to Buddhists, etc. along with Hindu, wherever they occur in the Act, may be omitted.[3]

(2) A definition of the expression "child" should also be inserted, as under :—

"(aa) 'child' includes—

(a) an adopted child, in the case of any one whose personal law permits adoption;

(b) an illegiiimate child."[4]

(3) A definition of the expression "Parsi" should be inserted.

(4) To remove the discrepancy between the definition of "probate" as occuring in section 2(f) and the form of probate as given in the Sixth Schedule to the Act, the definition of "probate" should be revised, and the expression

[1]See for example, discussion as to sections 63—65, 91, etc.

[2]Law Commission File No. F. 2(6)/84-L.C. S. No. 6A Hindustani Mercantile Association, Delhi letter No. HMA/2241 dated 30th May, 1984.

[3]Paragraphs 3.7. and 3.14.

[4]Paragraphs 3.8, 3.9 and 9.18

[5]Paragraphs 3.4 and 3.15.

"probate" should be defined as meaning a "document issued in respect of a will under the signature of the proper officer of the court, certifying that the original will was proved on a certain date and attaching a certified copy of the will, with a grant of administration to the estate of the testator.[1]

(5) In regard to the rules of conflict of laws as applicable on the subject of the formal validity of wills, the connecting factors that could possibly operate should be made more liberal than at present, broadly on the lines of the (English) Wills Act, 1963. This is desirable in order to avoid certain anomalies of the present law, which are pointed out in the Report.[2]

(6) To avoid a possible inconsistency in the legislation, it will also be necessary, as a consequential change, to modify suitably the text of section 5, which is relevant on the subject of conflict of laws.[3]

On adding the tests that will become operative by virtue of the proposed new provisions relating to formal validity of wills, the restrictive rule contained in section 5 would, to some extent, become inaccurate, since that section provides for only two criteria (law of domicile of a person at the time of his death, or the law of India). On this score, section 5 will need suitable amendment.[4]

(7) Insertion of certain new sections 3A to 3E is recommended, to deal with the rules of conflict of laws as to the formal validity of wills.[5]

(8) Section 4, at present, provides that Part II of the Act (sections 4 to 19) which deals with domicile, **does not apply** to Hindus, Mohammedans, Buddhists, Sikhs or Jains. It is, however, desirable that Part II of the Act should be extended to the persons who are at present excluded from its scope by section 4. The reason is, that even now, the rules contained in sections 5 to 18 governing domicile are, by judicial decisions, followed, in principle, in determining the domicile of the excluded persons. Section 4 should therefore be deleted.[6]

(9) In regard to section 5, which deals with the law that will regulate succession to the immovable and movable property of a person deceased, it is necessary to provide an exception for cases where the deceased has, by his will, expressly opted for applying the national law in relation to succession to his movable property.

This change should be carried on in section 5, even if the recommendation for the addition of liberal provisions generally in regard to the law determining the validity of execution of wills is not accepted.[7]

(10) In the light of the separate recommendation for inserting certain tests relating to the formal validity of wills which are not contained in present section 5, section 5 will require consequential amendment, by adding, at the end of that section, the following new sub-section:—

"(3) The provisions of this section shall be subject to those of Chapter 1A."[8]

(11) With reference to section 6, which provides that a person can have only one domicile for the purpose of regulating succession to his movable property, it is desirable to provide that where it is difficult to determine the domicile of a person by reason of the fact that he has two or more places of permanent residence, the place where he last permanently resided shall be the place of his domicile. Section 19 may be the appropriate place for carrying out this object, and it is therefore, recommended that a suitable Explanation should be added to that section for the purpose.[9]

[1]Paragraph 3.20.

[2]Paragraphs 4.2, 4.18 and 4.20.

[3]Paragraph 4.18, second sub-paragraph and paragraph 5.19.

[4]Paragraphs 4.14 and 4.19.

[5]Paragraph 4.20.

[6]Paragraphs 5.12 to 5.15.

[7]Paragraph 5.20 to 5.22.

[8]Paragraph 5.23.

[9]Paragraph 5.25.

(12) Under section 7, latter half, the domicile of origin of a posthumous child is that of the father of the child at the time of the father's death. This rigid provision might lead to certain anomalies, which are pointed out in the Report. It is, therefore, recommended that in section 7, latter half, the mother's domicile should be substituted in place of the father's.[1] In certain exceptional circumstances, however, such a rule might not benefit the child, for example, where the mother deliberately and **mala fide** changes the domicile so as not to benefit the child. For this purpose, section 14 may be amended to the effect that where the change of domicile effected by the mother is not for the welfare of the minor, the change in the domicile of the minor, which may otherwise follow from a change of domicile on the part of the mother, is not to be regarded as a necessary consequence of change in the mother's domicile.[2]

(13) As regards section 7, latter half, as well as section 14,, to carry out the above recommendations, suitable re-draft/amendment have been recommended in the Report.[3]

(14) With referere to section 10, which deals with the acquisition of a new domicile, a verbal change is recommended so as to substitute, for the existing word "man", the word "person".[4]

(15). Illustration (i) to section 10 should be verbally amended, and illustrations (vi) and (vii) to that section should be deleted as obsolete, for reasons given in the Report.[5]

(16) The Explanation to section 10 should be revised as under :—

> *Explanation*—A person is not deemed to have taken up his fixed habitation in India or in any other country merely by reason of his residing there in serivce of any Government, authority or person or in the exercise of any profession or calling, but if a person, having gone to another country for the purpose of service or the exercise of any profession or calling intends to remain there, he may acquire a domicile in that country."[6]

(17) In regard to section 11 which deals with a special mode of acquiring domicile by making a declaration in the prescribed office, it is desirable to clarify its scope (which is intended to be a limited one) by adding an Explanation to the effect that the provisions of the section confer a limited domicile ***only for the purpose*** *of regulating succession to movable property,* and not for any other purpose.[7]

(18) Section 11 provides that "any person" may acquire a domicile in India by depositing a specified declaration. It should be made clear that the section is not intended to cover the case of a person who is not competent to contract. The section should, therefore, be amended by adding, after the words "any person," the words "competent to contract by the law of the country in which he was immediately before such declaration domiciled."[8]

(19). As regards section 14 which deals with the domicile of the minor, certain changes, based largely on section 4, Domicile and Matrimonial Proceedings Act, 1973 of England, are recommended.[9]

(20) Further, from the scope of section 14, the case where the parent *mala fide* changes his domicile, should be excluded. This change has been recommended by the Commission while dealing with section 7.[10]

[1]Paragraph 5.28.
[2]Paragraph 5.28 A.
[3]Paragraph 5.29.
[4]Paragraph 5.37.
[5]Paragraph 5.42.
[6]Paragraph 5.41.
[7]Paragraph 5.46.
[8]Paragraph 5.47.
[9]Paragraph5.58.
[10]Paragraphs 5.27 and 5.59.

