INTESTATE AND TESTAMENTARY

SUCCESSION IN INDIA

THE LAW

OF

INTESTATE AND TESTAMENTARY

SUCCESSION IN INDIA;

INCLUDING

THE INDIAN SUCCESSION ACT (X OF 1865),

WITH A COMMENTARY;

AND

THE PARSEE SUCCESSION ACT (XXI OF 1865), THE HINDU WILLS ACT (XXI OF 1870), THE PROBATE AND ADMINISTRATION ACT (V OF 1881), THE DISTRICT DELEGATES ACT (VI OF 1881), ACTS XII AND XIII OF 1855, THE REGIMENTAL DEBTS ACT, 1863 (26 AND 27 VICT., C. 57), THE ACTS RELATING TO THE ADMINISTRATOR-GENERAL (ACTS II OF 1874, XIII OF 1875, AND IX OF 1881), THE CERTIFICATE ACT (XXVII OF 1860), & THE OUDH ESTATES ACT (I OF 1869)

WITH

NOTES AND CROSS REFERENCES, AND A GENERAL INDEX.

BY

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OF THE MIDDLE TEMPLE,
BARRISTER-AT-LAW, AND ADVOCATE OF THE HIGH COURT AT CALCUTTA.

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PREFACE.

WITH reference to the case of *Alangamanjori Dabee* v. *Sonamoni Dabee*, 9 C. L. R., 121, quoted at pp. 124, 128, 322, and 375, and to the notes under ss. 99 and 101 of the Indian Succession Act and s. 3 of the Hindu Wills Act, it may be useful to point out that, since this book has been passed through the press, Mr. Justice Pontifex, in the case of *Kallynath Naug Chowdhry* v. *Chunder Nath Naug Chowdhry* (which has not yet been reported, but which will shortly appear in the 8th Volume of the Indian Law Reports, Calcutta Series, and in the 10th Volume of the Calcutta Law Reports), very strongly expressed his dissent from the decision of Mr. Justice Wilson in the former case, allowing a bequest to the unborn children of the testator's unmarried daughters. Mr. Justice Pontifex said: "I am unable to agree that the words 'create any interest' in s. 3 (of the Hindu Wills Act) can be 'read in the narrower sense as referring only to the estate or interest which can be given without reference to the further question to whom it can be given.'" It is true the remarks of Mr. Justice Pontifex were extra-judicial, and the conclusion arrived at by Mr. Justice Wilson must be taken for the present to be binding in law on the Original Side of the High Court. An appeal, however, from his decision is now pending, and will soon be determined. A report of the case on appeal will duly appear in the current volumes of the Indian Law Reports, Calcutta Series, and Calcutta Law Reports.

G. S. H.

HIGH COURT, CALCUTTA;

March, 1882.

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THE

INDIAN SUCCESSION ACT

BEING

ACT X OF 1865.

(Received the assent of the Governor-General on the 16th March, 1865.)

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

Preamble.

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:—

PART I.

PRELIMINARY.

Short Title.

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

This Act to constitute the law of British India in cases of Intestate or Testamentary Succession.

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.

The enactment in this section, that this Act shall constitute the law of the country applicable to all cases of intestate or testamentary suc-

cession, operates as a repeal of the previously existing law just as completely and effectually as if it had been expressly repealed—*De Souza* v. *Secretary of State*, 12 B. L. R., 427, *per* MACPHERSON, J.

The provisions of this Act are applicable only to cases of intestate or testamentary succession—*Sultan Chand* v. *Smyth*, 12 B. L. R., 358.

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

Interpretation-clause.

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

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

'Year.' 'Month.' 'Year' and 'month' respectively mean a year and month reckoned according to the British calendar.

Similar provisions are contained in the General Clauses Act, I of 1868, s. 2.

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

The word 'tenement,' in its ordinary legal sense, includes not only land, but rents, commons, and several other rights and interests issuing out of or concerning lands—1 Stephens's Blackstone's Commentaries, p. 169, 8th Edn.; Co. Litt. 6a, 20a, 78a. Property not being of a visible and tangible nature, is denominated incorporeal.

Incorporeal tenements are the rights and profits annexed to, or issuing out of, or exercisable within or over the land. Among incorporeal tenements are included rents, rights of way, light, watercourses and commons—1 Stephens's Blackstone's Commentaries, p. 646, 8th Edn.

Under the General Clauses Act, I of 1868, s. 2, 'immoveable property' shall include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth.

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

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

Assam does not come within the definition of a Province, but of a District, for the purposes of this Act—*Thakoor Kristo Surma Adhikaree* v. *Basoodeb Ghoshamee*, 12 W. R., 424.

'British India.' 'British India' means the territories which are or may become vested in Her Majesty or her successors by the Statute 21 & 22 Vict., c. 106, other than the Settlement of Prince of Wales' Island, Singapore, and Malacca.

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

The term 'District Judge' is used in this Act in contra-distinction to the term 'Subordinate Judge'; see s. 235, *infra*. As to powers of the Recorders of Rangoon and Moulmein, see *Fackerooddeen Adam Saw*, 11 W. R., 413.

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

These definitions of 'minor' and 'minority' do not apply in cases where a person enters into a contract on his own behalf and not in any representative character under this Act—*Sultan Chand* v. *Smyth*, 12 B. L. R., 358; see *Rollo* v. *Smith*, 1 B. L R., O. C., 10, and the cases there cited. They apply to Hindus—Hindu Wills Act, XXI of 1870, s. 6.

By the Indian Majority Act, IX of 1875, s. 2, it is enacted, that every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Succession Act (X of 1865) or in any other enactment, be deemed to have attained his majority when he shall have completed his age of 21 years, and not before; but that, subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of 18 years, and not before. See *Raj Coomar Roy* v. *Alfuzuddin Ahmed*, 8 C. L. R., 419.

The age of majority under Act XL of 1858 also is 18 years (s. 26).

The Succession Act is silent as to how the age is to be computed. In England, in computing the age of a person for testamentary or other purposes, the day of his birth is included; thus, if he were born on the 16th January 1800, he would have attained his majority on the 15th January 1821; and as the law does not recognize fractions of a day, the age would be attained at the first instant of the latter day—1 Jarm., 45, 4th Edn. So, under the Majority Act, s. 4, in computing the age of any person, the day on which he was born is to be included as a whole day.

'Will.' '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.

The form of a paper does not affect its title to probate as a will, provided that it is the intention of the deceased that it should operate after his death—*Masterman* v. *Maberly*, 2 Hagg., 235; *In the Goods of Morgan*, L. R., 1 P. and D., 214; see *In the Goods of Wemyss*, I. L. R., 4 Calc., 721; see also Williams on Executors, 7th Edn., p. 108.

Thus, documents in the form of deeds, agreements, letters, bills of exchange, powers-of-attorney, or other instruments, may take effect as wills, if duly executed, where a testamentary intention can be collected, and the dispositions are not to take effect until after the death of the persons making them—*Robertson* v. *Smith*, L. R., 2 P. and D., 43; *Habergham* v. *Vincent*, 2 Ves., 204, 231.

If one part of a document is clearly testamentary in its character, the remainder of the language, if capable of that construction, may be presumed to have been intended also to be testamentary, and the document may be admitted to probate as a will—*In the matter of Komola Kant Biswas*, 4 C. L. R., 401.

A document may be testamentary only on the happening of a particular event, as if the testator bequeath his property to *C*, "if I die of this particular sickness, and *C* survive me"—*Kamenee Dossee* v. *Bissonath Ghose*, 2 Ind. Jur., N. S., 6; see *In the Goods of Mayo*, L. R., 6 P. and D., 17.

With reference to the property comprised in it, a will is said to speak from the death of the testator. See s. 77, *infra*, and the English Wills Act, 1 Vict., c. 26, s. 23.

A will may be written, or partly written, in pencil—*Bateman* v. *Pennington*, 3 Moore's P. C., 223.

'Codicil.' '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.

Prior to the English Wills Act (1 Vict., c. 26), it was held, that a codicil was *primâ facie* dependent on the will, and a revocation of the will was an implied revocation of the codicil—*Grimwood* v. *Cozens*, 2 Sw. and Tr., 364; *In the Goods of Dutton*, 3 Sw. and Tr., 66. But under s. 20 of that Statute, with which s. 57 of this Act corresponds, it has been held, that a testamentary paper in the form of a codicil to a will is not revoked by the revocation of the will—*In the Goods of Savage*, L. R., 2 P. and D., 78; *In the Goods of Turner*, L. R., 2 P. and D., 403; *Black* v. *Jobling*, L R., 1 P. and D., 685.

If a will republished by a codicil contains language which, if read as speaking at the date of the execution of the codicil, would operate as an incorporation of an unexecuted document to which it refers, that document, although not in existence until after the execution of the will, is entitled to probate by force of the codicil—*In the Goods of Truro*, L. R., 1 P. and D., 201. A codicil must be executed or revoked in the same manner as a will. See ss. 50 and 57, *infra*.

'Probate.' '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.

See notes to s. 256, *infra*.

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

This is the definition to be found in Blackstone (2 Blackstone's Commentaries, p. 503); see *Farrington* v. *Knightly*, 1 P. Wms., 548. The executor of an executor is not derivative executor of the original testator—*DeSouza* v. *Secretary of State*, 12 B. L. R, 423. The appointment may be either express or by implication, see s. 182, *infra*. It is not necessary that there should be any legacy given by the will, or that anything should be appointed to be done by the executor. The bare nomination is sufficient—*O'Dwyer* v. *Geare*, 1 Sw and Tr., 465; *In the Goods of Lancaster*, 1 Sw. and Tr, 464; see *In the Goods of Jordan*, L. R., 1 P. and D., 555; Williams on Executors, p. 231.

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

Before the Statute 20 & 21 Vict., c. 77, s. 3, the power in England of granting administration to the personal estate of a deceased person vested in the Ordinary. Since that Act an administrator has been the person to whom the Court of Probate has given the authority to administer the personal estate of a deceased person dying intestate; and in certain cases, as where there was no executor appointed, or the executor appointed predeceased the testator, or renounced, or became incapable of acting, of a deceased person dying testate.

After the grant the office and powers of an administrator are, for the most part, the same as those of an executor—Touch, p. 474; see *Blackborough* v. *Davis*, 1 P. Wms., 43.

'Local Government.' 'High Court.' 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 [and, for the purposes of ss. 242, 242*a*, and 277*a*, shall include the Court of the Recorder of Rangoon].

The words within brackets have been added by s. 1 of Act XIII of 1875.

All words defined in this section shall, unless there be something repugnant in the subject or context, be deemed to have the same meaning under the Hindu Wills Act—Act XXI of 1870, s. 6.

Interests and powers not acquired, nor lost, by marriage.

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.

The previous state of the law has been completely altered by this section, which prevents any person from acquiring or losing rights in respect of property by marriage; see *Proby* v. *Proby*, 5 C. L. R., 1; (S. C.) I. L. R., 5 Calc., 357. It does not apply to Hindus, &c., see s. 331, *infra*, and the Hindu Wills Act, XXI of 1870.

