THE

INDIAN SUCCESSION ACT,

1865,

(ACT X OF 1865),

WITH A COMMENTARY,

AND THE

PARSEE SUCCESSION ACT, 1865,

ACTS XII AND XIII OF 1855,

AND THE

ACTS RELATING TO THE ADMINISTRATOR GENERAL,

WITH NOTES,

BY

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Τρίφονται γὰρ πάντες οἱ ἀνθρώπινοι νόμοι ὑπο ἑνὸς τοῦ θείου.

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BY THE EDITOR.

A Treatise on the Liens of Legal Practitioners. London, Sweet, 1860.

Bythewood and Jarman's Conveyancing. Vol. 8, Part I. Powers of Attorney. London, Sweet. 1861.

Reports of Cases decided in the High Court of Madras in 1862 and 1863. Madras, Higginbotham. 1864.

Reports of Cases decided in the High Court of Madras, from January to August, 1864. Madras, Higginbotham. 1864.

Hindú Law-Books, with Notes and an Index. Madras, Higginbotham. 1865.

This Volume contains—

The *Vyavahára Mayúkha*, translated by Borrodaile.
The *Dáyabhága* of Jímúta Váhana, translated by Colebrooke.
The Law of Inheritance, from the *Mitákshará*, translated by Colebrooke.
The *Dáyakrama-sangraha*, translated by Wynch.
The *Dattaka Mímánsá*, translated by Sutherland.
The *Dattaka Chandriká*, translated by Sutherland.

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PREFACE.

THE present volume contains the Indian Succession Act, 1865, with the Parsee Succession Act (Act XXI of 1865), Act XII of 1855 (to enable executors, administrators or representatives to sue and be sued for certain wrongs), Act XIII of 1855 (to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong), and the three Acts relating to the Administrator General. To the first of these I have added a Commentary, to the rest, Notes, and to the whole, an Index.

The Indian Succession Act, which, with the commentary thereon, constitutes the bulk of this volume, is the first part of the body of substantive law framed for India by the Commissioners appointed by Her Majesty for that purpose. It comprises the law of succession and inheritance generally applicable to all classes domiciled in British India, other than the Hindús, Muhammadans and Buddhists, each of which portions of the population has laws of its own on the subject. In preparing this Act the law of England has been used as a basis, but the Commissioners have deviated from that law in some instances, of which the following are the principal:—

First.—The distinction between the devolution of, moveable and that of immoveable property is abolished. All rights, as under the Roman law, will devolve *ab intestato* agreeably to a uniform and coherent scheme. And we thus get rid of the needless distinction between realty and personalty, which, as Mr. Austin observes, is one prolific source of the intricacy of the system of the law of England (*a*).

(*a*). The Province of Jurisprudence, 2d. ed. pp. XCIV, XCV.

Second.—After the 1st January, 1866, no person is, by marriage, to acquire any interest in the property of the person whom he or she marries or to become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried. This abolishes the husband's interest as tenant by the courtesy, the wife's as tenant by dower: as to her property it has the effect of a settlement of it to her separate use *without* restraint on anticipation; and it will make other important changes, which I have attempted to point out, in the common-law rights, liabilities and disabilities arising out of the relation of husband and wife. In case of intestacy the widow has the same rights in respect of all the property of her husband as a widow has in England in respect of her husband's persona lproperty; and the widower has such rights in respect of his wife's property as the wife has in respect of his property where she is the survivor.

Following the example set by the framers of the Penal Code, the Commissioners have made copious use of Illustrations (mostly taken from the English Equity Reports) which "are not merely examples of the law in operation, but the law itself, showing by examples what it is." These, it is expected, will obviate many questions of construction and do much to fix the sense of the law: they will at all events get rid of the objections which might justly be made to a Code composed exclusively of abstract propositions. As the Commissioners observe:

"The operation of judicial decisions in making law precise is a natural process, and that process is adopted and improved in the use of illustrations. The laws of England, as they exist, are to be found partly in rules and principles, some of which are contained in statutes and some in books not stamped with any legislative or even judicial authority, and partly in the reports of decisions by judicial tribunals. Law framed in the way in which we have endeavoured to frame it also consists of rules and principles combined with decided cases, but with this difference, that the decisions are not made by Judges in trying causes, but by the legislature itself in enacting the law; and though they are an important part of the law, settling points which without them would have been left to be determined by the Judges, yet they are strictly confined to the function of guiding the Judges in their future

decisions, and of explaining in what manner the definitions and rules to which they are annexed are to be interpreted and applied."

With reference to the general question of the codification of English law *for England*, I may perhaps be permitted to say that, considering the imperfections of human language, the backwardness, in some respects, of English jurisprudence and the manifold defects of English legislative machinery, I side with those who hold that by the method of deduction from precedents and the other sources of non-statutory law, the law applicable to any given case as it arises can practically be ascertained with more certainty, and that the law so ascertained will be better, than by the method of giving the Judges nothing but a Code for their guide (*b*). But the successful employment of this method obviously implies, first, that the Judges and the persons who plead before them should be familiar with the sources of non-statutory law, and, secondly, that they should have acquired, by study and practice, the power of making correct deductions from those sources. No one will suspect me of wishing to cast a slur on the able and painstaking gentlemen who occupy judicial posts in the Mofussil. But they themselves would be the first to admit that their training as Civilians has not generally been such as to qualify them for administering, in its uncodified form, the English law, or anything like the English law, regarding Crimes, Civil and Criminal Procedure, and, lastly, Intestate and Testamentary Succession. To them, therefore, and to the millions of people whose rights it is their duty to decide, the codification of the law on these subjects is a matter of the utmost importance. It is to be hoped that the Penal Code, the Codes of Criminal and Civil Procedure, and the Code of the Law of Succession contained in this volume will soon be followed by Codes of the law of Contracts, of Torts, of Persons and of Evidence. And if, as is proposed, each of these Codes shall, at intervals of only a few years, be revised, at leisure, by trained legislators, and so amended as to make it contain in the form of

(*b*). See 11 Jur. N. S. part II, p. 205.

definitions, rules, illustrations, explanations and exceptions, all that may from time to time be deemed fit be made a part of it, leaving nothing to rest as law on the authority of previous judicial decisions, this will prevent many of the evils certain to arise from contradictory and erroneous rulings, and from the inadaptibility of a Code, bound, as it is, in the fetters of set terms, to the rapidly changing circumstances of a society like that of modern India.

But to revert to the Indian Succession Act, 1865.

The Act is divided into Parts with titles.

Part I contains the short title, the interpretation clause, the provision above referred to, that no person shall by marriage acquire any interest or lose any power, and a declaration that, except as provided by law, the rules contained in the Act shall constitute the law of British India applicable to all cases of intestate and testamentary succession.

Part II contains rules as to domicil, which agree generally with those recognized in England. The domicil of origin of a posthumous child is, however, to be in the country in which his *father* was domiciled at the time of the death of the latter; and the Act declares that no one shall acquire a domicil in India merely by residing there in Her Majesty's Civil or Military service, or in the discharge of the duties of any public office, or in the exercise of any profession or calling. The old rule was that a person did not change his domicil by going to India in the service of the Crown, but that it was otherwise if he entered the service of the Company. The Act provides a special mode of acquiring an Indian domicil for persons resident in British India for one year immediately preceding the acquisition.

Part III defines consanguinity, lineal and collateral; abolishes the distinction between whole and half blood in cases of succession to immoveable property; and contains a table of kindred.

Part IV defines intestacy, and regulates the devolution of the intestate's property where he has left a widow and lineal descendants, or a widow and kindred only, or a widow and no kindred, or no widow but descendants or other kindred, or neither widow nor kindred. In this the English law is

followed, except that, when there is a widow and no kindred, the whole property belongs to her instead of one-half going to her and the other half going to the Crown.

Part V provides the rules for the distribution of the intestate's property (after deducting the widow's share, if he has left a widow) among his lineal descendants where he has left any, and among his other kindred where he has left no lineal descendants. This Part also provides (herein varying from English law in the case of gifts by a *father*) that anything which a child may have received from the intestate in his lifetime by way of advancement shall not be deducted from the child's share of the property, or—as an English lawyer would say—that children's advancements shall not be brought into hotchpot.

Part VI declares the rights of the widower in respect of the property as to which his wife has died intestate. It provides that, in the case of the marriage of a person not having an Indian domicil to a person having such domicil, neither party shall acquire any rights in respect of the other's property not comprised in an antenuptial settlement which he or she would not acquire thereby if both were domiciled in India at the time of the marriage. Without some such provision, in the case of an East Indian woman marrying a man domiciled in England and thus acquiring his domicile, her unsettled moveables would immediately become his absolute property, while her immoveables in India would go according to the *lex loci rei sitae*. Hitherto the general personal estate of a female infant was bound by a settlement made on her marriage because such estate became by the marriage the husband's absolute property, and the settlement was in effect his settlement and not hers. But under the provisions of the fourth Section of this Act this reason is no longer valid. Moreover, according to the law which has hitherto prevailed, a female infant's real estate is not bound by her marriage settlement. Hence the necessity for a provision (which Part IV accordingly

contains) to enable a minor's property, whether moveable or immoveable, to be settled in contemplation of marriage.

Part VII declares the persons capable of making Wills, including all persons, whether married or single, male or female, of sound mind, who have completed the age of *eighteen* years (the age at which the Courts of Wards withdraw from the management of the estates of youthful landholders), and contains provisions as to testamentary guardians, the nullity of a Will obtained by fraud, coercion or importunity, and the ambulatory character of the instrument.

Part VIII contains the provisions as to the execution of ordinary Wills. These agree in general with the well-known provisions of the Statute 1 Vic., Cap. 26; but the Act does not require that more than one of the witnesses shall be present at the same time, nor that the Will should be signed "at the foot or end thereof" by the testator. It seems, too, that *signature* by the witnesses is required, and that it will not be enough for either to affix his mark.

Part IX contains the rules as to nuncupative, or as they are called in the Act, privileged Wills, which may be made by any *adult* mariner at sea or soldier employed in an expedition or engaged in actual warfare. In England a minor soldier or sailor may make a privileged Will.

Part X contains the rules as to gifts to attesting witnesses, their qualifications, and the alteration, revocation, and revival of Wills. These provisions agree generally with those of the English Wills' Act. The Indian Succession Act, however, excludes parol evidence to shew how a revival was intended to operate in cases where it may be doubtful whether the whole or part of a Will, which was first partly and then wholly revoked, was intended to be revived.

Part XI contains rules as to the construction of Wills, and as to Lapse. Here again, the English law as to personalty has been followed, and the Commissioners have made good use of the propositions set forth in Mr. Hawkins' excellent *Treatise*

on the Construction of Wills (London, 1863). The rules giving the legacy absolutely to the first taker, where words of limitation and not of purchase are added, appear to render it impossible in India to create an estate tail by Will.

Part XII contains rules as to void bequests and enacts a new "rule against perpetuity," *viz.*, that no bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the life-time of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he complete the age of eighteen, the thing bequeathed is to belong. The Act also provides that a direction to accumulate the income arising from any property shall be void, except where the property is immoveable, or where accumulation is directed to be made from the death of the testator. In either of these cases the direction will be valid in respect only of the income arising from the property within one year next following the testator's death. The Act also provides that a bequest to a person not in existence at the testator's death, subject to a prior bequest, must comprise the whole of the remaining interest of the testator in the thing bequeathed; and that where, at the time fixed for the payment of a legacy, the person for whom it was intended has not come into existence, the bequest shall fail. This Part also makes provision against death-bed bequests to charitable uses by persons having nephews or nieces or any nearer relatives. In such cases the Will must be executed at least twelve months before the testator's death, and deposited within six months from its execution in some place provided by law for the deposit of Wills by living persons.

Part XIII contains rules as to the vesting of legacies. Part XIV deals with onerous, and Part XV with contingent, bequests.

In Part XVI, which relates to conditional bequests, the Act excludes from India the refined distinctions which the Court of Chancery has, in relation to personal property, borrowed from the Ecclesiastical Courts. It provides in effect that the words of the Will shall be adhered to where no condition inconsistent with law or morality is sought to be imposed ; that all bequests made upon illegal, immoral or impossible conditions shall be void, and that wherever the testator's wishes can be carried into effect, if expressed in one way, they ought to be permitted to take effect if expressed in any other way ; so that whatever he can do by a limitation he is allowed to do by imposing a condition. The Act also provides that whenever a condition subsequent is valid, if accompanied with a gift over, it shall be valid without a gift over, and shall not be treated as if it had been inserted merely *in terrorem*.

Part XVII contain provisions as to bequests with directions as to the application or enjoyment of the subject-matter.

Part XVIII relates to bequests to an executor. He is not to take the legacy unless he proves the Will or otherwise manifests an intention to act as executor.

Part XIX deals with specific legacies ; Part XX with demonstrative legacies ; and Part XXI with the ademption of legacies.

Part XXII contains provisions, some of which are modelled on Locke King's Act (Stat. 17 & 18 Vic., cap. 113), as to the payment of liabilities in respect of the subject of a bequest. In all cases of specific bequests of moveable or immoveable property, subject to any pledge or incumbrance created by the testator, the legatee, unless a contrary intention appears by the Will, is to take the bequest subject to such pledge or incumbrance.

Part XXIII relates to bequests of things described in general terms ; Part XXIV, to bequests of the interest or produce of a fund ; Part XXV, to

bequests of annuities; and Part XXVI, to legacies to creditors and portioners. Here the English law is departed from, the Act in effect providing that—

(1). Where a debtor bequeaths to his creditor a legacy equal to, or exceeding the amount of, his debt, the testator shall not be presumed to have meant the legacy to be a satisfaction of the debt.

(2). Where a parent, who is under obligation by contract to provide a portion for his child, fails to do so and afterwards bequeaths a legacy to the child, he shall not be presumed to mean the legacy to be a satisfaction or fulfilment of the obligation.

(3). Where a father bequeaths a legacy to a child and afterwards advances a portion for that child, he shall not be presumed to adeem the legacy thereby.

Part XXVII states the leading rules as to the doctrine of election. And Part XXVIII deals with the subject of donations *mortis causa*.

As property of every kind is to devolve in the same channel, the Act facilitates the constitution of a general representative of the deceased with unlimited power, and, accordingly,

Part XXIX provides for the probate of Wills and the grant of letters of administration by the Judge of every District in which any part of the property of the deceased may be found, and contains rules drawn for the most part from the practice of the Probate Court.

Part XXX relates to limited grants of administration, *viz.*, grants limited in duration; grants for the use and benefit of others having right; grants for special purposes; grants with exception; grants of the rest; grants of effects unadministered; alteration in grants, and revocation of grants. The Act wisely discards the English doctrine that an executor on taking probate of his own testator's Will becomes executor *ipso facto* not only of that Will but also of the Will of any testator of whom that

other was sole or surviving executor, and so on *ad infinitum* upwards.

Part XXXI states the rules of practice in granting and revoking probates and letters of administration, and contains provisions as to petitions, caveats, and administration-bonds. Original Wills after probate will be filed and kept in Court. The enactments contained in this Part and in Part XXX are, for the most part, taken from Mr. Coote's *Practice of the Court of Probate* and from the Court of Probate Act, 1857.

Part XXXII relates to executors *de son tort* (*a*).

Part XXXIII defines the powers of an executor or administrator. An unfortunate Illustration to Section 271 shews that the powers hitherto exercise-able by one of several executors may be restrained when the testator directs that two or more of his executors shall be a quorum. A married executrix or administratrix is to have all the powers of an ordinary representative. Hence, and since the husband acquires no interest in her property, the writer has ventured to contend (p. 198) that the Act impliedly abolishes the husband's liability for his wife's devastavit.

Part XXXIV deals with the duties of an executor or administrator, and provides for the exhibition at proper times of an inventory and account of the deceased's estate. The Act wisely excludes from India the rule which enables an executor to pay any creditor (whether himself or another person) in preference to another creditor of equal degree. It provides that funeral and death-bed expenses and charges of probate and administration are to be first paid, then wages due to any labourer, artizan or domestic servant employed by the deceased, and that in respect of no other debt shall a creditor be entitled to a preference either by reason of its being secured by deed under seal or on any other account.

(*a*.) Add to the cases cited at p. 170 *Elworthy* v. *Sandford*, 3 Hurl. & C. 330.

Parts XXXV, XXXVI, XXXVII, and XXXVIII relate to the executor's assent to a legacy: to the payment and apportionment of annuities: to the investment of funds to provide for legacies; and to the right to the produce and interest of legacies. The income in respect of a contingent general residuary bequest between the death of the testator and the vesting of the legacy goes as undisposed of, instead of (as in England) falling into the residue.

Part XXXIX contains rules as to the refunding of legacies. A novel provision is here introduced, limiting to two years the period of time within which a creditor may call upon a legatee to refund. And the refunding is in *all* cases to be without interest, even though the legatee is entitled to another fund in Court making interest.

Part XL relates to the liability of an executor or administrator for a *devastavit*.

Part XLI comprises several miscellaneous provisions. It provides for the payment of stamp duty in respect of the instruments mentioned in the Schedule. It saves the rights, duties and privileges of the Administrator General and the Officiating Administrator General. It empowers the Governor General of India in Council, either retrospectively from the passing of the Act or prospectively, to exempt from its operation any race, sect or tribe in British India. And it declares that the Act shall not apply to succession to the property of any Hindú, Muhammadan or Buddhist.

The wisdom of thus excluding the Natives from the operation of the testamentary portion of the Act appears to the writer exceedingly questionable.

Although the Sanskrit text-books of Hindú law nowhere recognise a posthumous disposition of property, the validity of a Hindú's Will has long been admitted by our Courts in the Presidencies of Bengal and Bombay. In Madras also, after some fluctuations of opinion, it is now settled that a Hindú's testamentary power is co-extensive with his independent right of alienation *inter vivos* (*a*).

(*a*). *Vallinâyagam Pillai* v. *Pachché*, 1 Mad. H C. Rep. 326.

Liberty of testation is thus thoroughly established throughout peninsular India (*b*); and I have been informed by Colonel Fytche, late Commissioner of the Tenasserim Provinces, that the practice of making Wills is beginning to prevail among the Burmese Buddhists, although their law of succession is founded on that of the Hindús. The Muhammadan law recognises the testamentary power, which, however, without the consent of the heirs, does not extend to more than one-third of the

in question has probably [illegible]
English law, and its exercise doubtless produces in India the beneficial effects which it has produced in England and elsewhere, by stimulating the circulation of property and quickening the stagnation of society (*d*). But the power has been engrafted on the Hindú system, and is used by the Muhammadans, without any of those securities for its due exercise, such as the requirement of writing, signature and attestation, which have been found desirable in Europe. Nor are Native testators subject to any restraints [illegible]
in the cases of devises to religious or charitable uses, of postponements of the acquisition of the absolute interest in property, and of prospective accumulations of its income.

Thus the High Court at Bombay has decided (*e*) that a Hindú's Will need not be attested, and the High Court of Madras has lately declared, in a learned judgment delivered by Mr. Justice Holloway (*f*), that a Hindú's Will need not be in writing, in other words, that a Hindú may make a valid nuncupative Will, and this without any formalities similar to those required in such cases by European systems of jurisprudence. So Hindús' nuncupative Wills were held valid by the late Supreme Court at Fort

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(*b*). See *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*, 9 Moo. I. A. Ca 123, 135, and as to the N. W. Pr [illegible]
Bhao, Ibid. 96.
(*c*). See the *Heddya*, IV. 468, and 5 Moo. I. A. Ca. 199.
(*d*). See Maine's *Ancient Law*, p. 194.
(*e*). *Muncherjee Pestonjee* v. *Narayen Luxamonjee*, 1 Bomb. H. C. Rep. 77.
(*f*). *Çrínivásammál* v. *Vijayammál*, 2 Mad. H. C. Rep. 37.

William (*g*), and are frequently recognised by the present High Court of Judicature for Bengal. Considering the facilities with which frauds in setting up nuncupative Wills are attended, (for, false swearing is more easy to perpetrate and more difficult to detect than forgery), it may perhaps be doubted whether the benefits above mentioned arising from the introduction among the Natives of the testamentary power are not counterbalanced by the encouragement which its recognition by our Courts at present affords to perjury. Moreover, the same evidence that sets up a false oral Will may practically revoke a true written one. The witness has only to declare that the testator made an oral Will subsequent to the date of the written Will and revoking the latter, and his evidence, if believed, destroys the written will, however solemnly executed or carefully preserved (*h*). Lastly, even in the case of a genuine testamentary disposition by word of mouth, the certainty of writing is replaced by the frailty of memory.

Then, as to the non-existence of restraints on the testamentary power : a Native may now, on his death-bed, when his mind is enfeebled by disease or fear, deprive his nearest relations of self-acquired property which would otherwise have devolved upon them, and bequeath it in accordance with the dictates of his priests or the promptings of his own superstition. A Native testator, in the absence of anything like what is technically called the rule against perpetuities, may lock up his estate for an indefinite time, and thus obstruct the circulation of property, check the improvement of land, and withdraw capital from its natural employment in commerce. A Native testator may legally create an accumulating trust, absorbing the entire income of property not merely (as in the well-known Thel-

(*g*). The possibility of a Hindú making a valid oral Will was admitted on the 6th Feb. 1851 by Peel C. J. and Colvile J. in *Sreemutty Woomasoondury Dossee Bohoo Ranee* v. *Maharajah Jaudubindrokistno Bahadoor* (only reported, so far as I know, in *The Englishman* of 11th Feb. 1851), although in that case the evidence of the factum of the alleged Will was insufficient. The latest case on the subject is *Tara Chand Bose* v. *Nobeen Chunder Mitter*, 3 Suth. W. R. 188, (14th July, 1865), where Kemp and Seton-Karr JJ. upheld a Hindú's nuncupative Will.

(*h*). *Wharram* v. *Wharram*, 3 Swab. & T. 301.

lusson case) during the full period for which the vesting of property may, according to English law, be protracted, but (for anything to the contrary enacted by the Legislature or laid down by the Judges) for the full time expressed by the Native formula of limitation *áchandrárkam*, 'so long as moon and sun endure.' Thus in the case of a bequest to the testator's family-idol, with directions that, after its expenses are paid, the surplus shall belong to certain persons and their descendants in the male line as a joint family and that none of these legatees shall have power to alienate, the Privy Council has held (*i*) that such a testamentary disposition is effectual, although the family may obviously remain undivided for ever. There is reason to fear, too, that under colour of a bequest to religious uses, a Hindú often not only enjoys property but trades with it, without his beneficial interest being subject to the just demands of his creditors. It may be that the creditors would have a right to come against the surplus income of the property after providing thereout for the expenses of the idol. But the ascertainment of what ought to be allowed for such expenses is generally a matter of such difficulty as practically to reduce that right to a nullity.

Again, a Native's Will, not requiring to be proved, need not be deposited for safe custody. The resulting opportunities for forgery and fraudulent alteration are obvious. Nor can a Native executor be compelled to exhibit an inventory or account of his testator's estate except by the tedious, expensive, and hazardous process of a lawsuit. The consequence is, where the estate is too small to bear the costs of the suit, that women, children and absentees have no adequate check on the executor, and, at any distance of time, it is difficult to fix him with the possession of moveable and sometimes even of immoveable property (*j*).

Lastly, the character and ex-officio powers of a Native executor seem to be by no means clearly

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(*i*). *Sonatun Byzack* v. *Sreemutty Juggutsoondree Dossee*, 8 Moo. I. A. Ca. 66.
(*j*). See Mort. Dec. ed. Montriou, p. 262.

defined. As to the latter, the High Court of Bengal has lately held on appeal (*k*) that he has no greater power over immoveable property than a Manager. Now the powers of a Manager, as declared by the Privy Council in a case (*l*) to which the High Court refer, are limited and qualified ; and where he makes a mortgage, the lender is bound to enquire into the necessity for the loan and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate. If this be so in the case of a mortgage or conditional sale, *a fortiori* it must be so in the case of an absolute sale. It is unnecessary to dwell on the difficulties which this doctrine imposes on all persons dealing with Hindú executors.

The Indian Succession Act, 1865, contains, as has been shewn, provisions on all these subjects, expressed in language of singular terseness and lucidity.

Section 331, however, excludes the Hindús, Muhammadans, and Buddhists from the benefit of these provisions, as well as from that of having the series of simple rules contained in Part XI of the Act, applied to the construction of their Wills. But the foregoing remarks will, I trust, have convinced the reader of the expediency of extending to the Hindús and Buddhists such parts of the Act as relate to Testamentary Succession, including in this phrase all that relates to the execution, revocation, interpretation and probate of Wills and the limitation of the exercise of the testamentary power. In the case of the Muhammadans, owing to the prejudice with which they are apt to regard any measure touching their law, the extension may, at present, be undesirable.

Of the other Acts printed in this volume the only one which requires notice here is that relating to intestate succession among Parsees. The

(*k*). *Sreemutty Dassee* v. *Tarrachurn Coondoo Chowdry*, 1 Bourke, Rep. 48.
(*l*). *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*, 6 Moo. I. A. Ca. 393.

object of this enactment is to exempt the Parsees from the operation of that portion of the Indian Succession Act, 1865, which relates to succession to the property of an intestate, and to define the Parsee law relating to such succession. It provides for the cases of a male Parsee dying intestate leaving a widow and children, of a female Parsee leaving a widower and children, of a male Parsee leaving children, but no widow, and of a female Parsee leaving children, but no widower, of a Parsee leaving a widow or widower but no lineal descendants, and of a Parsee leaving neither widow nor widower, nor lineal descendants. This Act was necessitated by the repugnance which the Parsees felt to treating females as on an equality with males in matters of intestate succession. Under the Act, (unless when children succeed to the property of their intestate mother), a male will take double the share of a female standing in the same degree of propinquity to the intestate.

Lastly, as to the compilation which I have ventured to call a commentary, I wish to speak with sincere deference. My professional brethren will at once see that it is not intended for them, but for the Judges and practitioners in the Mofussil. Nevertheless, I am not without hope that it may here and there be useful to such members of the Presidency Bars as did not practise in the Equity Courts before coming to India. They will perhaps be unfamiliar with some of the sources from which the draftsmen of the Succession Act drew their rules and illustrations, and I have spared no pains to ascertain these sources, feeling, as I do, the truth of what is now a trite remark, that no elaborate and complex result, such as a Religion, an Art or a Code, can be scientifically understood without a knowledge of the rudimentary ideas on which it rests and of the various forms which it assumed in the successive stages of its developement. Nor can I help thinking that at home those practitioners who may have to advise on Indian settlements and

titles, may be occasionally aided by the indications which this book contains of the differences between the law of England and that of British India. But, as I said, the book is primarily intended for non-professional persons. I have therefore, unless where the rules to be found in it were purely arbitrary, endeavoured to state the reasons on which they rest, and thus to facilitate the decision of the unforeseen questions which are sure to arise upon them. I have added many Illustrations, taken, mostly, from the English Equity and Ecclesiastical reports, and distinguished from those that have the force of statutory law by being printed in small type. Above all things I have striven to make the language of my commentary clear and untechnical. And if I shall be sometimes unintelligible, let my readers not accuse me of want of willingness, but rather lay to heart the saying of the Mariner to Count Arnaldos:

Yo no digo esta cancion sino a quien comigo va.

W. S.

CALCUTTA,
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CONTENTS.

THE INDIAN SUCCESSION ACT, 1865.

ARRANGEMENT OF SECTIONS.

PART I.

Preliminary.

SECTION.		Page.
1.	Short Title ...	1
2.	This Act to constitute the law of British India in cases of Intestate or Testamentary Succession ...	1
3.	Interpretation Clause ...	1, 2
4.	Interests and powers not acquired nor lost by marriage	3
	Changes produced by this Section on law of Husband and Wife ...	3, 4, 5

PART II.

Of Domicile.

5.	Law regulating succession to a deceased person's immoveable and moveable property respectively	6
	Ceremonial of execution of Will made under power...	7
6.	One domicile only affects succession to moveables ...	7
7.	Domicile of origin of person of legitimate birth ...	7
	——————— posthumous child ...	7
8.	——————— illegitimate child ...	7
	Three kinds of domicile ...	7, 8
9.	Continuance of domicile of origin ...	8
	Presumption of retention of domicile of origin ...	8
10.	Acquisition of new domicile ...	8, 9
	Animus manendi ...	8, 9
11.	Special mode of acquiring domicile in British India ...	10
12.	Domicile not acquired by residence in a country merely as the representative of a foreign Government, or by residence with him as part of his family or as a servant ...	
13.	Continuance of new domicile ...	
	Evidence of resumption of domicile ...	
14.	Minor's domicile ...	11, 12
15.	Domicile acquired by a woman on marriage ...	12
16.	Wife's domicile during marriage ...	12
	Effect of divorce or judicial separation ...	12
17.	Except in cases stated, minor cannot acquire a new domicile ...	

SECTION.

18. Lunatic's acquisition of new domicile ...
19. Succession to a person's moveable property in India, in absence of proof of his domicile elsewhere

PART III.

Of Consanguinity.

20. Kindred or consanguinity defined 13
21. Lineal consanguinity defined ... 13
22. Collateral consanguinity defined ... 14
23. Persons held for purpose of succession to be similarly related to the deceased ... 14
Half-blood and child unborn ... 14
24. Mode of computing degrees of kindred ... 15
Table of consanguinity ... 15

PART IV.

Of Intestacy.

25. As to what property a deceased person is considered to have died intestate ... 16
26. Devolution of such property ... 17
27. Where the intestate has left a widow and lineal descendants, or a widow and kindred only, or a widow and no kindred ... 18
Widow divorced a mensa et toro ... 17
28. Where the intestate has left no widow, and where he has left no kindred ... 18
Right of Crown ... 18

PART V.

Of the Distribution of an Intestate's Property.

(*a*) *Where he has left lineal descendants.*

29. Rules of distribution ... 18
30. Where the intestate has left a child or children only 18
Meaning of child and children ... 18
31. Where the intestate has left no child, but a grandchild or grandchildren ... 18
32. Where the intestate has left only great-grandchildren or lineal descendants in a remoter degree ... 19
33. Where the intestate leaves lineal descendants not all in the same degree of kindred to him, and those through whom the more remote descend are dead ... 19

(*b*) *Where the Intestate has left no lineal descendants.*

34. Rules of distribution where the intestate has left no lineal descendants ... 20
35. Where intestate's father is living 20

		Page.
36.	Where intestate's thers and sisters ...	20
37.	Where intestate's father is dead and his mother, a brother or sister, and children of any deceased brother or sister are living ...	20, 21
38.	Where intestate's father is dead and his mother and the children of any deceased brother or sister are living ...	
39.	Where intestate's father is dead, but his mother is living, and there is no brother nor sister nor nephew ...	21
40.	Where intestate has left neither lineal descendant, nor father nor mother ...	22
41.	Where intestate has left neither lineal descendant, nor parent, nor brother nor sister ...	22
42.	Children's advancements not to be brought into hotchpot ...	22, 23

Part VI.

Of the Effect of Marriage and Marriage Settlements on Property.

43.	Rights of widower and widow respectively ...	23
44.	No rights to property not comprised in an antenuptial settlement, acquired by marriage between a person domiciled and a person not domiciled in British India ...	23
45.	Settlement of minor's property in contemplation of marriage ...	24

Part VII.

Of Wills and Codicils.

46.	Persons capable of making Wills	24
	Sanity	24
	Minority	24
	Alienage	25
	Joint Will	25
	Mutual Will	25
	Will on contingency	25
	Married woman's Will	25
	Deaf, dumb and blind persons' Wills	25
	Will in lucid interval	25, 26
	Will defaced during insanity	26
	Form of Will	27
	Instructions for Will	27
	Blanks in Will	27
	Language of Will	27
	Punctuation of Will	27
	Materials of Will	27
	Alterations in ink and in pencil. ...	27
47.	Testamentary guardian ...	28
48.	Will obtained by fraud, coercion or importunity	28
49.	Will may be revoked or altered	29
	Objects of testamentary power	30

Part VIII.

Of the execution of unprivileged Wills.

Section.		Page.
50.	Execution of unprivileged Wills ...	30
	Signature ... 30,	31
	Attestation ...31, 32,	33
51.	Incorporation of papers by reference ...	34

Part IX.

Of privileged Wills.

52.	Privileged Will ...	33
53.	Mode of making, and rules for executing, privileged Wills ... 34,	35

Part X.

Of the Attestation, Revocation, Alteration and Revival of Wills.

54.	Effect of gift to attesting witness ... 36,	37
	When attesting witness a joint legatee ...	37
55.	Witness not disqualified by interest or by being executor ...	37
56.	Revocation of Will by testator's marriage ...	37
	Power of appointment defined ... 37,	38
57.	Revocation of unprivileged Will or Codicil ... 38,	41
	By subsequent testamentary instrument ...	39
	Not by words declaring only intention ...	39
	By destruction ... 39,	40
	Animus revocandi ...	40
	Declarations by testator ...	40
	Doctrine of dependent relative revocation ...	40
	Presumptions of revocation ...	40
	Presumptions as to mutilation and destruction ...	40
	Destruction without testator's authority ... 40,	41
	Conditional Will ...	41
	Revocation of one of two mutual Wills ...	41
58.	Effect of obliteration, interlineation, or alteration in unprivileged Will ...	41
	Presumption as to unattested alterations ...	41
	Complete obliteration ...	42
59.	Revocation of privileged Will or Codicil ...	42
60.	Revival of unprivileged Will ...	42
	Extent of revival of Will or Codicil partly revoked and afterwards wholly revoked ...	43
	Effect of revival ...	43

Part XI.

Of the Construction of Wills.

61.	Wording of Will need not be technical ...	43
	Testator's intention to be effected ...	43
	General principles governing construction ...	44

Section.		Page.
62.	Enquiries to determine questions as to object or subject of Will ...	44
	When testator's declarations are admissible ...	45
63.	Misnomer or misdescription of object ...	45
64.	When words may be supplied ...	46
	Transposition of clause otherwise senseless ...	47
	Changing words ...	47
65.	Rejection of erroneous particulars in description of subject ...	48
66.	When part of description may not be rejected as erroneous ...	48
67.	Extrinsic evidence admissible in case of latent ambiguity ...	49
68.	Extrinsic evidence inadmissible in cases of patent ambiguity or deficiency ...	50, 51
69.	Meaning of any clause to be collected from entire Will	51
70.	When words may be understood in a restricted sense, and when in a sense wider than usual ...	52
	Articles ejusdem generis ...	52
71.	Where a clause is open to two constructions, that which has some effect is to be preferred ...	54
72.	No part of Will to be rejected, if reasonable construction can be put on it ...	55
73.	Interpretation of words repeated in different parts of Will ...	55
74.	Testator's intention to be effected as far as possible ...	55
75.	The last of two inconsistent clauses prevails ...	55, 56
76.	Will or bequest void for uncertainty ...	56
	Degree of definiteness necessary ...	56
77.	Words describing subject refer to property answering that description at testator's death ...	57
	Whether mortgage and trust estates pass ...	58
78.	Power of appointment executed by general bequest ...	59
79.	Implied gift to the objects of a power in default of appointment ...	59, 60
	Rule in *Brown* v. *Higgs* ...	60
80.	Bequest to "heirs," &c., of a particular person without qualifying terms ...	61
81.	Bequest to "representatives," &c., of a particular person ...	62
82.	Bequest without words of limitation ...	62, 63
83.	Bequest in the alternative ...	63
84.	Effect of words describing a class added to a bequest to a person ...	64
85.	Bequest to a class of persons under a general description only ...	65
86.	Construction of terms 'children,' 'grandchildren,' 'nephews,' 'nieces,' 'cousins,' 'issue,' 'descendants'	65, 66
87.	Words expressing relationship denote only legitimate relatives, or failing such, relatives reputed legitimate	67
88.	Rules of construction where a Will purports to make two bequests to the same person ...	69,70, 71
89.	Constitution of residuary legatee ...	71
90.	Property to which a residuary legatee is entitled ...	72
91.	Time of vesting of legacy in general terms ...	72, 73
92.	In what case a legacy lapses ...	73, 74
93.	A legacy does not lapse if one of two joint legatees die before the testator ...	74, 75

Section.		Page.
	Failure of legacy to one joint legatee from any cause other than death ...	75
94.	Effect in such a case, of words showing testator's intention that the shares should be distinct ...	75
	Creation of tenancy in common ...	75
95.	Lapse of share of residue ...	75
96.	When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime ...	76
97.	Bequest to A for the benefit of B does not lapse by A's death in testator's lifetime ...	76, 77
98.	Survivorship in case of bequest to a described class ...	77, 78

Part XII.

Of void Bequests.

99.	Bequest to a person by a particular description, who is not in existence at the testator's death ...	79
100.	Bequest to a person not in existence at the testator's death, subject to a prior bequest ...	80, 81
101.	Rule against perpetuity ...	81
	English rule ...	81, 82
	Regard had to possible events ...	82
102.	Bequest to a class, some of whom may come under the rules in the Sections 100, 101 ...	83
103.	Bequest to take effect on failure of bequest void under Sections 100, 101, or 102 ...	83, 84
	Gift over on alternative event, one branch of which is within the prescribed limits ...	84
104.	Effect of direction for accumulation ...	84
105.	Bequest to religious or charitable uses ...	85, 87
	Bequest on secret charitable trust ...	87
	Increase of rents of estate bequeathed to charitable uses	87
	Cy près doctrine applied to charities ...	87

Part XIII.

Of the Vesting of Legacies.

106.	Date of vesting of legacy when payment or possession postponed ...	87
107.	Date of vesting when legacy is contingent upon a specified uncertain event ...	89, 91
108.	Vesting of interest in a bequest to such members of a class as shall have attained a particular age ...	91

Part XIV.

Of Onerous Bequests.

109.	Onerous bequest ...	91
110.	One of two separate and independent bequests to same person may be accepted, and the other refused	92

Part XV.

Of Contingent Bequests.

Section		Page.
111.	Bequest contingent upon a specified uncertain event, no time being mentioned for its occurrence ...	92, 93
112.	Bequest to such of certain persons as shall be surviving at some period not specified ...	93, 94
	Survivorship *primâ facie* refers to point of time mentioned in gift in nearest juxtaposition ...	93

Part XVI.

Of Conditional Bequests

113.	Bequest upon impossible condition ...	95
114.	Bequest upon illegal or immoral condition ...	95
115.	Fulfilment of condition precedent to the vesting of a legacy ...	95
	Performance of condition *cy près* ...	96
	Bequests on condition as to marriage with consent ...	96
	Presuming consent ...	96
116.	Bequest to A and, on failure of the prior bequest, to B	97
117.	Case in which the second bequest shall not take effect on failure of the first ...	97
118.	Bequest over, conditional upon the happening or not happening of a specified uncertain event ...	98
119.	Condition subsequent must be strictly fulfilled ...	99
120.	Original bequest not affected by invalidity of condition subsequent ...	100
	Condition subsequent illegal, immoral, or uncertain ...	100
	Repugnant conditions subsequent ...	100
121.	Bequest conditional that it shall cease to have effect in case a specified uncertain event shall happen or not happen ...	101
122.	Such condition must not be invalid under Section 107	101
123.	Result of legatee rendering impossible or indefinitely postponing an act for which no time is specified and on the non-performance of which the subject-matter is to go over ...	102
124.	Performance of condition, precedent or subsequent, within specified time ...	102
	Further time allowed in case of fraud ...	102
	Computation of time in case of condition precedent ...	102

Part XVII.

Of Bequests with Directions as to application or enjoyment.

125.	Direction that funds be employed in a particular manner following an absolute bequest of the same to or for the benefit of any person ...	103
126.	Direction that a mode of enjoyment of absolute bequest is to be restricted, to secure a specified benefit for the legatee ...	103, 104
127.	Bequest of a fund for certain purposes, some of which cannot be fulfilled ...	104

Part XVIII.

Of Bequests to an Executor.

Section.		Page.
128.	Legatee named as executor cannot take unless he proves will or otherwise shews intention to act as executor ...	104
	Proof without *bonâ fide* intention of executing trusts...	105
	Proper form of bequests to executors ...	105

Part XIX.

Of Specific Legacies.

129.	Specific legacy defined ...	105
	Examples of specific legacies ...	106, 107
130.	Bequest of a sum certain where the stocks, &c., in which it is invested are described ...	108
131.	Bequest of stock where the testator had at the date of his Will an equal or greater amount of stock of the same kind ...	108, 109
	Jeffreys v. *Jeffreys* ...	109
132.	Bequest of money where it is not to be paid until some part of the testator's property shall have been disposed of in a certain way ...	109
	Importance of distinction between specific and general legacies ...	109
133.	Articles enumerated in residuary clause not to be deemed specifically bequeathed ...	110
134.	Retention in form of specific bequest to several persons in succession ...	110
135.	Sale and investment of proceeds of property bequeathed to two or more persons in succession ...	110
	Howe v. *Lord Dartmouth* ...	110
136.	Where there is a deficiency of assets to pay legacies, specific legacy not liable to abate with general legacies ...	111

Part XX.

Of Demonstrative Legacies.

137.	Demonstrative legacy defined ...	111
	How far general and how far specific ...	111
	Demonstrative legacy of stock does not carry interest from testator's death ...	111
138.	Order of payment when legacy is directed to be paid out of a fund the subject of a specific legacy.	112

Part XXI.

Of Ademption of Legacies.

139.	Ademption explained ...	113
	Effect of pawning article specifically bequeathed ...	113
140.	Non-ademption of demonstrative legacy ...	114

Section.		Page.
141.	Ademption of specific bequest of right to receive thing of value from a third party ...	114
142.	Ademption *pro tanto* by testator's receipt of part of entire ...	
143.	Ademption *pro tanto* by testator's receipt of portion of an entire fund of which a portion has been specifically bequeathed ...	
144.	Order of payment where a portion of a fund is specifically bequeathed to one legatee, and a legacy charged on the same fund to another, and the testator having received a portion of that fund, the remainder is insufficient to pay both legacies ...	
145.	Ademption where stock, specifically bequeathed, does not exist at testator's death ...	116
146.	Ademption *pro tanto* where stock, specifically bequeathed, exists in part only at testator's death ...	116
147.	Non-ademption of specific bequest of goods described as connected with a certain place, by reason of removal from temporary cause, &c. ...	117
148.	Removal of thing so bequeathed does not constitute ademption where place referred to only to complete description ...	117, 118
149.	When the thing bequeathed is a valuable to be received by the testator from a third person; and the testator himself, or his representative, receives it	118
150.	Change by operation of law of subject of specific bequest between date of Will and testator's death ...	118
151.	Change of subject without testator's knowledge ...	119
152.	Replacement of stock specifically bequeathed, lent to a third party on condition that it shall be replaced	119
153.	Stock specifically bequeathed, sold but replaced and belonging to the testator at his death ...	119

Part XXII.

Of the payment of liabilities in respect of the subject of a Bequest.

154.	Non-liability of executor to exonerate specific legatees	120
155.	Completion of testator's title to things bequeathed to be at cost of his estate ...	121
156.	Exoneration of legatee's immoveable property for which land revenue or rent is payable periodically	122
157.	Exoneration of specific legatee's stock in a Joint Stock Company ...	122

Part XXIII.

Of Bequests of things described in general terms.

158.	Bequest of things described in general terms ...	123

Part XXIV.

Of Bequests of the Interest or produce of a Fund.

	Under bequest of the interest or produce of a fund, testator not showing that the enjoyment shall be limited, legatee takes principal ...	124

Part XXV.

Of Bequest of Annuities.

Section.		Page.
160.	Annuity created by Will is payable for life only, unless a contrary intention appears by the Will ...	124
	Annuity to A during life of B ...	125
	Effect of direction to segregate a portion of assets, the interest of which is to be paid as an annuity ...	125
161.	Period of vesting and right of legatee where Will directs that an annuity be provided out of the proceeds of property, or out of property generally, or where money is bequeathed to be invested in the purchase of an annuity ...	125
162.	Abatement of annuity ...	126
163.	Where there is a gift of an annuity, and a residuary gift, the whole of the annuity to be first satisfied...	126

Part XXVI.

Of Legacies to Creditors and Portioners.

164.	Creditor *primâ facie* entitled to legacy as well as debt	127
165.	Child *primâ facie* entitled to legacy as well as portion	127
166.	No ademption by subsequent provision for legatee ...	128

Part XXVII.

Of Election.

167.	Circumstances in which election takes place ...	128
168.	Devolution of interest relinquished by the owner ...	129
169.	Testator's belief as to his ownership immaterial ...	129
	Personal competency essential to raise a case of election ...	130
170.	Bequest for a man's benefit, for purpose of election, is same as bequest to himself ...	130
171.	A person deriving a benefit indirectly not put to his election ...	
172.	A person taking under a Will in his individual capacity, may in another character elect to take in opposition to it ...	131
173.	When acceptance of a benefit given by a Will constitutes an election to take under the Will ...	131
174.	Presumption arising from enjoyment by legatee for two years ...	132
175.	Confirmation of bequest by act of legatee ...	132
176.	When testator's representatives may call upon legatee to elect ...	133
	Effect of non-compliance with their request within a reasonable time ...	133
	Doctrine of election applicable to appointments under powers ...	133
177.	Postponement of election in case of disability ...	

Part XXVIII.

Of Gifts in contemplation of Death.

Section.

178. Property transferable by gift made in contemplation of death ... 133
When a gift is said to be made in contemplation of death ... 134
Such gift resumable ... 134
When it fails ... 134
Where subject does not admit of corporeal delivery ... 134
Where no property passes by delivery ... 135
How a donation *mortis causa* differs from a legacy ... 135
Policy of insurance may be given in contemplation of death ... 135

Part XXIX.

Of Grant of Probate and Letters of Administration.

179. Character and property of executor or administrator as such ... 135
180. Administration with copy annexed of authenticated copy of Will proved abroad ... 135
181. Probate to be granted to executor appointed by Will ... 136
182. Appointment express or implied ... 136
Executor according to the tenor ... 137
Executor on condition ... 137
Executor from or until a certain time ... 137
183. Persons to whom probate cannot be granted ...
Minors, lunatics, married women without husband's assent ... 137
Corporation aggregate ... 137
184. Grant of probate to several executors simultaneously or at different times ... 137
185. Separate probate of Codicil discovered after grant of probate ... 138
Procedure when different executors are appointed by the Codicil ... 138
186. Accrual of representation to surviving executor ... 138
187. No right as executor or legatee can be established, unless probate or letters of administration shall have been granted by a competent Court ... 138
188. Probate establishes the Will from testator's death ... 139
Executor cannot sue before probate ... 139
189. Persons to whom letters of administration may not be granted ... 139
190. No right to intestate's property can be established, unless administration previously granted by a competent Court ... 139
191. From what period letters of administration entitle administrator to intestate's rights ... 140
192. Acts of administrator not validated by letters of administration ... 140
193. Grant of administration where executor has not renounced ... 140
Exception ... 140
Form and effect of renunciation of executorship ... 140, 141

SECTION.

195. Procedure where executor renounces or fails to accept within the time limited ... 141
196. Grant of administration to universal or residuary legatee ... 141
197. Right to administration of representative of deceased residuary legatee ... 142
198. Grant of administration when there is no executor, nor residuary legatee, nor representative of such legatee ... 142
199. Citation to be issued before grant of administration to any legatee other than universal or residuary ... 142
200. Order in which connections by marriage or consanguinity are entitled to administration ... 143
201. Administration to be granted to widow, unless Court see cause to exclude her 143
Good causes for her exclusion 143
202. Persons associated with widow in administration 143
203. Grant of administration where no widow, or widow excluded ... 143
Proviso ... 143
204. Deceased's kindred of equal degree, equally entitled to administration ... 144
205. Right of widower to administration of wife's estate ... 144
206. Grant of administration to a creditor ... 144
Amount of debt indifferent ... 144
Declarations as to date of debt becoming due ... 144
Grant to assignee in bankruptcy ... 144
Not to attornies of creditor to recover debt 144
To executors of creditor ... 144
207. Where deceased has left property in British India, administration must be granted according to the foregoing rules ... 145
Court of administration regulated by *lex loci* ... 145

PART XXX.

Of Limited Grants.

(*a*). *Grants limited in Duration.*

208. Probate of copy or draft of lost Will ... 145
209. Probate of contents of lost or destroyed Will ... 145
Parol evidence admissible ... 145
210. Probate of copy where original exists ... 146
211. Administration until the Will be produced ... 146

(*b*). *Grants for the use and benefit of others having right.*

212. Administration, with the Will annexed, to attorney of an absent executor ... 146
Attorney need not reside in Province, if sureties do so 147
213. Administration, with the Will annexed, to attorney of an absent person who, if present, would be entitled to administer ... 147
214. Administration to attorney of absent person entitled to administer in case of intestacy ... 147
215. Administration during minority to guardian 147
Testamentary guardian preferred 147
Where there are several testamen 148

Section.

216. Administration until one of several minor executors, or residuary legatees, attains majority ... 148
217. Administration for use and benefit of lunatic *jus habens* 148
Lunatic not found by due course of law to be insane 148
218. Administration *pendente lite* ... 149

(c). For Special Purposes.

219. Probate limited to purpose specified in the Will ... 149
220. Administration with the Will annexed limited to a particular purpose ... 149
221. Administration limited to property in which a person has a beneficial interest ... 150
222. Administration limited to a suit ... 150
Rights of grantee under this form of administration... 151
223. Administration limited to the purpose of becoming a party to a suit to be brought against absent executor or administrator ... 151
Payments to temporary administrator ... 151
Effect of death of absent representative ... 151
224. Administration limited to collection and preservation of deceased's property ... 151
225. Appointment as administrator of person other than the one who, under ordinary circumstances, would be entitled to administration ... 152

(d). Grants with Exception.

226. Probate or administration, with the Will annexed, subject to exception ... 152
227. Administration with exception ... 153

(e). Grants of the Rest.

228. Probate or administration of the rest ... 153
Grant *caeterorum* with Will annexed ... 153

(f). Grants of effects unadministered.

229. Grant of effects unadministered ... 153
230. Rules as to grants of effects unadministered ... 154
231. Administration when a limited grant has expired, and there is still some part of the estate unadministered 154
Distinction between a cessate grant, and a grant *de bonis non* ... 154

(g). Alteration in Grants.

232. What errors may be rectified by the Court ... 155
233. Procedure where Codicil discovered after grant of administration, with Will annexed ... 155

(h). Revocation of Grants.

234. Revocation or annulment for just cause of grant of probate or administration ... 155
"Just cause" defined ... 155, 156

PART

Of the Practice in granting and revoking Probates and Letters of Administration.

Jurisdiction of District Judge in granting and revoking probates and letters of administration ... 157

Section.		Page.
236.	District Judge's powers as to the granting of probate and administration ...	157
237.	District Judge may order any person to produce testamentary papers ...	157
238.	Procedure of District Judge's Court in granting probate and administration ...	
	Does this Section apply to the High Court on the original side ? ...	157, 158
239.	When and how District Judge is to interfere for the protection of property ...	159
240.	Probate or administration may be granted by District Judge, when testator, or intestate at his death, had a fixed dwelling or any property within the jurisdiction ...	159
241.	When application is made to the Judge of a District in which the deceased had no fixed abode ...	159
242.	Conclusiveness of probate or letters of administration	160
243.	Conclusiveness of application for probate or administration, if properly made and verified ...	160
244.	Petition for probate ...	160, 161
	Stamp on petition ...	161
245.	In what cases translation of Will to be annexed to the petition ..	161
	Verification of translation made by any person other than the Court translator ...	161
246.	Petition for letters of administration ...	162
247.	Petition for probate or letters of administration to be signed and verified ...	162
248.	Verification of petition for probate, by one of the witnesses to the Will ...	162
249.	Punishment for making false averment in petition or declaration ...	
250.	District Judge may examine petitioner in person, and require further evidence, and issue citations to inspect the proceedings ...	163
	Publication of citation ...	163
	Examination under commission ...	
251.	Caveat against grant of probate or administration ...	163
252.	Form of caveat ...	164
253.	After entry of caveat, no proceeding to be taken on the petition, until after notice to the caveator ...	164
254.	Grant of probate to be under seal of the Court ...	164
	Form of probate grant ...	164
255.	Grant of letters of administration to be under seal of Court ...	165
	Form of grant ...	165
256.	Administration bond ...	165
	Form of bond ...	165, 166
257.	Assignment of administration bond	166, 167
258.	Probate not to be granted until after seven days, and letters of administration until after fourteen days, from the testator's or intestate's death ...	167
259.	Filing of original Wills of which probate or letters of administration with Will annexed have been granted ...	167
260.	Grantee of probate or letters of administration shall alone have power to sue, &c., throughout the Province, until the probate or letters shall have been revoked ...	

Section.		Page.
261.	Procedure in contentious cases ...	168
262.	Payment to executor or administrator before probate or letters of administration revoked ...	168
	Right of such executor or administrator to recoup himself for payments ...	168
263.	Appeals from orders made by District Judge under powers conferred by this Act ...	168
264.	Concurrent jurisdiction of High Court ...	168

Part XXXII.

Of Executors of their own Wrong.

265.	Executor of his own wrong ...	169
266.	Liability of an executor of his own wrong ...	170
	Agent of executor *de son tort* ...	170

Part XXXIII.

Of the Powers of an Executor or Administrator.

267.	In respect of causes of action surviving the deceased, and rents due at the time of his death ...	170
	Executor may distrain before probate ...	170
268.	Demands and rights of action in favour of or against deceased, survive to and against his executor or administrator ...	
269.	Power of executor or administrator to dispose of deceased's property ...	
270.	Purchase by executor or administrator of deceased's property ...	172
271.	Powers of several executors or administrators, exerciseable by one ...	172
272.	Survival of powers on death of one of several executors or administrators ...	172
273.	Powers of administrator of effects unadministered ...	173
274.	Powers of administrator during minority ...	173
275.	Powers of married executrix or administratrix ...	174

Part XXXIV.

Of the Duties of an Executor or Administrator.

276.	As to deceased's funeral ...	174
277.	Inventory and account to be exhibited ...	174, 175
278.	Duty of executor or administrator as to property of, and debts owing to, the deceased ...	175
279.	Funeral expenses and death-bed charges to be paid before all debts ...	175
	Preferential debts in Military estates ...	176
280.	Expenses to be paid next after such expenses ...	176
	Costs of probate and administration suits ...	176, 177
281.	Wages for services by labourer, artizan, or domestic to be next paid, and then the other debts ...	177
	[illegible] equally and ...	177, 178

SECTION.

283. Application of moveable property to payment of debts, where the deceased's domicile was not in British India ... 178
284. Creditor paid in part under Section 283 to bring such payment into account before sharing in proceeds of immoveable property ... 179
285. Debts to be paid before legacies. ... 180
286. Executor or administrator not bound to pay legacies without indemnity ... 180
287. Abatement of general legacies ... 180, 181
Executor has no right to pay one legatee in preference to another ... 180
Preferential legacies .. 180, 181
288. Non-abatement of specific legacy when assets sufficient to pay debts ... 181
289. Right under demonstrative legacy, when the assets are sufficient to pay debts and necessary expenses... 181
290. Rateable abatement of specific legacies ... 182
291. Legacies treated as general for purpose of abatement ... 182

PART XXXV.

Of the Executor's Assent to a Legacy.

292. Executor's assent necessary to complete legatee's title 182
293. Effect of executor's assent to specific legacy ... 183
Assent may be verbal, and either express or implied... 183
294. Conditional assent ... 184
295. Assent of executor to his own legacy ... 184
When implied ... 184
296. Assent of executor gives effect to legacy from testator's death ... 185
When executor should assent .. 185
297. Executor not bound to pay or deliver legacies until after one year from testator's death ... 185, 186

PART XXXVI.

Of the Payment and Apportionment of Annuities.

298. Commencement of annuity when no time fixed by Will 186
299. When payment of annuity to be paid quarterly or monthly first falls due ... 186
300. Dates of successive payments when first payment of an annuity directed to be made within a given time or on a day certain ...
Apportionment where annuitant dies between times of payment ... 187

XXXVII.

Of the Investment of Funds to provide for

301. Investment of sum bequeathed where a legacy, not specific, is given for life ... 187

302. Investment of amount of general legacy, to be paid at a future time ... 187
Intermediate interest ... 187
303. Procedure when no fund is charged with or appropriated to an annuity ... 187
304. Transfer to residuary legatee of amount of contingent bequest ... 188
305. Investment of residue bequeathed to a person for life, without direction to invest in particular securities ... 188
306. Investment of residue bequeathed to a person for life, with direction to invest in specified securities ... 188
307. Time and manner of the conversion and investment. 188
Interest payable until investment ... 188
308. Procedure where minor is entitled to immediate payment or possession of bequest, and there is no direction to pay to any person on his behalf ... 189

Part XXXVIII.

Of the Produce and Interest of Legacies.

309. Legatee of a specific legacy entitled to produce thereof from testator's death ... 190
310. Residuary legatee entitled to produce of residuary fund from testator's death ... 191
311. Interest when no time is fixed for payment of a general legacy ... 191
312. Interest when time has been fixed ... 192
313. Rate of interest .. 192
314. No interest payable on arrears of annuity within first year after testator's death ... 193
315. Interest payable from testator's death on sum to be invested to produce annuity ... 193

Part XXXIX.

Of the Refunding of Legacies.

316. Refund of legacy paid under Judge's order ... 193
317. No refund if legacy paid voluntarily ... 193
318. Refund when legacy has become due on performance of a condition within further time allowed under Section 124 ... 194
319. When each legatee is compellable to refund in proportion ... 194
320. Distribution of assets ... 194
Creditor may follow assets ... 194
Notice in administration suit ... 194, 195
321. Within what period a creditor may call upon a legatee to refund ... 195
322. When a legatee who has not received payment or who has been compelled to refund under Section 321, cannot oblige one who has received payment in full to refund ... 195

Section.		Page.
323.	When an unsatisfied legatee must first proceed against executor, if solvent ...	196
324.	Limit to the refunding of one legatee to another ...	196
325.	Refunding to be in all cases without interest ...	196
326.	Residue of the deceased's property after usual payments to be paid to residuary legatee ...	196

Part XL.

Of the Liability of an Executor or Administrator for Devastation.

327.	Liability of executor or administrator for devastation. Unfounded claim ...	197
328.	For neglect to get in any part of the deceased's property ... 197,	198
	Continuing testator's partnership business ...	198
	Liability for devastavit by co-executor ...	
	Whether husband liable for wife's devastavit ...	

Part XLI.

Miscellaneous.

329.	Stamps and fees on instruments mentioned in this Act.	
330.	Saving of rights, duties, and privileges of Administrator-General ...	
331.	Succession to property of Hindús, Muhammadans or Buddhists and certain Wills, intestacies, and marriages not affected by this Act ...	200
	To whom this Act applies ...	200
332.	Power of Governor-General to exempt any race, sect or tribe in British India from the operation of this Act ...	201
	Schedule ...	202

Appendix.

Act No. XXI of 1865 (*to define and amend the law relating to Intestate succession among Parsees*) ...	203
Act No. XII of 1855 (*to enable Executors, Administrators or Representatives to sue and be sued for certain wrongs*) ...	206
Act No. XIII of 1855 (*to provide compensation for families for loss occasioned by the death of a person caused by actionable wrong*) ...	207
Act No. VIII of 1855 (*to amend the law relating to the office and duties of Administrator General*) ...	210
Act No. XXVI of 1860 (*to amend Act VIII of* 1855) ...	229
The Administrator General's Act, 1865 ...	231
...	233

TABLE OF CASES.

A.

Abbott v. Middleton 44, 47, 51
Abdullah . 200
Abraham v. Abraham . 201
Acherley v. Vernon . 57
Adams v. Jones ... 56
Addams v. Ferick ... 122
Agnew v. Matthews . 65
Aikman v. Aikman . 8
Alexander, In re . 175
Allen v. McPherson 28
——— v. Maddock . 33
Allnutt . 33
Alton v. Medlicot . 107
Anderson . 143
Andrew v. Trinity Hall . 92
Andrews v. Murphy . 144
Apreece v. Apreece . 107
Aratoon v. Aratoon . 200
——— v. Johannes ... 200
Armstrong v. Burnet ... 122
Ashburner v. McGuire . 113
Ashton v. Ashton . 107
Attorney General v. Harley . 54
——— v. Hickman . 86
v. Kent . 11
v. Köhler . xxvi
v. Nash . 86
v. Rowe . 8
Atkins v. Hiccocks . 91
Attwater v. Attwater . 112
Audsley v. Horn . 65
Austen . 34
Ayrey v. Hill . 26
Ayton v. Ayton . 79

B.

Bacchus v. Gilbee . 101
Bailey ... 25
Bainbridge v. Lord Ashburton 58
Baker v. Brooks .. 167
——— v. Dening .. 30
——— v. Hall .. 4
Barber, Ex parte .. 54
-- — v. Barber .. 65
Barkes v. Rayner .. 114
Barkworth v. Young .. 76
Barnes v. Patch .. 62
Barnett v. Tugwell .. 67
Bartlett v. Wood ... 177
Barrow v. Barrow ... 5
Bason v. Brandon ... 119
Bateman v. Pennington ... 27
Bawden
Bayley v. Bishop .. 126
Baylis v. Attorney General .. 45, 51
Bayne v. Crowther .. 103
Beardmore v. Gregory .. 170
Beales v. Cresford
Beatson, Wm. ... 138
Benson v. Maude ... 186
Bennett v. Marshall ... 50
Bentley v. Blizard ... 67
Bernasconi v. Atkinson ... 45
Bidwell, In re ... 133
Birch, Re ... 96
Birtwhistle v. Vardell ...
Blagrave v. Blagrave ... 101
Blake v. Midland Ry. Co. ... 208
Blaque v. Gold ... 48
Blease v. Burgh ... 100
Blewitt v. Blewitt ... 139
——— v. Roberts ... 125
Blue v. Marshall ... 198
Blundell v. Dunn ... 68
Bortoft v. Wadsworth ... 78
Bouverie v. Bouverie ...
Bowles v. Jackson ... 34
Boyle ... 141
Boyes v. Bedale ... 6
Boys v. Morgan ... 71
Boyse v. Rossborough ... 28
Bradley v. Peixoto ... 100
Bradshaw v. Bradshaw ... 28
Bradwin v. Harpur ... 47
Bramall v. Lees ... 208
Braybrooke, Lord, v. Inskip ... 58
Bremer v. Freeman .. 6
Brewer v. Pocock ... 180
Brewis
Bridgman v. Dove 54
Britton v. Twining 65
Broad v. Bevan 66
Brocklebank v. Johnson
Brogden v. Brown 26
Broker v. Carter 141
Brooke v. Brooke ... 60, 63
——— v. Lewis
Broome v. Monck 121

Brown *v.* Brown ... 181
... 60
Pocock ... 60
Bryan *v.* White ... 33
Bruce *v.* Bruce ... 10
Budd ... 39
Buffar *v.* Bradford ... 65
Bullock *v.* Bennett ... 57
Burch ... 147
Burdus *v.* Dixon ... 59
Burnie *v.* Getting ... 53
Burne *v.* Markham ... 135
Burrough *v.* Philcox ... 60
Burroughs *v.* Chisholm ... 167
Burton *v.* Fisher ... 9
Butler *v.* Stratton ... 66
Butts ... 145
Byrd ... 32

C.

Calvert *v.* Sebbon ... 105
Cambridge *v.* Pons ... 93
Campbell ... 145
v. Campbell ... 55
French ... 39
— *v.* Graham ... 112
——— *v.* Netterville ... 96
Candler *v.* Tillett ... 198
Careless *v.* Careless ... 50
Carmichael ... 74
Carr *v.* Carr ... 53
Cartwright *v.* Cartwright 26, 100
——— *v.* Vawdry ... 67
Cary *v.* Askew ... 130
Casson *v.* Dade ... 32
Catherwood *v.* Chabaud ... 173
Cawthron *v.* Cawthron ... 41
Cave *v.* Roberts ... 17
Chambers *v.* Brailsford ... 55
Chapman *v.* Brown ... 54
——— *v.* Hart ... 117
——— *v.* Rothwell ... 208
Charnley *v.* Winstanley ... 4
Chauncy *v.* Graydon ... 100
Chilcot *v.* Bromley ... 177
Christmas *v.* Whinyates ... 38
Clare *v.* Hodges ... 151
Clark (27 L. J. Prob. 18.) ... 30
——— (2 Curt. 329.) ... 30
Clarke, Re ... 77
v. Brown .. 118
v. Palmer ... 96
v. Sewell ... 192
Clarkington 144, 152
Clavering *v.* Ellison 55, 100
Cleaver *v.* Sperling ... 98
Clerke *v.* Berkeley ... 96
Clive *v.* Carew ... 5
Cloves *v.* Awdry ... 59
Cockerell *v.* Barber ... 105
Cole *v.* Fitzgerald ... 53
Collier *v.* Squire ... 53
Collison *v.* Girling ... 57
Collinson *v.* Lister ... 175
Commula Hyder ... 215
Compton *v.* Bloxham ... 27
Connor, In re ... 68
Cook *v.* Oakley ... 52
Cooke *v.* Turner ... 98
Cooper *v.* Bockett ... 41
——— *v.* Thornton ... 189
Corneby *v.* Gibbons ... 27
Cornwall *v.* Cornwall ... 53
Craigie *v.* Lewin ... 8
Creed ... 143
Crickett *v.* Dolby ... 192
Crínivásammál *v.* Vijayammál 36
Crispin *v.* Doglioni ... 6
Croft *v.* Croft ... xxvi
Crommelin *v.* Crommelin ... 99
Crossly *v.* Clare ... 66
Cunningham ... 42
Curry *v.* Pile ... 70

D.

Dadoo Mania ... 144
Dallow ... 39
Dalton *v.* S. E. Ry. Co. ... 208
Davies *v.* Morgan ... 106
Dawson *v.* Kearton ... 179
——— *v.* Hearn ... 103
Day *v.* Day 47, 122, 126
——— *v.* Thompson ... 44
——— *v.* Trig ... 48
De Bonneval *v.* De Bonneval .. 8, 10
De la Farque ... 166
Dickson's Trust ... 101
D' Huart *v.* Harkness ... xxvi
Dilley *v.* Matthews ... 46
Dodgson ... 151
Doe *v.* Baidam Beebee ... 200
——— *v.* Edlin ... 77
——— *v.* Clarke ... 14
——— *v.* Gallini ... 47
——— *v.* Gilbert ... 4
——— *v.* Harris ... 40
——— *v.* Lightfoot ... 58
——— *v.* Manifold ... 32
——— *v.* Mills ... 37
——— *v.* Needs ... 61
——— *v.* Palmer ... 41
——— *v.* Perkes ... 40
——— *v.* Perratt ... 44
——— *v.* Sturges ... 184
——— *v.* Thomson .. 44

Doe *v.* Vardill ... 6
——— *v.* Wright ... 26
Dolphin *v.* Robins ... 12
Dommett *v.* Bedford ... 101
Don's Estate, In re ... 18
Doo *v.* Brabant ... 74
Doody *v.* Higgins ... 63
Dorchester *v.* Webb ... 4
D'Orleans, Duchess ... 9
Douglas *v.* Douglas ... 57
——— *v.* Congreve ... 54
Down *v.* Down ... 49
Downward *v.* Dickenson ... 144
Dowson *v.* Gaskoin ... 53
Drake *v.* Drake .. 56
Drummond *v.* Parish ... 34
Duane ... 27
Duckworth *v.* Johnson ... 208
Duffield *v.* Elwes ... 134
Du Hourmelin *v.* Sheldon ... 43
Durrant *v.* Friend ... 114
Dutton ... 40
Dyce Sombre *v.* Troup ... 26

E.

Earle *v.* Wilson ... 68
Eccles *v.* Cheyne ... 76
Edmunds *v.* Waugh ... 78
Edwards *v.* Edwards ...93, 174
——— *v.* Hall ... 108
Eeles ... 39
Egerton *v.* Lord Brownlow ... 43, 51
Ellice ... 40
Elliot *v.* Davenport ... 74
Ellis *v.* Eden ... 53
——— *v.* Walker ... 106
Emin *v.* Emin ... 200
Emuss *v.* Smith ... 57
Eno *v.* Tatham ... 121
Enohin *v.* Wylie ... 6
Essington *v.* Vashon ... 53
Euston, Earl of *v.* Seymour ... 34
Evans *v.* Jones ... 66
Eyre *v.* Countess of Shaftesbury ... 28

F.

Farquhar ... 34
Feltham's Trust ... 45
Ferrier ... 156
Field *v.* Peckett ... 53
Fitzroy, Re ... 38
Flanders *v.* Clarke ... 178
Fonnereau *v.* Poyntz ... 181
Fontaine *v.* Tyler ... 106
Forbes *v.* Forbes ...7, 8, 10
Ford *v.* Ford ... 57
——— *v.* Fleming ... 112
Fordyce *v.* Bridges ... 60
Frampton ... 144
Frankcombe *v.* Hayward ... 59
Franklin *v.* S. E. Ry. Co. ... 208
Fryer *v.* Morris ... 115
——— *v.* Ward ... 172

G.

Gardner ... 145
——— *v.* Hatton ... 106
Garland, Ex parte ... 198
Garth *v.* Meyrick ... 46, 70
Gauntlett *v.* Carter ... 27
Gayre *v.* Gayre ... 106
Gaze *v.* Gaze ... 30
Geale ... 25
Geaves *v.* Price ... 39
Gibson *v.* Bott ... 186
Gill *v.* Shelley ... 67
Girdar Dás Vallaba Dás ... 213
Gittings *v.* McDermott ... 63, 74
Gittins *v.* Steele ... 196
Godfrey *v.* Davis ... 68
Goldie ... xxvi
Goodlad *v.* Burnett ... 57
Goodtitle *v.* Southern ... 49
Gordon *v.* Gordon ... 68
Gorst *v.* Lowndes ... 84
Gough *v.* Bult ... 103
Gout *v.* Zimmermann ... 11
Grant *v.* Leslie ... 136
——— *v.* Lynan ... 62
Graydon *v.* Hicks ... 99
Graysbrook *v.* Fox ... 168
Green *v.* Ekins ... 191
——— *v.* Howard ... 61
——— *v.* Perwee ... 76
Greenwood *v.* Cozens ... 3
Gregory *v.* Cochrane ... 200
——— *v.* Queen's Proctor ... 31
Greville *v.* Tylee ... 42
Grey *v.* Mullick ... 44
——— *v.* Pearson ... 44, 51
Griffiths *v.* Prince ... 105
Grimwood *v.* Cozens ... 40
Gurney *v.* Gurney ... 37
Gwillim *v.* Gwillim ... 32

H.

H. *v.* W. ... 100
Hadjee Mustapha ... 200
Hale *v.* Tokelove ... 40
Halthead *v.* Shepherd ... 61
Hall *v.* Warren ... 44
Hallifax *v.* Wilson ... 88
Hamilton *v.* Lloyd ... 53
Harding *v.* Glyn 60, 61, 62
Harford *v.* Browning ... 105
Hargreaves *v.* Pennington ... 128
——— *v.* Wood ... 141

Harison *v.* Harison ... 46
Harris ... 39
——— *v.* Davis ... 64, 68
——— *v.* Watkins ... 132
Harrison *v.* Foreman ... 99
——— *v.* Rowley ... 105
Harrod *v.* Harrod ... 25
Hart *v.* Talk ... 47
Harvey *v.* Harvey ... 55
Harwood *v.* Baker ... 26
Hearle *v.* Greenbank ... 130
Hearn *v.* Baker ... 94
Heath *v.* Perry ... 192
——— *v.* Samson ... 11
Hepburn *v.* Skirving ... 13
Herbert *v.* Herbert ... 34, 35
Heseltine *v.* Heseltine ... 113
Hill ... 34
——— *v.* Walker ... 178
Hills *v.* Mills ... 139
Hinckley *v.* Simmons ... 25, 41
Hindmarsh *v.* Charlton ... 32
Hinton *v.* Pinke 106, 107
Hobbs *v.* Knight ... 39, 40
Hodges *v.* Peacock ... 71
Hodgson *v.* Beauchesne ... 8
Hogan *v.* Byrne ... 56
Hogg *v.* Hurrydoss Dutt ... 214
—— *v.* Mendieta ... 213
Holder *v.* Ramsbottom ... 54
Holford *v.* Wood ... 70
Holloway *v.* Clarkson ... 62
Holt *v.* Frederick ... 23
Home *v.* Pillans ... 93
Hood *v.* Hood ... 121
Hooley *v.* Hatton ... 69
Hosking *v.* Nicholls ... 106
Hoskins *v.* Mathews ... 8
Houghton *v.* Franklin ... 186
Howe *v.* Lord Dartmouth ... 110
Hudson *v.* Hudson ... 173
Huffam *v.* Hubbard ... 94
Hughes *v.* Empson 175, 198
——— *v.* Wells ... 5
Humberstone *v.* Stanton ... 74
Humphrey *v.* Tayleur ... 75
Hunt ... 33, 43
——— *v.* Hort .. 51, 54
——— *v.* Stevens ... 161
Hurjeevandass *v.* Davidass ... 219
Hurst *v.* Beach ... 70
Hutchinson *v.* Hammond ... 99
Hutchinson *v.* Barras ... 57
——— *v.* Smith ... 54

I.