(21) To provide for the domicile of a minor who has no parent and has only a guardian, the following new section should be inserted :—

"14A. A change in the domicile of a guardian other than a parent brings about a change in the domicile of the ward, unless, by virtue of the change of domicile, the guardian ceases to be guardian and the relationship of guardian and ward thereby ceases."[1]

(22) Section 15 provides that, by marriage, a woman acquires the domicile of her husband, if she had not the same domicile before. How far the section should be retained in its present form, depends on the view to be taken with reference to section 16.[2]

(23) As regards section 16 which, in its main paragraph, provides that the wife's domicile during marriage follows her husband's domicile, it is necessary to substitute a different rule, which would leave the domicile of a married woman to be governed by the rules that will otherwise apply.

(24) The amendment of section 16 recommended above,[3] would render the Exception to section 16 unnecessary. The Exception provides that the wife's domicile no longer follows that of her husband, if they are separated by the sentence of a competent court or if the husband is undergoing a sentence of transportation. However, if section 16 is not amended as recommended above, it will be necessary to carry out certain verbal changes in the Exception, having regard to current usage and law. Hence, if the main paragraph of section 16 is to be retained in the present form, the Exception to the Section should be revised as under:—[4]

"*Exception.*—The wife's domicile no longer follows that of her husband if they are separated by a decree of judicial separation or the husband is undergoing a sentence analogous to transportation."

(25) If sections 15 and 16 (relating to the effect of marriage on domicile) are retained without substantial amendment, a new section 16A should be inserted to deal with the domicile of widows and divorced woman, as under :—[5]

"16A. (1) A widow retains, after the death of her husband, her late husband's last domicile until she changes it in accordance with the provisions of this Act.

(2) A divorced woman retains, after the divorce, her former husband's last domicile, until she changes it in accordance with the provisions of this Act."

(26) Section 18, at present, provides that an insane person cannot acquire a new domicile in any other way than by his domicile following the domicile of another person. It is recommended that the section should be revised as under :—

"18. The domicile of an insane person follows that of the person in whose care and protection he is for the time being."[6]

(27) To meet cases where domicile of a person cannot be determined, new section 18A should be inserted, on the following lines :—

"18A. Where it is difficult to determine the domicile of a person by reason of the fact that he has two or more places of permanent residence, the place, being one of the two or more places aforesaid, where such person last resided permanently, shall be deemed to be the place of his domicile."[7]

[1]Paragraph 5.61.

[2]Paragraph 5.62.

[3]Paragraph 5.74.

[4]Paragraph 5.75.

[5]Paragraph 5.78.

[6]Paragraph 5.83.

[7]Paragraph 5.84.

(28) To provide for cases where foreign law cannot be easily proved, the following new section 19A should be inserted :—

"19A. The court may, for the purpose of this Chapter, presume that the law of a foreign country is the same as that of India."[1]

(29) Section 22(1) should be revised as under :—

"(1) The property of a minor may be settled in contemplation of marriage, provided the settlement is made by the minor—

(a) with the approbation of the minor's father or

(b) *if the father is dead or absent from India or under disability, with the approbation of the minor's mother,* or

(c) if both the *father and the mother are* dead or absent from India or under disability, with the approbation of the High Court."[2]

(30) To clarify the position under section 29 on the points discussed in the Report, two recommendations are made :—

(a) The Travancore Christian Succession Regulation[3] of 1092 should be repealed by an express provision. This course may be adopted if, as a matter of social policy, it is considered that the Indian Succession Act should apply to the persons governed by the Travancore Regulation, referred to above.

If, on the other hand, it is considered that as a matter of social policy, the provisions of the Travancore Christaian Succession Regulation should govern succession to the persons concerned, then there should be inserted a provision in section 29 of the Indian Succession Act to the effect that the Travancore Regulation would apply to Christians governed by that Regulation in respect of intestate succession—

(i) in the State of Kerala, and

(ii) the adjoining areas in the State of Tamil Nadu (in the district of Kanya Kumari and Shencottah taluk).

(b) Besides the above amendment, an Explanation should be added to section 29(2) of the Indian Succession Act, to the effect that "law" in this section does not include custom.[4]

(c) The recommendation made above regarding the Travancore Succession Regulation applies with necessary adaptation, to the Cochin Succession Act also.[5]

(d) If the Indian Succession Act, 1925, becomes applicable to the persons in question, provisions made for daughters by the father should be taken into account when the succession opens on intestacy. It is therefore, recommended that suitable provision should be made to the effect that from the share to be distributed to a daughter on intestacy, the amount or value of the property so provided by the father during his lifetime should be deducted, provided the following conditions in favour of the daughter are fulfilled :—

(i) the making of such provision is evidenced in writing, whether or not the writing is stamped or registered; and

(ii) the amount of the provision or its value, on each individual occasion, is not less than five hundred rupees.

[1]Paragraph 5.88.
[2]Paragraph 6.10.
[3]Paragraph 8.12.
[4]Paragraph 8.12.
[5]Paragraph 8.12.

Intestates other than Parsis : Sections 31 to 49

(31) Where the intestate governed by section 33 leaves no surviving issue, parent, brother or sister of the whole blood or issue of such brother or sister, his whole *estate* should pass to the widow. On this point the provision in section 46, Intestates Estates Act, 1952 (Eng.) is worth adopting, being in consonance with the present day sentiments. Section 33 should be amended accordingly.[1]

(32) Section 33A, providing for the compulsory share of the widow where the deceased has left no lineal descendants, should be amended so as to—

(i) increase the amount from 5,000 rupees to Rs. 35,000; and

(ii) increase the rate of interest from 4 p.c. to 9 p.c.[2]

(33) Section 34 provides that where the intestate has left no widow, his property shall go—

(a) to his lineal descendants; or

(b) to those who are of kindred to him, not being lineal descendants, according to the prescribed rules; or

(c) if no kindred are left, then to the Government.