By s. 2 of the Married Woman's Property Act, III of 1874, it is enacted, that "the fourth section of the Indian Succession Act shall not apply, and shall be deemed never to have applied, to any marriage, one or both of the parties to which professed, at the time of the marriage, the Hindu, Muhammadan, Buddhist, Sikh, or Jaina religion."

In the case of *Miller* v. *Administrator-General*, I. L. R., 1 Calc., 412, it was held, that this section (4) of the Succession Act did not apply, where moveable property was concerned, where either of the parties had an English domicile, or a domicile which was not Indian, and the marriage took place in India. "It declares," said MARKBY, J., "the general *lex loci* of India," while s. 44 lays down a special rule in a particular case.

Where a marriage was contracted after the passing of the Succession Act, but before the passing of the Married Woman's Property Act, III of 1874, it was held, in a suit upon a joint and several promissory note executed by the husband and wife, where it was sought to render liable property settled on the marriage on the wife to her use without power of anticipation, that this section (4) did not prevent the operation of the clause in the settlement in restraint of anticipation—*Peters* v. *Manuk*, 13 B. L. R., 383; (S. C.) 22 W. R., 175. COUCH, J., was of opinion, on the authority of *Sanger* v. *Sanger*, L. R., 11 Eq., 470, that, had the marriage taken place after Act III of 1874 came into operation, there would have been a remedy against the separate property of the wife. See *Archer* v. *Watkins*, 8 B. L. R., 372, and the cases there cited.

The section (4) is prospective, and leaves rights which had already been acquired before the passing of the Act unaffected—*Sarkies* v. *Prosonomoyee Dassee*, I. L. R., 6 Calc., 794; (S. C.) 8 C. L. R., 76. In that case it was contended that s. 27, *infra*, which provides as to what property of the husband the widow shall be entitled in the event of his dying intestate, impliedly, though not expressly, excluded a widow from the inchoate right to dower which she possessed at the date of the Act coming into force; but it was held, that this construction was excluded by s. 4.

As the section (4) does not apply to marriages contracted before January 1st, 1866 (s. 331, infra), it may be well to note some of the more important changes in the law effected by this Act in the case of persons to whom hitherto the law of England was applicable.

In the first place, the Act seems to have got rid of the principle, so far as property is concerned, that husband and wife are *one person in law*.

In England (prior to the Married Woman's Property Act, 1870, 33 and 34 Vict., c. 93), the personal chattels in possession belonging to the wife at the date of the marriage became absolutely vested in the husband by virtue of the marriage. See Co. Litt., 300.

The husband further acquired by the marriage the right to reduce into possession the wife's outstanding personal choses in action; that is things to which the wife had a mere right enforceable by action or suit, as debts, income of property, and arrears of property (*Wilkinson* v. *Charlesworth*, 10 Beav., 324), money in the hands of third persons appropriated to the use of the wife (*Fleet* v. *Perrins*, L. R., 4 Q. B., 500), bills and promissory notes—*Hart* v. *Stephens*, 6 Q B., 937.

Moreover, a married woman could not acquire any legal right to personal property during her coverture—Chitty on Contracts, p. 151, 7th edition.

Formerly, marriage extinguished all contracts between husband and wife—Co. Litt., 204 (*b*), and was an absolute gift of the goods, chattels, and effects, of which the wife, in her own right, was possessed at the time of the marriage—Co. Litt., 351 (*b*).

As to real estate, the husband acquired, during the marriage, a freehold interest in his wife's real estate for their joint lives, both being seised together in her right by entireties (Litt., 291); hence he might have alienated at pleasure without his wife's co-operation—Macqueen, on Husband and Wife, 29. The English Married Woman's Property Act, however, *inter alia*, provided: (1) the earnings of a married woman acquired in any trade, &c., carried on by her separate from her husband, are to be deemed settled to her separate use and independent of her husband's control; (2) deposits in the Savings Bank, property in the funds, shares or stock in a Joint Stock Company, shares in a friendly society or other benefit society, may be held by a married woman to her separate use; (3) any woman married since the passing of the Act coming into any personal property through an intestacy, or any sum not exceeding £200 under a deed or will, shall hold such property to her separate use; (4) the rents of any freehold, &c., property which shall descend to a married woman married after the passing of the Act, shall be for her separate use; (5) a married woman may sue in her own name, as if she were a *feme sole*, for any wages, earnings, money, &c., which were declared to be her separate property; or for any property belonging to her before marriage, and which her husband shall, by writing, have agreed with her shall belong to her after marriage as her separate property, or for any chattels purchased out of her separate property; (6) the husband shall not be liable for any debts contracted by his wife before marriage; but property belonging to her for her separate use shall be liable for such debts. See Macqueen on Husband and Wife.

Provisions somewhat similar to these have been made by Act III of 1874. The object of that Act was to extend the protection afforded to wives by s. 4 of the Succession Act (so far as regards future wages and earnings and policies of insurance) to women married before 1st January 1866; to declare that a married woman might sue in her own name for any property which by force of the Succession Act or the Act itself, was her separate property; to relieve the husband of a wife married after the 31st March 1865 from her antenuptial debts; and to declare that any person entering into a contract with a wife otherwise than as her husband's agent, should be entitled to sue her; and to the extent of her separate property to recover against her, whatever he might have recovered had she been unmarried.

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 part of this section applies the almost universal rule that succession to immoveable property is governed by the *lex loci rei sitae*, or the law of the country in which it is actually situate—*Birtwhistle* v. *Vardill*, 7 Cl. and Fin., 895; (S. C.) 5 B. and C., 438.

The rule was applied before the passing of this Act—*Luckunchunder Seal* v. *Koroonamoney Dossee*, 1 Boul., 210.

The second part of the section applies an equally general rule (*Enohin* v. *Wylie*, 10 H. of L. Ca., 1)—a rule applicable irrespective of the place of birth or death of the deceased or the situation of the property—*Crespin* v. *Doglione*, 3 Sw. and Tr., 97.

In *Birtwhistle* v. *Vardill*, 2 Cl. and Fin., 571, ABBOTT, C.J., said:—"Personal property has no locality. It is not correct to say that the law of England gives way to the law of the foreign country; but it is part of the law of England, that personal property should be distributed according to the *jus domicilii*."

This section is applicable in cases of testacy as well as intestacy. Accordingly, the place where a will as to immoveable property happens to be made, and the language in which it is written, are wholly unimportant as affecting either its construction or the ceremonial of its execution. The locality of the devised property is alone to be considered—*Bovey* v. *Smith*, 1 Vern., 85; *Brodie* v. *Barry*, 2 V. and B.,

* This Part does not apply to Hindus—Hindu Wills Act, XXI of 1870.

131; 1 Jarm. 1, 4th Edn. Thus, if a man domiciled in England make a will respecting immoveable property in this country, both its construction and the ceremonial of its execution must be in accordance with this Act. So, with regard to moveable property in this country, wills affecting it are regulated by the *lex domicilii*, or the law of the domicile of the testator—*Arnold* v. *Arnold*, 2 M. and Cr., 256; see *Barlow* v. *Orde*, 5 B. L. R. (P. C.), 1. It having been once ascertained who, by the law of the domicile, are entitled under a will, the duty of the Court of Administration is to be discharged according to the *lex loci rei sitae*—*Enohin* v. *Wylie*, 10 H. L. C., 19, *per* Lords Cranworth and Chelmsford; see 1 Jarm., p. 2, 4th Edn.; and *Carron Iron Co.* v. *Maclaren*, 5 H. of L. Ca., p. 456.

Of course, the *law of the country* may, in some instances, mean, not the general law applicable to the subjects of the particular country, but the particular law applicable to foreigners domiciled therein—*Collier* v. *Rivaz*, 2 Curt., 855.

In England, it has been held in a number of cases, that a will made under a power in the particular form required by the power is good without reference to the testator's foreign domicile, because the appointee takes, not under the instrument exercising, but under the instrument creating, the power. See *In the Goods of Haliburton*, L. R., 1 P. and D., 90, where the cases are collected. In the case just cited, a will made in Scotland in the English form, by a married woman domiciled in Scotland, purporting to be made under a power, and disposing of property in England, was held to be entitled to probate, although not valid according to the law of Scotland. See *D'Huart* v. *Harkness*, 34 L. J., Chan., 311.

There seems to be nothing in this Act which would prevent a similar construction in analogous circumstances.

Probate will be granted, in India, of a will as to moveable property, though the will be not valid according to Indian law, provided it be valid according to the law of the domicile of the testator—*Re Maraver*, 1 Hagg., 498; *Stanley* v. *Bernes*, 3 Hagg., 373. But a will disposing of property in a foreign country only is not entitled to probate in this country—*In the Goods of Coode*, L. R., 1 P. and D., 449,—the object of granting probate being to enable the executor to administer property in the country in which it is granted—*Ibid*, *per* Sir J. P. Wilde.

In determining where a man's domicile is, questions of considerable difficulty may sometimes arise. The leading principle is, that the domicile of origin is presumed to be the domicile of the deceased (*Attorney-General* v. *Rowe*, 1 H. and C., 31; see s. 9, *infra*), unless there is an intention to abandon the old and acquire a new domicile (*Attorney-General* v. *Count Blucher*, 10 Jur., N. S., 1159; *Whicker* v. *Hume*, 7 H. L. C., 159; *Moorhouse* v. *Lord*, 10 H. L. C., 272); and change of residence, however long and continued, is not sufficient evidence of such intention—*Pitt* v. *Pitt*, L. R., 4 H. L. C., 627.

Two things must concur to constitute domicile; *first*, residence; and, *secondly*, intention of making it the home of the party. Story's Conflict of Laws, Chap. III, § 43.

Mr. Justice Story lays down a number of practical rules for determining where a person's domicile is. The more important of these rules are the following—

(1) A person under the power of another is considered to have the domicile of the principal party—as a child, of the father; a wife, of the husband (see ss. 7, 8, and 15, *infra*).

(2) There is a presumption in favour of the native country when the question lies between that and another domicile; and in favour of the place where one lives or has his family, rather than in favour of his place of business.

(3) Free choice is necessary; hence constrained residence is no domicile; and in case of change, a new domicile begins as soon as choice begins to take effect.

(4) A floating purpose to leave the soil at some future period does not prevent domicile from being acquired, for such purpose does not amount to a full and fixed intention.

In *Barlow* v. *Orde*, 5 B. L. R. (P. C.), 1, a case to which this Act did not apply, the Judicial Committee of the Privy Council held, that where a testator's domicile can be ascertained, the construction and effect of his will must depend on the law of the domicile; but that, if the domicile could not be ascertained, the will was to be construed according to justice, equity, and good conscience. See now s. 19, *infra*.

Where the construction of a will is to be regulated by foreign law, in England, the opinion of an advocate versed in such law is obtained for the information and guidance of the Court on which devolves the task of construing it; or the Court may remit a case for the opinion of a Court in any other part of the British dominions or of a Court in any foreign country with which there is a convention for that purpose. But if the point in dispute depend upon principles of construction common to both countries, the Court will adjudicate upon the question according to its own view of the case without having recourse to the assistance of a foreign jurist—1 Jarm., 4th Edn., p. 6; *Harrison* v. *Harrison*, L. R., 6 Chan., 346; *Bernal* v. *Bernal*, 3 My. and C., 559; see *Doglioni* v. *Crispin*, L. R., 1 H. L. C., 301.