Ibbetson ... 42
Ilchester, Ex parte Lord ... 40
Incorporated Society *v.* Richards 57
Indian Chief, The ... 9
Innes *v.* Mitchell ... 126
——— *v.* Sayer ... 45
Irvin *v.* Ironmonger ... 187
Ison *v.* Butler ... 74

J.

Jackson, Mary ... 139
——— *v.* Hamilton ... 56
——— *v.* Paulet ... 136
Jacomb *v.* Harwood ... 172
James *v.* Smith ... 66
Jefferies *v.* Michell ... 45
Jeffreys *v.* Jeffreys ... 109
Jenkins *v.* Gaisford ... 30
Joel *v.* Mills ... 101
Johnson *v.* Johnson ... 76
Johnstone *v.* Lord Harrowby... 70
Jones 137, 148, 167
——— *v.* Beytagh ... 144
——— *v.* McIlwain ... 88
——— *v.* Southall ... 59
Jopp *v.* Wood ... 10
Judson ... 147

K.

Kane *v.* Reynolds ... 17
Kell *v.* Charmer ... 27
Kenebel *v.* Scrafton ... 68
Kennedy *v.* Kingston ... 61
Kerr *v.* Middlesex Hospital ... 125
Key *v.* Key ... 51
Kidney *v.* Coussmaker ... 130
Killican ... 144
Killick ... 32
King, Re ... 54
——— *v.* Cleaveland ... 62
——— *v.* Wallcott ... 188
Kirby *v.* Potter 108,112
Kirkpatrick *v.* Kilpatrick ... 47
——— *v.* Kirkpatrick ... 109
Knight *v.* Ellis ... 65
——— *v.* Knight ... 91
——— *v.* Robinson ... 54
Knollys *v.* Shepherd ... 57
Knox *v.* Hotham ... 103

L.

Labouchere *v.* Tupper ... 175
Lambell *v.* Lambell ... 143
Lane ... 137
——— *v.* Green ... 46
Lang *v.* Pugh ... 47
Langdon *v.* Rooke ... 138
Langford *v* Gowland ... 87
Lawson *v.* Stitch ... 106

... 34
Leake v. 83
Leeds, Duke of, v. Amherst ... 54
——— v. Munday 56
Leeming v. Sherrall 91
Leeson 147
Leighton v Baillie 71
Leslie v. Leslie 192
Lester v. Garland ...84, 102
Lett v. Randall ... 125
Lewin v. Lewin ... 181
Lewis v. Lewis ... 32
Lincoln v. Wright ... 198
Lindgren v. Lindgren ... 45
Lindsell v. Thacker ... 58
Lister v. Smith ... 27
Lloyd v. Branton ... 101
Loffus v. Maw ... 30
Long v. Blackall ... 62
——— v. Short ... 107
——— v. Watkinson ... 62
Longbottom v. Satoor ... 87
Longhead v. Phelps ... 84
Longmore v. Broom ... 60
Lovegrove ... 25
Lovejoy ... 144
Luckanunder Seal v. Koroona-
money Dossee ... xxvi
Ludlow, Re ... 52
Luke ... xxvi
Lushington v. Sewell ... 53
Lyall v. Paton ... 8
Lyons, Mayor of, v. E. I. Co. ... 25, 30

M.

McCleroth v. Bacon 62
Mackinnon v. Peach ... 75
Maddison v. Andrew ... 60
Mahárání Essada Bye v. E. I.
Company ... 169
Maitland v. Adair ... 74
Major v. Williams ... 43
Maltass v. Maltass ... 11
Manly, Martha 136
Manning v. Purcell 54
——— v. Thesiger ... 70
Markwell v. Markwell ... 179
Marsh v. Marsh ... 43
Marshall, Ex parte .. 58
Mason v. Clarke ... 65
——— v. Morgan ... 5
Masters v. Masters ... 71
Mathews v. Warner ... 27
Mathias ... 33
Matthews v. Foulshaw ... 46
Maybank v. Brooks 74
Maynard v. Wright ... 56
Mellish v. Mellish ... 55
121
Metcalfe ... 146
Mihirwanjee Nusserwanjee
v. Awan Baee .. 201
Miller v. Huddlestone .. 181
——— v. Thurgood .. 133
Milligan .. 35
Mitcheson .. 40
Mitchell v. Gard ... 177
Modee Kaikoosrow Hormusjee
v. Cooverbhaee .. 201
Moffet v. Bates ...92, 122
Moorhouse v. Lord .. 8, 11
Morgan v. Thomas ... 140
Morley, Re ..
Morrall v. Sutton .. 27
Morrel v. Fisher .. 48
Morris .. 28
Mortimer v. West .. 67
Morton .. 28
Moseley v. Mafrey .. 47
Moss v. Bardswell .. 138
Moyle v. Moyle ..
Muddenmohun Mullick .. xxvi
Mullick v. Mullick .. 174
Mullins v. Smith . 111
Muncherjee Pestonjee v. Na-
rayen Luxmon .. 36
Mundy ... 27
Munro v. Douglas ... 6
——— v. Munro ...
Murray v. Jones ...
Musleah v. Musleah ... 200

N.

Napier, C. J. ... 156
Nash v. Morley ... 86
Nawab Amin Ood Dowlah v.
Syud Roshun Ali Khan ... xxvii
Naylor v. Stainsby ...
Neathway v. Reed ... 94
Nerot v. Burnard ... 4
Newman v. Barton ... 193
Newton v. Metr. Ry. Co. ... 139
Nichols v. Hawkes
Nicholls v. Binns 26
v. Hawkes
v. Nicholls 27
v. Osborn 98
Nickesson v. Cockill 187
Nosotti v. Jefferson 177

O.

Oddie v. Brown 56
Ogle v. Morgan 177
Ommaney v. Bingham
Onions v. Tyrer
Oppenheim v. Henry
Orr v. Kaines ...
Owston

P.

Padbury *v.* Clark
Padget *v.* Priest 169
Page *v.* Leapingwell 181
Palmer *v.* Craufurd 126
Paramour *v.* Yardley 183
Parker, John 85
Paull *v.* Simpson 170
Peacock 144
Pearce *v.* Graham 76
Pegg *v.* Chambelain 150
Pelham *v.* Anderson 86
Pembroke *v.* Friend 121
Pennington *v.* Healey 198
Penny *v.* Turner 60
Perkins *v.* Micklethwaite 48
Pettifer *v.* James 143
Peyton *v.* Bury 99
Phanus Johannes 200
Phillips *v.* Eastwood 53
Phipps *v.* Annesley 187
Pickering *v.* Pickering 110
Pickup *v.* Atkinson 110
Piercy 33
Pitt *v.* Pitt ... 12
Pomfret *v.* Perring 59
Pope *v.* Whitcombe 61, 62
Porter *v.* Fox 83
Pottinger *v.* Wightman 11
Potts *v.* Atherton ... 88
Powell's Trust ... 54
Powell *v.* Evans ... 198
——— *v.* Rees ... 207
——— *v.* Stratford ... 136
Pratt *v.* Mathew ... 46
Price *v.* Newbolt ... 45
Pulman ... 138
Pulsford *v.* Hunter ... 90
Pyot *v.* Pyot ... 61

R.

Rackham *v.* Seddall ... 58
Radford *v.* Radford ... 47
Raffenel ... 11
Raine ... 25
Rainsford *v.* Taynton ... 151
Raja Deedar Hossein *v.* Ranee Zuhoor ool Nissa ... 200
Randfield *v.* Randfield ... 37
Raven *v.* Waite ... 192
Rawlings *v.* Jennings ...
Rawlinson *v.* Burnell ... 144
Rayner *v.* Mowbray ... 61
Read *v.* Snell ...
Reay *v.* Rawlinson ...
Reed *v.* Devaynes ... 105
Rees xxvi
Regina *v.* Sandes 221
Rehden *v.* Wesley
v. Cooper ... 59
Reynolds *v.* Kortw ...
Rhodes *v.* Rhodes ... 55
Richard *v.* Robson 87
Richards *v.* Richards
Richardson *v.* Watson
Richmond *v.* Nicholson ...
Ricketts *v.* Turquand 45
Ridges *v.* Morrison 71
Ring *v.* Hardwick ... 100
Ripley ... 146
Rippen *v.* Bates ... 54
Ritchie *v.* Stokes 217, 218
River's Case ... 67
Roberts ... 146
v. Kuffin ... 53
v. Pocock 109, 182
v. Robert ... 41
Rocke ... 144
Roddy *v* Fitzgerald ... 44, 65
Roe *v.* Bell ... 49
v. Reade ... 58
Rogers *v.* Thomas ... 53
——— *v.* Towsey ... 94
Rolfe *v.* Perry ... 17
Ross *v.* Borer ... 125
Rosser ... 141
Rowson *v.* Harison ... 121
Ryan *v.* Ryan 143
Ryder 136

S.

Sadler *v.* Turner 109
Sandersen *v.* Stoddart 176
Saunders 167
Savery *v.* Dyer
Schloss *v.* Stiebel 46
Scrimshire *v.* Scrimshire 7
Scruby *v.* Fordham ... 40
Scurfield *v.* Howes ... 94
Selsey, Lord *v.* Lake, Lord 46
Senior *v.* Ward 208
Seymour's Trusts 62
Shaftsbury *v.* Shaftsbury 117
Sharland *v.* Mildon 170
Sharpe *v.* Sharpe 58
Shaw, Ex parte ... 58
Shelling ... 76
Shirt *v.* Westby ...
Shore *v.* Wilson 143
Short *v.* Smith 75
Sibley *v.* Cook ... 74
——— *v.* Perry 55, 66
Simson *v.* Jones xxvi
Simpson ... 217
——— *v.* Jones 24
Skrymsher *v.* Northcote ... 75
Slatter *v.* Slatter 16
Smith (8 Curt. 31) ...
——— (34 L. J. Prob. 19) 41

Smith *v.* Campbell
——— *v.* Everett
——— *v.* Lediard
——— *v.* Smith
Solomon Hayum Musleah
Ezra Ezechiel Musleah 200
Somerville *v.* Somerville 7
Southey *v.* Lord Somerville 55
Sparrow *v.* Josselyn
Sperling 33
Spooner's Trusts ... 59, 72
Stackpoole *v.* Howell
Stahlschmidt *v.* Lett ... 178
Staines *v.* Stewart 40
Standen *v.* Standen
Stanley *v.* Barnes 201
Stapleton *v.* Cheales 90
Stephen *v.* Hume 200
Stephens *v.* Stephens 133
——— *v.* Taprell 39
Stevenson *v.* Abington 101
——— *v.* Dowson 106
Stillman *v.* Weedon 57
Stockwell *v.* Ritherdon 38, 41
Stokes *v.* Cheek 103
Stone *v.* Parker 121
Stracey 25
Stott *v.* Lord 172
Strange *v.* Smith 96
Stratton *v.* Best 129
Street *v.* Street 126
Stretch *v.* Watkins
Stringer *v.* Gardiner 45
Stuart *v.* Bute 28
Studholm *v.* Hodgson 191
Sturgess *v.* Pearson 99
Suisse *v.* Lowther ... 70
Summerell *v.* Clements ... 28
Sweeting *v.* Sweeting 87
Sydney *v.* Wilmer 78

T.

Talbot *v.* Lord Radnor 92
Taylor *v.* Newton 175
——— *v.* Richardson 47
——— *v.* Taylor 110
Taynton *v.* Hannay ... 151
Tebbs *v.* Carpenter 175
Tempest *v.* Tempest 37
Thellusson *v.* Rendlesham
——— *v.* Woodford 55
Thomas *v.* Evans 39
Thompson *v.* Shakespeare 87
Thorncroft *v.* Lashmar 27
Thrupp *v.* Collett 86
Thwaites *v.* Foreman 181
Toomy 136
Toplis *v.* Baker 24
Tothill *v.* Pitt
Townley *v.* Bedwell
Towns *v.* Wentworth
Tregonwell *v.* Sydenham ...
Trevelyan
Trimnell ...
Trotter *v.* Trotter ...
Tupper *v.* Tupper ... 40
Turner
v. Cox 177
v. Hardey

U.

Ulrich *v.* Litchfield ... 51, 56
Underwood *v.* Wing ... 74, 98

V.

Vancittens 144
Van Straubensee *v.* Monck 33
Vaughan *v.* Vanderstegen 5
Veal *v.* Veal
Veiga 141
Velho *v.* Leife 138
Viegas xxviii
Vincent *v.* Godson
Vinnicombe *v.* Butler
Vize *v.* Stoney 91

W.

Walcot *v.* Hall ... 195
Walker *v.* Carless 143
Waller *v.* Barrett 180
Wallich 138
Walsh *v.* Wallinger 61
Walton, Re ... 64
Ward *v.* Turner ... 134
Warren *v.* Kelson 154
——— *v.* Rudall 92
Webb *v.* Byng 45
——— *v.* Needham 143
Webber *v.* Webber 188
Westmeath *v.* Westmeath 100
Whale *v.* Booth 171
Wharram *v.* Wharram 36
Wharton *v.* Barker 62
Whicker *v.* Hume 8
White
White's Trusts 60
White *v.* Baker 94
——— *v.* Repton ... 34
Whitehead *v.* Taylor 170
Whitehorn *v.* Harris ... 61
Whitley *v.* Whitley ... 129
Wigan *v.* Rowland 37
Wigg *v.* Wigg ... 77
Wiggett *v.* Fox ... 208
Wild's Case ... 65

Wilkins *v.* Jodrell 53
Williams 13, 149
67
v. Ashton ... 41
v. Dormer 12
v. Jones 74
Willis *v.* Courtois 53, 54
——— *v.* Hiscox 100
Wilson *v.* Lady Dunsany 178
——— *v.* Eden 57
Wiltshire, Re 181
Wing *v.* Angrave 74
Wisden *v.* Wisden ... 63
Witt *v.* Amiss ... 135
Wood *v.* Penoyre 186
Woodhouse *v.* Meredith 59
Woodhouslee, Lord *v.* Dalrymple 67
Woodstock *v.* Shilleto ... 47
Woolstencroft *v.* Woolstencroft 121
Worthington *v.* Evans ... 96
——— *v.* Wiginton ... 132
Wrench *v.* Jutting ... 53
Wright, In re ... 18
Wylie *v.* Wylie ... 43
Wynch, Ex parte ... 65

Y.

Yates *v.* Compton ... 126
Yates *v.* Maddan ... 125
Yelverton *v.* Yelverton ... 12
Young *v.* Davies 37, 66, 75
——— *v.* Oxley ... 167

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AND

P. 2, l. 14, *for* 'Statutes' *read* 'Statute'

P. 6, l. 3 of the commentary, *add* '*Lachmunder Seal* v. *Koroonamoney Dossee*, 1 Boulu. 210.'

P. 7, l. 11, *add* 'A power created by an English Will to appoint moveables "by Will duly executed" may be executed by a Will valid according to the law of England or by a Will made in conformity with the law of the testator's domicile (*D'Huart* v. *Harkness*, 34 L. J. Ch. 311).'

P. 10, last line, add, 'See, too, the International Domicile Act, 1861 (24 25 Vic. c. 121) Sec. 1.'

P. 17, last line, add 'See *Attorney General* v. *Köhler*, 9 H. L. Ca. 654.'

P. 24, lines 7 and 8, *omit the words* 'of land and moveables becoming subject to different rules in such a case;' and for line 22 *substitute* 'The real estate of a female infant has hitherto not been capable of being bound by the settlement, because her real estate does not by the marriage become the absolute property of the husband (*Simson* v. *Jones*, 2 R. & M. 376). Hence Sec. 45, which extends to moveables as well as immoveables, was introduced as an enabling Section.'

P. 25, line 6 from bottom, *add* 'If, however, he be of 'sound mind' (like Laura Bridgman) and over 18, there is no reason why under this Act he should not be a testator.'

P. 31, line 3, *for* 'where' *read* 'when'

P. 32, line 21 from bottom, *add* '*Rees*, 34 L. J. Prob. 56: *Croft* v. *Croft*, 34 L. J. Prob. 44.'

P. 33, line 22, *after* '598' *insert* '*Luke*, 11 Jur. N. S. 397.'

P. 34, *after* Illustration (*c*) *insert* '*Goldie*, 1 Boulu. 360.'

P. 36, line 13 from bottom, *for* '*Luxmon*' *read* '*Luxamonjee* (1 Bomb. H. C. Rep. 77).'

P. 40, line 11 from bottom, *after* '135' *insert* '*Mudden Mohun Mullick*, 2 Boulu. 90.'

P. 46, Illustration (*f*) line 4, *for* 'testators' *read* 'testator'

P. 47, line 27, *for* 'E' *read* 'C.'

—— line 36, *for* 'apparently' *read* 'apparent'

P. 48, Illustration (*b*) *for* 'zámíndárí' *read* 'zamíndárí'

P. 50, line 16, *for* 'two more' *read* 'two or more'

P. 52, line 27, *for* '*ibid.*' *read* '1 Jarm. Wills.'

P. 54, line 2 from bottom, *after* 'Wills' insert 765.

P. 58, Illustration (*f*) *for* 'bequest' *read* 'bequeaths'

P. 68, last line, *for* (*n*) *read* (*m*)

P. 69, line 19, *for* 'are legitimate' *read* 'are illegitimate'

P. 72, line 5, *for* 'entitied' *read* 'entitled'

—— line 7 from bottom, *before* '(Hawk.' *insert* '18'

P. 74, in marg. note, *for* 'or' *read* 'of'

P. 75, line 9, *for* 'survivor' *read* 'other joint-tenant'

P. 76, line 11 from bottom, *for* 'whereby' *read* 'where by'

P. 77, line 13 from bottom, *for* 'brother' *read* 'brothers'

P. 78, line 11, *for* 'A,' *read* 'A.'

—— line 12 from bottom, *after* 'F' *insert a comma*

P. 81, Sec. 101, line 4, *for* 'leaving' *read* 'living'

line 19, *before* 'impliedly' *insert* 'or'

—— line 9 from bottom, *for* 'Eg.' *read* 'Eq.'

P. 90, last line, *for* 'interest") not' *read* interest"

P. 138, line 11, *for* 'B' *read* 'C'

P. 143, note, line 2, *before* 'S.' *insert* 'S'

P. 161, Sec. 245. The whole of the note to this Section, except the first line, should be transposed to Sec. 248 (p. 162).

P. 180, line 13 from bottom, *after* 'volunteers' *insert* 'The phrase "has no right" merely excludes the executor's discretion.'

P. 191, line 14, *after* 'property' *insert* 'to'

P. 191, line 23, *for* 'That is to say' *read* 'In England'

P. 196, line 17, *for* '*Kaimes*' *read* '*Kaines*'

P. 200, note, line 2, *after* 'nuncupative' *insert* '(*Nawab Amin-ood-Dowlah* v. *Syud Roshun Ali Khan*, 5 Moo. I. A. Ca. 199).'

P. 201, line 8, for '9' *read* '8.'

P. 205, after Sec. 7, *add* 'When there is no next of kin the Crown, of course, would take as *ultimus hæres*.'

P. 210, line 1, *for* '1865' *read* '1855.'

P. 215, *after sec.* 17 *insert* 'The Administrator General is entitled under this Section to a grant in preference to an ordinary pecuniary legatee (*Viegas*, 1 Bom. H. C. Rep. 103).'

P. 217, line 2 from bottom, *for* 'hall' *read* 'shall"

P. 221, line 5, *for* '1855' *read* '1849.'

P. 230, line 15 from bottom, *for* 'certifiate' *read* 'certificate'

An Act to amend and define the Law of Intestate and Testamentary Succession in British India.

WHEREAS it is expedient to amend and define the rules of law applicable to Intestate and Testamentary Succession in British India; It is enacted as follows:—

Preamble.

PART I.

Preliminary.

1. This Act may be cited as "The Indian Succession Act, 1865."

Short Title.

2. Except as provided by this Act or by any other law for the time being in force, the rules herein contained shall constitute the law of British India applicable to all cases of Intestate or Testamentary Succession.

India in cases of

3. In this Act, unless there be something repugnant in the subject or context—

Interpretation Clause.

Words importing the singular number include the plural: words importing the plural number include the singular; and words importing the male sex include females.

"Number."

"Gender."

"Person" includes any Company or Association, or body of persons whether incorporated or not.

"Person."

"Year" and "Month" respectively mean a year and month reckoned according to the British Calendar.

"Year."

"Month."

"Immoveable property" includes land, incorporeal tenements and things attached to the earth, or permanently fastened to anything which is attached to the earth.

pro-

'Incorporeal tenements.' An incorporeal tenement includes every modification of right concerning land, to which the law has attributed a substantive though invisible being. It consists of a right, not to the

possession of the land itself, but to some benefit to arise out of it (Burton, Comp. Secs. 3, 4.) For example, Rents, private rights of Way rights to running Water (*a*), and to Light.

"Moveable property" means property of every description except immoveable property.

"Moveable property."

See the Penal Code, Sec. 22.

"Province" includes any division of British India having a Court of the last resort.

"Province."

"British India" means the Territories which are, or may become, vested in Her Majesty or her successors by the Statutes 21 and 22 Vic., Cap. 106 (*An Act for the better Government of India*) other than the Settlement of Prince of Wales' Island, Singapore, and Malacca.

"British India."

"District Judge" means the Judge of a principal Civil Court of original jurisdiction.

"District Judge."

"Minor" means any person who shall not have completed the age of eighteen years, and "minority" means the status of such person.

"Minor."
"Minority."

"Will" means the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death.

This definition seems taken from the Roman Law: "Voluntatis nostrae justa sententia, de eo, quod quis post mortem suam fieri velit," Dig. lib. 28, tit. 1, l. 1.

"Codicil" means an instrument made in relation to a Will, and explaining, altering or adding to its dispositions. It is considered as forming an additional part of the Will.

"Codicil."

This is the meaning *now* given by English law to Codicil. (Of old, it meant a testament without an executor appointed). The Roman *Codicilli* might be made without there being any testament at all, and were merely directions enforced as creating *fidei commissa*. Sand. Inst. 350.

(*a*) 1 Morl. Dig. 2d. ser. 389: 1 Madras H. C. Rep. 258.

A Codicil is *primâ facie* dependent on the Will, and, as we shall see, the destruction of the latter is presumed to be a revocation of the former (*Greenwood* v. *Cozens*, 2 Sw. & T. 364, 368.)

"Probate" means 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.

"Probate."

From Wms. Exors. 254.

"Executor" means a person to whom the execution of the last Will of a deceased person is, by the testator's appointment, confided.

"Executor."

In England an executor means "the person to whom the execution of the last Will and Testament *of personal estate* is, by the testator's appointment, confided (Wms Exors. 196). No distinction being drawn by this Act between the devolution of real and that of personal property, the words italicised have been omitted from this definition.

"Administrator" means a person appointed by competent authority to administer the estate of a deceased person when there is no executor.

"Administrator."

And in every part of British India to which this Act shall extend, "Local Government" shall mean the person authorized by law to administer Executive Government in such part; and "High Court" shall mean the highest Civil Court of Appeal therein.

"Local Government."

"High Court."

4. No person shall, by marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried.

Interests and powers not acquired nor lost by marriage.

This Section (which does not apply to marriages contracted before 1st January 1866—see Sec. 331) will make important changes in the general rights, liabilities and disabilities arising out of the relation of husband and wife, in the case of persons to whom English Law has hitherto been applied in India.

So far as regards property, it appears to abolish by implication the doctrine of unity of persons between husband and wife.

Of the effect of marriage upon the acts and agreements of the husband and wife prior to marriage. Marriage will still revoke the

maker's will, except when made under a power in the case mentioned in Section 56. But a spinster's submission to arbitration in respect of her own property will not be revoked by her marriage before the award, (*Charnley* v. *Winstanley*, 5 East, 266 : Russ. Arb. 156), and the marriage of a spinster partner will now probably be held not to operate as a dissolution of a partnership at will (*Nerot* v. *Burnard*, 4 Rep. 17).

Of the effect of marriage upon the prior acts and agreements of the husband or wife, with or in relation to each other. It will probably be held that Section 4 has altogether done away with the common law rule, that where a man marries his creditor the debt is thereby released. The law remains as it was in the case of an executrix or administratrix marrying a debtor to the estate (*Dorchester* v. *Webb*, Cro. Car. 372), and in that of an executor marrying a residuary legatee (*Baker* v. *Hall*, 12 Ves. 497).

Of the effect of limitations of property to husband and wife during the coverture. At common law, when an estate is conveyed or devised to the husband and wife during the coverture, they will take by entireties, *i. e.* each of them is seised of the whole estate, and neither of a part, and the survivor is entitled to the whole ; but the husband may do what he pleases with the rents and profits during coverture. This doctrine rests on the unity of persons between husband and wife which, as above suggested, would seem to be abolished in the case of those to whom this Act applies. The consequence is that the husband and wife in such a case would take as joint tenants with equal undivided shares, and with power to each to alien his or her own moiety in his or her life-time. When a term of years becomes vested in husband and wife, the husband alone will have no power, such as he has at common law (Co. Litt. 187 b.), to assign the term so as to bind the wife surviving. And when lands are granted jointly to a husband and wife and a third person, Littleton's doctrine, that the married couple would only take a moiety, would probably not be followed.

Of gifts and grants between husband and wife. In this respect the law generally seems unaltered. Since the statute of uses a husband has been able to convey to his wife, and in equity a gift by a husband to his wife has always been upheld where the transaction was *bonâ fide* and reasonable. It will, however, possibly be held, should such a case as *Doe* v. *Gilbert*, 5 Q. B. 423, Sugd. Pow. 168, arise, that a wife, tenant for life with the usual leasing power, may grant a lease to her husband ; and where a husband gives his wife moveable property, he will have no power to alien it.

Of the husband's interest in wife's personal estate in possession. Section 4 altogether does away with the rule, that marriage is an absolute gift to the husband (*a*) of the personal chattels of which the wife was actually and beneficially possessed at the time of the marriage in her own right; (*b*) of such other personal chattels as come to her during the marriage; and (*c*) of the chattels personal of the wife which, at the time of the marriage, were in the possession of a third person.* (See 1 Bright, 34). It also does away with the rule that marriage is a gift to the husband of his wife's *choses in action*, (that is, things to which she has only a bare right enforceable by suit, such as debts owing to her, arrears of rent, legacies, negotiable instruments, Government Promissory Notes, etc.), on condition that he reduce them into possession during the continuance of the marriage.

* In suing for these it will now be necessary for the wife to join: *quaere*, indeed, whether the husband should be a party? The Code of Civil Procedure is silent on the subject.

He will no longer be able, by his indorsement alone, to pass his wife's negotiable instruments (*Mason* v. *Morgan*, 2 A. & E. 30): nor has he any power to release or assign her choses in action.

Of the husband's interest in personal estate belonging to his wife as executrix or administratrix. By English Law marriage gives the husband no interest in the goods and chattels belonging to his wife as executrix or administratrix, because, it is said, such gift might prove disadvantageous to the creditors of the testator or intestate, (1 Bright, 39). Section 4 in this respect leaves the law as it was. It would, however, seem that under this Act the husband is not entitled to administer in his wife's right, and, consequently, that he has no power of disposition over the personal estate vested in her as executrix or administratrix, and that he cannot release debts owing to the estate of the testator or intestate.

As regards the wife's chattels real the husband takes no interest in her right, no power to sell, sub-lease or mortgage them during the coverture. It follows, of course, that the law will make no disposition of the wife's term in case of the husband's misconduct, *e. g.*, for committing waste or incurring forfeiture under the Penal Code. Nor can his wife's property be sold for the satisfaction of his debts.

With respect to the wife's freeholds for life and to her freeholds of inheritance before the birth of issue, the husband, according to the law hitherto in force, acquired a freehold interest during the joint lives of himself and his wife (1 Bright, 112). But as to lands and tenements of which she was seised in fee or in tail, upon having issue by her born alive that might by possibility inherit the estate by descent from her, he was entitled to an interest for his own life—called 'an estate by the curtesy'—in the lands and tenements in question. Section 4 denies him any such interest, and removes from Indian law a large and difficult body of learning, which, in a country where there are so few settlements, would have occasionally caused much difficulty in working out the part of this Act relating to succession. Other difficult heads of English law—the husband's power over his wife's realty—his right to be relieved against dispositions of property made by the wife before marriage, her equity to a settlement out of her own property—are also swept away by the operation of this Section. And in antenuptial settlements prepared after the commencement of this Act it will be needless to insert the usual covenant to settle the wife's after-acquired property, or (as regards her own property) at the time of the marriage to create a trust for her separate use.

It will probably still be held that the permissive receipt by the husband of the wife's income shall be assumed to have taken place with her consent, and hence that she shall not be allowed to charge him as her debtor for the amount received, or, at all events, shall not be allowed to recover more than one year's income. (2 Dav. Conv. 2nd ed. 56, 57).

Henceforward, in the absence of a settlement, a wife's estate (as in the case of property settled to the separate use of a married woman which she is not restrained from anticipating) will be liable for her engagements (*Vaughan* v. *Vanderstegen*, 2 Drew. 179), and chargeable with the consequences of a fraud or breach of trust committed by her (*Barrow* v. *Barrow*, 4 K. & J. 409: *Hughes* v. *Wells*, 9 Hare 773: *Clive* v. *Carew*, 5 Jur. N. S. 487.)

The only way, then, in which a husband by operation of law becomes entitled to his wife's estate is as her administrator under Sec. 205; and when he dies without having recovered all his wife's personal estate, letters of administration *de bonis non* &c. of her estate, will probably, in accordance with the English practice till lately (1 Bright, 41). be granted to the representative of the wife—the administration being thus united with the beneficial interest.

PART II.

Of Domicile.

Law regulating succession to a deceased person's immoveable and moveable property, respectively.

5. Succession to the immoveable property in British India of a person deceased is regulated by the law of British India, wherever he may have had his domicile at the time of his death. Succession to the moveable property of a person deceased is regulated by the law of the country in which he had his domicile at the time of his death.

Illustrations.

(a) A, having his domicile in British India, dies in France, leaving moveable property in France, moveable property in England, and property, both moveable and immoveable, in British India. The succession to the whole is regulated by the law of British India.

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

The first clause of this Section is merely a particular case of the rule, that succession to immoveable property is regulated by the *lex loci rei sitae* (*Doe* v. *Vardill*, 5 B. & Cr. 438).

If a Will be made in England of lands in India, its construction and the ceremonial of its execution will be governed by the rules laid down in this Act. So if a man die intestate, domiciled in England, his lands in India will descend according to the rules hereinafter prescribed in cases of intestate succession. (1 Jarm. Wills, 1, 2).

Mobilia sequantur personam (*a*), as the rule that succession to moveables is regulated by the *lex domicilii* is occasionally expressed, of course respects only questions of testacy and intestacy, of the interpretation and construction of the Will (see *Trotter* v. *Trotter*, 4 Bl. N. S. 502) and of the devolution of the property: (*Enohin* v. *Wylie*, 10 H. L. Ca. 1, 13: *Crispin* v. *Doglioni*, 3 Sw. & T. 96): the Court of Administration is regulated by the *lex loci rei sitæ* (1 Jarm. Wills, 2). It was to prevent the evils which would result from a conflict of jurisdictions, that the law of domicile was introduced and adopted by civilised nations (10 H. L. Ca. 15). But parties entitled to insist on the authority of the Court of the domicile may, by their conduct give

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(*a*) See Story Confl. of Laws, par. 380, Phillim. Dom. 8, and *Bremer* v. [illegible], 10 Moo. P. C. C. 306, 358, per Lord Wensleydale: *Boyes* v. *Bedale*, 12 W.

to the Court where the property is situate power to construe the Will and administer the estate so far as funds and persons in the jurisdiction of the latter Court are concerned (10 H. L. Ca. 16).

The Section under consideration does not appear to affect the rule, that a Will made under a power, if executed as required by the power, will be good without reference to the testamentary law of the testator's domicile: for the appointee takes, not under the instrument exercising, but under the instrument creating, the power; and the latter instrument will be construed according to the law of the place where it is executed if it deal with moveables and according to the *lex loci rei sitæ* if it deal with immoveables. 1 Jarm. Wills, 5.

6. A person can only have one domicile for the purpose of succession to his moveable property.

One domicile only affects succession to moveables.

See *Somerville* v. *Somerville*, 4 Ves. 794, per Lord Alvanley: *Forbes* v. *Forbes*, Kay 353, per Wood V. C.

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 father was domiciled at the time of the father's death.

Domicile of origin of person of legitimate birth.

Illustration.

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.

8. The domicile of origin of an illegitimate child is in the country in which, at the time of his birth, his mother was domiciled.

Domicile of origin of illegitimate child.

Except in one point, Sections 7 and 8 merely express the rule of the Civil Law: *Patris originem unusquisque sequitur* and *Ejus, qui justum patrem non habet, prima origo a matre* (1 Burge, 33: *Scrimshire* v. *Scrimshire*, 2 Hagg. Cons. Rep. 405). The exception referred to, is the provision as to the domicile of origin of a posthumous child. The rule hitherto prevalent is that such a child's domicile of origin is the domicile which its *mother* had at the time of its birth.

The Act makes no provision for the case where the child's parents are unknown. It is submitted that the domicile of origin is then the place of its birth, or that where it is found (Westl. 35.)

Domicile is the legal conception of residence (Westl. 30), of which there are three kinds. I. Every one receives at birth a "Domicile of origin" (*domicilium originis vel naturale, domicilium nativitatis*) which adheres until another is acquired and so, throughout life, each successive domicile can only be lost by the acquisition of a new one (Sec. 9 infra: Westl. 33)—II. Domicile by operation of law (*necessarium*) which attaches to two classes: those under the control of another, as in the case of (*a*) the wife (Secs. 15, 16) *b*. the minor, Sec. 14), *c*. the servant, (Sec. 12) and those on whom the State affixes a domicile as in the case of *a*. the officer,

b. the prisoner (Sec. 16).—III. Domicile of choice (*voluntarium, adscititium*) where one is abandoned and another acquired (Phillim. 25).

Continuance of domicile of origin.

9. The domicile of origin prevails until a new domicile has been acquired.

The presumption of law is that the domicile of origin is retained unless the change is proved. The burthen of proving the change is cast on him who alleges it (1 Burge, Comm. 34, 40: *Aikman* v. *Aikman*, 3 Macq.877 : 7 Jur. N. S. 1017, per Lord Wensleydale, *Atty Gen.* v. *Rowe*, Hurl. & Colt. 31 ; 8 Jur. N. S. 823). The circumstances amounting to proof of the acquisition of a new domicile are defined in the following Section to be these : 1st, the factum of taking up a new habitation in a country not that of his origin, and 2d, that such habitation be "fixed" *i. e.* taken up with the *animus manendi*, the intention to reside, in the new locality. As to the first it would seem that a man's being *in itinere* would not be a sufficient taking up a new habitation (but see *Munro* v. *Douglas*, 5 Madd. 379 : *Forbes* v. *Forbes*, Kay 354) : there must be a complete transit to, and an actual residence in the new home. But to consolidate the new domicile, when the transit is once complete, length of time is not important : one day will be sufficient, provided the *animus manendi* exist (*Craigie* v. *Lewin*, 3 Curt. 448 : Westl. 38). When death occurs *in transitu* the old domicile (if an acquired one) does not remain, the consequence being that the domicile of origin reverts, *Lyall* v. *Paton*, 25 L. J., Ch. 746 : 2 Jarm. Wills 9 : 3 Sw. & T. 18. Much difficulty will probably arise from the ambiguity of the term "fixed" as it depends for its interpretation on the intention of the party, which must be collected from various indicia incapable of precise definition. (Wood V. C., Kay 353) : the mere being in the new locality for however long a continuance, will not of itself be sufficient. As Lord Cranworth said in *Whicker* v. *Hume*, 7 H. L. Ca. 159, and in *Moorhouse* v. *Lord*, 10 H. L. Ca. 283, a man must intend *quatenus in illo exuere patriam.* See further as to the effect of residence, *Hodgson* v. *Beauchesne*, 12 Moo. P. C. 285, 328. A Scotch domicile has been retained by the absence of the *animus manendi*, during an eight years' habitation in London (*Munro* v. *Munro*, 7 Cl. & F. 842, Westl. 36.) Next, as the intention must be to reside, it will not be satisfied by a sojourn adopted for a limited or temporary purpose, with the design of returning on accomplishment (Westl. 36.) Thus in the case of the political refugee (Section 10, *infra*, Illustration 6), which seems suggested by *DeBonneval* v. *De Bonneval*, 1 Curt. 856, his hope of a political change, which may enable him to return, is considered to preserve to him his native domicile. So an English domicile would not be lost by the intention of spending a year or two in Italy for the sake of health (*Whicker* v. *Hume*, 13 Reav. 366, 398)—"though," says Mr. Westlake, "if the necessity of a warm climate should cause one to remove his establishment to Naples, it would not be preserved by the indefinite hope of returning at some future period with a renovated constitution" (see *Hoskins* v. *Mathews*, 8 De G. Mac. & G. 13: *Moorhouse* v. *Lord*, 10 H. L. Ca. 292, per Lord Kingsdown).

The following is Dr. Phillimore's list of the circumstances which have been relied on as affording evidence of the intention (animus manendi). 1. Place of birth and origin. 2. Oral (*a*) and written declaration. 3. The place of death. (*b*) 4. The place of wife (*c*)and family. 5. The

The English Courts ascribe little value to *oral* declarations, Phill. 513 : 12 Moo. P. C. 325.

(*b*) A circumstance of very slight moment, Phill. 114, 118.

(*c*) See per Wood V. C., Kay, 364

house of trade. 6. The depository of family papers and memorials. 7. The Mansion house. 8. Description in legal documents. 9. Possession and exercise of political rights and privileges. 10. Possession of real estate. 11. Length of residence and lapse of time. (Time being, according to Lord Stowell, the grand ingredient in constituting domicile, 2 Rob. Adm. 224).

It is a rule that an office which requires a residence confers a domicile in that place where its holder is bound to reside constantly. But to this the Act makes two exceptions, first, in the case of persons residing here in the Civil or Military Service, next, in the case of Ambassadors and Consuls. Except in the case of the servant of an Ambassador or Consul (Sec. 12), the Act is silent as to the domicile of a domestic servant, which is held to be that of his master (Westl. 42, Phillim. *et seq.*).

As to prisoners, an enforced sojourn does not change the domicile (*Burton* v. *Fisher*, 1 Milw. 183: Phillim. Dom. 88.), unless, as in the case of transportation for life (see Sec. 16), it be such as to exclude the possibility of return (Phillim. Dom. p. 89 : Westl. 47, 48).

A domicile will not be lost by a constrained residence in a foreign country (*In the Goods of the Duchess D'Orléans*, 1 Sw. & T. 254.)

Acquisition of new domicile.

10. A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin.

Explanation.—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 Her Majesty's Civil or Military Service, or in the exercise of any profession or calling.

Illustrations.

(*a.*) A, whose domicile of origin is in England, proceeds to British India, where he settles as a Barrister or a Merchant, intending to reside there during the remainder of his life. His domicile is now in British India.

See *The Indian Chief*, 3 Robins. Adm. Rep. 18.

(*b.*) A, whose domicile is in England, goes to Austria, and enters the Austrian service, intending to remain in that service. A has acquired a domicile in Austria.

Ommaney v. *Bingham*, Phill. Dom. 72-75, 5 Ves. 757.

(*c.*) A, whose domicile of origin is in France, comes to reside in British India under an engagement with the British Indian Government for a certain number of years. It is his intention to return to France at the end of that period. He does not acquire a domicile in British India.

(*d.*) A, whose domicile is in England, goes to reside in British India for the purpose of winding up the affairs of a partnership which has been dissolved, and with the intention of returning to England as soon as that purpose is

accomplished. He does not by such residence acquire a domicile in British India, however long the residence may last.

(*e.*) **A**, having gone to reside in British India under the circumstances mentioned in the last preceding illustration, afterwards alters his intention, and takes up his fixed habitation in British India. **A** has acquired a domicile in British India.

(*f.*) **A**, whose domicile is in the French Settlement of Chandernagore, is compelled by political events to take refuge in Calcutta, and resides in Calcutta for many years in the hope of such political changes as may enable him to return with safety to Chandernagore. He does not by such residence acquire a domicile in British India.

De Bonneval v. *De Bonneval*, 1 Curt. 856.

(*g.*) **A**, having come to Calcutta under the circumstances stated in the last preceding illustration, continues to reside there after such political changes have occurred as would enable him to return with safety to Chandernagore, and he intends that his residence in Calcutta shall be permanent. **A** has acquired a domicile in British India.

The Explanation follows the first branch of the old rule, that a person did not change his domicile by going to British India in the service of the Crown; but that it was otherwise if he entered the service of the East India Company (*Bruce* v. *Bruce*, 2 B. & P. 229: *Forbes* v. *Forbes*, Kay, 356: *Jopp* v. *Wood*, 11 Jur. N. S. 52, 212.) The provision embodied in the explanation "is as regards the bulk of the army, nothing more than a statement of the existing law. Its application to the staff corps and to the official and professional classes may perhaps be less favourable to the acquisition of an Indian domicile by those classes than the strict rules of English law, but we believe that it is the most just and suitable rule that can be laid down for India."—*First Report of Commissioners.*

Special mode of acquiring domicile in British India.

11. Any person may acquire a domicile in British India by making and depositing in some Office in British India (to be fixed by the Local Government), a declaration in writing under his hand of his desire to acquire such domicile, provided that he shall have been resident in British India for one year immediately preceding the time of his making such declaration.

This Section seems suggested by the French *Code Civil*, Art. 104, which permits a person to declare his domicile to the municipality of the place which he has abandoned, and to that of the place to which he has transferred his domicile. Such declaration affords conclusive evidence of the existence of the intention.

12. A person who is appointed by the Government of one country to be its ambassador, consul 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 him as part of his family or as a servant.

Domicile not acquired by residence in a country merely as the representative of a foreign Government, or by residence with him as part of his family or as a servant.

The house of an Ambassador is considered to be part of his sovereign's territory (Westl. 9, note, 45). But as the same reason does not apply to the domicile of Consuls (*Maltass* v. *Maltass*, Rob. 79: *Gout* v. *Zimmermann*, 5 Notes of Cases, 445) or Attachés, another ground must be sought for the rule; and it is supplied by the duty of these classes of public servants to act for the interest and remain identified with the feelings of the State by which they are accredited. Accordingly the doctrine is confined to the retention of the home-domicile by such minister when sent out. If a Government choose to employ in such capacity the services of one already resident in the foreign country—a frequent case with consuls, and not unknown with ambassadors (*Heath* v. *Samson*, 14 Beav. 441)—the domicile is not changed by the appointment (Westl. 45), and see *Atty. Gen.* v. *Kent*, 31 L. J. Exch. 391: 1 Hurl. & Colt. 12.

13. A new domicile continues until the former domicile has been resumed, or another has been acquired.

Continuance of new domicile.

No provision is made as to the evidence of resumption of domicile, as to which see *In the Goods of Raffenel*, 3 Sw. & T. 49: *Moorhouse* v. *Lord*, 9 Jur. N. S. 677: 10 H. L. Ca. 272. The requisite evidence would be slighter than is necessary to justify the conclusion that a man means to abandon his domicile of origin and acquire a new one (*Lord* v. *Colvin*, 4 Drew. 366).

Where a domicile has been acquired, the burthen of proof lies on him who seeks to show that that domicile has been changed (*Maxwell* v. *McClure*, 6 Jur. N. S. 407.)

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

Minor's domicile.

What, then, is the rule, in the case of a legitimate child, after the father's death, and after the death of both parents? It would seem that, under the Act, a fatherless minor's domicile is that which it had at its father's death. And there is some reason for this rule, as it precludes the possibility of the mother or guardian gaining an advantage, in case of the child's death under age, by removing its domicile to a country where the rules of succession are more advantageous to them (see Westl. 35). The weight of English authority, however, was in favour of the mother's domicile. See *Pottinger* v. *Wightman*, 3 Mer. 67: 1 Jarm. Wills, 11. But Denisart and the French Courts in his time held that neither mother nor guardian could change the minor's domicile (Phillim. 37, 38.)

Exception.—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 Her Majesty, or has set up, with the consent of the parent, in any distinct business.

The minor married (whether with or without the proper consent?) is treated as *sui juris* in respect of his domicile, since on his marriage he is emancipated and actually founds an establishment separate from the parental home. (Westl. 36: Phillim. 49, 50.)

Domicile acquired by a woman on marriage.

15. By marriage a woman acquires the domicile of her husband, if she had not the same domicile before.

"By marriage" that is, by an actual lawful marriage, not by an unlawful marriage or mere betrothal (Burge 35.)

She acquires the husband's domicile even before she leaves her residence (*ib.*). The theory of this acquisition of domicile rests upon this: it is the wife's duty to reside with her husband, and with this duty her wish is presumed to coincide (Westl. 7.)

If a widow remarry, her domicile will be that of her second husband (Phill. 27.)

Wife's domicile during marriage.

16. The wife's domicile during the marriage follows the domicile of her husband.

In re Daly, 25 Beav. 456.

Exception.—The wife's domicile no longer follows that of her husband if they be separated by the sentence of a competent Court, or if the husband is undergoing a sentence of transportation.

"Separated" *i. e.* whether by divorce *a vinculo*, or *a mensa et toro* only (*Williams* v. *Dormer*, 2 Rob. 505) or, *semble*, by a decree for judicial separation (*Dolphin* v. *Robins*, 7 H. L. Ca. 390, 416, per Lord Cranworth. But see *Yelverton* v. *Yelverton*, 1 Sw. & T. 574). There may also be exceptional cases to which even without judicial separation the general rule would not apply, as, for instance, where the husband has abjured the realm, has deserted his wife and established himself permanently in a foreign country (7 H. L. Ca. 416.) and see *Pitt* v. *Pitt*, 10 Jur. N. S. 735,736, per Lord Westbury C.

In such cases, and also when the husband dies, the wife regains the power of changing her domicile, but retains the last matrimonial domicile until she has actually changed it *animo et facto* (Westl. 42.)

Except in cases stated minor cannot acquire a new domicile.

17. Except in the cases above provided for, a person cannot during minority acquire a new domicile.

Lunatic's acquisition of new domicile.

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

A domicile of choice can of course only be acquired by a person *sui juris*. Where a Scotchman after a service of forty years in India became insane and was sent to England on leave and never recovered his faculties and died in England, it was held that his domicile was Anglo-Indian (*Hepburn* v. *Skirving*, 9 W. R. 764). The section only appears to apply to cases of lunatic minors and lunatic married women *Quaere*, would an adult lunatic acquire the domicile of the committee of his person? See Phill. Dom. p. 55.

Succession to a person's moveable property in British India, in absence of proof of his domicile elsewhere.

19. If a man dies leaving moveable property in British India; in the absence of proof of any domicile elsewhere, succession to the property is regulated by the law of British India.

This section, in the case of the death in India of every person other than a Hindú, a Buddhist or a Muhammadan, throws the onus on him who would prove that the deceased was domiciled elsewhere.

PART III.

Of Consanguinity.

This Part does not apply to Parsees (Act XXI of 1865, Section 8.)

Kindred or consanguinity.

20. Kindred or consanguinity is the connexion or relation of persons descended from the same stock or common ancestor.

This is the old definition: *vinculum personarum ab eodem stipite descendentium*. 2 Black. Comm., 203: Wms. Exors., 365.

Lineal consanguinity.

21. Lineal consanguinity is that which subsists between two persons, one of whom is descended in a direct line from the other, as between a man and his father, grandfather, and great-grandfather, and so upwards in the direct ascending line; or between a man, his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation constitutes a degree, either ascending or descending. A man's father is related to him in the first degree, and so likewise is his son; his grandfather and grandson in the second degree; his great-grandfather and great-grandson in the third.

2 Black. Comm., 203: Wms. Exors. 365, 366.

22. Collateral consanguinity is 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. For the purpose of ascertaining in what degree of kindred any collateral relative stands to a person deceased, it is proper to reckon upwards from the person deceased to the common stock, and then downwards to the collateral relative, allowing a degree for each person, both ascending and descending.

Collateral consanguinity.

In other words, to take the sum of the degrees in both lines to the common ancestor (Wms. Exors., 366, 367.)

23. For the purpose of succession, there is no distinction between those who are related to a person deceased through his father and those who are related to him through his mother; nor between those who are related to him by the full blood, and those who are related to him by the half blood; nor between those who were actually born in his life time, and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive.

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

By English law, the half blood is admitted to administration as well as the whole: for they are kindred of the intestate, and have been excluded from the inheritance of land only on feudal reasons. Therefore the brother of the half blood shall exclude the uncle of the whole blood.

A child *in ventre sa mère* at the time of the father's death, is, by the rules of the Common and the Civil law, to all intents and purposes a child as much as if born in the father's life-time (*Doe* v. *Clarke*, 2 H. Bl. 401: Wms. Exors. 1348.)

24. In the annexed table of kindred the degrees are computed as far as the sixth, and are marked by numeral figures.

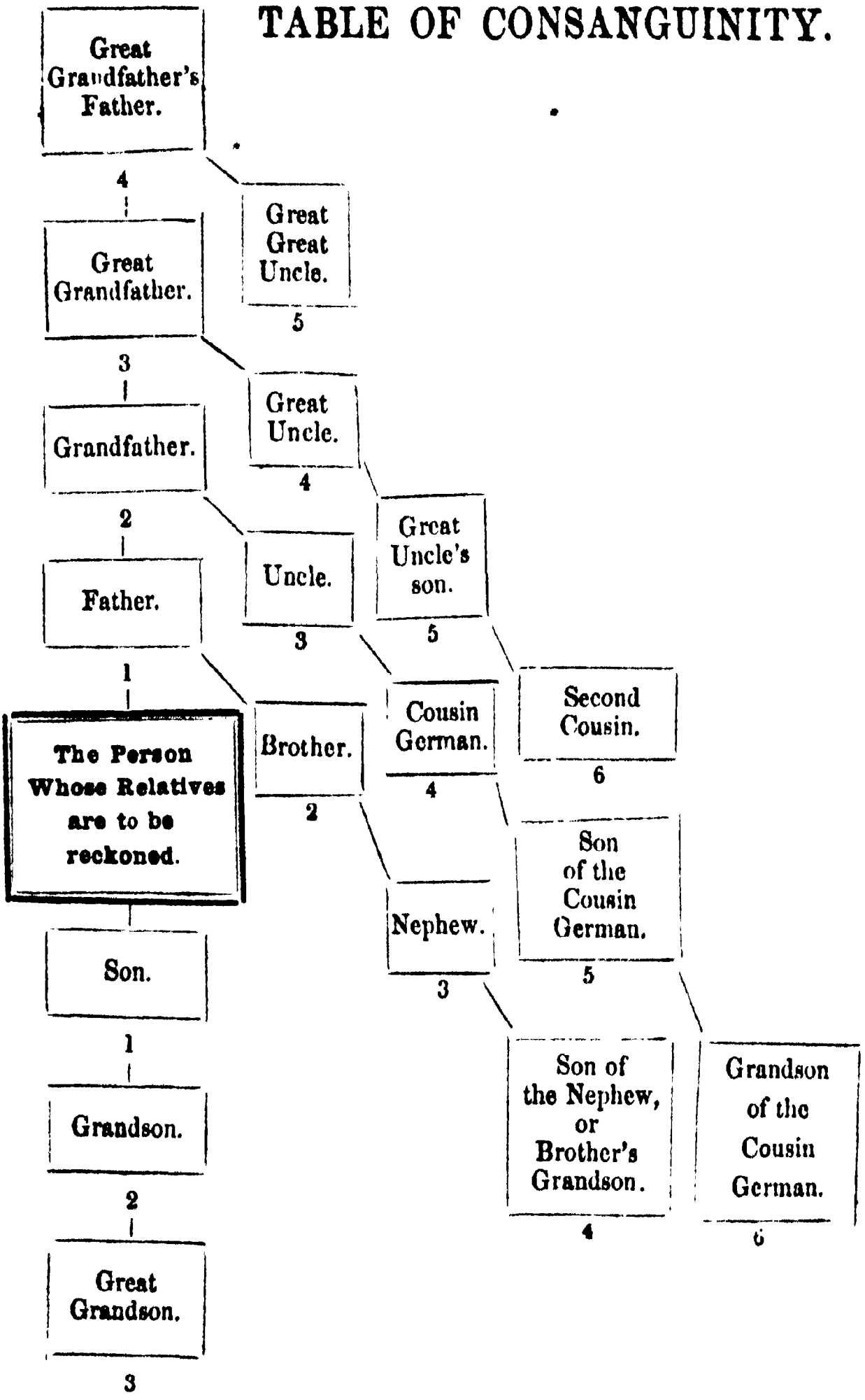
Mode of computing degrees of kindred.

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 the grandfather; and from him one of descent to the uncle, and another to the cousin-german; making in all four degrees.

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.

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.

TABLE OF CONSANGUINITY.



PART IV.

Of Intestacy.

25. A man is considered to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of

As to what property a deceased person is considered to have died intestate.

Illustrations.

(*a.*) A has left no Will. He has died intestate in respect of the whole of his property.

(*b.*) A has left a Will, whereby he has appointed B his executor; but the Will contains no other provisions. A has died intestate in respect of the distribution of his property.

The appointment of B. as executor does not operate as a testamentary disposition in his favour of any part of the testator's property. This has been the law in England since 11 Geo. 4 & 1 Will. 4, cap. 40.

(*c.*) A has bequeathed his whole property for an illegal purpose. A has died intestate in respect of the distribution of his property.

(*d.*) A has bequeathed 1,000*l* to B, and 1,000*l* to the eldest son of C, and has made no other bequest; and has died leaving the sum of 2,000*l* and no other property. C died before A without having ever had a son. A has died intestate in respect of the distribution of 1,000*l*.

N. B. The rest of this Part does not apply to Parsees (Act XXI of 1865, Sec. 8.)

26. Such property devolves upon the wife or husband, or upon those who are of the kindred of the deceased, in the order and according to the rules herein prescribed.

of such

Explanation.—The widow is not entitled to the provision hereby made for her, if by a valid contract made before her marriage she has been excluded from her distributive share of her husband's estate.

So in England the widow's title under the statute of distributions may be barred by a settlement before marriage excluding her from her distributive share of her husband's estate; and even in the case of a female infant she may be barred of her right by such a settlement, made before marriage, with the approbation of her parents and guardians (Wms. Exors. 1342). In *Slatter* v. *Slatter*, 1 Y. & C. 28, Lyndhurst L. C. B., held that a separation-deed executed by the

wife after marriage did not deprive her of her statutory share. It is, however, to be noted that the deed did not mention such share expressly.

27. Where the intestate has left a widow, if he has also left any lineal descendants, one-third of his property shall belong to his widow, and the remaining two-thirds shall go to his lineal descendants, according to the rules herein contained. If he has left no lineal descendants, but has left persons who are of kindred to him, one-half of his property shall belong to his widow, and the other half shall go to those who are of kindred to him, in the order and according to the rules herein contained. If he has left none who are of kindred to him, the whole of his property shall belong to his widow.

Where the intestate left a widow and lineal descendants, or a widow and kindred only, or a widow and no kindred.

The first and second rules laid down in this Section are those that have hitherto prevailed as to the *personal* property of an intestate husband. But where an intestate leaves a widow, but no next of kin, the widow has hitherto been entitled only to one moiety of the personal estate, the other going to the Crown (*Cave* v. *Roberts*, 8 Sim. 214.)

It has lately been held in England that a wife divorced *a mensa et toro* is one of the next of kin, and entitled under the statute (*Rolfe* v. *Perry*, 32 L. J., Ch. 14.)

28. 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 herein contained : and if he has left none who are of kindred to him, it shall go to the Crown.

Where the intestate has left no widow, and where he has left no kindred.

The Crown would take the property subject to the intestate's debts, if any (Wms. Exors., 1365), and not in a fiduciary character but beneficially (*Kane* v. *Reynolds*, 4 D. M. & G. 511, per Lord Cranworth). In England the Crown usually grants the property, with the exception of a small part, by letters patent or otherwise; and then, says Mr. Justice Williams (Exors. 1365), such grantee seems of course entitled to the administration, and, consequently, to the sole enjoyment of the property.

PART V.

Of the Distribution of an Intestate's Property.

This Part does not apply to Parsees' (Act XXI of 1865, Sec. 8.)

(*a.*) *Where he has left lineal descendants.*

Rules of distribution.

29. The rules for the distribution of the intestate's property (after deducting the widow's share, if he has left a widow) amongst his lineal descendants are as follows:—

Where the intestate has left a child or children only.

30. Where the intestate has left surviving him a child or children, but no more remote lineal descendant through a deceased child, the property shall belong to his surviving child, if there be only one, or shall be equally divided among all his surviving children.

"Child" and "Children" here mean, respectively, a child and children legitimate according to the law of the country where its parents are domiciled at the time of its conception and birth, and not by the law of the country where it is born (*In re Wright*, 2 K. & J. 595): see 2 Bl. Com. 247: *Birtwhistle* v. *Vardell*, 7 Cl. & F. 925, 934: and *In re Don's Estate*, 4 Drew 199.

Where the intestate has left no child, but a grandchild or grandchildren.

31. 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 be only one, or shall be equally divided among all his surviving grandchildren.

Illustrations.

(*a.*) 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 shall have one-ninth.

From Wms. Exors. 1348-9.

(*b.*) 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.

(*c.*) A has two children, and no more; John and Mary. John dies before his father, leaving his wife pregnant. Then

A dies, leaving Mary surviving him, and in due time a child of John is born. A's property is to be equally divided between Mary and such posthumous child.

Where the intestate has left only great-grandchildren or lineal descendants in a remoter degree.

32. 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.

Where the intestate leaves lineal descendants not all in the same degree of kindred to him and those through whom the more remote descend are dead.

33. If the intestate has left lineal descendants who do not all stand in the same degree of kindred to him, and the persons through whom the more remote are descended 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 of kindred to him at his decease, or, having been of the like degree of kindred to him, died before him leaving lineal descendants who survived him ; and 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.

Illustrations.

(*a.*) A had three children, John, Mary, and Henry ; John died, leaving four children, and Mary died, leaving one, and Henry alone survived the father. On the death of A intestate, one-third is allotted to Henry, one-third to John's four children, and the remaining third to Mary's one child.

(*b.*) A left no child, but left eight grandchildren, and two children of a deceased grandchild. The property is divided into nine parts, one of which is allotted to each grandchild ; and the remaining one-ninth is equally divided between the two great-grandchildren.

(*c.*) A has three children, John, Mary, and Henry. John dies leaving four children, and one of John's children dies leaving two children. Mary dies leaving one child. A afterwards dies intestate. One-third of his property is allotted to Henry ; one-third to Mary's child ; and one-third is divided into four parts, one of which is allotted to each of John's three surviving children, and the remaining part is equally divided between John's two grandchildren.

(*b.*) *Where the Intestate has left no lineal descendants.*

Rules of distribution where the intestate has left no lineal descendants.

34. Where an intestate has left no lineal descendants, the rules for the distribution of his property (after deducting the widow's share, if he has left a widow) are as follows :—

Where intestate's father is living.

35. If the intestate's father be living, he shall succeed to the property.

Where intestate's father is dead but his mother, brothers and sisters are living.

36. If the intestate's father is dead, but the intestate's mother is living, and there are also brothers or sisters of the intestate living, and there is no child living of any deceased brother or sister, the mother and each living brother or sister shall succeed to the property in equal shares.

Illustration.

A dies intestate, survived by his mother and two brothers of the full blood, John and Henry, and a sister Mary, who is the daughter of his mother, but not of his father. The mother takes one-fourth, each brother takes one-fourth, and Mary, the sister of half blood, takes one-fourth.

Where intestate's father is dead and his mother, a brother or sister, and children of any deceased brother or sister are living.

37. If the intestate's father is dead, but the intestate's mother is living, and if any brother or sister, and the child or children of any brother or sister who may have died in the intestate's lifetime

are also living, then the mother and each living brother or sister, and the living child or children of each deceased brother or sister, shall be entitled to the property in equal shares, 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.

Illustration.

A the intestate leaves his mother, his brothers, John and Henry, and also one child of a deceased sister, Mary, and two children of George, a deceased brother of the half blood who was the son of his father but not of his mother. The mother takes one-fifth, John and Henry each take one-fifth, the child of Mary takes one-fifth, and the two children of George divide the remaining one-fifth equally between them.

Where intestate's father is dead and his mother and the children of any deceased brother or sister are living.

38. If the intestate's father is dead, but the intestate's mother is living and the brothers and sisters are all dead, but all or any of them have left children who survived the intestate, the mother and the child or children of each deceased brother or sister shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the share which their respective parents would have taken if living at the intestate's death.

Illustration.

A the intestate leaves no brother or sister, but leaves his mother and one child of a deceased sister Mary, and two children of a deceased brother George. The mother takes one-third, the child of Mary takes one-third, and the children of George divide the remaining one-third equally between them.

Where intestate's father is dead, but his mother is living, and there is no brother nor sister nor nephew.

39. If the intestate's father is dead, but the intestate's mother is living, and there is neither brother, nor sister, nor child of any brother or sister of the intestate, the property shall belong to the mother.

40. Where the intestate has left neither lineal descendant, nor father, nor mother, the property is 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 share which their respective parents would have taken if living at the intestate's death.

Where intestate has left neither lineal descendant nor father nor

41. If the intestate left neither lineal descendant, nor parent, 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.

Where intestate has left neither lineal descendant nor parent, nor brother nor sister.

Illustrations.

(*a.*) A, the intestate, has left a grandfather and a grandmother, and no other relative standing in the same or a nearer degree of kindred to him. They, being in the second degree, will be entitled to the property in equal shares, exclusive of any uncle or aunt of the intestate, uncles and aunts being only in the third degree.

(*b.*) A, the intestate, has left a great-grandfather or great-grandmother, and uncles and aunts, and no other relative standing in the same or a nearer degree of kindred to him. All of these being in the third degree shall take equal shares.

(*c.*) A, the intestate, left a great-grandfather, an uncle, and a nephew, but no relative standing in a nearer degree of kindred to him. All of these being in the third degree shall take equal shares.

(*d.*) Ten children of one brother or sister of the intestate, and one child of another brother or sister of the intestate, constitute the class of relatives of the nearest degree of kindred to him. They shall each take one-eleventh of the property.

42. Where a distributive share in the property of a person who has died intestate shall be 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

Children's advancements not to be brought into hotchpot.

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.

Respecting this Section, the Commissioners observe, " We propose to omit the rule of the English law by which, in cases of total intestacy, anything which a child may have received from the father in his lifetime by way of advancement, is deducted from his share of the father's estate. This rule, though founded upon a desire to equalise as far as possible the benefit derived by children from their father's property, often fails to effect that object, and proves productive of considerable inconveniences. It tends to encourage minute and difficult investigations of matters of family account, and it frequently interferes with the arrangements of a father who has given property to a child by way of advancement, and yet has not seen fit to make any alteration in his testamentary dispositions; and these evils, which are often felt in England, would be still more felt in India."

The Section only alters the law as regards succession from intestate *fathers*. Where a mother, being a widow, advances a child and dies intestate, leaving many children, it has always been held, since Lord King's decision in *Holt* v. *Frederick*, 2 P. Wms. 357, that the child advanced shall not bring what he received from his mother into hotchpot (Wms. Exors. 1350).

It may be remarked that the money, &c., will not be taken into account, whether the provision takes effect before or after the intestate's death. Wms. Exors. 1353, 1356.

Part VI.

Of the Effect of Marriage and Marriage Settlements on Property.

Rights of widower and widow respectively.

43. The husband surviving his wife has the same rights in respect of her property, if she die intestate, as the widow has in respect of her husband's property, if he die intestate.

This Section (43) does not apply to Parsees, Act XXI of 1865, Sec. 8.

No rights to property not comprised in an antenuptial settlement, acquired by marriage a person domiciled in British India and a person not domiciled in British India.

44. If a person whose domicile is not in British India marries in British India a person whose domicile is in British India, neither party acquires by the marriage any rights in respect of any property 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 British India at the time of the marriage.

For instance, if a man domiciled in England, marries an East Indian woman possessed of land and money in India, she acquires his domicile (Sec. 15), and (in the absence of Section 44) her unsettled moveables would, according to the law of England, immediately become the absolute property of the husband, while her immoveable property would go according to that of British India, the *lex loci rei sitæ*, i. e. this Act. To prevent this evil of land and moveables becoming subject to different rules in such a case, Section 44 was introduced.

Settlement of minor's property in contemplation of marriage.

45. The property of a minor may be settled in contemplation of marriage, provided the settlement be made by the minor with the approbation of the minor's father, or if he be dead or absent from British India, with the approbation of the High Court.

Hitherto the general personal estate of a female infant was bound by a settlement made on her marriage, because such personal estate became by the marriage the absolute property of the husband, and the settlement was in effect his settlement and not hers (3 Dav. Conv. 2nd ed. 728 n., citing Sir John Leach in *Simpson* v. *Jones*, 2 Russ. & My. 376). Now, by Sections 4 and 44, this reason is no longer valid. Hence Section 45 was introduced as an enabling Section.

Part VII.

Of Wills and Codicils.

Persons capable of making Wills.

46. Every person of sound mind and not a minor, may dispose of his property by Will.

'Of sound mind.' The Will of an idiot is of course void (Dyer 143 b), and, as we shall see from Explanation 4, infra, mental imbecility arising from advanced age, or produced permanently or temporarily by drinking, or any other cause, may destroy the testamentary power (1 Jarm. Wills, 29). A person impeaching a will on the ground of the testator's supposed incapacity of mind, must establish such incapacity by the clearest and most satisfactory evidence. The burthen of proof rests upon him who attempts to invalidate what, on its face, purports to be a legal act. Sanity must be presumed till the contrary is shewn (Wms. Exors. 18, 19). A Will made by a lunatic, who afterwards recovers his understanding, does not thereby obtain any validity. But if he should, after having regained a sound state of mind, revive the Will made during his former insanity it would become valid (Wms. Exors. 196).

"A minor" (Section 2) means any person who has not completed the age of eighteen years. This, say the Commissioners, is the age at which the Courts of Wards withdraw from the management of the estates of youthful landholders. In computing the age of a person the day of his birth is included. Thus if he were born on the 16th of January 1848 he would attain his majority on the 15th of January 1866, and as the Law does not recognise fractions of a day, the age would be attained at the first instant of the latter day (1 Jarm. Wills, 39).

'Every person' includes alien friends, and, apparently, alien enemies (*Mayor of Lyons* v. *E. I. Co.*, 1 Moo. I A. Ca. 175, 286). A *felo de se* (*See in the Goods of Bailey*, 31 L. J. Prob. 178) and convicted criminals seem able to make Wills under this Act.

Notwithstanding the opinions of Lord Mansfield (1 Cowp. 268) and Mr. Justice Williams (Exors. 10, 109), it is now clear that two or more persons may make a joint Will which, if properly executed by each, is, so far as his own property is concerned, as much his Will, and is as well entitled to probate on the death of each as if he had made a separate Will (1 Jarm. Wills, 13, citing *Re Stracey* 1 Jur. N. S. 1177, and see *In the Goods of Lovegrove*, 2 S. & T. 453). But a joint Will made by two persons, to take effect after the death of both, will not be admitted to probate after the death of either (*Re Raine*, 1 Sw. & T. 144).

Mutual Wills may also be made (*Hinckley* v. *Simmons*, 4 Ves. 160); and a Will may be made so as to take effect only on a contingency, and if the contingency does not happen the Will ought not to be admitted to probate (1 Jarm. Wills 12.)

Explanation 1.—A married woman may dispose by Will of any property which she could alienate by her own act during her life.

By Roman law a married woman was as capable of bequeathing as a *femme sole*. But at common law a wife's Will was void as to lands, and as to chattels she had no testamentary power. unless the husband was banished or transported, or unless the will was restricted to property of which she was executrix or administratrix, or unless it was made with her husband's special permission (Wms. Exors., 48). But equity holds a wife's will valid as an execution of a power, or in pursuance of an agreement, or as a disposition of her separate estate (2 Bright 60 : Wms. Exors. 54). The present Section assimilates the law in this respect to the Roman and equitable doctrines.

Explanation 2.—Persons who are deaf, or dumb, or blind are not thereby incapacitated for making a Will if they are able to know what they do by it.

By English law one who is deaf *and* dumb from his birth is presumed to be an idiot, and therefore incapable of making a will. But such a presumption may be rebutted (Wms. Exors. 16: *Harrod* v. *Harrod*, 1 K. & J. 4, 9). Where probate was sought of the will of a testator who was deaf, dumb and illiterate, the Court, before granting probate, required evidence on affidavit of the signs by which the testator had signified that he understood and approved of the provisions of the Will: *In the Goods of Owston*, 2 Sw. & T. 461 : *In the Goods of Geale*, 3 Sw. & T. 431. The Ecclesiastical Courts have always recognised a blind man's will—allowing him even to make a nuncupative testament; but his will in writing must be read before witnesses, and in their presence acknowledged by him for his will (Wms. Exors., 17). The Explanation omits the case of a person who is deaf *and* dumb *and* blind, who is held incapable of making a will (Co. Lit. 42 b).

Explanation 3.—One who is ordinarily insane may make a Will during an interval in which he is of sound mind.

The party setting up the will in such a case must prove that the will was made in a lucid interval—a matter sometimes of extreme diffi-

culty (*Cartwright* v. *Cartwright*, 1 Phillim. 19: Wms. Exors. 19, 20). The act itself of making unassisted a rational will is strong proof of a lucid interval (*Nicholls* v. *Binns*, 1 Sw. & T. 239: but see *Dyce Sombre* v. *Troup*, 1 Deane Ecc. Rep. 22.).

Explanation 4.—No person can make a Will while he is in such a state of mind, whether arising from drunkenness, or from illness, or from any other cause, that he does not know what he is doing.

The probabilities, *à priori*, in favour of a lucid interval are infinitely stronger in a case of delirium than in one of permanent proper insanity; and the difficulty of proving a lucid interval is less, in the same exact proportion, in the former, than it is in the latter case (*Brogden* v. *Brown*, 2 Add. 445, per Sir John Nicholl).

A person may make a will, though "his understanding is obscured" by drink, "and his memory troubled" (Swinburne cited Wms. Exors. 38). When the testator was habitually addicted to the use of spirituous liquors, under the actual excitement of which he talked and acted in most respects like a madman, all that need be shewn is the absence of the excitement at the time of the act done, or at least the absence of excitement in any such degree as would vitiate the act done (*Ayrey* v. *Hill*, 2 Add. 206).

A will executed by a testator of sound mind, and afterwards wholly or partially defaced by him while of unsound mind, is to be pronounced for as it existed in its integral state, that being ascertainable. Part of a will may be established, and part held disentitled to probate, if actual incapacity be shown at the time of the execution of the latter part. So a will may be held valid, and probate refused to a codicil, because the deceased was insane at the time of making the latter (Wms. Exors. 39).