The most usual cases under the last part are of illegitimate persons. Although, technically, their property goes to Government, it appears that there was practice in the past of the Crown (now, the State) re-granting the property to certain relatives, in case of illegitimate persons.[3]

The Law Commission has not been able to ascertain whether these arrangements still continue. However, social justice requires that the need for such arrangements should be considered in the context of section 34.[4]

(34) There is also a point of drafting pertaining to section 34. The corresponding provision in the Hindu Succession Act is more precise than the provision in the section 34 of Indian Succession Act. The Hindu Succession Act (section 29) provides that the Government takes the *property subject to all the obligations of the heir.* It is recommended that in section 34, for the last six words "it shall ..... the Government", the words *"such property shall devolve on the Government; and the Government shall take the property subject to all the obligations and libabilities to which an heir would have been subject,"* should be substituted.[5]

(35) Even in cases governed by sections 37—39, there should be succession *per stripes,* as that would be more in consonance with the general sense of the community. Section 37 should be revised as under, to carry out this object.

Revised section 37

"37. Where the intestate has left surviving him a child or children, but no more remote lineal descendant through a deceased child, the property shall—

(a) belong to his surviving child, if there is only one, or

(b) shall be divided among all his surviving children as if section 40 applied to the case."[6]

"child includes—

(a) an adopted child, in the case of any one whose personal law permits adoption.

(b) an illegitimate child."[7]

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[1]Paragraphs 9.5. and 9.6 and 9.8.

[2]Paragraph 9.8.

[3]Paragraph 9.11.

[4]Paragraph 9.12.

[5]Paragraph 9.13.

[6]Paragraph 9.17.

[7]Paragraph 8.20.

(38) Section 38 should be revised as recommended in the Report.[1]

(39) With reference to sections 43—46, even where brothers and sisters of the intestate are alive, the father and mother should take the property (sharing equally) and if only one of them survives, he or she should take the whole.[2]

(40) In regard to section 47, it should be made clear that the section does not apply unless there is at least one brother or sister alive.[3]

(41) With reference to section 48, which provides that where the intestate has left neither lineal descendant nor parents, nor brother, nor sister, the property of the intestate shall be divided equally among relatives in the nearest degree of kindred to the deceased, an Explanation should be added to the effect that where such relatives are children or brothers or sisters of the intestate, they shall take *per stirpes*. Illustration (iv) to section 48 should also be revised, accordingly.[4]

(42) Section 51 (succession to a male Parsi—division of his property among his widow, children, and parents) gives to the sons double the share of the daughters. This discrimination against women should be removed.[5]

(43) Similarly, in sections 54(d) and 55, the present provision giving males double the share of each female standing in the same degree of propinquity should be amended, so as to remove the disparity of shares based solely on sex.[6]

(44) In section 59 (competence to make a will), the first paragraph should be revised, so as to provide that a person may, by will, dispose of not only his property, but also any property over which he has a disposing power which he can exercise by will.[7]

(45). To section 59, the following proviso should be added :—

"Provided that any person, whatever his age may be, may, by will, revoke or alter any will appointing a guardian or guardians, for his child during minority."[8]

(46) Explanation 1 to section 59 (power of married woman to make a will) is not intended to dispense with the requirements of capacity to make a will as prescribed in the main paragraph of the section. To make this clear, the Explanation should be revised as under :—

"*Explanation* 1.—A married woman, *if otherwise competent to make a will,* may by will dispose of any property which she could alienate by her own act during her life."[9]

(47) The law should be amended by providing that the court exercising jurisdiction under the Indian Lunacy Act, 1912, in relation to the property of a lunatic shall have power to make an order, direction or authority for the execution for the lunatic, of a will making any provision which could be made by a will executed by the lunatic if he were a person of sound mind. The amendment could be in the form of—

(a) a new section, to be inserted in the Indian Succession Act, as section 59A; or

(b) two new sections, to be inserted in the Indian Lunacy Act, 1912, as sections 49A and 71A, intended to provide for the powers of the High Court and the district court, respectively, on the subject.[10]

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[1]Paragraph 8.24.
[2]Paragraph 8.29.
[3]Paragraph 8.33.
[4]Paragraph 8.37.
[5]Paragraph 10.6.
[6]Paragraph 10.7.
[7]Paragraph 12.11.
[8]Paragraph 12.12.
[9]Paragraphs 12.13 and 12.14.
[10]Paragraphs 12.20 to 12.22

(48) The right to appoint, by will, a guardian for a minor child, given by section 60 to the father, should be given to the mother also, where the father is absent or not competent to act.[1] Further, it should be made clear that only a *person of sound mind* may appoint a guardian during the minority of the child.[2]

[A suitable re-draft of section 60 is suggested for the purpose][3]

(49) In section 61, the case of *mistake* of the *testator* should be covered, by adding, after the words "the free agency of the testator," the words "or by mistake."[4]

(50) In section 63(a) (which deals with the formal requirements of wills), it should be made clear, *by adding an Explanation,* that the "other person" signing for the testator is competent to attest the will under clause (c) of the section.[5]

(51) As a consequential change, it should also be made clear that the provisions of clause (c) of section 63 are subject to those of clause (a) and of the Explanation thereto (which is to be added as above).[6]

(52) In section 64, which deals with documents incorporated in will by reference, it should be made clear that the document must not only be acutally in existence, but must be also described (in the will) as actually, in existence.[7]

(53) Section 65 should be extended to Hindus etc. by amending the Third Schedule.[8]

(54) In Section 65, it should further be provided that a person otherwise competent to make a privileged will can do so, whether or not he has completed the age of eighteen years.[9]

(55) A new section 65A should be inserted, to confer, on persons affected by natural calamities, the right to make a privileged will, where there is a reasonable apprehension of death.[10]

(56) If the provisions of the Act relating to privileged wills are to be extended to persons affected by calamity (by inserting section 65A) as recommended above, section 66 will also require consequential changes.[11]