It is to be observed, that a person whose opinion may be taken on the construction of a will regulated by foreign law, must be one whose knowledge has been acquired in the particular foreign country and not from having studied the law of that country elsewhere—*Bristow* v. *Secqueville*, 19 L. J., Ex., 289; *Re Bonelli*, L. R., 1 P. and D., 69.

As to the application of moveable property to payment of the debts of a person not domiciled in British India, see s. 283, *infra*.

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

One domicile only affects succession to moveables.

It is a settled principle, that no man shall be without a domicile; and to secure this end the law attributes to every individual, as soon as he is born, the domicile of his father, if the child be legitimate, and the domicile of his mother if the child be illegitimate. This is called the domicile of origin, and is involuntary. It is the creation of law, not of the party. It may be extinguished by act of law, as for example, by sentence of death or exile for life, which puts an end to the *status civilis* of the criminal, but it cannot be destroyed by the will and act of the party—*Udny* v. *Udny*, L. R., 1 Sc. App., 441, *per* Lord WESTBURY; *King* v. *Foxwell*, L. R., 3 Chan. Div., 518. See *Somerville* v. *Somerville*, 5 Ves., 786; *Forbes* v. *Forbes*, 1 Kay, 353.

Every person born in wedlock acquires by birth the domicile of his father, and this domicile continues until a new one has been actually acquired, *facto et animo—Ibid; Munroe* v. *Douglas*, 5 Madd., 379;

Bruce v. *Bruce*, 3 B. and P., 228; *Bell* v. *Kennedy*, L. R., 1 H. L., Sc. App., 323; Story's Conflict of Laws, § 47. See next section.

A domicile of choice is the creation of the party. When such a domicile is acquired, the domicile of origin is in abeyance; but is not absolutely extinguished or obliterated. When a domicile of choice is abandoned, the domicile of origin revives, a special intention to revert to it being unnecessary—*Ibid*, see *per* LORD CHELMSFORD.

It is always material, in determining what is a man's domicile, to consider where his wife and children live and have their permanent place of residence, and where his establishment is kept up—*Platt* v. *Attorney-General of N. S. Wales*, L. R, 3 App. Ca, 243, *per* SIR BARNES PEACOCK. In that case M. having abandoned his domicile of origin, which was in Scotland, acquired a new domicile in that portion of New South Wales which, in 1859, was, by proclamation, separated therefrom, and became the colony of Queensland. Thereafter he built in New South Wales a house suitable to his fortune. His wife and children resided there till his death, having removed thereto from Queensland. He himself also resided there except at times when he was engaged upon his business or political duties in Queensland. He died, however, and was buried by his own wish in Queensland. It was held that, whether or not at the moment of separation in 1859, the domicile of M. was transferred to and became a domicile in Queensland, or continued to be a domicile in New South Wales from the time the house built therein was finished, and the establishment of M. removed thereto, his *animus manendi* in New South Wales must be inferred, and his domicile then determined.

As an indication of intention acts are more important than declarations—*Drevon* v. *Drevon*, 10 Jur., N.S., 717. In *Doucet* v. *Geoghegan*, L. R., 9 Chan. Div., 441, the testator was a Frenchman, but had lived 27 years in England, during the greater part of which time he was a partner in an English house of business, paying occasional visits to France. He married successively, in English Churches, two wives, who were Englishwomen and Protestants, though himself a Roman Catholic, and his children were brought up in England as Protestants. He made his will in the English form, and left his property in a manner inconsistent with French law. In an action to establish a French domicile, numerous witnesses deposed that he had made parol declarations that he intended to return to France when he made his fortune. It was also proved that he always refused to be naturalized in England, and would not take a lease for more than three years of his house. It was held by the Court of appeal that the acts of the testator manifested an intention to acquire an English domicile; that his declarations of intention to return to France when he had made his fortune were not sufficient to rebut the conclusion to be derived from the facts of his life.

Officers of the Crown, coming to India in the time of the East India Company, did not lose their domicile of origin; but officers of the East India Company did—*Bruce* v. *Bruce*, 2 B. and P., 229*n*.; *Munroe* v. *Douglas*, 5 Madd., 379; *Forbes* v. *Forbes*, Kay, 341; *Jopp* v. *Wood*, 4 DeG. J. and S., 616. These cases were before the Succession Act; but since that Act it has been similarly decided by the Court of Session in Scotland (*Wauchope* v. *Wauchope*, Court of Session Rep. 4th Series, Vol. 4, p. 945; reported also in 2 C. L. R., 497*n*.), and by the High Court at Calcutta—*In the Goods of Elliot*, I. L. R., 4 Calc., 106; (S. C.) 2 C. L. R, 496.

In *Drevon* v. *Drevon*, 10 Jur., N. S., 717, KINDERSLEY, V. C., observed, that "the decisions that persons going to India in the service of

the East India Company thereby acquire an Anglo-Indian domicile, are excrescences upon, and anomalous to, the principles of domicile."

In order to change his domicile of origin a man must voluntarily fix his sole or principal residence in a country which is not his country of origin, with the intention of residing there for a period not limited as to time. The domicile so acquired may be put an end to by abandoning it without acquiring a new domicile of choice, and in such a case the domicile of origin reverts—*King* v. *Foxwell*, L. R., 3 Chan. Div., 518.

Domicile of origin of person of legitimate birth.

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.

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.

The first part of this section is in accordance with the rule of the civil law, "*patris originem unusquisque sequatur*," Cod. Lib. 10 tit., 31; and see *Scrimshire* v. *Scrimshire*, 2 Hagg. Cons., 405-6.

The second part of the section declares that the last domicile of the father shall be the domicile of his posthumous child, and not the domicile of the mother, wherever that may be at the time of the birth.

Domicile of origin of illegitimate child.

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.

This section is in accordance with the civil law—*Ejus qui justum patrem non habet prima origo à matre.* Dig. Lib., 50 tit. 1.

Minors are generally incapable, *proprio motu*, of changing their domicile during their minority.—Story's Conflict of Laws, § 47. Their domicile follows that of the parent from whom it was derived. See the exception to s. 14, *infra.*

Domicile is of three sorts: domicile by birth, or domicile of origin, domicile by choice, and domicile by operation of law.

Continuance of domicile of origin.

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

There must be an intention to abandon the domicile of origin and to acquire a new domicile, otherwise the former will continue—*Attorney-General* v. *Blucher*, 10 Jur., N. S., 1159. Mere change of residence however long and continued, is not sufficient—*Moorhouse* v. *Lord*

10 H. L. C., 272. The acts, as already pointed out, of the testator or intestate are in general a better indication of his intention than mere declarations—*Drevon* v. *Drevon*, 10 Jur., N. S., 717; *Doucet* v. *Geoghegan*, L. R., 9 Chan. Div., 441; *Platt* v. *Attorney-General*, L. R., 3 App. Ca., 336. See notes to s. 6, *supra*.

A residence may be originally temporary, yet, so soon as a change of purpose, or *animus manendi*, can be inferred, the fact of domicile is established—*Haldane* v. *Eckford*, L. R., 8 Eq., 631. In *King* v. *Foxwell*, L. R., 3 Chan. Div., 518, it was held, that, in order to change the domicile of origin, it was sufficient for a man voluntarily to fix his sole or principal residence in a foreign country with the intention of residing there for a period not limited as to time.

A domicile will not be lost by a compulsory residence in a foreign country, as by flight from civil commotion or revolution—*In the Goods of the Duchess D'Orleans*, 1 Sw. and Tr., 254. See s. 10, illustration (*f*), *infra*.

Residence in any place for health's sake is of dubious import, and further manifestation of intention is requisite before such residence can be assumed to be permanent—1 Jarm., 4th Edn., 14, citing *Hoskins* v. *Matthews*, 8 DeG. M. and G., 13. By the law of all countries it seems to have been considered, that a prisoner preserves the domicile of his country—Phill. Dom., 87. See, however, s. 16, exception, *infra*.

The burden of proving a change of domicile lies on the person asserting it—*Aikman* v. *Aikman*, 7 Jur., N. S., 1017; *Bell* v. *Kennedy*, L. R., 1 Sc. App., 307, *per* Lord Chelmsford.

The following circumstances, according to Dr. Phillimore, may be relied on as affording evidence of intention (*animus manendi*):—(1) Place of birth. (2) Oral and written declarations. (See *Drevon* v. *Drevon*, 10 Jur., N. S., 717; *Doucet* v. *Geoghegan*, L. R., 9 Chan. Div., 441, and Phill. Dom., pp. 114, 118, as to the value of such evidence). (3) The place of death—("a circumstance of slight moment"—Phill., 115, though *primâ facie* evidence of a faint kind—*Burton* v. *Fisher*, 1 Milw.; 187). (4) The place of residence of wife and family. (5) The house of trade. (6) The depository of papers and muniments. (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.—("Perhaps," says Dr. Phillimore, "the most important criterion of domicile is the length of time during which residence has continued in a particular place"—Phill. Dom., 140-1. See *Hodgson* v. *Beauchesne*, 12 Moore's P. C. 285, 325.)

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.

Acquisition of new domicile.

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.

(*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.

Phill. Dom., 72 ; *Ommaney* v. *Bingham*, cited in *5* Ves. Rep., *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.

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.

(*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.

Whether the habitation taken up by a man in a country which is not that of his domicile of origin, is with the intention of acquiring a new domicile, must be determined with reference to circumstances. The criteria to which reference may be made have been referred to in the notes to the preceding sections.

The Explanation to this section is no more than an announcement of the settled law on the subject as exemplified in the case of *Bruce* v. *Bruce*, 2 B. & P., 229 (*n*) and other cases referred to in the notes to s 6, *supra*. Officers of the East India Company acquired an Anglo-Indian domicile—*Wauchope* v. *Wauchope*, Court of Sessions Rep. 4th Series, Vol. IV, p. 945; (S. C.) 2 C. L. R., 497; *In the Goods of Elliot*, I. L. R., 4 Calc., 106; (S. C.) 2 C. L. R., 496.

One who settles as a trader in a foreign country will commonly thereby acquire a domicile in that country—1 Jarm., 4th Edn., 14; *Cockerell* v. *Cockerell*, 2 Jur., N. S., 727; *Doucet* v. *Geoghegan*, L. R., 9 Chan. Div., 441. See Illustration (*a*).

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.

By an order of the Governor-General in Council, it was directed that, in the Province of Oudh, the office of the Judicial Commissioner at Lucknow should, until further orders, be the office in which declarations made under this section should be deposited—*Gazette of India*, July, 15th, 1865, p. 803. In British Burmah, the office of the Chief Commissioner of British Burmah at Rangoon is the office in which such declarations are to be deposited—*Gazette of India*, 29th July, 1865, p. 845.

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.

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.

The residence of a foreign minister within the jurisdiction of the State to which he is accredited, is by a fiction considered as a continuing residence in his own country; and this fictitious situation is applied not only to the person of the minister but to his family and suite, secretaries of legation and other secretaries, servants, moveable effects, and the house in which he resides—Kent's International Jurisprudence, 106; Wheaton's International Law, ss. 98, 224, 235; Phill. Dom., 79, 80.