It may be well to note that it has been held that letters written *to* a testator and not acted upon, or indorsed or answered by him, are not evidence of his sanity (*Doe* d. *Tatham* v. *Wright*, 4 Bing. N. C. 489).

Illustrations.

(*a*.) A can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property, or the persons who are of kindred to him, or in whose favour it would be proper that he should make his Will. A cannot make a valid Will.

See *Harwood* v. *Baker*, 3 Moo. P. C. C. 282, 290.

(*b*.) A executes an instrument purporting to be his Will, but he does not understand the nature of the instrument nor the effect of its provisions. This instrument is not a valid Will.

(*c*.) A being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property, makes his Will. This is a valid Will.

The Act makes no provision as to the form of a Will, as to its language, its punctuation, or as to the materials with which it may be written. Of these in their order.

First as to the Form. To operate as a Will an instrument need not be of a testamentary form. The form of a paper does not affect its title to probate, provided the deceased intend that it should operate *after his death* (Wms. Exors., 90), and make it depend for his death as necessary to consummate it (Ibid. 92). Thus Bonds, Marriage-Settlements, Letters, Drafts on Bankers, &c., have been held to be testamentary (Ibid. 91). But it will be remembered that papers in their terms dispositive will be entitled to probate, unless they are proved not to have been written *animo testandi*, whilst in the case of papers of an equivocal character the animus must be proved by the party claiming under them (Wms. Exors., 92: *Thorncroft* v. *Lashmar*, 2 S. & T. 479). It is not necessary that the testator should intend to perform, or be aware that he had performed a testamentary act. On the other hand a Will though formally executed as such, will not be valid if there were no *animus testandi*, e. g. if it was written in jest (*Nicholls* v. *Nicholls*, 2 Phillim. 180, and see *Lister* v. *Smith*, 32 L. J. Prob. 29). And when a clause is introduced into a testamentary paper *per incuriam* and the testator executes the will in ignorance of the existence of the clause, it forms no part of the will, and probate will be granted of the remainder of the paper (*In the Goods of Duane*, 2 S. & T. 590).

Several instruments of different natures and forms, may be considered as constituting altogether the Will of the deceased (Wms. Exors. 93).

Instructions for a Will if properly executed and attested may be as operative as a Will itself, so a paper described as "Heads," "Plan" or "Sketch" of a Will, may be admitted to probate, if the requisites as to signing and attestation have been complied with. But in such cases, when the character of the paper is on the face of it equivocal, parol evidence is admissible as to whether the testator meant the instrument as memoranda for a future disposition or to execute it as a final Will (3 Phillim. 479: *Mathews* v. *Warner*, 4 Ves. 186, 5 Ves. 23: Wms. Exors., 95, 314).

The validity of a Will is not affected by reason of blank spaces having been left in it (*Corneby* v. *Gibbons*, 1 Rob. 705).

Next as to the language. It is immaterial in what language a Will may be written (Shepp. Touchst. 407). If the testator used a foreign tongue and be domiciled in British India the effect of the language employed can only be looked at to ascertain what are the equivalent expressions in the testator's mother tongue (see *Reynolds* v. *Kortright*, 18 Beav. 426).

No legal instrument should be punctuated. But in construing a Will marks of punctuation, parentheses, capital letters, &c., may be taken into consideration (Hawk. 7, citing *Morrall* v. *Sutton*, 1 Phill. 533: *Compton* v. *Bloxham*, 2 Coll. 201: *Oppenheim* v. *Henry*, 9 Hare, 802 n.: *Gauntlett* v. *Carter*, 17 Beav. 586.)

Lastly as to the materials. A Will or codicil, or any part thereof, may be written on paper, parchment or any other substance (*a*), in any character, at large, by abbreviations, or in cipher (Shepp. Touchst. 407), and may be made or altered in pencil (*Bateman* v. *Pennington*, 3 Moo. P. C. C. 223: *Kell* v. *Charmer*, 23 Beav. 195: *In the Goods of Mundy*, 7 Jur. N. S. 52,) as well as ink. "But when the question is, whether the testator intended the paper as a final declaration of his mind, and as testamentary, or whether it was merely preparatory to a more formal disposition, the material with which it is written becomes a most important circumstance. And it has been held that the general presumption and probability are that when alterations in pencil only are made, they are deliberative; where in ink, they are final and absolute" (Wms. Exors., 96).

(*a*) It is to be hoped that when the testamentary portion of this Act shall be extended to Hindús, the use of cadjans or palmleaves for testamentary purposes will be prohibited by the Legislature.

47. A father, whatever his age may be, may by Will appoint a guardian or guardians for his child during minority.

Testamentary Guardian.

The disability of infancy was expressly taken away in regard to the paternal appointment of testamentary guardians by the Stat. 12 Car. 2, c. 24, s. 8, and unintentionally restored by the Stat. 1 Vic., c. 26=Act No. XXV of 1838. The jurisdiction to grant probate of an instrument is founded on the fact that it affects personal property. Hence a paper purporting to be a Will, but containing simply an appointment of a guardian, is not entitled to probate (*In the Goods of F. Morton*, 3 Sw. & T. 422). Administration will be granted to a testamentary guardian of minors, preferably to a guardian elected by them (*In the Goods of Morris*, 3 Sw. & T. 360).

The *father* is the only person who can appoint guardians by Will. But a testamentary appointment of guardians by the mother (after the death of the father and not interfering with any appointment by him) would induce the High Court to appoint by preference the persons named, and is therefore not wholly ineffectual (*Stuart* v. *Bute*, 9 H. L. Ca. 440, 442 : 4 Dav. Conv. 2d ed. 8).

If several guardians are appointed by will and one or more die, the office survives (*Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 103). Otherwise in the case of guardians appointed by the Court of Chancery (*Bradshaw* v. *Bradshaw*, 1 Russ. 528 : 4 Dav. Conv. 2d ed. 57, 58).

48. 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.

Will obtained by fraud, coercion or importunity.

If part of a will has been obtained by fraud, probate should be refused as to that part and granted as to the rest (*Allen* v. *McPherson*, 1 H. L. Cas. 191 : Wms. Exors. 42).

Though all requisite formalities have been complied with, and the testator was perfectly in his senses, a Will obtained by actual force can never stand (Wms. Exors. 41). "Coercion," as we see from Illustration (*d*), includes "fear," and though Mr. Justice Williams says that is not a vain fear, but a fear that may fall *in constantem virum*, as the fear of death, or of bodily hurt, or of imprisonment, or of the loss of all or part of one's goods (Wms. Exors. 14), in *Boyse* v. *Rossborough* (6 H. L. Ca. 2) it was held that imaginary terrors may be sufficient to constitute coercion.

The importunity invalidating a Will must be such as the testator is too weak to resist, such as will render the act no longer the act of the deceased, nor the free act of a capable testator (Wms. Exors. 43, citing Sir John Nicholl).

Failure to establish pleas of fraud or undue influence will, as a rule, be followed by condemnation in costs (*Summerell* v. *Clements*, 3 Sw. & T. 35 : 29 L. J. Prob. 134, and see *Mitchell* v. *Gard*, 3 Sw. & T. 279).

Illustrations.

(*a.*) A falsely and knowingly represents to the testator that the testator's only child is dead, or that he has done

some undutiful act, and thereby induces the testator to make a Will in his, A's favour; such Will has been obtained by fraud, and is invalid.

(*b.*) A by fraud and deception prevails upon the testator to bequeath a legacy to him. The bequest is void.

(*c.*) A, being a prisoner by lawful authority, makes his Will. The Will is not invalid by reason of the imprisonment.

(*d.*) A threatens to shoot B, or to burn his house, or to cause him to be arrested on a criminal charge, unless he makes a bequest in favour of C. B in consequence makes a bequest in favour of C. The bequest is void, the making of it having been caused by coercion.

(*e.*) A being of sufficient intellect, if undisturbed by the influence of others, to make a Will, yet being so much under the control of B that he is not a free agent, makes a Will dictated by B. It appears that he would not have executed the Will but for fear of B. The Will is invalid.

(*f.*) A being in so feeble a state of health as to be unable to resist importunity, is pressed by B to make a Will of a certain purport, and does so merely to purchase peace, and in submission to B. The Will is invalid.

(*g.*) A being in such a state of health as to be capable of exercising his own judgment and volition, B uses urgent intercession and persuasion with him to induce him to make a Will of a certain purport. A, in consequence of the intercession and persuasion, but in the free exercise of his judgment and volition, makes his Will in the manner recommended by B. The Will is not rendered invalid by the intercession and persuasion of B.

(*h.*) A with a view to obtaining a legacy from B, pays him attention and flatters him, and thereby produces in him a capricious partiality to A. B, in consequence of such attention and flattery, makes his Will, by which he leaves a legacy to A. The bequest is not rendered invalid by the attention and flattery of A.

Though persuasion may be employed to influence the dispositions in a Will, this does not amount to influence in the legal sense; and whether or not a capricious partiality has been shown, the Court will not inquire. But where persuasion is used to a testator on his death-bed, when even a word distracts him, it may amount to force and inspiring fear (Wms. Exors. 44, citing Sir Wm. Wynne.)

Will may be revoked or altered.

49. 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.

Even though the testator make his will irrevocable in the strongest and most express terms, yet he may revoke it, because his own act and deed cannot alter the judgment of law to make that irrevocable which is of its own nature revocable. A Will is therefore said to be ambulatory until the death of the testator (Wms. Exors. 109). In *Loffus* v. *Maw*, 3 Giff. 592, however, Stuart V. C. negatived the power to revoke a gift by codicil, the gift being the consideration for valuable services and represented to the donee as having been secured to her.

Except in the case of an attesting witness (Sec. 54) the Act makes no provisions as to the objects of the testamentary power. It seems that the disability of Corporations to take lands by devise does not extend to India, *Mayor of Lyons* v. *E. I. Co.* 1 Moo. I. A. Ca. 175, 296 : it is clear that they may be legatees of moveables. Minors and lunatics may take by bequest, and their acceptance will be presumed unless such presumption would work injury to the legatee (1 Jarm. Wills, 70, 71).

Part VIII.

Of the Execution of unprivileged Wills.

Execution of unprivileged Wills.

50. Every testator, not being a soldier employed in an expedition, or engaged in actual warfare, or a mariner at sea, must execute his Will according to the following rules :—

First.—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 direction.

This provision is the same as that of Stat. 1 Vict. c. 26 (hereinafter called the English Wills Act) s. 9, except that signature is not required to be " at the foot or end" of the Will, or to be " made or acknowledged by the testator in the presence of two or more witnesses *present at the same time*." It will be enough (see Rule 3) if the signature or mark be made or acknowledged before or to one witness at a time. Sealing would not be regarded a signing (Wms. Exors 68).

The making of the mark is sufficient, although the testator can write at the time (*Baker* v. *Dening*, 8 A. & E. 94 : Wms. Exors. 67). The mark will be sufficient if made by the testator's hand, though a wrong name be written against it, or though that hand be guided by another person (*Re Clark*, 27 L. J. Prob. 18 : *Wilson* v. *Beddard*, 12 Sim. 28 : Wms. Exors. 67). The signature may be stamped, *Jenkins* v. *Gaisford*, 3 Sw. & T. 93. The testator's initials, or his signature under an assumed name, may stand for, and pass as, his mark (Wms. Exors. 68).

The " some other person" may be one of the witnesses (Wms. Exors. 72 : *contra* Sugd. Wills 38), and he may sign his own name and not that of the testator (*In the Goods of Clark*, 2 Curt. 329).

Proof that the testator acknowledged a signature to the attesting witnesses is sufficient *primâ facie*, without proving that the signature is in his handwriting, or that it was made by " some other person in his presence and by his direction" (*Gaze* v. *Gaze*, 3 Curt. 456 : Wms. Exors. 73).

When a Will consists of several sheets or papers, they need not all be signed by the testator, nor need they all be connected together. It is enough if they were in the same room where the execution took place; and it must be presumed, *primâ facie*, that they were so (*Gregory* v. *The Queen's Proctor*, 4 Notes of Cas. 620, 639: Wms. Exors. 73, 84, 85).

Second.—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.

The words of the Wills Act Amendment Act 1852 (Stat. 15 and 16 Vict. cap. 24) Sec. 1, from which this provision is taken, are "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." The omission in the Indian Act of the words italicised, will probably be held to show that the Legislature intended to restore the old rule as to Wills under the Statute of Frauds (1 Jarm. Wills, 74) that it was immaterial in what part of the Will the testator's name was written, and that, for instance, the name of the testator written in the commencement thus "I, A. B., do make, &c.," would be a sufficient signature. The signature, however, must be made with the design of authenticating the instrument. If, for example, the testator contemplated up to his death a further signature which he never made, the Will must be considered as unsigned. But a signature originally made without such design may afterwards be adopted by the testator as his final signature. Such, it is probable, would be the presumed intention, if he acknowledged the instrument as his Will to the attesting witnesses without alluding to any further act of signing (1 Jarm. Wills, 94); and under the present Act, which omits the words "on the face of the Will," extrinsic evidence of such intention would seem admissible.

Third.—The Will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the Will, or have seen some other person sign the Will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must 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.

Section 9 of the English Wills Act, upon which this Rule is founded, enacts that no Will shall be valid unless the 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." The Rule, as already remarked,

only requires the signature to be made or acknowledged in the presence of *one* witness *at a time*; and of course it may be made in the presence of one witness and acknowledged in the presence of another. So in the construction of the Statute of Frauds it was held that the Act did not require the witnesses to subscribe in the presence of each other, but that they might attest the execution separately at different times (Wms. Exors. 78). When the testator produces the Will with his signature visibly apparent on the face of it to each witness, and requests him to sign it, this will be a sufficient acknowledgment of the signature, and it is not necessary that the testator should state to the witnesses that it is his signature. But it is not sufficient merely to produce the paper to the witnesses where it does not appear that the signature was affixed to it at the time (Wms. Exors., 77, 78). Nor is there a sufficient acknowledgment where the witness is unable to see the signature, and the testator merely calls him in to sign without giving him any explanation of the instrument he is signing (Wms. Exors. 78). But when the witnesses do not recollect having seen the testator's signature when they subscribed their names, the Court may judge from the circumstances of the case whether it is probable that the testator's name was or was not on the Will at the time of attestation; and if it think that the name *was* there then, may pronounce for the Will (*Gwillim* v. *Gwillim*, 3 Sw. & T. 200).

As to the attestation, it is submitted that *signature* is required by the Indian Act, and that it will not be enough for either witness to affix his mark. I know very well that, on the construction both of the Statute of Frauds and of the English Wills Act, in the case of the witnesses as well as of the testator, a subscription by mark is sufficient. But the words in each of those statutes are "attest and subscribe:" the word in the Indian enactment is "sign;" and where the Indian Legislature wished to authorize the affixing of a mark, as in the case of the testator, it said so, using the words "sign *or affix his mark.*" It is sufficient if the attesting witnesses hold the top of the pen while the writer of the Will subscribes their names (*Lewis* v. *Lewis*, 2 Sw. & T. 153). It is immaterial in what part of the Will a witness signs; and where the Will is written on several or even separate sheets, and the last alone is attested, the whole Will is well executed, provided the whole be in the room, and although a part may not have been seen by the witnesses. The presumption is that all the papers constituting the Will were in the room (Wms. Exors. 84, 85). As to the presumption of due execution see *Vinnicombe* v. *Butler*, 10 Jur. N. S. 1109.

Attestation by sealing is of course insufficient (*In the Goods of Byrd*, 3 Curt. 117): so is acknowledgment of the witness' previous signature (*Hindmarsh* v. *Charlton*, 8 H. L. Ca. 160). Each witness must sign for himself (*In the Goods of White*, 2 Notes of Ca. 461) and "in the presence of the testator." The English decisions have established that it is not requisite that the testator should actually see each of the witnesses sign, but that it is sufficient if he might have seen him had he chosen to look (Wms. Exors. 80). Thus, where a Will was executed by a testatrix in her carriage, and the witnesses subscribed in the Attorney's office, opposite to the window of which the carriage was, so that she might have seen them through the window while subscribing, it was held that the statute was satisfied (*Casson* v. *Dade*, 1 Bro. C. C. 99, and see *In the Goods of Trimnell*, 11 Jur. N. S. 248). But where the witnesses signed in a room adjoining that in which the testator was, and the door between them was open, but he was not in such a position that he could see them, it was held that the attestation was ill (*Doe* v. *Manifold*, 1 M. & S. 249: *In the Goods of Killick*, 10 Jur. N. S. 1083). Mere corporal presence is insufficient. The testator must be mentally capable of recognizing the act which is being performed before him (1 Jarm. Wills, 80).

Though the testator was blind, it has been held that it must be shewn that he could have seen the witnesses sign had he had his eyesight (*Piercy*, 1 Robert. 278).

"No particular form of attestation shall be necessary." It is enough, therefore, if the witnesses merely sign their names (*Bryan* v. *White*, 2 Robert. 315) and in England the subscription "servant to Mr. S.," without any name, is sufficient (*Sperling*, 3 S. & T. 272) But in case of the death of both witnesses it is desirable that there should be an attestation clause reciting that the formalities required by the Act have been complied with. The clause may be in the following form:—"Signed and acknowledged by the abovenamed testator A. B. as his last Will in the presence of us who in his presence have hereunto subscribed our names as witnesses."

[*Signatures and descriptions of wit*

Incorporation of papers by reference.

51. If a testator, in a Will or Codicil duly attested, refers to any other document then actually written, as expressing any of his intentions, such document shall be considered as forming a part of the Will or Codicil in which it is referred to.

The reference must be distinct, so as to exclude the possibility of mistake (*Brewis*, 3 S. & T. 473, 10 Jur. N. S. 598); and two things must be proved—the identity of the document (*Allnutt*, 3 S. & T. 167, 9 Jur. N. S. 581) and that it was written before the Will was made (*Mathias*, 3 S. & T. 100). The latter point may be proved either by internal or extrinsic evidence (1 Jarm. Wills, 84: *Allen* v. *Maddock*, 11 Moo P. C. C. 427). Evidence of the surrounding facts can only be used to aid in the construction of what the testator has written (*Van Straubenzee* v. *Monck*, 3 Sw. & T 6, 12). Where the date, heading and other particulars of the document are so distinctly referred to that there can be no doubt of identity, and the Will states the paper to be then in existence, it will be assumed, in the absence of circumstances leading to the contrary conclusion, that the paper then existed (1 Jarm. Wills, 84, 85, citing *Re Hunt*, 2 Rob. 622).

Part IX.

Of Privileged

Privileged Will.

52. Any soldier being employed in an expedition, or engaged in actual warfare, or any mariner being at sea, may, if he has completed the age of eighteen years, dispose of his property by a Will made as is mentioned in the fifty-third Section. Such Wills are called privileged Wills.

Illustrations.

(*a.*) A, the surgeon of a regiment, is actually employed in an expedition. He is a soldier actually employed in an expedition, and can make a privileged Will.

(*b.*) 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.

(*c.*) A, a soldier serving in the field against insurgents, is a soldier engaged in actual warfare, and as such can make a privileged Will.

(*d.*) A, a mariner of a ship in the course of a voyage, is temporarily on shore while she is lying in harbour. He is, in the sense of the words used in this clause, a mariner at sea, and can make a privileged Will.

Lay, 2 Curt. 375.

(*e.*) A, an admiral who commands a naval force, but who lives on shore, and only occasionally goes on board his ship, is not considered as at sea, and cannot make a privileged Will.

The Earl of Euston v. *Seymour*, cited 2 Curt. 339 : 3 Curt. 530.

(*f.*) A, a mariner serving on a military expedition, but not being at sea, is considered as a soldier, and can make a privileged Will.

This section is modelled on the 11th section of the English Wills Act, which enacts that "any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act." Similar words were contained in the Statute of Frauds. It will be seen, however, that a minor soldier or sailor is expressly excluded by the Indian Act from making a privileged Will. Otherwise in England: *Farquhar*, 4 Notes of Cases 651, 652.

As regards soldiers—(which word includes army-surgeons, Illustration (*a*), and perhaps all those who form part of, and are attached to, an army, although their functions may be of a civil character, 4 Burge Comm. 395)—the privilege is confined to those who are "employed in an expedition or engaged in actual warfare." Hence the will of a soldier would not be privileged if made while he is quartered in barracks (*Drummond* v. *Parish*, 3 Curt. 522: *White* v. *Repton*, ibid. 818), or while on a tour of inspection of the troops under his command (*In the Goods of Hill*, 1 Robert. 276), or before the expedition actually commences (*Bowles* v. *Jackson*, Eccl. and Adm. Rep. 294). In *Herbert* v. *Herbert* (2 Jur. N. S. 24), however, an Officer on his way from one regiment to another, a short distance off, both of which were in actual military service, was held entitled to make a privileged Will.

A chaplain, surgeon and purser (see Illustration *b*), being part of the ship's complement, are 'mariners', which word applies to merchant seamen, as well as to the whole naval service (*ibid.* and Coote Prob. 64).

Notwithstanding the words "being at sea," where an Admiral, though not actually at sea, was in a river on a naval expedition, it has been held that his case fell within the spirit of the exception in the English statute (*Austen*, 2 Robert. 611).

53. Privileged Wills may be in writing, or may be made by word of mouth. The execution of them shall be governed by the following rules:—

Mode of making, and rules for executing privileged Wills.

First.—The Will may be written wholly by the testator, with his own hand. In such case it need not be signed nor attested.

This clause authorizes the making of a holograph will, and with the signature, which is of the essence of the French *testament olographe.*

By the Roman law, if the testament of a soldier were written, no witness was necessary. Sandars' Inst. 255.

See *Herbert* v. *Herbert*, 2 Jur. N. S. 24: *Milligan*, 2 Robert. 108, and *John Parker*, 2 Sw. & T. 461, for instances of a soldier's or seaman's letter being admitted to probate; and, generally, as to nuncupative wills before the Statute of Frauds, see Shepp. Touchst. ed. Preston, 406, 407, and after it, Burn, Ecc. Law, 9th ed. IV. 134.

Second.—It may be written wholly or in part by another person, and signed by the testator. In such case it need not be attested.

Third.—If the instrument purporting to be a Will is written wholly, or in part, by another person, and it is not signed by the testator, it shall be considered to be his Will, if it be shown that it was written by the testator's directions, or that he recognized it as his Will. If it appear on the face of the instrument, that the execution of it in the manner intended by him 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 intentions expressed in the instrument.

Fourth.—If the soldier or mariner shall have written instructions for the preparation of his Will, but shall have died before it could be prepared and executed, such instructions shall be considered to constitute his Will.

Fifth.—If the soldier or mariner shall in the presence of two witnesses have given verbal instructions for the preparation of his Will, and they shall have been reduced into writing in his life-time, but he shall have 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.

Sixth.—Such soldier or mariner as aforesaid may make a Will by word of mouth by declaring his intentions before two witnesses present at the same time.

A 'will by word of mouth,' *i. e.*, a nuncupative will, under the Statute of Frauds, required *three* witnesses. This Act dispenses with the *rogatio testium*, *i. e.*, the testator's bidding the persons present, or some of them, to bear witness that such is his will, or to that effect.

Seventh.—A Will made by word of mouth shall be null at the expiration of one month after the testator shall have ceased to be entitled to make a privileged Will.

So by the Roman law the testament which a soldier was permitted to make on active service was not valid after the expiration of *a year* from the time of his quitting the army (4 Burge Comm. 394).

Before leaving the subject of nuncupative wills, the student may be reminded that the *factum* of such a will "requires to be proved by evidence more strict and stringent than that of a written one in every single particular. This is requisite in consideration of the facilities with which frauds in setting up nuncupative wills are obviously attended [see per Sir J. P. Wilde, *Wharram* v. *Wharram*, 3 S. & T. 303]; facilities which absolutely require to be counteracted by Courts insisting on the strictest proofs as to the "*facta*" of such alleged wills. Hence the testamentary capacity of the deceased, and the *animus testandi* at the time of the alleged nuncupation, must appear, in the case of a nuncupative will, by the clearest and most indisputable testimony" (Wms. Exors. 106). These observations, it may be remarked, are peculiarly applicable to the nuncupative wills of Hindus, the power of making which, untrammelled by any restrictions whatever, has been lately recognized by the High Court of Madras, in the case of *Çrínivásammál* v. *Vijayammál*, 2 Mad. H. C. Rep. 37. (Hindu wills had previously been held by the High Court of Bombay in *Muncherjee Pestonjee* v. *Narayen Lurmon* not to require attestation).

Part X.

Of the Attestation, Revocation, Alteration and Revival of Wills.

54. A Will shall not be considered as insufficiently attested by reason of any benefit thereby given, either by way of bequest or by way of appointment, to any person attesting it, or to his or her wife or husband: but the bequest or appointment shall be void so far as concerns the person so attesting, or the wife or husband of such person, or any person claiming under either of them.

Effect of gift to attesting witness.

Explanation.—A legatee under a Will does not lose his legacy by attesting a Codicil which confirms the Will.

It is obvious that nothing could be more dangerous than to allow a Will to be supported by the testimony of persons who are beneficially interested in its contents (1 Jarm. Wills, 65).

It would seem that, though there be more witnesses than the necessary two, a bequest to one of them would still be void: see *Doe* v. *Mills*, 1 Mood. & Rob. 288: *Wigan* v. *Rowland*, 11 Ha. 157, but see *Randfield* v. *Randfield*, 8 H. L. Ca. 225, 228 note (*c*).

Where a joint tenant witnesses the Will by which the joint tenancy is created, his share goes to the other joint tenants (*Young* v. *Davies*, 9 Jur. N. S. 399).

An 'appointment' is explained *infra* in Section 56.

The Explanation is V. C. Wood's decision in *Tempest* v. *Tempest*, 2 Kay & J. 635: the word 'thereby' indicates that the bequest is given by the same instrument which is attested. Each witness attests only the instrument to which he puts his name. A residuary legatee of a share of a residue does not lose it by attesting a codicil which, by revoking legacies, increases the residuary share (*Gurney* v. *Gurney*, 3 Drew. 208).

55. No person, by reason of interest in or of his being an executor of a Will, is disqualified as a witness to prove the execution of the Will or to prove the validity or invalidity thereof.

Witness not disqualified by interest or by being executor.

Shortened from Sections 16 and 17 of the English Wills Act.

56. Every 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 his executor, or administrator, or to the person entitled in case of intestacy.

Revocation of Will by testator's marriage.

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.

Power of appointment defined.

This is Section 18 of the English Wills Act, with the addition of an Explanation and a few merely verbal alterations.

The principle upon which a Will is revoked by marriage is, that marriage creates such a change in the testator's condition, such new obligations and duties, that they raise an inference that a testator would not adhere to a Will made previous to their existence (See 1 Hagg. 711, 712).

The reason for the exception is that a revocation of the Will in a case to which the exception applies, would operate only in favour of those entitled in default of appointment, and the new family of the testator would derive no benefit whatever from it, Wms. Exors., 175 note (*b*). Where the limitation in default of appointment was to the donee's children, who happened to be also his next of kin under the statute of distributions, the exception was nevertheless held to apply (*Re Fitzroy*, 1 Swab. & T. 133).

As to the Explanation, the student should know that a power may be either general or special. A *general* power of appointment is a right to appoint to whomsoever the donee—that is, the person invested with the power—pleases (Sugd. Pow. 394). The donee of a *special* or *particular* power is restricted to some objects designated in the instrument creating the power (*ibid*).

Revocation of unprivileged Will or Codicil.

57. 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 hereinbefore 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, with the intention of revoking the same.

Illustrations.

(*a.*) A has made an unprivileged Will; afterwards A makes another unprivileged Will, which purports to revoke the first. This is a revocation.

(*b.*) A has made an unprivileged Will. Afterwards, A being entitled to make a privileged Will, makes a privileged Will, which purports to revoke his unprivileged Will. This is a revocation.

This is, with a slight verbal alteration, Section 20 of the English Wills Act, on which it has been held that a testator cannot delegate his power of revoking the will, by inserting in it a clause conferring on another an authority to destroy it after his death (*Stockwell* v. *Ritherdon*, 1 Robert. 661).

It also seems to embody the provision made by Section 19 of the English Wills Act, which enacts that no Will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances (Wms. Exors., 175).

A part only of a Will may be revoked in the manner here described, for the Act says "no unprivileged Will or Codicil, *nor any part thereof*, shall," &c. (Wms. Exors., 113): and the intention to revoke wholly, or only in part may be evidenced either by proof of the expressed declaration of the testator of his intention in doing the act, or by proof of circumstances from which it may be inferred, or by the state and condition to which the instrument has been reduced by the act itself (Wms. Exors., 123, see *Christmas* v. *Whinyates*, 3 S. & T. 81).

Of revocation by a subsequent testamentary instrument. The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one unless the latter expressly or in effect revoke the former, or the two be incapable of standing together. For though "no man can die with two testaments," yet any number of testamentary instruments may be admitted to probate as together containing the last Will of the deceased (Wms. Exors., 140, 141). A late case on the subject is *Geaves* v. *Price*, 3 S. & T. 71, where the testator by his first testamentary instrument gave all his real and personal estate to B. and appointed him sole executor, and by a subsequent instrument, which contained no clause of revocation, he gave two houses to C. and appointed him sole executor. Each instrument began with the words: "This is the last Will and Testament of" &c. Sir Cresswell Cresswell held that the two papers were not inconsistent, that both were entitled to probate as containing the will of the deceased, and that both executors might take probate jointly.

If two inconsistent Wills be found of the same date, or without any date, and there be no evidence establishing the posteriority of the execution of either, both are necessarily void and the deceased must be considered intestate (Wms. Exors., 144). But where the two wills are partially consistent and partially inconsistent, probate may be granted of them so far as they are not inconsistent (*Budd*, 3 S. & T. 196). If a man by a subsequent will or codicil make a disposition different from a former one under a false impression, the impulse of which is the foundation of his wish to change his former intent, such an act will be considered only as effecting a contingent presumptive revocation, depending on the existence or non-existence of that fact (1 Powell on Dev., 524, 3d. ed., cited Wms. Exors. 149). As if one having previously bequeathed to A., afterwards by another Will, without destroying the first, or by codicil, bequeathed to B., stating her to be his wife, so that it may be understood that he intended her to be benefitted in that character only, and it turn out that she was married before, and had a husband living, neither of which facts was in the testator's knowledge, such subsequent will or codicil will not operate as a revocation of the former will, because it depends on a contingency which fails (*Ibid.*). So where a testator gave legacies to certain children, and afterwards by a codicil revoked the legacies, giving as a reason that the legatees were dead. It being proved that they were alive, it was held that their legacies were not revoked (*Campbell* v. *French*, 3 Ves. 322).

As to express revocation: Words declaring only a *future* intention to revoke, e. g. by a codicil, are not sufficient (*Thomas* v. *Evans*, 2 East, 448), even though such words be contained in an instrument executed according to the Act (Wms. Exors. 159).

As to revocation by destruction: The words "otherwise destroying" have been considered to mean modes of destruction *ejusdem generis*, as cutting, throwing into the water, or the like, and, therefore exclude cancelling (Sugd. Wills 46: *Stephens* v. *Taprell*, 2 Curt. 458), or incomplete obliteration, unless the words as originally written are thereby rendered illegible.

In order to operate a revocation it is not necessary that the whole instrument should be destroyed. It is sufficient if an essential part of the will, such as the name of the testator or those of the attesting witnesses (*Dallow*, 31 L. J. Prob. 128 (*a*), or a part of the Will considered by the testator as material (*Harris*, 3 Sw. & T. 485) be cut out, burnt, torn off or completely erased or obliterated. See *Hobbs* v. *Knight*, 1 Curt. 768: Wms. Exors., 118.

How far must the destruction of the Will go, in order to effect a revocation? Coleridge, J. said that there must be such an

(*a*) But see *In the Goods of Eeles*, 2 S. & T. 600.

injury with intent to revoke *as destroys* the entirety of the Will: because it may then be said, that the instrument no longer exists as it was (*Doe* v. *Harris*, 6 A. & E. 209: *Hobbs* v. *Knight*, 1 Curt. 768).

If the act of destruction be inchoate or incomplete, it will not amount to a revocation (*Doe* v. *Perkes*, 3 B. & A. 489: Wms. Exors. 121, 122).

The Section provides that the acts prescribed for the revocation of Wills must be done "with the intention of revoking the same." Destruction is an equivocal act which in order to operate a revocation must be done with intent to revoke. The presumption is that such an act is done *animo revocandi*. But this presumption may be repelled by evidence shewing that the animus did not exist. As if a man was to throw ink upon his Will instead of sand, though it might be a complete defacing of the instrument, it would be no revocation. Or suppose a man having two wills of different dates by him, should direct the former to be destroyed, and, by mistake, the latter were destroyed, this would be no revocation of the latter (Wms. Exors., 128).

Where a testator having executed two wholly inconsistent wills, destroyed the earlier one *animo revocandi*, and then duly executed a codicil shewing an intention to revive it, Dr. Lushington held that this codicil necessarily revoked the later will, though it might be inoperative to revive the earlier one by reason of its having been so destroyed (*Hale* v. *Tokelove*, 2 Robert. 318).

Declarations by a testator that he had destroyed a Will the revocation of which is in issue are inadmissible (*Staines* v. *Stewart*, 31 L. J. Prob. 10).

Of the Doctrine of dependent relative Revocation. The doctrine of "dependent relative revocation" rests on this: Where it is evident that the testator, though using the means of revocation, could not intend it for any other purpose than to give effect to another disposition, if the instrument as altered cannot have the intended effect, there shall be no revocation (*Ex-parte Lord Ilchester*, 7 Ves. 372). For example: a man makes a Will bequeathing property to trustees for the benefit of A. He then makes a second will for the benefit of A, with a variation only in the name of one of the trustees, and tears off his signature to the first will. The second will is not good as not being duly attested. It would be held that the former will was not revoked (see *Onions* v. *Tyrer*, 2 Vern. 742). So a subsequent will made under the impulse of a mistaken notion of facts, will not revoke a former one. But where the second disposition fails for want of capacity in the legatee to take, the first will is revoked (*Tupper* v. *Tupper*, 1 K. & J. 665).

Of presumptions of revocation. The destruction or mutilation of a will is an implied revocation of a codicil (*Grimwood* v. *Cozens*, 2 Sw. & T. 364: *Dutton*, 3 S. & T. 69). But the legal presumption may be repelled by shewing that the testator intended the codicil to operate, notwithstanding the revocation of the Will (Wms. Exors., 135), as in *Ellice* (33 L. J. Prob. 27), where the object for the Will had ceased, while the object for the codicil remained. The destruction by the testator of one of two duplicate Wills is presumed to be a revocation of both (Wms. Exors. 135). If a Will in the testator's custody be found mutilated, the presumption is that he mutilated it himself and did so *animo revocandi*. So if a testator has a Will in his own custody, and that Will cannot be found after his death, the presumption is that he destroyed it himself (Wms. Exors., 137: *Mitcheson*, 9 Jur. N. S. 360).

If a Will duly executed is destroyed in the testator's lifetime without his authority, or after his death, it may be established upon satisfactory proof being given of its having been so destroyed, and also of its contents (*Trevelyan* v. *Trevelyan*, 1 Phill. 149: Wms. Exors., 137, 332, 333). So where a wife having power to dispose of property by her

will, makes her will and afterwards destroys it by her husband's compulsion (Wms. Exors., 138). So if a will be mutilated or destroyed by the testator while of unsound mind (*Scruby* v. *Fordham*, 1 Add. 74: Wms. Exors., 138).

Where a Will is in its terms conditional, as for example, if a testator execute a will containing the following words: Should anything happen to me on my voyage to England, or during my stay there, I leave, &c. If he make the voyage and return to India, the Will will be null, even though he subsequently refer to it as his will, and though after his death it be found in his writing desk (*Roberts* v. *Roberts*, 2 Sw. & T. 337: and see cases cited in Wms. Exors., 163 and *Cawthron*, 3 S. & T. 417, 33 L. J. Prob. 23).

A memorandum endorsed on a will, that it was only to take effect on the happening of a particular contingency, is wholly unavailing unless it be duly executed and attested, and cannot be used as evidence of the testator's intention that the will should be contingent only (*Stockwell* v. *Ritherdon*, 1 Robert. 661).

As to mutual wills: the circumstance that the will of one testator is revoked, by marriage or otherwise, does not revoke the other will (*Hinckley* v. *Simmons*, 4 Ves. 160).

Effect of obliteration, interlineation, or alteration in unprivileged Will.

58. No obliteration, interlineation 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 shall have been thereby rendered illegible or undiscernible, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the Will; save 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 be made in the margin or on 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.

This is nearly Section 21 of the English Wills Act, which provides that "no obliteration, &c., shall be valid or have any effect, except so far as the words or *effect of the will before such alteration shall not be apparent* unless," &c.

Where unattested alterations appear on the face of a will, and no information can be given, and there are no circumstances to shew when the alterations were made, the presumption is that they were made *after* the execution of the will (*Cooper* v. *Bockett*, 4 Moo. P. C. 419: *Smith*, 34 L. J. Prob. 19). To rebut this presumption declarations of the testator, *before* the execution of his will, that he intended to provide by his will for a person who would be unprovided for with the alteration in question, are admissible evidence; but not declarations after the execution, that the alteration had been made previously (*Doe* v. *Palmer*, 16 Q. B. 747: *Williams* v. *Ashton*, 1 Johns. & H. 118: Wms. Exors., 114, 115).

As to the attestation of alterations, see *Cunningham*, 29 L. J. Prob. 7.

The mere circumstance of the amount of a legacy, or name of a legatee, being inserted in different ink, and in a different handwriting, does not alone constitute an "obliteration, interlineation or other alteration" within the meaning of the Section; nor does any presumption arise against the Will having been duly executed as it appears (*Greville* v. *Tylee*, 7 Moo. P. C. 320).

If the words are completely obliterated, so that it cannot be made out on the face of the instrument itself what they originally were, the alteration is valid, and probate must then be granted as if there were blanks in the Will (Wms. Exors., 125, 126: *Ibbetson*, 2 Curt. 337: Coote Prob. 63). But where a testator entirely erases the original words, intending to revoke a legacy *by substituting a different sum* for that originally given, and such substituted legacy is not effectually given, the original legacy is not revoked, and evidence *aliunde* is admissible to shew what the words were (Wms. Exors., 127). Such evidence may be various. The original words may be deciphered in the Will itself, or the testator may have made a memorandum on his Will showing what they were, or a comparison of the original draft of the will may prove the same thing, or an attesting witness or some other person who may have read the will may recollect the original bequest (Coote Prob. 63).

59. A privileged Will or Codicil may be revoked by the testator, by an unprivileged Will or Codicil, or by any act expressing an intention to revoke it, and accompanied with 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.

Revocation of privileged Will or Codicil.

Explanation.—In order to the revocation of a privileged Will or Codicil by an act accompanied with 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.

60. No unprivileged Will or Codicil, nor any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a Codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any Will or Codicil which shall be

Revival of unprivileged Will.

partly revoked, and afterwards wholly revoked, shall be revived, such

Extent of revival of Will or Codicil partly revoked and afterwards wholly revoked.

not extend to so much thereof as shall have been revoked before the revocation of the whole of, unless an intention to the contrary shall be shown by the Will or Codicil.

This is Section 22 of the English Wills Act, with the addition of the words "by the Will or Codicil," which were added in Committee with the view of excluding parol evidence to shew how a revival was intended to operate in cases where it may be doubtful whether the whole or part of a will, which was first partly and then wholly revoked, was intended to be revived (See 1 Jarm. Wills, 135).

To effect a revival there must be either a re-execution or a duly executed codicil. Destruction of the revoking instrument is not enough (*Major* v. *Williams*, 3 Curt. 432: Wms. Exors., 157,186).

The intention to revive shewn by the codicil must appear by the contents of the codicil, and not by any external act, such as affixing it to the revoked will (*Marsh* v. *Marsh*, 6 Jur. N. S. 380).

A testatrix executed a will and subsequently thereto two other wills, in each of which was contained a clause revoking all former wills. She afterwards destroyed the two latter wills: Held that the first will was not thereby revived and that parol evidence was not admissible to show an intention to revive (*Major* v. *Williams*, 3 Curt. 432).

The revival of a will is tantamount to making it *de novo*. Thus it revokes any will of a date prior to the revival (Wms. Exors, 189): its operation is extended to subjects (Section 77 infra) which have arisen between its date and revival, (but see *Du Hourmelin* v. *Sheldon*, 19 Beav. 389), and even to objects to whom the description is applicable at the date of revival, though not originally intended (*Perkins* v. *Micklethwaite*, 1 P. Wms. 275); and a codicil duly executed will give effect to unattested alterations or additions to the will, or validate a previous unexecuted will (Wms. Exors., 194, 195: *quaere* the decision in *Hunt's* case, there cited, and cf. 1 Swab. & T. 102).

Part XI.

Of the Construction of Wills.

61. It is not necessary that any technical words or terms of art shall be used in a Will, but only that the wording shall be such that the intentions of the testator can be known therefrom.

Wording of Will.

The fundamental principle in the construction of Wills is to effectuate the testator's intention so far as it is consistent with the rules of law. Hence no technical words are necessary, so that the law often dispenses with the want of words in Wills that are absolutely requisite in all other instruments, and frequently gives effect to a necessary or plain implication. But intention alone is not sufficient, it must appear either by express words or by plain implication (Smith, R. & P. Prop. 955: Burt. Comp. par. 603: *Wylie* v. *Wylie*, 1 D. F. & J. 410: *Egerton* v. *Lord Brownlow*, 4 H. L. Ca. 181).

"Known therefrom."—"In construing a Will, the object of the Courts is to ascertain not the *intention* simply, but the *expressed intentions* of the testator, *i. e.*, the intention which the Will itself either expressly or by implication, declares: or (which is the same thing) the meaning of the words,—the meaning, that is, which the words of the Will properly interpreted convey." (*Shore* v. *Wilson*, 9 Cl. & F. 525: *Doe* d. *Brodbelt* v. *Thomson*, 12 Moo. P. C. C. 116: *Abbott* v. *Middleton*, 7 H. L. Ca. 68). This is the first of the four propositions in which Mr. Hawkins expresses the general principles which govern the construction of Wills. The second and third are as follows:—

II. "In construing a Will the words are to be taken in their *ordinary*, *proper* and *grammatical* sense, unless upon so reading them in connection with the entire Will, [see Sec. 69], or upon applying them to the facts of the case, [see Sec. 67], an ambiguity or difficulty of construction, in the opinion of the Court, arise: in which case the primary meaning of the words may be modified, extended or abridged [see Sec. 70], and words or expressions supplied [see Sec. 64], or rejected [see Sec. 65], in accordance with the presumed intention, *so far* as to avoid the difficulty or ambiguity in question, but no further." (*Shore* v. *Wilson*, 9 Cl. & F. 565 per Tindal C. J.: *Grey* v. *Pearson*, 6 H. L Ca. 61, per Lord St. Leonards: *Abbott* v. *Middleton*, 7 H. L. Ca. 68).

III. "As a corollary to, or part of, the last proposition, *technical* words and expressions must be taken in their *technical* sense, unless a *clear* intention can be collected to use them in another sense, and that other can be ascertained" (*Doe* d. *Winter* v. *Perratt*, 6 Man. & G. 342 per Parke J.: *Roddy* v. *Fitzgerald*, 6 H. L. Ca. 877, per Lord Wensleydale: *Grey* v. *Mullick*, 6 Moo. I. A. Ca. 526). In *Hall* v. *Warren*, however, (9 H. L. Ca. 420, 427) the testator was an exceedingly illiterate man, and Lord Campbell, C. held that not only the rules of grammar, but the usual meaning of technical language might be disregarded in construing his Will.

Enquiries to determine questions as to object or subject of Will.

62. For the purpose of determining questions as to what property is denoted by any words used in a Will, a Court must 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.

Illustrations.

(*a.*) A, by his Will, bequeaths 1,000 rupees to his eldest son, or to his youngest grandchild, or to his cousin Mary. A Court may make inquiry in order to ascertain to what person the description in the Will applies.

(*b.*) A, by his Will, leaves to B "his estate called Black Acre." It may be necessary to take evidence in order to ascertain what is the subject matter of the bequest, that is to say, what estate of the testator's is called Black Acre.

(*c.*) A, by his Will, leaves to B "the estate which he purchased of C." It may be necessary to take evidence in order to ascertain what estate the testator purchased of C.

The proposition laid down in this Section is taken from Wms. Exors., 1037, 1082; citing Wigram's Treatise on the application of extrinsic evidence to interpretation of Wills; *Innes* v. *Sayer*, 3 Mac. & G. 606, 615: *Feltham's Trust*, 1 K. & J. 528: *Bernasconi* v. *Atkinson*, 10 Hare, 345: *Jefferies* v. *Michell*, 20 Beav. 15, as to the Object of the bequest, and *Lindgren* v. *Lindgren*, 9 Beav. 358: *Ricketts* v. *Turquand*, 1 H. L. Ca. 472: *Webb* v. *Byng*, 1 K. & J. 580, as to its Subject.

In every case of ambiguity, whether latent or patent, evidence is admissible to show the state of the testator's family or property (*Stringer* v. *Gardener*, 27 Beav. 37).

Evidence of the testator's declarations is admissible only where an ambiguity arises from the admission of extrinsic evidence, as to which of two or more things, or which of two or more persons, each answering the description in the will, the testator meant to designate (Wms. Exors., 1038). Accordingly sec. 68 provides that where a complete blank is left for the legatee's name in a Will, no parol evidence will be allowed to fill it up, as intended by the testator (*Baylis* v. *Atty. Gen.*, 2 A. & E. 239, and other cases cited in Wms. Exors., 1038).

Misnomer or misdescription of object.

63. Where the words used in the 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. 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.

Illustrations.

(*a.*) A bequeaths a legacy "to Thomas, the second son of his brother, John." The testator has an only brother, named John, who has no son named Thomas, but has a second son whose name is William. William shall have the legacy.

(*b.*) A bequeaths a legacy "to Thomas, the second son of his brother John." The testator has an only brother named John, whose first son is named Thomas, and whose second son is named William. Thomas shall have the legacy.

Price v. *Newbolt*, 14 Sim. 354.

(*c.*) The testator bequeaths his property "to A and B, the legitimate children of C." C has no legitimate child, but has two illegitimate children, A and B. The bequest to A and B takes effect, although they are illegitimate.

Standen v. *Standen*, 2 Ves. Jun. 589.

(*d.*) The testator gives his residuary estate to be divided among "his seven children," and proceeding to enumerate them, mentions six names only. This omission shall not prevent the seventh child from taking a share with the others.

(*e.*) The testator having six grandchildren, makes a bequest to "his six grandchildren," and proceeding to mention them by their Christian names, mentions one twice over, omitting another altogether. The one whose name is not mentioned shall take a share with the others.

Garth v. *Meyrick*, 1 Bro. C. C. 30.

(*f.*) The testator bequeaths "1,000 rupees to each of the three children of A." At the date of the Will, A has four children. Each of these four children shall, if he survives the testators, receive a legacy of 1,000 rupees.

2 Jarm. Wills 178 : *Matthews* v. *Foulshaw*, 12 W. R. 1141 : *Lee* v. *Lee*, 10 Jur. N. S. 1041.

The following are other illustrations of the rules laid down in this Section :—

A bequeaths a legacy to the wife of B. A woman not married to B may take the legacy if she be reputed or known as B's wife (Wms. Exors, 1039, and see *Dilley* v. *Matthews*, 11 W. R. 614).

A, a bachelor, after mentioning his betrothed B by name, and alluding to his intended marriage with her, gives Rs. 10,000 "to my wife" and dies during the engagement and before the marriage. B is entitled to the legacy (*Schloss* v. *Stiebel*, 6 Sim. 1 : *Pratt* v. *Mathew*, 22 Beav. 334).

A bequeaths to the *two sons* and *the daughter* of B Rs. 500 each. At the date of the will and of the testator's death B had *five* children living, namely *one son* and *four daughters*. Each of the five children is entitled to Rs. 500 (*Harison* v. *Harison*, 1 Russ. & M. 72).

A bequeaths Rs. 1,000 a piece to the four sons of B by her former husband, and she had four such children but one of them was a daughter. The daughter takes a legacy of Rs. 1,000 (*Lane* v. *Green*, 4 De G. & S. 239).

A gives a Government Promissory Note for Rs. 10,000 to trustees during the life of his niece and her *five daughters*, in trust to pay the interest of the Note to his niece for life, and, after her death, upon the like trust for her *said* daughters and the survivors and survivor of them, and while more than one should be living, to be divided among them in equal shares. At the date of the will and at the testator's death his niece had *five* sons and *only one daughter*. The daughter alone is entitled to an annuity for life on the death of her mother (*Lord Selsey* v. *Lord Lake*, 1 Beav. 146).

64. Where any word material to the full expression of the meaning has been omitted, it may be supplied by the context.

When words may be supplied.

Illustration.

The testator gives a legacy of "five hundred" to his daughter A, and a legacy of "five hundred rupees" to his daughter B. A shall take a legacy of five hundred rupees.

Of this rule we have another very simple illustration in an early case, where a devise to A and the heirs of his body and, if he should die, then over, was read, "and if he should die *without issue*" (*Anon.* 1 And. 33 : 1 Jarm. Wills 456). The following is another illustration :—A bequeaths Rs. 1,000 to B. and C. to be equally divided, but if either of them die before attaining *the age of* 21 *years, and without issue*, his share to go to the survivor : but in the event of both dying *without issue*, then over. The words "under twenty-one" will be supplied in the ulterior bequest (*Kirkpatrick* v. *Kilpatrick*, 13 Ves. 476).

So "without issue" has been read "without leaving issue" (*Radford* v. *Radford*, 1 Keen, 486) : "on marriage" has been read "at 21 or marriage" (*Lang* v. *Pugh*, 1 Y. & C. C. C. 718) ; and "dying" has been read "dying without leaving a child" (*Abbott* v. *Middleton*, 21 Beav. 143 ; 7 H. L. Ca. 68).

In connection with this subject, it may be noted that where a clause or expression otherwise senseless and contradictory can be rendered consistent with the context by being transposed, the Courts are warranted in making that transposition (1 Jarm. Wills, 466). For example : A having two nieces, B. a spinster, and C. who has been married and was dead leaving two children, bequeaths half of his Government paper to the *children* of his niece *B.* and the other half to his niece E., it being evident that the bequest to the children of B. was intended for the children of C. and that to C. for B, the Court will correct the mistake (*Bradwin* v. *Harpur*, Amb. 374).

The same principle is applicable to the subjects of a bequest (*Moseley* v. *Mafrey*, 8 East, 149).

As to changing words. It often happens that the misuse of some word or phrase is so palpable on the face of the will, as that no difficulty occurs in pronouncing the testator to have employed an expression which does not accurately convey his meaning. But this is not enough : it must be apparently not only that he has used the wrong word or phrase ; but also what is the right one (*Taylor* v. *Richardson*, 2 Drew. 16) ; and if this be clear the alteration in language is warranted by established principles of construction (1 Jarm. Wills, 470). Thus in *Hart* v. *Tulk*, 2 D. M. & G. 300, the testator's general intention appeared to be to make make an equal distribution of his property (which he described in seven different schedules) amongst his seven children; and he subjected the properties comprised in the seven schedules to mortgage debts in such a manner that if, in a particular clause, the words "fourth schedule" were read literally, not only would the entire plan of the will be frustrated ; but the payment of the debts in the manner provided by the will would become impossible. The Court read the word "fourth" as meaning "fifth," which the context shewed was the change required to render the will consistent. So "without issue" has been read "leaving issue" (*Doe* v. *Gallini*, 5 B. & Ad. 621), "severally" has been read "respectively" (*Woodstock* v. *Shilleto*, 6 Sim. 416), and in a numerous class of cases "or" has been changed into "and" and "and" into "or" (See 1 Jarm. Wills. 471, 486). As to the latter change, the rule is that "and" will not be construed "or" where a previously vested gift would be thereby defeated (*Day* v. *Day*, Kay 703).

65. If the thing which the testator intended to bequeath can be sufficiently identified from the description of it of the description do not apply, such parts of the description shall be rejected as erroneous, and the bequest shall take effect.

Rejection of erroneous particulars in description of subject.

This section is a paraphrase of the rule *Falsa demonstratio non nocet cum de corpore constat.* "The characteristic of cases within the rule is, that the description, so far as it is false, applies to no subject at all, and so far as it is true, applies to one only" (Per Aldersou B. *Morrel* v. *Fisher*, 4 Exch. 591).

Illustrations.

(*a.*) A bequeaths to B "his marsh lands lying in L, and in the occupation of X." The testator had marsh lands lying in L, but had no marsh lands in the occupation of X. The words "in the occupation of X" shall be rejected as erroneous, and the marsh lands of the testator lying in L shall pass by the bequest.

Blaque v. *Gold*, Cro. Car. 447, 443.

(*b.*) The testator bequeaths to A "his zámíndárí of Rámpur." He had an estate at Rámpur, but it was a taluk and not a zámíndárí. The taluk passes by this bequest.

Day v. *Trig*, 1 P. W. 286.

66. If the 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.

When part of description may not be rejected as erroneous.

1 Jarm. Wills, 746.

Explanation.—In judging whether a case falls within the meaning of this Section, any words which would be liable to rejection under Section 65 are to be considered as struck out of the Will.

Illustrations.

(*a.*) A bequeaths to B "his marsh lands lying in L, and in the occupation of X." The testator had marsh lands

lying in L, some of which were in the occupation of X, and some not in the occupation of X. The bequest shall be considered as limited to such of the testator's marsh lands lying in L as were in the occupation of X.

(*b.*) A bequeaths to B "his marsh lands lying in L, and in the occupation of X, comprising 1,000 bíghás of land." The testator had marsh lands lying in L, some of which were in the occupation of X, and some not in the occupation of X. The measurement is wholly inapplicable to the marsh lands of either class, or to the whole taken together. The measurement shall be considered as struck out of the Will, and such of the testator's marsh lands lying in L, as were in the occupation of X, shall alone pass by the bequest.

This is contra to the law established by several English cases, *e. g.* *Goodtitle* d. *Radford* v. *Southern*, 1 M. & Sel. 299: *Down* v. *Down*, 1 J. B. Moo. 80, &c. 1 Jarm. Wills, 747, 748: the distinctions, too, between a reference to locality and a reference to occupation seem abolished.

Where a subject is bequeathed and there are two species of property, the one technically and precisely corresponding to the description in the bequest, and the other not so completely answering thereto, the latter will be excluded; though had there been no other property on which the bequest would have operated, it might have been held to comprise the less appropriate subject (1 Jarm. Wills 951). Take this as an illustration. A bequeaths "all his property situate at Barrackpur which he became entitled to at the decease of his father." The fact was, that, on his father's death, the testator had taken possession of two houses, one which his father had in his life-time given to him, but of which he (the father) had retained possession until his death, and another which descended to the testator as heir. As the latter estate is sufficient to satisfy the words, the former will not pass. (See *Roe* d. *Ryall* v. *Bell*, 8 T. R. 579.)

Extrinsic evidence admissible in case of latent ambiguity.

67. Where the words of the 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.

Illustrations.

(*a.*) A man having two cousins of the name of Mary, bequeaths a sum of money to "his cousin Mary." It appears that there are two persons, each answering the description in the Will. That description, therefore, admits of two applications, only one of which can have been intended by the testator. Evidence is admissible to show which of the two applications was intended.

(*b.*) A, by his Will, leaves to B "his estate called Sultánpur Khurd." It turns out that he had two estates

called Sultánpur Khurd. Evidence is admissible to show which estate was intended.

This is the present law—"Parol evidence is admissible to shew what were the actual testamentary intentions of the testator to determine which of several persons or things was intended under an *equivocal description* (Hawk. 9). The general test of such a description is, that it must apply with entire propriety to each of the persons or things in question. A description which applies partly to one and partly to another of the persons or things in question is not equivocal. Thus a devise to John Thomas Smith, there being a John Smith and also a Thomas Smith, is not equivocal with respect to them. But descriptions which are partly inaccurate are equivocal if the inaccurate part of the description applies to *none* of the persons or things in question, while the remaining description is equivocal with respect to them. Thus a devise to John Thomas Smith is equivocal, if there be no Smith bearing the Christian name of Thomas, but two more Smiths with the Christian name of John. In this case the word "'Thomas' which is inapplicable to *any* of the claimants, being rejected, the description John Smith remains, which is equivocal" (Hawk. 11). Further illustrations of the Section are these:—

A bequeaths a sum of money to Robert A, my nephew, the son of Joseph A. The testator has no brother named Joseph, but has two brothers each of whom has a son named Robert. The word 'Joseph' will be rejected and evidence is admissible to shew which son is intended (*Careless* v. *Careless*, 1 Mer. 384).

A bequeaths an estate to William Marshall. There are two persons, one named William Marshall, the other William John Marshall. Evidence is admissible to shew which of the two is intended (*Bennett* v. *Marshall*, 2 K. & J. 615).

A bequeaths a sum of money to his 'brother' without specifying the name. A has several brothers. Evidence is admissible to show which of them was intended (1 Jarm. Wills, 404).

Parol evidence of intention is only admissible to shew *which* of the persons or things was intended, and not (*e. g.*) to shew that the words were used in a sense which would include more than one of them (Hawk. 12, citing *Richardson* v. *Watson*, 4 B. & Ad. 799, where the equivocal description was "all that close in Kirton in the occupation of J. W." There were two closes in Kirton in the occupation of J. W., but evidence was not admitted to shew that the testator supposed them to be one, and that both were therefore intended to pass).

68. Where there is an ambiguity or deficiency on the face of the Will, no extrinsic evidence as to the intentions of the testator shall be admitted.

Extrinsic evidence inadmissible in cases of patent ambiguity or deficiency.

Illustrations.

(*a.*) A man has an aunt Caroline and a cousin Mary, and has no aunt of the name of Mary. By his will he bequeaths 1,000 rupees to "his aunt Caroline" and 1,000 rupees to "his cousin Mary," and afterwards bequeaths 2,000 rupees to "his before-mentioned aunt Mary." There is no person to whom the description given in the Will can apply, and evidence is

not admissible to show who was meant by "his before-mentioned aunt Mary." The bequest is therefore void for uncertainty under Section 76.

(*b.*) A bequeaths 1,000 rupees to , leaving a blank for the name of the legatee. Evidence is not admissible to show what name the testator intended to insert.

(*c.*) A bequeaths to B rupees, or "his estate of ." Evidence is not admissible to show what sum or what estate the testator intended to insert.

Another illustration of the rule in this Section is this: A bequeaths Rs. 1,000 to the Rájá of : evidence is not admissible to show what Rájá the testator intended (*Hunt* v. *Hort*, 3 B. C. C. 311).

In no instance has a *total* blank for the name been filled up by parol evidence (*Baylis* v. *Atty. Gen.*, 2 Atk. 239: *Ulrich* v. *Litchfield*, Ib. 372). In such cases, indeed, there is no certain intent upon the face of the Will to give to *any* person; the testator may not have definitively resolved in whose favour to bequeath the projected legacy (1 Jarm. Wills, 413, citing Parke B., *Doe* v. *Needs*, 2 M. & W. 139).

Where a testator bequeathed Rs. 1,000 to "Mr. and Mrs. B.," using merely the initial, it has been held that evidence is admissible to show who were intended by "Mr. and Mrs. B" (*Abbot* v. *Massie*, 3 Ves. 148).

Meaning of any clause to be collected from entire Will.

69. 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; and for this purpose a Codicil is to be considered as part of the Will.

See *Egerton* v. *Brownlow*, 4 H. L. Ca. 181 per Lord Truro: *Brocklebank* v. *Johnson*, 20 Beav. 213: *Abbott* v. *Middleton*, 7 H. L. Ca. 95.

"The intention of the testator, which can be collected with reasonable certainty *from the entire Will*, with the aid of extrinsic evidence of a kind properly admissible, must have effect given to it, beyond and even against, the literal sense of particular words and expressions. The intention, when legitimately proved, is competent not only to *fix* the sense of *ambiguous* words, but to control the sense even of *clear* words, and to *supply* the place of *express* words, in cases of difficulty or ambiguity" (Hawk. 5, citing *Key* v. *Key*, 4 D. M. & G. 73: *Grey* v. *Pearson*, 6 H. L. Ca. 61: and *Towns* v. *Wentworth*, 11 Moo. P. C. C. 526).

Illustrations.

(*a.*) The testator gives to B a specific fund or property at the death of A, and by a subsequent clause gives the whole of his property to A. The effect of the several clauses taken together is to vest the specific fund or property in A for life, and after his decease in B; it appearing from the bequest to B that the testator meant to use in a restricted sense the words in which he describes what he gives to A.

(*b.*) Where a testator having an estate, one part which is called Black Acre, bequeaths the whole of estate to A, and in another part of his Will bequeaths Black Acre to B, the latter bequest is to be read as an exception out of the first, as if he had said, "I give Black Acre to B, and all the rest of my estate to A."

70. 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 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.

sense, and when in a sense wider than usual.

The words 'effects,' 'goods' or 'chattels' will comprise the entire moveable property of a testator, unless restrained by the context within narrower limits. Where, however, such general expressions stand immediately associated with less comprehensive words, they are sometimes restrained to articles *ejusdem generis*, the specified effects being considered as denoting the species of property which the larger term was intended to comprise (1 Jarm. Wills, 715: Wms. Exors. 1060).

On the same principle, terms, which in their strict and proper acceptation, apply to a particular species of property only, may be held, by force of the context, to embrace the general residue (*ibid.* 731).

Illustrations.

(*a.*) A testator gives to A "his farm in the occupation of B," and to C "all his marsh lands in L." Part of the farm in the occupation of B consists of marsh lands in L, and the testator also has other marsh lands in L." The general words, "all his marsh lands in L," are restricted by the gift to A. A takes the whole of the farm in the occupation of B, including that portion of the farm which consists of marsh lands in L.

(*b.*) The testator (a sailor on ship-board) bequeathed to his mother his gold ring, buttons, and chest of clothes, and to his friend A (a ship-mate) his red box, clasp-knife and all things not before bequeathed. The testator's share in a house does not pass to A under this bequest.

This is *Cook* v. *Oakley*, 1 P. W. 302 and see *Re Ludlow*, 1 Sw. & T. 29.

(*c.*) A, by his Will, bequeathed to B all his household furniture, plate, linen, china, books, pictures, and all other goods of whatever kinds; and afterwards bequeathed to B a

specified part of his property. Under the first bequest B is entitled only to such articles of the testator's as are of the same nature with the articles therein enumerated.

This is *Wrench* v. *Jutting*, 3 Beav. 521, and see *Collier* v. Russ. 467.

No Illustration is given of the second branch of the rule. Take the following :—

A by her Will appoints executors, bequeaths them Rs. 1,000 each for their trouble and proceeds thus : "and whatever remains of *money* I bequeath to B's five children." At the date of the Will and the death A's property consisted chiefly of Government Promissory Notes. The children take the Notes (*Dowson* v. *Gaskoin*, 2 Kee. 14).

A, whose moveable property consists of cash, Government paper, plate, horses, clothes and furniture, after giving various legacies of sums of money, bequeathed to the inhabitants of B "all that might remain of her *money* after her lawful debts and legacies were paid." The inhabitants of B are entitled to the residue of her general moveable property (*Rogers* v. *Thomas*, 2 Keen, 8 : and see 1 Jarm. Wills, 736).

Regarding this branch of the rule, it may be useful to state the sense which the following words "usually bear." They are arranged alphabetically.

'*Articles of domestic use and enjoyment*' includes books (*Cornwall* v. *Cornwall*, 12 Sim. 303).

'*Books*' includes MSS. bound into volumes (*Willis* v. *Courtois*, 1 Beav. 189).

'*Cash*' does not include a promissory note payable to order (*Beales* v. *Crisford*, 13 Sim. 592).

'*Debenture*' includes a policy of assurance (*Phillips* v. *Eastwood*, 1 Ll. & G. 291).

'*Debts*' due to the testator includes a bill of exchange drawn in the testator's favor, and a cash balance at his banker's (*Carr* v. *Carr*, 1 Mer. 541 ; and see *Essington* v. *Vashon*, 3 Mer. 434). The bequest of a debt due on a particular security will pass the capital only, and not arrears of interest due at the testator's death (*Roberts* v. *Kuffin*, 2 Atk. 112), and *e converso*, the bequest of arrears of a debt will not pass the principal (*Hamilton* v. *Lloyd*, 2 Ves. Jun. 416).

'*Factory*.' The bequest of an Indigo Factory would probably be held, like the devise of a West India Plantation (*Lushington* v *Sewell*, 1 Sim. 435), to pass the stock, implements, utensils, &c., in and upon it.

'*Funds*.' The 'funds' or the '*public funds*' generally means funded securities guaranteed by Government, and '*foreign funds*' mean securities guaranteed by foreign Governments (*Ellis* v. *Eden*, 23 Beav. 543). But *funds* will not include Bank Stock (Jarm. Wills 731).

"*Government Securities*." See *Burnie* v. *Getting*, 2 Coll. 324.

"*Household Effects*" includes all property in the house or on the premises, intended for use or consumption therein, or for ornament or defence thereof (*Cole* v. *Fitzgerald*, 1 Sim. & S. 189: 3 Russ. 301: *Field* v. *Peckett*, 29 Beav. 573).

"*Household Furniture*" includes all personal chattels that may be useful or convenient to the householder or ornamental to the house, as plate, linen, china, pictures: but not goods or plate in the possession of the testator by way of his trade, nor books, nor wines, (Wms. Exors., 1067). A gift of *furniture* in a particular house will not include plate, sometimes in use there and sometimes elsewhere (*Wilkins* v. *Jodrell*, 11 W. R. 588).

'*Household Goods*' include everything of a permanent nature, *i. e.*, plate and other articles of household which are not consumed

on their enjoyment that were used in, or purchased, or otherwise acquired by a testator for his house. But not victuals, nor fire-arms, nor goods in the way of the householder's trade or business (Wms. Exors., 1063).

'*Jewels*' see *Atty. Gen.* v. *Harley*, 5 Russ., 173.

'*Linen*' includes table and bed linen. But under a bequest of my 'linen and clothes of all kinds,' only body linen passes (*Hunt* v. *Hort*, 3 Bro. C. C. 311).

'*Medals*' see *Bridgman* v. *Dove*, 3 Atk. 202.

'*Money*' extends to bank-notes, bills of exchange endorsed in blank, and money lent on mortgage. But it does not include money in the hands of a stakeholder, to abide an event which does not happen in the testator's life-time (*Manning* v. *Purcell*, 7 D. M. G. 55: 1 Jarm. Wills, 730,) money does not by the force of the word include stock, although upon the context stock may include money (Wms. Exors., 1070, 1071).

'*Ready Money*' or '*Money in hand*' includes a balance at a banker's, (*Re Powell's Trust* Johns. 49), but not money in the hands of an agent, nor unreceived dividends (1 Jarm. Wills) 730, nor consols (10 H. L. Ca. 20). '*Money in my house*' includes ready money and bank-notes, but not mortgages, bonds or receipts for Government Annuities (Wms. Exors. 1070). '*Money at my Banker's*' is confined to money on account current, and would not include money on a deposit account, which is an investment (*Rehden* v. *Wesley*, 29 Beav. 213).

'*Pecuniary Legacies*' does not include legacies of stock (*Douglas* v. *Congreve*, 1 Keen, 410).

'*Personal Ornaments*' see *Willis* v. *Curtois*, 1 Beav. 189.

'*Plate*' does not include plated articles (*Holder* v. *Ramsbottom*, 11 W. R. 302).

'*Portraits*' see *Duke of Leeds* v. *Amherst*, 13 Sim. 459.

'*Securities for Money*' includes bills of exchange and promissory notes, stock in the funds, and a policy of assurance on the life of a debtor, but not Bank stock nor shares in an Insurance or Canal Company, nor an I. O. U. given for goods sold (1 Jarm. Wills 731 n: Wms. Exors. 1072, 1073). A bequest of Securities for Money, will by itself carry the legal estate in mortgaged lands, though coupled with a trust for conversion (*Exp. Barber*, 5 Sim. 451), or a charge of debts (*Re King*, 5 De G. & S. 644, *Knight* v. *Robinson*, 2 K. & J. 503:) 1 Jarm. Wills, 644: 4 Dav. Conv. XXXVII: *Rippen* v. *Bates* 9 Jur. N. S. 649).

'*Stock on Farm*' includes all moveable property upon or belonging to the Farm, and also growing crops (Wms. Exors. 1069). '*Live and Dead Stock*' may include books and wines (*Hutchinson* v. *Smith*, 11 W. R. 417).

'*Utensils*' does not include plate or jewels. Wms. Exors. 1070.

71. Where a clause is susceptible of two meanings, according to one of which it has effect, and according to the other it can have none, the former is to be preferred.

When a clause is open to two construc-tions, that which has

See *Turner* v. *Frampton*, 2 Coll. 331, 336. The Court in one instance adhered to the literal language of the testator, though it was highly probable that he had written a word by mistake, for one which would have rendered the devise void (2 Jarm. Wills, citing *Chapman* v. *Brown*, 3 Burr. 1626).

No part of a Will to be rejected, if reasonable construction can be put on it.

72. No part of a Will is to be rejected as destitute of meaning if it is possible to put a reasonable construction upon it.

Words are not to be expunged upon mere conjecture, nor unless actually irreconcileable with the context of the Will, though the retention of them may produce rather an absurd consequence (1 Jarm. Wills, 453), *e. g.* giving the same person, in the same sentence, an estate for life and an estate in fee in the same land : see *Chambers* v. *Brailsford*, 18 Ves. 368 : *Mellish* v. *Mellish*, 4 Ves. 48).

Interpretation of words repeated in different parts of Will.

73. If the same words occur in different parts of the same Will, they must be taken to have been used everywhere in the same sense, unless there appears an intention to the contrary.

See *Sibley* v. *Perry*, 7 Ves. 522 : *Rhodes* v. *Rhodes*, 27 Beav. 413, 417 per Romilly M. R. : *Clavering* v. *Ellison*, 3 Drew. 472. The "intention to the contrary" must appear *on the face of the will* (*Harvey* v. *Harvey*, 32 Beav. 441), and the indication of such intention must be strong (*Ibid*).

On the same principle, where a testator uses an additional word or phrase, it has been held that he must be presumed to have an additional meaning (2 Jarm. Wills, 765 : *Campbell* v. *Campbell*, 4 Bro C. C. 18). But slight variation of expression does not always prove difference of intention : see cases referred to in 2 Jarm. Wills, 765 n. (*t*).

Testator's intention to be effectuated as far as possible.

74. The intention of the testator is not to be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.

See 2 Jarm. Wills, 766 : *Thellusson* v. *Woodford*, 4 Ves. 326 : *Southey* v. *Lord Somerville*, 13 Ves. 492, 493.

Illustration.

The testator by a Will made on his death-bed bequeathed all his property to C D for life, and after his decease to a certain hospital. The intention of the testator cannot take effect to its full extent, because the gift to the hospital is void under Section 105, but it shall take effect so far as regards the gift to C D.

The last of two inconsistent clauses prevails.

75. Where two clauses or gifts in a Will are irreconcileable, so that they cannot possibly stand together, the last shall prevail.

Illustrations.

(*a.*) The testator by the first clause of his Will leaves his estate of Rámnagar "to A," and by the last clause of his Will leaves it "to B and not to A." B shall have it.

(*b.*) If a man at the commencement of the Will gives his house to A, and at the close of it directs that his house shall be sold and the proceeds invested for the benefit of B, the latter disposition shall prevail.