(57) On the insertion of a new section (as recommended above) to extend the facility of "privilged wills" to persons affected by natural calamity, (proposed new section 65A) consequential changes will become necessary in section 66(2), caluses (e), (f) and (g). In these clauses, the words "soldier, sailor or airman should be replaced by the words" the person entitled to make a privileged will.[12]

(58) Section 67 should be amended by inserting the following exception in the section, before the Explanation :—

> *"Exception—For the purposes of this section, the attestation of a will be a person to whom or to whose spouse there is given any such benefit as is described in this section shall be disregarded—*
>
> (a) *Where, by means of an oral trust, a beneficial interest is conferred upon an attesting witness who at the time of attestation is unaware of the secret trust in his favour;* or

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[1]Paragraphs 12.26 to 12.29.
[2]Paragraphs 12.27 and 12.28.
[3]Paragraph 12.29.
[4]Paragraph 12.52.
[5]Paragraphs 13.9 and 13.21.
[6]Paragraph 13.23.
[7]Paragraph 13.26.
[8]Paragraphs 13.4 and 14.11.
[9]Paragraph 14.12.
[10]Paragraph 14.20.
[11]Paragraph 14.23.
[12]Paragraphs 14.20 and 14.24.

(b) *where the marriage to an attesting witness of a person taking a beneficial interest under the will takes place after the attestation,* or

(c) *where at the time of the attestation it could not be predicted that the attesting witness was person taking a beneficial interest under the will;* or

(d) *where the will has been witnessed by not less than two other witnesses, to whom no such benefit as is described in this section is given by the will."*[1]

(59) Section 69 should be revised as under :—

"69. (1) Every will, *not being a mutual will,* shall be revoked by the marriage of the maker, except a will made in exercise of a power of appointment, when the property over which the power of appointment is exercised would not, in default of such appointment, pass to his or her executor or administrator, or to the person entitled in case of intestacy.

Explanation—Where a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property.

Exception—A will expressed to be made in contemplation of a marriage or indicating an intention that it was so made shall not be revoked by the solemnization of the marriage contemplated; and such an intention may be inferred from any portion of the will showing that marriage was thought of.

(2) Where the law of domicile of the maker of the will at the time of death has a different rule, that rule shall prevail, and the provisions of sub-section (1) shall not apply to the extent to which there is inconsistency between the two."[2]

(60) Specific provision (proposed section 69A) to deal with the effect of divorce or annulment of marriage, on wills should be inserted, on the lines recommended in the Report.[3]

(61) If, as recommended above (under section 69), the case of effect of divorce or annulment of marriage is added in the Act, it will also be necessary to amend section 70, by adding, after the word "marriage", the words "*or dissolution or annulment of marriage.*"[4]

(62) The following new section is recommended to be inserted as section 70A :—

"70A. *Where, after the execution of the will by a Hindu testator who has, in the will, purported to deal with co-parcenary property, a son is born to that testator, the will shall stand revoked as regards all property, unless the will contains an express provision indicating a contrary intention."* [5]

(63) The present structure of section 72 being complicated, its main paragraph should be re-structured, as recommended in the Report.[6]

CONSTRUCTION OF WILLS—SECTIONS 74—111.

(64) To section 89, an Explanation (regarding bequests for *Dharma*) should be added on the lines of section 10, Bombay Public Trusts Act, 1950.[7]

(65) The various rules as to construction of will, contained in section 99 are intended to be applicable only if a different intention is not disclosed. This should be made clear by inserting, in section 99, at an appropriate place, in the words "in the absence of any intention to the contrary."[8]

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[1]Paragraph 15.16.
[2]Paragraph 15.23.
[3]Paragraph 15.32.
[4]Paragraph 15.34.
[5]Paragraph 15.38.
[6]Paragraph 15.41.
[7]Paragraph 16.26.
[8]Paragraph 16.39 and 16.46.

(66) The following Explanation should be inserted in section 99 on the subject of a child in the womb :

"Explanation—For the purposes of this section, a child is presumed to have been in the womb at time of death of a person if the child was born within three hundred and fifteen days of such death."[1]

(67) But if the illustration is to be retained at all, then illustrations (vii) and (viii) should be amended, so as to incorporate the reasoning on which the view taken in the illustrations is based. In illustration (vii), the words *"since it would be against public policy"* should be added at the end, And, in illustration (viii), the words *"since there is evidence of contrary intention"* could be added at the end for the purpose.[2]

(68) Section 100 should be suitably re-drafted *so as to refer to a reputation or relationship, but not necessarily a reputation of legitimacy.* The object could be achieved by substituting, in place of the words "being such relative", the words *"being a child, son or daughter or otherwise standing in the relationship in question".*

Revised section 100 would then read thus—

"100. In the absence of any intimation to the contrary in a will, the word "child", the words "son", the word "daughter", or any word which expresses relationship, is to be understood as denoting only a legitimate relative, or, where there is no such legitimate relative, a person who has acquired, at the date of the will, the reputation of being a *child, son or daughter or otherwise standing in the relationship in question."*[3]

(This recommendation to be carried out, only if the alternative recommendation to revise the section is not accepted).[4]

(69) Section 100, illustration (vii), is anachronistic. Both from the juristic point of view and on wider considerations of social justice, a bequest to an illegitimate child, whether already begotten or otherwise, should not be regarded as against public policy. In the Transfer of Property Act, 1882 there is no provision corresponding to section 100, illustration (vii), as regards gifts during life time and there is no reason for retaining any such provision in the law of testamentary succession.[5]

(70) Illegitimate children should be regarded as *prima facie* included within the scope of reationship, in the absence of expression of a contrary intenuon. If a person begets an illegitimate child, it would not, in general, be unrealistic to presume that he would, in making a testamentary disposition, like to benefit his illegitimate children as well. There will still remain scope for the expression of a contrary intention by him. But, subject to this safeguard, it would be proper, as a matter of social justice, to reverse the present rule, which was framed at a time when the notions of society on the subject under consideration were much more rigid than they are now. Section 100 should be revised and new section 100A should be inserted for the purpose, as recommended in the Report.[6]

(71) In regard to section 105, illustration (vi), dealing with the situation of "commorients" (deaths of two or more persons in a common disaster), attention is drawn to the Law Commission's recommendation in its Report on the Evidence Act.[7]

If the will does not, in any manner, indicate an intention that the two persons are to take it jointly, the presumption should be *in favour of a tenancy in common.*

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[1]Paragraphs 16.45, 16.47 and 16.53.