A different rule generally applies to consuls and other commercial agents who are presumed to remain in a country for purposes of trade, and who, therefore, acquire a domicile where they reside—Story's Conflict of Laws, § 48; *Maltass* v. *Maltass*, 1 Rob., 79. Phill. Dom., 85.

If, being already domiciled in a foreign country, a man be appointed by his own sovereign ambassador or consul in that country, his original domicile is not thereby restored, *quoad* succession to personal property—1 Jarm, 4th Edn., 14; *Sharpe* v. *Crispin*, L. R., 1 P. and D., 611.

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

Continuance of new domicile.

The section is silent as to the manner in which a former domicile may be resumed.

In *Udny* v. *Udny*, L. R., 1 Sc. App., 457, LORD WESTBURY said:—"When another domicile is put on, the domicile of origin is, for that purpose, relinquished, and remains in abeyance during the continuance of the domicile of choice; but as the domicile of origin is the creature of law and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed to suppose that it is capable of being, by the act of the party, entirely obliterated. It revives and exists whenever there is no domicile, and it does not require to be regained or reconstituted *animo et facto* in the manner which is necessary for the acquisition of a domicile of choice." (See also *King* v. *Foxwell*, L. R., 3 Chan. Div., 518.) Again LORD WESTBURY says (p. 458):—"Domicile of choice, as it is gained *animo et facto*, so it may be put an end to in the same manner. Expressions are found in some books, and in one or two cases, that the first or existing domicile remains until another is acquired. This is true if applied to the domicile of origin, but cannot be true if such general words were intended (which is not probable) to convey the conclusion that a domicile of choice, though unequivocally relinquished and abandoned, clings, in despite of his will and acts, to the party, until another domicile has, *animo et facto*, been acquired."

According to the provisions, however, of this section, it would seem, that where a new domicile has been acquired, that domicile will continue until another domicile has been acquired *animo et facto*.

As to the evidence of presumption, KINDERSLEY, V C., in *Lord* v. *Colvin*, 4 Drew., 422, observes:—"There is one principle very well established,—namely, that slighter evidence is required to warrant the conclusion that a man intends to abandon an acquired domicile and to resume his domicile of origin, than is necessary to justify the conclusion that he means to abandon his domicile of origin and acquire a new one."

In *In the Goods of Raffenel*, 3 Sw. and Tr., 49, *B* left Dunkerque, where she had acquired a domicile, with the intention of residing in England. She got on board the packet at Calais, but before it left the harbour, she was, through illness, obliged to land, and never sufficiently recovered to leave France. It was held by the Court, that, there was no sufficient act to give effect to the intention to resume the English domicile.

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

Minor's domicile.

Exception —The domicile of a minor does not change with that of his parent, if the minor is married or[2] holds any office or employment in the service of Her Majesty, or[3] has set up with the consent of the parent in any distinct business.

A minor is, generally, incapable of changing his domicile during his minority, and, therefore, retains the domicile of his father during his minority. If the father change his domicile, that of the infant children follows it; and if the father dies, his last domicile is that of the infant children—Story's Conflict of Laws, § 46. In *Sharpe* v. *Crispin*, L. R., 1 P. and D., 611, it was held, that if a man, at the time he attains his majority, is of unsound mind, and remains in that state continuously up to the date of his death, the incapacity of minority never having been followed by adult capacity, will continue to confer upon the father the right of choice in the matter of domicile for his son, and a change of domicile by the father will usually produce a similar change of domicile as regards the lunatic son.

In England, it has been made a question, whether infant children, who, after the death of their father, remain under the care of their mother, follow the domicile which she may, from time to time acquire, or retain that which their father had at the time of his death until they are capable of gaining one by acts of their own. The weight of authority in such cases seems to be in favour of the mother's domicile—1 Jarm , 15, 4th Edn.; *Potinger* v. *Wightman*, 3 Mer., 67.

In this country, it is submitted, in cases to which this Act applies, that the domicile of the father at the time of his death would continue. See s. 9, *supra*.

The Exception to this section is based on the principle that a married minor must be treated as *sui juris* in respect of domicile, since on his marriage he actually founds an establishment separate from the parental home—West., 36. So, by accepting a benefice or other office from which he is not removeable, or by entering into a house of commerce with the consent of those under whose control he is, a minor becomes emancipated and capable of acquiring a domicile of his own—Phill. Dom., 50.

In the case of the marriage of a minor, according to Pothier, the marriage must have been contracted with the consent of one of his parents or guardian; but it can scarcely be doubted, says Dr. Phillimore, that, in Great Britain, a minor once married, whether, with or without the proper consent, would be held capable of choosing his domicile—Phill. Dom., 50.

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

Domicile acquired by a woman on marriage.

This is the maxim of the Roman and Continental Civilians—Phill. Dom , 27 ; *Dalhousie* v. *M'Douall*, 7 Cl. and Fin., 817. The widow retains her matrimonial domicile until she has actually changed it *animo et facto*—West., 42. If she marry again, her domicile will be that of her second husband—Phill. Dom., 27 ; *Dalhousie* v. *M'Douall*, 7 Cl. and Fin., 817.

The principle upon which this section is based is, that it is the duty of a wife to remain with her husband, and her will is presumed to coincide with that duty.—West., 47.

Wife's domicile during marriage.

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

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.

The domicile of the husband is the domicile of the wife, and even when he has been guilty of such misconduct as would furnish her with a defence to a suit by him for restitution of conjugal rights, she cannot on that ground acquire a separate domicile for herself—*Yelverton* v. *Yelverton*, 1 Sw. and Tr., 574.

Competent Court.—It has been held in England, that the sentence of a foreign Court granting a divorce cannot be recognized by an English Matrimonial Court as putting an end to the marriage bond of domiciled English subjects—*Dolphin* v. *Robins*, 7 H. of L., 390; *Tollemache* v. *Tollemache*, 1 Sw. and Tr., 557; *Argent* v. *Argent*, 34 L. J., P. and D., 133; *Shaw* v. *Attorney-General*, L. R., 2 P. and D., 156.

It is not necessary that the separation should be by actual divorce *a vinculo*. A divorce *a mensa et thoro* (*Williams* v. *Dormer*, 2 Rob, 505), or a judicial separation (see Indian Divorce Act, IV of 1869, s. 22) is, it seems, sufficient; see *Dolphin* v. *Robins*, 7 H. of L. Ca., 416, *per* LORD CRANWORTH.

The domicile of the husband, however, will continue, where the parties are living apart under a deed of separation—*Warrender* v. *Warrender*, 2. Cl. and Fin., 488; and even after the wife (who was living apart from her husband by agreement) had instituted a suit in the Scotch Court for divorce on the ground of her husband's adultery—*Dolphin* v. *Robins*, *ubi supra*.

In England it has been held, that where a husband goes away from the place of his domicile to avoid his creditors, leaving his wife behind, his domicile is not to be regarded in law as the domicile of his wife, either by construction or attraction so as to compel the wife to become subject to the jurisdiction of the tribunal of any country in which the husband may choose to acquire a domicile—*Pitt* v. *Pitt*, 10 Jur., N. S. 735; Browne, Div., p. 8.

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.

Dr. Phillimore is of opinion that an adult lunatic would acquire the domicile of the committee of his person—Phill. Dom., 55. Mr. Westlake, on the other hand, is of opinion, that such a lunatic must retain the domicile which he had when he first lost his reason.

The section does not clearly specify in what manner a lunatic may acquire a new domicile, or whose domicile his own domicile must follow.

In the case of a person of unsound mind from the time of minority, the domicile follows that of the father—*Sharpe* v. *Crispin*, L. R., 1 P. and D., 611. See s. 14, *supra*.

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.

Succession to a person's moveable property in British India, in

This section throws the onus, in the circumstances mentioned, of proving a domicile elsewhere than in India on the persons alleging such a domicile. See *Bell* v. *Kennedy*, L. R., 1 Sc. App., 307.

PART III.*

OF CONSANGUINITY.

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

Kindred or consanguinity.

'Consanguinity,' or 'kindred,' is defined by the writers on these subjects to be "*vinculum personarum ab eodem stipite*:" the connection or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal or collateral—2 Blackstone's Commentaries, 203, 19th Edn.

No person can take as next-of-kin, unless blood-relationship exists between him and the intestate. Thus, a mother-in-law, or step-mother, or persons similarly connected with him, cannot take—*Rutland* v. *Rutland*, 2 P. W., 216. Husband and wife cannot be deemed next-of-kin—*Watt* v. *Watt*, 3 Ves., 244; *Carrick* v. *Camden*, 14 Ves., 376, *per* Lord Eldon. Thus, in England, a limitation to next-of-kin *simpliciter*, whether it be contained in a will or settlement, is a limitation to the nearest in blood to the *propositus*—*per* Wood, L. J., in *Halton* v. *Foster*, L. R., 3 Chan. App., 505. In this country, however, it is to be observed, that a bequest to the next-of-kin of a particular person shall be distributed as if that person had died intestate. See s. 80, *infra*.

* This Part of the Succession Act does not apply to Parsees (Act XXI of 1865, s. 8); nor to Hindus, etc. (Act XXI of 1870).

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.

Lineal consanguinity.

This section is borrowed from 2 Blackstone's Commentaries, 202, 19th Edn.

'Lineal consanguinity' falls strictly within the definition of *vinculum personarum ab eodem stipite descendentium*, since lineal relations are such as descend from one another and both, of course, from the same common ancestor—*Ibid*, 203; see Williams on Executors, 425.

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.

See 2 Blackstone's Commentaries, 203-4; Williams on Executors, 426-8.

The method of computing degrees in the collateral line, is that of the Civil Law, which has been adopted by the English Law,—Co. Litt., 23. The rule, in other words, is to take the sum of the degrees in both lines to the common ancestor—*Mentney* v. *Petty*, Prec. in Chan., 593; 2 Blackstone's Commentaries, 207, *note*.

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

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

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 lifetime, and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive.

This is according to the English Statutes of Distribution, 22 and 23 Car. II, c. 10, and 1 Jac. II, c. 17, which, however, relate only to personal property.

By the English law, the half-blood were excluded from inheriting real property at one time for feudal reasons; but now, by 3 & 4 Will. IV, c. 106, they are entitled to inherit real property, but only after kinsmen of the whole blood of the same degree, and after the issue of such kinsmen where the common ancestor is a male, and next after the common ancestor when such common ancestor is a female. Williams' Real Property, 106 (10th Edn.)

Under this Act, there is no distinction between the devolution of moveable and immoveable property.

The half-blood, therefore, is entitled to administration as well as the whole, and the brother of the half-blood will exclude the uncle of the whole blood—*Collingwood* v. *Pace*, 1 Ventr., 424. So administration may be granted either to the sister of the half, or the brother of the whole, blood—*Brown* v. *Wood*, Alleyn., 36; Williams on Executors, 428; see s. 204, *infra*. And brothers and sisters of the half-blood of an intestate are equally entitled, with brothers and sisters of the whole blood, to share with their mother after the death of the intestate's father, where the intestate dies without wife or children—*Jessop* v. *Watson*, 1 My. and K., 665.