An old maxim: *Cum duo inter se repugnantia reperiuntur in testamento, ultimum ratum est*, Co. Litt. 112 b. The rule rests on the theory that the testator may have changed his mind (*Ulrich* v. *Litchfield*, 2 Atk. 372). It is never applied but on the failure of every attempt to give to the whole Will such a construction as will render every part of it effectual (1 Jarm. Wills, 445: *Brocklebank* v. *Johnson*, 20 Beav. 205). In the attainment of this object the local order of the limitations is disregarded, if it be possible by the transposition of them to deduce a consistent disposition from the entire Will. Thus if a man in the first instance, devise lands to A in fee and in a subsequent clause give the same lands to B for life, both parts of the Will shall stand; and in the construction of law, the devise to B shall be first, the Will being read as if the lands had been devised to B for life, with remainder to A in fee (1 Jarm. Wills, 445).

76. A Will or bequest not expressive of any definite intention is void for uncertainty.

Will or bequest void for uncertainty.

See 1 Jarm Wills, 332: *Drake* v. *Drake*, 25 Beav. 642: affirmed 8 H. L. Ca. 172: *Hogan* v. *Byrne*, 13 Ir. C. L. Rep. 166.

Illustration.

If a testator says—"I bequeath goods to A;" or "I bequeath to A;" or "I leave to A all the goods mentioned in a Schedule," and no Schedule is found; or "I bequeath 'money' 'wheat,' 'oil,' or the like," without saying how much, this is void.

The Object and Subject must each be defined; but a reasonable degree of definiteness will suffice (*Adams* v. *Jones*, 9 Ha. 485). The Court very reluctantly comes to the conclusion that it cannot discover the meaning of the testator as expressed in his Will (*Maynard* v. *Wright*, 26 Beav. 291). In cases like those put in the Illustration, the question is: does the Will furnish any ground on which to estimate the amount intended to be bequeathed? (See 1 Jarm. Wills, 332). Thus if a testator says "I bequeath to my executors a reasonable amount for their trouble" (*Jackson* v. *Hamilton*, 3 J. & Lat. 702), or "I bequeath a sum for the maintenance of A" (*Broad* v. *Bevan*, 1 Russ. 511 n.), or "I bequeath Rs. 1,000 or thereabouts to be raised by accumulating annual income," this is valid, and in the first and second cases the Court will determine the amount: in the third case any little excess occasioned by the addition of an entire dividend, would be subject to the same disposition as the specific sum (*Oddie* v. *Brown*, 4 De G. & J. 179, 195).

77. The description contained in a Will, of property the subject of gift, shall, unless a contrary intention appear by the Will, be deemed to refer to and comprise the property answering that description at the death of the testator.

Words describing object refer to property answering that description at testator's

This is almost verbatim the rule in Hawk. 18. "Descriptions of real or personal estate, the subject of gift, *primâ facie* refer to and comprise the property answering to the description at the death of the testator." The Section (24) of the English Wills Act by which this Rule is established enacts that "every Will shall be construed, with reference to the real estate and the personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will." See *Bulloch* v. *Bennett*, 7 D. M. G. 283.

Thus a bequest of "all my leasehold houses" would pass after-acquired leasehold houses, and a bequest of "my 5½ per cent. stock" passes all the stock of the description possessed by the testator at his death (*Goodlad* v. *Burnett*, 1 K. & J. 341).

"Unless a contrary intention appear by the Will." The cases on this exception fall into two classes (Hawk. 20):—

(1) When the date of the Will as opposed to the death is distinctly referred to; as where a testator bequeaths "my house with the lands belonging thereto *now occupied* at B," a field taken into occupation by the testator after the date of the Will, will not pass (*Hutchinson* v. *Barras*, 1 W. R. 538).

(2) Where there is a particularity in the description of the specified subject of gift, shewing that an object in existence at the date of the Will was intended. For example, where a testator gives "my *brown* horse" or "the houses which I bought from Mr. B." (See *Emuss* v. *Smith*, 2 De G. & S. 722), or "all the stock which I have purchased" (*Douglas* v. *Douglas*, Kay, 400, 405), the description shews that it must have been intended to refer to the state of things existing at the date of the Will and not at the death of the testator.

As regards general powers of appointment, the effect of this and the 78th Sections combined will be to make all *general* bequests operate as an execution by anticipation of all *general* powers (see Section 46) vested in the testator at the time of his death, although created by an instrument subsequent in date to the Will, unless the language of the power be such as to forbid its being exercised by anticipation (Hawk. 19, citing *Stillman* v. *Weedon*, 16 Sim. 26). And even *special* powers of appointment (see Section 56) created after the date of the Will may be exercised by a bequest contained in the Will, if the bequest contain a sufficient description of the particular property afterwards made the subject of the power, to show that the testator *had the subject of the power in view* (Hawk. 19).

The following Illustrations of the Rule laid down in this section may be useful:

(*a.*) A bequeaths his houses in Calcutta to B. After the date of the Will A enters into a binding contract to buy another house in Calcutta, but the house is not actually conveyed. B takes the house contracted for (*Acherley* v. *Vernon*, 10 Mod. 518: *Collison* v. *Girling*, 4 My. & Cr. 75: 1 Jarm. Wills. 46).

(*b.*) A bequeaths his houses in Calcutta to B, and all his moveable property to C. After the date of the Will A contracts to sell one of

these houses, but dies before conveying it to the purchaser. B will take the house contracted to be sold as a trustee for D, and C will be entitled to the purchase-money (*Knollys* v. *Shepherd*, 1 J. & W. 499: 1 Jarm. Wills, 152).

(*c.*) A bequeaths his "lands," or "his real estate," or "his immoveable property" in B. At his death he has both leasehold and freehold lands in B. The bequest includes both (*Wilson* v. *Eden*, 5 Exch. 752).

(*d.*) A bequeaths his "lands" in B. At his death he has immoveable property in possession in B, and also the reversion* in fee of lands settled on his wife for her life. The bequest includes the reversion (*Ford* v. *Ford*, 6 Hare, 486).

(*e.*) A having two estates, one settled and the other not, bequeaths his "unsettled real estate." The bequest passes not only the unsettled estate but the unsettled reversion in the settled estate (*Incorporated Society* v. *Richards*, 1 Dru. & War. 285).

(*f.*) A bequest to Z 'his land' or 'his lands in B' or his 'real estate'. A at his death has lands of his own and also lands of which he was seised as trustee or mortgagee. Z takes the trust and mortgage estates as well as the lands to which A was absolutely entitled (*Lord Braybrooke* v. *Inskip*, 8 Ves. 425).

A general bequest of "my lands," "my lands in A," "my immoveable estate," &c., includes lands of which the testator was seised as trustee or mortgagee, *unless an intention appear to the contrary*. Such an intention appears when the disposition made by the will is such as the testator could not intend to make of property not beneficially his.

Thus: (*g*) A bequeaths his lands on trust for sale. Mortgage and trust estates do not pass (*Ex parte Marshall*, 9 Sim. 555: *Re Morley*, 10 Hare, 293).

(*h*) A bequeaths his lands to B for life with remainder to C. Mortgage and trust estates do not pass (*Lindsell* v. *Thacker*, 12 Sim. 183).

(*i*) A bequeaths his lands to B subject to an annuity payable to C for her life: mortgage and trust estates do not pass (*Duke of Leeds* v. *Munday*, 3 Ves. 348; *Rackham* v. *Siddall*, 16 Sim. 297).

(*j*) A bequeaths his lands to B after payment of debts, legacies and general expenses. Mortgage and trust estates do not pass (*Roe* v. *Reade*, 8 T. R. 118: *Doe* v. *Lightfoot*, 8 M. & W. 559).

Considering Section 4 and the fact that under this Act a married woman will hold all her property as a *feme coverte* in England holds property settled to her separate use, it is submitted that a bequest of lands to the sole use of a married woman would not now be held to indicate that the property should be enjoyed by her beneficially (See *Lindsell* v. *Thacker*, 12 Sim. 178, *contra*. But see *Ex parte Shaw*, 8 Sim. 159). If so, under such a bequest, the testator's mortgage and trust estates would pass to the married woman, just as they would under a general devise to A his heirs and assigns to and for his and their own use and benefit (*Bainbridge* v. *Lord Ashburton*, 2 Y. & C. 347: *Sharpe* v. *Sharpe*, 12 Jur. 598).

A general bequest which passes the legal estate in a mortgage vested in the testator, does not include the beneficial interest in the money secured by the mortgage, which is moveable property, and would pass by the general or residuary bequest of such property contained in the Will. On the other hand if a mortgagee in possession devises the mortgaged lands by a specific description as a bequest of all "my lands in the Zillah of B," the testator having no other land answering to the description, such a bequest may well be held to pass the beneficial as well as the legal estate in the mortgaged land (Hawk. 37, 38, citing

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* A 'reversion' is that portion of ownership which on the creation of a partial interest only, remains undisposed of and therefore vested in the person by whom such interest is created.

Woodhouse v. *Meredith*, 1 Mer. 450: *Burdus* v. *Dixon*, 4 Jur. N. S. 38).

If the testator leaves all his lands to A and his "securities for money" to B, the legal estate in the land of which the testator was mortgagee would pass to B and not to A (*Renvoize* v. *Cooper*, 6 Mad. 371).

Power of appointment executed by general bequest.

78. Unless a contrary intention shall appear 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.

Shortened from Section 27 of the English Wills Act. The words "to appoint *by Will to any object* he may think proper" correspond with the words in the Statute "to appoint *in any manner* he may think proper," but these words have been held to mean "to any objects the donee may think proper," and not "by any form of execution" (Hawk. 28), and a power to appoint generally by Will (but not by deed) is within the section of the English Statute. The section of the Act therefore has been made to express the meaning of the corresponding section of the Statute; and the following decisions on the latter section may be taken as decisions on the former:—

A power to appoint in any manner to *children* or any other limited class of objects is not within the section (*Cloves* v. *Awdry*, 12 Beav. 604).

A power to revoke what has been already appointed is not within the scope of the Section (*Pomfret* v. *Perring*, 5 D. M. & G. 775).

The following are Illustrations of the Rule contained in this Section:—

(*a.*) A bequeaths "property which I am possessed of or entitled to." The bequest passes property subject to a power of appointment in the testator (*Frankcombe* v. *Hayward*, 9 Jur. 344).

(*b.*) A makes a Will containing the words "constituting B my residuary legatee." This is enough to operate as an execution of all general powers (*Spooner's Trusts*, 2 Sim. N. S. 129).

Of course a general power given by Will to a person, who predeceased the testator, is not executed by the donee's Will (*Jones* v. *Southall*, 11 W. R. 247).

Implied gift to the objects of a power in default of appointment.

79. Where property is bequeathed to or for the benefit of such of certain objects as a specified person shall appoint, or for the benefit of certain objects in such proportions as a specified person shall appoint; and the Will does not provide

for the event of no appointment being made ; if the power given by the Will be not exercised, the property belongs to all the objects of the power in equal shares.

Illustration.

(*a.*) A, by his Will, bequeaths a fund to his wife for her life, and directs that at her death it shall be divided among his children in such proportions as she shall appoint. The widow dies without having made any appointment. The fund shall be divided equally among the children.

Grieveson v. *Kirsopp*, 2 Keen, 653.

This section is taken almost verbatim from the rule in *Brown* v. *Higgs* (4 Ves. 708, 5 Ves. 495, 8 Ves. 561) as stated in Hawk. 57. In *Burrough* v. *Philcox* 5 My. & Cr. 72, Lord Cottenham thus stated the principle on which the rule rests : "When there appears a general intention in favour of a class, and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails, from that selection not being made, the Court will carry into effect the general intention in favour of the class. When such an intention appears, the case arises, as stated by Lord Eldon in *Brown* v. *Higgs*, (see 8 Ves. 574,) of the power being so given as to make it the duty of the donee to execute it ; and, in such case, the Court will not permit the objects of the power to suffer by the negligence or conduct of the donee, but fastens upon the property a trust for their benefit."

Other Illustrations of the Rule are these :—

(*b.*) A bequeaths property "to such of his relations as B shall think most deserving" (*Harding* v. *Glyn*, 1 Atk. 469), or "for the benefit of the wife and children of B in such manner as he shall by Will bequeath" (*Brown* v. *Pocock*, 6 Sim. 257). B dies without having made any appointment. The property shall be divided equally among the class of objects mentioned, *per capita*.

(*c.*) A bequeaths property to his brothers and sisters *or* their children in such shares as and at such times as his trustees shall think fit. No appointment is made. The property is divisible equally among all the children and their parents *per capita* (*Longmore* v. *Broom*, 7 Ves. 128 : *Penny* v. *Turner*, 2 Phill. 493).

Wherever the rule in *Brown* v. *Higgs* is applied, the objects will take the property among them as tenants in common, and not as joint tenants (Hawk. 59).

The Rule does not apply where there is a mere *permission* to give to certain objects : as if property be given to A for life with power for her (if she pleases) to bequeath it to the children of B (*Brook* v. *Brook*, 3 Sm. & G. 380).

If the power has been partially exercised the Rule applies, and the unappointed part is divisible among the objects of the power without regard to the appointment (Hawk. 61 : citing *Maddison* v. *Andrew*, 1 Ves. Sen. 57 : *Fordyce* v. *Bridges*, 2 Phill. 513).

The period for ascertaining the objects to take in default of appointment is the time when the power ought to be exercised (*Longmore* v. *Broom*, 7 Ves. 124 : *Re White's Trusts*, Johns. 656).

A bequeaths property to B for life with a power of disposition among A's relations. B dies without exercising the power. The to take are those who would be entitled under this Act at the

death of B to the property of which A died intestate (*Harding* v. *Glyn*, 1 Atk. 469: *Pope* v. *Whitcombe*, 21 Beav. 112).

If the power of appointment is not to arise until a given period, no objects can take under the Rule, who die before that period (*Walsh* v. *Wallinger*, 2 R. & My. 78: *Kennedy* v. *Kingston*, 2 J. & W. 431: *Halfhead* v. *Shepherd*, 7 W. R. 480).

Bequest to "heirs," &c., of a particular person without qualifying terms.

80. 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.

Illustrations.

(*a.*) A leaves his property "to his own nearest relations." The property goes to those who would be entitled to it if A had died intestate, leaving assets for the payment of his debts independently of such property.

(*b.*) A bequeaths 10,000 rupees "to B for his life, and after the death of B, to his own right heirs." The legacy after B's death belongs to those who would be entitled to it if it had formed part of A's unbequeathed property.

(*c.*) A leaves his property to B; but if B dies before him, to B's next of kin; B dies before A. the property devolves as if it had belonged to B, and he had died intestate, leaving assets for the payment of his debts independently of such property.

(*d.*) A leaves 10,000 rupees "to B for his life, and after his decease, to the heirs of C." The legacy goes as if it had belonged to C, and he had died intestate, leaving assets for the payment of his debts independently of the legacy.

See Wms. Exors. 995-1013: Hawk. 103.

The reason of this rule is that it is desirable to ascertain the object of the testator's bounty as soon as possible (Hawk. 99).

Under this section "relations" would include a wife. Otherwise in England (*Green* v. *Howard*, 1 Bro. C. C. 31.) A gift to those related to a person is equivalent to a gift to relations (*Rayner* v. *Mowbray*, 3 Bro. C. C. 234.) "Near relations" is equivalent to "relations" (*Whitehorn* v. *Harris*, 2 Ves. Sen. 527. "Nearest relations" is expressly made equivalent to "relations." Otherwise in England (*Smith* v. *Campbell*, 19 Ves. 400). Under a bequest to "my relations of the *name* of A" a female relation entitled to the name of A by birth would take though she has lost the name of A by her marriage (*Pyot* v. *Pyot*, 1 Ves. Sen. 336). A power to appoint to "relations"

of the testator, or of B, authorises an appointment to relations not within the Act (*Harding* v. *Glyn*, 1 Atk. 469). Otherwise if the power be one of distribution only (*Pope* v. *Whitcombe*, 3 Mer. 689). Where there is a power of selection among relations, with no gift in default of appointment, and the power is not exercised, those within the Act only will take by implication (*Harding* v. *Glyn*, 1 Atk. 469: *Grant* v. *Lynan*, 4 Russ. 297: Hawk. 104).

"Without any qualifying terms." The language of the Will may be such as to shew that the testator intended the "next of kin," &c., to be ascertained at the period of distribution. Thus: A leaves property to B for life, and after his decease to the persons who shall *then* be the legal representatives of A. The property goes on B's death to those who would be entitled to it if A had died at the same moment as B, intestate and leaving assets for the payment of his debts independent of such property (*Long* v. *Blackall*, 3 Ves. 486: *Wharton* v. *Barker*, 4 K. & J. 483). So the context may narrow or enlarge the term "family" so as to mean only "children" (*Barnes* v. *Patch*, 8 Ves. 604), or to include relations by marriage (*McLeroth* v. *Bacon*, 5 Ves. 159).

Bequest to "representatives," &c., of a particular person.

81. Where a bequest is made to the "representatives," or "legal representatives," or "personal representatives" or "executors or administrators" of a particular person, 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.

This is the rule settled by the more recent English cases.

Illustration.

(*a.*) A bequest is made to the "legal representatives" of A. A has died intestate and insolvent. B is his administrator. B is entitled to receive the legacy, and shall apply it in the first place to the discharge of such part of A's debts as may remain unpaid; if there be any surplus, B shall pay it to those persons who at A's death would have been entitled to receive any property of A's which might remain after payment of his debts, or to the representatives of such persons.

The rule and illustration establish that in the case of a bequest to the "representatives," &c. of A simply, not in trust for themselves or any other persons, the property passes not directly to A's next of kin, but to A's executors or administrators, as part of his assets, and they take it in their official capacity and not beneficially (See *Long* v. *Watkinson*, 17 Beav. 471: *Re Seymour's Trusts*, Johns. 472: *Holloway* v. *Clarkson*, 3 Hare 523: *King* v. *Cleaveland*, 4 De G. & J. 477).

Bequest without words of limitation.

82. 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.

In England before 1st January 1838, and in India before 1st February 1839, a devise of lands to A *simpliciter*, (or to A and his assigns, Co. Litt. 96), conferred an estate for life only, unless an intention appeared to the contrary. The application of this rule being frequently found to disappoint the intention of the testator, the English Wills Act, Section 28, enacted that "where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by Will in such real estate." This Section has been held to apply only to devises of previously existing estates or interests, and not to the devise of an estate created by the Will (*Nichols* v. *Hawkes*, 10 Hare, 342). It is submitted that Section 82 of the Indian Succession Act, 1865, would be construed similarly. Accordingly, if A devise a rent charge vested in him to B without more, B would take the fee simple. But if A devise a rent charge created by his Will (*e. g.* an annuity with the usual powers of distress and entry)—see Section 160 infra,—to B, the devisee would take only an estate for his life. So if A bequeath to B a house and grass for a cow in a certain meadow belonging to A, B will take A's whole interest in the house, but only a life estate in the easement (*Reay* v. *Rawlinson*, 7 Jur. N. S. 118).

"Unless it appear from the Will that only a restricted interest was intended for him." The *onus probandi* lies on those who contend for the restricted construction (2 Jarm. Wills, 266), and will not be discharged by shewing that another bequest in the Will contains formal words of limitation (*Wisden* v. *Wisden*, 2 Sm. & Gif. 396), or that a special power of appointment is, in terms, given to the legatee (*Brooke* v. *Brooke*, 3 Sm. & G. 280).

83. Where property is bequeathed to a person, with a bequest in the alternative to another person or to a class of persons;—if a contrary intention does not appear by the Will, the legatee first named shall be entitled to the legacy, if he be alive at the time when it takes effect; but if he be then dead, the person or class of persons named in the second branch of the alternative shall take the legacy.

Bequest in the alternative.

This is an improvement on English law, which is apt to regard gifts to several persons alternatively as void for uncertainty (see 1 Jarm. Wills, 343, 344). The section follows to some extent the rule as to *personalty* which prevails in England. There if *personal* estate be bequeathed, *e. g.* to A *or* his heirs, the word 'heirs' is read as a word not of limitation but of substitution, so as to prevent a lapse, *Giltings* v. *McDermott*, 2 My. & K. 69: *Doody* v. *Higgins*, 9 Ha. App. 32. The rule as to realty is different (Hawk. 92, 180).

Illustrations.

(*a.*) A bequest is made to A or to B. A survives the testator. B takes nothing.

(*b.*) A bequest is made to A or to B. A dies after the date of the Will, and before the testator. The legacy goes to B.

(*c.*) A bequest is made to A or to B. A is dead at the date of the Will. The legacy goes to B.

(*d.*) Property is bequeathed to A or his heirs. A survives the testator. A takes the property absolutely.

So a gift to A *or* his heirs *or* assigns is an absolute gift to him (*Re Walton*, 2 Jur. N. S. 363); and it has long been settled that a devise of realty to A *or* his heirs gives A an estate in fee (*Read* v. *Snell*, 2 Atk. 645). The same result would follow here from a bequest to A *or* the heirs of his body, although in England of course A would take an estate tail (*Harris* v. *Davis*, 1 Coll. 416).

(*e.*) Property is bequeathed to A or his nearest of kin. A dies in the lifetime of the testator. Upon the death of the testator the bequest to A's nearest of kin takes effect.

The nearest of kin will take under Section 80, as if the property had belonged to A, and he had died intestate in respect of it, leaving assets for the payment of his debts independent of such property.

(*f.*) Property is bequeathed to A for life, and after his death to B or his heirs. A and B survive the testator. B dies in A's lifetime. Upon A's death the bequest to the heirs of B takes effect.

(*g.*) Property is bequeathed to A for life, and after his death to B or his heirs. B dies in the testator's lifetime. A survives the testator. Upon A's death the bequest to the heirs of B takes effect.

84. Where property is bequeathed to a person, and words are added which describe a class of persons, but do not denote them as 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.

Effect of words describing a class added to a bequest to a person.

Illustrations.

(*a.*) A bequest is made—

to A and his children,
to A and his children by his present wife,
to A and his heirs,
to A and the heirs of his body,
to A and the heirs male of his body,
to A and the heirs female of his body,
to A and his issue,
to A and his family,
to A and his descendants,
to A and his representatives,
to A and his personal representatives,
to A, his executors and administrators.

In each of these cases, A takes the whole interest which the testator had in the property.

And it is immaterial whether or not the class described exist at the testator's death.

(*b.*) A bequest is made to A and his brothers. A and his brothers are jointly entitled to the legacy.

(*c.*) A bequest is made to A for life, and after his death to his issue. At the death of A the property belongs in equal shares to all persons who shall then answer the description of issue of A.

The rules and illustrations in this Section agree generally with the English law as to personalty. But by English law a devise of *real* estate to A and his children, A having no children at the date of the Will, vests in A an estate tail: children being construed a word of limitation (*Wild's case*, 6 Rep., 17: *Buffar* v. *Bradford*, 2 Atk. 220). But this rule does not apply to personal estate (*Audsley* v. *Horn*, 1 De G. F. & J. 226: *Agnew* v. *Mattheus*, 1 Mad. H. C. Rep. 17). Under an immediate bequest of *personal* estate to A and his children, A and his children, if any, living at the death of the testator will take as joint tenants; and if there are no children at that period, A will take the whole (*Mason* v. *Clarke*, 17 Beav. 130).

A bequest of *personal* estate to A and the heirs of his body (*Tothill* v. *Pitt*, 7 Bro. P. C. 453), or to A and the heirs male of his body, or to A for life and after his decease to the heirs male of his body, is an absolute gift to A (*Britton* v. *Twining*, 3 Mer. 176).

In devises of realty the rule in England is that "issue" is a word of limitation. Thus a devise of *real* estate to A and his issue would give A an estate tail (*Roddy* v. *Fitzgerald*, 6 H. L. Ca. 823). But this rule does not extend to bequests of personal estate (*Knight* v. *Ellis*, 2 Bro. C. C. 570: *Ex parte Wynch*, 5 D. M. & G. 188). And if personal estate be given to A for life, and after his decease to his issue, A, as in Illustration (*c*), takes for life only, and the issue take in remainder (*Knight* v. *Ellis*, 2 Bro. C. C. 570).

Bequest to a class of persons under a general description only.

85. 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.

"A gift to a class implies an intention to benefit those who constitute the class, and to exclude *all others*:" per Lord Cottenham, *Barber* v. *Barber*, 3 My. & Cr. 688.

Construction of terms.

86. The word "children" in a Will applies only to lineal descendants in the first degree; the word "grandchildren" applies only to lineal descendants in the second degree of the person whose "children," or "grandchildren," are spoken of; the words "nephews" and "nieces" apply only to children of brothers

or sisters; 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; the words "first cousins once removed" apply only to children of cousins german, or to cousins german of a parent, of the person whose "first cousins once removed" are spoken of; the words "second cousins" apply only to grandchildren of brothers or of sisters of the grandfather or grandmother of the person whose "second cousins" are spoken of; the words "issue" and "descendants" apply to all lineal descendants whatever of the person whose "issue" or "descendants," are spoken of. Words expressive of collateral relationship apply alike to relatives of full and of half blood. All words expressive of relationship apply to a child in the womb who is afterwards born alive.

This is the English law: Hawk. 85—87. Although "children" is sometimes used in a loose sense, signifying descendants, it is a settled rule that "children" does not include "grandchildren," that "grandchildren" does not include "great grandchildren," and that 'nephews' or 'nieces' does not include 'grandnephews' or 'grandnieces,' (Hawk. 85). Nor does 'nephew' or 'niece' include a nephew or niece by marriage (*Smith* v. *Lediard*, 3 K. & J. 252). The testator, however, may define his meaning of the word 'nephew' or 'niece,' so as to include in it a child of a nephew or niece (*James* v. *Smith*, 14 Sim. 214).

A gift to "all the first and second cousins" includes all cousins within the degree of second cousin, and therefore includes not cousins once removed, and also first cousins twice removed (Hawk. 87).

A gift to the 'issue' of A, or the issue begotten by A (*Evans* v. *Jones*, 2 Coll. 516), or the offspring of A (*Young* v. *Davies*, 9 Jur. N. S. 399) includes descendants of every degree, and creates a joint tenancy. But if the gift be to the issue, &c., as tenants in common, they take *per capita* (Hawk. 87).

The Act does not seem to infringe on the rule in *Sibley* v. *Perry*, 7 Ves. 522, *viz.*, that when the parent of 'issue' is spoken of, the word 'issue' is *primâ facie* restricted to children of the parent (Hawk. 88).

Under a gift "to the descendants of A," all the lineal descendants of A would take *per capita* (*Crossly* v. *Clare*, Ambl. 397: *Butler* v. *Stratton*, 3 Bro. C. C. 367).

The Act does not define 'offspring,' which term seems equivalent to 'descendants' (*Young* v. *Davies*, 9 Jur. N. S. 399).

Under the rule as to half-blood a gift to 'brothers' or 'sisters' would, as it does in England, include half-brothers and half-sisters, and a gift to nephews and nieces would include the children of a half-brother or half-sister.

87. In the absence of any intimation to the contrary in the Will, the term "child," "son," or "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.

denote only legitimate relatives, or failing such, relatives reputed legitimate.

See 2 Jarm. Wills, 204 : Hawk. 80 : Wms. Exors. 989 : 11 Bythewood Conv. ed. Sweet 341, 574, 763 *Re Williams*, 12 W R. 818 · *Barnett* v. *Tugwell*, 31 Beav 232.

Illustrations.

(*a.*) A, having three children, B, C, and D, of whom B and C are legitimate, and D is illegitimate, leaves his property to be equally divided among "his children." The property belongs to B and C in equal shares, to the exclusion of D.

See *Cartwright* v. *Vawdry*, 5 Ves. 530.

(*b.*) A, having a niece of illegitimate birth, who has acquired the reputation of being his niece, and having no legitimate niece, bequeaths a sum of money to his niece. The illegitimate niece is entitled to the legacy.

(*c.*) A, having in his Will enumerated his children, and named as one of them B, who is illegitimate, leaves a legacy to "his said children." B will take a share in the legacy along with the legitimate children.

Rivers' Case, 1 Atk. 410 : *Bentley* v. *Blizard*, 4 Jur. N. S. 652.

(*d.*) A leaves a legacy to the "children of B." B is dead, and has left none but illegitimate children. All those who had, at the date of the Will, acquired the reputation of being the children of B are objects of the gift.

Woodhouselee v. *Dalrymple*, 2 Mer. 419 : *Gill* v. *Shelley*, 2 M. 33

(*e.*) A bequeathed a legacy to "the children of B." B never had any legitimate child. C and D had at the date of the Will acquired the reputation of being children of B. After the date of the Will, and before the death of the testator, E and F were born, and acquired the reputation of being children of B. Only C and D are objects of the bequest.

Mortimer v. *West*, 3 Russ. 370.

(*f.*) A makes a bequest in favour of his child by a certain woman, not his wife. B had acquired at the date of the Will the reputation of being the child of A by the woman designated. B takes the legacy.

(*g.*) A makes a bequest in favour of his child to be born of a woman, who never becomes his wife. The bequest is void.

See *Kenebel* v. *Scrafton*, 2 East, 530, 542.

(*h.*) A makes a bequest in favour of the child of which a certain woman, not married to him, is pregnant. The bequest is valid.

Gordon v. *Gordon*, 1 Mer. 141.

Other Illustrations are:—

(*i*) A, having four children, three legitimate and one illegitimate, bequeaths to every such child as he might happen to leave at his death one-fourth of the income of his property. The illegitimate child takes nothing (*Cartwright* v. *Vawdry*, 5 Ves. 530).

(*j*) A bequeaths an annuity to the 'eldest child' of B. When the Will was made B had several illegitimate children, who were known to A, but no others then or at A's death. The bequest fails (*Godfrey* v. *Davis*, 6 Ves. 43).

(*k*) A by his Will creates a trust for the children of his son B. B had no other than illegitimate children at the date of the Will, but these had always been treated and recognized by A as his grandchildren. The trust fails (*Harris* v. *Lloyd*, T. & R. 312).

(*l*) A leaves a legacy to the children '*now living*' of a person who has no other than illegitimate children at the date of the Will. They are entitled to the legacy (*Blundell* v. *Dunn*, cit. 1 Mad. 433).

(*m*) A leaves a legacy to the child of which a certain woman, not his wife, is pregnant *by him*. The bequest fails (*Earle* v. *Wilson*, 17 Ves. 528).

(*n*) A makes a bequest in favour of the future illegitimate children of a particular woman. The bequest fails (*In re Connor*, 2 Jo. & Lat. 459 per Sugden L. C.)

Illustrations (*c*), (*d*) and (*l*) shew that is no objection to the claim of illegitimate children that they are styled "children" if they are otherwise identified. According to the facts stated in Illustration (*d*) legitimate children never could have taken.

Illustration (*e*) rests on the ground that there was nothing to shew by necessary implication that the testator intended the bequest to be to the illegitimate children subsequently born.

Illustration (*g*) exemplifies the rule that a gift to the future, i. *e.*, the unprocreated, illegitimate children of a man, or of a woman by a particular man, is void (2 Jarm. Wills, 229).

Regarding Illustration (*h*) it is to be remarked that where the gift is to the child with which a particular woman is enceinte, generally the fact of birth is the sole ground of title, and that is easy of ascertainment. On the other hand, a gift to the child by which a woman is enceinte *by a particular man* introduces in the description of the object a circumstance which the law treats as uncertain, and which it cannot properly permit to be enquired into (2 Jarm. Wills, 224). Thus in *Earle* v. *Wilson*, 17 Ves. 528 (which has been introduced as Illustration (*n*)), Sir W. Grant held that a gift by A to a child of which a

certain woman not his wife was pregnant *by him* was void. This decision has, however, been questioned.

Illustration (*i*) shews that expressions or a mode of disposition, *affording a mere ground of conjecture*, will not be a ground for the admission of illegitimate children (2 Jarm. Wills, 205).

Illustration (*j*) shews that the fact of there being no other than illegitimate children when the Will takes effect, or at any other time, so that the gift, if confined to legitimate children, has eventually failed for want of objects, does not warrant the application of the word children to bastards (2 Jarm. Wills, 206).

Illustration (*k*) shews that the testator's recognition of illegitimate children is not sufficient.

Inasmuch as under this Act, Section 56, a Will not operating as an appointment is revoked by marriage, a gift by a bachelor to his "children" can never take effect in favour of legitimate children. Consequently such a gift comes under the same head as a gift to the children of a person whom the testator knows, or presumably knows to be dead, which will, in default of legitimate children, take effect in favour of those who are legitimate (see Illustration (*d*) and 2 Jarm. Wills, 217).

Rules of construction where a Will purports to make two bequests to the same person.

88. Where a Will purports to make two bequests to the same person, and a question arises whether the testator intended to make the second bequest instead of or in addition to the first; if there is nothing in the Will to show what he intended, the following rules shall prevail in determining the construction to be put upon the Will.

As to the repetition of legacies the Act generally agrees with the English law. See Wms. Exors. 1160: Hawk. 303: *Hooley* v. *Hatton*, 2 Wh.& T. L. C.

First.—If the same specific thing is bequeathed twice to the same legatee in the same Will, or in the Will and again in a Codicil, he is entitled to receive that specific thing only.

Second.—Where one and the same Will or one and the same Codicil purports to make in two places a bequest to the same person of the same quantity or amount of anything, he shall be entitled to one such legacy only.

And parol evidence would not be admissible to show that the legacies were intended to be cumulative.

Third.—Where two legacies of unequal amount are given to the same person in the same Will, or in the same Codicil, the legatee is entitled to both.

Fourth.—Where two legacies, whether equal or unequal in amount, are given to the same legatee,

one by a Will and the other by a Codicil, or each by a different Codicil, the legatee is entitled to both legacies.

If a legacy of the same amount is given to the same person by each of two testamentary instruments, *and the same motive* is assigned for each, a presumption of law is raised that it is a mere repetition, and that one legacy only was intended; but this being a mere presumption and not a rule of construction may be rebutted by parol evidence of intention (Hawk. 305, citing *Hurst* v. *Beach*, 5 Madd. 358.)

Explanation.—In the four last rules, the word Will does not include a Codicil.

Illustrations.

(*a.*) A having ten shares, and no more, in the Bank of Bengal, made his Will, which contains near its commencement, the words "I bequeath my ten shares in the Bank of Bengal to B." After other bequests, the Will concludes with the words "and I bequeath my ten shares in the Bank of Bengal to B." B is entitled simply to receive A's ten shares in the Bank of Bengal.

(*b.*) A having one diamond ring, which was given him by B, bequeathed to C the diamond ring which was given him by B. A afterwards made a Codicil to his Will, and thereby after giving other legacies, he bequeathed to C the diamond ring which was given him by B. C can claim nothing except the diamond ring which was given to A by B.

v. *Lowther*, 2 Ha. 432.

A, by his Will, bequeaths to B the sum of 5,000 rupees, and afterwards, in the same Will, repeats the bequest in the same words. B is entitled to one legacy of 5,000 rupees only.

Garth v. *Meyrick*, 1 Bro. C. C. 30: *Holford* v. *Wood*, 4 Ves. 75: *Manning* v. *Thesiger*, 3 My. & K.

(*d.*) A, by his Will, bequeaths to B the sum of 5,000 rupees, and afterwards, by the same Will, bequeaths to B the sum of 6,000 rupees. B is entitled to 11,000 rupees.

Curry v. *Pile*, 2 Bro. C. C. 225.

A, by his Will, bequeaths to B 5,000 rupees, and by a Codicil to the Will he bequeaths to him 5,000 rupees. B is entitled to receive 10,000 rupees.

s v. *Morrison*, *Hooley* v. *Hatton*, 1 Bro. C. C. 389, 390· *Hurst* v. *Beach*, 5 Madd.

(*f.*) A, by one Codicil to his Will, bequeaths to B 5,000 rupees, and by another Codicil, bequeaths to him 6,000 rupees. B is entitled to receive 11,000 rupees.

Johnstone v. *Lord Harrowby*, 1 De G. F. & J. 183.

(*g.*) A, by his Will, bequeaths "500 rupees to B because she was his nurse," and in another part of the Will bequeaths 500 rupees to B "because she went to England with his children." B is entitled to receive 1,000 rupees.

Ridges v. *Morrison*, 1 Bro. C. C. 388. A different motive is assigned for each legacy.

(*h.*) A, by his Will, bequeaths to B the sum of 5,000 rupees, and also, in another part of the Will, an annuity of 400 rupees. B is entitled to both legacies.

Masters v. *Masters*, 1 P. W. 423, 424.

(*i.*) A, by his Will, bequeaths to B the sum of 5,000 rupees, and also bequeaths to him the sum of 5,000 rupees if he shall attain the age of 18. B is entitled absolutely to one sum of 5,000 rupees, and takes a contingent interest in another sum of 5,000 rupees.

s v. *Peacock*, 3 Ves. 735.

89. A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.

Constitution of residuary legatee.

See Wms. Exors 1310.

Illustrations.

(*a.*) A makes her Will, consisting of several testamentary papers, in one of which are contained the following words:—"I think there will be something left, after all funeral expenses, &c., to give to B, now at school, towards equipping him to any profession he may hereafter be appointed to." B is constituted residuary legatee.

Leighton v. *Baillie*, 3 My. & K. 267.

(*b.*) A makes his Will, with the following passage at the end of it:—"I believe there will be found sufficient in "my banker's hands to defray and discharge my debts, which "I hereby desire B to do, and keep the residue for her "own use and pleasure." B is constituted the residuary legatee.

v. *Morgan*, 9 Sim. 269: 3 My. & Cr. 661.

(*c.*) A bequeaths all his property to B, except certain stocks and funds, which he bequeaths to C. B is the residuary legatee.

Property to which a residuary legatee is entitled.

90. 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 any other testamentary disposition which is capable of taking effect.

See Wms. Exors. 1313 : Hawk. 40.

Illustration.

(*a.*) A by his Will bequeaths certain legacies, one of which is void under Section 105, and another lapses by the death of the legatee. He bequeaths the residue of his property to B. After the date of his Will, A purchases a zamíndárí, which belongs to him at the time of his death. B is entitled to the two legacies and the zamíndárí as part of the residue.

The residue will include property over which the testator has a general power of appointment (see Sec. 56), and which he has by the Will ineffectually appointed. For example, A in exercise of a general power of appointment, gives Rs. 1,000 to B and gives the residue of his moveable property to C. B dies in A's lifetime. C is entitled to the Rs. 1,000 as part of the residue (*Spooner's Trusts*, 2 Sim. N. S. 129).

In England, if the testator show an intention to circumscribe and confine the residuary bequest so as to exclude from it in every event particular property specifically given, effect will be given to his intention, and the Will would be inoperative as to such property. It would seem, however, that this would not be the case here : the words of the rule are imperative, and the spirit of the whole Act is hostile to intestacy.

A general residuary bequest contingent in terms, carries the intermediate income, which is not undisposed of, but accumulates. Thus if A bequeaths the residue of his property to such son of B as shall first attain 18, and B has no son of that age at the testator's death, the income of the residue does not go to the persons entitled on an intestacy, but accumulates in trust for such son of A as may attain (Hawk. 43, 44).

Time of vesting of legacy in general terms.

91. If a legacy be given in general terms, without specifying the 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 dies without having received it, it shall pass to his representatives.

"The law is said to favour the vesting of estates, the effect of which principle seems to be, that property which is the subject of any disposition, whether testamentary or otherwise, will belong to the object of gift, immediately on the instrument taking effect, or so soon afterwards as such object comes into existence, or the terms thereof will permit. As, therefore, a Will takes effect at the death of the testator, it follows that any devise or bequest in favour of a person *in esse* simply (*i. e.* without any intimation of a desire to suspend or postpone its operation) confers an immediately vested interest" (1 Jarm. Wills, 758).

Although the words of the section ('to be paid') would seem to confine its operation to mere pecuniary legacies, there can be no doubt that it would be read as applicable to devises of immoveable and bequests of every species of moveable property.

As to the vesting of legacies when the possession or enjoyment of the subject is postponed, or when the bequest is contingent, see Part XIII, Secs. 106, 108.

92. 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 appear by the Will that the testator intended that it should go to some other person. In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

In what case a legacy lapses.

Illustrations.

(*a.*) The testator bequeaths to B "500 rupees which B owes him." B dies before the testator; the legacy lapses.

(*b.*) 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.

(*c.*) 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.

(*d.*) A sum of money is bequeathed to A for life, and after his death to B. A dies in the life-time of the testator; B survives the testator. The bequest to B takes effect.

(*e.*) 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 his eighteenth year, and dies in the life-time of the testator. The legacy to A lapses, and the bequest to B does not take effect.

(*f.*) The testator and the legatee perished in the same shipwreck. There is no evidence to show which died first. The legacy will lapse.

In cases like the last Illustration the question of survivorship is, by the law of England [as to the civil law *de commorientibus* see 4 Burge Comm. 13—29: as to the French, the Code Napoleon, Arts. 720, 721, 722: as to the Muhammadan, W. H. Macn. cap. 1, s. 11: Baillie Inheritance, p.

172 : Dig. of M. Law, 407] a matter of evidence merely, and, in the absence of evidence there is no rule or conclusion of law on the subject. And as the burthen of proof lies on the representatives of the legatee they cannot claim the legacy, unless they can produce positive evidence that he was the survivor (Wms. Exors. 1084 : *Underwood* v. *Wing*, 4 D. M. & G. 633 : *Wing* v. *Angrave*, 8 H. L. Ca. 183 : *Carmichael*, 11 W. R. 462).

As to Illustration (*a*) see *Elliot* v. *Davenport*, 1 P. W. 83 : *Maitland* v. *Adair*, 3 Ves. 231 : *Toplis* v. *Baker*, 2 Cox. 118 : *Izon* v. *Butler*, 2 Price, 34, and see 4 Dav. Conv. 86 : 1 Jarm. Wills, 314 n.

As to Illustration (*b*) the bequest to A and his children gives A the whole interest (see Sec. 84.) The same result as to lapse follows when the legacy is given 'to A his executors and administrators,' 'to A and his representatives,' &c. (*Elliott* v. *Davenport*, 1 P. Wms. 83). The words 'or happens to be dead when the will is made' are suggested by *Maybank* v. *Brooks*, 1 Bro. C. C. 84.

Illustration (*c*) shews that the testator may if he think fit, prevent a legacy from lapsing; though, in order to effect this object, he must declare either expressly or in terms from which his intention can be collected with sufficient clearness, what person or persons he intends to substitute for the legatee dying in his lifetime (Wms. Exors. 1088). A declaration that the bequest shall not lapse, following a bequest to A *and* his executors or administrators would be considered as indicating an intention to substitute the representatives in the event of the gift to A failing by lapse (*Sibley* v. *Cooke*, 3 Atk. 572). Moreover where where there is a bequest to 'A *or* his representatives,' or to A *or* his heirs (*Gilling* v. *McDermott*, 2 M. & W. 69), or 'to A *or* his nearest of kin' (Illustration (*e*) Sec. 83, supra), the word 'or,' generally speaking, implies a substitution, so as to prevent a lapse (Wms. Exors. 1088).

Illustration (*e*) shews that the doctrine of lapse extends to the cases of gifts on contingency. See *Humberstone* v. *Stanton*, 1 V. & B. 385 : *Doe* v. *Brabant*, 3 Bro. C. C. 393 : *Williams* v. *Jones*, 1 Russ. 517.

The rules as to lapse are applicable to a legacy given under a power, and if an appointee by Will made under a general power die before the testator, his legacy will not go to his representatives. Wms. Exors, 1092, 1093.

A legacy does not lapse if one or two joint legatees die before the testator.

93. If a legacy be given to two persons jointly, and one of them die before the testator, the other legatee takes the whole.

See Wms. Exors. 1093 : 1 Jarm. Wills, 316 : Hawk. 111 : 4 Dav. Conv. 175.

Illustration.

The legacy is simply to A and B. A dies before the testator. B takes the legacy.

The number 'two' is merely for example. Of course a bequest to three or more persons *nominatim*, or to a class, without more, creates a joint-tenancy; and if one of the legatees predecease the testator his interest will survive to the others. The rule applies to gift to a class though the interests of the members vest at different times. Thus under a bequest to A, for life, with remainder to the children of B, the children in existence at the death of the testator take the whole interest given to the class as joint-tenants, and as more children come

into existence during A's life, they take as joint-tenants also (*Hawk.* 111). But there cannot be a joint-tenancy among the members of a class, some of whom have vested and others contingent interests. Therefore under a bequest to A for life with remainder to the children of B, if the interests of the children are not to vest until a given age, *e. g.* 18, the children will take as tenants in common, although if the interests vested at birth they would take as joint-tenants (Hawk. 112).

If the legacy to one of the joint-tenants fail from any cause other than death, the survivor takes the whole. Thus if A gives a legacy to A and B, and by a codicil revokes his bequest to A, B takes the whole (*Humphrey* v. *Taylear*, Amb. 136, and see *Short* v. *Smith*, 4 East, 419, 429). So where one of the joint legatees is an attesting witness v. *Davies*, 9 Jur. N. S

94. But where a legacy is given to legatees in words which show that the tator intended to give them distinct shares of it, then if any legatee die before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.

Effect in such a case, of words showing testator's intention that the shares should be distinct.

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 shall only take so much as they would have had if A had survived the testator.

Other words which shew that the testator intended to give "the legatees distinct shares" are "between," "among," "respectively." So if the "share" of any one is spoken of, (*e g.* 'share and share alike') a tenancy in common is created (Hawk. 112).

But when a legacy is given *to a class* of persons in general terms as tenants in common, as "to the children of A equally," the death of one of them before the testator will not occasion a lapse of any part of the fund, but those of the described class, who survive the testator, will take the whole (Wms. Exors. 1093, 1094). So where the Will contains an express limitation over of the legacy to survivors (*Mackinnon* v. *Peach*, 2 Keen, 555).

95. Where the share that lapses is a part of the general residue bequeathed by the Will, that share shall go as undisposed of.

When lapsed share goes as undisposed of.

Illustration.

The testator bequeaths 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.

'Residue' means all of which no effectual disposition is made by the Will *other than the residuary clause* (*Skrymsher* v. *Northcote*, 1 Swanst. 570: Wms. Exors. 1315). When the disposition of the

residue itself fails, to the extent to which it fails, the Will is inoperative. For example, A bequeaths a legacy to B, and then half the residue to C and the other half to D. C dies in the testator's lifetime. B survives and gets his legacy. D would only take his half of the residue, and the other half would go as if A had died intestate. So if A give a legacy to B and Rs. 1,000 *out of the residue* of his moveable property to C and *the residue* to D, if C dies in A's lifetime D will not take C's Rs. 1,000, which will therefore be undisposed of (*Green* v. *Perwee*, 5 Hare, 249).

When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime.

96. Where a bequest shall have been made to any child or other lineal descendant of the testator, and the legatee shall die in the lifetime of the testator, but any lineal descendant of his shall survive 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 shall appear by the Will.

Illustration.

A makes his Will, by which he bequeaths a sum of money to his son B for his own absolute use and benefit. B dies before A, leaving a son C who survives A, and having made his Will whereby he bequeaths all his property to his widow D. The money goes to D.

This is, with a few verbal alterations, such as substituting 'lineal descendant' for 'issue,' Sec 33 of the English Wills Act.

See Wms. Exors. 1097 : 1 Jarm. Wills, 328, 329 : 4 Dav. Conv. 109 note : *Shelling*, 2 Jur. N. S. 1052 : *Barkworth* v. *Young*, 3 Jur. N. S. 37 : *Pearce* v. *Graham*, 11 W. R. 415.

This Section does not substitute the lineal descendant for the deceased legatee, but gives the legacy to him absolutely, as though he had survived the testator ; and it is therefore disposable by the Will of the legatee (*Johnson* v. *Johnson*, 3 Hare, 157 : *Shelling*, 2 Jur. N. S. 1052), whether he die before (7 Hare, 473) or after (3 Hare, 157) the date of the Will. Mr. Justice Williams lays down that the Section does not apply to a testamentary appointment. This is true in the case of a particular power whereby the instrument creating the power the property is disposed of in default of any appointment being made (12 Sim. 327, 334). But the Section *does* prevent lapse where the appointment is made in exercise of a general power (*Eccles* v. *Cheyne*, 2 K. & J. 677).

Bequest to A for the benefit of B does not lapse by A's in testator's life-

97. Where a bequest is made to one person for the benefit of another, the legacy does not lapse by the death, in the testator's lifetime, of the person to whom the bequest is made.

See 1 Jarm. Wills, 319 : Wms. Exors. 1099.

Where the bequest that lapses comprises the legal or beneficial ownership only, of course its failure creates a failure in the disposition merely to that extent. Thus

(*a*) A bequeaths lands to B on trust to receive the rents and pay them to C for her life. B dies in A's lifetime : the legal estate in the lapsed bequest to B devolves on A's representatives charged with a trust in favour of C (1 Jarm. Wills, 319).

(*b*) Conversely : A bequeaths to B lands upon trust to receive the rents and pay them to C for her life, and then upon trust to convey the lands as C by Will should appoint. C dies in A's lifetime. The legal inheritance passes to B (*Doe* v. *Edlin*, 4 A. & E. 582).

(*c*) A bequeaths an estate to B charged with a legacy to C. B dies in A's lifetime A's representatives or his residuary legatee will take the estate charged with C's legacy (*Wigg* v. *Wigg*, 1 Atk. 382).

(*d*) A bequeaths an estate to B charged with a legacy to C, provided C complete the age of 18. C dies during minority. The charge sinks for the benefit of B (*Tregonwell* v. *Sydenham*, 3 Dow. 210).

Survivorship in case of bequest to a described class.

98. Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as shall be alive at the testator's death.

See Hawk. 68 : 2 Jarm. Wills 142 : *Re Clarke*, 12 W. R. 898.

It was once supposed that a gift to the children (*e. g.*) of a person *simpliciter*, would include all the children he might have whenever coming into existence (2 Cox, 191), but the testator is now considered to intend the objects of his bounty to be ascertained at as early a period as possible. It is a general rule that a gift to the children, or to all the children, or to all and every the children, or to all the present born children of A or of the testator means, *prima facie*, the children in existence at the testator's death, provided there are such children then in existence (Hawk. 68, 69.) The rule is the same whether the gift be of an aggregate fund to the class or of a certain sum to each member of the class. And the rule applies to gifts by way of appointment (2 Jarm. Wills 143 note *d.*)

For the rule to operate the gift must be to a described *class* of persons. Hence it will not apply to such cases as a gift to the children of A, *namely* B, C and D, or to the brother and *sister* of A, A having several brothers and only one sister at the date of the Will (Hawk. 69.) And children born after the testator's death may be admitted under a gift to children as a class if the intention clearly appear : as where the gift was to all grandchildren now born or *hereafter to be born* during the lifetime of their respective parents (Hawk. 69, 70, 72 : 2 Jarm. Wills. 168.)

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

to such of them as shall be then alive, and to the representatives of any of them who have died since the death of the testator.

Illustrations.

(*a.*) A bequeaths 1,000 rupees to "the children of B" without saying when it is to be distributed among them. B had died previous to the date of the Will, leaving three children, C, D, and E. E died after the date of the Will, but before the death of A, C and D survive A. The legacy shall belong to C and D, to the exclusion of the representatives of E.

(*b.*) A bequeaths a legacy to the children of B. At the time of the testator's death, B has no children. The bequest is void.

is a great departure from English law, according to which, if there be no object in being at the death of the testator, the gift will embrace *all* the children who may subsequently come into existence by way of executory gift (2 Jarm. Wills, 154). The change, however, will, doubtless, tend to prevent property from being tied up till a child comes into *esse*, and will get rid of some difficult questions as to the destination of the income between the period of the testator's death and the birth of a child, and as to the appropriation of the income between the birth of the first and the birth of the last child (*Edmunds* v. *Waugh*, 2 N. R. 408: *Sydney* v. *Wilmer*, 10 Jur. N. S. 217: *Bortoft* v. *Wadsworth*, 12 W. R. 523).

(*c.*) 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.

(*d.*) 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 has 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.

C and D, the children living at the testator's death, take an immediately vested interest in their shares subject to the diminution of those shares, as the number of objects is augmented by future births during the life of A the tenant for life. Consequently on the deaths of any of the children during A's life their shares devolve on their respective representatives (2 Jarm. Wills, 144).

(*e.*) 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 lands belongs to D, E, and the representatives of C, in equal shares.

(*f.*) A bequeaths 1,000 rupees to B for life, and after his death equally among the children of C. Up to the death of B, C had not had any child. The bequest after the death of B is void.

(*g*) 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.

See *Ayton* v. *Ayton*, 1 Cox, 327.

(*h.*) 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.

Part XII.

Of void Bequests.

Bequest to a person by a particular description, who is not in existence at the testator's death.

99. 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 reason 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 pro-

perty shall, at such later time, go to that person, or if he be dead, to his representatives.

Illustrations.

(*a.*) A bequeaths 1,000 rupees to the eldest son of B. At the death of the testator, B has no son. The bequest is void.

(*b.*) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son of C. At the death of the testator, C had no son. Afterwards, during the life of B, a son is born to C. Upon B's death, the legacy goes to C's son.

(*c.*) A bequeaths 1,000 rupees to B for life and after his death to the eldest son of C. At the death of the testator, C had no son ; afterwards, during the life of B, a son, named D, is born to C. D dies, then B dies. The legacy goes to the representative of D.

(*d.*) A bequeaths his estate of Greenacre to B for life, and at his decease to the eldest son of C. Up to the death of B, C has had no son. The bequest to C's eldest son is void.

(*e.*) A bequeaths 1,000 rupees to the eldest son of C, to be paid to him after the death of B. At the death of the testator, C has no son, but a son is afterwards born to him during the life of B, and is alive at B's death. C's son is entitled to the 1,000 rupees.

Bequest to a person not in existence at the testator's death, subject to a prior bequest.

100. 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 later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

This seems new.

Illustrations.

(*a.*) Property is bequeathed to A for his life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death, A has no son. Here the bequest to A's eldest son is a bequest to a person not in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to A's eldest son for his life is void.

(*b.*) A fund is bequeathed to A for his life, and after his death to his daughters. A survives the testator. A has daughters, some of whom were not in existence at the tes-

tator's death. The bequest to A's daughters comprises the whole interest that remains to the testator in the thing bequeathed. The bequest to A's daughters is valid.

(*c.*) A fund is bequeathed to A for his life, and after his death to his daughters, with a direction that if any of them marries under the age of 18, her portion shall be settled so that it may belong to herself for life, and may be divisible among her children after her death. A has no daughters living at the time of the testator's death, but has daughters born afterwards who survive him. Here the direction for a settlement has the effect in the case of each daughter who marries under 18, of substituting for the absolute bequest to her a bequest to her merely for her life; that is to say, a bequest to a person not in existence at the time of the testator's death of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund is void.

(*d.*) A bequeaths a sum of money to B for life, and directs that upon the death of B the fund shall be settled upon his daughters, so that the portion of each daughter may belong to herself for life, and may be divided among her children after her death. B has no daughter living at the time of the testator's death. In this case the only bequest to the daughters of B is contained in the direction to settle the fund, and this direction amounts to a bequest, to persons not yet born, of a life interest in the fund, that is to say, of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund upon the daughters of B is void.

Rule against perpetuity.

101. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the life-time of one or more persons leaving at the testator's decease, 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.

This is a serious restriction upon the power of creating successive interests in property by Will. According to the law hitherto prevalent in India as well as in England property *might* be bequeathed so that it should necessarily vest in right, if at all

(1.) Within the life-time *of* a person in being (*i. e.*, already born or in his mother's womb) *and* the infancy of a child born previously to his decease: or the gestation and infancy of a child then in his mother's womb.

(2.) Within the life-time of a person in being and an absolute term of 21 years afterwards; or

(3.) Within the absolute term of 21 years without reference to any life.

The rule in Section 101, it will be seen, does away altogether with the absolute term of 21 years, and, owing to the definition of 'minority,' reduces to 18 (or to 18 and the period of gestation when the person in being is unborn), the 21 years of infancy which went to make up the period in (1).

Illustrations.

(*a.*) A fund is bequeathed to A for his life, and after his death to B for his life, and after B's death to such of the sons of B as shall first attain the age of 25. A and B survive the testator. Here the son of B who shall first attain the age of 25, may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B; and the vesting of the fund may thus be delayed beyond the life-time of A and B, and the minority of the sons of B. The bequest after B's death is void.

In deciding on the question of remoteness, it is an invariable principle that regard is had to possible and not to actual events; and the fact that the gift might have included objects too remote, is fatal to its validity, 1 Jarm. Wills, 252.

(*b.*) A fund is bequeathed to A for his life, and after his death to B for his life, and after B's death to such of B's sons as shall first attain the age of 25. B dies in the life-time of the testator, leaving one or more sons. In this case the sons of B are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own life-time. The bequest is valid.

(*c.*) A fund is bequeathed to A for his life, and after his death to B for his life, with a direction that after B's death it shall be divided amongst such of B's children as shall attain the age of 18; but that if no child of B shall attain that age, the fund shall go to C. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of B, a person living at the testator's decease. All the bequests are valid.

(*d.*) A fund is bequeathed to trustees for the benefit of the testator's daughters, with a direction that if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. Any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughter whose share it was. All these provisions are valid.

102. If a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules contained in the two last preceding Sections, or either of them, such bequest shall be wholly void.

Bequest to a class, some of whom may come under the rules in the Sections 100, 101.

Porter v. *Fox*, 6 Sim. 485.

What the Court has to determine is *whether the class can take*: if not, the Court cannot split into portions the general bequest to the class, and say that because the rule of law forbid the testator's intention from operating in favor of the whole class, his bequests shall be made what he never intended them to be, *viz.* a series of particular legacies to particular individuals, or distinct bequests, in each instance to two different classes: for this in effect would be to make a new Will for the testator; see *Leake* v. *Robinson*, 2 Mer. 390, per Sir Wm. Grant. Wms. Exors. 1125: 1 Jarm. Wills, 239, 240.

Illustrations.

(*a.*) A fund is bequeathed to A for life, and after his death to all his children who shall attain the age of 25. A survives the testator, and has some children living at the testator's death. Each child of A's living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest. But A may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of A. The bequest to A's children, therefore, is inoperative as to any child born after the testator's death; and as it is given to all his children as a class, it is not good as to any division of that class, but is wholly void.

(*b.*) A fund is bequeathed to A for his life, and after his death to B, C, D, and all other the children of A who shall attain the age of 25. B, C, D are children of A living at the testator's decease. In all other respects the case is the same as that supposed in illustration (*a*). The mention of B, C, and D by name does not prevent the bequest from being regarded as a bequest to a class, and the bequest is wholly void.

103. Where a bequest is void by reason of any of the rules contained in the three last preceding Sections, any bequest contained in the same Will, and intended to take effect after or upon failure of such prior bequest, is also void.

Bequest to take effect on failure of bequest void under Sections 100, 101 or 102.

Illustrations.

(*a.*) A fund is bequeathed to A for his life, and after his death to such of his sons as shall first attain the age of 25, for his life, and after the decease of such son, to B. A and B survive the testator. The bequest to B is intended to take effect after the bequest to such of the sons of A as shall first attain the age of 25, which bequest is void under Section 101. The bequest to B is void.

(*b*) A fund is bequeathed to A for his life, and after his death to such of his sons as shall first attain the age of 25, and if no son of A shall attain that age, to B. A and B survive the testator. The bequest to B is intended to take effect upon failure of the bequest to such of A's sons as shall first attain the age of 25, which bequest is void under Section 101. The bequest to B is void.

This is the old law, 1 Jarm. Wills, 264. But there is a distinction where the gift over is to arise on an alternative event, one branch of which is within, and the other is not within, the prescribed limits. Thus: A bequeaths B a house in case C die without leaving sons, *or* in case such sons should die without issue. C dies without leaving sons. The first contingency having happened, the bequest to B is valid without reference to the other contingency (see *Longhead* v. *Phelps*, 2 W. Bl. 704).

104. A direction to accumulate the income arising from any property shall be void; and the property shall be disposed of as if no accumulation had been directed.

Effect of direction for accumulation.

Formerly a settlor or testator was free to create an accumulating trust absorbing the entire income of property during the full period for which its vesting might be protracted (1 Jarm. Wills, 282). But Mr. Thellusson having availed himself of this liberty to an extraordinary and mischievous extent, the British Legislature interposed and passed the Stat. 39 & 40 Geo 3, cap 98, commonly called the Thellusson Act, by which this Section has been suggested. The English Statute, however, allows a testator to direct an accumulation for 21 years from his death, *or* during the minority of any person in being at his death, *or* during the minority of any person who, under the Will, would, for the time being of full age, be entitled to the income directed to be accumulated, and the Statute does not affect provisions for payment of debts, or for raising portions. The Indian Act only allows accumulation in two cases: (1) when the property is immoveable (see Sec. 2) and (2) when the accumulation is directed to be made "from the death of the testator." In each case the accumulable income must arise "within one year next following the testator's death," which period (as will probably be held) is to be calculated exclusively of the day of his death (see *Gorst* v. *Lowndes*, 11 Sim. 434: *Lester* v. *Garland*, 15 Ves. 248).

Exception.—Where the property is immovable, or where accumulation is directed to be made from the death of the testator, the direction shall be valid in respect only of the income arising from the property within one year next following the testator's death; and at the end of the year such property and income shall be disposed of respectively, as if the period during which the accumulation has been directed to be made had elapsed.

Illustrations.

(*a.*) The Will directs that the sum of 10,000 rupees shall be invested in Government securities, and the income accumulated for 20 years, and that the principal, together with the accumulations, shall then be divided between A, B, and C. A, B, and C are entitled to receive the sum of 10,000 rupees at the end of the year from the testator's death.

(*b.*) The Will directs that 10,000 rupees shall be invested, and the income accumulated until A shall marry, and shall then be paid to him. A is entitled to receive 10,000 rupees at the end of a year from the testator's death.

(*c.*) The Will directs that the rents of the farm of Sultánpur shall be accumulated for 10 years, and that the accumulation shall be then paid to the eldest son of A. At the death of the testator, A has an eldest son living, named B. B shall receive at the end of one year from the testator's death the rents which have accrued during the year, together with any interest which may have been made by investing them.

(*d.*) The Will directs that the rents of the farm of Sultánpur shall be accumulated for 10 years, and that the accumulations shall then be paid to the eldest son of A. At the death of the testator, A has no son. The bequest is void.

(*e.*) A bequeaths a sum of money to B, to be paid to him when he shall attain the age of 18, and directs the interest to be accumulated till he shall arrive at that age. At A's death the legacy becomes vested in B; and so much of the interest as is not required for his maintenance and education is accumulated, not by reason of the direction contained in the Will, but in consequence of B's minority.

105. No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a Will executed not less than twelve months

before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the Wills of living persons.

See 1 Jarm. Wills, 189: Wms. Exors. 950: 4 Dav. Conv. 2d ed. 67, 68: Hawk 64.

Regarding this Section the Commissioners say "we have provided against death-bed bequests to *charitable* uses by persons *having near relations*," *i. e.* according to the Table of Consanguinity, Section 24 supra, a father, mother, son, daughter, grandfather, grandmother, grandson, grand-daughter, brother, or sister.

The Section does not appear to affect the existing law in India (whatever that may be) as to *superstitious* uses.

The English law on the subject of religious uses is contained in the Statutes 23 Hen. 8, cap. 10: 1 Edw. 6, c. 14, the Roman Catholic Relief Act, 2 and 3 Will. 4, c. 115, s. 1: the Religious Disabilities Act, 9 and 10 Vic., c. 59.

Bequests to religious uses are bequests for the support of ministers of religion, or for the propagation of religious opinions.

'Charity' has been defined to be a general public use, Amb. 651, also 1 Jarm. Wills, 192, and 'charitable uses' are the objects expressly impliedly comprised in the preamble to Stat. 43 Eliz., c. 4.

Illustration.

A having a nephew makes a bequest by a Will not executed nor deposited as required—

For the relief of poor people;

Nash v. *Morley*, 5 Beav. 177.

For the maintenance of sick soldiers;
For the erection or support of a hospital;

Pelham v. *Anderson*, 2 Eden, 296.

For the education and preferment of orphans;
For the support of scholars;
For the erection or support of a school;

Atty. Gen. v. *Nash*, 3 B. C. C. 587.

For the building and repairs of a bridge;
For the making of roads;
For the erection or support of a church;
For the repairs of a church;
For the benefit of ministers of religion;

Atty. Gen. v. *Hickman*, 2 Eg. Ca. Abr. 193.

For the formation or support of a public garden:

Townley v. *Bedwell*, 6 Ves. 194.

All these bequests are void.

Other Illustrations are—

A having a grandson makes a bequest by Will, not executed or deposited as required,

For the relief of prisoners for debt (see *Thrupp* v. *Collett*, 26 B. 125).

For the erection of waterworks for the use of a town.

For the general improvement of a town.
To the trustees and for the benefit of a public museum; or
To the widows and children of seamen belonging to a port.
These bequests are void.

But if the bequest had been for the erection or repair of a monument to, or tomb for, the donor (*Richard* v. *Robson*, 31 Beav. 244); or to found a private museum (*Thompson* v. *Shakespeare*, 1 Johns. 612), the bequest would have been good (1 Jarm. Wills, 194).

A gift will not be deemed charitable merely from the professional character of the legatee, or on account of the testator having accompanied the bequest with an expressions of his expectation that the legatee would discharge the duties incidental to such character, however intimately those duties may concern the welfare of others (*Ibid.* 195).

A bequest to A upon a secret charitable trust passes the legal estate to him in trust for the testator's representatives (*Sweeting* v. *Sweeting*, 10 Jur. N. S. 31).

As to the rules applicable when the rents of an estate validly bequeathed to charitable uses greatly increase in amount from the time of the bequest, and when the Will makes no express provision for the employment of the surplus rents, see Hawk. 64-67: Tudor, Char. Trusts, 2d ed., 234, 239, and as to the doctrine of *cyprès*, when the testator specifies some particular charitable object which cannot be accomplished at all or not in the way prescribed, see Tudor, Char. Trusts, 260-273: *Langford* v. *Gowland*, 3 Giff. 617: 9 Jur. N S. 12: *Longbottom* v. *Satoor*, 1 Mad. H. C. Rep. 429.

Part XIII.

Of the Vesting of Legacies.

Date of vesting of legacy when payment or possession postponed.

106. 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.

The rules in this and the next Section appear to be those of the English, not the Civil law. It is clear, for instance, from Illustration (*f*) that a vested legacy may be conditional and yet transmissible to the legatee's representatives. So, although the Act does not expressly state the result, it is pretty clear that if D, in Illustration (*a*) to Section 107, were to pre-decease A, B and C, and if then A, B and C died under 18, D's representatives would take the legacy. Here then is an

instance of a conditional legacy being transmissible, which is contrary to the rules of the Civil law.

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 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.

Illustrations.

(*a.*) A bequeaths to B 100 rupees, to be paid to him at the death of C. On A's death the legacy becomes vested in interest in B. and if he dies before C, his representatives are entitled to the legacy.

Hallifax v. *Wilson*, 16 Ves. 171 : Hawk. 232.

(*b.*) A bequeaths to B 100 rupees, to be paid to him upon his attaining the age of 18. On A's death the legacy becomes vested in interest in B.

(*c.*) A fund is bequeathed to A for life, and after his death to B. On the testator's death the legacy to B becomes vested in interest in B.

(*d.*) A fund is bequeathed to A until B attains the age of 18, and then to B. The legacy to B is vested in interest from the testator's death.

(*e*) A bequeaths the whole of his property to B upon trust to pay certain debts out of the income, and then to make over the fund to C. At A's death the gift to C becomes vested in interest in him.

Jones v. *McIlwain*, 1 Russ. 220: *Potts* v. *Atherton*, 28 L. J. Ch. 486.

(*f.*) A fund is bequeathed to A, B, and C in equal shares, to be paid to them on their attaining the age of 18 respectively, with a proviso that, if all of them die under the age of 18, the legacy shall devolve upon D. On the death of the testator, the shares vest in interest in A, B, and C, subject to be divested in case A, B, and C shall all die under 18, and upon the death of any of them (except the last survivor) under the age of 18, his vested interest passes, so subject, to his representatives.

107. A legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens. A legacy bequeathed in case a specified uncertain event shall not happen does not vest until the happening of that event becomes impossible. In either case, until the condition has been fulfilled, the interest of the legatee is called contingent.

Date of vesting when legacy is contingent upon a specified uncertain event.

Exception.—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 the income, or so much of it as may be necessary, to be applied for his benefit ; the bequest of the fund is not contingent.

A legacy is bequeathed to D in case A, B, and C shall all die under the age of 18. D has a contingent interest in the legacy until A, B, and C all die under 18, or one of them attains that age.

(*b.*) A sum of money is bequeathed to A "in case he shall attain the age of 18," or, "when he shall attain the age of 18," A's interest in the legacy is contingent until the condition shall be fulfilled by his attaining that age.

So if the legacy had been to A, or to a class, *if* he or they attain 18, or *at* 18, or *upon attaining* 18, or *as he or they shall attain* 18, or *from and after* attaining 18 (Hawk. 224) : and the rule is the same when the gift is in the form of a direction to pay. Thus if the bequest be to trustees upon trust for A, for life, and after his decease upon trust to pay and divide among his children when they shall respectively attain 18, no child dying under that age will be entitled (*ibid*) However, slight circumstances in the context may show that the attainment of the specified age was not intended as a condition, but only to fix the time of actual payment. Thus if the bequest be in trust to pay the children of A *as* they respectively attain 18, with a gift over in the event of A dying *without leaving children* (not without children who shall attain 18) the gift over may show an intention that the children (if any) should take though not attaining 18 (Hawk. 225).

(*c.*) An estate is bequeathed to A for life, and after his death to B, if B shall then be living, but if B shall not be then living, to C. A, B and C survive the testator. B and C each take a contingent interest in the estate until the event which is to vest it in one or in the other shall have happened.

(*d.*) An estate is bequeathed as in the case last supposed. B dies in the lifetime of A and C. Upon the death of B, C acquires a vested right to obtain possession of the estate upon A's death.

(*e.*) A legacy is bequeathed to A when she shall attain the age of 18, or shall marry under that age with the consent of B, with a proviso that if she shall not attain 18, or marry under that age with B's consent, the legacy shall go to C. A and C each take a contingent interest in the legacy. A attains the age of 18. A becomes absolutely entitled to the legacy, although she may have married under 18 without the consent of B.

(*f.*) An estate is bequeathed to A until he shall marry, and after that event to B. B's interest in the bequest is contingent until the condition shall be fulfilled by A's marrying.

(*g.*) An estate is bequeathed to A until he shall take advantage of the Act for the Relief of Insolvent Debtors, and after that event to B. B's interest in the bequest is contingent until A takes advantage of the Act.

(*h.*) An estate is bequeathed to A if he shall pay 500 rupees to B. A's interest in the bequest is contingent until he has paid 500 rupees to B.

(*i.*) A leaves his farm of Sultánpur Khurd to B, if B shall convey his own farm of Sultánpur Buzurg to C. B's interest in the bequest is contingent until he has conveyed the latter farm to C.

(*j.*) A fund is bequeathed to A if B shall not marry C within five years after the testator's death. A's interest in the legacy is contingent, until the condition shall be fulfilled by the expiration of the five years without B's having married C, or by the occurrence, within that period, of an event which makes the fulfilment of the condition impossible.

(*k.*) A fund is bequeathed to A if B shall not make any provision for him by Will. The legacy is contingent until B's death.

(*l.*) A bequeaths to B 500 rupees a year upon his attaining the age of 18, and directs that the interest, or a competent part thereof, shall be applied for his benefit until he reaches that age. The legacy is vested.

Stapleton v. *Cheales* Prec. Cha. 315. But if the testator, instead of a direction, only give a discretionary power to the trustees of the fund to apply all or any part of the income for the benefit of the legatee, the legacy will not be vested (*Pulsford* v. *Hunter*, 3 Bro. C. C. 416). And if the gift of interest itself be contingent on the legatee attaining the specified age, so that the interest is to follow the fate of the principal, it, of course, cannot have the effect of vesting the principal. As if the gift be "I bequeath to A, when he attains 18, the sum of Rs. 1,000 with interest") not with interest in the meantime) : Hawk. 230, citing

Knight v. *Knight*, 2 Sim. & Stu. 490. So a bequest to A, to be paid on his marriage with interest *in the meantime* is vested (*Vize* v. *Stoney*, 1 D. & War. 337), although a bequest to A to be paid on his marriage is *primâ facie* contingent (*Atkins* v. *Hiccocks*, 1 Atk. 504).