[2]Paragraph 16.64.

[3]Paragraph 16.61.

[4]See *infra* (summary of paragarphs 16.72 to 16.76).

[5]Paragraph 16.69.

[6]Paragraphs 16.72 to 16.76.

[7]Paragraph 16.92 *et seq.*

For this purpose, the law should be amended; and an Explanation to section 107 should be added somewhat in these terms.

"Explanation—If the will does not, in any way indicate an intention that the legacy is given to two persons jointly, it shall be presumed that the testator intended to give them distinct shares of it."[1]

(72) Section 113 should either be deleted, or amended as recommended in the Report.[2]

(73) Section 114 should be revised as recommended in the Report.[3]

(74) In section 118, the changes of substance and drafting, as recommended in the Report, should be carried out.[4]

In brief, the amendments recommended in section 118 are :—

(a) Removing the present provision for compulsory deposit of the will, in cases where the section applies;

(b) removing the present provision that there should be the prescribed minimum interval between execution of the will and death of the testator:

(c) substituting a requirement that (in the case of a will governed by the section), one of the near relatives of the testator must be an attesting witness;

(d) defining the expression "near relative", as meaning a nephew or a niece or nearest relative; and

(e) inserting, in the section, an Explanation on the following lines :—

"Explanation—The spouse of a person shall be deemed to be the nearest relative of that person for the purposes of this section."

(75) New section 118A should be inserted in the Act as follows :—

118A. *The restrictions contained in sections* 114, 116, *and* 117 *shall not apply in the case of a bequest for the benefit of the public, for the relief of poverty or the advancement of religion, education, commerce, health, safety or any other object beneficial to mankind."*[5]

(76) In section 120, Exception, a proviso should be inserted at the end, to make it clear that the Exception does not affect the provisions of section 121.[6]

(77) Section 124 should be brought in line with the present English law. It is recommended that the following proviso should be added to section 124, for the purpose.

"Provided that :

(a) *where the event so specified is the death of any person without issue or unmarried or before a particular age or accompanied by any other specified circumstance, and*

(b) *that person is the holder of a prior bequest contained in the will, then, unless the will indicates an intention to the contrary, the legacy shall take effect whether the death happens before or after the period when the prior bequest takes effect."*[7]

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[1]Paragraph 16.104.

[2]Paragraphs 17.7 and 17.8.

[3]Paragraphs 17.10, *et. seq.*

[4]Paragraphs 17.11 and 17.19.

[5]Paragraph 17.23.

[6]Paragraph 18.5.

[7]Paragraph 20.16.

(78) The fourth illustration to section 124 should also be revised in conformity with the above recommendation. The object could be achieved by reframing the last eleven words of the illustration, as under[1] :—

"in case B dies without children *during* or *after* the lifetime of A".

The second illustration to section 124 should also be revised, as recommended in the Report.[2]

(79) Under section 127, a bequest upon a condition, the fulfilment of which would be contrary to law or to morality, is void. This section should be amended by adding the words "or to public policy" after the words "or morality."[3]

(80) Section 136 should be revised as recommended in the Report, the object being to provide that where the testator has not prescribed a particular time limit for the performance of a condition attached to a bequest, the donee should have his (donee's) entire lifetime for performing the condition.[4]

(81) Section 137 should be amended by adding, after the word "fraud", the words "of a person who would be directly benefitted by non-performance of the condition."[5]

Bequests with directions etc.—sections 138—144

(82) In sections 138-139, the present word "fund" would seem to suggest that the sections are intended to apply only to movable property. But the sections should apply to all types of property and, accordingly, the word "fund" should be replaced by the word "property", with necessary consequential change[6].

Legacies to executors—section 141

(83) Section 141 (legacy to executors) should be made subject to an intention to the contrary, by adding, at the end, the words "unless a different intention appears from the will."[7]

Demonstrative legacies—section 151

(84) A recommendation is made to combine sections 151 and 157.[8]

Ademption—sections 152—166

(85) Conversion of an asset by *legislative action* falls within section 163, and is outside section 152. The cause should be excluded from section 152 by express words[9] and it is recommended that in section 152, after the words, "has been converted into property of a different kind", the words "by act of parties" should be inserted for the purpose.[9]

(86) Further, section 152 should be made subject to a different intention.[10]

The will should govern the converted property as it would have governed the original property, if such an intention can be inferred.[11]

(87) The situations in which sections 155 and 156 operate are distinct from each other and this should be brought out by a suitable re-casting of the section. There is also need to introduce symmetry between the two sections. The two sections should, therefore, be re-cast, as recommended in the Report.[12]

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[1]Paragraph 20.16.
[2]Paragraph 20.7.
[3]Paragraph 21.7.
[4]Paragraph 21.16.
[5]Paragraph 21.20.
[6]Paragraph 22.7.
[7]Paragraph 23.4.
[8]Paragraphs 25.3, 26.12, 26.13 and 26.14.
[9]Paragraph 26.6.
[10]Paragraph 26.6.
[11]Paragraph 26.6.
[12]Paragraph 26.10.

(88) Overlapping between sections 151 and 157 should be removed, and the law simplified, by combining the gist of the two sections in one section[1].

(89) In regard to section 162, it should be made clear that the section applies to "specific bequests". For this purpose, the section should be amended by substituting, for the words "the thing bequeathed", the words "the thing specifically bequeathed[2]."

Payment of liability in respect of subject of bequest: Sections 167—172

(90) Section 170 (specific bequest of stock in a company) should be suitably amended, so as to add an express mention of shares in a company with a limited liability. A re-draft of the section is recommended for the purpose.[3]

(91) In regard to section 172, it should be made clear that the section applies to "specific bequests". For this purpose, the section should be amended by should be added, after the word "funds", with consequential changes.[4]

(92) There is an inconsistency between sections 173 and 174, and where a fund is set apart for the payment of an annuity, there arises a conflict between the two sections. To remove the conflict, there should be excluded, from section 174, cases where the annuity is for life only, or where it otherwise appears that it is not intended to be perpetual. Re-drafts of the two sections on the above basis are recommended[5].