The law considers every child *en ventre sa mère* as actually born for the purpose of taking any benefit to which, if born, it would be entitled—*Doe* v. *Clarke*, 2 H. Bl., 399; *Trower* v. *Butts*, 1 Sim. and Stu., 181; see also s. 87, *infra*. Thus, in *Burnet* v. *Thann*, 1 Ves., Sen., 156, a posthumous brother was held to be entitled to a share of an intestate's estate. See *Blasson* v. *Blasson*, 2 De G. J. and S., 665.

By the Hindu law current in Bengal, a brother of the whole blood succeeds, in the case of an undivided immoveable estate, in preference to a brother of the half-blood—*Rajkishore Lahoory* v. *Gobind Chunder Lahoory*, I. L. R., 1 Calc (F. B.), 27.

Mode of computing degrees of kindred.

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

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.

			(4) Great Grandfather's Father.
			(3) Great Grandfather.
			(5) Great Great Uncle.
			(2) Grandfather.
			(4) Great Uncle.
			(1) Father.
			(3) Uncle.
			(5) Great Uncle's Son.
The Person whose Relatives are to be reckoned.	(2) Brother.	(4) Cousin German.	(6) Second Cousin.
(1) Son.		(3) Nephew.	(5) Son of the Cousin German.
(2) Grandson.			(4) Son of the Nephew, or Brother's Grandson.
			(6) Grandson of the Cousin German.
(3) Great Grandson.			

The words 'cousins,' 'first cousins,' or 'cousins-german' apply only to children of brothers or of sisters of the father or mother of the person whose 'cousins,' 'first cousins,' or 'cousins-german' are spoken of; see s. 87, *infra*.

The words 'second cousin' apply only to grandchildren of brothers or of sisters of the grandfather or grandmother of the person whose 'second cousins' are spoken of—*Ibid.*

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 (*Ibid*),—*i. e.*, great uncle's son and son of cousin-german in the table given, both of whom are in the sixth degree.

So, a first cousin twice removed,—*i.e.*, grandfather's cousin, or son of great great uncle and a second cousin,—are in the same degree as second cousins—*Silcox* v. *Bell.*, 1 Sim. and Stu., 301.

It is to be observed that kindred are found distant from the propositus by an equal number of degrees, although they are relations of very different denominations. Thus a grand-daughter of a sister,—*i e.*, a great niece and the daughter of the intestate's aunt, *i. e.*, a cousin-german, are in equal degree, *viz.*, in the fourth degree—Williams on Executors, 427; *Thomas* v. *Ketteriche*, 1 Ves. Sen., 333.

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 tak-

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

Even where an executor is appointed; see *Travers* v. *Travers*, L. R., 14 Eq., 275.

This section is the only section in this Part which applies to Parsees—Act XXI of 1865, s. 8. That Act contains special provisions as to intestate succession among Parsees, Parsees having a repugnance to treating females as on an equality with males. See Parsee Succession Act, *in extenso*, *post.*

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.

Prior to 11 Geo. IV and Will. IV, c. 40, executors were, at law, and *in general* in equity also, entitled beneficially to the residue not expressly disposed of or given to them in trust—*Pratt* v. *Sladden*, 14 Ves., 197; *Johnstone* v. *Hamilton*, 11 Jur., N. S, 777. By the first section of that Act, the executor of any person dying after 1st September 1830, is to be deemed in equity a trustee for the persons who would be entitled under the Statute of Distributions in respect of

* This Part does not apply to Hindus, etc. (Act XXI of 1870); nor does it, with the exception of s. 25, apply to Parsees (Act XXI of 1865, s. 8).

of residue, unless it shall appear by the will or codicil that the executor was intended to take beneficially.

This Act, therefore, has cast on the executor the burden of proving from the will a distinct intention that he should take the residue beneficially—*Juler* v. *Juler*, 29 Beav., 37.

The mere nomination of an executor only entitles the will to probate—*O'Dwyer* v. *Geare*, 1 Sw and Tr., 465.

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

See *Dacre* v. *Patrickson*, 1 Dr. and S, 182; *Johnstone* v. *Hamilton*, 11 Jur, N. S, 777.

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

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.

Devolution of such property

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.

In England, also, a widow's title under the Statute may be barred by a settlement before marriage excluding her from her distributive share of her husband's personal 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 or guardians—Williams on Executors, 1496.

The Explanation to the section has reference only to contracts made before marriage In *Slatter* v *Slatter*, 1 Y and C., Exch., 28, the question was raised but not decided, whether, by a post-nuptial settlement, the widow could be deprived of her distributive share, the right to the distributive share not having been expressly excluded by the settlement. A provision made by the husband in his will in lieu of the distributive share, does not bar the widow from taking under an intestacy on the failure of legacies—*Garthshore* v. *Chalie*, 10 Ves., 17-18;

In England, where a husband has covenanted *to leave*, or that his executor shall pay, to his widow, a sum of money or part of his personal estate, and he dies intestate, so that she becomes entitled to a portion of his personal property under the Statute, such distributive

share shall be a performance, or part-performance, if less than the amount covenanted—(*Garthshore* v. *Chalie*, 10 Ves., 16); and she cannot claim both—*Blandy* v. *Widmore*, 1 P. W., 324.

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 has left a widow and lineal descendants, or a widow and kindred only, or a widow and no kindred.

The last provision in this section departs from the law in I There, if an intestate leaves a widow but no next-of-kin, a moiety only of the property belongs to the widow, and the other moiety goes to the Crown—*Cave* v. *Roberts*, 8 Sim., 214. As to who are of kindred, see s 20, *supra*.

The section, by providing what property of the husband the wife sl be entitled to on his dying intestate, does not impliedly deprive a widow of any inchoate rights, *e g*, of dower, to which she may have been entitled when the Act came into force—*Sarkies* v. *Prosonomoyee Dossee*, I L. R., 6 Calc., 794, (S C 8 C. L R., 76.

By a notification dated the 31st March 1873, the Governor-General in Council was pleased to rule that the effects of illegitimate persons dying intestate, which have already become escheats to the Government since the Indian Succession Act came into operation, shall, after deduction of the expenses incurred and the established proportion of the Crown's share, be distributed in conformity with the aforesaid *of India*, April 5th, 1873, Part I, p 334.

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.

Where an intestate dies leaving none who are of kindred to him, the Crown takes as *ultimus haeres*, subject to his debts—*Megit* v. *Johnson*, 4 Dougl., 548, *per* LORD MANSFIELD. The most usual case, of course, of a person dying without kindred, is that of a bastard dying leaving neither wife nor children.

PART V.*

OF THE DISTRIBUTION OF AN INTESTATE'S PROPERTY.

(*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 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.

As to moveable property, succession is regulated according to the law of the country in which the intestate had his domicile at the time of his death,—s. 5, *supra*. 'Child' or 'children,' therefore, must refer to a child or children legitimate according to the law of the country in which the intestate had his domicile at the time of his death—*Doe* v. *Vardill*, 5 B. and C., 451; *In re Ewin*, 1 Crompt. and Jerv., 156; Williams on Executors,

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.

The grandchild or grandchildren here take in their own right *per capita*, for, as the children of the intestate are all dead, they are the next-of-kin—*Walsh* v. *Walsh*, 1 Eq. Ca. Abr., 249, pl. 7.

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

* This Part does not apply to Parsees (Act XXI of 1865, s. 8); nor to Hindus, etc. (Act XXI of 1870).

A dies intestate, leaving those nine grandchildren a no descendant of any deceased grandchild. Each of grandchildren shall have one-ninth.

This is the case of *Walsh* v. *Walsh*, 1 Eq. Ca. Abr., 249, pl. 7, cited in Williams on Executors, 1503.

(*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.

Williams on Executors, 1504.

(*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.

This illustration is hardly apposite to the present section, which deals with cases where the intestate has left no child; see s. 33, *infra*. The posthumous child takes by representation.

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.

This section applies only where the lineal descendants are *all* in the same degree, and they take equally, or *per capita*—Williams on Executors, 1503.

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 such share 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.

The rule in England seems to be different Thus, in *Re Ross's Trust*, L.R., 13 Eq., 286; (S C) 41 L J Chan., 130, it was decided, that where an intestate left no children, but grandchildren and great grandchildren only, they take *per stirpes*, the shares being calculated with reference to the number of children leaving descendants and not with reference to the number of grandchildren In that case Wickens, V. C., said: "If there are descendants, but no children living to share the estate, it is to be divided into as many shares as there were children who have left living descendants, and the descendants of each such child are to take as representing the child, and of course only the child's

(*b*) *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.

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

35. If the intestate's father be

property.

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.

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

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.

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 life-time 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.

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

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.

In England, prior to the Statute 1 Jac. II, c. 7, the mother enjoyed an equality with the father of an intestate as to taking the whole of his property in the event of his dying intestate without wife and children. Under s. 7 of that Statute, the law there is now as it has been declared by this section.

The principle upon which the alteration was made was, that it was thought unreasonable that the mother, by marrying again, might transfer all to another husband—*Blackborough* v. *Davis*, 1 P. Wms., 49, *per* LORD HOLT.

In England also, brothers and sisters of the half-blood share with their mother—*Jessopp* v. *Watson*, 1 M. and K., 665; *Burnet* v. *Mann*, 1 Ves. Sen., 156.

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

Where intestate's father is dead, and his mother and the children

t 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

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 belong to the mother.

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

That is, representation is not to be carried beyond brother's and sister's children. The law is similar in England. See *Stanley* v. *Stanley*, 1 Atk., 455, *per* LORD HARDWICKE.

40. Where the intestate has left neither lineal descendant, nor father, nor mother, the property is divided equally between his brothers and 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 mother.

Here, as in England, brothers and sisters, though in the same degree, are preferred to grandparents—*Winchelsea* v. *Norcliff*, 1 Vern., 403; *Evelyn* v. *Evelyn*, 3 Atk., 762.

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.

Children's advancements not to be brought into hotchpot.

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 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.

This section gets rid of the English rule that such children as have any estate by settlement, or who shall have been advanced by the intestate in his lifetime by pecuniary portions, must bring the amount of their advancement into hotchpot, so as to make the estate of all the children to be equal as nearly as can be estimated.

Upon this subject the Commissioners in their Report say:—"We propose to omit the rule of 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 his father's estate. This rule, though founded upon a desire to equalize, 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 managements 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 disposition, and these evils, which are often felt in England, would be still more felt in India"—*Gazette of India*, July 1st, 1864, p. 53.

The English rule only applied in the case of intestate fathers—*Holt* v. *Frederick*, 2 P. Wms., 356.

Moneys advanced by a mother were never required to be brought into hotchpot—*Ibid.*

This section does not apply to Parsees—Parsee Succession Act (XXI of 1865), s. 8. Accordingly the rule provided by s. 5 of the Statute of Distributions (22 and 23 Car. II, c. 10) does not apply to the Parsee community. See *Dhanjibhai Bomanji Gugrat* v. *Narasbai*, I. L. R., 2 Bomb., 75.

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 does not apply to Parsees (Act XXI of 1865, s.

* This Part does not apply to Hindus, etc. (Hindu Wills Act, XXI of 1870). With the exception of s. 43, it applies to Parsees (Act XXI of 1865, s. 8).