(*m*.) A bequeaths to B 500 rupees when he shall attain the age of 18, and directs that a certain sum, out of another fund, shall be applied for his maintenance until he arrives at that age. The legacy is contingent.

Illustrations (*l*) and (*m*) exemplify the rule that a gift of the interim interest to or for the benefit of the legatee *primâ facie* vests the principal (Hawk. 227.)

Vesting of interest in a bequest to such members of a class as shall have attained a particular age.

108. 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.

v. *Sherratt*, 2 Ha. 14.

XIV.

Of Onerous Bequests.

Onerous bequest.

109. 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).

110. **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.**

One of two separate and independent bequests to same person may be accepted, and the other refused.

This reverses the rule supposed to have been established by Sir Jno. Leach, in *Talbot* v. *Ld. Radnor*, 3 M. & K. 254. But Wood V. C. in *Warren* v. *Rudall* (1 J. & H. 1) puts the case on the testator's intention. There the testator devised a freehold life estate, and by a separate and independent bequest, a leasehold estate to the same persons. Wood V. C. held that the devisee was at liberty to refuse the leasehold, observing—"If I saw here any intention to couple the gift of the life-interest in the freehold with the gift of the leasehold so as to make the acceptance of the burden a condition of the benefit, the case would be different. But the testator's intention seems to me to have been exactly the contrary. In each gift his meaning was to bestow a bounty not to impose a burden." See too *Moffett* v. *Bates*, 3 Sm. & G. 268.

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 shall not by this refusal forfeit the money.

Andrew v. *Trinity Hall*, 9 Ves. 525, 534: *Warren* v. *Rudall*, 1 Jo. & H. 12. *Moffett* v. *Bates*, 3 Sm. & G. 468.

Part XV.

Of Contingent Bequests.

111. **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.**

Contingent bequest, specified uncertain event, no time mentioned for its occurrence.

Where a gift of the absolute interest in property to one person is followed by a gift of it to another in a particular event, the disposition of the Courts is to put such a construction on the gift over as will interfere as little as possible with the prior gift. Hawk. 254.

Illustrations.

(*a*) A legacy is bequeathed to A, and in case of his death, to B. If A survives the testator, the legacy to B does not take effect.

Cambridge v. *Rous*, 8 Ves. 12. The rule is the same when the bequest is to A and in the event of his death to B, or to A and if he die to B.

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.

Edwards v. *Edwards*, 15 Beav. 357.

(*c.*) 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.

Home v. *Pillans*, 2 My. & K. 23.

(*d.*) 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 shall die without children during the lifetime of A.

(*e.*) 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 shall die in the lifetime of A."

Bequest to such of certain persons as shall be surviving at some period not specified.

112. 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 shall be alive at the time of payment or distribution, unless a contrary intention appear by the Will.

Survivorship *primâ facie* refers to the point of time mentioned in the gift in nearest juxtaposition with the words, Hawk. 260.

Illustrations.

(*a.*) Property is bequeathed to A and B, equally to be 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.

The testator's death being the time of distribution.

(*b.*) Property is bequeathed to A for life, and after his death to B and C, equally to be 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.

Hearn v. *Baker*, 2 K. & J. 383, A's death being the time of payment.

(*c.*) 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 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 representative of B.

Rogers v. *Towsey*, 9 Jur. 575: here the survivorship refers to the death of the testator.

(*d.*) 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.

Scurfield v. *Howes*, 3 Bro. C. C. 90: *White* v. *Baker*, 2 De G. F. & J. 55: here the survivorship refers to the last antecedent, *i. e.* the death of the legatee dying first.

So if the bequest be to A, for life and after his decease to his *surviving* children, "surviving" is construed to mean "living at the death of A" (*Neathway* v. *Reed*, 3 D. M. & G. 18). So when the bequest to A is for life, with remainder to his surviving children who shall attain 18 (*Huffam* v. *Hubbard*, 16 Beav. 579).

The Courts lean against making a provision for children subject to the additional contingency of surviving their parents. Hence where the bequest is to A for life with remainder to his children with words of survivorship, and the interests of the children are to vest at a given age or marriage, the words of survivorship may be referred to the period of vesting and not of distribution (Hawk. 264). Thus under a bequest to A for life, and at her death to her children when they shall attain 18, "in case one dies the others to share alike, the survivors to have the whole: should they all die before 18 then over." Here the word *dies* would be held to mean "dies under 18," and survivors would mean "surviving so as to attain 18." Accordingly the representatives of children of A dying during her lifetime above 18 are entitled to share with the children who both attained 18 and survived A (see *Bouverie* v. *Bouverie*, 2 Phil. 349).

PART XVI.

Of Conditional Bequests.

"On the subject of conditions," say the Commissioners, "we have deemed it right to abstain from introducing into India, the very refined distinctions which the Court of Chancery has, in questions relating to personal property, borrowed from the Ecclesiastical Courts. We think

that the words of the Will should be adhered to where no condition inconsistent with law or morality is sought to be imposed; that all bequests made upon illegal, immoral, or impossible conditions should be void; and that wherever the testator's wishes can be carried into effect, if expressed in one way, they ought to be permitted to take effect, if expressed in any other way; so that whatever he can do by a limitation he ought to be allowed to do by imposing a condition. It appears also to us that whenever a condition subsequent is valid if accompanied with a gift over, it ought to be valid without a gift over, and ought not to be treated as if it had been inserted merely to frighten the legatee by an unmeaning threat."

Bequest upon impossible condition.

113. A bequest upon an impossible condition is void.

See Wms. Exors. 1137, 1138: 2 Jarm. Wills, 13.

Illustrations.

(*a.*) An estate is bequeathed to A on condition that he shall walk one hundred miles in an hour. The bequest is void.

(*b.*) 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.

According to the Civil law when a condition precedent to the vesting of a legacy is impossible, the bequest is absolute and unconditional, except in cases where, as in Illustration (*b*), the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator or the condition which was possible in its creation has subsequently become impossible by the act of God (2 Jarm. Wills, 13).

Bequest upon illegal or immoral condition.

114. A bequest upon a condition, the fulfilment of which would be contrary to law or to morality, is void.

By the Civil law, in the case of moveables, a condition involving a *malum prohibitum* is void and the bequest absolute. But when it involves a *malum in se* the Civil agrees with the Common law in holding the gift as well as the condition void (2 Jarm. Wills, 13). The Act recognises no distinction between the two kinds of *mala*.

Illustrations.

(*a.*) A bequeaths 500 rupees to B on condition that he shall murder C. The bequest is void.

(*b.*) A bequeaths 5,000 rupees to his niece if she will desert her husband. The bequest is void.

Wren v. *Bradley*, 2 De G. & S. 49.

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115. Where a Will imposes 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.

Although the general rule is that conditions precedent must be strictly performed, yet by the Civil law, which has been in this respect adopted by Courts of Equity and the Indian Legislature, if the condition is performed *cy près* as it is termed, that is, so as *substantially* to fulfil the testator's intention, it will be sufficient (Wms. Exors. 1140).

Illustrations.

(*a.*) 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.

Qui tacet satis loquitur : Campbell v. *Lord Netterville*, cited 2 Ves. Sen. 530 : 10 Ves. 243.

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.

Worthington v. *Evans*, 1 S. & S. 172.

(*c.*) 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.

Clarke v. *Palmer*, 19 Ves. 171 (*a*).

(*d.*) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and 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.

Strange v. *Smith*, Ambl. 263 : otherwise when the consent is retracted for good reasons, moral or pecuniary, afterwards discovered, 10 Ves. 242, 243.

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.

(*f.*) 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.

Clerke v. *Berkeley*, 2 Vern. 720.

(*a.*) As to presuming consent after a lapse of time see *Re Birch*, 17 Beav. 358.

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.

This is an example of that 'giving effect to the plain meaning of the words of the testator' which the framers of this Act consider so desirable. By English law if the document mentioned in Illustration (g) is in fact executed within a reasonable time, the legatee will be entitled, on the principle that the period for executing the document was merely ancillary to the accomplishment of that object, and the procurement of the instrument was the end and substance of the condition (Wms. Exors. 1140, and cases there cited).

116. Where there is a bequest to one person and a bequest of the s to another if the prior shall fail, the second bequest shall take effect upon the failure of the prior bequest, although the failure may not have occurred in the manner contemplated by the testator.

Bequest to A, and on failure of the prior bequest, to B.

(*a*.) A bequeaths a sum of money to his own children surviving him, and if they all die under 18, to *B*. A dies without having ever had a child. The bequest to *B* takes effect.

Murray v. *Jones*, 2 V. & B. 313.

(*b*.) A bequeaths a sum of money to B, on condition that he shall execute a certain document within three months after A's death, and if he should neglect to do so, to C. B dies in the testator's lifetime. The bequest to C takes effect.

In such cases "the intention of the testator is effectually fulfilled by regarding a clause of apparent condition, as a clause of conditional limitation, so as not to require, as in the case of a gift on a condition, that the very event on which the gift is made contingent, must be fulfilled with strict exactness, but paying regard, in the construction, to the substantial effect of the contingency specified, and so to the real intent of the testator" (Wms. Exors. 1141, [illegible]

117. Where the Will shows an intention that the second bequest shall take effect only in the event of the first bequest failing in a particular manner, the second bequest shall not take effect unless the prior bequest fails in that particular manner.

Case in which the second bequest shall not take effect on failure of the first.

Illustration.

A makes a bequest to his wife, but in case she should die in his lifetime, bequeaths to B that which he had bequeathed to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The bequest to B does not take effect.

Here the gift over was made dependent on an event which had not been proved to have happened, *viz.* the testator's surviving his wife; and it did not become operative from the mere fact of the gift to the wife failing to have practical operation; for the testator indicated no such intention, either expressly or impliedly (*Underwood* v. *Wing*, 4 D. M. & G. 633).

Bequest over, conditional upon the happening or not happening of a specified uncertain event.

118. A bequest may be made to any person with the condition superadded that in case a specified uncertain event shall happen, the thing bequeathed shall go to another person; or, that in case a specified uncertain event shall not happen, the thing bequeathed shall go over to another person. In each case the ulterior bequest is subject to the rules contained in Sections 107, 108, 109, 110, 111, 112, 113, 114, 116, 117.

Sec. 115 is purposely omitted.

Illustrations.

(*a.*) A sum of money is bequeathed to A, to be paid to him at the age of 18, and if he shall die before he attains that age, to B. A takes a vested interest in the legacy, subject to be devested and to go to B in case A shall die under 18.

Nicholls v. *Osborn*, 2 P. W. 419.

(*b.*) An estate is bequeathed to A with a proviso that if A shall dispute the competency of the testator to make a Will, the estate shall go to B. A disputes the competency of the testator to make a Will. The estate goes to B.

Cleaver v. *Sperling*, 2 P. W. 528: *Cooke* v. *Turner*, 15 M. & W. 727: 14 Sim. 493: 15 Sim. 611: 16 Sim. 482: Wms. Exors. 1146, 1147.

(*c.*) A sum of money is bequeathed to A for life, and after his death to B, but if B shall then be dead, leaving a son, such son is to stand in the place of B. B takes a vested interest in the legacy, subject to be devested if he dies leaving a son in A's lifetime.

(*d.*) A sum of money is bequeathed to A and B, and if either should die during the life of C, then to the survivor living at the death of C. A and B die before C. The gift

over cannot take effect, but the representative of A takes one-half of the money, and the representative of B takes the other half.

For the legatees took vested interests at the death of the testator, subject to be devested in favour of the survivor who might be living at C's death; but as there was no such survivor *at that period*, the devesting contingency never happened (*Harrison* v. *Foreman*, 5 Ves. 207).

(*e.*) A bequeaths to B the interest of a fund for life, and directs the fund to be divided, at her death, equally among her three children, or such of them as shall be living at her death. All the children of B die in B's lifetime. The bequest over cannot take effect, but the interests of the children pass to their representatives.

Here the vested interests first given by the Will were, by the form of the expression, only defeated in case there should be some or one and not all of the children living at the mother's death; but that event did not happen, for there was not one child then living (*Sturgess* v. *Pearson*, 4 Madd. 411, and see other cases cited in Wms. Exors. 1145).

119. An ulterior bequest of the kind contemplated by the last Section cannot take effect, unless the condition is strictly fulfilled.

Condition must be strictly fulfilled.

Conditions subsequent are to be construed with great strictness, as they go to devest estates already vested. Therefore the very event must happen, or the act with all its details must be done, in order to deprive the legatee of his legacy. (Wms. Exors. 1146).

Illustrations.

(*a.*) A legacy is bequeathed to A, with a proviso that if he marries without the consent of B, C and D, the legacy shall go to E. D dies. Even if A marries without the consent of B and C the gift to E does not take

The condition is discharged altogether (*Peyton* v. *Bury*, 2 P. Wms. 626). So of course when B, C and D die (*Graydon* v. *Hicks*, 2 Atk. 18).

(*b.*) A legacy is bequeathed to A, with a proviso that if he marries without the consent of B, the legacy shall go to C. A marries with the consent of B. He afterwards becomes a widower and marries again without the consent of B. The bequest to C does not take effect.

Here the first marriage with B's consent is a sufficient performance of the condition, and therefore the second marriage without consent, though in B's lifetime, will cause no forfeiture (*Hutcheson* v. *Hammond*, 3 Bro. C. C. 128: *Crommelin* v. *Crommelin*, 3 Ves. 227).

(*c.*) A legacy is bequeathed to A, to be paid at 18, or marriage, with a proviso that if A dies under 18, or marries

without the consent of B, the legacy shall go to C. A marries under 18, without the consent of B. The bequest to C takes effect.

Chauncy v. *Graydon*, 2 Atk. 616.

Original bequest not affected by invalidity of second.

120. If the ulterior bequest be not valid, the original bequest is not affected by it.

Illustrations.

(*a*.) An estate is bequeathed to A for his life, with a condition superadded that if he shall not on a given day walk 100 miles in an hour, the estate shall go to B. The condition being void, A retains his estate as if no condition had been inserted in the Will.

Where a condition subsequent is impossible, it is the doctrine as well of the common law as of the Civil, that the condition is void and the legacy single and absolute (Wms. Exors. 1137).

(*b*.) An estate is bequeathed to A for her life, and if she do not desert her husband, to B. A is entitled to the estate during her life as if no condition had been inserted in the

ght v. *Cartwright*, 3 D. M. G. 982 *H.* v. *W.*, 3 K. & J. 482: *Westmeath* v. *Westmeath*, 1 Dow. & Cl. 519.

The condition is void, being *contra bonos mores* as tending to induce A to desert her husband. Where the performance of a condition subsequent would be contrary to law or morality, then by the Civil law, at common law and in equity, the condition is void and the bequest freed from it as if it had been given unconditionally (Wms. Exors. 1138). So where the condition is too uncertain to enable the Court to say what is meant by it (*Clavering* v. *Ellison*, 3 Drew. 451).

(*c*.) An estate is bequeathed to A for life, and if he marries, to the eldest son of B for life. B, at the date of the testator's death, had not had a son. The bequest over is void under Section 92, and A is entitled to the estate during his life.

The gift over is void by reason of being too remote; (*Blease* v. *Burgh*, 2 Beav. 221, 226. *Ring* v. *Hardwick*, ibid. 352). An absolute interest is not to be taken away by a gift over unless that gift over may itself take effect (Wms. Exors. 1138).

Among illegal conditions subsequent Mr. Justice Williams classes such as are repugnant. Thus if A gives his son B a Government Promissory Note for Rs. 10,000, but adds 'if B attempt to dispose of all or any part of the legacy' then over to A's other children, B takes the Note discharged of the condition (*Bradley* v. *Peixoto*, 3 Ves. 325) and cases cited 2 Jarm. Wills. 19. 20. So if lands be bequeathed to A and his heirs upon condition that he shall not alien them, (Co. Litt. 206 *b*. 223 *a*.) or charge them with an annuity (*Willis* v. *Hiscox*, 4 My. & C. 201). However the condition may be good if the restraint is confined to the disposal of it to a particular person or before a particular time. (Wms. Exors, 1139: 2 Jarm. Wills. 16).

121. A bequest may be made with the condition superadded that it shall cease to have effect in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Bequest conditioned that it shall cease to have effect in case a specified uncertain event shall happen or not happen.

The object of this Section is to get rid of the rule of law (which however is not a *general* rule: see 1 Sim. N. S. 37), that a condition subsequent shall operate merely *in terrorem* unless the legacy, as in Illustration (*b*) to Section 118, is given over to another on breach of the condition. Wms. Exors 1146, 1149: 2 Jarm. Wills, 40, 43 *Bacchus* v. *Gilbee*, 9 Jur. N. S. 228.

Illustrations.

(*a.*) An estate is bequeathed to A for his life, with a proviso that in case he shall cut down a certain wood, the bequest shall cease to have any effect. A cuts down the wood; he loses his life interest in the estate.

Dommett v. *Bedford*, 6 T. R. 684: *Joel* v. *Mills*, 3 K. & J. 458. The condition might have been rendered effectual by injunction see *Blagrave* v. *Blagrave*, 1 DeG & S. 252.

(*b.*) An estate is bequeathed to A, provided that if he marries under the age of 25 without the consent of the executors named in the Will, the estate shall cease to belong to him. A marries under 25 without the consent of the executors. The estate ceases to belong to him.

Lloyd v *Branton*, 3 Mer. 108 *Stevenson* v. *Abington*, 11 W. R. 935.

(*c.*) An estate is bequeathed to A, provided that if he shall not go to England within three years after the testator's death, his interest in the estate shall cease. A does not go to England within the time prescribed. His interest in the estate ceases.

(*d.*) An estate is bequeathed to A, with a proviso, that if she becomes a Nun, she shall cease to have any interest in the estate. A becomes a Nun. She loses her interest under the Will.

Dickson's Trust, 1 Sim. N. S. 37.

(*e.*) A fund is bequeathed to A for life, and after his death to B, if B shall be then living, with a proviso that if B shall become a Nun, the bequest to her shall cease to have any effect. B becomes a Nun in the lifetime of A. She thereby loses her contingent interest in the fund.

122. In order that a condition that a bequest shall cease to have effect may be valid, it is necessary that the event to

Such condition must not be invalid under Section 107.

which could legally constitute the condition of a bequest as contemplated by Section 107.

123. Where a bequest is made with a condition superadded that unless the legatee shall perform a certain act, the subject-matter of the bequest shall go to another person, 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 or indefinitely postpones the performance of the act required, the legacy shall go as if the legatee had died without performing such act.

indefinitely postponing an act for which no time is specified and on the non-performance of which the subject-matter is to go over.

Illustrations.

(*a.*) 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.

(*b.*) 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, and thereby indefinitely postpones the fulfilment of the condition. The bequest ceases to have effect.

124. Where the Will requires an act to be performed by the legatee within a specified time, either as a condition to be fulfilled before the legacy is enjoyed, or as a condition upon the non-fulfilment of which the subject-matter of the bequest is to go over to another person, or the bequest is to cease to have effect; the act must be performed within the time specified, unless the performance of it be prevented by fraud, in which case such further time shall be allowed as shall be requisite to make up for the delay caused by such fraud.

Performance of condition, precedent or [illegible] within

Further time allowed in case of fraud.

In the case of a condition precedent, when the act is required to be performed within a specified time after the testator's decease, the computation of the term will be exclusive of the day of his death (*Lester* v. [illegible] *l*, 15 Ves. 248).

Part XVII.

Of Bequests with Directions as to Application or Enjoyment.

125. 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.

Direction that funds be employed in a particular manner following an absolute bequest of the same to or for the benefit of any person.

Illustration.

A sum of money is bequeathed towards purchasing a country residence for A (*a*), or to purchase an annuity for A (*b*), or to purchase a commission in the Army for A, or to place A in any business (*c*). A chooses to receive the legacy in money. He is entitled to do so.

Even though the testator have expressly declared that he shall not be permitted to receive it (*Stokes* v. *Cheek*, 29 L. J. Ch. 922). If the legatee die before receiving the money his representatives are entitled thereto (*Bayne* v. *Crowther*, 20 Beav. 400).

The rule rests on the principle that the legatee ought not to be compelled by a Court to do what he may undo the next moment, as by selling the residence or giving up the business. The same principle applies when the nature of the property is directed to be changed, for the donee may claim it in its original state (1 Jarm. Wills, 368).

126. 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; if that benefit cannot be obtained for the legatee, the fund belongs to him, as if the Will had contained no such direction.

Direction that a mode of enjoyment of absolute bequest is to be restricted, to secure a specified benefit for the legatee.

Illustrations.

(*a.*) A bequeaths the residue of his property to be divided equally among his daughters, and directs that the shares of the daughters shall be settled upon themselves

(*a*) *Knox* v. *Hotham*, 15 Sim. 82. (*b*) *Dawson* v. *Hearn*, 1 R. & M. 306. (*c*) *Gough* v. *Bult*, 16 Sim. 45.

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 her share of the residue.

(*b.*) A directs his trustees to raise a sum of money for his daughter, and he then directs that they shall invest the fund, and pay the income arising from it to her during her life, and divide the principal among her children after her death. The daughter dies without having ever had a child. Her representatives are entitled to the fund.

Bequest of a fund for certain purposes, [illegible] cannot

127. 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.

(*a.*) 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 the estate of the testator.

(*b.*) A bequeaths the residue of his estate to be divided equally among his daughters, with a direction that they are to have the interest only during their lives, and that at their decease the fund shall go to their children. The daughters have no children. The fund belongs to the estate of the testator.

PART XVIII.

Of Bequests to an Executor.

Legatee named as executor cannot take unless he shews intention to act as executor.

128. If a legacy is bequeathed to a person who is named an executor of the Will, he shall not take the legacy unless he proves the Will or otherwise manifests an intention to act as executor.

Illustration.

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.

Harrison v. *Rowley*, 4 Ves. 202: Hawk. 309 : Wms. Exors. 1152: 4 Dav. Conv. 100.

This is the old rule in England (*Cockerell* v. *Barber*, 2 Russ. 599). The present law is that a legacy to a person appointed executor is *primâ facie* conditional on his accepting the office, and that it is excluded if any expressions can be found implying an intention to benefit the person independently of the office imposed on him (Hawk. 309, 310).

The rule applies although the legacy be not given to the person *as* executor, but by name and description : (*Stackpoole* v. *Howell*, 13 Ves. 417), and although equal legacies be given to the executors and to other persons not executors (*Calvert* v. *Sebbon*, 4 Beav. 222). And there seems no reason for thinking that it does not apply to a bequest of the residue. (Otherwise in England, *Griffiths* v. *Prince*, 11 Sim 202).

Even in the case of a child who had a portion left him by Will in which he was appointed executor, it would be held, in accordance with Lord Alvanley's opinion in *Reed* v. *Devaynes*, 2 Cox, 285, that he could not take the portion unless he acted as executor. So in the case of a widow. Nor do there seem to be any means of getting out of this ruthless rule by providing, as the draftsman may effectually do in England, that the widow or children should not lose their legacies by not acting.

The Act does not say that if the executor proves he *shall* have his legacy but that he shall not have it if he does not prove. Accordingly, if he prove without a *bonâ fide* intention to execute the trusts, but merely to entitle himself technically to his legacy, it is clear that he would not be allowed to take it (*Harford* v. *Browning*, 1 Cox, 302).

In bequests to executors this form should be adopted, so as to prevent any question as to the sufficiency of manifestation of intention to act:—"I hereby appoint A, B and C executors of this my Will, and bequeath to each of them who shall prove my Will the sum of Rs. "

PART XIX.

Of Specific Legacies.

Specific legacy defined.

129. 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.

Illustrations.

(*a*) A bequeaths to B—
"The diamond ring presented to him by C."
"His gold chain."
"A certain bale of wool."
"A certain piece of cloth."

" All his household goods, which shall be in or about his dwelling-house in M Street, in Calcutta, at the time of his death."

Gayre v. *Gayre*, 2 Vern. 538.

" The sum of 1,000 rupees in a certain chest."

Lawson v. *Stitch*, 1 Atk. 508.

" The debt which B owes him."

Ellis v. *Walker*, Amb. 309.

" All his bills, bonds, and securities belonging to him, lying in his lodgings in Calcutta."

" All his furniture in his house in Calcutta."

" All his goods on board a certain ship then lying in the River Hooghly."

" 2,000 rupees which he has in the hands of C."

Hinton v. *Pinke*, 1 P. W. 540.

" The money due to him on the bond of D."

Davies v. *Morgan*, 1 Beav. 405.

" His mortgage on the Rampore Factory."

" One-half of the money owing to him on his mortgage of Rampore Factory."

Gardner v. *Hatton*, 6 Sim. 93.

" 1,000 Rupees, being part of a debt due to him from C."

" His capital Stock of 1,000*l* in East India Stock."

Hosking v. *Nicholls*, 1 Y. & C. C. C. 478.

" His promissory notes of the Government of India, for 10,000 rupees in their 4 per cent. loan."

" All such sums of money as his executors may, after his death, receive in respect of the debt due to him from the insolvent firm of D and Company."

" All the wine which he may have in his cellar at the time of his death."

Fontaine v. *Tyler*, 9 Price 98.

" Such of his horses as B may select."

Richards v. *Richards*, 9 Price 226.

" All his shares in the Bank of Bengal."

" All the shares in the Bank of Bengal which he may possess at the time of his death."

" All the money which he has in the 5½ per cent. loan of the Government of India."

" All the Government securities he shall be entitled to at the time of his decease."

Stevenson v. *Dowson*, 3 Beav. 342.

Each of these legacies is specific.

(*b.*) A having Government promissory notes for 10,000 rupees, bequeaths to his executors "Government promissory notes for 10,000 rupees in trust to sell" for the benefit of B.

The legacy is specific.

Ashton v. *Ashton*, 3 P. W. 384—the intention is manifest from the direction to sell that the testator referred to the notes he then had.

(*c.*) A having property at Benares, and also in other places, bequeaths to B all his property at Benares.

The legacy is specific.

(*d.*) A bequeaths to B—

His house in Calcutta.

His zamíndárí of Rámpur.

His taluk of Rámnagar.

His lease of the Indigo factory of Sulkea.

An annuity of 500 rupees out of the rents of his zamíndárí of W.

A directs his zamíndárí of X to be sold, and the proceeds to be invested for the benefit of B.

Each of these bequests is specific.

Every bequest of immoveable property is specific.

(*e.*) A by his Will charges his zamíndárí of Y with an annuity of 1,000 rupees to C during his life, and subject to this charge he bequeaths the zamíndárí to D. Each of these bequests is specific.

Long v. *Short*, 1 P. W. 403.

(*f.*) A bequeaths a sum of money to buy a house in Calcutta for B.

To buy an estate in Zillah Furreedpore for B.

Hinton v. *Pinke*, 1 P. W. 540.

To buy a diamond ring for B.

Apreece v. *Apreece*, 1 V. & B. 364.

To buy a horse for B.

To be invested in shares in the Bank of Bengal for B.

To be invested in Government securities for B.

A bequeaths to B—

A diamond ring."

" A horse."

" 10,000 rupees worth of Government securities."

" An annuity of 500 rupees."

Alton v. *Medlicot*, cited 2 Ves. Sen. 417.

" 2,000 rupees, to be paid in cash."

Richards v. *Richards*, 9 Price 22C.

"So much money as will produce 5,000 rupees 4 per cent. Government securities."

Edwards v. *Hall*, 11 Ha. 23.

These bequests are not specific.

They are general.

(*q*.) A, having property in England and property in India, bequeaths a legacy to B, and directs that it shall be paid out of the property which he may leave in India. He also bequeaths a legacy to C, and directs that it shall be paid out of the property which he may leave in England.

No one of these legacies is specific.

They are demonstrative.

130. Where a sum certain is bequeathed, the legacy is not specific merely because the stocks, funds, or securities in which it is invested are described in the Will.

of a sum where the xc. in which it is invested are described.

The risk of failure from the particular subject not being found among the testator's property at his death outweighs the advantages which, as we have seen, are possessed by specific legacies. The Courts consequently lean against construing legacies to be specific, Hawk. 300.

Illustration.

A bequeaths to B—

"10,000 rupees of his funded property."

"10,000 rupees of his property now invested in Shares of the East Indian Railway Company."

"10,000 rupees, at present secured by mortgage of Rampore Factory."

No one of these legacies is specific.

They are demonstrative. *Kirby* v. *Potter*, 4 Ves. 248.

131. Where a bequest is made in general terms, of a certain amount of any kind of 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.

Bequest of stock where the testator had at the date of his Will an equal or greater amount of stock of the same kind.

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 is directly opposed to the decision in *Jeffreys* v. *Jeffreys*, 3 Atk. 120, where a bequest of 2702*l.* 3*s.* bank stock, the testator having the particular sum, and no more, was held specific. But this decision is not approved of, and Mr. Hawkins observes, "the possession of the particular sum may be the motive for fixing the amount of the bequest, but yet the testator may intend to give it in the form of a general legacy."

Bequest of money where it is not to be paid until some part of the testator's property shall have been disposed of in a certain way.

132. 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 shall have been reduced to a certain form, or remitted to a certain place.

Illustration.

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 realized in England.

The legacy is not specific.

Wms. Exors. 1041 : 1 Rop. Leg. 170, Hawk. 300.

The distinction between specific and general legacies is important. For, as we see from Section 136, if there be a deficiency of assets, a specific legacy will not be liable to abate with the general legacies. Moreover, if it be to a person in being and of a subject producing income, it carries the income from the testator's death (Section 309). On the other hand, if the specific legacy fail by the ademption or inadequacy of its subject, the legatee will not be entitled to any recompense or satisfaction out of the general personal estate (Wms. Exors. 1042 : Hawk. 300).

The text is from Wms. Exors. 1044, and the Illustration is the case of *Sadler* v. *Turner*, 8 Ves. 617. The legatees are entitled to satisfaction, although all the property in India belonging to the testator should have been transmitted to England in his lifetime. So when sums of money are bequeathed by a testator, who has property in England and India, to persons resident in each place, with a direction that they shall be paid out of the assets in the respective countries, such a direction will not make the legacies specific (*Kirkpatrick* v. *Kirkpatrick* cited in *Roberts* v. *Pocock*, 4 Ves. 158 : Wms. Exors. 1044, 1045).

When enumerated articles are not to be deemed to be specifically bequeathed.

133. 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.

See Wms. Exors. 1055.

A general residuary clause is not the less general because it contains an enumeration of some of the particulars of which it may consist (*Pickup* v. *Athinson*, 4 Hare, 629, per Wigram V. C. See *Taylor* v. *Taylor*, 6 Sim. 246.)

134. 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.

Retention, in form, of specific bequest to persons in succession.

These are almost the words of Lord Chancellor Cottenham in *Pickering* v. *Pickering*, 4 My. & Cr. 299.

Illustrations.

(*a.*) A having a lease of a house for a term of years, 15 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 15 years, C can take nothing under the bequest.

(*b*) A, having an annuity during the life of B, bequeaths 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.

135. Where property comprised in a bequest to two or more persons 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 to be made from time to time, authorize or direct, and the fund thus constituted shall be enjoyed by the successive legatees according to the terms of the Will.

Sale and investment of proceeds of property bequeathed to two or more persons in succession.

This is the rule laid down by Lord Eldon in *Howe* v. *Lord Dartmouth*, 7 Ves. 137. It invariably prevails unless *some* expression of intention can be gathered from the Will that the property is to be enjoyed *in specie*. The mere absence of any direction to convert the property is not enough to preclude the application of the rule (Wms. Exors. 1059, 1060).

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, and the proceeds invested as stated in the text, 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.

Where there is a deficiency of assets to pay legacies, specific legacy not liable to abate with general legacies.

136. If there be a deficiency of assets to pay legacies, a specific legacy is not liable to abate with the general legacies.

But when the assets not specifically bequeathed are insufficient to pay all the debts, then the specific legatees must abate in proportion to the value of their individual legacies (Wms. Exors. 1235).

PART XX.

Of Demonstrative Legacies.

Demonstrative legacy defined.

137. Where a testator bequeaths a certain sum of money or a certain quantity of 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.

Explanation—The distinction between a specific legacy and a demonstrative legacy consists in this, that where specified property is given to the legatee, the legacy is specific; where the legacy is directed to be paid out of specified property, it is demonstrative.

The testator is considered to refer to the particular fund or stock rather by way of demonstration than of condition that the bequest shall fail if the fund or stock fail.

A demonstrative legacy is so far general that if the fund be called in or fail the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets: but it is so far specific that it will not be liable to abate with general legacies upon a deficiency of assets (Wms. Exors. 1043). It is, however, liable to abate when it becomes a general legacy by reason of the failure of the fund out of which it is payable. And a demonstrative legacy of stock does not carry interest from the testator's death (*Mullins* v. *Smith*, 1 Drew. & S. 210, 211, per Kindersley V. C.)

Illustrations.

(*a.*) 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.

Ford v. *Fleming*, 2 P. W. 469: *Campbell* v. *Graham*, 1 R. & M. 453.

(*b.*) A bequeaths to B "ten bushels of the corn which shall grow in his field of Greenacre."

"80 chests of the Indigo which shall be made at his factory of Rampore."

"10,000 rupees out of his five per cent. promissory notes of the Government of India."

Kirby v. *Potter*, 4 Ves. 748.

An annuity of 500 rupees "from his funded property."

Attwater v. *Attwater*, 18 Beav. 330.

"1,000 rupees out of the sum of 2,000 rupees due to him by C."

A bequeaths to B an annuity, and directs it to be paid out of the rents arising from his taluk of Rámnagar.

The testator intends to give B an annuity *at all events*, not as in Sec. 129, Illustration (*e.*).

A bequeaths to B "10,000 rupees out of his estate at Rámnagar," or charges it on his estate at Rámnagar.

"10,000 rupees, being his share of the capital embarked in a certain business."

Sparrow v. *Josselyn*, 16 Beav. 135.

Each of these bequests is demonstrative.

Order of payment when legacy is directed to be paid out of a fund the subject of a specific legacy.

138. 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 bequeathed shall first be paid to the legatee, and the demonstrative legacy shall be paid out of the residue of the fund, and so far as the residue shall be deficient, out of the general assets of the testator.

Illustration.

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 debt due to A from W is only 1,500 rupees; of these 1,500 rupees,

1,000 rupees belong 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.

PART XXI.

Of Ademption of Legacies.

Ademption explained.

139. 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.

When the disposition of the subject is not absolute the legacy is not adeemed: as where a testator pawns an article specifically bequeathed, a right of redemption is left in him and passes to the legatee at his death (Sec. 154, Illustration *a*); not, however, as in England, so as to enable him to call upon the executor to redeem and deliver it to him (*Ashburner* v. *McGuire*, 2 Bro. C. C. 113, and Sec. 154 *infra*).

Illustrations.

(*a*) A bequeaths to B—

"The diamond ring presented to him by C."

"His gold chain."

"A certain bale of wool."

"A certain piece of cloth."

"All his household goods which shall be in or about his dwelling-house in M Street, in Calcutta, at the time of his 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.

Ashburner v. *McGuire*, 2 Bro. C. C. 113: *Heseltine* v. 3 Madd. 276.

(*b*) A bequeaths to B—

"The sum of 1,000 rupees in a certain chest."

"All the horses in his stable."

At the death of A, no money is found in the chest, and no horses in the stable.

The legacies are adeemed.

(*c*) 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.

And if the goods had been insured, as it could not be shewn that the testator died before the goods perished, the legatee can have no claim on the insurance money (*Durrant* v. *Friend*, 5 De G. & S. 343).

140. A demonstrative legacy is not adeemed by reason that the property on which it is charged by the Will does not exist at the time of the death of the testator, or has been converted into property of a different kind ; but it shall in such case be paid out of the general assets of the testator.

Non-ademption of demonstrative legacy.

141. Where the thing specifically bequeathed is the right to receive something of value from a third party, and the testator himself receives it, the bequest is adeemed.

Ademption of specific bequest of right to receive something from a third party.

But according to Sec. 149 there is a distinction between the gift of a debt *quâ* debt and the gift of the sum of money produced when the debt shall have been recovered and ceased to exist as a debt, *e. g.*, a gift of "whatever sum may be received from my claim on A."

Illustrations.

(*a*) A bequeaths to B—

"The debt which C owes him."

Badrick v. *Stevens*, 3 Bro. C. C. 431.

"2,000 rupees which he has in the hands of D."

"The money due to him on the bond of E."

"His mortgage on the Rámpur Factory."

All these debts are extinguished in A's lifetime, some with and some without his consent.

All the legacies are adeemed.

There is no distinction between a case where the testator himself calls in a debt which he has bequeathed, and a case where the debtor unprovoked and without solicitation, thinks fit to pay it (Wms. Exors. 1191).

A bequeaths to B—

"His interest in certain policies of life assurance."

A in his lifetime receives the amount of the policies. The legacy is adeemed.

Barker v. *Rayner*, 5 Madd. 208 : 2 Russ. 122.

142. 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.

Ademption *pro tanto* by testator's receipt of

Illustration.

A bequeaths to B "the debt due to him by C." The debt amounts to 10,000 rupees. C pays to A 5,000 rupees, the one-half of the debt. The legacy is revoked by ademption, so far as regards the 5,000 rupees received by A.

Fryer v. *Morris*, 9 Ves. 360.

143. If a portion of an entire fund or stock be 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 received; and the residue of the fund or stock shall be applicable to the discharge of the specific legacy.

Ademption *pro tanto* by testator's receipt of portion of an entire fund on which a portion has been specifically bequeathed.

Illustration.

A bequeaths to B one-half of the sum of 10,000 rupees, due to him from W. A in his lifetime receives 6,000 rupees, part of the 10,000 rupees. The 4,000 rupees which are due from W to A at the time of his death belong to B under the specific bequest.

144. Where a portion of a fund is specifically bequeathed to one legatee, and a legacy charged on the same fund is bequeathed to another legatee; if the testator receives a portion of that fund, and the remainder of the fund is insufficient to pay both the specific and the demonstrative legacy, the specific legacy shall be paid first, and the residue (if any) of the fund shall be applied so far as it will extend in payment of the demonstrative legacy, and the rest of the demonstrative legacy shall be paid out of the general assets of the testator.

Order of payment where a portion of a fund is specifically bequeathed to one legatee, and a legacy charged on the same fund to another, and the testator having received a portion of that fund, the remainder is insufficient to pay both legacies.

Illustration.

A bequeaths to B 1,000 rupees, part of the debt of 2,000 rupees 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. A afterwards receives 500 rupees, part of that debt, and dies leaving only 1,500 rupees due to him from W. Of these 1,500 rupees, 1,000 rupees belong 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.

Ademption where stock, specifically bequeathed, does not exist at testator's death.

145. Where stock which has been specifically bequeathed does not exist at the testator's death, the legacy is adeemed.

Illustration.

A bequeaths to B—

"His capital stock of 1,000*l.* in East India Stock."

"His promissory notes of the Government of India for 10,000 rupees in their 4 per cent loan."

A sells the stock and the notes.

The legacies are adeemed.

Sec. 153 shows, however, that the legacy is not irretrievably adeemed, and that it would be revived by a new purchase of similar stock by the testator (Wms. Exors. 1193).

Sec. 152 too, shows that it would not be adeemed when the testator *lends* the stock specifically bequeathed on condition of its being replaced.

And Sec. 150 provides that no ademption will take place when the stock specifically bequeathed is exchanged by act of law.

Ademption *pro tanto* where stock, specifically bequeathed, exists in part only at testator's death.

146. Where stock which has been specifically bequeathed, does only in part exist at the testator's death, the legacy is adeemed so far as regards that part of the stock which has ceased to exist.

Illustration.

A bequeaths to B—

His 10,000 rupees in the 5½ per cent. loan of the Government of India.

A sells one-half of his 10,000 rupees in the loan in question.

One-half of the legacy is adeemed.

147. A specific bequest of goods under a description connecting them with a certain place, is not adeemed by reason that they have been removed from such place from any temporary cause, or by fraud, or without the knowledge or sanction of the testator.

Non-ademption of specific bequest of goods described as connected with a certain place by reason of

Wms. Exors. 1196.

Illustrations.

A bequeaths to B "all his household goods which shall be in or about his dwelling-house in Calcutta at the time of his death." The goods are removed from the house to save them from fire. A dies before they are brought back.

Chapman v. *Hart*, 1 Ves. Sen. 273.

A bequeaths to B "all his household goods which shall be in or about his dwelling-house in Calcutta at the time of his death." During A's absence upon a journey, the whole of the goods are removed from the house. A dies without having sanctioned their removal.

Shaftsbury v. *Shaftsbury*, 2 Vern. 747.

Neither of these legacies is adeemed.

148. The removal of the thing bequeathed from the place in which it is stated in the Will to be situated, does not constitute an ademption, where the place is only referred to in order to complete the description of what the testator meant to bequeath.

When removal of thing bequeathed does not constitute ademption.

Chapman v. *Hart*, 1 Ves. Sen. 273 : Wms. Exors. 1196.

Illustrations.

A bequeaths to B all the bills, bonds, and other securities for money belonging to him then lying in his lodgings in Calcutta. At the time of his death, these effects had been removed from his lodgings in Calcutta.

A bequeaths to B all his furniture then in his house in Calcutta. The testator has a house at Calcutta and another at Chinsurah, in which he lives alternately, being possessed of one set of furniture only, which he removes with himself to each house. At the time of his death, the furniture is in the house at Chinsurah.

A bequeaths to B all his goods on board a certain ship then lying in the River Hooghly. The goods are removed by A's directions to a warehouse, in which they remain at the time of A's death.

No one of these legacies is revoked by ademption.

149. Where the thing bequeathed is not the right to receive something of value from a third person, but the money or other commodity which shall 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.

When the thing bequeathed is a valuable to be received by the testator from a third person; and the testator himself, or his representative, receives it.

Illustration.

A bequeaths to B whatever sum may be received from his claim on C. A receives the whole of his claim on C, and sets it apart from the general mass of his property. The legacy is not adeemed.

See Sec. 141. Here the testator contemplates the recovery of the debt in his lifetime, and his intention that the subject should not be adeemed is shown by his setting it apart. *Clarke* v. *Brown*, 2 Sm. & G. 524.

150. 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.

Change by operation of law of subject of specific bequest between date of Will and testator's death.

Illustrations.

A bequeaths to B "all the money which he has in the 5½ per cent. loan of the Government of India."

The securities for the 5½ per cent. loan are converted during A's lifetime into 5 per cent. stock.

A bequeaths to B the sum of 2,000*l.*, invested in Consols in the names of trustees for A.

The sum of 2,000*l.*, is transferred by the trustees into A's own name.

A bequeaths to B the sum of 10,000 rupees in promissory notes of the Government of India which he has power, under his marriage settlement, to dispose of by will. Afterwards, in A's lifetime, the fund is converted into Consols by virtue of an authority contained in the settlement.

No one of these legacies has been adeemed.

All cases of ademption arise from a supposed alteration of the testator's intention, and in the cases put, the conversion or transfer of the stock is not sufficient evidence of such alteration (Ca. temp. Talbot, 227, 228: 1 Cox, 427).

Change of subject without testator's knowledge.

151. Where a thing specifically bequeathed undergoes a change between the date of the Will and the testator's death, and the change takes place without the knowledge or sanction of the testator, the legacy is not adeemed.

Illustration.

A bequeaths to B "all his 3 per cent. Consols." The Consols are, without A's knowledge, sold by his agent, and the proceeds converted into East India Stock. This legacy is not adeemed.

The unauthorized act of the agent could not of course alter his principal's Will (*Basan* v. *Brandon*, 8 Sim 171). So if stock standing in the name of a trustee and specifically bequeathed were sold or transferred into another fund without the testator's knowledge or authority, the legacy is not adeemed, for the act of the trustee will not be allowed to prejudice the *cestui que trust* or the persons claiming under him. The legatee would be entitled to follow the subject into other funds or to full recompense out of the trustee's own property, as the nature of the case may require (1 Rop. Leg. 3d. ed. p. 290).

Stock specifically bequeathed lent to a third party on condition that it shall be replaced.

152. 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.

Here the testator continues owner of the stock, notwithstanding the loan of it; and although it be not literally existing in his possession at his decease, yet he is substantially and beneficially possessed of it at that period (1 Rop. Leg. 292).

Stock specifically bequeathed but replaced and belonging to the testator at his

153. 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.

Wm. Exors, 1193. This settles the law in accordance with the dicta of Lord Talbot, Lord Hardwicke and Sir Thomas Clarke, there referred to.

PART XXII.

Of the Payment of Liabilities in respect of the Subject of a Bequest.

Non-liability of executor to exonerate specific legatees.

154. Where property specifically bequeathed is subject at the death of the testator 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. 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.

(*a*) A bequeaths to B the diamond ring given 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.

(*b*) A bequeaths to B a zamíndárí, 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.

This is otherwise in England as to *personal* estate (as to mortgaged *realty*, since 1st Jan. 1855, see Locke King's Act, 17 and 18 Vict. c. 113: 2 Jarm. Wills, 610-613, 4 Dav. Conv. 257, 258). There the specific legatee can call on the executor to redeem and deliver the article pledged, and if the executor fail to do so, the legatee is entitled to compensation to the amount of his legacy out of the testator's general assets.

The great difficulty on this Section, as it has been on Locke King's Act, will be to determine what amounts to "a contrary intention" within the meaning of the Act, so as to relieve the legatee from liability to make good the amount of the incumbrance. The Act itself says that a mere direction "for the payment of the testator's debts generally," will not be sufficient (see *Pembroke* v. *Friend*, 1 Johns & H. 132: *Rowson* v. *Harison*, 31 Beav. 207: *Woolstencroft* v. *Woolstencroft*, 6 Jur. N. S. 1170. But where there was a general bequest of personalty to trustees upon trust *for payment of the testator's debts out of the proceeds* (*Smith* v. *Smith*, 3 Giff. 263, 273), a devise and bequest of residuary real and personal estate, *subject to the payment of the testator's debts* (*Stone* v. *Parker*, 1 Drew. & Sm. 212) or a general bequest of personal estate, *subject to the payment of debts* (*Mellish* v. *Vallins*, 2 Johns & H. 194), the statutory rule is held to be excluded. In fact, wherever there is a direction that the debts should be paid out of some other fund, the pledged or incumbered property is not liable (*Eno* v. *Tatham*, 9 Jur. N. S. 481, per Lord Justice Turner).

A lien for unpaid purchase money is not within this Section: see Illustration (*a*) to Section 155 and *Hood* v. *Hood*, 26 L. J. Ch. 616.

155. Where any thing is to be done to complete the testator's title to the thing bequeathed, it is to be done at the cost of the testator's estate.

Completion of testator's title to things bequeathed to be at cost of his estate.

Illustrations.

(*a*) 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.

(*b*) 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.

Wms. Exors. 1596, 1597: Sugd. V. & P. 13th ed. 161—163: Dart, V. & P. 3rd ed. 174.

If before the assets are got in, the legatee pay for the thing bequeathed out of his own pocket, he may afterwards call on the testator's representative to reimburse him (*Broome* v. *Monck*, 10 Ves. 614, 615). So if the assets are insufficient to pay the purchase-money and the contract is on that account rescinded, the legatee will be entitled to the assets so far as they go. And where by reason of the complication of the testator's affairs the purchase-money cannot be immediately paid, and the vendor for that reason rescinds the contract, the legatee, on the coming in of assets, may compel the representative to buy him other property for his benefit. But if a title cannot be made, or there was not a perfect contract, or the Court should think the contract ought not to be executed, the legatee will not be entitled to anything (Sugd. V. & P. 13th ed. 172).

156. Where there is a bequest of any interest in immoveable property, in respect of which payment in the nature of 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 up to the day of his death.

Exoneration of legatee's immoveable property for which land revenue or rent is payable periodically.

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 shall make good 25 rupees in respect of the rent.

157. 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 such stock, such call or payment shall, as between the testator's estate and the legatee, be borne by such estate; but if any call or other payment shall, after the testator's death, become due in respect of such stock, the same shall, as between the testator's estate and the legatee, be borne by the legatee if he accept the bequest.

Exoneration of specific legatee's stock in a Joint Stock Company.

See 2 Jarm. Wills, 597.

This seems to be nearly the rule now established in England by Romilly M. R., in *Armstrong* v. *Burnet*, 20 Beav. 424, (Illustration *b*), and *Addams* v. *Ferick*, 26 Beav. 384, (which suggested Illustration *c*), and by Kindersley V. C. in *Day* v. *Day*, 1 Drew. & S. 262, who says, if the matter "were *res integra*, I should say generally that the specific legatee must pay the calls made subsequently to the testator's death."

"If he accept the bequest." Where the person named as legatee repudiates the legacy he cannot of course be subjected to any of the liabilities attaching to the testator's interest (*Moffett* v. *Bates*, 3 Sm. & Giff. 468).

Illustrations.

(*a*) A bequeathed to B his shares in a certain railway. At A's death there was due from him the sum of 5*l.* in respect of each share, being the amount of a call which

had been duly made, and the sum of 5*s.* in respect of each share, being the amount of interest which had accrued due in respect of the call. These payments must be borne by A's estate.

(b) A has agreed to take 50 shares in an intended Joint Stock Company, and has contracted to pay up 5*l.* 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.

(*c*) 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.

(d) 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 shareholder is called upon for contribution. The amount of the contribution must be borne by the legatee.

(e) A is the owner of ten shares in a Railway Company. At a meeting held during his lifetime a call is made of 3*l.* 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.

PART XXIII.

Of Bequests of Things described in general Terms.

158. If there be a bequest of something described in general terms, the executor must purchase for the legatee what may reasonably be considered to answer the description.

Bequest of thing described in general terms.

Illustrations.

(*a*) A bequeaths to B *a* pair of carriage horses, or *a* diamond ring. The executor must provide the legatee with such articles, if the state of the assets will allow it.

(*b*) A bequeaths to B "*his* pair of carriage horses." A had no carriage horses at the time of his death. The legacy fails.

1 Atk. 416 n.

PART XXIV.

Of Bequests of the Interest or Produce of a Fund.

159. 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.

Bequest of the interest or produce of a fund.

Wms. Exors. 1074.

Illustrations.

(*a*) A bequeaths to B the interest of his 5 per cent. promissory notes of the Government of India. There is no other clause in the Will affecting those securities. B is entitled to A's 5 per cent. promissory notes of the Government of India.

(*b*) A bequeaths the interest of his 5½ per cent. promissory notes of the Government of India 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.

(*c*) A bequeaths to B the rents of his lands at X. B is entitled to the lands.

As to Illustration (*c*) a devise of the rents and profits of land has always passed the land itself both at law and in equity, Co. Litt, 4 *b.*: 1 Jarm. Wills, 756, and since the Wills Act such a devise would pass the whole estate vested in the testator (*Nichols* v. *Hawkes*, 10 Hare, 344, 345).

PART XXV.

Of Bequests of Annuities.

160. 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. And this rule shall not be varied by the circumstance 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 is payable for life only, unless a contrary intention appears by the Will.

Illustrations.

(*a*) A bequeaths to B 500 rupees a year. B is entitled during his life to receive the annual sum of 500 rupees.

(*b*) 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.

(*c*) A bequeaths an annuity of 500 rupees to B for life, and on B's death to C. B is entitled to an annuity of 500 rupees during his life. C, if he survives B, is entitled to an annuity of 500 rupees from B's death until his own death.

Yates v. *Maddan*, 3 Mac. & G. 532: *Blewitt* v. *Roberts*, Cr. & P. 274.

Hawk. 125—129: 2 Jarm. Wills, 373: Wms. Exors. 1075. So in England a bequest of an annuity not existing before to A, *simpliciter*, is *primâ facie* for life only (Hawk. 125).

But where a personal annuity is given to A *during the life of B*, if A die in B's life-time the annuity does not expire, but goes to A's representative (*Savery* v. *Dyer*, Amb. 139).

So where the testator directs his representatives to segregate and appropriate *a portion of* his property the interest or produce of which is to be paid as the annuity, the annuity represents the corpus so appropriated, and the corpus passing by the bequest of the annuity (see Sec. 159), the annuity may be said to be perpetual (see *Lett* v. *Randall*, 2 De G. F. & J. 392). Thus a gift of "Rs. 20,000 a year being part of the moneys I have in Bank of Bengal shares," (*Rawlings* v. *Jennings*, 13 Ves. 39), or a bequest of Rs. 1,600 per annum, *that is to say* the interest of Rs. 40,000 of my 4 per cent. Government Paper (*Stretch* v. *Watkins*, 1 Mad. 253) would give the legatee a perpetual annuity.

The Section is somewhat less favourable to the annuitant than the English law, for in England where a particular sum is bequeathed to be invested in the purchase of an annuity the annuitant is entitled (in the absence of any contrary direction) to a perpetual annuity, or (what comes to the same thing) to the particular sum so invested (see *Ross* v. *Borer*, 2 Jo. & H. 472: *Kerr* v. *Middlesex Hospital*, 2 D. M. G. 576).

Period of vesting where Will directs that an annuity be provided out of the proceeds of property, or out of property generally, or where money is bequeathed to be invested in the purchase of an annuity.

161. 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 an 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.

Wms. Exors. 1076: 1 Jarm. Wills, 367.

Illustrations.

(*a*) A by his Will directs that his executors shall out of his property purchase an annuity of 1,000 rupees for B. B is entitled at his option to have an annuity of 1,000 rupees for his life purchased for him, or to receive such a sum as will be sufficient for the purchase of such an annuity.

Palmer v. *Craufurd*, 3 Swanst. 417, 488.

(*b*) 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.

Bayley v. *Bishop*, 9 Ves. 6: *Day* v. *Day*, 1 Drew. 569. So in England it makes no difference whether it be a bequest of a specified sum to purchase an annuity, or a direction to purchase an annuity of a specified amount (*Yates* v. *Compton*, 2 P. W. 308).

Abatement of annuity.

162. 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 annuity is a general legacy. Therefore, as between annuitants and legatees, there is no priority where there is a deficient estate, but both must abate proportionably. The principle equally applies whether the annuity commences immediately on the death of the testator or at a future period (*Innes* v. *Mitchell*, 1 Phill. 716), or whether the legacies be immediate or on the death of the annuitant (*Street* v. *Street*, 2 N. R. 56). If annuities abate with reference to other legacies, they must of course abate between themselves (Wms. Exors. 1231).

Where there is a gift of an annuity, and a residuary gift, the whole of the annuity to be first satisfied.

163. 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.

PART XXVI.

Of Legacies to Creditors and Portioners.

Creditor *primâ facie* entitled to legacy as well as debt.

164. 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 the amount of the debt.

"We have departed from the English law," say the Commissioners, "where its provisions appeared to us to be objectionable in themselves, or especially inapplicable to India. Above all things we have aimed at giving effect to the plain meaning of the words of the testator, without endeavouring to do or to say for him that which he has not done or said for himself. We have accordingly discarded [Sec. 164] the rules by which the English Courts are compelled to presume, in the absence of any intimation of a contrary intention, that when a debtor bequeaths to his creditor a legacy equal to or exceeding the amount of his debt, the legacy is meant by the testator to be a satisfaction of the debt; that when a parent [Sec. 165] who is under a legal obligation to provide a portion for his child fails to do so, and afterwards bequeaths a legacy to the child, the legacy is meant as a satisfaction or fulfilment of the obligation. We have in like manner discarded [Sec. 166] the rule of English law, that where a father bequeaths a legacy to a child, and afterwards advances a portion for that child, he thereby redeems the legacy. We have endeavoured so to frame the law in this respect as to prevent the occasion from ever arising, which in England requires a nice balancing of judgment, the exercise of large discretion, the prosecution of a difficult inquiry, and the admission of parol evidence of the intentions of testators."

As to the English law, see Wms. Exors. 1167.

Child *primâ facie* entitled to legacy as well as portion.

165. 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.

As to the English law, see Wms. Exors. 1170.

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.

166. No bequest shall be wholly or partially adeemed by a subsequent provision made by settlement or otherwise for the legatee.

No ademption by subsequent provision for legatee.

Illustrations.

(*a*) A bequeaths 20,000 rupees to his son B. He afterwards gives to B the sum of 20,000 rupees. The legacy is not thereby adeemed.

(*b*) A bequeaths 40,000 rupees to B, his orphan niece, whom he had brought up from her infancy. Afterwards, on the occasion of B's marriage, A settles upon her the sum of 30,000 rupees. The legacy is not thereby diminished.

As to the English law, see Wms. Exors. 1200: *Hargreaves* v. *Pennington*, 10 Jur. N. S. 834.

PART XXVII.

Of Election.

167. Where a man, 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.

Circumstances in which election takes place.

The principle of this rule is that a person who accepts a benefit under an instrument, must adopt the whole, giving full effect to its provisions and renouncing every right inconsistent with it (Wms. Exors. 1299). To accept the benefit while he declines the burthen is to defraud the design of the donor (1 Swanst. 396 n.)

Election may be either express or implied. "The enquiry as to what acts or acquiescence constitute an implied election must be decided rather by the circumstances of the case than by any general principle. The questions are, whether the parties acting or acquiescing were aware of their rights; whether they intended election; whether they can restore the individuals affected by their claim to the same situation as if the acts had never been performed; or whether these enquiries are precluded by lapse of time" (Wms. Exors. 1306).

The latter part of this Section satisfactorily settles for India the question whether the election to take against the Will necessitates relinquishing the benefit given by it *in toto*, or only imposes an obligation to indemnify the claimants whom it disappoints (see Wms. Exors 1307).

To raise a case of election, the intention as manifested by the Will itself must be clear and decisive; for if the testator's expressions will admit of being restricted to property belonging to or disposable by him, the inference will be that he did not mean them to apply to that on which he had no disposing power (1 Jarm. Wills, 425, and see *Whitley* v. *Whitley*, 31 Beav. 173).

"By his Will," *i. e.* upon the face of his Will: parol evidence is inadmissible for the purpose of shewing the testator's intention to dispose of property not his own (*Stratton* v. *Best*, 1 Ves. Jun.

Devolution of interest relinquished by the owner.

168. The interest so relinquished 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.

Testator's belief as to his ownership immaterial.

169. This rule will apply whether the testator does or does not believe that which he professes to dispose by his Will to be his own.

It is impossible to know with certainty that the testator would not have made the disposition, had he been accurately acquainted with the title, and "nothing can be more dangerous than to speculate upon what he would have done, if he had known one thing or another" (1 Jarm. Wills, 417, citing Sir R. P. Arden in 2 Ves. Jun. 370.)

Illustrations.

(a) The farm of Sultánpur 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 Sultánpur, 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.

(b) 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.

(c) 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 elect to give up the estate, or to lose the legacy.

This and Illustration (*b*) shew that the doctrine of election is applicable to contingent interests.

(d) A, a person of the age of 18 domiciled in British 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 his 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.

Cary v. *Askew*, 1 Cox, 241 : *Hearle* v. *Greenbank*, 3 Atk. 695, 715.

The real property in England does not pass by the Will because A, by English law, is an infant and therefore incapable of making a Will, and succession to immoveable property is regulated by the *lex loci rei sitæ* (see Comm. on Sec. 4, supra, p. 6).

In order to raise a case of election there must be a *personal* competency on the part of the author of the attempted disposition, as the doctrine is founded on intention, which supposes such competency (1 Jarm. Wills, 418).

How is the legatee to obtain knowledge "of those circumstances which would influence a reasonable man in making an election?" In England a party bound to elect is entitled first to ascertain the value of the funds and for that purpose may sustain a bill to have all necessary accounts taken (Wms. Exors. 1307). Here in the High Courts such a suit may be brought; but in the Mofussil, unless perhaps by Sec. 181 of Act VIII of 1859, no provision seems made for such a case by the Code of Civil Procedure or otherwise.

Until the expiration of the two years—the limitation of this period is novel but likely to be useful—it is submitted that a person having elected under a misconception is entitled to make a fresh election (*Kidney* v. *Coussmaker*, 12 Ves. 136.)

Bequest for a man's benefit how regarded for the purpose of election.

170. A bequest for a man's benefit is, for the purpose of election, the same thing as a bequest made to

Illustration.

The farm of Sultánpur Khurd being the property of B, A bequeathed it to C; and bequeathed another farm called Sultánpur 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 Sultánpur Khurd in opposition to it.

A person deriving a benefit indirectly not put to his election.

171. A person taking no benefit directly under the Will, but deriving a benefit under it indirectly, is not put to his election.

Wms. Exors. 1300, 1301.

Illustration.

The lands of Sultánpur are settled upon C for life, and after his death upon D, his only child. A bequeaths the lands of Sultánpur to B, and 1,000 rupees 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 Sultánpur which accrued after the death of the testator and before the death of C. In his individual character he retains the lands of Sultánpur in opposition to the Will.

A person taking under a Will in his individual capacity, may in another character elect to take in opposition to it.

172. A person who in his individual capacity takes a benefit under the Will, may in another character elect to take in opposition to the Will.

Illustration.

The estate of Sultánpur is settled upon A for life, and after his death upon B. A leaves the estate of Sultánpur 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 Sultánpur 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.

Exception to the six last Rules.—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, 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 Sultánpur during her life.

A by his Will bequeaths to his wife an annuity of 200*l.* during her life, in lieu of her interest in the estate of Sultánpur, which estate he bequeaths to his son. He also gives his wife a legacy of 1,000*l.* 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*l.*

When acceptance of a benefit given by a Will constitutes an election to take under the Will.

173. Acceptance of a benefit given by the Will constitutes an election by the legatee to take under the Will, if he has knowledge of his right to elect, and of those circum-

stances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

1 Jarm. Wills, 441 : *Worthington* v. *Wiginton*, 20 Beav. 67.

Illustrations.

(*a*) A is owner of an estate called Sultánpur Khurd and has a life interest in another estate called Sultánpur Buzurg to which, upon his death, his son B will be absolutely entitled. The Will of A gives the estate of Sultánpur Khurd to B, and the estate of Sultánpur Buzurg to C. B, in ignorance of his own right to the estate of Sultánpur Buzurg allows C to take possession of it, and enters into possession of the estate of Sultánpur Khurd. B has not confirmed the bequest of Sultánpur Buzurg to C.

(*b*) B, the eldest son of A, is the possessor of an estate called Sultánpur. A bequeaths Sultánpur 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, allow C to take possession of Sultánpur. He afterwards discovers that the residue does not amount to more than 500 rupees. B has not confirmed the bequest of the estate of Sultánpur to C.

Presumption arising from enjoyment by legatee for two years.

174. 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.

It would seem that in case either of the subject-matters of election is reversionary, the two years will not begin to run until the reversion falls in : see *Padbury* v. *Clark*, 2 Mac. & G. 298.

As to how far the gain or loss to the person called on to elect is to weigh in presuming election, see *Harris* v. *Watkins*, 2 K. & J. 473.

Confirmation of bequest by act of legatee.

175. 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.

176. If the legatee shall not, within one year after the death of the testator, signify to the testator's representatives 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.

When testator's representatives may call upon legatee to elect.

Effect of non-compliance with their request within a reasonable time.

177. In case of disability the election shall be postponed until the disability ceases, or until the election shall be made by some competent authority.

Postponement of election in case of disability.

The doctrine of election is applicable to cases of appointment under a power, so that if one having a special power, by his Will, gives benefits out of his own property to the objects of the power, and appoints the subject of the power to strangers, the former will be obliged to elect in favour of the latter (1 Jarm. Wills, 421).

The Act leaves unnoticed a difficult class of cases which will probably be of frequent occurrence, at least when the testamentary part of it is made applicable to Hindús. I mean those in which the testator and the person against whom the election is sought to be raised have each an undivided share, or some partial and limited interest, in the property, and in which therefore the question is not simply whether the testator referred to particular property, but whether he intended the bequest to comprise such property *inclusive of the interest of his co-owner* (1 Jarm. Wills, 428: see cases there cited, to which add *Miller* v. *Thurgood*, 12 W. R. 660, and *In re Bidwell*, 8 L. T. N. S. 107).

If a testator having an estate subject to an incumbrance, simply bequeaths the estate without saying more, he is taken to mean the estate *in its actual condition*: and the incumbrancer to whom other benefits are given by the Will, is not in such a case put to his election: still less if the beneficiary be entitled only to participate in the incumbrances with others to whom no benefit is given by the Will (1 Jarm. Wills, 429, citing *Stephens* v. *Stephens*, 3 Drew. 697: 1 De G. & J.

PART XXVIII.

Of Gifts in Contemplation of Death.

178. A man may dispose, by gift made in contemplation of death, of any moveable property which he could dispose of by Will. A gift is

Property transferable by gift made in con-

When a gift is said to be made in contemplation of death.

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. Such a gift may be resumed by the giver. It does 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.

Such gift resumable.

When it fails.

... 606-608. Story Eq. Jur. par. 606: 1 Spence Eq. ... 912: *Ward* v. *Turner*, 1 Wh. & T. L. C.

Illustrations.

(*a*) A being ill, and in expectation of death, 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.

Government India endorsed

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.

... of the Government of India.

Bill of Exchange.

The money secured by the mortgage deeds.

Duffield v. *Elwes* 1 Bli. N. R. 498.

(*b*) 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 are 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.

(*c*) 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 set aside the parcels. B and C are not entitled to the contents of the parcels.

Burns v. *Markham*, 7 Taunt. 224.

The Section states the English law relating to donations *mortis causâ*. The Act, like the English law (Wms. Exors. 686) says, 1—that the gift must be with a view to the donor's death; 2—that it must be conditioned, expressly or by implication, to take effect only on the donor's death by his existing illness, and 3—that there must be a delivery of the subject.

A donation *mortis causâ* differs from a legacy in two respects. It need not be proved, and the executor's or administrator's consent is unnecessary. It resembles a legacy in two respects: it is ambulatory and revocable during the testator's life, and it is liable to the testator's debts upon deficiency of assets.

If the donor does not resume the gift he cannot revoke it by Will, for on his death the gift becomes complete, but it has been held in England that it may be satisfied by a legacy.

The mention in Illustration (*a*) of the bill of exchange *endorsed in blank* may be thought to shew that the Legislature intended that where no property is transferred by delivery of the subject, there can be no valid *donatio mortis causâ*, and that, for example, Bills of Exchange and Promissory Notes *not payable to bearer* could not be the subject of such a donation. But it appears to the writer that the introductory words of the Section are wide enough to shew that it will be sufficient if the property so far pass by the delivery of the instrument as to entitle the donee to the assistance of the Court to make the donation complete (Wms. Exors. 694: *Veal* v. *Veal*, 6 Jur N. S. 527).

A policy of life-assurance may be the subject of a donation *mortis causa* (*Witt* v. *Amiss*, 7 Jur. N. S. 499.)

PART XXIX.

Of Grant of Probate and Letters of Administration.

Character and property of executor or administrator as such.

179. The executor or administrator, as the case may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

Administration with copy annexed of authenticated copy of Will proved abroad.

180. When a Will has been proved and deposited in a Court of competent jurisdiction, situated beyond the limits of the Province, whether in the British dominions, or in a foreign country, and a properly authenticated copy of the Will is produced, letters of administra-

tion may be granted with a copy of such copy annexed.

Probate to be granted to executor appointed by Will.

181. Probate can be granted only to an executor appointed by the Will.

Wms. Exors. 287.

But semble this would not preclude the granting of probate to a person nominated as executor by the legatees (Wms. Exors. 214), or by other persons appointed executors (*Jackson* v. *Paulet*, 2 Robert. 344 : Wms. Exors. 216). And where a testatrix concluded her Will thus : "I must beg A to appoint some one to see this my Will executed: Held that A might appoint himself, and the Court granted probate to him (*Ryder*, 2 S. & T. 127).

Appointment express or implied.

182. The appointment may be express or by necessary implication.

Illustrations.

(*a*) A wills that C be his executor if B will not; B is appointed executor by implication.

Wms. Exors. 211.

(*b*) 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.

Naylor v. *Stainsby*, 2 Ca. t. Lee, 54.

(*c*) 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 of different dates." The nephew is appointed an executor by implication.

Grant v. *Leslie*, 3 Phillim. 116.

Other Illustrations are—

(*d*) A makes B *or* C his executors, they shall both be executors, *or* being construed *and* (Godolph. cited Wms. Exors. 211).

(*e*) A supposing his brother B to be dead, in his Will says, 'as my brother B is dead I make C my executor.' If B is alive he shall be executor (Godolph. cited Wms. Exors. 212).

(*f*) A names his wife his executrix and B to assist her. B is appointed executor by implication (*Powell* v. *Stratford*, cited 3 Phillim. 118)

(*g*) A writes a letter (duly executed as a Will) to B stating the amount of her property and how she wished it to be disposed of, and concluding thus "I know of nothing else, my dear B, to trouble you with, and trust that this will not involve you in much." B is appointed executor by implication. (*Martha Manly*, 3 Sw. & T. 56).

But a direction to B to pay the testator's debts out of a particular fund is not enough to constitute him executor, even though the testator say that that fund is all the property he possesses (*Toomy*, 13 W. R. 106).

for where all the property is left to a trustee on trust *for a specific purpose*, and no executor is named in the Will, is such trustee entitled to probate (*Jones*, 2 S. & T. 155).

An executor appointed by implication or construction is generally called an executor *according to the tenor*. Wms. Exors. 211.

An executor may be appointed on condition, *e. g.* that he give security to pay the legacies, &c., or that he prove the Will within a certain time after the testator's death (Wms. Exors. 220). The testator may also limit the time when the person appointed shall begin or when he shall cease, to be executor (Wms. Exors. 217), and in such cases if the testator does not appoint a person to act before the period limited for the commencement of the office, or after the period limited for its expiration, the Court may commit administration to another person until there be an executor or after the executorship is ended (Wms. Exors. 218).

Persons to whom probate cannot be granted.

183. Probate cannot be granted to any person who is a minor or is of unsound mind, nor to a married woman without the previous consent of her husband.

This of course does not preclude the appointment of an infant as executor, but if an infant be appointed sole executor, he cannot exercise his office during minority, and Section 215 provides that letters of administration, with the Will annexed, may be granted to the guardian, or to such other person as the Court shall think fit, until the infant shall have completed the age of 18.

By the English as well as by the Civil law idiots and lunatics are incapable of being executors (Wms. Exors. 207); and if an executor become *non compos* the Court may commit administration to another.

A married woman by English law cannot take upon herself the office of executrix without her husband's consent (Wms. Exors. 202). The Indian Act, it will be observed, requires his *previous* consent.

A corporation aggregate may be named executor, and they appoint syndics to receive administration with the Will annexed. Aliens, also, may be executors (Wms. Exors.

Grant of probate to several executors simultaneously or at different times.

184. When several executors are appointed, probate may be granted to them all simultaneously or at different times.

Illustration.

A is an executor of B's Will by express appointment, and C an executor of it by implication. Probate may be granted to A and C at the same time, or to A first and then to C, or to C first and then to A.

Several persons may be appointed executors in several degrees: *e. g.* the testator may make his wife executrix, but if she will not or cannot be executrix then he may substitute his son, if his son will not or cannot be executor then he may substitute his brother (Wms. Exors. 214: *Lane*, 33 L. J. Prob. 185). And several executors

may be appointed with power to the survivor or survivors to appoint others or another (Wms. Exors. 215, and see *Moss* v. *Bardswell*, 6 Jur. N. S. 869).

An executor, as we see from Section 219, may be appointed for a limited purpose. Thus the testator may make A his executor for his property in Bengal, and B for that in Madras, and C for that in Bombay. So he may make A his executor for his property in India and B for that in England (Wms. Exors 219: *Velho* v. *Leite*, 33 L. J. Prob. 107: *Wallich*, 33 L. J. Prob. 87). So he may make A executor for his immoveable property, B for his debts due to him and B for the rest of his moveable property (Wms. Exors. 219: *Pulman*, 9 Jur. N. S. 1204).

Separate probate of Codicil discovered after grant of probate.

185. If a Codicil be 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. If different executors are appointed by the Codicil, the probate of the Will must be revoked, and a new probate granted of the Will and the Codicil together.