Legacies to creditors and portioners

(93) A new section 177A should be inserted as under, to deal with bequests to debtors :—

> "177A. Where a creditor bequeaths a legacy to his debtor, and it does not appear from the will that the legacy is to be paid even if the debt is not repaid by the debtor, the debtor shall not be entitled to the legacy unless so much of the debt as has become due and payable has been repaid[6]."

Election :—Sections 180—190

(94) The law relating to election in India, as incorporated in section 180, insists on forfeiture and is unduly harsh. Section 180 (the principal section on the subject) should be revised as under[7] :—

> "180. Where a testator, by his will professes to dispose of some thing which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it; and in the latter case, he shall *compensate any person who has, by virtue of such election, lost the benefits provided for him by the will, such compensation not to exceed the benefits which may have been provided by the will for the person so dissenting.*"

(95) Section 181 should also be deleted, if section 180 is deleted as recommended above, since, after the proposed amendment of section 180, there will be no "relinquishment" by the legatee.[8]

96. In section 182 the reference to section 181 should be deleted, if section 181 is deleted as recommended above. Illustration to section 182 will also require change, if the recommendation to substitute (in section 180) compensation in place of forfeiture is accepted. Illustration (iv) to section 182 has become obsolete

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[1]Paragraph 26.12.

[2]Paragraph 26.19.

[3]Paragraph 27.10.

[4]Paragraph 28.4.

[5]Paragraphs 29.3 and 29.4.

[6]Paragraph 30.6.

[7]Paragraphs 31.9 to 31.11.

[8]Paragraph 31.12.

in view of present English law as to the age of majority and should be deleted. On the above basis, the illustrations to section 182 should be revised as recommended in the Report.[1]

Gifts in contemplation of death : section 191

(97) Section 191 should be extended to Hindus etc. by amending the Third Schedule.[2]

(98) In regard to section 192, judicial interpretation of the word "succession" should be codified by adding, after the word "succession" wherever it occurs in the section, the words "testamentary or intestate".[3]

(99) With reference to section 200 (suit in the name of the curator), it should be made clear that it is not necessary that the curator must have been specifically authorised to institute or defend the suit.[4] It should also be made clear, by amending section 200, that it is not necessary for the curator to obtain a succession certificate before instituting a suit to recover the debt.[5]

Drafts of Explanations 1 and 2, to be added to section 200 on the above points, are suggested.[6]

Representative title of the deceased—sections 211 to 216

(100) A special provision is needed to cover shares, in the context of the grant of letters of administration (section 211). There is also need to cover all cases of survivorship, in the context of grant of succession certificate. Accordingly, an Explanation should be added to section 211, as under :—

> *"Explanation*—Where shares in joint stock company belonging to an undivided family governed by the Mitakshara school of Hindu law stand in the name of the karta of the family, letters of administration limited to the shares may, in the event of the karta dying intestate, be granted to the legal representatives of the karta (including, in an appropriate case, the next karta of the family).[7]

The amendment to authorise grant of succession certificate in cases of survivorship is dealt with later.[8]

(101) Section 213, which provides that before title as an executor under a will can be established, probate of the will must be obtained, should be amended, by clarifying that where probate has not been obtained, what is barred is only the passing of a decree in favour of the executor, and not the institution of a suit by him.[9]

(102) From section 213, Indian Christians should be excluded, and consequential changes, where necessary, be made in other sections.[10]

(103) For carrying out the various points made in the Report with reference to section 214, insertion of the following Explanations to section 214 is recommended.[11]

> *"Explanation* 1. *Nothing in this section*[12] *shall be construed as precluding a debtor of a deceased person from making payment of a debt to a person (in this Explanation referred to as the 'payee') claiming, on succession, to be entitled to the effects of the deceased person or to any part thereof, where*

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[1]Paragraph 31.14.

[2]Paragraph 32.9.

[3]Paragraph 33.3.

[4]Paragraph 33.12.

[5]Paragraph 33.13.

[6]Paragraph 33.14.

[7]Paragraphs 34.14 and 34415.

[8]Paragraphs 48.8 and 49.3.

[9]Paragraph 34.18.

[10]Paragraph 34.18A.

[11]Paragraph 34.45 read with paragraphs 34.40, 34.33 and 34.36.

[12]If so considered necessary, the first Explanation (proposed to be added to section 214) could be limited to claims for small amounts.

the debtor is satisfied that the payee is so entitled and has taken from the payee a bond indemnifying the debtor and where a debtor makes such payment in good faith and after due care and attention, he shall not be bound to make payment of the debt again in the person entitled to the effects of the deceased person or to any part thereof, as the case may be; but nothing in this Explanation shall affect any remedy which the person so entitled may have against the payee who has received payment from the debtor[1]."

(104) To section 218, an Explanation should be added as under :—

Explanation—Where the property of a Hindu undivided coparcenary passes by survivorship to the sole surviving coparecener, the sole surviving coparcener shall, for the purpose of this section, be deemed to be a person entitled to the estate of the person on whose death the property so passes, and shall accordingly be entitled to apply for letters of administration under this section[2]."

(105) In section 219(a), illustration (ii) should be revised as under[3] :—

"(ii) The widow has married again since the decease of her husband. This, *in itself*, is not a good cause for her exclusion."

(106) The following new section should be inserted in the Act, as section 222A.

"222A. *The court may by order exclude from acting as executor, a person who, in the opinion of the court, is definitely unfit to administer the affairs of the deceased, whether or not that person has committed waste or breach of trust after commencing administration of such affairs* :

Provided that no such order shall be passed without affording such person a reasonable opportunity of being heard[4]. "

(107) Section 223 should be re-drafted as under :—

"223—Probate cannot be granted—

(a) to any person who is a minor or is of unsound mind, or

(b) to any company, unless it satisfies the conditions prescribed by rules to be made by the State Government in this behalf; or

(c) *to any corporation other than a company, if it is not* legally competent to accept probate[5]."

(108) To section 241, an Explanation should be added to the effect that—

(a) section 241 will apply also where the case falls under section 228; and

(b) if the case falls under section 228, a copy of the will is to suffice and the original will need not be produced.[6]

(109) In view of that has been stated above section 223, section 236 should be revised as follows :—

"236. Letters of administration cannot be granted—

(a) to any person who is a minor or is of unsound mind, or

(b) *to any company unless* it satisfied the conditions prescribed by rules to be made by the State Government in this behalf, or

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[1]Paragraph 34.36.
[2]Paragraph 35.7.
[3]Paragraph 35.9.
[4]Paragraph 35.16.
[5]Paragraph 35.21.
[6]Paagraph 35.31.