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 marriage, which he or she would not acquire thereby if both were domiciled in British India at the time of the marriage.

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

It has been held, that s. 4 of this Act, which declares that no person shall by marriage acquire any interest in the property of the person whom he or she marries, does not apply in respect of the moveable property of persons not having an Indian domicile—*Miller* v. *Administrator-General*, I. L. R., 1 Calc., 412. By this section, where either of the parties has an Indian domicile, and the marriage takes place in India, the Legislature has submitted the rights of the parties both as to moveables and immoveables to the territorial law of India.—*Ibid.* "To that extent," says MARKBY, J., "the *jus gentium*, or common law of nations, has been set aside or modified. From this point of view it is easy to see why s. 4 and s. 44 are kept apart. The two sections deal with different subjects. The former declares the general *lex loci* of India; the second lays down a special rule in a particular case."

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.

Settlement of minor's property in contemplation of marriage.

PART VII.*

OF WILLS AND CODICILS.

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

Persons capable of making wills.

Every person.—In England, formerly, alien friends, or such as were at peace with England, might make wills to dispose of their personal estate; but alien enemies, unless they had the King's license, express or

* Of this Part, ss. 46, 48, and 49 apply to the wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay, under Act XXI of 1870.

implied, to remain in England, were incapable of making any testamentary disposition of their property—Williams on Executors, 13. Now, by s. 2 of the Naturalization Act, 1870, an alien has power to take, acquire, hold, and dispose of both real and personal property in the same manner in all respects as a natural born British subject.

Under this section it would seem that aliens, whether friends or enemies, if not disqualified by reason of mental capacity or minority, may dispose of property of every description by will—*Mayor of Lyons* v. *E. I. Co.*, 1 Moore's P. C., 175.

In England, the personal property of a *felo de se* was forfeited to the Crown; but now forfeiture is abolished by 33 & 34 Vict., c. 23, except in case of outlawry. Under this section not only a *felo de se* but a convicted criminal may make a will; see *In the Goods of Bailey*, 31 L. J., Prob., 178.

Sound mind.—A lunatic, usually mad, but having intervals of reason, cannot, during the time of his insanity, make a will (Williams on Executors, 19); but during the intervals of reason he may make a testament appointing executors and disposing of his goods at pleasure—Williams on Executors, 21; *Cartwright* v. *Cartwright*, 1 Phillim., 100; *Waring* v. *Waring*, 6 Moore's P. C., 341; *Nichols* v *Binns*, 1 Sw. and Tr., 239.

An idiot, that is a fool or madman from his nativity, who never has any lucid intervals, is incapable of making a will—Williams on Executors, 17.

If a person impeach the validity of a will on account of the supposed incapacity of mind in the testator, it will be incumbent on such person to establish such incapacity by the clearest and most satisfactory proofs. The burden of proof rests upon the person attempting to invalidate what on its face purports to be a legal act. Sanity must be presumed till the contrary is shown—*Groom* v. *Thomas*, 2 Hagg., 434; *Smee* v. *Smee*, L. R., 5 P. D., 84; *Banks* v *Goodfellow*, L. R., 5 Q. B., 549; *Jenkins* v. *Morris*, L. R, 14 Ch. D, 674; Williams on Executors, 20. Where there is no evidence of insanity at the time of execution, the commission of suicide three days after will not invalidate the instrument by raising an inference of previous derangement—*Burrows* v. *Burrows*, 1 Hagg, 109.

The presumption, however, that every man is sane until the contrary is proved, is not a presumption of law, but a presumption of fact, or at the most a mixed presumption of *law and fact*,—that is, an inference to be made by a jury from the absence of evidence to show that a party does not enjoy that soundness of mind which experience proves to be the general condition of the human mind * * * And where a will is set up as a valid will, a jury ought not to pronounce it to be so, unless they are convinced of the affirmative—*Sutton* v. *Sadler*, 3 C. B., N. S., 96, *per* Cresswell, J., delivering the judgment of the Court (Cresswell, Williams, Crowder, and Willes, JJ.); see *Cartwright* v. *Cartwright*, 1 Phillim., 100.

So where, after executing a will, a testatrix subsequently became insane, and shortly before her death the will was found to be mutilated, it was held, that the onus was upon those who alleged a revocation to show that, at the time of the mutilation, the testatrix was sane—*Harris* v. *Berral*, 1 Sw. and Tr., 153.

As to proof of lucid intervals Sir John Nicholl said:—"It is scarcely possible to be too strongly impressed with the great degree of caution necessary to be observed in examining the proof of a lucid interval"—*White* v. *Driver*, 1 Phillim., 88.

In some cases, where the act was not only done and completed by the testator himself, *but the will was proper and natural*, the Court has

treated the will as made in a lucid interval; see *Cartwright* v. *Cartwright*, 1 Phillim., 90; *Scruby* v. *Fordham*, 1 Add., 90.

If a testator make his will while *non compos*, and afterwards recover his understanding, the will does not thereby obtain any force or strength; but if he should, after having regained a sound state of mind, republish the will, it would, doubtless, become a valid will—Williams on Executors, 229.

ions.—A man moved by capricious, frivolous, mean or even bad motives, may distinguish wholly or partially his children, and leave his property to strangers. He may take an unduly harsh view of the character and conduct of his children, but there is a limit beyond which it will cease to be a question of harsh unreasonable judgment, and then the repulsion which a parent exhibits to his child must be held to proceed from some mental defect—*Boughton* v. *Knight*, L. R., 3 P. and D., 64. See *Smee* v. *Smee*, L. R., 5 P. D., 84; *Jenkins* v. *Morris*, L. R., 14 Ch. D., 674.

Law.—Although there is no mention in the ancient Hindu of a testamentary disposition, yet modern authorities have determined that a Hindu has testamentary power which can be exercised by him at least within the limits which the Hindu law prescribes in the case of alienation by gift *inter vivos*—*Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*, 12 Moore's I. A., 1.

A minor, it was held, was incapable of making a will—*Cossinauth Bysack* v. *Harrosoondery*, 2 Morley's Dig., 198. A married woman had power to make a will of her *stridhan*, unless it were immoveable property given to her by her husband—*Teencowrie Chatterjee* v. *nath Banerjee*, 3 W. R.,

According to Explanation 1 to this section, in cases where, by the Hindu Wills Act, it applies, a Hindu married woman will still be incapable of making a valid testamentary disposition of property inherited from her husband. See Hindu Wills Act, XXI of 1870, s. 3.

Under Hindu law minority terminated at the age of sixteen; but in cases to which the Hindu Wills Act is applicable a 'minor' is one who shall not have completed the age of eighteen years.

As to the testamentary power of Hindus, see note to s. 3 of the Hindu Wills Act, *post*.

It was not necessary that the will should be in writing, but in case of a nuncupative will, the strictest proof was required—*Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*, 12 Moore's I. A., 1. A testamentary paper did not require signature, if assented to by the testator—*Tarachand Bose* v. *Nobeenchunder Mitter*, 3 W. R., 138; *Radhabai* v. *Ganesh Tatya*, I. L. R., 3 Bomb., 7. So, if a paper contained the testamentary wishes of the deceased, its form was immaterial—Mayne's Hindu Law, § 357; see *Mahomed Shumsool* v. *Shewukram*, L. R., 2 I. A., 7; *Hurpurshad* v. *Sheo Dyal*, L. R., 3 I. A., 2

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

This explanation is in accordance with the civil law, according to which a married woman was capable of bequeathing as a *feme*
2 Blackstone's Commentaries,

In England, a *feme covert* is generally incapable of making a will. is not only incapable of devising lands (being excepted out of the Statute of Wills, 34 & 35 Hen. VIII, c. 5), but also she is incapable of making a testament of chattels without the license of her husband; and the Statute 1 Vict., c. 26, has made no alteration in the law with respect to the testamentary capacity of a *feme covert*—Williams on Executors, 51. A married woman, however, might make a will as to property to which she is entitled in *autre droit* as executrix (Williams on Executors, 54,; and a will made by such a woman in pursuance of an agreement made before marriage or by virtue of a power, is valid; see *Tucker* v. *Inman*, 4 M. and Gr., 1077; Williams on Executors,

might dispose of property settled to her separate use—*Taylor* v. *Meads*, 11 Jur, N. S., 166; *Pride* v *Bubb*, L. R, 7 Chan., 64. So she might dispose of her savings out of alimony—*Moore* v. *Barber*, 11 Jur, N. S.,

Where a will is that of a married woman disposing of her *separate* probate is granted in respect of property of which she as a married woman could and did dispose of—*In the Goods of De* , L. R., 1 P. and D., 454; *Noble* v. *Phelps*, L. R., 2 P. and D., 276.

As by s. 3 and by s 2 of the Hindu Wills Act, extending this section (46) to Hindus, every person may dispose by will of that which he or she may alienate *inter vivos*, a question may arise as to whether a Hindu widow may not dispose by will of accumulations in her own hands at her death. The question did arise in the case of *Mussumat Hunsbutti Koerain* v. *Ishuri Dut Koer*, 4 C. L. R., 511; (S. C.) I. L. R., 5 Calc., 512, but was not decided.

A Hindu widow is no more disentitled to make a will disposing of her property than any other person—*Behari Lall Sandyal* v. *Mohun Gossain*, 2 C. L. R., 422.

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.

In England, one who is deaf and dumb from his nativity, is, in presumption of law, an idiot, and therefore incapable of making a will; but the presumption may be rebutted—*In the Goods of Owston*, 2 Sw. and Tr., 461; Williams on Executors, 18; *In the Goods of* , 3 Sw. and Tr., 431. A blind person may make a will—*In the* , 1 Rob., 278.

The case of a person born deaf *and* dumb, or deaf *and* dumb *and* blind, is not contemplated by this section.

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

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.

Old age alone does not deprive a man of the capacity of making a testament (*Ex parte Crammer*, 12 Ves., 445); nor mere incapacity to manage his affairs — *Sherwood* v. *Sanderson*, 19 Ves., 285. Extreme old age, however, tends to excite the jealousy and vigilance of the Court—*Kinleside* v. *Harrison*, 2 Phill., 462, *per* Sir John Nicholl.

If no suspicion of fraud exists, a will consistent with previous affection and declarations, and supported by recognitions and circumstances showing volition and capacity, is valid, though made *in extremis*, and though the instructions were conveyed through the party benefited—*Ross* v. *Chester*, 1 Hagg., 227.

In *Prinsep* v. *Dyce Sombre*, 10 Moore's P. C., 278, Dr. :—"In cases where no insanity has either existed or been to exist, the enquiry into the capacity of a testator in extreme old age, or enfeebled by long illness, or where death is fast approaching is simply whether the mental faculties retain sufficient strength fully to comprehend the act to be done."

To constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to an object of his regard, but he must also have capacity to comprehend the extent of the property and the nature of the claims of others, whom, by his will, he is excluding from participation in the property—*Harwood* v. *Baker*, 3 Moore's P. C., 282; *Earl of Sefton* v. *Hopwood*, 1 F. and F., 578; *Smith* v. *Tebbitt*, L. R., 1 P. and D., 398, 400. See *Smee* v. *Smee*, L. R., 5 P. D., 84.