Procedure when different executors are appointed by the Codicil.

From Coote, Prob. p. 32. *Langdon* v. *Rooke*, 1 No. Ca. 254: *Wm. Beatson*, 6 No. Ca.

Accrual of representation to surviving executor.

186. 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.

Wms. Exors. 224: *Smith*, 3 Curt. 31.

No right as executor or legatee can be established, unless probate or letters of administration shall have been granted by a competent Court.

187. No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the Province shall have granted probate of the Will under which the right is claimed, or shall have granted letters of administration under Section 180.

Wms. Exors. 254, 255.

And if a Will be made in England and proved there, disposing of goods in India, the executor cannot have action on such probate, but ought to prove the Will here (Wms. Exors. 254).

The usual proof of such grant is the production of the probate or letters of administration. The probate, however, merely operates as the authenticated evidence, and not as the foundation of the executor's title, for he derives all his interest from the Will itself, and the property

of the deceased vests in him from the moment of the testator's death (Wms. Exors. 225).

188. 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.

Probate establishes the Will from testator's death.

And though he should die after any of these acts done, without proving the Will, the acts will stand good. But an executor (see Sec. 187) cannot *maintain* suits before probate unless such as are founded on his *actual* possession, as when the subject of the suit has come wrongfully from his to the defendant's hands, or when the defendant has acquired it by contract with the executor (Wms. Exors. 258, 259). The law is the same with respect to an executor's grantee. In England, though an executor cannot *maintain* suits before probate, he may *commence* them and carry them on to the stage at which the production of the probate becomes necessary. And he may give notice of motion for an injunction (*Newton* v. *Metropolitan Ry. Co.* 1 Drew. & S. 583), and arrest a debtor to the estate (Wms. Exors. 260, 261). Here, however, it would be otherwise, for the first step in the suit is the presentation of a verified plaint, which must show the character in which the plaintiff sues, and all documents on which he relies must be produced in Court when the plaint is presented (Act VIII of 1859, sec. 39).

On the other hand, if the executor have elected to administer, he may, before probate, be sued by the deceased's creditors, whose rights shall not be impeded by the delay (Wms. Exors. 262). So in England, and here in the High Courts, the residuary legatee may sue an executor before probate for an account, and to have the assets secured (*Blewitt* v. *Blewitt*, 1 Younge, 541).

189. Letters of administration cannot be granted to any person who is a minor or is of unsound mind, nor to a married woman without the previous consent of her husband.

Persons to whom letters of administration may not be granted.

See Section 215 as to administration where the sole residuary legatee is a minor.

In England, also, a married woman cannot take administration without her husband's consent, inasmuch as, amongst other reasons, he is required to enter into the administration-bond, which she is incapable of doing (Wms. Exors. 391).

The Act does not exclude an alien from being administrator; nor a bankrupt nor an insolvent: otherwise in England as to bankruptcy (*Hills* v. *Mills*, 1 Salk. 36). Insolvency, too, in the late Supreme Court disqualified for administration (*Mary Jackson*, Morton Dec. 2d. ed. 26).

190. No right to any part of the property of a person who has died intestate can be established in any Court of Justice, unless letters of administration have first been granted by a Court of competent jurisdiction.

No right to intestate's property can be established [illegible] a competent Court.

In reading this Section regard must be had to Section 330 and the powers which it saves to the Administrator General. Act VIII of 1855, Sections 43, 44, authorizes that Officer, in cases where the deceased's effects do not exceed Rs. 500, to grant to any person claiming to be entitled to a principal share of the effects, a certificate entitling him to receive the sum or security therein mentioned; and any such certificate, with a receipt by the certificate-holder, shall be a full discharge for the payment or delivery of such sum or security. And Act XXVI of 1860, Section 2, provides that if in cases falling within Section 43 of Act VIII of 1855 no person claiming to be entitled to a principal share shall within three months obtain such certificate or letter of administration, the Administrator General may administer the estate without letters of administration. If the Administrator General be unwilling to administer, he may grant a certificate to a creditor. See these Sections *in extenso*, infra.

191. 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.

From what period letters of administration entitle administrator to intestate's rights.

192. Letters of administration do not render valid any intermediate acts of the administrator, tending to the diminution or damage of the intestate's estate.

Acts of administrator not validated by letters of administration.

See per Parke B., *Morgan* v. *Thomas*, 8 Exch. 302.

193. When a person appointed an executor has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon the executor to accept or renounce his executorship; except that when one or more of several executors have proved a Will, the Court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved.

Grant of administration where executor has not renounced.

Exception.

See Wms. Exors. 241 : Coote, Prob. 182.

194. The renunciation may be made orally in the presence of the Judge, or by a writing signed by the person renouncing, and when

Form and effect of renunciation of executorship.

made shall preclude him from ever thereafter applying for probate of the Will appointing him executor.

See Wms. Exors. 247.

A letter to the Judge will be sufficient: *Broker* v. *Carter*, Cro. Elix. 92: *Boyle*, 33 L. J. Prob. 109. Or, apparently, the renunciation by a person duly authorised by a power of attorney to renounce, see *Rosser*, 33 L. J. Prob. 155.

An executor cannot in part refuse. He must refuse entirely, or not at all. Nor can he renounce after probate (*Veiga*, 32 L. J. Prob. 9). An agreement to renounce is not recognised (*Hargreaves* v. *Wood*, 32 L. J. Prob. 8).

In England a renouncing executor is incapable of being at any time *after the grant of administration cum testamento annexo* admitted to the executorship. But he may at any time before the grant of such administration retract his renunciation (Wms. Exors. 248).

Procedure where executor renounces or fails to accept within the time limited.

195. If the executor renounce, or fail to accept the executorship within the time limited for the acceptance or refusal thereof, the Will may be proved and letters of administration with a copy of the Will annexed, may be granted to the person who would be entitled to administration in case of intestacy.

If no such person appear and entitle himself to a grant of administration, or if a person so entitling himself fail to give the requisite security, the Court shall grant letters of administration to the Administrator General (Act VIII of 1855, Section 17).

Grant of administration to universal or residuary legatee.

196. When the deceased has made a Will, but has not appointed an executor, or when he has appointed an executor who is legally incapable or refuses to act, or has died before the testator, or before he has proved the Will, or when 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.

Wms. Exors. 403, 404.

The residuary legatee is the testator's choice: he is the next person in his election to the executor. He is, moreover, for obvious reasons interested beyond other legatees in effecting a faithful, complete and speedy administration of the estate (Coote, Prob. 41). If there are

several entitled to the residue administration may be granted to any of them. In England, if granted to a widow as one of the residuary legatees it ought, it should seem, to be limited during widowhood (Wms. Exors. 404 n). Here, however, this seems unnecessary: see Sec. 275.

The rule applies though there be no present prospect of any residue, or though the residuary legatee is only entitled to the residue in trust. (Wms. Exors. 404: Coote, 40).

Right to administration of representative of deceased residuary legatee.

197. 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.

Wms. Exors. 405.

But where the residuary legatee is a mere trustee, upon his death administration is granted not to his representative, but to such person or persons as has or have the beneficial interest in the residue (Wms. Exors. 406).

Grant of administration with will annexed when there is no executor, nor residuary legatee, nor representative of such legatee.

198. 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.

Wms. Exors. 406.

The Administrator General's right is preferable to the creditor's (Act VIII of 1855, Section 9).

to any legatee

199. Letters of administration with the Will annexed shall not be granted to any legatee other than an universal or a residuary legatee, a citation has been issued published in the manner hereinafter mentioned, calling on the next of kin to accept or refuse letters of administration.

The general rule is, that wherever a party has a prior title to a grant, he must be cited before administration is committed to any other person (Wms. Exors. 407).

200. When the deceased has died intestate, 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.

Order in which connections by marriage or consanguinity are entitled to administration.

201. If the deceased has left a widow, administration shall be granted to the widow unless the Court shall see cause to exclude her, either on the ground of some personal disqualification, or because she has no interest in the estate of the deceased.

Administration to be granted to widow unless Court see cause to exclude her.

Illustrations.

(*a*) The widow is a lunatic (*a*), or has committed adultery (*b*), or has been barred by her marriage settlement of all interest in her husband's estate (*c*); there is cause for excluding her from the administration.

So if she have lived separate from her husband (*Lambell* v. 3 Hagg. 568), or if she has deserted his children to lead an immoral life, (*Creed*, 6 Jur. N. S. 590) : or if she have been divorced according to foreign law (*Ryan* v. *Ryan*, 2 Phillim. 332).

(*b*) The widow has married again since the decease of her husband ; this is not good cause for her exclusion.

Webb v. *Needham*, 1 Add. 494.

202. If the Judge think 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.

Persons associated with widow in administration.

Wms. Exors 363 : Coote, Prob. 160.

203. If there be no widow, or if the Court see 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 shall be

Grant of administration where no widow, or widow excluded.

Proviso.

(*a*) *Williams*, 3 Hagg. E. R. 217. (*b*) *Pettifer* v. *James*, Bunb. 16: S. & T. 489. (*c*) *Walker* v. *Carless*, 2 Ca. t. Lee, [illegible]

one of the class of persons so entitled, she shall be solely entitled to administration.

The right to the administration of the effects follows the right to the property in them (*Gill*, 1 Hagg. 342 : *Dadoo Mania*, 1 Ind. Jur. 59, 60).

Deceased's kindred of equal degree, equally entitled to administration.

204. Those who stand in equal degree of kindred to the deceased, are equally entitled to administration.

Right of widower to administration of wife's estate.

205. 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.

Of course when the marriage took place under one of the civil disabilities, such as prior marriage, want of age, idiocy and the like, the marriage is void *ab initio*, and consequently the husband cannot be entitled to take out administration (Wms. Exors. 358, 359).

Grant of administration to a creditor.

206. When there is no person connected with the deceased by marriage or consanguinity who is entitled to letters of administration, and willing to act, they may be granted to a creditor.

But by Act VIII of 1855, Section 9, preference must be given to the Administrator General.

The ground for granting administration to a creditor is that he may be enabled to recover his debt. In the late Supreme and present High Court of Bengal the grant is made to the *principal* creditor in degree, not in sum (*Peacock*, Mort. 6 : *Kellican*, Mort. 12 : *Vansittart*, Mort. 21). But no such distinction is made in England or will be made under this Act. It is indifferent what the amount is, except when two or more creditors contend *inter se* for a grant (Coote, Prob. 82). Then the grant should be made to the creditor for the largest amount (*Lovejoy*, Mort. 14. But see *Rocke*, ibid. 3). The creditor should make a declaration of the date on which the debt became due, that the Court may see that it is not barred by the Act of limitation (*Rawlinson* v. *Burnell*, 3 S. & T. 479).

In England the Court will not grant to a person who has bought up a debt after the intestate's death (Coote, Prob. 83 : *Day* v. *Thompson*, 32 L. J. Prob. 193). Otherwise as to the assignee in bankruptcy (*Dowsward* v. *Dickenson*, 34 L. J. Prob. 4).

The Court sometimes grants administration to more creditors than one, but it prefers that one should be fixed upon; and if creditors contend, and their pretensions are equally balanced, the administration will be granted to a third person being a creditor whom they may all agree in nominating for that purpose (Coote, Prob. 83).

The attornies of a creditor to recover a debt are not entitled to letters of administration of the goods of the deceased (*Frampton*, 9 Jur. N. S. 755). But administration may be granted to the executors of a creditor (*Jones* v. *Beytagh*, 3 Phillim. 635).

See too *Andrews* v. *Murphy* 30 L. J. Prob. 57; and for an instance of a limited grant to a creditor, *Clarkington*, 10 W. R.

207. Where the deceased has left property in British India, letters of administration must be granted according to the foregoing rules, although he may have been a domiciled inhabitant of a country in which the law relating to testate and intestate succession differs from the law of British India.

Where deceased has left property in British India, administration must be granted according to the foregoing rules.

So in England the court of administration is regulated by the *lex loci rei sitæ*, 1 Jarm. Wills, 2, note

PART XXX.

Of Limited Grants.

(*a*). *Grants limited in Duration.*

208. When the Will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy or the draft of the Will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it be produced.

Probate of copy or draft of lost Will.

See Coote, 92, 93: *Butts*, 2 Spinks, 59.
As to the verification in such cases, see infra.

209. When the Will has been lost or destroyed and no copy has been made nor the draft preserved, probate may be granted of its contents, if they can be established by evidence.

Probate of contents of lost or destroyed Will.

'Destroyed,' *i. e.* after the testator's death, or in his lifetime by another person without his consent, or by himself without intention. Coote, Prob. 93.

'Evidence:' this includes parol evidence. The validity of the execution must be shewn as well as the substance or contents of the Will (*Gardner*, 1 Swab. & T. 110). "The witnesses to establish these points must be the subscribed witnesses, or the drawer and writer, or persons who have read the Will and have made themselves cognizant more or less of its tenor. Proof or vehement presumption must be adduced that the Will was in existence after the testator's death; or, if that cannot be shewn, that it is impossible that the testator could have himself destroyed it, or caused it to be destroyed" (Coote, Prob. 93).

If a Codicil has been similarly lost or destroyed its contents may be proved in the same manner; and where the contents of a lost will, in existence after the testator's death, are unknown, the Court will grant administration limited until the original Will be found and brought in (*Campbell*, 2 Hagg. 555).

Probate of copy where original exists.

210. When the Will is in the possession of a person residing out of the Province in which application for probate is made, who has refused 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 be produced.

Coote, Prob. 95 : *Ripley*, 1 Sw. & T. 68.

In England in such a case the executor should make an affidavit shewing the manner in which the Will or Codicil was transmitted, that a better or more authentic copy does not exist in Great Britain; and that it is essential or necessary for the interests of the estate that probate be forthwith granted without waiting the arrival of the original or a better or more authentic copy; and if the copy has been transmitted to a person other than the executor, he is required to join the executor in the affidavit (Coote, Prob. 95.)

Administration until the Will be produced.

211. 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, be produced.

See Coote, Prob. 96 : *Metcalfe*, 1 Add. 343 : Wms. Exors. 448, 449.

(*b.*) *Grants for the Use and Benefit of others having Right.*

Administration, with the Will annexed, to Attorney of an absent executor.

212. When any executor is absent from the Province in which application is made, and there is no executor within the Province willing to act, letters of administration, with the Will annexed, may be granted to the Attorney 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 *Roberts*, 1 S. & T. 64, a grant was made to the nephew of the party entitled who, although within the jurisdiction, was of advanced age and unwilling to take upon himself the burden of administration.

But administration is never granted to A for the use of B when B is within the jurisdiction and able to take the grant (*Burch*, 2 S. & T. 139).

It is not necessary that the attorney reside in the Province, provided his sureties reside therein (*Leeson*, 1 Sw. & T. 463). But it has been held that if the principal and attorney reside abroad in the same place, a grant will be refused to the attorney (Coote, Prob. 97 n.) It matters not that the executor has been resident within the jurisdiction since the testator's death and in a situation to apply for probate (*Judson*, 2 Tayl. & B. 137).

The practice in England is that if the attorney be appointed by *one* only of two or more executors, no grant will be made to the attorney until the other executor or executors has or have renounced or been cited, as no power of granting probate to the executor or executors can be reserved (Coote, Prob. 97).

If the power of attorney contain a power of substitution, and the attorney exercise it, the substitute may take the grant (Coote, Prob. 98).

The power of attorney is filed in court and the grant is determined by the executor returning to this country and taking probate (Coote, Prob. 98).

Administration, with the Will annexed, to the Attorney of an absent person, who, if present, would be entitled to administer.

213. When any person whom, if present, letters of administration with the Will annexed might be granted, is absent from the Province, letters of administration with the Will annexed may be granted to his Attorney, limited as above-mentioned.

Administration to Attorney of absent person entitled to administer in case of intestacy.

214. When a person entitled to administration in case of intestacy is absent from the Province, and no person equally entitled is willing to act, letters of administration may be granted to the Attorney of the absent person, limited as before mentioned.

The attorney of one of several residuary legatees may take out administration with the Will annexed, without notice to the other residuary legatees, and the attorney of one of several next of kin may take administration in like manner without notice to the other next of kin (Coote, Prob. 98).

Administration during minority.

215. When a minor is sole executor or sole residuary legatee, letters of administration, with the Will annexed, may be granted to the legal guardian of such minor or to such other person as the Court shall think fit until the minor shall have completed the age of eighteen years, at which period and not before, probate of the Will shall be granted to him.

See above, Section 183: Wms. Exors. 201: Coote, Prob. 99. Where there are two guardians, one appointed by the father's Will, the other the guardian of the minor's estate, preference would, as in England, probably be given to the former.

Where there are several testamentary guardians, the Court will not grant to one without the consent of the others (Coote, Prob. 100). When the guardian is appointed by a competent foreign Court, he must prove his appointment by a copy of the decree by which he was nominated, authenticated by the seal of the Court (*Jones*, 28 L. J. Prob. 80).

No power seems given to the Court to assign a guardian.

Administration until one of several minor executors or residuary legatees attains majority.

216. When there are two or more minor executors and no executor who has attained majority, or two or more residuary legatees and no residuary legatee who has attained majority, the grant shall be limited until one of them shall have completed the age of eighteen years.

See Coote, Prob. 103.

Administration for use and benefit of lunatic *jus habens*.

217. 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 rule for the distribution of intestates' estates be 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 be no such person, to such other person as the Court may think fit to appoint, for the use and benefit of the lunatic until he shall become of sound mind.

Coote, Prob. 105, 106: Wms. Exors. 451, 452.

'A lunatic.' The word 'lunatic' is not defined in this Act: in those next hereinafter mentioned it is defined to mean any person *found by due course of law* to be of unsound mind and incapable of managing his affairs. But the Indian legislature did not intend to vary from the home-practice of granting administration for the use and benefit of the lunatic, though the person alleged to be so has not been found a lunatic by inquisition. When such a case occurs the Court requires affidavits, stating the fact of lunacy and that no inquisition has been had, and of course no Committee appointed. The Court then grants administration to the next of kin of the lunatic for the use and benefit of the lunatic pending the lunacy; and it requires sureties in double the amount of the property, and such sureties must justify (Wms. Exors., 452). The same practice prevails if the *jus habens* be imbecile, or mentally unsound. If there be two Committees, both must take, or one must renounce.

'Committed by competent authority': see as to lunatics in the Sec. 9 of Act XXXV of 1858 (*An Act to make better provision for the care of the estates of lunatics not subject to the jurisdiction of the Supreme Courts of Judicature*) and as to other lunatics, Act XXXIV of 1858, Secs. 12, 24.

When the intestate's widow is a lunatic, administration may be granted either to the Committee of her estate, if there be one, or to her next of kin for her use or benefit; or the Court, under Section 201, may pass her over and grant to the intestate's next of kin absolutely (*Williams*, 3 Hagg. E. R. 217: Coote, Prob. 107).

Administration *pendente lite*.

218. Pending any suit touching the validity of the Will of a deceased person, 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.

This is (with a few verbal alterations) Section 70 of the Court of Probate Act, 1857 (20 and 21 Vict., c. 77). In England the Court never grants administration *pendente lite* if the application be opposed, except upon proof that such a grant is necessary for the protection of the estate (Coote, Prob. 108). The Court will make the grant to one of the parties with the consent of the other, or to a nominee of both when they agree in their nomination, or jointly to a nominee of each. If the parties cannot agree, the Court prefers one of their nominees, or may appoint a nominee of its own (Coote, Prob. 109).

The grant is made for the benefit of such persons as shall thereafter appear by law to be entitled to the deceased's estate and effects, and is limited to the dependence of the suit. It determines on the termination of the suit; but not upon the suit being carried up by appeal to a superior Court (Coote, Prob. 109).

(c.) Grants for Special Purposes.

Probate limited to purpose specified in the Will.

219. If an executor be appointed for any limited purpose specified in the Will, the probate shall be limited to that purpose, and if he should appoint an Attorney to take administration on his behalf, the letters of administration with the Will annexed shall accordingly be limited.

See Coote, Prob. 110.

Administration with the Will annexed limited to a particular purpose.

220. If an executor appointed generally give an authority to an Attorney 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.

Coote, Prob. 115.

Administration limited to property in which a person has a beneficial interest.

221. 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 person beneficially interested in the property, or to some other person on his behalf.

Coote, Prob. 116.

If the property be Government securities, the limitation will include interest due and to grow due thereon. If it be leasehold, the grant will be limited to assigning the deceased's interest in the term of years remaining unexpired.

If the beneficial owners are authorised to appoint new trustees in the stead of the deceased trustee, the Court will grant administration to the nominees of such persons, limited to transferring the property to the new trustees, and for the purpose of carrying the trusts into execution. If no such provision exists, the Court grants to the sole beneficiary, or if there be more than one, to one of them with the consent of the others, or to a nominee or third person elected or appointed by all of them (*Pegg* v. *Chamberlain*, 1 Sw. & T. 528 : Coote, Prob. 116, 117).

If only some of the parties elect, the grant will be made to their nominee to the extent of their shares, and the dissentient parties may afterwards apply for a grant limited to the remaining shares. If the party applying be only entitled to a life interest in the fund, the grant will be limited to the receipt of the dividends or other produce of the fund during the annuitant's life (Coote, Prob. 117).

Administration limited to a suit.

222. 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 nominee 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 cause or suit, and until a final decree shall be made therein and carried into complete execution.

Coote, Prob. 118: *Turner*, 33 L. J. Prob. 180: Wms. Exors. 456—459.

Under this form of administration the grantee has only authority to carry on the suit, and has no right to receive the fruits of it (*Dodgson*, 1 Swab. & T. 260). But if it be required, the Court will allow a further limitation, viz., to receive any sum which shall be pronounced by the final order or decree to be due and payable with interest (Coote, Prob. 119).

Administration limited to the purpose of becoming a party to a suit to be brought against administrator.

223. 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 absent from the Province within which the Court that has granted the probate or letters of administration is situate, it shall be lawful for such Court to 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 or administrator, and carrying the decree which may be made therein into effect.

This is founded on the first and third Sections of Stat. 38 Geo. 3, c. 87 (An Act for the Administration of Assets in cases where the Executor to whom Probate has been granted is out of the Realm). The object is to provide a method of proceeding in the Courts of the Province where the representative is out of the jurisdiction, and to carry its decrees into effect, so that a suit so instituted does not end on his return, but is to go on, he being made a party; and then the temporary administrator may account, have his costs and be discharged (*Rainsford* v. *Taynton*, 7 Ves. 460). Payments made to such temporary administrator are good even after the return, if the party paying had no notice thereof (*Clare* v. *Hodges*, cited 2 P. W. 580). The authority of an administrator appointed under this section becomes voidable, but not void, on the death of the absent representative (*Taynton* v. *Hannay*, 3 Bos. & P. 26). See further 1 Chitty's Stat. 1140.

Administration limited to collection and preservation of deceased's property.

224. In any case in which it may appear necessary for preserving the property of a deceased person, the Court within whose district 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 giving discharges for debts due to his estate, subject to the directions of the Court.

See Act XIX of 1841 (*an Act for the protection of moveable and immoveable property against wrongful possession in cases of successions*).

The Court is not bound to wait for the application of persons entitled to the estate (Coote, Prob. 121, 122 : *Clarkington*, 2 Sw. & T. 382).

The grant may be limited to any part of the deceased's property within the jurisdiction, *e. g.*, to sell a ship, to collect and get in outstanding debts: to sell a cargo, to endorse and receive the amount of certain bills of exchange, &c.

Appointment as administrator, of person other than the one who under ordinary circumstances would be entitled to administration.

225. 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 shall, at the time of the death of such person, be resident out of the Province, and it shall appear 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 under ordinary circumstances would be entitled to a grant of administration, it shall be lawful for the Judge, in his discretion, having regard to consanguinity, amount of interest, the safety of the estate, and probability that it will be properly administered, to appoint such person as he shall think fit to be administrator, and in every such case letters of administration may be limited or not as the Judge shall think fit.

This is founded on Section 73 of the Court of Probate Act, 1857. The applicant will probably have to prove that the appointment is 'necessary or convenient' *by reason of the insolvency of the estate or other special circumstances*, though the words italicised, which occur in the Statute, are omitted in the Act.

(d.) Grants with Exception.

Probate or administration with the Will annexed, subject to exception.

226. 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.

Coote, Prob. 125, 126.

For example, if a testator appoint an executor for a special purpose or a specific fund only, and appoint an executor for all other purposes, the latter may take probate except that purpose or fund. Or, if there be no such other executor, the residuary legatee may take administration with the Will annexed of the deceased's effects, with the same exception (Coote, Prob. 126).

227. Whenever the nature of the case requires that an exception be made, letters of administration shall be granted subject to such exception.

Administration with exception.

Where a testator has made his Will for a particular or limited purpose only, and has died intestate as to all other property, his next of kin, without waiting for the executor to take the limited probate, may take administration of all the deceased's effects, save what the testator has himself excepted (Coote, Prob. 126).

(e.) Grants of the Rest.

228. Whenever a grant, with exception, of probate or 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 may be, of the rest of the deceased's estate.

Probate or administration of the rest.

This is technically called a grant *cæterorum*. It is made when the testator has appointed an executor for a special purpose or a specific fund together with another executor for all other purposes and effects, and the first mentioned executor has taken his limited probate, the other may take probate of the rest of the testator's effects. So where the deceased has made a Will and appointed an executor for a special purpose, or for a specific fund or property only, and has died intestate in all other respects, his next of kin, after the executor has taken a limited probate of the Will, are entitled to administration of the rest (Coote, Prob. 127, 128).

The Act does not expressly mention a grant *cæterorum with the Will annexed*. But there seems no doubt that here, as in England, if a limited grant has been previously made (*viz.* on the renunciation of the executor) the residuary legatee may at any time come in and take administration, with the Will annexed, of the rest of the testator's effects (Coote, Prob. 127).

(f) Grants of Effects unadministered.

229. If the executor to whom probate has been granted have 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.

Grant of effects unadministered.

The species of grant technically called a "grant *de bonis non*" is in England made only when the executorship has not been legally transmitted. Under this Act, however, the probate necessarily expires with the death of the grantee: and the absurd and dangerous doctrine that an executor on taking probate of his own testator's Will becomes

executor *ipso facto* not only of that Will, but also of the Will of any testator of whom that other was sole or surviving executor and so on *ad infinitum* upwards, has been wisely discarded by the Indian Legislature.

Rules as to grants of effects unadministered.

230. In granting letters of administration 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.

Coote, Prob. 129.

But this rule does not bind the Court to perpetuate an error. Where a correction has become necessary it will make the necessary variation. Thus in England, where the Probate Court erroneously considering that a testator had not disposed of his residuary estate, accordingly granted administration with the Will annexed to one of next of kin of a testator, it afterwards granted administration *de bonis non* to the person whom the Court of Chancery had in the meantime decided to be a residuary legatee (*Warren* v. *Kelson*, 1 Sw. & T. 290).

(*ff*) *Supplemental Grants.*

Administration when a limited grant has expired, and there is still some part of the estate unadministered.

231. When a limited grant has expired by effluxion of time, or the happening of the event or contingency on which it was limited, and there is still some part of the deceased's estate unadministered, letters of administration shall be granted to those persons to whom original grants might have been made.

A supplemental grant, or as it is commonly called, a *cessate* grant, is distinguished from a grant *de bonis non* as being a regrant of the whole of the deceased's personal estate as it was embraced in the original grant (Coote, Prob. 136).

The following Illustrations of the rule laid down in this Section are taken from Coote, Prob. 137, 138.

(*a*) An executor appointed for a year takes probate, the grant ceases on the expiration of the year, and the substituted executor, if there be one, takes probate.

(*b*) Administration with the Will annexed is granted for the use and benefit of a lunatic executor. The executor becomes sane. The grant ceases, and he may take probate of the Will.

(*c*) Administration with the Will annexed is granted to a guardian for the use of an executor during his minority. The executor completes the age of 18. The administration ceases and probate is granted to him.

(*d*) Administration *c. t. a* is granted to a guardian as in the last Illustration. The guardian dies during the executor's minority. The administration ceases, and further letters will be granted to a new guardian.

(*e*) Administration *c. t. a.* is granted to the attorney of the executor. The attorney dies or the executor applies for and obtains probate. The administration

(g) *Alteration in Grants.*

What errors may be rectified by the Court.

232. 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.

Coote, Prob. 140: Court of Probate Act, 1858, Section 17.
Where the original grant is lost or inaccessible a notation or alteration is made on an exemplification of it (Coote, Prob. 143).

Procedure where Cod- discovered after of administration Will annexed.

233. If, after the grant of letters of administration with the Will annexed, a Codicil be discovered, it may be added to the grant on due proof and identification, and the grant altered and amended accordingly.

When a codicil is found after probate of a Will is granted the English practice is to grant a separate probate of the codicil and not to alter or amend the first probate. But where the appointment of the executors under the Will is annulled or varied by the codicil, the probate must be brought in and revoked, and probate will be granted anew of the Will and codicil. Should an unattested or unexecuted paper incorporated by the testator in his Will, have been omitted from probate, the probate may be amended by engrossing the former into it (Coote, Prob. 143, 144).

(h) *Revocation of Grants.*

Revocation or annulment for just cause, of grant of probate or administration.

234. The grant of probate or letters of administration may be revoked or annulled for just cause.

"The Court, as having the fullest authority on the subject-matter, is not necessarily or absolutely *functa officio*, even after a grant has been made, for the Court possesses and exercises, when it becomes necessary, the power of revoking or annulling for just cause any grants which it has made. And in so doing it only resumes into its own hands the powers which it parted with on false or inaccurate suggestions" (Coote, Prob. 150).

"Just cause."

Explanation.—Just cause is—1st, that the proceedings to obtain the grant were defective in substance; 2nd, that the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; 3rd, that

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; 4th, that the grant has become useless and inoperative through circumstances.

Illustrations.

(*a.*) The Court by which the grant was made had no jurisdiction.

(*b.*) The grant was made without citing parties who ought to have been cited.

(*c.*) The Will of which probate was obtained was forged or revoked.

(*d.*) 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.

(*e.*) A has taken administration to the estate of B as if he had died intestate, but a Will has since been discovered.

(*f*) Since probate was granted, a later Will has been discovered.

(*g.*) Since probate was granted, a Codicil has been discovered, which revokes or adds to the appointment of executors under the Will.

(*h.*) The person to whom probate was or letters of administration were granted has subsequently become of unsound mind.

Other Illustrations are—

(*i*) An executor being a minor obtains probate of the Will by which he is appointed, on the tacit suggestion or understanding that he is of full age.

(*j*) An executor obtains probate of the Will of a living person (*Chas. Jas. Napier*, 1 Phillim. 83).

(*k*) Bastards claiming to be an intestate's next of kin have obtained administration to his estate.

(*l*) One of two executors proves a Will and becomes a lunatic, the other then takes probate. This will be revoked and a grant made to the sane executor, reserving power to make a grant to the lunatic executor whenever he shall become of sound mind.

(*m*) A tenant for life of a fund, after taking administration thereto, assigns his interest therein to the remainder man. A grant will be made to the latter (*Ferrier*, 1 Hagg. 243).

PART XXXI.

Of the Practice in granting and revoking Probates and Letters of Administration.

Jurisdiction of District Judge in granting and revoking probates and letters of administration.

235. The District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his District.

District Judge's powers as to the granting of probate and administration.

236. 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 or proceeding depending in his Court.

Light may possibly be thrown on this somewhat obscure Section by comparing Section 25 of the Court of Probate Act, 1857, by which it seems to have been suggested: "The Court of Probate shall have the like powers, jurisdiction and authority for enforcing the attendance of persons required by it as aforesaid, and for punishing persons failing, neglecting or refusing to produce deeds, evidences or writings, or refusing to appear, or to be sworn or make affirmation or declaration, or to give evidence, or guilty of contempt, and generally for enforcing all orders, decrees and judgments made or given by the Court under this Act, and otherwise in relation to the matters to be enquired into and done by or under the orders of the Court under this Act as are by law vested in the High Court of Chancery for such purposes in relation to any suit or matter depending in such Court."

District Judge may order any person to produce testamentary papers.

237. 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 possession or under the control of such person; and if it be 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, and such person shall be bound to answer such questions 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, and the costs of the proceeding shall be in the discretion of the Judge.

This is nearly the 27th Section of the Court of Probate Act, 1857, the words 'punishment under the Indian Penal Code' being substituted for 'the like process of contempt.'

In the Commissioners' draft Act here followed a Section, taken from 20 & 21 Vic. c. 77, s. 28, providing a punishment for the forgery of the Court seal, or the Judge's signature. The offence being supposed to be sufficiently met by the Indian Penal Code, the Section in question was struck out in Committee.

Proceedings of District Judge's Court in relation to probate and administration.

238. The proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, except as hereinafter otherwise provided, be regulated so far as the circumstances of the case will admit by the Code of Civil Procedure.

'The Court of the District Judge.' 'District Judge' is defined by Sec. 3 to mean "the Judge of a principal Civil Court of original jurisdiction." This Section 238, then, with Sec. 261, would apparently apply to the High Court on its original side—a matter of much importance, first, because it is obviously desirable to have uniformity in the practice as to granting probate and letters of administration; next, because the present testamentary and intestate procedure of the High Court is the same as that of the late Supreme Court, and is as barbarous, expensive and tedious as that which prevailed in matters and causes testamentary in England before the passing of the Court of Probate Act, 1857. But had the Indian Legislature power to effect this change? The writer submits that it had. Clause 37 of the Charter for the High Court of Judicature of Bengal (it is the same for the other two High Courts) ordains that the High Court's *proceedings* in the exercise of its Intestate and Testamentary jurisdiction "shall be regulated by the rules relating to the granting of probates and letters of administration contained in the" Letters Patent of Geo. III, "and by such further or other rules as are now in force:" the clause then ordains that in Matrimonial matters the *proceedings* shall be regulated by the rules of the Divorce Court; and that, save as hereinbefore in this clause otherwise provided, the *proceedings* in Civil suits shall be regulated by the Code of Civil Procedure, "*provided always that the regulation of such proceedings* respectively *shall be subject to such laws and regulations as shall be hereafter made by the Governor General in Council in relation to such proceedings* respectively." It may be said that in this proviso the expression 'such proceedings' means proceedings in Civil suits other than testamentary and matrimonial suits. But what then would be the meaning of the word 'respectively' which occurs twice in the proviso? It must work somewhat, and be not idle and frivolous, contrary to the maxim *verba aliquid operari debent: verba cum effectu sunt accipienda* (per Willes J. *Thellusson* v. *Rendlesham*, 7 H. L. Ca. 461). To the writer it seems clearly to refer to each of the three species of proceedings mentioned in the Section. If so, the Indian Legislature possesses a power to regulate the practice of the High Court in granting probates and

letters of administration. Then, has the Legislature exercised this power? Section 264 seems the only part of the Act opposed to an answer in the affirmative, for in that Section 'District Judge' could hardly apply to a High Court Judge sitting on the original side. But here would apply the saving clause in Sec. 3, 'unless there be something repugnant in the subject or context.' And, on the whole, it is submitted that the Act changes the testamentary and intestate procedure of the High Courts.

239. Until probate be granted of the Will of a deceased person, or an administrator of his estate be constituted, the District Judge within whose jurisdiction any part of the property of the deceased person is situate, is authorized 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 shall see fit, to appoint an officer to take and keep possession of the property.

When and how District Judge is to interfere for the protection of property.

This appears suggested by the fourth Section of Act XIX of 1841, (An Act for the protection of moveable and immoveable property against wrongful possession in cases of successions). As to the Judge's authority in respect to an intestate's *moveable* property when there are no claimants, see Ben. Reg. V of 1799, Section 7, and XV of 1806, Section 6, Mad. Reg. III of 1802, Section 16, cl. 7, and Bomb. Reg. VIII of 1827, Section 10.

This Section must be made to harmonize with Section 230 infra.

240. Probate of the Will or letters of administration to the estate of a deceased person may be granted by the District Judge under the seal of his Court, if it shall appear by a petition verified as hereinafter mentioned, 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, moveable or immoveable, within the jurisdiction of the Judge.

Probate or administration may be granted by District Judge, when testator or intestate at his death had a fixed dwelling or any property within the jurisdiction.

241. 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

When application is made to the Judge of a District in which the deceased had no fixed abode.

refuse the application, if in his judgment 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.

Conclusiveness of probate or letters of administration.

242. Probate or letters of administration shall have effect over all the property and estate, moveable or immoveable, of the deceased, throughout the Province in which the same is 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 shall have been granted.

Conclusiveness of application for probate or administration, made and

243. The application for probate or letters of administration, if made and verified in the manner hereinafter mentioned, shall be conclusive for the purpose of authorizing the grant of probate or administration, and no such grant shall be impeached, by reason 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.

Petition for probate.

244. Application for probate shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the Will annexed, and stating the time of the testator's death, that the writing annexed is his last Will and testament, that it was duly executed, and that the petitioner is the executor therein named; and in addition to these particulars, when the application is to the District Judge, the petition shall further state that the deceased at the time of his death had his fixed place of abode, or

had some property, moveable or immoveable, situate within the jurisdiction of the Judge.

As to the stamp on the petition, see the Schedule, where, it is submitted, the expression 'value of the estate' must be taken to mean—not value of the *whole* estate of the deceased but—value of the property within the jurisdiction of the District Judge likely to come to the petitioner's hands. So in England where two probates are taken out, the one in the province of Canterbury in respect of assets there, and the other in the province of York in respect of assets there, the duty on each probate is only in respect of the amount in each province (Wms. Exors. 544). So too in England assets situate abroad are never taken into account (13 Jur 624) Desperate and doubtful debts need not be included in the amount for which duty is paid.

The amount of the stamp may be of great importance, for no instrument not properly stamped can be given in evidence. Hence where an executor or administrator brings a suit in which it is necessary for him to prove his representative character, it his case shews that he sues for a greater value than is covered by the stamp of his probate and letters of administration, he cannot recover (*Hunt* v. *Stevens*, 3 Taunt. 113). Nor will it make any difference that he is suing for a doubtful claim (Wms. Exors. 543).

245. In cases wherein the Will 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 be 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:—"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."

In what cases translation of Will to be annexed to petition.

Verification of translation made by any person other than the Court translator.

As to the fee for the translation, see the Schedule.

In England the affidavit from a subscribing witness is required only when there is no attestation clause, or there is a clause which does not state a performance of all the prescribed ceremonies.

'When procurable.' So in England the rule requiring the witness' affidavit may be dispensed with if the witnesses, after diligent inquiry, are not forthcoming (Wms. Exors. 297).

Where it appears from the verification of the witness (the attestation clause being imperfect) that the Will was not properly attested, the Court cannot decree administration to pass to the property of

deceased *as dead intestate*, for there might be collusion. The Court simply rejects the petition for probate, leaving the parties to take out administration as they think fit.

246. Applications for letters of administration shall be made by petition distinctly written as aforesaid, and stating the time and place of the deceased's death, the family or other relatives of the deceased, and their respective residences, the right in which the petitioner claims, that the deceased left some property within the jurisdiction of the District Judge to whom the application is made, and the amount of assets which are likely to come to the petitioner's hands.

Petition for letters of administration.

247. 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 following manner or to the like effect :—

Petition for probate or letters of administration to be signed and verified.

"I (*A B*), the petitioner in the above petition, declare that what is stated therein is true to the best of my information and belief."

As to the stamp on the petition, see the Schedule, and note on Section 244. In the case of a petition for administration the stamp should cover the value of the assets as it stood, not merely at the time of the death of the deceased, but also at the date of the grant of letters (Wms. Exors. 544).

248. 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 :—

Verification of petition for probate, by one of the witnesses to the Will.

"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 (*as the case may be*), (*or* that the said testator acknowledged the writing annexed to the above petition to be his last Will and testament in my presence)."

249. If any petition or declaration which is hereby required to be verified shall contain any averment which the person making the verification knows or believes to be false, such person shall be subject to punishment according to the provisions of the law for the time being in force for the punishment of giving or fabricating false evidence.

for averment in petition or declaration.

See the Indian Penal Code, Section 193.

250. In all cases it shall be lawful for the District Judge, if he shall think proper, to examine the petitioner in person, upon oath or solemn affirmation, and also to require further evidence of the due execution of the Will, or the right of the petitioner to the letters of administration, as the case may be, and to 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. 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 issuing the same may direct.

and require further evidence, and issue citations to inspect the proceedings.

Publication of citation.

The Act contains no express power to examine persons at a distance under commission. But Section 238, in conjunction with Section 175 of Act VIII of 1859, appears to confer the necessary power.

The citation must bear a stamp of one rupee: see the Schedule.

251. Caveats against the grant of probate or administration may be lodged with the District Judge; and immediately on a caveat being entered with the District Judge, a copy thereof shall be given to any other Judge to whom it may appear to the District Judge expedient to transmit the same.

Caveat against grant of probate or administration.

Thus any person having an interest may prevent a grant being issued without notice to himself. There seems no limit to the time during which a *caveat* remains in force. In England it remains in force for six months only, but may be renewed from time to time.

252. The caveat shall be to the following effect:—"Let nothing be done in the matter of the estate of A B, late of , deceased, who died on the day of at without notice to C D of ".

Form of caveat.

"C D" apparently may be either the party having interest, or his proctor, attorney or vakeel

The caveat must bear a four-rupee stamp

253. 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 to whom the application has been made, until after such notice to the person by whom the same has been entered as the Court shall think reasonable.

After entry of caveat, proceeding to be on the petition until after notice to the caveator

254. When it shall appear to the Judge that probate of a Will should be granted, he will grant the same under the seal of his Court in manner following:—

Grant of probate to be under seal of the Court.

"I, Judge of the District of hereby make known that on the day of in the year the last Will of late of , a copy whereof is hereunto annexed, was proved and registered before me, and that administration of the property and credits of the said deceased, and in any way concerning his Will, was granted to the executor in the said Will named, he having undertaken to administer the same, and to make a true inventory of the said property and credits, and to exhibit the same at or before the expiration of a year next ensuing, and also to render a true account thereof."

Form of such grant

The probate must bear a stamp of eight rupees. See the Schedule

255. And wherever it shall appear to the District Judge that letters of administration to the estate of a person deceased, with or without a copy of the Will annexed, should be granted, he will grant the same under the seal of his Court in manner following :—

Grant of letters of administration to be under seal of Court.

"I, , Judge of the District of , hereby make known that on the day of letters of administration (with *or* without the Will annexed, *as the case may be*) of the property and credits of , late of , deceased, were granted to , the father (*or as the case may be*) of the deceased, he having undertaken to administer the same, and to make a true inventory of the said property and credits, and to exhibit the same in this Court at or before the expiration of one year next ensuing, and also to render a true account thereof."

Form of such grant.

The letters must bear a stamp of eight rupees See the Schedule
As to the Inventory mentioned in this and Section 254 see Section 277 *infra*.

256. Every person to whom any grant of administration shall be committed shall give a bond to the Judge of the District Court to enure for the benefit of the Judge for the time being, with one or more surety or sureties, engaging for the due collection, getting in, and administering the estate of the deceased, which bond shall be in such form as the Judge shall from time to time by any general or special order direct.

Administration-bond.

This is, with slight verbal alteration, 20 & 21 Vic. c. 77, Sec 81. The bond must bear a stamp of eight rupees and may be in the following form :—

We A. B. of C. D. of and G. F. of are bound unto G. H., Esq., the Judge of the District Court of in the sum of Rupees [*double the amount of the assets likely to come to the Administrator's hands*] to be paid to the said G. H., or the Judge of the said Court for the time being, for which payment we bind ourselves and each of us and any two of us and the heirs, executors,

, of us and of each of us and of any two of us (*a*) and respectively. Dated the day of 186 .

The engagement of this bond is such that if the abovenamed A. B, the person appointed by the abovenamed G. H., Esq., under the Indian Succession Act, 1865, to be the administrator of the estate of I. K. late of deceased, who died on the day of 186 do make a true inventory of all the estate of the said deceased which has or shall come to his possession, power or knowledge, and do exhibit the same into the said Court on or before the day of 18 [*the last day of the year next following the date of the grant*], and the same estate and all other the estate of the said deceased at the time of his death which at any time after shall come into the possession or power of the said A. B., do administer according to law (that is to say) do pay the debts which he owed at his decease, and further do render a true account of his said administration whenever by law required so to do, and all the residue of the said estate do pay unto such person or persons as shall be entitled thereto under the said Act; and if it shall hereafter appear that any last Will was made by the said deceased and the executor or executors or other persons therein named do exhibit the same into the same Court, if the said A. B. being thereunto required do render and deliver the said letters of administration (approbation of such Will being first had and made) in the said Court: then this obligation to be void or else to remain in full force.

A. B.
C. D.
E. F.

Signed by the said A. B. C. D. and E. F. in the presence of

The Administrator General, under Section 8 of Act VIII of 1855, is exempted from entering into any administration bond or giving other security on the grant of letters of administration to him in virtue of his office.

The Act gives no power to the Court to dispense with the sureties. Otherwise in England (*De la Farque*, 2 S. & T. 631).

Assignment of administration-bond.

257. 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 own name as if the same had been originally given to him instead of to the Judge of the Court, and shall be entitled to recover thereon as trustee for all persons inter-

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to name the executors or administrators of the obligors —where the parties are domiciled in British India—as all

l pl. 69), moveable

or adminis-

to name

ested, the full amount recoverable in respect of any breach thereof.

This is modelled in 20 & 21 Vic. c. 77, Sec. 83, see *Young* v. *Oxley*, 1 S. & T. 26, and for instances of assigning bond, *Bawden* 3 S. & T. 25: *Baker* v. *Brooks*, ibid. 32. In the Probate Court the practice is to move for a rule *nisi* calling on the sureties to shew cause why one of the Registrars of the Court should not be ordered to assign the bond to a person named in such rule (*Jones*, 3 Sw. & T. 28). And here in the late Supreme Court the practice was for the Court to refuse to put the bond in suit till citations had been issued to the sureties (*Saunders*, Mort. 21; and see *Burroughs* v. *Chisholm*, East's Notes, case 50, 2 Morl. Dig. 72).

Probate not to be granted until after seven days, and letters of administration until after fourteen days, from the testator's or intestate's death.

258. 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.

The English rule (43 of 1862) provides that "no probate or letters of administration with the Will annexed shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the Judge or by order of two of the Registrars," *i. e.* the probate may not issue at an earlier date than the eighth day after the death of the testator, the day of his death being included (Coote, Prob. 32).

Filing of original Wills of which probate or letters of administration with Will annexed have been granted.

259. Every District Judge 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 Wills is established; and the Local Government shall make regulations for the preservation and inspection of the Wills so filed as aforesaid.

Grantee of probate or letters of administration shall alone have power to sue, &c., until the same shall have been revoked.

260. After any grant of probate or letters of administration no other than the person to whom the same shall have been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, throughout the Province in which the same may have been granted, until such probate or letters of administration shall have been recalled or revoked.

261 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, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who may have appeared as aforesaid to oppose the grant shall be the defendant.

Procedure in contentious cases.

262. Where any probate is or letters of administration are revoked, all payments *bonâ fide* made to any executor or administrator under such probate or administration before the revocation thereof shall, notwithstanding such revocation, be a legal discharge to the person making the same; and the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself in respect of any payments made by him, which the person to whom probate or letters of administration shall be afterwards granted might have lawfully made.

Payment to executor or administrator before probate or letters of administration revoked.

Right of such executor or administrator to recoup himself for payments.

So in England in the case of a *voidable* grant (Wms. Exors. 520); and even in the case of a *void* grant, as between the rightful representative and a person to whom the wrongful executor or administrator has aliened the effects of the deceased, the act of alienation, *if done in the due course of administration*, shall not be void. Thus when A made a Will appointing an executor and died, and the Judge without taking notice of the Will granted administration to B before the executor proved the Will, and B sold part of the property to discharge funeral expenses and debts, it was held that the subsequently granted probate superseded the administration *ab initio*, but that the sale was nevertheless indefeasible (*Graysbrook* v. *Fox*, Plowd. 276, 282, 283 cited Wms. Exors. 520).

263. 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 under the rules contained in the Code of Civil Procedure applicable to appeals.

Appeals from orders made by District Judge under powers conferred by this Act.

264. The High Court shall have concurrent jurisdiction with the District Judge in the exercise of all powers hereby conferred upon the District Judge.

Concurrent jurisdiction of High Court.

PART XXXII.

Of Executors of their own Wrong.

265. 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.

Executor of his own

"While there is no rightful executor or administrator in existence" see *Mahá Raní Essada Bye* v. *E. I. Co.*, 1 Tayl. & B. 290.

Exceptions. First.—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.

Second.—Dealing in the ordinary course of business with goods of the deceased received from another, does not make an executor of his own wrong.

Illustrations.

(*a*) 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.

Wms. Exors. 225, 226.

(*b*) 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.

Padget v. *Priest*, 2 T. R. 97.

(*c*) A sues as executor of the deceased, not being such. He is an executor of his own wrong.

Other Illustrations are—

(*d*) A is sued, and he, not being executor of the deceased, pleads in that character. A is an executor of his own wrong (Wms. Exors 227).

(*e*) The deceased in his lifetime makes a deed of gift of all his property to B in fraud of his creditors. B after the deceased's death disposes of part of the property. He is an executor of his own wrong (Wms. Exors. 228).

As to the first Exception, a stranger may safely lock up the goods for preservation, direct the funeral in a manner suitable to the estate which is left, and defray the expenses of such funeral out of the deceased's effects, make an inventory of his property, feed his cattle, repair his house, or provide necessaries for his children (Wms. Exors. 229, 230).

As to the second Exception, it is clear that if A takes the goods of the deceased and sells or gives them to B, this shall charge A as executor of his own wrong, but (in the absence of collusion) not B (Wms. Exors. 231). Thus where a lessee died intestate

during the term and his widow entered without taking possession, and paid rent, and afterwards her son-in-law took the premises with her concurrence and the landlord's assent, and paid rent, and continued to occupy during the remainder of the term, it was held that he had not made himself executor of his own wrong (*Paull* v. *Simpson*, 9 Q. B. 365).

So a man who possesses himself of the effects of the deceased under the authority of, and as agent for, the rightful executor, cannot be charged as executor of his own wrong: otherwise if he continue to act after the death of his principal (Wms. Exors. 231, 232).

An executor of his own wrong has all the liabilities though none of the privileges that belong to the character of executor; and he is liable to be sued not only by the rightful executor or administrator, but by a creditor or legatee of the deceased. See *Beardmore* v. *Gregory*, 11 Jur. N. S. 363.

Liability of an executor of his own wrong.

266. 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 a due course of administration.

Wms. Exors. 234, 237.

When an executor of his own wrong pleads that he has fully administered, he cannot give in evidence a retainer for his own debt; for otherwise the executors of the deceased would be running a race to take possession of his goods without taking administration to him.

The agent of an executor of his own wrong, who has, by collecting the assets, made himself also liable as executor of his own wrong, cannot discharge himself by shewing that he has duly accounted for his receipts to his principal: for the rule, that the receipt of the agent is the receipt of the principal, does not apply to the case of a wrong-doer (*Shorland* v. *Mildon*, 5 Hare, 469).

PART XXXIII.

Of the Powers of an Executor or Administrator.

In respect of causes of action surviving the deceased, and rents due at the time of his death.

267. An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and to distrain for all rents due to him at the time of his death, as the deceased had when living.

An *Executor* may distrain before probate (*Whitehead* v. *Taylor*, 10

Demands and rights of action in favour of or against deceased, survive to and against his executor or administrator.

268. 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 Penal 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.

(*a*) A collision takes place on a railway in consequence of some neglect or default of the officials, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having brought any action. The cause of action does not survive.

(*b*) A sues for divorce. A dies. The cause of action does not survive to his representative.

This is nearly the English law as to *personal* injuries. But the Indian Act goes further. By English law actions founded on what are technically called wrongs to the freehold do not survive except in the cases mentioned in 3 & 4 Wm IV. c. 42, s. 2—Act XII of 1855, see Wms. Exors. 707. But it is clear that this section extends to such injuries, and that an executor or administrator may, for example, bring a suit for diverting a watercourse, obstructing lights or cutting down trees in the life-time of his testator or intestate.

"Personal injuries not causing the death of the party" :—If they *do* cause his death, where the deceased could have maintained the action, if alive, a suit for damages may be brought under Act No. XIII of 1855 ("An Act to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong)." This Act is the English Statute 9 & 10 Vic. cap. 93 (Lord Campbell's Act), with the additional provision that in any such suit "the executor, administrator or representative of the deceased may insert a claim for, and recover any pecuniary loss to the estate of the deceased caused by such wrongful act, neglect or default which sum, when recovered, shall be deemed part of the assets of the deceased." See Acts XII and XIII of 1855 in the Appendix.

269. An executor or administrator has power to dispose of the property of the deceased, either wholly or in part, in such manner as he may think fit.

Power of executor or administrator to dispose of deceased's property.

So in England as to personalty (Wms. Exors. 838). The property so disposed of cannot be followed by creditors or legatees into the hands of the alienee. The principle is that the executor or administrator, in many instances, *must* sell in order to perform his duty in paying debts, etc. ; and no one would deal with an executor or administrator if liable afterwards to be called to an account (*Whale* v. *Booth*, 4 T. R. 625 per Lord

Illustrations.

(*a*) 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.

Fryer v. *Ward*, 32 L. J. Ch. 433: the purchaser should get the specific legatee to concur in the assignment, lest the executor should have assented to the bequest (Sugd. V. & P.) see Section 293, *infra*.

(*b*) The executor, in the exercise of his discretion, mortgages a part of the immoveable estate of the deceased. The mortgage is valid.

The mortgage may be by actual assignment or deposit, and it may properly give the mortgagee a power of sale (Wms. Exors. 840). So the executor may pledge part of the assets, and the pledgee may sell the things pledged if they are not redeemed within the proper time (*Russell* v. *Plance*, 18 Beav. 28, 29).

Of course when there is collusion between the purchaser or mortgagee and the personal representative, *e. g.* to obtain the testator's effects at a nominal price, or to get payment of a security for the representative's own debt, the fraud vitiates the transaction, and the attempt to transfer the property is ineffectual (Wms. Exors. 841, 843).

When a power of sale is given to executors they cannot sell by attorney: *delegatus non potest delegare*, Sugd. Pow. 8th ed. 174.

Purchase by executor or administrator of deceased's property.

270. If an executor or administrator purchases, either directly or indirectly, any part of the property of the deceased, the sale is voidable at the instance of any other person interested in the property sold.

The executor is considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased. And if executors sell to a trustee for themselves or to one of themselves the transaction cannot stand if it be not for the benefit of the *cestuis que trust* (see Sugd. Pow. 8th ed. 126).

Powers of several executors or administrators, exerciseable by one.

271. When 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.

Illustrations.

(*a*) One of several executors has power to release a debt due to the deceased.

Jacomb v. *Harwood*, 2 Ves. Sen. 267. So one executor has power to settle an account with a person accountable to the estate (*Smith* v. [illegible] 27 Beav. 446: But see *Stott* v. *Lord*, 8 Jur. N. S. [illegible]

One has power to surrender a lease.

(*c*) One has power to sell the property of the deceased, moveable or immoveable.

But it is desirable to get all the executors to concur in order to guard against the possible event of a sale having been made by any other executor.

(*d*) One has power to assent to a legacy.

Wms. Exors. 853. Even to his own legacy.

(*e*) One has power to endorse a promissory note payable to the deceased.

(*f*) The Will appoints A, B, C and D to be executors, and directs that two of them shall be a quorum. No act can be done by a single executor.

Illustration (*f*), which, like all the other Illustrations in this Act, is to be regarded as not merely an example of the law in operation, but the law itself, shewing by example what it is, will inconveniently restrain the power of executors in dealing with the assets. For no one will now be safe in dealing with a single executor unless he sees the probate and ascertains *either* that no other executors were appointed by the testator, *or* that the Will contains no such direction as that mentioned in the Illustration. In England it has long been felt that no difficulty should be thrown in the way of the dealing by executors with the property of their testators: a purchaser from an executor is therefore not bound to enquire whether the other executors concur, the theory being that co-executors, however numerous, are regarded as an individual person. But though one of several executors may dispose of the assets so as to bind the others, one of several executors is not the agent of the others so as to bind them by his several contracts (*Turner* v. *Hardey*, 9 M. & W. 770, 773).

272. Upon the death of one or more of several executors or administrators, all the powers of the office become vested in the survivors or survivor.

Survival of powers on death of one of several executors or administrators.

Flanders v. *Clarke*, 3 Atk. 509: *Hudson* v. *Hudson*, Ca. t. Talbot, 127: Wms. Exors. 855.

273. The administrator of effects unadministered has, with respect to such effects, the same powers as the original executor or administrator.

Powers of administrator of effects unadministered.

Catherwood v. *Chabaud*, 1 B. & C. 154, per Bayley J. Wms. Exors. 865.

274. An administrator during minority has all the powers of an ordinary administrator.

Powers of administrator during minority.

Wms. Exors. 426. But by the law of England it is said that he cannot do anything to the prejudice of the infant, and therefore he

cannot sell the goods of the deceased any further than they are necessary for the payment of debts, nor can he otherwise sell a term for years during the minority (Ibid. 427, 428 and see 2 Strange No. Ca. 158). The Indian Legislature appears to have done away with this limitation of the administrator's power.

275. When probate or letters of administration have been granted to a married woman, she has all the powers of an ordinary executor or administrator.

Powers of married executrix or administratrix.

This would seem by implication to deprive the husband of the privilege which he has hitherto enjoyed of administering in his wife's right. This privilege was given him for his own safety, lest she should misapply the funds, in which case he would, as the law has hitherto stood, be liable. She may now release a debt, assent to a legacy, or make a gift or grant without her husband's concurrence—of all which acts she is incapable by the law of England (Wms. Exors. 867, 868). It would under these circumstances be harsh to hold the husband liable for her acts as executrix or administratrix, and it is probable that such liability no longer exists, although it is to be regretted that the Legislature has left the point to inference. See further infra, at Sec. 328.

PART XXXIV.

Of the Duties of an Executor or Administrator.

276. It is the duty of an executor to perform the funeral of the deceased in a manner suitable to his condition, if he has left property sufficient for the purpose.

As to deceased's funeral.

The executor is entitled to be allowed reasonable expenses, according to the testator's condition in life; and if he exceeds those, he is to take the chance of the estate turning out insolvent. No precise sum can be fixed to govern executors in all cases. It must obviously vary in every instance, not only with the station in life of each particular testator, but also with the price of the requisite articles at the particular place, *Edwards* v. *Edwards*, 2 Cr. & M. 612: and see *Mullick* v. *Mullick*, 1 Knapp, 245, as to the expenses of the funeral obsequies of a Hindu testator.

277. An executor or administrator shall, within six months from the grant of probate or letters of administration, exhibit in the Court by which the same may have been granted 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

Inventory and account.

any person or persons to which the executor or administrator is entitled in that character, and shall in like manner, within one year from the date aforesaid, exhibit an account of the estate, showing the assets that may have come to his hands, and the manner in which they have been applied or disposed of.

The inventory must bear a stamp of one rupee. See the Schedule.

An administrator *durante minoritate* may be compelled to give in an inventory though his administration has expired (*Taylor* v. *Newton*, 1 Ca. t. Lee, 15).

As to the form of the Inventory, it seems unnecessary to distinguish, as is done in England, between good debts and those which are doubtful or desperate (Wms. Exors. 883). It is enough if the appraisement be made by any honest persons, and there seems no need of its being specially verified.

The Inventory contemplated by this Section appears to include not only all the deceased died possessed of within the jurisdiction, but also the subsequent profits of his business, and the rents of his leaseholds. Property out of the jurisdiction should certainly not be included.

Duty of executor or administrator as to property of, and debts owing to, the deceased.

278. The executor or administrator shall collect, with reasonable diligence, the property of the deceased and the debts that were due to him at the time of his death.

There is no fixed period for realising assets, which varies with the property and circumstances (*Hughes* v. *Empson*, 22 Beav. 181).

Illustration *b* to Sec. 328 infra, shows that if by unduly delaying to bring a suit the executor or administrator enables a debtor of the deceased to avail himself of the Act of limitations, the executor or administrator will be personally liable (Wms. Exors. 889, where 'creditor' is put for 'debtor'). The difficulty of collecting arrears of rent is no excuse for not collecting them, without some evidence that in fact they would not have been recovered (*In re Alexander*, 13 Ir. Chan. Rep. 137). An executor is chargeable with interest on arrears of rent unreceived (*Tebbs* v. *Carpenter*, 1 Madd. 293).

An executor cannot carry on a trade except to wind up, but may and even should complete some contracts (*Collinson* v. *Luster*, 7 D. M. G. 634, S. C. 20 Beav. 355-6: and see *Labouchere* v. *Tupper*, 5 W. R. 797).

Funeral expenses to be paid before all debts.

279. Funeral expenses to a reasonable amount, according to the degree and quality of the deceased, and death-bed charges, including fees for medical attendance, and board and lodging for one month previous to his death, are to be paid before all debts.

As to the funeral expenses see Section 276 : Wms. Exors 871, 890.

The provision as to board and lodging for one month previous to the death of the deceased was introduced in consequence of a suggestion made in an able memorandum on the Bill, for which the Select Committee were indebted to the present Administrator General of Bengal. It is obvious, as Mr. Hogg remarks, that this provision will tend to ensure a comfortable abode for the sick.

The Administrator General is bound by 26 & 27 Vic. c. 57 (the Regimental Debts Act) s. 21 to administer *Military* estates in accordance with the provisions of Section 4 of that Statute, as to preferential charges. Section 4 enacts that "Where an Officer or Soldier dies on service, the following classes of expenses and debts incurred and owing by him, or on his account, shall, for the purposes of this Act, be considered preferential charges on his personal property, and be payable thereout in preference to all other debts and liabilities, and, as among themselves, in the following order :—

(1.) Expenses of last illness and funeral.

(2.) Military debts, namely, sums due in respect of—Quarters; Mess, Band and other Regimental accounts: Military clothing, appointments, and equipments, not exceeding a sum equal to six months pay of the deceased, and having become due within 18 months before his death; including sums due to any Agent or to any Paymaster, Quartermaster or other Officer, on any such account, or on account of any advance made for any such purpose.

To which shall be added, where the death occurs out of the United Kingdom,

(3.) Servants' wages, not exceeding two months' wages to each servant.

(4.) Household expenses incurred within a month before the death or after the last issue of pay to the deceased, whichever is the shorter period."

Expenses to be paid next after such expenses.

280. The expenses of obtaining probate or letters of administration, including the costs incurred for or in respect of any judicial proceedings that may be necessary for administering the estate, are to be paid next after the funeral expenses and death-bed charges.

These costs are a first charge on the estate : see Wms. Exors. 891, and cases there cited, to which add *Sanderson* v. *Stoddart*, 9 Jur. N. S. 1216, where, though the executors had voluntarily confessed judgments and thus denuded themselves of the assets, they were held entitled to be paid in priority.

Where the Will provides for payment of "testamentary expenses" out of a specific bequest, this provision does not include the costs of a suit occasioned by the Will, for the words "testamentary expenses" are confined to the usual charges of the probate, &c., and such costs must therefore be paid out of the residuary estate (Wms. Exors. 891).

As the Act contains no rules for the guidance of the Court in giving costs, the following passage from a recent judgment of Sir J. P. Wilde may be usefully quoted :—"First, if the cause of litigation take its origin in the fault of the testator or those interested in the residue,

the costs may properly be paid out of the estate; secondly, if there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the Will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent" (*Mitchell* v. *Gard*, 3 Sw. & T. 278).

Here and in Section 320 the framers of this Act appear to assume the existence of administration-suits in India. It is true that the High Court in its original jurisdiction has continued to entertain such suits in analogy to the practice of the late Supreme Court. But there is no allusion to this kind of suit in the Civil Procedure Code.

In an administration-suit no costs can be given out of the estate, except for those proceedings that are in their origin properly directed for the benefit of the estate, or which have in their result conduced to that benefit (*Bartlett* v. *Wood*, 9 W. R. 817).

281. Wages due for services rendered to the deceased within three months next preceding his death by any labourer, artizan, or domestic servant are next to be paid, and then the other debts of the deceased.

Wages for certain services to be next paid, and then the other debts.

Wms. Exors. 923: 26 & 27 Vic. c. 57, s. 4.

"Domestic servant." In *Ogle* v. *Morgan*, 1 D. M. G. 359, where the words were 'servant in the testator's domestic establishment', L. C. Truro seemed to think a domestic servant was an in-door servant, *i. e.* one living in the house and dieted by his master, and held that the words above cited did not apply to a head gardener living out of the house on board wages. Of course the 'domestic servant' must have been the servant of the deceased, and not, *e. g.* a coachman supplied by a job-master (*Chilcot* v. *Bromley*, 12 Ves. 114).

The executor or administrator must be careful to observe the rules of priority laid down in this and Sections 279, 280. For if, having notice of the existence of superior debts, he pay debts of a lower degree first, he must, on a deficiency of assets, answer those of a higher out of his own estate (Wms. Exors. 891). If, for example, he exhaust the assets in discharging the amount of a promissory note given by the deceased, he will have to pay out of his own pocket the funeral and testamentary expenses and the wages mentioned in Section 280. And the testator cannot disappoint the rules of law as to the precedence of debts by directing his executor to make an equal distribution of the assets among all his creditors (*Turner* v. *Cox*, 8 Moo. P. C. 288). But an executor may voluntarily pay a debt of an inferior nature before one of a superior, of *which he has no notice* (Wms. Exors. 926), and a precipitate payment may be good, if made without the fraud of which such precipitancy is rebuttable evidence (*Norotti* v. *Jefferson*, 11 W. R. 84, reversing the decision of Stuart V. C. Ibid. 658).

282. Save as aforesaid, no creditor is to have a right of priority over another, by reason that his debt is secured by an instrument under seal, or

Save as aforesaid, all debts to be paid equally and rateably.

on any other account. 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.

An executor may pay a debt justly due to another person although barred by the Act of limitation in the testator's lifetime, and he may retain a debt due to himself, although so barred (*Stahlschmidt* v. *Lett*, 1 Sm. & G. 415: *Hill* v. *Walker*, 4 K. & J. 166).

Respecting payments and retainers by an executor the Commissioners observe:—"We do not propose to extend to India the rule which enables an executor to pay any creditor (whether himself or another person) in preference to another creditor of equal degree (Wms. Exors. 930, 936). We have provided that funeral and death-bed expenses and charges of probate, and administration are to be first paid, then wages due to any labourer, artizan or domestic servant employed by the deceased; and that in respect of no other debt shall a creditor be entitled to a preference, either by reason of its being secured by deed under seal or on any other account."

Application of moveable property to payment of debts, where the deceased's domicile was not in British India.

283. If the domicile of the deceased was not in British India, the application of his moveable property to the payment of his debts is to be regulated by the law of the country in which he was domiciled.

Illustration.

A dies, having his domicile in a country where instruments under seal have priority over instruments not under seal, 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.

This is in accordance with the rule laid down by Romilly M. R. in *Wilson* v. *Lady Dunsany*, 18 Beav. 293. Cases under this Section will generally arise when the deceased dying in India is domiciled in England. It is therefore desirable to state the rules of priority established by English law.

1*st*.—The solicitor's charging-lien.

2*nd*.—Debts due to the Crown by record or specialty (*i. e.* instruments under seal.)

3*rd*.—Debts to which particular statutes give priority (Wms. Exors. 895, 898), such as money due to a parish by the overseers of the poor, or by the officers of a friendly society to the society, and debts due by an officer to his regiment.

4*th*.—Debts of Record (Judgments, Decrees, Recognizances).

5*th*.—Debts due to the Crown by simple contract (Parker, Rep. 101).

6*th*.—Debts by specialty (instrument under seal) and debts for rent, (except for land out of England, *Vincent* v. *Godson*, 4 D. M. G. 546); but not voluntary bonds or covenants (*Markwell* v. *Markwell*, 10 Jur. N. S. 816), nor bonds *ex turpi causâ*, nor contingent debts by specialty.

7*th*.—Debts by simple contract.

8*th*—Voluntary bonds and voluntary promissory notes (*Dawson* v. *Kearton*, 2 Jur. N. S. 113).

Creditor paid in part under Section 283 to bring such payment into account before sharing in proceeds of immoveable property.

284. No creditor who has received payment of a part of his debt by virtue of the last preceding Section shall be entitled to share in the proceeds of the immoveable estate of the deceased unless he brings such payment into account for the benefit of the other creditors.

Illustration.

A dies, having his domicile in a country where instruments under seal have priority over instruments not under seal, leaving moveable property to the value of 5,000 rupees, and immoveable 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 remain due to them.

In the case put, the specialty creditors, instead of resorting to the immoveable property, which, in England, they alone could reach (before the passing of Stat. 3 & 4 W. IV. c. 104), proceed against the moveable property to the exclusion of the simple contract creditors, who had no other fund, and the Court "marshalls the assets," as it is called, by permitting the simple contract creditors to stand in the place of specialty creditors against the immoveable property so far as the latter have exhausted the moveable (Wms. Exors. 1549).

Debts to be paid legacies.

285. Debts of every description must be paid before any legacy.

As the whole estate is liable, in the hands of the executor or administrator, to the payment of the testator's debts, the executor or administrator must take care to discharge them before the payment of any legacy. There is no distinction in this respect, in favour of specific legacies (Wms. Exors. 1207); and even voluntary bonds must be paid in preference to legacies (Wms. Exors. 914).

Executor or administrator not bound to pay legacies without indemnity.

286. If the estate of the deceased is subject to any contingent liabilities, an executor or administrator is not bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due.

Otherwise, if the contingent covenants, &c., should afterwards be broken, the executor would be liable to answer the damages out of his own pocket, without any fault in him (see Wms. Exors. 1211, and cases there cited; to which add *Brewer* v. *Pocock*, 23 Beav. 310: *Waller* v. *Barrett*, 24 Beav. 413, where the principles on which the Court acts in indemnifying executors against the outstanding leasehold covenants of their testators are clearly stated by the Master of the Rolls).

Abatement of general legacies.

287. 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 the executor has no right to pay one legatee in preference to another, nor to retain any money on account of a legacy to himself or to any person for whom he is a trustee.

Executor not to pay one legatee in preference to another.

Wms. Exors. 1223, 1224.

This will probably be understood as referring only to legatees who are all volunteers. For if there be any valuable consideration for the testamentary gift, as where a general legacy is given in consideration of a debt owing to the legatee by the testator at the death of the latter, or of the relinquishment of any right or interest existing at the testator's death, such legacy is entitled to a preference of payment over the other general legacies, which are mere bounties (Wms. Exors. 1228, 1229, 1230).

General legacies given to volunteers are not exempted from abatement on the ground of their being applied to any particular object or purpose. Thus legacies of a certain sum each to executors for their care and trouble, or of sums of money for mourning rings, or to servants or to the testator's wife or child, are not to be preferred to other general legacies (Wms. Exors. 1231).

Section 291 shews that for the purpose of abatement life-interests and annuities are to be treated as general legacies.

Primâ facie the testator must be presumed to have intended that all his legatees should be paid in equal proportions: he may give a preference (*Lewin* v. *Lewin*, 2 Ves. Sen. 415), but the onus is on those who contend for a priority to shew that he intended to give a preference to a particular legatee (*Brown* v. *Brown*, 1 Keen 275, 277): and the proof of this must be clear and conclusive (*Miller* v. *Huddlestone*, 3 Mac. & G. 523 per Lord Truro). A direction in the first place to pay what may be due on the testator's covenant to D, then to set apart what may be sufficient to pay certain annuities given by the Will, and in the next place, after making such investments, to pay the legacies given by the Will is not sufficient to give a preference to the annuitants over the legatees (2 Spence, Eq. Jur. 330, citing *Thwaites* v. *Foreman*, 1 Coll. 409: see Wms. Exors. 1232, 1234: *Re Wiltshire*, 6 Jur. N. S. 190).

With regard to general legacies of stock the abatement will be regulated by the value of stock at the end of one year next after the testator's death (Wms. Exors. 1223 n.)