(c) *to any corporation other than a company, if it is not legally competent to accept letters of administration*[1].

(110) Sections 237 and 238 should be re-drafted, and new sections 238A and 238B should be inserted, as follows[2] :—

"237. When—

(a) a will has been lost or mislaid *before or after* the testator's death, or has been destroyed by a *natural* event and not by any act of the testator amounting *in law to revocation of the will*, and

(b) a copy of the will or a draft of the will has been preserved, probate may be granted of such a copy or draft, limited until the original or a properly authenticated copy of it is produced."

"238. When a will has been lost or mislaid *in the circumstances mentioned in section* 237, and no copy or draft of the will has been preserved, probate may be granted of its contents if they can be established by oral evidence."

"238A. *In sections* 237 *and* 238, *"will includes a part of* a will.

"238B. *Where a will proved to have been lost in the custody of the testator before his death is not forthcoming after his death, the court may presume that it was destroyed by an act of the testator amounting in law to its revocation.*"

111. Section 241 should be revised as follows :

"241. When any executor is absent from the State in which application is made, and there is no executor within the State willing to act, letters of administration, with the will annexed, may be granted to the attorney or agent of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself.

Exception : *Nothing in this section applies to a case falling within the provisions of section* 273.

Explanation : Where the grant is by the High Court, it is not necessary that the attorney or agent should be residing within the State, provided he resides within India[3]."

(112) Below section 244, the following Explanation should be inserted[4] :—

"*Explanation : In this section, "legal guardian" means a guardian of the property appointed by a person or authority having power to do so, whether within or outside India, but does not include a natural guardian.*"

(113) Section 245 deals with the case dealt with in section 244 and, is indeed, a kind of Explanation to that section. This should be brought out by adding in that section, after the words, "the grant", the words and figures "under section 244".[5]

(114) Section 246 should be revised as follows (to remove overlapping with section 244).

"246. If

(a) sole executor or a sole universal or residuary legatee *is a lunatic,* or

(b) a person who would be solely entitled to the estate of the intestate, according to the rules for the distribution of intestates' estate applicable in the case of the deceased, is a minor or a lunatic,

letters of administration, with or without the will annexed, as the case may be, shall be granted to the person to whom the care of his estate has been committed by competent authority, or, if there is no such person, to such

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[1]Paragraph 35.40.

[2]Paragraph 36.10.

[3]Paragraph 36.16.

[4]Paragraph 36.20.

[5]Paragraph 36.21.

other person as the Court may think fit to appoint, for the use and benefit of the minor or lunatic until he attains majority or becomes of sound mind, as the case may be[1]".

(115) Section 247 should be amended to provide that an application for the appointment of an administrator under the section can be made by any person interested in the estate, and even by a creditor of the deceased[2].

(116) To section 255, an Exception should be added as under[3-4] :—

Exception—Notwithstanding anything contained in this section or in section 256, *where moneys have been deposited in joint account in a bank and the amount thereof is payable to either or any survivor of the persons depositing the money, the application for letters of administration in respect of those moneys may, on the death of either or any of such persons, be made by the survivor."*

Practice in granting and revoking probate etc. sections 264, 302.

(117) Under the present proviso to section 265(1), the appointment of judicial officers as "Delegates" for granting probate etc. in non-contensous cases requires, in the case of High Courts not established by Royal Charter, the previous sanction of the State Government. This proviso should be deleted, as unnecessary at the present day[5]

118. In section 273, the amount of ten thousand rupees should be increased to rupees fifty thousand, in view of fall in the value of the rupee.[6]

(119) In section 291, the following sub-section should be added :—[7]

"(3) *Notwithstanding anything contained in this* section, *the Court may dispense with the taking of a bond* thereunder or *with the need for sureties to such bond where—*

(a) *the person to whom the grant of probate or letters of administration is to be made is the sole legatee or the sole heir of the deceased,* or

(b) *where, for reasons to be recorded, the Court in the circumstances of the case thinks it proper to dispense with such bond or sureties, as the case may be."*[7]

(120) From section 306, the exception for assault and other personal injuries not causing death should be removed.[8]

(121) From section 306 (survival or causes of action after death), the provision for non-survival of proceedings for defamation should also be deleted.[9]

(122) Section 306 should apply to other persons (besides executors or administrators), who represent the estate of a deceased, such as heirs.[10]

(123) Section 306, should, therefore, be revised as follows[11]

"306. All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators *or* representatives, except ..... in cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory."

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[1]Paragraph 36.24.
[2]Paragraph 36.28.
[3]Paragraph 36.40.
[4]Section 250 may require consequential change.
[5]Paragraph 38.3.
[6]Paragraph 38.15.
[7]Paragraph 38.40.
[8]Paragraph 40.11.
[9]Paragraph 40.20.
[10]Paragraph 40.21.
[11]Paragraph 40.22.

ILLUSTRATION

** ** ** ** **

A sues for divorce. A dies. The cause of action does not survive to his representatives."

(124) If, from section 306, the words excluding "personal injuries" are not deleted (as recommended above), then the expression "personal injury" should be defined as recommended, and the expression "representative" should also be added in the section. The amendment should define 'personal injury' as (i) including any disease and any impairment of a person's physical or mental condition, and (ii) excluding injury caused by malicious prosecution.

For the purpose, an appropriate Explanation could be added to section 306.[1]

(125) Section 309 should be modified on the following lines :

(1) Whether or not the will provides for the payment of remuneration to an executor or administrator, so long as the will does not *prohibit* such payment, an executor or administrator shall be entitled to receive or retain reasonable commission or agency charges.