The mere facts, that the testator was addicted to drinking and had an attack of *delirium tremens* a few days before executing the will, are immaterial, if he was able to understand it at the time of executing it —*Handley* v. *Stacey*, 1 F. and F., 574.

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 Moore's P. C., 290.

(*b*) *A* executes an instrument purporting to be his will, but he does not understand the nature of the instrument or 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.

This Act merely defines a will, see s 3. It does not contain any provisions as to the form or language of a will, or the materials with which, or the manner in which, it may be written.

Form.—It is not necessary that a will should be testamentary in form, see *Masterman* v. *Maberley*, 2 Hagg., 248, *per* Sir John Nicholl; nor does the *form* of the paper affect its title to probate, provided it is the intention of the testator that it should operate after his death—*Ibid*, *Glynn* v. *Oglander*, 2 Hagg., 432; Williams on Executors, 105. Thus a deed, poll, or an indenture (*Peacock* v. *Monk*, 1 Ves. Sen., 127), a deed of gift (*Thorold* v. *Thorold*, 1 Phill., 1), a bond (*Masterman* v. *Maberley*, 2 Hagg., 235), marriage settlements (*Passmore* v. *Passmore*, 1 Phill., 218, *per* Sir John Nicholl), letters (*Habberfield* v. *Browning*, 4 Ves., 200*n.*), drafts on bankers (*Bartholomew* v. *Henley*, 3 Phill., 317; *In the Goods of Marsden* 1 Sw. and Tr., 542), the assignment of a bond by endorsement (*Musgrave* v. *Down*, T. T., 1784, cited in 2, Hagg., 247, promissory notes (*Sabine* v *Goate*, cited in 2 Hagg., 247) have been held to be testamentary. Williams on Executors, 105, 106.

• must be an intention that the particular document should take effect as a will; as where it is referred to, or treated as such, and the document must of course be executed as a will (see *Robertson* v. *Smith*, L. R., 2 P. and D., 43); and the dispositions must be to take effect after the death of the person making them—*Habergham* v. *Vincent*, 2 Ves., 204, 231; *In the Goods of Morgan*, L. R., 1 P. and D., 214; *Cock* v *Cooke*, *ib*, 241. The dispositions must also be revocable—*In the Goods of Robinson*, L. R., 1 P. and D., 384; *In the Goods of Coles*, L. R., 2 P. and D., 362.

A will, though formally executed as such, will not be valid if there be no *animus testandi*; as if it were written in jest or without any intention of making an operative will—*Nicholls* v. *Nicholls*, 2 Phill., 180; Williams on Executors, 107. An instrument may operate as a will if shown to have been written with a testamentary intention. If there is proof either in the paper itself, or from clear evidence *dehors*, 1*st*, that the writer intended to convey the benefits by it which would be conveyed if the paper be considered testamentary; and 2*ndly*, that death was the event to give it effect, then, whatever be the form of the instrument, it may be admitted to probate—*King's Proctor* v. *Daines*, 3 Hagg., 221; see also p. 231.

It seems to have been considered in England, that a joint will was not valid (see *per* Lord Mansfield, 1 Cowp., 268); but it is now settled that it is not so. A joint will is valid so far as regards the property of each testator, and will be entitled to probate on his death (*In the Goods of Stracey*, Deane 6; 1 Jur., N.S., 1177), unless it is to take effect on the death of all the joint testators (*In the Goods of Raine*, 1 Sw. and Tr. 144, in which case probate will be granted on the death of all; see *In the Goods of Lovegrove*, 2 Sw. and Tr., 453.

In the last case two sisters executed a will to the effect that the survivor should have all that remained of their property at the death of the first deceased; and that, at the death of the survivor, it should be divided amongst certain relations. The survivor died without having revoked or altered the will, and the Court granted administration with the will annexed as her will and testament.

In *In the Goods of Raine*, 1 Sw. and Tr., 144, it was held, that pro- of a joint will containing devises and legacies to take effect after decease of both testators, could not be granted during the lifetime of either of them.

A mutual will is valid—*Hunkley* v. *Simmons*, 4 Ves., 160.

A will may also be contingent, and will, in general, take effect or not according as the contingency does or does not happen, as if it is to take if the testator die on a particular journey—*In the Goods*

Porter, L. R., 2 P. and D., 22; *In the Goods of Robinson*, *ib.*, 171; and evidence of subsequent adherence to the will is inadmissible—*Roberts* v. *Roberts*, 8 Jur., N. S., 220.

In *In the Goods of Mayd*, L. R., 6 P. D., 17, a testator being about to travel made his will, which contained the following words: "On leaving this station for T. and M., in case of my death on the way, know all men that this is a memorandum of my last will and testament." It was held, that the will was not contingent upon his death before arriving at T. or M.

There seems to be this distinction in the consideration of papers which are in their terms dispositive, and those which are of an equivocal character, that the first will be entitled to probate, unless (as in the case of *Nicholls* v *Nicholls*, 2 Phill., 180) they are proved not to have been written *animo testandi*; whilst in the latter, the *animus* must be proved by the party claiming under it—*per* Sir H. Jenner Fust in *Griffin* v. *Ferrard*, 1 Curt., 100.

Incorporation of documents.—A will may consist of several distinct papers or documents written and dated at different times; see *Marsh* v. *Marsh*, 1 Sw. and Tr., 528; *Burks* v. *Burks*, 4 Sw. and Tr., 23. So a will may *refer* to some deed or document which is no part of, but may be incorporated with, it, if the deed or other document be clearly identified—*Habergham* v. *Vincent*, 2 Ves., 204; *In the Goods of Gill*, L. R., 2 P. and D., 6. See further as to this subject the notes to s. 51, *infra*.

As to the manner in which a will may be written.—It may be written, or partly written, in pencil—*Baleman* v *Pennington*, 3 Moore's P.C., 223. Where the part of a will written in pencil appears to be deliberative only, such part must be omitted from the probate—*In the Goods of Hall*, L. R., 2 P. and D., 256; and *In the Goods of Adams*, *ib.*, 367. And the general presumption appears to be, that where alterations are made in pencil, they are deliberative; where in ink, final and absolute—*Hawkes* v. *Hawkes*, 1 Hagg., 321; Williams on Executors, 112.

A will containing blank spaces in the body of it, is entitled to probate—*Corneby* v. *Gibbons*, 1 Rob., 705; *In the Goods of Kirby*, *ib.*, 709

Language.—It is immaterial in what language a will is written—Williams on Executors, 112; see *Reynolds* v. *Kortright*, 18 Beav., 417. As to the wording of a will, see s. 61, *infra*, and notes thereto.

Although if a paper be superscribed 'Heads of a Will,' &c., or 'Plan of a Will,' the inference would be from this, that it was a paper from which it was intended that a more formal will should be drawn out. Yet in a case where such an instrument was dated, signed, and endorsed 'intended will,' and alterations in it afterwards made in a formal manner, and the deceased declared upon being taken ill that he had written the heads of his will and signed it, and that it would do very well, the paper was established as a will—*Bone* v. *Spear*, 1 Phill., 350; Williams on Executors, 110. In order that instructions for a will, or memoranda, &c., for a will, may be operative as a will itself, it is essential that the requisites as to signing and attesting should have been complied with. In such cases, where the character of the paper is on the face of it equivocal, the case is open to the admission of parol evidence of the testator's intention as to whether he meant the instrument as memoranda for a future disposition or to execute it as a final will—Williams on Executors, 111; see *Mathews* v. 4 Ves., 186; 5 Ves., 23.

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

Testamentary guardian.

In England, a power to appoint guardians of their infant children by will was given to infants by 12 Car. II, c. 24, s. 8. That power was, however, repealed, though not expressly, by s 24 of the Wills Act, 1 Vict., c. 26. As to an infant appointing a guardian by deed, see *Morgan* v. *Hatchell*, 19 Beav., 86.

In England, a testamentary guardian of minor children is entitled to a grant of administration for their use and benefit, preferably to a guardian elected by the children—*In the Goods of Morris*, 2 Sw. and

Where two or more persons are appointed testamentary guardians, the office survives, although there are no express words of survivorship in the clause of appointment—*Eyre* v. *Shaftesbury*, 2 P. Wms., 102; see notes to s. 215, *infra*.

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.

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.

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.

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,

a will dictated by *B*. It appears that he would not 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.

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*.

As to a will made under coercion, see *Hall* v. *Hall*, L. R., 1 P. and D., 481.

Fraud and imposition upon weakness is sufficient ground to set aside a will—*per* Lord Hardwicke in *Lord Donegal's case*, 2 Ves. Sen., 408; see *Allen* v. *McPherson*, 1 H. of L., 207 and 208.

If part of a will has been obtained by fraud, it seems, only such part is void (*Allen* v. *McPherson*, 1 H. of L., 191), and probate may be granted of the other part.

The influence to vitiate an act must amount to force and coercion destroying free agency, and there must be proof that the act was obtained by this coercion—*Williams* v *Goude*, 1 Hagg., 581. Actual violence is not necessary to constitute coercion. Imaginary terrors may be sufficient for that purpose—*Boyse* v. *Rossborough*, 6 H. L., 2. "If a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives to the end, that these impressions, which she knows he had thus formed, may never be removed, such contrivance may be equivalent to positive fraud, and may render invalid any will executed under false impressions thus kept alive"—*per* Lord Cranworth, *ib*.

The leading case upon undue influence is that of *Huguennin* v. *Baseley* (14 Ves., 273; 2 White and Tudor's L. C., 547), where a donation was set aside on the ground of spiritual ascendency and undue influence obtained by the defendant over the mind of the plaintiff. The most recent case on this subject is that of *Lyon* v. *Home*, L. R., 6 Eq., 655. As to undue influence dependent on religious feelings, see *Norton* v. *Relly*, 2 Eden., 286.

A will is not void if made under the influence of acts of attention and kindness—*Earl of Sefton* v. *Hopwood*, 1 F. and F., 578; illustration (*h*) to this section.

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.

Will may be revoked or altered.

Though a man make his testament and last 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—*Vinior's case*, 8 Co., 82 (*a*). A will is, therefore, said to be *ambulatory* until the death of the testator—Williams on Executors, 126.

Even joint wills are liable to be revoked; see Williams on Executors, 10 and 126. But in certain cases such wills will be enforced in equity, as compacts, see *Dufour* v. *Pereira*, 1 Dick., 419; *Walpole* v. *Lord Orford*, 3 Ves., 402.

So in *Loffus* v. *Maw*, 3 Giff., 592, the testator, who was in ill-health, ed his niece to reside with him as housekeeper, on the verbal representation that he would leave her certain property by his will, which he accordingly caused to be prepared and executed; but this will he subsequently revoked by a codicil. The Court held, that, inasmuch as the niece had been induced to render valuable services to the testator on the faith of the representation made, the testator had no right to revoke the gift; see *Jorden* v. *Money*, 5 H. L. C., 185; *Hammersley* v. *De Biel*, 12 Cl. and Fin., 45.

PART VIII.*

OF THE 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:—

Execution of unprivileged wills.

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.