Of course a residuary legatee has no right to call upon particular general legatees to abate, unless, perhaps, when there is at the testator's death a residue of a certain amount, but by reason of the executor's devastavit the estate becomes insufficient to pay all the pecuniary legacies. Even here, however, Lord Thurlow and Sir Wm. Grant thought no abatement should take place (*Fonnereau* v. *Poyntz*, 1 Bro. C. C. 478: *Page* v. *Leapingwell*, 18 Ves. 466).

Non-abatement of specific legacy when assets sufficient to pay debts.

288. Where there is a 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.

As long as any of the assets not specifically bequeathed remain, the things specified are not to be applied to in payment of debts, or of costs where a suit has been instituted (Wms. Exors. 1235). But when the assets not specifically bequeathed are insufficient to pay all the debts, then the specific legatees must abate in proportion to the value of their individual legacies.

Right under demonstrative legacy, when the assets are sufficient to pay debts and necessary expenses.

289. 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 for the remainder against the general assets as for a legacy of the amount of such unpaid remainder.

In this, as in the case of specific legacies, the testator's intention is the principle; for it is inferred, that he in referring to specific parts of his estate for payment of particular legacies, intended those legacies a preference to others which he had not so secured (*Roberts* v. *Pocock*, 4 Ves. 150).

Rateable abatement of specific legacies.

290. 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.

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.

Wms. Exors. 1235.

So a demonstrative legatee must abate with the specific legatees (*Roberts* v. *Pocock*, 4 Ves. 150).

Legacies treated as general for purpose of abatement.

291. For the purpose of abatement, a legacy for life, a sum appropriated 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.

PART XXXV.

Of the Executor's Assent to a Legacy.

Executor's assent necessary to complete legatee's title.

292. The assent of the executor is necessary to complete a legatee's title to his legacy.

Illustrations.

(*a*) A by his will bequeaths to B his Government paper, which is in deposit with the Bank of Bengal. The Bank has no authority to deliver the securities, nor B a right to take possession of them, without the assent of the executor.

(*b*) 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.

B would have no right to take possession of the securities, or C to receive the rents, even though the testator by his Will expressly directed that they should do so without his executor's assent. For if this were permitted a testator might appoint all his effects to be thus taken, in fraud of his creditors (Wms. Exors. 1236).

Here is another Illustration :

A by his Will forgives a debt due to him from B. A debt so forgiven is regarded in the light of a legacy, and B must pay the debt unless the executor assents (Wms. Exors. 1236).

The rule laid down in this Section is for the executor's protection, he being responsible to the creditors of the deceased to the extent of the whole estate.

Before the assent, the legatee has an inchoate right to the legacy, transmissible to his representatives in case of his death before it is paid or delivered (Wms. Exors. 1236).

293. The assent of the executor to a specific bequest shall be sufficient to divest his interest as executor therein, and to transfer the subject of the bequest to the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way. This assent may be verbal, and it may be either express or implied from the conduct of the executor.

Effect of executor's assent to specific legacy.

Assent may be verbal, and either express or implied.

It is the Will which gives the interest to the legatee, and therefore the law does not require any exact form in which the assent is to be made (1 Jarm. Byth. Conv. ed. Sweet, 185).

Illustrations.

(*a*) 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.

So if the executor himself buys the horse, or offers the legatee money for it (Wms. Exors. 1238).

(*b*) 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.

Paramour v. *Yardley*, Plowd. 539.

(*c*) 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.

For the particular estate and remainder constitute but one estate (Wms. Exors. 1240).

(*d*) Executors die after paying all the debts of the testator, but before satisfaction of specific legacies. Assent to the legacies may be presumed.

This is upon the principle that in the absence of evidence the executors shall be taken to have acted in conformity with their duty.

(*e*) 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.

'Retains it,' *i. e.*, for some considerable time and with the executor's knowledge.

294. The assent of an executor to a legacy may be conditional, and if the condition be one which he has a right to enforce, and it is not performed, there is no assent.

Conditional assent.

Illustration.

(*a*) A bequeaths to B his lands of Sultánpur, 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.

(*b*) 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.

Because the condition was such as the executor had no authority to impose (Wms. Exors. 1241).

295. When the executor 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 express or implied. 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.

Assent of executor to his own legacy.

Implied assent.

v. *Sturges*, 7 Taunt. 223, per Gibbs C. J.

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.

An executor's assent to his own legacy is required on the same principle as his assent in the case of a bequest to another person, *viz.* that until he has examined the state of the assets, he cannot decide whether they will admit of his taking the thing bequeathed as a legacy, and whether it must not of necessity be applied in satisfaction of debts (Wms. Exors. 1244).

Other Illustrations are. An executor says that he will have the legacy according to the Will; or by deed reciting that he has a house by bequest, assigns it; or repairs a house bequeathed to him at his own expense; or excludes a co-executor from joint occupancy of property with him; or performs a condition or trust annexed to the bequest the executor has impliedly assented to his legacy.

It is a rule that it is not sufficient to constitute an implied assent to shew that the act is equally applicable to the title of legatee as to the character of executor (Wms. Exors. 1245). Thus if the executor sells or grants a lease of a house bequeathed to him, this cannot be construed an assent, because the act is consistent with his power and character as executor.

If an executor-legatee renounce probate, his assent to his own legacy will be ineffectual.

Assent of executor gives effect to legacy from testator's death.

296. The assent of the executor to a legacy gives effect to it from the death of the testator.

Wms. Exors. 1243.

Illustrations.

(*a*) 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.

(*b*) A bequeaths 1,000 rupees to B with interest, from his death. The executor does not assent to this legacy until the expiration of a year from A's death. *B* is entitled to interest from the death of A.

It is the duty of executors to assent as soon as all the debts and expenses attending the administration have been satisfied and there is a sufficient residue to pay all the legacies (1 Rop. Leg. by White, 854).

Executor not bound to pay or deliver legacies until after one year from testator's death.

297. An executor is not bound to pay or deliver any legacy until the expiration of one year from the testator's death.

Wms Exors. 1250

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.

Benson v. *Maude*, 6 Madd. 15; *Brooke* v. *Lewis*, ibid. 358.

One year is also the period fixed by the Civil law and adopted by the English Courts. During this time it is presumed that the executor may fully inform himself of the state of the property (*Wood* v. *Penoyre*, 13 Ves. 333, 334). But within that period (as the Illustration shews) he cannot be compelled to pay a legacy, even where the testator directs it to be discharged within a less time after his death. Of course, if the state of the testator's circumstances be such as to enable the executors to discharge legacies at an earlier period, they have authority to do so.

PART XXXVI.

Of the Payment and Apportionment of Annuities.

298. Where an annuity is given by the 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.

Commencement of annuity when no time fixed by Will.

Gibson v. *Bott*, 7 Ves. 96, 97 per Lord Eldon.

299. Where there is a direction that the annuity shall be paid quarterly or monthly, the first payment shall be due at the end of the first quarter or first month, as the case may be, after the testator's death; and shall, if the executor think fit, be paid when due, but the executor shall not be bound to pay it till the end of the year.

When payment of annuity to be paid quarterly or monthly first falls due.

Houghton v. *Franklin*, 1 Sim. & Stu. 390.

300. Where there is a direction that the 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 authorizes the first payment to be made; and if the

Dates of successive payments when first payment of an annuity directed to be made within a given time, or on a day certain.

Apportionment where annuitant dies between times of payment.

annuitant should die in the interval between the times of payment, an apportioned share of the annuity shall be paid to his representative.

Here the English law as laid down in *Irvin* v. *Ironmonger*, 2 R. & M. 531, appears slightly departed from. According to that case where a testator gives an annuity to A for life, and directs the first payment to be made within one month from his, the testator's, death, the annuity commences from such death; the first year's payment is paid in advance at the appointed time: the payment for the second year does not become due till the end of that year.

PART XXXVII.

Of the Investment of Funds to provide for Legacies.

Investment of sum bequeathed where a legacy, not specific, is given for life.

301. 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 to be made from time to time, authorize or direct, and the proceeds thereof shall be paid to the legatee as the same shall accrue due.

Investment of amount of general legacy, to be paid at a future time.

Intermediate interest.

302. Where a general legacy is given to be paid at a future time, the executor shall invest a sum sufficient to meet it in securities of the kind mentioned in the last preceding Section. The intermediate interest shall form part of the residue of the testator's estate.

Phipps v. *Annesley*, 2 Atk. 58: *Nickesson* v. *Cockill*, 9 Jur. N. S. 975.

Procedure when no fund is charged with or appropriated to an annuity.

303. 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 such securities as the High Court may, by any general rule to be made from time to time, authorize or direct.

304. Where a bequest is contingent, the executor is not bound to invest the amount of the legacy, but may transfer the whole residue of the estate to the residuary legatee on his giving sufficient security for the payment of the legacy if it shall become due.

Transfer to residuary legatee of amount of contingent bequest.

The principle is that the legatee being entitled to receive a *certain* sum of money when the contingent event happens, the legacy is not capable of being secured by the present appropriation of any sum of stock, which is always fluctuating in value. See *Webber* v. *Webber*, 1 Sim. & Stu. 312, 313 per Sir John Leech: *King* v. *Wallcott*, 9 Ha. 696.

305. 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 the testator's decease invested in such securities as the High Court may for the time being regard as good securities, shall be converted into money and invested in such securities.

Investment of residue bequeathed to a person for life, without direction to invest in particular securities.

Wms. Exors. 1256.

306. 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.

Investment of residue bequeathed to a person for life, with direction to invest in specified securities.

Wms. Exors. 1256.

307. Such conversion and investment as are contemplated by the two last preceding Sections shall be made at such times and in such manner as the executor shall in his discretion think fit; and until such conversion and investment shall be completed, the person who would be for the time being entitled to the income of the fund when so invested shall receive interest at the rate of four per cent. per

Time and manner of the conversion and investment.

Interest payable until investment.

annum upon the market value (to be computed as of the date of the testator's death) of such part of the fund as shall not yet have been so invested.

Wms. Exors. 1257.

308. 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 [illegible] executor or administrator shall pay or deliver the same into the Court of the District Judge, by whom the probate was or letters of administration with the Will annexed were granted, to the account of the legatee, unless the legatee be a ward of the Court of Wards; and if the legatee be a ward of the Court of Wards the legacy shall be paid into that Court to his account, and such payment into the Court of the District Judge, or into the Court of Wards, as the case may be, shall be a sufficient discharge for the money so paid; and such money when paid in 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.

Procedure where minor is entitled to immediate payment or possession of bequest, and there is no direction to pay to any person on his behalf.

So in England when a legatee is an infant and would be entitled to receive the legacy if he were of age, the executor is not justified in paying it either to the infant or to the father, or any other relation of the infant on his account without the sanction of a Court of Equity. And even in the case of a child who has attained majority payment to the father is not good unless it be made by the consent of the child, or confirmed by his subsequent ratification. But when the direction is not to pay to the child; but the bequest is made to a trustee for him, the executor will be justified in paying the money to the person so appointed (Wms. Exors. 1267, 1269).

"And there is no direction *in the Will*." So in England the direction for payment to the trustee must appear on the face of the Will, and cannot be proved by parol evidence (*Cooper* v. *Thornton*, 3 Bro. C. C. 97 per Lord Alvanley).

"Shall pay or deliver *the same*," *i. e.* the whole legacy. The executor cannot apply any part of the *capital* of the legacy for the child's maintenance or advancement, or any other purpose than mere

necessaries, without the sanction of the Court. But as to the *interest* of the sum bequeathed, he may apply a requisite part of it for the support of the infant without the authority of the testator.

The executor does not appear bound to pay the legacy into the District Court, or into the Court of Wards, till the expiration of a year from the testator's death.

PART XXXVIII.

Of the Produce and Interest of Legacies.

Legatee of a specific legacy entitled to produce thereof from testator's death.

309 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.

Illustrations.

(*a*) 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.

Wms. Exors. 1283.

(*b*) A bequeaths his Government securities to B, but postpones the 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 a minor, be paid to him as it is received.

(*c*) The testator bequeaths all his four per cent. Government promissory notes to A when he shall complete the age of 18. A, if he complete 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.

2 Rop. Leg. 276.

The law considers specific legacies as severed from the bulk of the testator's property, by the operation of the Will, from the testator's death, and with their increase and emolument specifically appropriated for the benefit of the legatee from that period, so that interest is computed on them from the death of the testator, and it is immaterial whether the enjoyment of the principal is postponed by the testator or not.

310. The legatee under a general residuary bequest is entitled to the produce of the residuary fund from the testator's death.

Residuary legatee entitled to produce of residuary fund from

Exception.—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.

With respect to contingent legacies, as well particular as residuary, interest is not due to the legatee until the time of payment arrives. 2 Rop. Leg. 279.

Illustrations.

(*a*) The testator bequeaths the residue of his property 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.

(*b*) The testator bequeaths the residue of his property to A when he shall complete the age of 18. A, if he complete 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.

That is to say, it falls into the residue to accumulate for the benefit of the residuary legatee, or for the executors or next of kin of the testestor upon the event of the residuary legatee's death before the legacy vests in him, or for such other person as may on that contingency be named to take (2 Rop. Leg. 280: *Studholm* v. *Hodgson*, 3 P. W. 299: *Green* v. *Ekins*, 2 Atk. 472).

311. Where no time has been fixed for the payment of a general legacy, interest begins to run from the expiration of one year from the testator's death.

Interest when no time is fixed for payment of a general legacy.

Section 297 allows the executor a year to ascertain and settle the testator's affairs; and it presumes that at the expiration of that period, and not before, all debts, &c., have been satisfied, and that the executor is able to apply the residue among the legatees. Before this period, therefore, a general legacy is not due, nor can the legatee claim it, although the executor may, if he think fit, pay it sooner: so that no interest accrues due for delay in payment of the principal, until after the expiration of the year from the death (2 Rop. Leg. 228).

Exceptions.—(1.) Where the legacy is bequeathed in satisfaction of a debt, interest runs from the death of the testator.

Clarke v. *Sewell*, 3 Atk. 98: and see *Shirt* v. *Westby*, 16 Ves. 393.

(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.

For a parent or person who has put himself *in loco parentis* is under a natural obligation to provide a present, as well as a future, maintenance for the child (*Crickett* v. *Dolby*, Pre. Cha. 367).

(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.

312. Where a time has been fixed for the payment of a general legacy, interest begins to run from the time so fixed. The interest up to such time forms part of the residue of the testator's estate.

Interest when time has been fixed.

It makes no difference whether the legacy be particular or residuary, vested or contingent, (2 Rop. Leg. 237, 240: *Heath* v. *Perry*, 3 Atk. 102).

Exception.—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.

"A more remote ancestor," a grandfather or great-grandfather. Herein the Act varies from the English law, according to which grandchildren and great-grandchildren are, in such cases, considered as strangers to the testator (2 Rop. Leg. 246).

"And the legatee is a minor." So in England, the exception in favour of children of the testator and those towards whom he has placed himself *in loco parentis* does not extend to adults (*Raven* v. *Waite*, 1 Swanst. 553).

As to the sum given for maintenance see *Leslie* v. *Leslie*, Dru. t. Sugd. 1: *Boddy* v. *Dawes*, 1 Keen, 362). If the sum be insufficient and the legacy be vested the Court will allow a reasonable maintenance, notwithstanding the surplus interest be directed to accumulate (2 Rop. Leg. 238: Wms. Exors. 1288).

Rate of interest.

313. The rate of interest shall be four per cent. per annum.

This is the English rate. Wms. Exors. 1291.

314. 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.

No interest payable on arrears of annuity after

As annuities, in the absence of any direction in the Will to the contrary, commence from the death of the testator (Section 298), and the first payment becomes due at the end of the year from that event, if interest upon the arrears of the annuity be payable at all, it must be computed from the year's end. (2 Rop. Leg. 223, 308: Wms. Exors. 1287).

315. 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.

Interest payable on sum to be invested to produce annuity.

Here the interest is payable as representing the annuity, which, as no time is fixed for its commencement, is considered as beginning from the testator's death (Section 298).

PART XXXIX.

Of the Refunding of Legacies.

316. When an executor has paid a legacy under the order of a Judge, he is entitled to call upon the legatee to refund, in the event of the assets proving insufficient to pay all the legacies.

Refund of legacy paid under Judge's orders.

So in England, where the executor pays the legacy under the compulsion of a suit, he is entitled to compel the legatee to refund in case of a deficiency of assets (Wms. Exors. 1308: *Newman* v. *Barton*, 2 Vern. 205).

317. When an executor 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.

No refund if legacy paid voluntarily.

When an executor voluntarily pays a legacy the presumption is that he has enough to pay all the legacies, and the Court will oblige him, if solvent, to pay the rest, (*Orr* v. *Kaines*, 2 Ves. Sen. 194: Wms. Exors. 1308: 1 Rop. Leg. 396).

"All the *legacies*"—not "all the *debts*."—See Sec. 319.

318. When the time prescribed by the Will for the performance of a condition has elapsed, without the condition having been performed, and the executor has thereupon, without fraud, distributed the assets; in such case, if further time has been allowed under the one hundred and twenty-fourth Section, for the performance of the condition, and the condition has been performed accordingly, the legacy cannot be claimed from the executor, but those to whom he has paid it are liable to refund the amount.

Refund when legacy has become due on performance of a condition within further time allowed under Section 124.

319. When the executor 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.

When each legatee is compellable to refund in proportion.

Wms. Exors. 1308.

320. Where an executor or administrator has given such notices as would have been given by the High Court 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; but 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.

Distribution of assets.

Creditor may follow assets.

This Section is—with the substitution of 'High Court' for 'Court of Chancery'—the 29th Section of 22 and 23 Vic. c. 35 (An Act further to amend the law of property, and to relieve trustees). The following is the form of notice now given by the High Court in an administration suit:—

"Pursuant to a Decree of the High Court of Judicature at Fort William in Bengal in its Ordinary Original Civil Jurisdiction, bearing

date the 2nd day of June 1865, in a cause A. B. *vs.* C. D., the creditors of [or the persons claiming debts or liabilities affecting the estate of, *or* the persons claiming to be next of kin to, *or* the heir of, *as the case may be*] E. F. deceased, late of Calcutta, Merchant, who died on or about the day of , are on or before the 22nd day of July next to come in and prove their claims before the Hon'ble Mr. J. Macpherson, one of the Judges of this Court, at the Town Hall, or in default thereof they will be peremptorily excluded from the benefit of the said Decree. Saturday the 29th day of July 1865 at 11 o'Clock in the forenoon at the said Town Hall is appointed for hearing and adjudicating upon the claims.

HIGH COURT, *Regr.'s Office.* } *Offg. Regr.*

(*Endorsed.*)

Let this advertisement be published twice in the *Government Gazette*, twice in the *Englishman*, twice in the *Hurkaru*, twice in the *Probhakur* and twice in the *Bhuskur*.

321. A creditor who has not received payment of his debt may, within two years after the death of the testator or one year after the legacy has been paid, 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 was voluntary or not.

Within what period a creditor may call upon a legatee to refund.

This is the English law, except that in England there is no express limitation of the time within which a creditor can make a legatee refund (Wms. Exors. 1308, 1309: 1 Rop. Leg. 398).

322. 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 the last preceding Section, 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.

When a legatee who has not received payment or who has been compelled to refund under Section 321, cannot oblige one who has received payment in full to refund.

Walcot v. *Hall*, 1 P. W. 495 n. The distinction between the case put in this Section and that put in Section 323, is that here the legatee has received no more than he was entitled to, and the executor is therefore the only person to be resorted to. Here too, where the executor has committed a *devastavit*, the legatee retains the advantage of his legal

diligence which the other legatees neglected by not bringing their suits in time before the wasting by the executor (*Anon.*, 1 P. W. 495).

When an unsatisfied legatee must first proceed against executor, if solvent.

323. 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 if he is solvent; but if the executor is insolvent or not liable to pay, the unsatisfied legatee can oblige each satisfied legatee to refund in proportion.

Here the legatee who has received his legacy in full has received more than he was entitled to, and the other legatees may therefore fairly call on him to refund. But they must resort in the first place against the executor if solvent, for he, by paying the one legacy, has admitted assets to pay all (*Orr* v. *Kaimes*, 2 Ves. Sen. 194).

Limit to the refunding of one legatee to another.

324. 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.

Illustration.

A has bequeathed 240 rupees to B, 480 rupees to C, and 720 rupees to D. The assets are only 1,200 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.

Refunding to be without interest.

325. The refunding shall in in all cases be without interest.

"In *all* cases." Here is a variation from the English law, which Lord Eldon in *Gittins* v. *Steele*, 1 Swanst. 200, stated thus: "If a le

Court is not to charge interest: but if the legatee is entitled to another fund making interest in the hands of the Court, justice must be done out of his share." (Wms. Exors. 1309 : 1 Rop. Leg. 401).

Residue of the deceased's property after usual payments to be paid to residuary lega-

326. 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.

And although the residuary legatee die before the payment of the debts and the ascertainment of the amount of the surplus, it shall devolve on his representative. (Wms. Exors. 1310).

PART XL.

Of the Liability of an Executor or Administrator for Devastation.

Liability of executor or administrator for devastation.

327. 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.

(*a*) The executor pays out of the estate an unfounded claim. He is liable to make good theloss.

(*b*) 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.

(*c*) 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.

Other Illustrations are :—

(*d*) The executor applies part of the assets to the satisfaction of his own debt to a third party :

(*e*) He collusively sells the testator's goods at an undervalue :

(*f*) He misapplies the assets in undue expenses for the funeral :

(*g*) He pays debts out of their legal order to the prejudice of such as are superior, and of which he had notice :

(*h*) He assents to or pays a legacy when there is not enough for creditors :

(*i*) He surrenders the residue of a term where the land is of greater yearly value than the rent :

(*k*) He neglects to assign the residue of a term where the rent is greater than the yearly value of the land ; or

(*l*) He releases a cause of suit founded on a wrong accruing in the testator's lifetime :

In each of these cases he is liable to make good the loss.

In Illustration (*a*) 'an unfounded claim' means a claim which the executor is not bound to satisfy, *e. g.* a claim on a bond *ex turpi causa*, or a claim for the schooling, feeding or clothing of the children of the deceased subsequently to his death.

For neglect to get in any part of the deceased's property.

328. 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.

Wms. Exors. 1632, 1645 : Seton Dec. 3d. ed. II, 739.

Illustrations.

(*a*) 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.

But if the release or composition appear to be for the benefit of the trust estate it is an excuse (*Blue* v. *Marshall*, 3 P. Wms. 381 : *Pennington* v. *Healey*, 1 Cromp. & M. 402).

(*b*) The executor neglects to sue for a debt till the debtor is able to plead the Act for the limitation of suits, and the debt is thereby lost to the estate. The executor is liable to make good the amount.

Wms. Exors. 1637.

Other Illustrations are :—

(*c*) The executor neglects to call in the money due on a bond to the testator, and the obligor becomes bankrupt and no dividend is made on the bankruptcy (*Powell* v. *Evans*, 5 Ves. 839) :

(*d*) An executor leaves an ascertained residue in his co-executor's hands who becomes bankrupt (*Lincoln* v. *Wright*, 4 Beav. 427).

(*e*) He enables a co-executor to receive money and does not enforce a debt due from him to the estate (*Candler* v. *Tillett*, 22 Beav. 257).

(*f*) The executor for more than a year, after the testator's death, allows part of the assets to lie unproductive in the hands of a banker who fails (*Moyle* v. *Moyle*, 2 Russ. & My. 710) :

(*g*) The executor negligently omits to sell certain shares of the testator which were at a premium at the time of his death, but which subsequently fell to a discount (*Hughes* v. *Empson*, 22 Beav. 181) :

In each of these cases the executor is liable.

If the testator have been in a partnership business the executor should wind it up as soon as possible. For, as Lord Eldon said in *Ex p. Garland*, 10 Ves. 119, "the case of an executor is very hard. He becomes liable, is personally responsible to the extent of all his own property ; also in his person, and he may be proceeded against as a bankrupt ; though he is but a trustee. But he places himself in that situation by his own choice, judging for himself whether it is fit and safe to enter into that situation and contract that sort of responsibility." See further as to executors continuing the testator's business, 2 Lindley Partnp. 882 et seq. Suppt. 139.

As to the liability of an executor for a devastavit by his co-executor see Wms. Exors. 1649 et seq.

A husband has hitherto been liable for the acts of his wife as executrix or administratrix because, as he became possessed of the assets in her right, and as she had no power to act alone, his assent to those acts was presumed. But although his previous consent is necessary to her becoming a representative, under this Act, Section 4, he acquires no interest in her property, and under Section 275 she has all the powers of an ordinary executor or administrator. Therefore she has power to act alone. Hence his assent to her acts is unnecessary and will not be presumed ; and therefore, it is submitted, on the principle *cessante ratione cessat et ipsa lex*, he will not be liable for a devastavit committed by his wife.

PART XLI.

Stamps and fees on instruments mentioned in this Act.

329. For every instrument or writing of any of the kinds specified in the Schedule to this Act, and which shall be made or executed after the commencement of this Act, there shall be payable to Government a Stamp duty or fee of the amount indicated in the said Schedule.

Saving of rights, duties, and privileges of Administrator General.

330. Nothing contained in this Act shall be deemed or taken to supersede or affect the rights, duties, and privileges of the Administrators General and Officiating Administrators General of Bengal, Madras, and Bombay respectively, under or by virtue of Act VIII of 1855 (*to amend the law relating to the office and duties of Administrator General*), Act XXVI of 1860 (*to amend Act VIII of* 1855), the Regimental Debts' Act, 1863, and the Administrator General's Act, 1865; and it shall be the duty of the Magistrate or other Chief Officer charged with the executive administration of a district or place in criminal matters, whenever any person to whom the provisions of this Act shall apply shall die within the limits of his jurisdiction, to report the circumstances without delay to the Administrator General of the Province, retaining the property under his charge until letters of administration shall have been obtained by that Officer or by some other person, when the property is to be delivered over to the person obtaining such letters, or who may obtain probate of the Will (if any) of the deceased.

The Indian Acts here referred to are printed in the Appendix. The Regimental Debts' Act is noticed at Sec. 279.

The badly worded provision as to the custody of the property, *i. e.* it is to be presumed, the deceased's property, which, with the rest of this Section, was introduced in Special Committee, seems modelled on Sec. 54 of Act VIII of 1855, and may possibly be held to conflict with the provision in Section 239 of the present Act. The Officer appointed by the Judge under the latter Section will probably be always the Magistrate or other Chief Officer mentioned in Section 330.

331. The provisions of this Act shall not apply to Intestate or Testamentary succession to the property of any Hindú, Muhammadan or Buddhist; nor shall they apply to any Will made, or any intestacy occurring before the first day of January 1866. The fourth Section shall not apply to any marriage contracted before the same day.

Succession to property of Hindús, Muhammadans or Buddhists and certain Wills, Intestacies and marriages not affected by this Act.

As we see from its connection with 'Muhammadan' and 'Buddhist' "Hindú" is here used as a theological term and as denoting a person professing any form of the Brahmanical religion or religion of the Puránas: this would include Jains and Sikhs (as to the latter see *Doe d. Kissenchunder Shah* v. *Baidam Beebee*, 2 Morl. Dig. 22). But the term 'Hindú' would not, apparently, include the *Bábá Lálís* who 'adore but one God, dispensing with all forms of worship, and directing their devotions by rules and objects [*sic*] derived from a medley of *Vedánta* and *Súfi* tenets' (H. H. Wilson's Works, i. 347): the *Prán Náthis* or *Dhámis* in Búndelkhand who consent to the real identity of the essence of the Hindú and Muhammadan creeds (Ibid. 352), the *Sádhus* 'Puritans' a sect of Hindu Unitarians who are found chiefly in the "upper part of the Doáb from Farúkhábád to beyond Delhi" (Ibid. 352), perhaps the *Satnámis* who profess to worship but one God, though they recognise the whole Hindú Pantheon (Ibid. 356), the *Çiva Náráyánis*, who simply profess the worship of one God, and admit proselytes alike from Hindús and Muhammadans (Ibid. 358): the *Çunyavádis* whose doctrines are atheistical (Ibid. 359).

'Muhammadan,' whether Shía (see *Rájá Deedar Hossein* v. *Ranee Zuhoor-oon-Nissa*, 2 Moore I. A. Ca. 441) or Sunní (*a*).

Where one *Hadjee Mustapha* stated in his Will that he did not believe in any of the established systems of religion, but that he conformed to the religion of the Government of Constantinople, where he was born, this was deemed by the late Supreme Court of Bengal sufficient evidence of his being a Muhammadan (Morton's Dec. 2d ed. p. 109).

'Buddhist:' this excludes the Burmese, the Tibetans in the valley of Spíti, and the Lepchas about Darjíling.

The Act at present *clearly* applies to

1°. Europeans by birth or descent domiciled in British India.

2°. East Indians or 'Eurasians' *i. e.* Christians of mixed European and Native blood.

3°. Jews (see *Solomon Hayum Musleah* v. *Ezra Ezechiel Musleah*, 1 Boulnois, 234: *Musleah* v. *Musleah*, Fult. 420).

4°. Armenians (see *Aratoon* v. *Aratoon*, 7 S. D. A. 528: *Stephen* v. *Hume*, Fult. 420: *Phanus Johannes*, Mort. 2d ed. 16: *Aratoon* v. *Johannes*, ib. 19. *Emin* v. *Emin*, ib. 242, the deed poll executed in their favour by the E. I. Company, ib. 37, and *Gregory* v. *Cochrane*, 8 Moo. I. A. Ca. 275).

(*a*) As to a Muhammadan's Will see *Abdullah*, Mort. Dec. 28. Like a Hindú's, a Muhammadan's Will may be nuncupative. But, without consent of the heirs, the testamentary power of a Muhammadan does not extend to more than one-third of the estate (*Hedáya* IV.

5. Parsees—so far as regards the law of testamentary succession—(see *Mihirvanjee Nusherwanjee* v. *Awan Bace*, 2 Borr. Bom. Rep. 209: *Modee Kaikoosrow Hormusjee* v. *Coorerbhace*, 6 Moo. I. A. Ca. 448).

6. Native Christians, *i. e.* converts to Christianity and their Christian descendants (see *Abraham* v. *Abraham*, 9 Moo. I. A. Ca. 195).

7. The Natives of India mentioned in the Commentary on the following Section.

9. The whole Act, except in so far as it relates to succession to moveable property, applies to Europeans in India not having an Indian domicile. But if a person domiciled in England die in India leaving a testamentary paper and possessed *only* of moveable property in India, the Courts of India should not grant probate of the paper unless it was executed according to the law of England. (*Stanley* v. *Barnes*, 3 Hagg. 373). If such a person die intestate and possessed only of moveable property in India his debts will be paid according to English law (Sec. 283), and of the residue, if he leave a widow but no next of kin, she will be entitled only to one moiety, the Crown taking the other. (supra, p. 17).

The Act, apparently, would not apply to a Will made before 1st January 1866, but revived by a Codicil executed after that day. The corresponding expression in Locke King's Act is "any Will *made* before January 1, 1855," and Mr Hawkins is of opinion that the republication by codicil since 1855 of a Will made before 1855 would not bring the Will, if containing a devise of mortgaged estates, within the provisions of that Act (Hawk. 280 *n.*)

Power of Governor-General to exempt any race, sect, or tribe in British India from the operation of this Act.

332. The Governor-General of India in Council shall from time to time have power, by an order, either retrospectively from the passing of this Act, or prospectively, to exempt from the operation of the whole or any part of this Act the members of any race, sect or tribe, in British India or any part of such race, sect or tribe, to whom he may consider it impossible or inexpedient to apply the provisions of this Act, or of the part of the Act mentioned in the order. The Governor-General of India in Council shall also have power from time to time to revoke such order, but not so that the revocation shall have any retrospective effect. All orders and revocations made under this Section shall be published in the Gazette of India.

This Section enables the Government to exempt the non-Aryan Natives of India not comprised within the theological terms 'Hindú,' 'Muhammadan' or 'Buddhist,' such as the Sántáls and other Kóls, the Sub-Himálávan and other Bhután tribes, the Nágas of Assam, the Kus, the Gónds, the Bhíls, the Rájmahálís, the Khonds of Orissa, the Tudas of the Nílagiris, the Shánárs and other demonolaters of the south of India. It also enables Government to exempt, if necessary, the eclectic, reformed and atheistical sects mentioned in the first paragraph of the Commentary on Sec. 331, and such of the Native Christians as wish to retain their ancient rules of succession.

SCHEDULE.

STAMPS.

		Stamps.		
Petition for probate or letters of administration where the value of the estate (*a*) exceeds Rupees five hundred	... Rupees	10	0	0
Ditto where the value of the estate (*a*) is less than Rupees five hundred	... Rupee	1	0	0
Probate or letters of administration	... Rupees	8	0	0
Caveat	... Rupees	4	0	0
Citation	... Rupee	1	0	0
All petitions other than those above-mentioned	... Rupee	1	0	0
Inventory	... Rupee	1	0	0
Administration-bond	... Rupees	8	0	0

FEE.

Translations by the Court Translator or by order of the Court, per folio of ninety words...	Rupees	2	0	0

(*a*) See supra, p. 161.

APPENDIX.

ACT No. XXI OF 1865.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor-General on the 10th April 1865*)

An Act to define and amend the Law relating to Intestate Succession among the Parsees.

WHEREAS it is expedient to define and amend the Law relating to Intestate Succession among the Parsees; It is enacted as follows:—

Preamble.

1. Where a Parsee dies leaving a widow and children, the property of which he shall have died intestate (*a*) shall be divided among the widow and children, so that the share of each son shall be double the share of the widow, and that her share shall be double the share of each daughter.

Division of property among widow and children of Intestate.

The 'children' may be either by the widow or a predeceased wife.

2. Where a female Parsee dies leaving a widower and children, the property of which she shall have died intestate (*a*) shall be divided among the widower and such children, so that his share shall be double the share of each of the children.

Division of property among widower and children of Intestate.

(*a*) See Section 25 of the Indian Succession Act, 1865, *supra*, p. 16, which Section applies to Pa

The 'children' may be either by the widower or a predeceased husband. Sons and daughters here, as under section 4, share equally.

Division of property amongst the children of male Intestate who leaves no widow.

3. When a Parsee dies leaving children but no widow, the property of which he shall have died intestate (*a*) shall be divided amongst the children, so that the share of each son shall be four times the share of each daughter.

Division of property amongst the children of female Intestate who leaves no widower.

4. When a female Parsee dies leaving children but no widower, the property of which she shall have died intestate (*a*) shall be divided amongst the children in equal shares.

Division of predeceased child's share of Intestate's property among the widow or widower and issue of such child.

5. If any child of a Parsee Intestate shall have died in his or her lifetime, the widow or widower and issue of such child shall take the share which such child would have taken if living at the Intestate's death in such manner as if such deceased child had died immediately after the Intestate's death.

Division of property when the Intestate leaves a widow or widower, but no lineal descendants.

6. Where a Parsee dies leaving a widow or widower, but without leaving any lineal descendants, his or her father and mother, if both are living, or one of them if the other is dead, shall take one moiety of the property as to which he or she shall have died intestate, and the widow or widower shall take the other moiety. Where both the father and the mother of the Intestate survive him or her, the father's share shall be double the share of the mother. Where neither the father nor the mother of the Intestate survives him or her, the Intestate's relatives on the father's side, in the order specified in the first Schedule hereto annexed, shall take the moiety which the father and the mother would have taken if they had survived the Intestate. The next of kin standing first in the same Schedule shall be preferred to those standing second, the second to the third, and so on in succession, provided that the property shall be so distributed as that each male shall take double the share of each female standing in the same degree of propinquity. If there be no relatives on the father's side, the Intestate's widow or widower shall take the whole.

"The whole" *i. e.*, the whole of the property of which the deceased shall have died intestate.

See Section 25 of the Indian Succession Act, 1865, supra, p. 16.

Division of property when the Intestate leaves neither widow nor

7. When a Parsee dies leaving neither lineal descendants nor a widow or widower, his or her next of kin, in the order set forth in the second Schedule hereto annexed, shall be entitled to succeed to the whole of the property as to which he or she shall have died intestate. The next of kin standing first in the same Schedule shall always be preferred to those standing second, the second to the third, and so on in succession, provided that the property shall be so distributed as that each male shall take double the share of each female standing in the same degree of propinquity.

Exemption of Parsees from certain parts of the Indian Succession Act, 1865.

8. The following portions of the Indian Succession Act, 1865, shall not apply to Parsees (that is to say) the whole of Part III, the whole of Part IV excepting Section twenty-five, the whole of Part V, and Section forty-three.

The First Schedule.

(1.) Brothers and sisters, and the children or lineal descendants of such of them as shall have predeceased the Intestate.

(2.) Grandfather and grandmother.

(3.) Grandfather's sons and daughters, and the lineal descendants of such of them as shall have predeceased the Intestate.

(4.) Great grandfather and great grandmother.

(5.) Great grandfather's sons and daughters, and the lineal descendants of such of them as shall have predeceased the Intestate.

The Second Schedule.

(1.) Father and mother.

(2.) Brothers and sisters and the lineal descendants of such of them as shall have predeceased the Intestate.

(3.) Paternal grandfather and paternal grandmother.

(4.) Children of the paternal grandfather, and the lineal descendants of such of them as shall have predeceased the Intestate.

(5.) Paternal grandfather's father and mother.

(6.) Paternal grandfather's father's children, and the lineal descendants of such of them as shall have predeceased the Intestate.

(7.) Brothers and sisters by the mother's side, and the lineal descendants of such of them as shall have predeceased the Intestate.

(8.) Maternal grandfather and maternal grandmother.

(9.) Children of the maternal grandfather, and the lineal descendants of such of them as shall have predeceased the Intestate.

(10.) Son's widow, if she have not re-married at or before the death of the Intestate.

(11.) Brother's widow, if she have not re-married at or before the death of the Intestate.

(12.) Paternal grandfather's son's widow, if she have not re-married at or before the death of the Intestate.

(13.) Maternal grandfather's son's widow, if she have not re-married at or before the death of the Intestate.

(14.) Widowers of the Intestate's deceased daughters, if they have not re-married at or before the death of the Intestate.

(15.) Maternal grandfather's father and mother.

(16.) Children of the maternal grandfather's father, and the lineal descendants of such of them as shall have predeceased the Intestate.

(17.) Paternal grandmother's father and mother.

(18.) Children of the paternal grandmother's father, and the lineal descendants of such of them as shall have predeceased the Intestate.

ACT No. XII OF 1855 (*a*).

PASSED BY THE LEGISLATIVE COUNCIL OF INDIA.

(*Received the assent of the Governor-General on the 27th March* 1855.)

An Act to enable Executors, Administrators or Representatives to sue and be sued for certain wrongs.

Preamble.

WHEREAS it is expedient to enable executors, administrators or representatives in certain cases to sue and be sued in respect of certain wrongs which, according to the present law, do not survive to or against such executors, administrators or representatives; It is enacted as follows :—

Executors may sue and be sued in certain cases for wrongs committed in of a deceas-

1. An action may be maintained by the executors, administrators or representatives of any person deceased, for any wrong committed in the life-time of such person, which has occasioned pecuniary loss to his estate, for which

(*a*) See supra, p. 171.

wrong an action might have been maintained by such person, so as such wrong shall have been committed within one year before his death (*a*), and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person: and further, an action may be maintained against the executors or administrators or heirs or representatives of any person deceased for any wrong committed by him in his life-time for which he would have been subject to an action, so as such wrong shall have been committed within one year before such person's death (*b*), and so as such action shall be commenced within two years after the committing of the wrong: and the damages to be recovered in such action shall, if recovered against an executor or administrator bound to administer according to the English law, be payable in like order of administration as the simple contract debts of such person.

2. No action commenced under the provisions of this Act shall abate by reason of the death of either party, but the same may be continued by or against the executors, administrators or representatives of the party deceased. Provided that, in any case in which any such action shall be continued against the executors, administrators or representatives of a deceased party, such executors, administrators or representatives may set up a want of assets as a defence to the action, either wholly or in part, in the same manner as if the action had been originally commenced against them.

Proviso.

ACT No. XIII of 1855 (*c*).

PASSED BY THE LEGISLATIVE COUNCIL OF INDIA.

(*Received the assent of the Governor-General on the 27th March 1855.*)

An Act to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong.

WHEREAS no action or suit is now maintainable in any Court against a person who, by his wrongful act, neglect, or default, may

Preamble.

(*a*) *Powell v. Rees*, 7 A. & E. 426. (*b*) *Richmond v. Nicholson*, 8 Scott,
(*c*) See *supra*, p. 171.

have caused the death of another person, and it is oftentimes right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him; It is enacted as follows:—

1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued, shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime. And it is enacted further, that every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased (*a*), and in every such action, the Court may give such damages (*b*) as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct.

... person for loss occasioned to it by his death by actionable wrong.

(*a*) The defendant is liable for negligence at the suit of the representative only when he would have been liable to an action for the same cause at the suit of the deceased had he survived. Thus where a servant is killed in the employment of his master, the master is not liable for negligence for which the servant could not have sued him (*Senior* v. *Ward*, 5 Jur. N. S. 172. See *Wiggett* v. *Fox*, 2 Jur. N. S. 955).

(*b*) In estimating the damages the reasonable expectation of pecuniary advantage which the surviving relatives had from the deceased is to be taken into account, and the probable pecuniary loss sustained by his death. Funeral and mourning expenses are not to be included (*Dalton* v. *S. E. Ry. Co.*, 4 C. B. N. S. 296: *Franklin* v. *S. E. Ry. Co.*, 3 H. & N. 211: 4 Jur. N. S. 565). The pecuniary loss is the only damage recoverable (*Blake* v. *Midland Ry. Co.*, 18 Q. B. 93). A widow, *e. g.* cannot recover for loss of her deceased husband's society and protection. Actual damage to the parties on whose behalf the action is brought must be proved, and the plaintiff is not entitled to a verdict with nominal damages on proof merely of death by negligence (*Duckworth* v. *Johnson*, 4 H. & N. 653: 5 Jur. N. S. 630). See further Bullen and Leake, 2d. ed., 285: 1 Chitty's Statutes, 1083 note: *Chapman* v. *Roth*- 4 Jur. N. S. 1180; *Bramall* v. *Lees*, 29 L. T. 111).

2. Provided always that not more than one action or suit shall be brought for, and in respect of the same subject-matter of complaint, and that every such action shall be brought within twelve calendar months after the death of such deceased person; provided that, in any such action or suit, the executor, administrator or representative of the deceased may insert a claim for, and recover any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default, which sum, when recovered, shall be deemed part of the assets of the estate of the deceased.

Not more than one action to be brought: to be commenced within 12 months.

Claim for loss to the estate may be added.

The damages given for the loss to the *family* will be distributable amongst the family under the provisions of Section 1.

3. The plaint in any such action or suit shall give a full particular of the person or persons for whom, or on whose behalf, such action or suit shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.

deliver

The direction as to the insertion of the particulars in the plaint was made to accommodate the provisions of the Act to the practice of the Mofussil Courts.

4. The following words and expressions are intended to have the meanings hereby assigned them respectively, so far as such meanings are not excluded by the context or by the nature of the subject-matter, that is to say, words denoting the singular number are to be understood to apply also to a plurality of persons or things, and words denoting the masculine gender are to be understood to apply also to persons of the feminine gender; and the word "person" shall apply to bodies politic and corporate; and the word "parent" shall include father and mother, and grand-father and grand-mother (*a*); and the word "child" shall include son and daughter, and grand-son and grand-daughter, and step-son and step-daughter.

Construction of Act.

(*a*) But not step-father nor step-mother.

ACT No. VIII. OF 1865.

PASSED BY THE LEGISLATIVE COUNCIL OF INDIA.

(Received the assent of the Governor General on the 17th February 1855.)

An Act to amend the law relating to the office and duties of Administrator General.

Preamble.

WHEREAS it is expedient to amend the law relating to the office and duties of Administrator General; It is enacted as follows :—

Designation of the Administrators General in the three Presidencies.

1. In each of the Presidencies of Fort William in Bengal, Fort St. George, and Bombay, there shall be an Administrator General. The said Administrators General shall be called respectively the Administrator General of Bengal, the Administrator General of Madras, and the Administrator General of Bombay.

Appointment, suspension and removal of Administrators General.

2. Such officers shall be appointed and may be suspended or removed by the authorities hereinafter mentioned respectively, that is to say

The Administrator General of Bengal, by the Governor General of India in Council.

The Administrator General of Madras, and the Administrator General of Bombay, by the Governments of those Presidencies respectively.

Continuance of existing incumbents.

3. Any person now holding the office of Administrator General at any of the said Presidencies, shall continue to hold the same, subject to the provisions of this Act.

Administrator General not to be deemed an officer of the Supreme Court.

4. The Administrator General shall not be deemed in that capacity to be an officer of the Supreme Court.

Letters of administration granted to the Ecclesiastical Registrar of the Madras Supreme Court since Act II. of 1850, and Estates, &c. transferred to Administrator General.

5. All letters of administration, which, since the passing of Act No. II of 1850, have been granted by the Supreme Court of Judicature at Fort St. George to the Ecclesiastical Registrar of that Court in virtue of his office, and all estates, effects and interests, books, papers and documents, now vested in, or belonging to the said Ecclesiastical Registrar, or under his control, by virtue of any such letters of administration, are by this Act transferred to and vested in him as Administrator General of that Presidency, and such letters of administration

shall have the same effect in all respects as to any act hereafter to be done or required to be done under this Act as if they had been granted to him as Administrator General.

6. The two offices of Ecclesiastical Registrar of the Supreme Court and Administrator General may be held by the present Administrator General at the Presidency of Fort St. George. With that exception, no person now holding the office of Administrator General, or hereafter to be appointed to such office, in any of the said Presidencies, shall hold the office of Ecclesiastical Registrar, nor, without the express sanction of Government, any other office, together with that of Administrator General. Provided that nothing in this Act shall prevent the present Administrator General of Bengal from holding the office of Receiver of the Supreme Court of Judicature now held by him.

The present Administrator General of Madras may hold the office of Ecclesiastical Registrar.

Otherwise no Administrator General to be Ecclesiastical Registrar.

Administrator General not to hold any other office without sanction of Government.

7. Unless the Governor General of India in Council or the Government with the sanction of the Governor General of India in Council shall otherwise order, every Administrator General hereafter to be appointed shall give security to the East India Company for the due execution of his office, for one lakh of Rupees by his own bond and for another lakh of Rupees, or for separate sums amounting together to one lakh of Rupees, by the deposit of Government Securities or by the joint and several bond or bonds of two or more sureties to be approved by Government, or partly by such deposit and partly by such bond or bonds; provided that every Administrator General may, with the consent of Government, substitute either of the said two last mentioned kinds of security for another previously given for such last mentioned lakh or any part of it; and every Administrator General may, with the consent of Government, and shall from time to time when required by Government so to do, cause fresh sureties to be substituted for any of those previously bound so far as the security shall relate to the due execution of his office for the time then to come.

Security to be given by Administrator General.

Substitution of Security or Sureties.

8. No Administrator General shall be required by the Supreme Court to enter into any administration bond, or to give other security to the Court, on the

No security to be required by Supreme Court

ministrator General.

of

in virtue of his office.

9. Any letters of administration, or letters *ad colligenda bona*, which shall hereafter be granted by the Supreme Court of Judicature at any of the said Presidencies, shall be granted to the Administrator General of the Presidency, unless they shall be granted to the next of kin of the deceased ; and it is hereby declared that the Administrator General of the Presidency shall be deemed to have a right to letters of administration in preference to that of any person merely on the ground of his being a creditor or friend of the deceased.

Administrator General entitled to letters of administration, unless ... of

Administrator General entitled in preference to creditor or friend.

10. The words "next of kin" shall be deemed throughout this Act to include a widower or widow of the deceased, or any other person who, by law and according to the practice of the Courts, would be entitled to letters of administration in preference to a creditor of the deceased. Provided that no Ecclesiastical Registrar or other Officer of any of the said Courts, shall, by reason of his Office, be deemed entitled to any letters of administration or *ad colligenda bona*, or have any grant thereof made to him.

Construction of words "next of kin."

Ecclesiastical Registrar not to be entitled to administration by reason of his office.

11. If any person, not being a Mahomedan or Hindoo, shall have died, whether within any of the said Presidencies or not, and whether before or after the passing of this Act, and shall, if a British subject, have left assets exceeding the value of five hundred Rupees within any of the said Presidencies, or any of the Provinces or places subject thereto, or shall, if not a British subject, have left personal assets exceeding five hundred Rupees within the local limits of the jurisdiction of the Supreme Court of Judicature at any of the said Presidencies, and no person shall, within one month after his death, have applied for probate of a will, or for any letters of administration of his estate, the Administrator General of the Presidency in which such assets shall be is hereby required, within a reasonable time after he shall have had notice of the death of such person, and of his having left such assets as aforesaid, to take such proceedings as may be necessary to obtain from the Supreme Court of Judicature at such Presidency letters of administration to the effects of such person, either generally or with a will annexed, as the case may require. Provided that assets, which any person

When administration of estates of persons other than Mahomedans or Hindoos is to be by Administrator General.

Proviso as to assets Act XX of 1841.

may be entitled to collect, receive, or dispose of, by virtue of a certificate granted under Act XX of 1841, shall not be deemed assets within the meaning of this Section.

This Section does not prevent the Administrator General from administering estates of less value than Rs. 500.

Where there are no next of kin and the Crown is consequently entitled, the Administrator General may take out administration without special appointment. He will be trustee for the Crown of the surplus remaining in his hands after payment of debts and due administration of the estate (*Hogg* v. *Mendieta*, 1 Boulu. 622, 626).

The phrase 'applied for probate'—means, of course, 'applied *in India*.'

Upon death of any person leaving assets within local limits, the Court may, if assets are in danger, direct Administrator General to apply for administration.

12. Whenever any person, whether a Mahomedan or Hindoo or not, shall die leaving assets within the local limits of the jurisdiction of Her Majesty's Supreme Court of Judicature at any of the said Presidencies, it shall be lawful for the Court, upon the application of any person interested in such assets or in the due administration thereof, either as a creditor, next of kin (*a*), or otherwise, or upon the application of a friend of any infant who may be so interested, or upon the application of the Administrator General, if the applicant shall satisfy the Court that danger is to be apprehended of the misappropriation of such assets, unless letters of administration of the effects of such person are granted, to make an order directing the Administrator General to apply for letters of administration of the effects of such person.

The bare possibility that the Act of limitations may ultimately become a bar to the recovery of assets, is not such danger of misappropriation as warrants the granting to the Administrator General of an order under this Section (*Girdar Dás Vallabu Dás*, 1 Mad. H. C. Rep. 77).

Semble a debtor to the estate of a deceased person cannot apply for an order under this Section (*Ibid.*).

Repeal of Section 20 Act XIX of 1841.

13. Section XX Act No. XIX of 1841 is hereby repealed, except as to acts done and except as to any case in which an order shall have been made before the commencement of this Act.

Upon death of any person leaving property within local limits, Court may, if property is in danger, enjoin Administrator General to collect and hold the same until right of or administra- is ascertained.

14. Whenever any person, whether a Mahomedan or Hindoo or not, shall have died leaving moveable or immoveable property within the local limits of the jurisdiction of any of Her Majesty's Supreme Courts of Judicature, and such Court shall be satisfied that danger is to be apprehended of the misappropriation or waste of such property, before it

(*a*) See Section

can be ascertained who may be legally entitled to the succession of such property, or whether the Administrator General is entitled to letters of administration to such deceased person, it shall be lawful for the Court to authorize and enjoin the Administrator General to collect and take possession of such property and to hold or deposit or invest the same according to the orders and directions of the Court, and in default of any such orders or directions, according to the provisions of this Act so far as the same are applicable to such property; and the Administrator General shall be entitled to a commission of one per cent. upon the amount of all personal assets collected or received by him in pursuance of such order; and in case letters of administration of such effects shall be afterwards granted to the Administrator General, the said commission of one per cent. shall be deemed a part payment of the commission payable to the Administrator General under the letters of administration. Any order of Court made under the provisions of this Section shall entitle the Administrator General to collect and take possession of such property, and if necessary, to maintain an action for the recovery thereof.

Rate of commission payable in such case.

So long as an order under this Section is in force unrevoked, the Administrator General's right to the possession of the property is clear, for it is an enactment to provide for secure possession *pendente lite* on allegation and proof to the satisfaction of the Court of danger of misappropriation or waste: the order is like a probate or letters of administration, so far as respects the title under it to get in the property (*Hogg* v. *Hurrydoss Dutt*, 1 Bouln. 656).

The object of this Section is to prevent the estates of Natives from being wasted or misapplied when one of the next of kin obtains possession of the whole property. In such case, whenever the Administrator General may be ordered to apply for administration, the person in possession, if justly entitled to administer, may always prevent administration being granted to the Administrator General by making out a preferential title and giving the necessary bond as security: see Sec. 16.

Administrator General may be Official Trustee under Act XVII of

15. The Administrator General of the Presidency may be appointed an Official Trustee under Act No. XVII of 1843.

Repealed by Act XVII of 1864 (*An Act to constitute an office of Official Trustee*). But Section 6 of this Act provides that the Administrator General or Officiating Administrator General for the time being of any of the Presidencies shall be eligible for the office of Official Trustee of that Presidency.

16. If in the course of proceedings to obtain letters of administration under the provisions of Section 11 or Sec. 12 of this Act, any executor appointed by a will of the deceased shall appear according to the practice of the Court and prove the

Probate to be granted to executor appearing in the course of proceedings taken by Administrator General to obtain admi-

will and accept the office of executor, or if any person shall appear according to such practice and make out his claim to letters of administration as next of kin of the deceased, and shall give such security as shall be required of him by law or by the practice of the Court, the Court shall grant probate of the will or letters of administration accordingly, and shall award to the Administrator General his costs of the proceedings so taken by him, to be paid out of the estate as part of the testamentary expenses thereof.

Costs of proceedings taken by the Administrator General to be paid out of the estate.

17. If no person shall appear according to the practice of the Court, and entitle himself to probate of a will, or to a grant of letters of administration, as next of kin of the deceased, or if the person who shall entitle himself to a grant of administration shall neglect to give such security as shall be required of him by law or according to the practice of the Court, the Court shall grant letters of administration to the Administrator General. Provided that, in the case of an application being made under Section 12 of this Act for letters of administration to the effects of a Mahomedan or Hindoo, the Court may refuse to grant letters of administration to any person if it be satisfied that such grant is unnecessary for the protection of the assets, and in such case the said Court shall make such order as to the costs of the application as it shall think just.

If no executor or next of kin appear or give necessary security, letters of administration to be granted to Administrator General.

Administration to effects of deceased Mahomedans or Hindoos not to be granted under Section 12 unless required to protect the assets.

Costs of unnecessary application.

In the case of Muhammadans and Hindús the Administrator General is bound to administer the effects of Muhammadans and Hindús, according to the Muhammadan or Hindú law, as the case may be (*Commula Hyder*, Mort. 1).

18. Nothing in this Act is intended to preclude the Administrator General from applying to the Court for the letters of administration in any case within one month after death of deceased.

Administrator General not precluded from applying for administration in any case within one month after death of deceased.

19. If any letters of administration, which shall be granted to the Administrator General under the provisions of this Act, shall be revoked, or recalled, the Administrator General and all persons acting under his authority in pursuance thereof, so far as regards the Administrator General and all persons acting under his authority in pursuance thereof, be deemed to have been only voidable, except as to any act done by any such Administrator

After revocation, letters of administration to Administrator General to be deemed as to him to have been voidable only.

Exception.

General or other person as aforesaid, after notice of a will or of any other fact which would render such letters of administration void. Provided that no notice of a will or of any other fact which would render any such letters of administration void, shall affect the Administrator General or any person acting under his authority in pursuance of such letters of administration, unless, within the period of one month from the time of giving such notice, proceedings be commenced to prove the will or to cause the letters of administration to be revoked, nor unless such proceedings be prosecuted without unreasonable delay.

Proviso.

20. If any letters of administration which shall be granted under this Act, shall be revoked upon the production and proof of a will, all payments made or acts done by or under the authority of the Administrator General in pursuance of such letters of administration prior to the revocation thereof, which would have been valid under any letters of administration lawfully granted to him with such will annexed, shall be deemed valid, notwithstanding such revocation.

What payments made or acts done by Administrator General prior to revocation of Administration upon production of a will, shall be deemed valid.

21. If an executor or next of kin of the deceased, who shall not have been personally served with a citation, or had notice thereof in time to appear in pursuance thereof, shall establish to the satisfaction of the Court a claim to probate of a will or to letters of administration in preference to the Administrator General, any letters of administration which shall be granted by virtue of this Act to the Administrator General, may be recalled and revoked, and probate may be granted to such executor, or letters of administration granted to such other person as aforesaid. Provided that no letters of administration, which shall be granted to the Administrator General, shall be revoked or recalled for the cause aforesaid, except in cases in which a will or codicil of the deceased shall be proved, unless the application for that purpose shall be made within one year after the grant to the Administrator General, and the Court shall be satisfied that there has been no unreasonable delay in making the application, or in transmitting the authority under which the application shall be made.

In what cases Court may recall Administrator General's administration and grant probate, &c., to executor or next of kin.

Unless a will is prov- , application to revoke tion must one year and without needless delay.

22. If any letters of administration, which shall be granted to the Administrator General in pursuance of this Act, shall be revoked, the Court may order the costs of obtaining such letters of administration and the whole or any part of any commission which would other-

Costs of obtaining administration, commission, ovocation, Court to Administrator General out of the assets.

wise have been payable under this Act, together with the costs of the Administrator General in any proceedings taken to obtain such revocation, to be paid to or retained by the Administrator General out of any assets belonging to the estate.

When letters of administration which had been granted to the Administrator General of Madras were recalled, and he had merely taken manual possession of cash, Government promissory notes and the title deeds of lease-holds belonging to the deceased, the High Court allowed him commission at the rate of 2½ per cent. on the cash and the value of the notes, but refused to allow it on the lease-holds (*Simpson*, 1 Mad. H. C. Rep. 171).

23. Any payment or delivery of assets to any legatee, or to any person entitled in distribution, which shall be made by an Administrator General after the expiration of one year from the grant of the letters of administration under which such payment or delivery shall be made, shall be allowed to the Administrator General as against all creditors and other claimants against the estate, of whose debts or claims he shall not have had notice before making such payment or delivery. Provided that nothing herein contained shall exempt the person to whom such payment or delivery shall be made, from any liability to refund to which he would otherwise be liable, and provided also that no notice of any debt or claim shall affect the Administrator General unless proceedings to enforce the debt or claim be commenced within one month after the giving of such notice and be prosecuted without unreasonable delay.

After one year from grant of administration, distribution of assets by Administrator General to be allowed against all claims of which he had no notice.

"According to the general law, an Administrator is bound to take notice of all debts of record, whether he has actual notice or not, and this distinction, as well as all question as to whether in the case of other debts the notice should not be by suit, is got rid of by Section 23" (*Ritchie* v. *Stokes*, 2 Mad. H. C. 255, 265).

24. All letters of administration, which shall be granted to any Administrator General in virtue of his office, shall be granted to him by his name of office, and all letters of administration heretofore granted to the Ecclesiastical Registrar or Administrator General officially, or which shall be granted to any Administrator General in virtue of his office, hall authorize the Administrator General for the time being of the same

Letters of administration to be granted to Administrator General in virtue of his Office.

Authority given by such letters.

Presidency to act as administrator of the estate to which such letters of administration shall relate; and all estates, effects and interests, which, at the time of the death, resignation or removal from office of any Administrator General, shall be vested in him by virtue of such letters of administration shall, upon such resignation or removal, cease to be vested in him, and shall vest in his successor in office immediately upon his appointment thereto; and all books, papers and documents kept by such Administrator General by virtue of his office, shall be transferred to, and vested in his successor in office.

On death, &c., of Administrator General, estate, &c., to vest in successor.

And office books to be transferred.

The power given by this Section "to act as administrator of the estate" authorises the Administrator General to retain for his own debt (*Ritchie* v. *Stokes*, 2 Mad. H. C. 255, 264).

25. All actions, suits or other proceedings, which shall be commenced by or against any Administrator General in his representative character, may be brought by or against him by his name of office, and no suit, action or other proceedings already commenced, or which shall be commenced against any person as Administrator General, either alone or jointly with any other person, shall abate by reason of the death, resignation or removal from office of any such Administrator General, but the same may, by order of the Court, and upon such terms as to the service of notices or otherwise as the Court may direct, be continued against his successor immediately upon his appointment, in the same manner as if no such death, resignation, or removal had occurred. Provided that nothing hereinbefore contained shall render any such successor personally liable for any costs incurred prior to the order for continuing the action or suit against him.

Administrator General to sue or be sued in his representative capacity by his name of office.

Proviso.

26. The Administrator General of each of the said Presidencies under any letters of administration which shall be granted to him in his official character, or under any probate which shall be granted to him of a will wherein he shall be named as executor by virtue of his office, and the Administrator General of Madras under any letters of administration which are vested in him by Section 5 of this Act, shall be entitled to receive a commission, at the following rates respectively; *viz.*:

..... to be received by Administrators General.

The Administrator General of Bengal at the rate of 3 per ., and the Administrators General of Madras and Bom-

bay respectively at the rate of 5 per cent., upon the amount or value of the assets which they shall respectively collect and distribute in due course of administration.

The Administrator General accounts for all the interest which accrues from the day of the testator's death, and makes no profit on the assets which come to his hands, exclusive of his fixed commission. (v. *Davidass*, Perry Or. Ca. 54, 57).

What expenses, &c., commission is to cover.

27. The Commission which the Administrator General of each of the said three Presidencies shall be entitled, is intended to cover not merely the expense and trouble of collecting the assets, but also his trouble and responsibility in distributing them in due course of administration. It is therefore enacted that one-half of such commission shall be payable to and retained by such Administrator General upon the collection of the assets, and the other half thereof shall be payable to the Administrator General who shall distribute any assets in the due course of administration, and may be retained by him upon such distribution. The amount of the commission lawfully retained by an Administrator General upon the distribution of assets shall be deemed a distribution in the due course of administration within the meaning of this Act.

How payable.

Commission retained to be deemed a distribution.

The last sentence of this Section was introduced to meet a difficulty raised by the Auditors at Madras as to whether the Administrator General was to be allowed commission upon his commission. If he collects Rs. 100 and distributes 97, retaining 3 as his commission, he does as substantially distribute 100 as if he paid 100 and received back 3. In such a case he does not receive commission upon his commission, but only 3 per cent. upon the amount distributed. The Auditors would only allow at the rate of 3 per cent. upon 97, which would have introduced great confusion into the accounts as the 97, and commission on it at the rate of 3 per cent. would not amount to 100.

Commission of the Administrators General of Madras and Bombay may be reduced and again raised.

28. The Governments of the said Presidencies of Fort St. George and Bombay respectively, may, with the sanction of the Governor General of India in Council, from time to time, order the aforesaid rate of commission hereby authorized to be received by the Administrators General for those Presidencies respectively to be reduced and again to be raised. Provided that the commission so to be received shall not at any time exceed five per cent. of the assets collected, and that no person now holding the office of Administrator General of either of the

Proviso.

said Presidencies of Fort St. George or Bombay shall, by any such order, be deprived of the right to receive and retain for his own use, a commission at the rate of three per cent. in respect of all assets collected and actually administered by him.

Administrator General to defray expenses of establishment and all other charges not expressly provided for.

29. The Administrator General shall defray all the expenses of the establishment necessary for his office, and all other charges to which the said office shall be subjected, except those for which express provision is made by this Act.

Commission or agency not to be charged by executor or administrator other than the Administrator General.

30. No person other than the Administrator General acting officially, shall receive or retain any commission or agency charges for anything done as executor or administrator under any probate or letters of administration, or letters *ad colligenda bona*, which have been granted by the Supreme Court of Judicature at Fort William in Bengal since the passing of Act No. VII of 1849, or by either of the said other Supreme Courts of Judicature since the passing of Act No. II of 1850, or which shall hereafter be granted by either of the said Courts; but this enactment shall not prevent any executor or other person from having the benefit of any legacy bequeathed to him in his character of executor, or by way of commission or otherwise.

Specific bequest in favor of executors not affected.

See the Indian Succession Act, 1865, Section 128.

Administrator General to keep a separate account-book for each estate, to be open to inspection, &c. on [illegible], &c.

31. The Administrator General of each of the said Presidencies shall enter into books, to be kept by him for that purpose, separate and distinct accounts of each estate, and of all such sums of money, bonds and other securities for money, goods, effects, and things, as shall come to his hands, or to the hands of any person employed by him, or in trust for him, under this Act, and likewise of all payments made by him on account of such estate, and of all debts due by or to the same, specifying the dates of such receipts and payments respectively, which said books shall be kept in the Administrator General's Office, and shall be open for the inspection of all such persons, practitioners in the said Courts and others, as may have occasion to inspect the same, at office hours, paying only such reasonable fee as hath been, or shall be, from time to time, fixed by the Government and pub-

lished in the official *Gazette* of the Presidency to which the same may relate.

This is nearly Section 10 of the repealed Act VII of 1849, which, again, follows Section 5 of the Statute 55 Geo. III, cap. 84. On Section 10 of Act VII of 1855 it has been held that every claimant on the estates of deceased persons, administered by the Administrator General (however the title be derived) and every person interested in such estates (though remotely) has a right to inspect on lawful occasions the books relating to such estates in the hands of the Administrator General. But such right of inspection cannot be extended to adverse litigants claiming adversely to those interested in such estates. Therefore when a debtor to an estate was sued by the Administrator General, and in aid of his defence to the action, claimed inspection of the books and accounts of that estate in the Administrator General's office, a rule for a mandamus was discharged (*The Queen* v. *Sandes*, 1 Tayl. & Bell, 411).

Government may make and alter rules and orders consistent with this Act.

For custody of assets.

For remittance of money.

For guidance of Administrator General.

32. The Government shall have power, from time to time, to make and alter any general rules and orders consistent with the provisions of this Act, for the safe custody of the assets and securities which shall come to the hands or possession of the Administrator General, and for the remittance to the East India Company at their House in England of all sums of money which shall be payable or belong to persons resident in Europe, or in other cases where such remittances shall be required, and generally for the guidance and government of the Administrator General in the discharge of his duties; and may, by such rules and orders, amongst other things, direct what books, accounts and statements, in addition to those mentioned in this Act, shall be kept by the Administrator General, and in what form the same shall be kept and what entries the same shall contain, and where the same shall be kept, and where and how the assets and securities belonging to the estates to be administered by such Administrator General shall be kept and invested or deposited, pending the administration thereof, and how and at what rate or rates of exchange any remittances thereof shall be made. Unless any such rules shall be made and published, the rules now in force in each of the said Presidencies so far as the same are not inconsistent with this Act, shall be of the same force and effect as if the same had been made and published under this Act.

Proviso as to rules now in force.

Publication of orders, &c.

33. Such orders shall be published in the official *Gazettes* of the several Presidencies, and it shall be the duty of the several Administrators General to obey and fulfil the same, and the

same shall be a full authority and indemnity for all persons acting in pursuance thereof.

Administrator General to furnish half-yearly Schedules, &c.

34. The Administrator General of each of the said Presidencies shall, twice in every year—that is to say, on the first day of March, and on the tenth day of August, or on the first day on which the Supreme Court of Judicature at the Presidency shall be sitting after those days, or on such other days as the Government shall, by any rules or orders to be published as aforesaid, direct—exhibit and deliver, in open Court, a true Schedule showing the gross amount of all sums of money received or paid by him on account of each estate in his charge, and the balances during the period of six months, ending severally on the thirty-first day of December and thirtieth day of Junenext before the day of delivering such Schedule, and a true list of all bonds or other securities received on account of each of the said estates during the same period; and also a true Schedule of all administrations, whereof the final balances shall have been paid over to the persons entitled to the same, during the same period, specifying the amount of such balances, and the persons to whom paid,

Schedules to be filed and published.

which Schedules shall be filed of record in such Supreme Court of Judicature, and shall, within fourteen days afterwards, be published in the official *Gazette* of the Presidency by the said Administrator General; and copies thereof in triplicate shall be delivered by such Administrator General to the Secretary of the said Presidency, and shall be sent by the Governor thereof to the Court of Directors of the East India Company, in order that the said Court of Directors may, if they think fit so to do, order the same to be deposited at the East India House, London, for public inspection, and may cause notices to be published in the *London Gazette* and other leading newspapers, that such Schedules are open to inspection there, or may make such other orders respecting the same as they may think fit.

Government to appoint Auditors.

35. The Government shall, from time to time, appoint an auditor or auditors to examine the accounts of the Administrator General at the times of the delivery of the said Schedules, and also at any other time when the Government shall think fit.

Auditors to examine Schedule, and report to Government.

36. The Auditor or Auditors shall examine the Schedules and accounts, and report to the Government whether they contain a full and true account of every thing which ought to be inserted therein, and whether the books which, by this Act, are, or which, by any such general rules and

orders as aforesaid, shall be directed to be kept by the Administrator General, have been duly and regularly kept, and whether the assets and securities have been duly kept and invested and deposited in the manner prescribed by this Act, or which shall be prescribed by any such rules and orders to be made as aforesaid.

Auditors to have power to summon witnesses and to call for books, &c.

37. Every Auditor shall have power to summon as well the Administrator General as any other person or persons whose presence he may think necessary, to attend him from time to time; and to examine the Administrator General, or other party or parties, if he shall think fit, on oath or solemn affirmation, to be by him administered; and to call for all books, papers, vouchers and documents which shall appear to him to be necessary for the purposes of the said reference: and if the Administrator General or other person or persons when summoned shall refuse, or without reasonable cause, neglect to attend or to produce any book, paper, voucher or document required, or shall attend and refuse to be sworn or make a solemn affirmation, when by law an affirmation may be substituted for an oath, or shall refuse to be examined, the Auditor or Auditors shall certify such neglect or refusal in writing to the Supreme Court of Judicature at the Presidency; and every person so refusing or neglecting shall thereupon be punishable, in like manner as if such refusal or neglect had been in contempt of the Supreme Court.

Penalty for non-attendance.

Costs of preparing Schedule, &c. how to be paid.

38. The costs and expenses of preparing and publishing the said Schedules and copies thereof, and of every such reference and examination as aforesaid, shall be defrayed by all the estates to which such Schedules or accounts shall relate, which costs and expenses, and the portion thereof to be contributed by each of the said estates, shall be ascertained and settled by the Auditor or Auditors, subject to the approval of the Government, and shall be paid out of the said estates accordingly by the Administrator General.

Auditors to report specially to Government, if accounts appear not correct.

39. If, upon any such reference and examination, the Auditor or Auditors shall see reason to believe that the said Schedules do not contain a true and correct account of the matters therein contained, or which ought to be therein contained, or that the assets have not been duly kept and invested or deposited in the manner directed by this Act, or which shall be directed by and such rules and orders as aforesaid, or that the Administrator General has failed to comply with the provisions and directions

of this Act, or of any such rules and orders, he or they shall report accordingly to the Government.

Proceedings upon such report.

40. The Government may refer every such report as last aforesaid to the consideration of the Advocate General for the Presidency, who shall thereupon, if he shall think fit, proceed summarily against the defaulter or his personal representative in the Supreme Court of Judicature int he Presidency, by petition for an account, or to compel obedience to this Act or to such rules and orders as aforesaid, or otherwise as he may think fit, in respect of all or any of the estates then or formerly under the administration of such defaulter; and the said Advocate General shall have power to exhibit interrogatories to the said Administrator General, or other person or persons, defendants, who shall be bound to answer the same as fully as if the same had been contained in a bill filed for the like purpose; and the Court shall have power upon any such petition, to compel the attendance in Court of the defendant or defendants, and any witnesses who may be thought necessary, and to examine them orally or otherwise as the said Court shall think fit, and to make and enforce such order or orders as the Court shall think just.

of reference, &c., to be defrayed.