(2) Unless the will otherwise provides or the court otherwise permits, those charges shall not be a higher rate than that for the time being fixed in respect of the Administrator General by or under the Administrator-General's Act, 1963.[2]

(126) From section 310, the case where purchase is sanctioned by the court should be excluded.[3]

(127) Section 311 speaks of a "direction to the contrary", but does not specify where the direction is to be contained. It is recommended that in section 311, it should be made clear that the direction may be either in the will or in the probate.[4]

(128) Section 317 should be amended, by adding the following Exception to the section[5] :

"Exception—Where the Administrator-General is the executor or administrator, he shall not be bound to exhibit an inventory or an account of the estate under this sub-section, unless the court has directed him to do so, in which case he shall exhibit the inventory or the account, as the case may be, within such period as the Court may allow; but copies of the accounts maintained by him shall be filed in court."

(129) Section 324 (2), and the illustration to the section, should be deleted.[6]

(130) If the provisions of the Succession Act relating to domicile are extended to Hindus etc. (as recommended separately), sub-section (3) of section 324 will also have to be deleted, as a consequential change.[7]

(131) In section 330, the illustration should be revised, so as to express the amounts in decimal coinage.[8]

(132) In regard to section 332 (assent of the executor etc. to legacy), the position should be improved by a suitable clarification, to the effect that nothing in this section shall be deemed to invalidate a transfer of the property (which is the subject-matter of the legacy) by the legatee before assent by the executor or administrator, but every such transfer shall be regarded as conditional on the

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[1]Paragraph 40.15.
[2]Paragraph 40.31.
[3]Paragraph 40.32.
[4]Paragraph 40.33.
[5]Paragraph 41.17.
[6]Paragraph 41.30.
[7]Paragraph 41.30.
[8]Paragraph 41.36.

assent of the executor or the administrator, as the case may be. The section should be amended by inserting an Explanation on the above lines.[1]

Also, in illustration (i) to the section, the words "Imperial Bank of India" should be replaced by the words "State Bank of India.[2]

(133) Section 362 needs a verbal change, namely, the last four words should read "wasting *on the part of* the executor"[3] (and not "wasting of the executor").

(134) In section 367, a new sub-section should be inserted, as under :—

"(2) *Where there has been a grant of administration in a country other than the country of domicile and other than India, the executor or administrator may, with the permission of the Court, take the same action as he could have taken if there had been a grant in a country of domicile other than India; and the provisions of this section shall, with necessary modifications, apply to the case as they apply if there had been a grant in a country of—domicile other than India.*"

Succession Certificates—Sections 370 to 390

(135) Section 370 bans the grant of succession cerificate, *inter alia,* in cases where letters of administration (or probate) are mandatory[4]. Letters of administration are mandatory in the case of Christians other than Indian Christians dying intestate—to mention the most usual situation. The restriction in section 370 is not required, except where *probate* is mandatory. The bar in section 370 should be limited only to cases where probate is mandatory. In the case of probate, the will has to be proved and it is understandable that without proof of the will, payment should not be made on the strength of a mere succession certificate. But this reasoning does not apply with the same force to letters of administration, where title is sought to be derived on the basis of a right of inheritance conferred by law and no formal writing is, in general, to be proved.

Accordingly, section 370(1) should be revised[5] as under :—

"(1) A succession certificate (hereinafter in this Part referred to as a certificate) shall not be granted under the Part with respect to any debt or security to which a right is required by section 212 or section 213 to be established by ..... probate."

(Existing proviso to be omitted, as a consequential change).

(136) There should also be inserted in section 370, a provision for the grant of succession certificate on survivorship. By making this amendment, the legislature would be merely giving recognition to what is already the practice in some part of India. Although a certificate, issued to certify survivorship, should be, strictly speaking, described as a "Survivorship certificate", it is not proposed to change the present nomenclature ("Succession Certificate"), since it has, by now, become familiar to all concerned.

Accordingly, the following proviso should be added to section 370 (1) :

"Provided that nothing contained in this section shall be deemed to prevent the grant of a certificate to any person claiming to be entitled on survivorship to the effects of a deceased Hindu, Mohammedan, Buddhist, Sikh, Jain or Parsi or to any part thereof, in respect of any debt or security by reason that the right thereto is claimed by survivorship and not by succession[6]."

(137) Section 371 should be revised as follows :—

"371. The District Judge within whose jurisdiction *the deceased, at the time of his death, had a fixed place of abode, or any property, movable or immovable,* may grant a certificate under this Part[7]."

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[1]Paragraph 42.3.
[2]Paragraph 42.2, footnote.
[3]Paragraph 46.8.
[4]Section 212(1).
[5]Paragraphs 48.4 and 48.5.
[6]Paragraphs 48.6 and 48.8.
[7]Paragraphs 48.13 and 48.17.

(138) To section 372, an Explanation should be inserted below :—

"Explanation—Where the applicant for succession certificate is a minor, he may apply through a next friend as if he were a plaintiff in a suit, and the provisions of the Code of Civil Procedure, 1908, *shall, so far as may be, apply in relation to such next friend as they apply in relation to a next friend sueing under Code*[1]."

(139) In section 379, a new sub-section should be inserted as follows[2] :—

"(4) *If the application is allowed with or without condition, the sum shall not be refunded, even if, by reason of breach of the condition, the certificate cannot be granted.*"

(140) It is also recommended that the provisions of sub-section (3) of section 379 should be made subject to those of new sub-section (4), which is proposed to be inserted, as above, in section 379.

Section 379 (3) should, therefore, begin as follows :—

"(3) *Subject to the provisions of sub-section* (4) any sum received ……[3]".

(141) New section 386A should be inserted, as recommended, to provide the facility of succession certificate to properties other than debts[4]

Succession by homicide (proposed section 390-A)

(142) A new section 390A should be inserted, disqualifying a person who commits culpable homicide, or abets its commission, from inheriting, or from taking as a legatee,—

(a) the property of the person whose death is so caused; or

(b) any other property in furtherance of the succession to which he or she committed or abetted the commission of such homicide.

The new section will not apply to persons to whom section 25 of the Hindu Succession Act, 1955, applies.[5]

Miscellaneous provisions (section 391) and Schedules :

(143) The Third Schedule to the Act will need changes in the light of the points discussed under various sections (sections 63—65) etc[6].

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[1]Paragraph 48.23.

[2]Paragraph 48.35.

[3]Paragraph 48.35.

[4]Paragraph 48.42A, read with paragraphs 48.19A to 48.19C.

[5]Paragraph 49.23.

[6]Paragraph 50.5.

85-L/B(N)144LJ&CA—625—3-5-86—GIPS

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