41. The costs, including those of the Advocate General, and of the reference to him, if the same shall be directed by the Court to be paid, shall be defrayed either by the defendant or defendants, or out of the estates rateably as the said Court shall direct; and whenever any costs shall be recovered from the defendant or defendants, the same shall be repaid to the estates by which the same shall have been in the first instance contributed, and the Court shall have power to order the Administrator General, or other person or persons, defendants, to receive his or her costs out of the said estates, if it shall think fit.

Orders of the Court to have same effect and to be executed in same manner as decretal orders.

42. Any orders which shall be made by any of the said Supreme Courts shall have the same effect, and be executed in the same manner as decretal orders.

In what case Administrator General may grant certificate.

43. Whenever any person, not being a Mahomedan or Hindoo, shall have died, whether within any of the said Presidencies or not, and whether before or after the passing of this Act, and shall, if a British subject, have left personal assets within any of the said Presidencies or any of the Provinces or places subject thereto, or shall, if not a British subject, have left personal assets within the local limits of the jurisdiction of the Supreme Court of Judicature

at any of the said Presidencies, and letters of administration of his effects shall not be taken out for three months after his death, and the Administrator General of such Presidency shall be satisfied that such effects do not exceed in the whole five hundred Rupees, he may, if he shall think fit, at any time before administration of such effects shall be granted, grant to any person claiming to be entitled to a principal share of the effects of the deceased, certificates under his hand, entitling the claimant to receive the sums or securities for money therein severally mentioned, belonging to the effects of the deceased, to the value of any sum not exceeding in the whole five hundred Rupees.

Act XXVI of 1860, Section 2.

The Administrator General cannot grant a certificate under this Section in respect of any sum of money deposited in a Government Savings Bank. Act XXVI of 1855, Section 4.

"If he shall think fit," this implies a right in the Administrator General to administer, if he pleases, estates of a less value than Rs. 500. 1 Boulu. 624.

44. The Administrator General shall not be bound to grant any such certificate, unless he shall be satisfied of the title of the claimant and of the value of the effects of the deceased, either by the oath, affidavit, or solemn affirmation of the claimant (which oath, affidavit or affirmation the Administrator General is hereby authorized to administer or take) or by such other evidence as he shall require.

Administrator General not bound to grant certificate unless satisfied of claimant's title, &c.

45. Any such certificate, with a receipt annexed under the hand of the person to whom the certificate shall be granted, shall be a full discharge for payment or delivery to him or her of the money or security for money therein mentioned, to the person paying or delivering the same: but nothing in this Act shall preclude any executor or administrator of the deceased from recovering from the person receiving the same, the amount remaining in his hands, after deducting the amount of all debts or other demands lawfully paid or discharged by him in due course of administration; and any creditor or claimant against the estate of the deceased shall be at liberty to recover his debt or claim out of the assets received by such person, and remaining in his hands unadministered, in the same manner and to the same extent as if such person had obtained letters of administration to the estate of the deceased.

Certificate with receipt annexed to be a sufficient discharge.

Proviso.

46. The Administrator General shall not be bound to take out letters of administration to the estate of any deceased person on account of the effects in respect of which he shall grant any such certificate, but he may do so if he shall discover any fraud or misrepresentation made to him, or that the value of the estate exceeded five hundred Rupees.

Administrator General not bound to take out administration on account of effects in respect of which he has granted certificate.

The object of this clause is to relieve the Administrator General from taking out administration to such small estates when he grants certificates. 1 Bouln. 624.

47. For every such certificate the Administrator General shall be entitled to charge a fee calculated after the rate of three Rupees in the hundred on the amount mentioned in the certificate.

Fee for certificate.

48. Every person who, having been sworn, or having taken a solemn affirmation under this Act, shall wilfully give false testimony upon any examination authorized by this Act, shall be deemed guilty of perjury, and, if convicted, shall be liable to be punished accordingly.

Penalty for false swearing, &c.

49. It is hereby declared to be a misdemeanour, punishable by fine and imprisonment, for any Administrator General to trade or traffic for his own benefit, or for the benefit of any other person or persons whomsoever, unless so far as shall appear to him to be expedient for the due management of the estates of which letters of administration shall be granted to him, and for the sole benefit of the several persons entitled to the proceeds of such estates respectively; but this exception is not to be construed to alter the civil liabilities of the Administrator General as trustee of such estates.

Penalty for Trading.

Exception.

50. And whereas it appears from the books and accounts of the Administrator General of Bombay, that, on the thirtieth day of June 1851, there were in his charge Government Securities and cash, arising from accumulations of interest on estates heretofore administered by, or in the charge of, the Ecclesiastical Registrar of the Supreme Court of Judicature at that Presidency, over and above the amount of interest heretofore allowed on the administration of such estates, it is further enacted as follows :—The Administrator General of Bombay shall forthwith transfer and pay the said Government Securities, and cash balance, and any other Government

Accumulation of interest in the hands of the Administrator General at Bombay to be transferred to the E. I. Company.

rities and cash which, at the time of the passing of this Act, shall or may be in his charge, or under his control in respect of such accumulations of interest, or any additions thereto, to the Accountant General and Sub-Treasurer of Bombay to be carried to the account and credit of the East India Company, for the general purposes of Government; and the receipt of the Accountant and of the Sub-Treasurer of Bombay for any monies or securities so paid or transferred to them under the provisions of this Act, shall be a full indemnity and discharge to the Ecclesiastical Registrar and Administrator General for any such payment or transfer.

In the Madras and Bombay Presidencies, the proceeds of Estates unclaimed for 15 years to be transferred to the E.I. Company.

51. The net proceeds of all estates in the official charge of the Administrator General of either of the Presidencies of Fort St. George or Bombay, and which now appear, or shall hereafter appear, from the official books and accounts of the Ecclesiastical Registrar and of the Administrator General of either of those Presidencies, or from the official books and accounts of either of those officers, to have been in official custody for a period of fifteen years or upwards, without any claim thereto having been made and allowed, shall be transferred and paid to the Sub-Treasurer of the East India Company at Fort St. George and Bombay respectively, and be carried to the account and credit of the East India Company, for the general purposes of Government; and the receipt of the said Sub-Treasurer and Accountant General shall be a full indemnity and discharge to the said Administrator General for any such payment or transfer. Provided

Proviso.

that this Act shall not authorize any transfer or payment of any such proceeds as aforesaid, pending any suit already instituted, or which shall be hereafter instituted, in respect thereof.

Mode of proceeding by claimant to recover principal money so transferred.

52. If any claim shall be hereafter made to any part of the securities, monies, or proceeds which shall be carried to the account or credit of the East India Company under the provisions of this Act, and if such claim shall be established to the satisfaction of the Administrator General and Accountant General to the Government of Fort St. George and Bombay, for the time being respectively, the said Accountant General shall direct the Sub-Treasurer of the Presidency to pay, and the Sub-Treasurer shall thereupon pay, out of the monies of the East India Company in his custody, to the claimant, the amount of the principal so carried to the credit and account of the said East India Company, or so much thereof as shall appear

to be due to the claimant. If the claim shall not be established to the satisfaction of the said Administrator General and Accountant General, the claimant may apply by petition to the Supreme Court at the Presidency against the East India Company and Administrator General of the Presidency for the time being, and after taking evidence, either orally or on affidavit, in a summary way, as the said Court shall think fit, the said Court shall make such order on the petition for the payment of such portion of the said principal sum as justice shall require, which order shall be binding on all parties to the suit.

Regulations repealed.

53. Section VI. Regulation XV. 1806 of the Bengal Code, and Section V. Regulation IV. of 1809 of the Madras Code are hereby repealed.

llah Judge in certain to take charge of rty of a British sub-

Zillah, and to report to Administrator General.

54. Whenever any British subject shall die leaving personal assets within the limits of the jurisdiction of a Zillah Judge, and effects of the deceased, it shall be the duty of the Zillah Judge to report the circumstance without delay to the Administrator General of the Presidency, retaining the property under his charge until letters of Administration shall have been obtained by the Administrator General or by some other person from the Supreme Court of Judicature, when the property shall be delivered over to the person obtaining such letters of Administration, or, in the event of a will being discovered, to the person who may obtain probate of the will.

But now see Section 330 of the Indian Succession Act, 1865.

Construction of Act.

55. In the construction of this Act, the word "Government" shall be deemed to mean the Governor General of India in Council, so far as the Act relates to the Presidency of Fort William in Bengal or any place subordinate thereto, and the person or persons for the time being administering the Executive Government of the Presidency, so far as the Act relates to the Presidencies of Fort St. George and Bombay respectively; the words "letters of administration" shall include any letters of administration, whether general or limited or with a will annexed, and letters *ad colligenda bona*. Words in the masculine gender shall include the feminine; and words in the singular number shall include the plural, and *vice versâ*; unless where such construction would be inconsistent with or repugnant to the context.

56. Acts VII of 1849 and II of 1850 are hereby repealed as to all letters of administration which shall hereafter be applied for or granted.

Repeal of Acts.

57. Nothing in this Act is intended to require the Administrator General to take proceedings to obtain letters of administration to the estate or effects of any officer or soldier or other person subject to any Articles of War, or to the estate or effects of any officer, seaman, or other person dying in the Marine Service of the East India Company, called the Indian Navy, unless when the Administrator General shall be duly authorized or required so to do by the Military Secretary, or other officer having similar powers with regard to the estate or effects of any officer, seaman, or other person dying in the Indian Navy; nor is anything in this Act contained intended to interfere with or alter the provisions of any Act of Parliament for regulating the payment of regimental debts and the distribution of the effects of officers and soldiers dying in the Service of the East India Company, or of any Articles of War, or of any Act of Parliament relating to the Indian Navy.

Act not to apply to administration of estates of soldiers or sailors.

58. This Act shall commence and take effect from the 1st day of March 1855.

Commencement of Act.

ACT No. XXVI of 1860.

BY THE LEGISLATIVE COUNCIL OF [illegible]

the assent of the Governor-General on the 31st May 1860).

An Act to amend Act VIII of 1855, (relating to the office and duties of Administrator General).

WHEREAS it is expedient to amend Act VIII of 1855, relating to the Office and duties of Administrator General; It is enacted as follows:—

Preamble.

1. The Administrator General shall, when duly authorized or required so to do by the Military Secretary to Government, secure and distribute the assets of the

Administrator General in certain cases to secure and distribute the estate and [illegible]

dier, or other person subject to any Articles of War, in all cases in which such estate and effects do not exceed on the whole five hundred Rupees, charging the estate with a

commission of three per centum only. Provided always that it shall not be necessary for the Administrator General to take out letters of administration in cases referred to in this Section.

Proviso.

This Section was enacted to meet a difficulty raised by the Administrator General of Madras, who declined to administer such estates, alleging, as was the fact, that the provisions of Sections 11 and 43 of Act VIII of 1855 were permissive, not imperative.

2. If in cases falling within Section 43 of Act VIII of 1855, no person claiming to be entitled to a principal share of the effects of the deceased shall within three months obtain a certificate from the Administrator General under the said Section of the said Act, or letters of administration to the estate and effects of the deceased, the Administrator General may administer the estate without letters of administration in the same manner as if such letters of administration had been granted to him, and if he shall neglect or refuse to take upon himself the administration of the estate and effects, he shall upon the application of a creditor and upon being satisfied of his title, grant a certificate in the same manner as if such creditor were entitled to a principal share of the effects of the deceased, and such certificate shall have the same effect as a certificate granted under the provisions of the said Section of the said Act, and shall be subject to all the provisions of the said Act which are applicable to such certificate. Provided that the Administrator General may, before granting such certificate, if he think fit, require the creditor to give reasonable security for the due administration of the estate and effects of the deceased.

Grant of certificate to creditors.

Proviso.

This is intended to enable creditors of small estates under Rs. 500 to obtain their dues in cases in which the next of kin may decline to apply for a certifiate from the Administrator General, or in which having applied and been refused, he declines to apply for letters of administration.

3. Whenever any person holding the Office of Administrator General shall obtain leave of absence, it shall be lawful for the Government to appoint some person to officiate as Administrator General, and such person while so officiating shall be subject to the same conditions and be bound by the same responsibilities as the Administrator General by any law now in force or that may hereafter be enacted, and he shall be deemed to be Administrator General for the time being under Act VIII of 1855, and shall be liable to give security under Section 7 of the said Act in like manner as if he had been appointed Administrator General.

Appointment of Officiating Administrator General.

ACT No. IV. OF 1865.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor-General on the 22nd February* 1865).

An Act to exempt the Estates of deceased Officers and Soldiers delivered over to the Administrator General of Bengal, Madras, or Bombay, from the operation of the twenty-sixth Section of Act No. VIII of 1855.

Preamble.

WHEREAS under or by virtue of the twenty-sixth Section of Act No. VIII of 1855 (*to amend the Law relating to the Office and Duties of Administrator General*), the Administrator General of each of the Presidencies of Fort William in Bengal, Fort St. George, and Bombay is entitled to receive a commission at the rates respectively therein mentioned upon the amount or value of the assets which he shall collect and distribute in due course of administration; And whereas by the 21st Section of "The Regimental Debts Act, 1863," it is declared that an Administrator General shall not be entitled to take, and it shall not be lawful for him to take, a percentage on the property of an Officer or Soldier dying on service exceeding three *per centum* on the gross amount coming to his hands if preferential charges have been previously paid, or on the gross amount remaining in his hands after payment by him of preferential charges, as the case may be; It is enacted as follows:—

1. In this Act—

Interpretation Clause. "Officer."

The term "Officer" means a Commissioned Officer of Her Majesty's Army or of Her Majesty's Indian Army.

"Soldier."

The term "Soldier" means a Soldier of Her Majesty's Army or European Soldier of Her Majesty's Indian Army, including a Warrant and a Non-Commissioned Officer.

Act VIII of 1855, Section 26, not to apply to property of Officers and Soldiers dying on service which shall come to hands of Administrator General.

2. From and after the passing of this Act, the 26th Section of Act No. VIII of 1855 shall not apply to cases in which the property of an Officer or Soldier dying on service shall come to the hands of the Administrator General of any of the said Presidencies, under the 9th or the 12th Section of "The Regimental Debts' Act, 1863;" and such Administrator General

shall not be entitled to take, and it shall not be lawful for him to take, a percentage on any such property exceeding three *per centum* on the gross amount coming to his hands after the passing of this Act, if preferential charges, as defined by the 4th Section of the said Statute, have been previously paid, or on the gross amount remaining in his hands after payment by him of such charges, as the case may be.

Administrator General only entitled to a commission of three per cent. on gross amount of such property.

Short Title.

3. This Act shall be called "The Administrator General's Act, 1865."

The English Statute called The Regimental Debts' Act, 1863, (26 & 27 Vic., c. 57) provides that the Administrator General shall in no case take a larger commission than 3 per cent. on the assets of Military estates made over to his charge. The Indian Act VIII of 1855, however, allows the Administrators General of Madras and Bombay to take a commission of 5 per cent. upon such assets. There is no doubt as to the law, for under the Indian Councils' Act, 1861, the English Statute, having been passed since 1861, would override the Indian Act. But still there is an evil in the Indian Act stating a different rate of charges; and therefore, in accordance with the wish of the Secretary of State, this Act was passed so as to bring Indian into harmony with English legislation.

INDEX.

Abatement of specific legacies, 111, 181, 182.
of annuity where assets insufficient to pay all the legacies, 126.
of general legacies, 180.
Account current, "Money at my banker's" confined to money on, 54.
Account, suit for, by party bound to elect, 130.
by residuary legatee, 139.
exhibition of, 175.
Accumulation, direction for, void, 84.
Act XXV of 1838 ... 28.
XIX of 1841 ... 152, Section 4 ... 159.
Section 20 ... 213.
XX of 1841, assets under, not within Section 11 of Act VIII of 1845 212, 213.
XVII of 1843 ... 215.
VII of 1849 ... 220, 229.
II of 1850 ... 210, 220, 229.
VIII of 1855 ... 199, 212, 213.
Section 11 ... 210,
XII of 1855 ... 171, 206.
XIII of 1855 ... 171, 207.
XXVI of 1855 ... 225.
XXXIV and XXXV of 1858 ... 149.
VIII of 1859, see *Civil Procedure Code*.
XXVI of 1860 ... 199, 229.
XVII of 1864 ... 214.
IV of 1865 ... 231.
X of 1865 ... 1, 205.
XXI of 1865 ... 16, 18, 23, 203.
Ademption explained, 113.
when demonstrative legacy not liable to, 114.
of specific bequest of right to receive debt, 114.
pro tanto, 115.
of stock, 116.
when removal of thing bequeathed does not constitute, 117.
by receipt by testator or his representative, 118.
not by reason of change of subject by operation of law, 118, 119.
not by reason of change without testator's knowledge or sanction 120.
not by loan of stock specifically bequeathed, if replaced, 119.
not by sale of stock specifically bequeathed, if equal quantity of same stock repurchased, 119.
not by subsequent provision for legatee, 128.
Additional words presumed to give additional meaning, 55.
Administration, with copy annexed of authenticated copy of will proved abroad, 135, 136.
necessity of, 138, 139.
persons who cannot take, 139.
entitles administrator to intestate's rights as if granted immediately after his death, 140.
letters of, do not validate intermediate acts if injurious to estate, 140.

Administration, grant of, where executor has not renounced, 140.
with will annexed, where executor renounces or fails to accept within limited time, 141.
to universal or residuary legatee, 141.
to representative of residuary legatee, 142.
to person entitled to administer in case of intestacy, 142.
to legatee having beneficial interest, 142.
c. t. a. to creditor, 142.
when citation issued before grant of, 142.
order in which connections by marriage or blood are entitled to, 143.
association of persons with widow in, 143.
grant of, where no widow or widow excluded, 143.
right of deceased's mother to, 143, 144.
kindred of equal degree equally entitled to, 144.
widower's right to, 144.
to a creditor, 144.
court of, regulated by *lex loci rei sitae*, 145.
until will produced, 146.
with will annexed, to attorney of absent executor, 146.
to person to whom if present letters *c. t. a.* might be granted, 147.
to attorney of absent person entitled to administer in case of intestacy, 147.
with will annexed during minority of sole executor or sole residuary legatee, 147.
limited till one of several minor executors or residuary legatees complete 18 ... 148.
for use and benefit of lunatic *jus habens*, 148.
pendente lite, 149.
with will annexed, for limited purpose specified in will, 149.
to attorney limited according to the purpose to which the power is limited, 149.
limited to trust property in which grantee is beneficially interested, 150.
limited to a suit, 150.
limited to the purpose of becoming party to a suit to be brought against absent executor or administrator, 151.
limited to collection and preservation of deceased's property and giving discharges for debts due to his estate, 151.
to person other than him who under ordinary circumstances would be entitled, 152.
with will annexed, subject to an exception, 152.
subject to an exception, 153.
of the rest, 153.
of effects unadministered, 153, 154.
supplemental grants of, 154.
alteration in grants of, 155.
revocation for just cause of grants of, 155.
practice in granting letters of, 157, 168.
form of grant of, 165.
when granted, 167.
conclusiveness of, 160.
suit, costs of, 176, 177.
Administrator defined, 3.
all deceased's property vests in, 135.
entitled to intestate's rights, 140.
his intermediate acts not validated if injurious to estate, 140.
his right to recoup himself when administration revoked, 168.

Administrator, powers of, 170, 171.
purchase by, 172.
de bonis non, 173.
Administrator General, saving of rights of, 199.
Act VIII of 1855, 210.
by whom appointed, suspended or removed, 210.
not an officer of High Court, 210.
not to hold any other office without sanction of Government, 211.
security to be given by, 211.
no security required on grant of letters to, 211.
entitled to letters unless granted to next of kin, 212.
preferred to creditor, 212.
or ordinary pecuniary legatee, xxviii.
when he is to administer, 212.
may be directed to apply for administration if assets in danger, 213.
——— enjoined to collect and hold assets in danger, 213.
commission of, under Section 14 of Act VIII of 1855 ... 214.
under Act No. IV of 1865 ... 231.
when administration revoked, 216, 217.
under Section 26, 218, 219.
of Madras and Bombay, 219.
may be Official Trustee, 214.
probate granted to executor appearing in course of proceedings by, 214.
costs of, when probate granted, 214, 215.
——— unnecessary application by, 215.
——— when letters revoked, 216.
——— incurred prior to order for continuing suit against, 218.
may apply for letters within one month after death, 215.
voidability (after revocation) of letters granted to, 215
validity of payments made &c. prior to revocation, 216.
recalling of administration granted to, 216.
distribution of assets by, 217.
refunding by person receiving payments by, 217.
notice of debt or claim to, 217.
letters granted by name of office, 217.
authority given by letters to, 217. 218
estates, &c. to vest in successor of, 218.
sues and is sued in his representative capacity, 218.
non-abatement of suits against, 218.
expenses covered by commission of, 219
defrays expenses of establishment, 220.
to keep separate accounts of each estate, 220.
rules for guidance of, 221.
schedules furnished by, 222.
certificate granted by, 224, 225, fee for, 226.
must not trade, 226.
zillah Judge to take charge of deceased's property and report to, 228.
when administration to estates of soldiers and sailors may be granted to, 229.
may grant certificate to creditors, 230.
Officiating, 230.
Adultery excludes widow from administration, 143.
Advancements not to be brought into hotchpot, 22, 23
Advocate General, reference to, under Act VIII of 1855, Sec. 40, 224.
Affirmation, District Judge may examine upon, 163.
Age how computed, 24.
Agent, money in hands of not included in 'ready money' or 'money in hand,' 54
Alien may make will, 25.
be administrator, 139.

Alteration of will, 29, 41.
in grants of administration, 154.
Alternative, bequest in the, 63.
Ambassador, non-acquisition of domicile by, 11.
Ambiguity, evidence as to testator's family or property, admissible in cases of, 45.
"Among" creates tenancy in common, 75.
"And" when not construed "or," 47.
Animus manendi, 8, evidence of, 8, 9.
Animus testandi, must be proved in case of papers of general character, 27.
formal will invalid in absence of, 27.
Annuity created by Will, payable for life, 124.
vesting of, 125.
annuitant's option to take money appropriated to purchase of, 125.
abatement of, 126.
satisfied before residue paid, 126.
abatement of sum bequeathed to produce, 182.
value of, to be treated as a general legacy for purpose of abatement, 182.
commencement of, when no time fixed, 186.
payable quarterly or monthly, when first payment due, 186.
dates of successive payments of, when time fixed for first payment, 186.
apportionment of, 186.
interest on arrears of, 193.
——— money to be invested to produce, 193.
Annulment of grants of probate or administration for just cause, 155.
Appeal to High Court from orders of District Judge, 168.
Application, bequest with direction as to, 103.
Appointment, power of, defined, 37.
general power of, executed by general bequest, 59.
implied gift to objects of power in default of, 59.
doctrine of election applies to cases of, 133.
of executor, 136.
Apportionment of annuity, when annuitant dies between times of payment, 186.
Armenians subject to Indian Succession Act, 1865, 200.
'Army Surgeon' included in 'Soldier', 34.
Arrears of interest, bequest of debt does not carry, 53.
bequest of, 53.
of annuity, interest on, 193.
Artizan, preferential payment of wages of, 177.
Assault, right of suit for, does not survive, 171.
Assent of executor, necessity of, 182.
effect of 183.
express or implied, 183, 184.
conditional, 184.
to his own legacy, 184, 185.
principle on which required, 185.
when he renounces probate, 185.
gives effect to legacy from testator's death, 185.
when it should be given, 185.
by one of several executors, 173.
Assets, distribution of, after notice, 194.
creditor may follow, 194.
Associate with widow in administration, 143.
Association included in 'Person', 1.
Attachés, non-acquisition of domicile by, 11.
Attestation of Will, 31.
no particular form of, necessary, 31.

Attestation should be by signature, not mark, 32.
not by sealing, 32.
nor by acknowledgment of previous signature, 32.
not required by Hindús' Wills, 36.
of alterations, 41, 42.
Attorney, grant of administration to, 146, 147, 149.
executors, donees of power of sale, cannot sell by, 172.
Auditors of Administrator General's accounts, 222.
to examine schedule, 222.
power of, to summon witnesses and call for books, 223.
to report specially, if accounts incorrect, 223, 224.
proceedings on such report, 224.
Bánú Lálís, 200.
Balance at a banker's, 54.
Banker, cash-balance at testator's, included in debts, 53.
Bank-notes, included in 'money,' 54.
Bank stock not included in 'securities for money,' 54.
Barrister, residence as a, does not change English domicile into Indian, 9.
Bastard, domicile of origin of a, 7.
when he may take under gift to legitimate children, 4, 5.
bequests to, 67, 68, 69.
Bequests, void for uncertainty, 56.
general power of appointment executed by, 59.
to heirs, &c., of a particular person without qualifying terms, 61.
to representatives, etc. of a particular person, 62.
without words of limitation, 62.
in the alternative, 63.
to a person, followed by words describing a class, 64.
to a class of persons under a general description, 65.
repeated in the same will, or in the will and a codicil, 69.
residuary, 71, 72.
vesting of, 73, when payment or possession postponed, 87.
lapse of, 73, 74.
joint, 74.
in common, 74.
to testator's child or other lineal descendant, 76.
to a described class of whom some predecease testator, 77.
void, 79, 87.
to a person by a particular description, who is not in existence at testator's death, 79.
to a person not in existence at testator's death subject to a prior bequest in the will, 80.
when the vesting may be delayed beyond the lifetime of a person living at testator's decease and the minority of the legatee, 81.
to a class with regard to some of whom it is inoperative by reason of rules against remoteness, 83.
failure of subsequent, by reason of prior, bequest being remote, 83.
to religious or charitable uses, 85.
vesting of, when payment or possession postponed, 87.
when contingent, 89.
when made to such members of a class as shall have attained a particular age, 91.
onerous, 91, 92.
contingent, 92.
to such of certain persons as shall be surviving at a specified period, 93.
conditional, 94, 95.
on an impossible condition, 95.
on an illegal or immoral condition,

Bequests with a condition precedent, 95, 96.
to A and on failure of prior bequest, to B, 97.
over, conditional upon the happening of a specified uncertain event, 98, 99.
with directions as to application and enjoyment, 103.
of a fund not severed from testator's estate, for certain purposes some of which cannot be fulfilled, 104.
to an executor, 104, 105.
specific, 105, 111.
demonstrative, 111, 112.
ademption of, 113, 119.
payment of liabilities in respect of subject of, 120.
completion of testator's title to subject of, 121.
of things described in general terms, 123.
of the interest or produce of a fund, 124.
of annuities 124, 126.
to creditors and portioners, 127.
of things described in general terms, 123.
" Between" creates tenancy in common, 75.
Bills of exchange indorsed in blank included in ' money', 54.
included in ' debts', 53.
Blank spaces in will, non-effect of, 27.
not filled up by parol evidence, 57.
for name of legatee, not filled up, 45.
Blind person may make a will, 25.
attestation in case of, 33.
Board and lodging, debt for, preferential, 175, 176.
Bond, held testamentary, 27.
administration, 165.
form of, 165, 166.
assignment of, 166.
voluntary, 179.
paid before legacies, 180.
not included in ' money in my house,' 54.
" Books" includes Mss. in volumes 53.
British India defined, 2.
Brother of intestate, right of, 20, 22.
Brown v. *Higgs*, rule in, 60.
Buddhists, Indian Succession Act does not apply to succession to property of, 200.
Burmese, 200.
Burning, revocation of will by, 42.
Caeteborum Grants, 153.
Calls, exoneration of stock from, 122.
Capital of testator's estate applicable to satisfy annuities, 126.
Carelessness, probate of will minus a clause introduced by, 27.
" Cash," does not include a promissory note payable to order, 53.
Caveat against the grant of probate or administration, 163.
form of, 164.
stamp on, 164, 202.
effect of, 164.
Certificate granted by Administrator General, 224
Cessate grant, 154.
Change of words, 47.
by operation of law of subject specifically bequeathed,
of subject without testator's knowledge, 119.
Chaplain of ship may make a privileged will, 34.
Charitable uses, bequest to, 85, 86.
surplus rents of estate bequeathed to, 87
See *Cypres*.

Charitable, when bequest not deemed, 87.
trust, effect of bequest on secret, 87.
Charity defined, 86.
'Child'
in ventre sa mère, considered as existing, 14.
means a legitimate child, 67, according to law of country where parents domiciled at time of its conception and birth, 18.
dying before testator, bequest to, 76.
Children, their advancements not to be brought into hotchpot, 22.
'by his present wife,' bequest to A and his, 64.
in a will means lineal descendants in first degree, 65.
bequest to, means children alive at testator's death, 77, 78.
China included in 'household furniture' 53.
Choice, domicile of, 8.
Choses in action, 4.
Citation to executor who has not renounced, 140.
to next of kin, 142.
stamp on, 202.
Çiva Náráyanís, 200.
Civil Procedure Code, to regulate Courts in granting probate and admn. 158
to regulate procedure in contentious cases, 168.
Civil Service, effect on domicile of residence in, 9.
Class, effect of words describing a, when added to a bequest to A, 64.
bequest to a, 65.
bequest to a described, 77.
survivorship in case of bequest to a described, 77.
of whom some within rule against perpetuity, 83.
bequest to members of, attaining a particular age, 91.
Code of Civil Procedure, 158, 168.
Codicil, defined, 2.
presumably revoked by destruction of Will, 40.
the presumption may be repelled, 40.
separate probate of, subsequently found, 138.
discovered after grant of administration *c. t. a.*, 155.
Coercion invalidates will, 28.
includes fear though imaginary, 28.
Collateral relationship, words expressive of, apply to half blood, 66.
Collection of deceased's property, 175.
Collusion between purchaser and mortgagee, 172.
Commission to examine witnesses, 163.
or agency charges, not receivable by any person but the Administrator General, for any thing done as exor. or admor., 220.
Committee, grant of administration to, 148.
Commorientes, law concerning, 73, 74.
Company included in "Person," 1.
Compensation for loss occasioned by death of person caused by actionable wrong, 207.
Completion, of title to thing bequeathed, 121.
of contracts, by executor, 175.
Conditional bequests, 94, 102.
transmissible to legatee's representatives, 87, 88.
Condition precedent, performance of, cy près, 95, 96.
subsequent, to be strictly fulfilled, 99.
performance of, within specified time, 102.
executor appointed on, 137.
Conditional will, nullity of, 41.
Consanguinity, defined, 13.
lineal, 13.
collateral, 14.
table of, 15.

Consent, conditions as to marriage with, 96.
of husband to wife's taking out probate, 137.
taking out administration, 139.
Construction of wills, 43.
having effect to be preferred, 54.
Consul, non-acquisition of domicile by, 11.
Contentious proceedings, 168.
Contents of will, probate of, 145.
Context, material word supplied from, 46, 47.
Contingency, doctrine of lapse extend to cases of gift on, 74.
Contingent will, 25, 41.
Contingent legacy, date of vesting of, 89.
bequests, 92, 93, 94.
transfer of residue to residuary legatee giving security, 188.
interest, doctrine of election applies to, 129.
liabilities authorise demand of indemnity from legatee, 180.
Contracts, completion by executor, of testator's, 175.
Copy of Will, limited probate of, 145.
when the original exists, 146.
Corporation, included in 'Person,' 1.
may take land in India by devise, 30.
aggregate may be named executor, 137.
Costs on failure of plea to establish fraud, 28.
of enforcing production of testamentary papers, 158.
of obtaining probate or letters, 176.
of reference to Advocate General under Act VIII of 1855, Sec. 40, ... 224.
'Cousins,' 'Cousins german,' how construed in a will, 66.
Creditor, legacy to, 127.
grant of administration, *c. t. a.* to a, 142.
grant of administration to, 144.
admon. to exors. of a, 144.
not to attorneys of, to recover debt, 144.
should declare date on which debt became due, 144.
to bring part payment under Section 283 into account before sharing proceeds of immoveables, 179.
Criminal, may make will, 25.
Crops, stock on farm includes growing, 54.
Crown, right of, when intestate leaves neither widow nor kindred, 17.
takes the property subject to the intestate's debts, 17.
grant by, 17.
Crown debts, priority of, 178, 179.
Cumulative legacies, 69.
Cunyavádís, 200.
Curtesy, tenancy by, 5.
Cyprès doctrine as to charities, 87.
performance of condition, 96.
Damages in suit by representative under Act XIII of 1855, 208.
Danger of misappropriating assets warrants grant to Administrator General of order, 213.
'Daughter' means a legitimate daughter, 67.
De bonis non, grants, 153.
Deaf person may make a will, 25.
mute may make a will, 25.
dumb and blind person cannot make a will, 25. See *Addenda*.
Death of one of several guardians, 28.
gifts in contemplation of, 133, 135.
Deathbed charges, 175.
persuasion used to testator on, 29.
'Debenture' includes a policy, 53.

Debts, what included in bequest of, 53.
to be paid equally and rateably by exor or admor, 177, 178.
domicil of deceased to regulate payment of, 178.
of record, 178, 179.
by specialty, 178, 179.
by simple contract, 179.
to be paid before legacies, 180.
bequest of, 113.
Declaration, of desire to acquire Indian domicile, 10.
by testator as to destruction of will, 40.
evidence of, admissible in case of latent ambiguity, 45.
when admissible to rebut presumption as to when alterations were made, 41.
by creditor seeking admon, 144.
Defacement of sane testator's will while of unsound mind, 26.
Defamation, right of suit for, does not survive, 171.
Demonstrative legacy defined, 111.
non-ademption of, 114.
of stock, no interest on, 111.
right under, 181.
abatement of, 111, 182.
Deposit of Will containing bequest to religious or charitable uses, 86.
Deposit account, money on, not included in "money at my Banker's," 54.
Description of subject comprises property answering that description at testator's death, 57.
'Descendants' 66. bequest to A and his, 64.
Desertion of children to lead immoral life, excludes widow from admon, 143.
Destruction, revocation by, 35, 39, 40.
is an equivocal act, 40.
must be *animo revocandi*, 40.
of one of two duplicate wills, 40.
of will, 40, 41.
of wife's will by husband's compulsion, 41.
of will during insanity, 41.
revocation of will by, 42.
of revoking instrument does not revive will, 43.
Destroyed will, establishment of, 40.
Devastavit defined, 197.
by neglect to get in any part of assets, 197.
by co-executor, 198.
by wife, 198.
Distraint by executor before probate, 170.
Distribution of assets, 194.
of intestate's property, 18, 23.
where he leaves lineal descendants, 18, 20.
where he leaves no lineal descendants, 20, 23.
District Judge, defined, 2.
his jurisdiction in granting and revoking probate and administration, 157.
his powers in relation to granting probate and administration, 157.
may compel production of testamentary papers, 157, 158.
procedure of Court of, in relation to granting probate and administration, 158.
in contentious cases, 168.
when to interfere for protection of deceased's property, 159.
grant of probate or letters of administration by, 159, 164, 165.
has discretionary power to refuse application, 159, 160.
may examine petitioner in person on oath or affirmation, 163.
may require further evidence of execution of will or right to letters, 163.

District Judge may issue citations to inspect proceedings, 163.
caveats may be lodged with, 163.
administration-bond given to, 165.
to file and preserve original wills, 167.
appeal from orders made by, 168.
concurrent jurisdiction of High Court with, 168.
Dividends, 'Ready Money' does not include unreceived, 54.
Divorce, effect of, on wife's domicil, 12.
according to foreign law excludes widow from administration, 143
right to sue for, does not survive, 171.
Domicil, 6—13.
succession to moveables regulated by law of, 6.
object of law of, 6.
three kinds of, 7, 8.
of origin, 7
by operation of law, 7, 8.
of choice, 8.
proof of acquisition of new, 8.
continuance of new, 11.
resumption of, 11.
declaration of desire to acquire, 10.
evidence of resumption of, 11.
onus probandi in questions of change of, 11.
of married minor, 12.
acquired by marriage, 12.
of wife follows husband's, 12.
effect of divorce on wife's, 12.
effect of husband's transportation on wife's, 12.
acquired by insane persons, 12, 13.
application of moveables to payment of debts regulated by law of, 178.
Donation *mortis causa*, 133, 135.
resumable by donor, 134.
fails if he recovers or survives donee, 134.
of things not admitting of corporeal delivery, 134.
need not be proved, 135.
does not require representative's assent, 135.
ambulatory and revocable, 135.
liable to testator's debts on deficiency of assets, 135.
not revocable by Will 135.
of Bills or Notes not payable to bearer, 135.
of life policy, 135.
Draft on Banker, 27.
of Will, limited probate of, 145.
Dumb person may make a Will, 25.
Dwelling within jurisdiction, probate or admon granted when deceased had fixed, 159.
Easement, bequest of, 63.
East Indians, Indian Succession Act, 1865, applies to, 200.
Election, what, 128.
express or implied, 128.
to take against will necessitates relinquishing benefit *in toto*, 128.
devolution of interest relinquished on, 129.
testator's belief as to his ownership immaterial, 129.
bequest for A's benefit how regarded for purpose of, 130.
person only indirectly benefiting by will, not put to, 130.
in one character by person taking benefit in another, 131.
when acceptance of benefit constitutes, 131, 132.
when testator's representatives may call for, 133.
postponement of, in case of disability, 133.
doctrine of, applies to cases of appointment,

See *Account*.

Endorsement by one of several executors, 173.
Enjoyment, bequest with direction as to, 103.
Enquiry as to Subject and Object of the will, 44.
circumstances of the testator, 44.
facts of which knowledge may conduce to right application of testator's words, 44.
Entireties, estate by, 4.
"Equally" creates tenancy in common, 75.
Equity to a settlement, 5.
Equivocal description, test of, 50.
Erasure of words in will, 42.
Erroneous parts of description of subject rejected, 48.
Estate tail, 64.
"Eurasians", 200.
Europeans not domiciled in British India, how far liable to Indian Succession Act, 201.
Evidence of resumption of domicile, 11.
of testator's sanity, 26.
of lucid interval, 25, 26.
as to whether testator intended an instrument as mere memorandum for a future will, 27.
of intention to adopt a signature as final, 31.
to show what words have been erased, 42.
parol, inadmissible to show testator's intention to dispose of property not his own, 129.
of grant of probate or administration, 138.
of contents of will, 145.
Exception, grants of administration with, 152, 153.
Execution of unprivileged will, 30, 33.
Executor defined, 3.
mere appointment of, does not operate as a disposition, 16.
not disqualified as a witness to will, 37.
bequest to, of a "reasonable amount for his trouble", 56.
or "administrator," bequest to, 62.
and administrator, bequest to A and his, 64.
bequests to, 104, 105.
deceased's property vests in, 135.
probate granted only to, 136.
appointed expressly or by necessary implication, 136.
according to the tenor, 136, 137.
minor, lunatic or married woman, 137.
becoming *non-compos*, 137.
instituted and substituted, 137.
accrual and representation to surviving, 138.
probate validates intermediate acts of, 139.
cannot sue in India before probate, 139.
renunciation by, 140, 141.
may recoup himself when probate revoked, 168.
of his own wrong (*de son tort*), 169.
liability of, 170.
powers of, 170, 174.
may sue and distrain, 170.
suits against, 170, 171.
purchase by, 172.
power of several executors exerciseable by one, 172.
survival of powers on death of one, 173.
duties of, 174 — 182.
to perform deceased's funeral, 174.
to exhibit inventory and account, 174, 175.
to collect deceased's property, 175.

Executor should complete some contracts, 175.
to pay debts according to rules of priority, 175, 176, 177.
when not bound to pay legacies without indemnity, 180.
not to pay one legatee in preference to another, 180.
not to retain on account of his own legacy, 180.
necessity of assent of, 182.
effect of assent of, 183.
assent of, to his own legacy, 184.
—— gives effect to legacy from testator's death, 185.
not bound to pay or deliver legacies until after one year from testator's death, 185.
reason of this rule, 186.
when he may call for refund of legacy, 193.
may distribute assets, after giving notices to creditors, 194.
liable for a devastavit, 197.
Exile, effect of, on domicil, 9.
Exoneration, specific legatees not entitled to, 120.
of immoveable property from arrears of land revenue or rent, 122.
of stock from calls, 122.
Expenses of deceased's funeral to be paid preferentially, 175.
of obtaining probate or letters of administration, 176.
False averment in petition or declaration, 163.
'Family,' bequest to, 61.
may mean only 'children,' or include relations by marriage, 62.
Father of intestate, right of, 20.
Fear, will made through, 29.
Fees, see *Medical attendance*, *Translations*.
Felo de se, will of, 25.
Filing of original wills, 167.
Fire-arms not included in 'Household Goods', 54.
'First Cousins', 'First Cousins once removed', how construed, 66.
Fixtures, see *Immoveable property*.
Force, will obtained by, 28.
Foreign assets, 161.
funds, 53.
Form of will, 27.
does not affect its title to probate, 27.
of grant of probate, 164.
of letters of administration, 165.
Fractions of a day not recognised, 24.
Fraud on marital rights, 5.
invalidates will, 28.
costs on failure to establish plea of, 28.
in obtaining grant of probate or administration, 155.
"Funds", 53.
Funeral, executor's duty to perform, 174.
expenses to be paid preferentially, 175.
Furniture in a particular house, bequest of, includes plate sometimes in use elsewhere, 53.
General words in a restrictive sense, 52.
legacies, 109.
Gift, to objects of power in default of appointment, implied, 59, 60.
in contemplation of death, 133, 135.
Government, Local, to fix office for deposit of declaration as to domicil, 10.
to make regulations for preservation and inspection of wills filed by District Judge, 167.
"Government securities," 53.
Governor-General in Council, his power to exempt from operation of Indian Succession Act, 201.
Great grandchild of intestate, right of, 19.

Grandchild takes when intestate has no child, 18.
"Grandchildren" how construed, 65.
Grant limited in duration, 145, 146.
for use and benefit of others having right, 146, 149.
for special purposes, 149, 152.
with exception, 152, 153.
of the rest, 153.
of effects unadministered, 153.
supplemental, 153.
alteration in, 153.
revocation of, 153, 154.
form of, 164.
Guardian, appointment of testamentary, 28.
grant of administration to minor's, 147, 148.
Half blood, for purposes of succession, no distinction between relation by whole blood and those by, 14.
in construing wills, words expressive of collateral relationship, apply to, 66.
'Heirs,' bequest to, 61.
'Heirs,' or 'heirs of his body,' or 'heirs male of his body,' or 'heirs female of his body', bequest to A and his, 64.
High Court defined, 3.
whether its intestate and testamentary procedure changed, by Act X of 1865 ... 158, 159.
appeal to, 168.
concurrent jurisdiction of, 168.
Hindús, nuncupative wills of, 36.
their wills need not be attested, 36.
succession to their property not affected by this Act, 200.
meaning of "Hindu", 200.
Holograph will, 35.
Hotchpot, children's advancement not to be brought into, 22, 23.
Household effects, 53.
furniture, 53.
Husband of attesting witness, bequest to, 36.
consent of, to wife's taking probate, 137.
——————— taking administration, 139.
and wife, see *Marriage*.
see *Widows*.
Idiot cannot make a will, 24.
probate not granted to, 127
Illegal purpose, intestacy in case of bequest for, 16.
condition, 95.
Illegitimate child, domicile of origin of, 7.
children, bequests to, 67, 69.
child, see *Bastard*.
Immoral condition, 95, 100.
Immoveable property, defined, 1.
succession to, 6.
income of, accumulable for a year, 85.
exoneration of, from revenue or rent, 122.
Implication, appointment of executor by, 136.
Importunity invalidating will, 28, 29.
Impossible condition, bequest on, 95, 100.
Income of general residuary contingent bequest, 72.
direction to accumulate, 84, 85.
Inconsistent wills of same date, 39.
Incorporation of papers by reference, 33.
Incorporeal tenement defined, 1, 2.

Indemnity to debtors, grant of probate or administration operates as, 160.
from legatee, when demandable, 180.
Infant, see *Minor*, *Minority*.
Initials of testator may pass as his mark, 30.
bequest to person described by, 51.
Insane, domicil acquired by, 12, 13.
Instituted executor, 137.
Instructions for will, 27.
for soldier's or mariner's will, when treated as privileged, 35.
Intention, parol evidence of, 50.
to be effectuated, 43.
expressed intention to be ascertained, 44.
of testator to be effected as far as possible, 55.
Interest of fund, bequest of, 124.
on arrears of rent unreceived by executor, 175.
on general legacy where time of payment is not fixed, 109.
on such legacy in satisfaction of a debt, 191.
given by parent or person *in loco parentis*, 192.
to minor with direction to pay thereout for his maintenance, 192.
on general legacy when time fixed for payment, 192.
exception where testator a parent or person *loco in parentis*, 192.
rate of, on legacies, 192.
on arrears of annuity, 193.
on money to be invested to produce an annuity, 193.
refunding to be without, 196.
Interlineation in will, 41.
Intestacy defined, 16.
Intestate, see *Distribution*.
Intoxication destroys testamentary power, 26.
Inventory, exhibition of, 174.
form of, 175.
contents of, 175.
stamp on, 202.
Investment of proceeds of property bequeathed to several in succession, 110.
of sum bequeathed to provide for non-specific legacy for life, 187.
of amount of general legacy to be paid at a future time, 187.
where not charged with or appropriated to an annuity bequeathed, 187.
of residue given for life without directions as to vesting it in particular securities, 188.
Irreconcileable clauses or gifts, last prevails, 55, 56.
Issue, bequest to A and his, 64, 66.
Jains, Act X of 1865 does not apply to succession to property of, 200.
Jest, will written in, 27.
'Jewels,' 54.
Jews, Act X of 1865 applies to, 200.
Joint-tenancy, by conveyance to husband and wife, 4.
gift to issue of A creates a, 66.
created by a bequest to two or more persons' nomination, or to a class, without more, 74.
Joint-tenant attesting Will by which the joint-tenancy is created, 37.
Joint will, 25.
probate of, 25.
Judicial separation, wife's domicil how affected by, 12.
Jurisdiction of District Judge in granting and revoking probates and admons., 157.
"Just cause," revocation for, 155.
defined, 13.
bequest to, 61.

Labourer, preferential payment of his wages, 177.
Language of will, 27.
Lapse of legacies, 73.
doctrine of, extends to gifts on contingency or under a power, 74.
not in case of joint legacy, 74, 75.
not when bequest is to testator's child or lineal descendant, 76.
not when bequest is to A for benefit of B, 76, 77.
Latent ambiguity, evidence admitted in cases of, 49, 50.
Legacy, to attesting witness or his or her wife or husband, 37.
to person attesting codicil confirming will, 38.
in general terms, vesting of, 72.
lapse of, 73, not in case of joint legatees, 74.
to child or lineal descendant of testator, 76.
to A for benefit of B, 76.
vesting of, when payment or possession postponed, 87.
——— when contingent on specified uncertain event, 89.
to an executor, 104, 105.
specific, 105, 111.
demonstrative, 111, 112.
ademption of, 113, 119.
to creditors and portioners, 127, 128.
debts paid before, 180.
when executor may require an indemnity on paying, 180.
abatement of, 180, 182.
assent to, 182, 186.
time for payment of, 185.
investment of funds to provide for, 187.
interest on, 190, 193.
refunding of, 193.
See *Abatement*, *Bequest*.
'Legal representatives,' bequest to, 62.
Legatee does not lose his legacy by attesting codicil confirming will, 37.
takes nothing under onerous bequest unless he accepts fully, 91.
may accept one and refuse other of two independent bequests, 92.
rendering impossible or indefinitely postponing act for which no time is specified and on non-performance of which subject is to go over, 102.
may receive fund bequeathed absolutely though directed to be applied in a particular manner, 103.
accepts specific bequest subject to incumbrance (if any) created by testator, 120.
of annuity created by the Will, 124.
has option to receive money appropriated for purchase of annuity, 125.
payment into Court of legacy of minor, 189.
entitled to clear produce of specific legacy, 190.
entitled to produce of residuary legacy, 291.
need not refund when assets were sufficient to satisfy all the legacies, 195.
sues executor, if solvent, before calling for a refund, 196.
limit to refund by, 196.
residuary, 196.
Legitimacy *primâ facie* intended by words expressing relationship, 67.
Legitimate child, domicile of origin of, 7.
Lepchas, 200.
Letters when not evidence of testator's sanity, 26.
held testamentary, 27.
Lex loci rei sitae regulates succession to immoveables, 6.
Court of Administration regulated by, 6,145.
Lien, priority of solicitor's charging, 178.

Life, abatement of legacy for, 182.
Light, rights to, 2.
suit for obstructing, 171.
Limitation, bequest without words of, 62.
executor's neglect to sue for debt till barred by Act of, 198.
Limited grants, 145.
purpose, executor for, 138.
Lineal descendant dying before testator, bequest to, 76.
Linen included in household furniture, 53.
'Live and dead stock,' 54.
Loan of stock specifically bequeathed, 119.
Local Government defined, 3.
to fix office for deposit of declaration of domicil, 10.
to make regulations for inspection and preservation of Wills, 167.
Lucid interval, proof of, 25, 26.
Lunatic, acquisition of domicile by, 12.
cannot make a will, 24.
except during a lucid interval, 25.
revival of will made by, 24.
may take by bequest, 30.
probate not granted to, 137.
cannot be administrator, 139.
widow cannot be administratrix, 143.
administration for use of, 148.
see *Defacement.*
Magistrate to report deaths to Administrator General, 199.
to retain deceased's property in charge, 199.
Maintenance of A, bequest of a sum for the, 56.
effect of direction that the interest of the subject shall be applied for legatees, 90.
Majority when attained, 24.
Malacca, Act X of 1865 does not apply to, 2.
Malum prohibitum, 95; *malum in se*, 95.
Manuscripts included in 'books,' 53.
Mariner, when he may make a privileged will, 33, 34.
Mark of testator, 30.
attesting witness not to subscribe by, 32.
Marriage, non-effect of, on property or powers respecting property, 3.
revokes will 4, 37; not wife's submission to arbitration, 4.
does not dissolve wife's partnership, 4.
nor release debt, 4.
domicil acquired by, 12.
between person domiciled and person not domiciled in India, effect of, 23.
settlement of minor's property in contemplation of, 24.
revocation of will by testator's, 37.
settlement held testamentary, 27.
Married woman, effect of bequest of lands to sole use of, 58.
consent of husband necessary to grant of probate to, 137.
administration to, 139.
see *Consent.*
powers of executrix or administratrix, 174.
Marshalling assets in favour of creditors, 179.
Materials of will, 27.
Maxims *Cum duo inter se repugnantia reperiuntur in testamento, ultimum ratum est*, 56.
Falsa demonstratio non nocet cum de corpore constat, 48.
Mobilia sequuntur personam, 6.
Qui tacet satis loquitur, 96.
Meaning of any clause to be collected from whole will, 51.

Medals', 54.
Medical attendance, fees for, 175.
Memoranda for a future will, 27.
referring to alteration, 41.
Mental imbecility destructive of testamentary power, 24.
Merchant, residence in British India as a, 9.
Military estates, administration of, 176.
service, effect on domicile of residence in, 9.
Minor defined, 2.
domicile of, 11; when married, 12.
property of, may be settled before marriage, 24.
cannot make a will, 24.
may take by bequest, 30.
soldier or sailor cannot make privileged will, 34.
probate not granted to, 137.
cannot be administrator, 139.
payment or delivery into Court of bequest to, 189.
interest applicable for support of, 190.
Minority defined, 2.
administration during, 147.
administrator during, 173.
Misconception, election under a, 130.
Misdescription of subject may be corrected, 45.
Misnomer of object may be corrected, 45.
"Money," 53, 54; 'Money in hand,' 'Money in my house,' 'Money at my Banker's,' 54. "Moneys and Securities" see *Mason's Will*, 13 W. R. 799.
Month defined, 1.
Mortgage, money lent on, included in 'Money,' 54.
not included in 'Money in my house,' 54.
when the mortgage money passes under general bequest comprising legal estate, 58.
estates when they pass by general bequest, 58.
by executor, 172.
Mother of intestate, right of, 20, 21.
her right to administer, 143.
cannot appoint guardian by will, 28.
Motive, effect of expressing, in cases of repetition of legacies, 70.
Moveable property defined, 2.
succession to, 6.
one domicile affects succession to, 7.
succession to, 13.
Muhammadan, Act X of 1865 does not apply to succession to property of, 200
testamentary power of, 200.
may make nuncupative will, 200.
Mutual will, 25, 41.
Native Christians, liable to Indian Succession Act, 201.
Near relations, "nearest relations," bequest to, 6.
Nearest of kin, bequest to, 61.
Negligence, when defendant liable for, at suit of representative, 208.
Negotiable instruments, husband cannot indorse wife's, 5.
Nephew of intestate, right of, 20, 21, 22.
how construed in will, 65.
Next of kin, bequest to, 61.
construction of, in Act VIII of 1855, 212.
Niece of intestate, right of, 20, 21, 22.
Nieces how construed in will, 65.
Notice of superior debt, payment of inferior, without, 177.
in administration suit, 194.
Nuncupative will, of blind man, 25.
requires two witnesses 35, 36.

Nuncupative will, reduced into writing, 35.
proof of *factum* of 36, nullity of, within a month after cessation of privilege of making, 36. *Rogatio testium*, 36.
Muhammadan may make, 200.
Oath see *District Judge.*
Obliteration in will, 41, 42.
Office, when domicile conferred by, 9.
Offspring, construction of, 66.
Omission of material word, 46, 47.
Onerous bequests, 91, 92.
Onus probandi, in questions of change of domicile, 11.
in questions as to where deceased was domiciled, 13.
in attempt to impeach a will, 24.
on those who contend that under a bequest to A he takes less than the testator's whole interest, 63.
Operation of law, domicile by, 7, 8.
Origin, domicile of, 7.
where child's parents are unknown, 7.
continuance of, 8, and see *Atty. Gen.* v. *Countess Blucher de Wahlstatt*, 3 Hurl. & Colt. 374.
presumption of retainer of, 8.
reverter of, 8.
Parsees, how far liable to the Indian Succession Act, 201.
cases relating to, 201.
law relating to intestate succession among, 203.
division of property among widow and children of intestate, 203.
——— widower and children of, 203.
——— children of male intestate, 204.
——— female intestate, 204.
——— predeceased child, 204.
——— where intestate leaves a widow or widower, but no lineal descendants, 205.
——— where intestate leaves neither widow or widower nor lineal descendant, 205.
Partnership included in 'person,' 1.
Patent ambiguity, extrinsic evidence not admitted to explain, 50.
Pencil, will made or altered in, 27.
Pendente lite, administration, 149.
Perpetuity, rule against, 81.
'Person' defined, 1.
Personal injury not causing death, 171.
'Personal ornaments,' 54.
'Personal representatives', bequest to, 62.
bequest to A and his, 64.
Petition for probate, 161.
letters of administration, 162.
subscribed and verified, 162.
stamp on, 202.
Pictures included in 'household furniture,' 53.
Plate included in 'household furniture,' 53.
or 'household goods,' 53, 54.
does not include plated articles, 54.
Pleader to subscribe petition for probate or administration, 162.
Pledge by executor, 172.
Policy included in 'debenture,' 53.
Portioner, legacy to, 127.
'Portraits,' 54.
Posthumous child, domicile of origin of, 7.
grand-child, of intestate, right of, 18, 19.
Power of appointment defined, 37.
may be general or special, 38.
marriage does not revoke will made in exercise of, 37, 38.

Power, will made under, good without reference to law of domicile, 7.
general, when executed by general bequest, 57.
special, when exercised by a bequest, 57.
to revoke not within Section 78 of Indian Succession Act, 59.
executed by general bequest, 59.
implied gift to objects of, in default of appointment, 59, 60.
to sue, grantee of probate or administration has sole, 167.
of sale, given by executor mortgaging, 172.
of several executors or administrators exerciseable by one, 172.
except when testator directs that two or more shall be a quorum, 173.
of married executrix or administratrix, 174.
doctrine of lapse extends to gifts under a, 74.
Practice in granting and revoking probate and administration, 157.
in contentious cases.
Prannáthís, 200.
Presumption of retainer of domicile of origin, 8.
of sanity of testator, 24.
as to alterations in pencil and alterations in ink, 27.
of acceptance of bequests in case of infant or lunatic, 30.
that several sheets of which will consists were in same room when execution took place, 31.
of due execution of a will, 32.
that a codicil is revoked by destruction of will, 40.
arising from destruction of one of two duplicate wills, 40.
as to mutilation of will in testator's custody, 40.
as to destruction of will which cannot be found, 40.
as to when alterations were made, 41.
repetition of legacies, 70.
as to election arising from enjoyment by legatee for two years, 132.
Prince of Wales' Island, Act X of 1865 does not apply to, 2.
Prisoners, domicile of, 9.
will by, 29.
Privileged wills defined, 33.
may be in writing or by word of mouth, 34.
rules for execution of, 35.
witnesses to, 35, 36.
nullity of, after cessation of right to make, 36.
Probate defined, 3.
of joint will, 25.
not of mere appointment of guardian, 28.
when part of will obtained by fraud, 28.
of two wills partially consistent, 39.
grant of, 136, 139.
granted only to executor appointed by will, 136.
to person nominated as executor by the legatees or other persons appointed executors, 136.
not to minor, lunatic or married woman without husband's consent, 137.
to several simultaneously or at different times, 137.
separate probate of codicil discovered after grant of, 138.
necessity of, 138.
establishes will from testator's death, 139.
of copy or draft of lost will, 145.
of contents of lost or destroyed will, 145.
of copy when original exists out of Province, 146.
limited to purpose specified in will, 149.
granted subject to exception, 152.
alteration and amendment of grant of, 155.

Probate, revocation or annulment of grant of, 155.
practice in granting and revoking, 157.
District Judge's power relating to grants of, 157.
procedure relating to, 158.
granted when testator had fixed dwelling or property within jurisdiction, 159.
conclusiveness of, 160.
petition for, 160.
stamp on, 161, 202.
translation annexed to, 162.
verification of, 160.
caveat against grant of, 163.
grant of, to be under Court seal, 164.
form of grant of, 164.
not to be granted till after 7 days from day of testator's death, 167.
costs of, 176, 177.
Produce of fund, bequest of, 124.
of legacy, right of specific legatee entitled to, 190.
of residuary fund, right of residuary legatee to, 191.
Production of testamentary papers, power to enforce, 157.
Profession, effect on domicile of residence in exercise of, 9.
Promissory Note not included in "Cash," 53.
voluntary, 179.
Protection of deceased's property, District Judge to interfere for, 159.
Province defined, 2.
See *Probate*.
"Public Funds," 53.
Punctuation of will, 27.
Punishment for verifying petition containing false averment, 153.
Purchase, gift of subject of contract to, 57.
by executor or administrator of deceased's property, 172.
Purser of ship may make a privileged will, 34.
Quorum of executors, 173.
Receipts for Government Annuities, not "money in my house," 54.
Record, debts of, 179.
Refund of legacies, 193.
when legacy has become due on performance of condition within further time allowed under Section 124 ... 194.
proportional, in case of debt, 194.
within what period creditor can call for, 195.
when legatee cannot call for, 195.
limit of, 196.
to be without interest, 196.
by person receiving payments from Administrator General, 218.
Regimental Debts' Act, 199, 231.
Regulation V of 1799 (Bengal) Section 7 ... 159.
III of 1802 (Madras) Section 16, clause 7 ... 159.
XV of 1806 (Bengal) Section 6 ... 159, repealed, 228.
IV of 1809 (Madras) Section 5 repealed ... 228.
VIII of 1827 (Bombay) Section 10 ... 159.
Rejection of erroneous parts of description, 48.
of part of Will, 55.
'Relations' or 'Relations of the name of A,' bequest to, 61.
power to appoint to, 61, 62.
Release of debt due to deceased, 172.
Religious uses, bequest to, 85, 86.
Remarriage of widow does not exclude from administration, 143.
Remoteness, rule in deciding questions of, 82.
Removal of goods specifically bequeathed, 117.

Rents are immoveables, 2.
of land, bequest of, 124.
collecting arrears of, 175.
Renunciation of executorship, 140, 141.
cannot be in part, 141.
not after probate, 141.
agreement to renounce, 141.
retractation of, 141.
administration *c. t. a.* granted on, 141.
Repetition of legacies, 69.
'Representatives,' bequest to, 62.
bequest to A and his, 64.
Repugnant conditions subsequent, 100.
Reputation of legitimacy, 67.
Residuary legatee of a share of residue attesting codicil which revokes legacies, 37.
constitution of, 71, 72.
entitled to what property, 72.
not to receive residue till annuity given by will satisfied, 126.
may sue for an account, 139.
grant of administration to, 141.
representative of, grant of administration to, 142.
cannot call on particular legatees to abate, 181.
security given by, to meet contingent bequest, 188.
right of, to produce of residuary fund, 191.
right of, 196.
right of representative of, 197.
Residue, includes property ineffectually appointed, 72.
lapse of part of, 75, 76.
bequest of, enumerating certain articles, 109.
conversion and investment of, bequeathed for life, 188.
"Respectively" creates tenancy in common, 75.
Rest, grants of the, 153.
Retainer by executor of his debt, 178.
legacy, 180.
by Administrator General, 218.
Reversion, 58.
Revival of lunatic's will, 25.
of unprivileged will, 42, 43.
tantamount to making will *de novo*, 43.
Revocation of will, 29, 30.
by testator's marriage, 37.
power of revoking will cannot be delegated, 38.
of unprivileged will, modes of, 38.
part of will revocable, 38.
by subsequent will, 38, 39.
not when made under false impression, 39.
not by words declaring future intention to revoke, 39.
by destruction, 38, 39.
not by inchoate or incomplete act of destruction, 40.
doctrine of dependent relative, 40.
presumption of, 40.
of one of two duplicate wills, 40.
of will by another will, 42.
by act expressing intention to revoke, 42.
by burning, tearing or otherwise destroying, 42.
of probate, 138.
of probate or letters, 168.
of grants of administration, 155.
"Right heirs," bequest to, 61.

Rogatio testium in case of nuncupative will, 36.
Roman law as to soldiers' testament, 35, 36.
Sádhus, 200.
Sale, gift of subject of contract of, 57.
of stock specifically bequeathed, 119.
of property bequeathed to several in succession, 110.
by executor, 171.
——— of specific bequest, 172.
by pledgee of things pledged by executor, 172.
by one of several executors, 173.
Sanity, evidence of, 26.
Satisfaction of a debt, interest on general legacy bequeathed in, 191.
Sátnámís, 200.
Seal of Court, probate granted under, 164.
administration granted under, 165.
'Second Cousin,' how construed in will, 66.
'Securities for money,' includes Bills and Notes, stock in the funds and a policy, 54.
bequest of, carries legal estate in mortgaged property, 54, 59.
Security given by residuary legatee, for payment of contingent bequest, 188.
Separate use, trust for, 5.
liability of property settled to, 5.
Separation from husband excludes widow from administration, 143.
Servant, domicile of, 9, 11.
of Ambassador or Consul, non-acquisition of domicile by, 11.
wages of officer's or soldier's, 176.
preferential payment of wages of domestic, 177.
Settlement, of minor's property in contemplation of marriage, 24.
barring widow of interest in husband's estate, excludes from administration, 143.
Shares not included in securities for money, 54.
Shías, 200.
Signature of testator, 30.
under assumed name, 30.
sealing not regarded as, 30.
may be stamped, 30.
immaterial where written, if intended to authenticate instrument, 31.
authenticating alteration, 41.
Sikhs, Act X of 1865 does not apply to succession to property of, 200.
Simple contract debts, see *Debts*.
Singapore, Act X of 1865 does not apply to, 2.
Sister of intestate, right of, 20, 22.
Soldier, when he may make a privileged will, 33, 34.
Solicitor, see *Lien*.
Son means a legitimate son, 67.
Special purposes, grant of administration for, 149.
Specialty debt not preferential, 177, 178.
in England, 179.
Specific legacy, 105.
leaning against construing legacy as, 108.
to two or more persons in succession, 110.
distinguished from demonstrative, 111.
does not abate with general legacies, when assets insufficient to pay legacies, 111.
legacy out of fund, of which portion is a, 112.
of right to receive something of value from a third party, 114.
ademption *pro tanto* of, 115.
——— of stock subject of, 116, 118, 119.
removal of subject of, 117.
does not abate, if assets sufficient for debts, 181.
ratcable abatement of, when assets insufficient for debts, 182.

Specific legatee entitled to produce of legacy from testator's death, 190.
Stakeholder, money in hand of, 54.
Stamp on the petition for probate, 161, for admon, 162, and see *Atty. Gen.* v. *Partington*, 3 Hurl. & Colt. 193.
on instruments mentioned in Indian Succession Act, 199, 202.
Statute 23 Hen. 8, c. 10 ... 86.
1 Edw. 6, c. 14 ... 86.
12 Car. II., c. 24, S. 8 ... 28.
38 Geo. 3, c. 87 ... 15.
39 & 40 Geo. 3, c. 98 ... 84.
55 Geo. 3, c. 84 ... 221.
11 Geo. IV & 1 Will. IV, Cap. 40 ... 16.
2 & 3 Wm. 4, c. 115 ... 86.
3 & 4 Wm. 4, c. 42 ... 171.
1 Vic. c. 26 ... 28.
Section 9 ... 30.
Section 11 ... 34.
Sections 16, 17, 18 ... 37.
Sections 19, 20 ... 31.
Section 20 ... 38.
Section 21 ... 41.
Section 22 ... 43.
Section 24 ... 57.
Section 27 ... 59.
Section 28 ... 63.
Section 33 ... 76.
9 & 10 Vic. c. 59 ... 86.
9 & 10 Vic. c. 93 ... 171.
15 & 16 Vic. c. 24, Section 1 ... 31.
17 & 18 Vic. c. 113 ... 120.
20 & 21 Vic. c. 77, Section 17 ... 155.
Section 25 157.
Section 27 158.
Section 28 158.
Section 70 149.
Section 73 152.
Section 81 165.
Section 83 167.
21 & 22 Vic. c. 106 ... 2.
22 & 23 Vic. c. 35 ... 194.
26 & 27 Vic. c. 57 ... 176, 177.
Stock, legacies of, not 'pecuniary,' 54.
ademption of, 116.
abatement of general legacies of, 181.
in a joint stock company, exoneration of, 122.
may include money, 54.
on farm includes growing crops, 54.
Straits Settlement, Act X of 1865 does not apply to, 2.
Subscription authenticating alteration, 41.
Substitute, grant of administration to attorney's, 147.
for legatee predeceasing testator, 74.
Substituted executor, 137.
Succession, to immoveable property in British India, 6.
to moveable property, 6, 7.
——— one domicil only for, 7.
——— in British India, 13.
specific bequest to several persons in, 110.
to property of intestate Parsees, 203, 204, 205.
Sunnís, 200.
Superstitious uses, 86.
Supplemental grants, 154.

Sureties to administration-bond, 165.
no power to dispense with, 165.
Surgeon of ship may make a privileged will, 34.
Surrender, one executor has power to, 172.
Survival of cause of action, 170, 171.
of powers on death of one of several executors or administrators, 173.
Survivorship, in case of *commorientes*, 73, 74.
in case of joint tenancy, 74.
in case of a described class, 77.
of representation, 138.
Syndics to receive administration with will annexed, 137.
TABLE of consanguinity, 15.
Tearing, revocation of will by, 42.
Technical words unnecessary, 43.
to be taken in their technical sense, 43.
Tenants in common, where the rule in *Brown* v. *Higgs* applies, the objects take as, 60.
Tenor, executor according to the, 136.
Testamentary papers, power to enforce production of, 157.
"Testamentary expenses," 176.
Thellusson Act, 84.
Threat, will made in consequence of, 29.
Tibetans, 200.
Title to thing bequeathed, completion of testator's, 121.
Trade, winding-up of, 175.
Translation of will, 161.
fee for, 202.
Transportation, effect of, on wife's domicile, 12.
Transposition of clause or expression, 47.
of limitation, 56.
Trees, suit for cutting down, 171.
Trust-estates, when they pass by general bequest, 58.
UNCERTAINTY, will or bequest void for, 56.
Undue influence, costs on failure of plea to establish, 28.
Unity of persons as between husband and wife, 4.
Universal legatees, grant of administration to, 141.
'Utensils,' 54.
'VALUE OF THE ESTATE,' 161.
Ventre sa mère, child in, 66.
Verification of translation of will, 161.
of petition for probate, 162.
Vesting of legacies, 87, 91.
Vesting, of legacy in general terms, 72.
law favours, 73.
Victuals, not included in 'Household Goods' 54.
Void bequests, 79.
Voluntary bonds and promissory notes, 179.
WAGES, paid preferentially, 177.
Ward, payment or delivery into Court of Wards of bequest to, 189.
Water, rights to running, 2.
Watercourse, suit for diverting, 171.
Way, private rights of, 2.
Widow, excluded by ante-nuptial contract from distributive share of her husband's estate, 16.
share of, when her husband leaves lineal descendants, 17.
———, when he leaves kindred but no lineal descendant, 17.
———, when he leaves no kindred, 17.
not excluded from distributive share by divorce *a mensa et toro*, 17.
grant of administration to, 143.
See *Adultery*. *Associate*. *Parsees*.
Widower, his right to intestate wife's property, 23.

Widower, his right to administer to wife's estate, 144.
Wife, conveyance by husband to, 4.
gift by husband to, 4.
lease by, to husband, 4.
receipt by husband of income of, 5.
administration to estate of, 5.
acquires husband's domicile, 12.
domicile of, follows husband's, 12.
may bequeath what she might have alienated, 25.
of attesting witness, bequest to, 36.
destruction by husband's compulsion of will of, 41.
probate not granted to, without husband's previous consent,
cannot become administratrix without husband's previous consent, 139.
Will defined, 2.
persons capable of making, 24.
idiot or lunatic cannot make a, 24.
revival of lunatic's, 24.
onus probandi in attempt to impeach, 24.
presumption of sanity of maker of, 24.
of alien, *felo de se*, criminal, 25.
joint, mutual, contingent, 25.
of married woman, 25.
of deaf, dumb, *or* blind, 25.
of deaf mute, 25.
of deaf, dumb and illiterate testator, 25.
of deaf, dumb *and* blind, 25.
form of, 27.
intention to make, 27.
written in jest, 27.
containing a clause introduced *per incuriam*, 27.
several instruments may constitute, 27.
instructions for, 27.
blank spaces in, 27.
language of, 27.
punctuation of, 27.
materials of, 27.
alteration of, in pencil or ink, 27.
appointment of guardian by, 28.
obtained by fraud, coercion, or importunity, 28.
revocation or alteration of, 29.
signature of unprivileged, 30, 31.
attestation of unprivileged, 31, 32.
incorporation, by reference, of papers in, 33.
privileged, 33, 36.
in writing or by word of mouth, 34.
holograph, 35.
instructions for, 35.
witnesses to, 36.
nullity of, at expiration of a month after testator ceases to be entitled to make, 36.
revocation of, 42.
gift to witnesses attesting, 36.
when revoked by marriage, 37.
by another will or codicil, 38.
by burning, tearing or otherwise destroying, 38.
obliteration, interlineation, and alteration in, 41.
revival of, 42, 43.
wording of, 43.

Will, enquiry to determine subject or object of, 44.
misnomer or misdescription of object of, 45.
supplying from context words of, 46.
no part to be rejected if it can be reasonably construed, 55.
interpretation of words repeated in different parts of, 55.
inconsistent clauses in, 55.
void for uncertainty, 56.
description of subject of, 57.
construction of terms in, 65, 67.
filed after probate or grant of administration *c. t. a.*, 167.
made before but revived after 1st January 1866, Indian Succession Act does not apply to, 201.
of Muhammadan, 200.
Wilson v. *Beddard*, 30.
Witnesses, to will, 31.
must sign, not mark, 32.
may sign any where, 32.
enough if testator *might* have seen signature by, 32.
Witness, failure of bequest to attesting, 36, 37.
as to execution or validity of will, 37.
Words, in what sense to be taken, 44.
when understood in a more, and when in a less, general sense than usual, 51, 52.
repeated in same will, 55.
Wrongs, Act to enable representatives to sue and be sued for certain, 206.
t, defined, 1.