Signature or Mark.—The words in the English Wills Act, 1 Vict., c. 26, s. 9, are, "shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction." Under that section it was held, that a mark by the testator for a signature, although the name did not appear, was sufficient (*In the Goods of Bryce*, 2 Curt., 325; *In the Goods of Amiss*, 2 Rob., 116); and although the testator was himself able to write—*In the Goods of* ... *d*, 3 Curt., 752. So, where a wrong name was added after the t, but there was no doubt as to the identity of the testator, the

* This Part applies to the wills of Hindus, etc., in the Lower Provinces of Bengal and the towns of Madras and Bombay (Act XXI of 1870, s.

execution was held good—*In the Goods of Clarke*, 1 Sw. and Tr., 2[illegible], *In the Goods of Douce*, 2 Sw. and Tr., 593. Here the validity of a mark is distinctly recognized; see *In the Goods of Wynne*, 13 B. L. R., 392. Sealing without signing is not sufficient—*Grayson* v. *Atkinson*, 2 Ves. Sen., 459, *per* LORD HARDWICKE; *Wright* v *Wakeford*, 17 Ves., 459, *per* LORD ELDON. Sealing is not a signature—*Wright* v. *Wakefield*, 17 Ves., 459. A will may be signed under an assumed name (*In the Goods of Redding*, 2 Rob., 339), or by a former name, as in the case of women signing the name of a former husband (*In the Goods of Glover*, 11 Jur., 1022), the signature in such case being treated as a mark.

The signature, it was held in *In the Goods of Wilson*, 2 Curt., 853, must be completed. In that case, the testator was unable to complete his signature, and probate was refused; but it is submitted that, under this Act, such uncompleted signature might be treated as a mark. A signing by initials is sufficient—*In the Goods of Savory*, 15 Jur., 1042; *In the Goods of Hinds*, 16 Jur., 1161.

If a will is written on several sheets of paper, one signature is sufficient—*Winsor* v. *Pratt*, 2 Brod. and B., 650; see *Marsh* v. *Marsh*, 1 Sw. and Tr., 528.

Where the will is on several pieces of paper, it is not necessary that they should all be connected together. It is sufficient that they should be in the same room when the execution took place, and they will be presumed to have been together, unless the contrary is proved—1 Jarm. on Wills, p. 79.

Signature by some other person in his presence and by his direction.—In Bombay it has been held, that the person making the on the will for the testator, is not competent as an attesting of its execution—*In the Goods of Vanabhai Sorabji Arabai* v. *Nanabhai*, 11 Bom. H. C. R., 87. "*Some other person*" in the third of the rules to this section, the Court there interpreted as meaning "some person other than the attesting witnesses."

In England, where the words of the Statute are the same, it was held, that there is nothing which prevents an attesting witness from also signing the will for the testator by his direction—*In the Goods of Bailey*, 1 Curt., 914. The person so signing may do so in his own name—*In the Goods of Clark*, 2 Curt., 329. In *Smith* v. *Harris*, 1 Rob., 262, it was held, that the *direction* of the testator amounts to an acknowledgment, and that direction the witness attests.

In *Jenkins* v. *Gainsford*, 3 Sw. and Tr., 93, two codicils, which were stamped with the name of the testator by another person in his presence and by his direction, were held to be duly executed. In that case, it appeared that it was the habit of the testator thus to stamp with his name all documents requiring his signature.

In all cases in which the will is signed by another person, there must be some act or word on the part of the testator to show that the signature was made at his request—*Re Marshall*, 13 L. T., N. S., 643, cited in Shelford's Real Property Statutes, 506.

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.

Intention to give effect to will.—The provisions of this rule are wider

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sheet of paper, occupied so much space as
signatures of the testator and of the witnesses in the ordinary form;
and beneath it were the signatures of the two attesting witnesses;
and on the right hand side of the paper, in a blank space between
the edge and the codicil, the signature of the testator was written at
right angles to the codicil,—it was held, that the codicil was duly signed.
Where, however, the testator signed the first five sheets of a will, but
omitted to sign the sixth, which was the last, and the attesting witnesses
signed all the six sheets, no part of the will was admitted to probate—
Sweetland v *Sweetland*, 13 W. R. (Eng.), 504, cited in Shelford's Real
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Where a testator read over an attestation-clause containing his
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d from probate—*In the Goods of Arthur*,
L. R.,
In the Goods of Greata, 2 Jur. (N. S.),
of the testator, but
and D., 189
written
the signi

was continued in three short lines to the left of it, the last two lines being somewhat below the signature, the sentence was included in the probate—*In the Goods of Ainsworth*, L. R., 2 P. and D., 151; see *In the Goods of Kimpton*, 33 L. J., Prob., 153; *In the Goods of Woodley*, *ib.*, 154; *In the Goods of Birt*, L. R., 2 P. and D., 214.

The rule seems to be, that where, from the obvious sequence, and sense of the context, it appears to the satisfaction of the Court that the signature of the testator really follows the dispositive part of a testamentary instrument, though it may occupy a place on the paper literally above the dispositive parts or part thereof, such testamentary instrument will be entitled to probate—*In the Goods of Kimpton*, 3 Sw. and Tr., 427; (S. C.) 33 L. J. Prob., 153.

Wills have been held duly executed where blank spaces were left after the concluding words. Thus, in *Hunt* v. *Hunt*, L. R., 1 P. and D., 209, where a will ended in the middle of the third page of a sheet of foolscap paper, the lower half of the page being left blank, and the attestation-clause and the signatures being written on the top of the fourth page, the will was held to be duly executed—*In the Goods of Wotton*, L. R., 3 P. and D., 159; *In the Goods of Archer*, L. R., 2 P. and D., 252; see *In the Goods of Gore*, 3 Curt., 758.

It may be a question whether the person signing for the testator may sign by a mark. The second clause of this section seems to draw a distinction between the "signature or mark of the testator" and the "signature of the person signing" for the testator.

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.

Attestation.—In *Fernandez* v. *Alves*, I. L. R., 3 Bomb., 382, M. Melvill and F. D Melvill, JJ., held, that it was necessary to the validity of a will that the actual signature, as distinguished from a mere mark, of at least two witnesses, should appear on the face of the will. In *In the Goods of Wynne*, 13 B. L. R., 392, which was quoted in argument in that case, Pontifex, J. said—"I am inclined to think that a signature by mark would be a sufficient signature by a witness even under the Indian Act, as it would undoubtedly be under the English Act."

White, J., in the case of *Bissonath Dinda* v. *Dogaram Jana*, 5 C. L. R., 565: S. C., I. L. R., 5 Calc., 738, again suggested a doubt whether it was necessary under this section that the attesting witnesses should affix their signatures as distinguished from their marks.

Under the Wills Act, where the words are "shall attest, and shall subscribe" it has been held, that a will is sufficiently attested by a mark

(*Harrison* v. *Harrison*, 8 Ves., 185; *Addy* v. *Grix*, 8 Ves., 504), although the witnesses can write (*In the Goods of Amiss*, 2 Rob., 116), and although a wrong surname has been placed opposite the mark (*In the Goods of Ashmore*, 3 Curt., 756); or by initials—*In the Goods of Christian*, 2 Rob, 110; *In the Goods of Martin*, 1 Rob, 712; Agnew's Statute of Frauds, pp. 317-8. One witness, it was held, cannot subscribe the name of another, for he might have made his mark—*In the Goods of Cope*, 2 Rob, 335; see also *In the Goods of Blewitt*, L. R., 5 P. and D., 116; and *In the Goods of Sheurn*, 50 L. J., P. and M, 15.

But a witness unable to write may have his hand guided by another person, who may be one of the witnesses—*Harrison* v. *Elvin*, 3 Q. B., 117; *In the Goods of Frith*, 4 Jur, N. S., 288; 27 L. J., Prob., 6.

In *In the Goods of Lewis*, 31 L. J., Prob., 153, the names of two attesting witnesses were written by another person whilst they held the top of the pen, and the will was held to be duly attested.

Where a witness merely described himself as "servant of S" without writing his *name*, it was held that there was a sufficient attestation—*In the Goods of Sperling*, 3 Sw. and Tr, 272.

It is not sufficient for an attesting witness to trace over a previous signature with a dry pen on the re-execution of a will. Such an act is a mere acknowledgment of the signature, which is not sufficient—*Playne* v *Scriven*, 1 Rob., 772. The witness must do an act which shall be apparent on the will—*ib*, 775, *per* Sir H. Jenner Fust; see *In the Goods of Trevanion*, 2 Rob, 311, where a witness, who merely added on a re-execution of the will the word 'Bristol' to her name written on the previous execution, was held not to have properly attested the re-execution.

Presence of testator.—The witnesses must sign the will in the *presence of the testator*. The words 'in the presence of the testator,' it has been held, cannot receive a larger interpretation than has been put upon them in the English Courts *viz.*, that the testator must at least be in such a position that he might have seen the witnesses subscribe their names if he had desired to do so—*Esaias* v. *Gabriel*, 3 All. H. C. R., 32. In *Tribe* v *Tribe*, 1 Rob, 775, at the time when the witnesses attested the will, the testatrix lay in bed with the curtains closed and her back to the attesting witnesses, who deposed to her inability to have turned herself so as to have drawn aside the curtains. The will was held not to have been signed in the presence of the testatrix; see *Newton* v *Clarke*, 2 Curt., 320. In the case of *In the Goods of Piercy*, 1 Rob., 278, where the testatrix was blind, it was held that, even in that case it must appear that the will was so attested that the testatrix if she had her eyesight, could have seen the witnesses subscribe. If the testator could not by any possibility have seen the witnesses sign, the will is not properly attested—*In the Goods of Colman*, 3 Curt., 118.

There is a presumption, in the absence of evidence to the contrary, where the witnesses do not recollect the facts attendant on the
, that the will was duly executed and attested—*Burgoyne* v.
Rob., 5; *In the Goods of Puddephatt*, L. R., 2 P. and D., 97;
v. *Stanton*, 2 Jur, N. S., 380.

fact that the testator had experience in the execution of wills
v. *Roberts*, 12 Moore's P. C., 158) is strong evidence in favour of
of the Statute having been complied with.

The testator must be conscious when the witnesses sign—*Right* v.
, 1 Doug., 241; *Jenner* v. *Finch*, L. R., 5 P. and D., 106.

Personal Acknowledgment.—It is not necessary that the testator should say in express terms 'that is my signature.' If it clearly

appears that the signature was existent on the will when it was produced to the witnesses at the request of the testator that they should subscribe it (*Keigwin* v. *Keigwin*, 3 Curt., 611), or that a statement was made to the witnesses that the document was the testator's will (*In the Goods of Davis*, 3 Curt, 748; *In the Goods of Ashmore*, 3 Curt., 756) that will be a sufficient acknowledgment.

In England it was considered a sufficient acknowledgment if the witnesses were asked to sign by a third party in the presence and with the assent of the testator (*Inglesant* v. *Inglesant*, L. R., 3 P. and D., 172, citing *Faulds* v. *Jackson*, 6 No. Cases. Supp. 1); but here the acknowledgment is a 'personal acknowledgment.'

If the testator produces a paper, and makes the witnesses understand that it is his will, it has been held, that that is an acknowledgment of his signature if the Court is satisfied that his signature was on the will when the witnesses attested it—*Manichbhai* v. *Hormasji Bomanji*, I L. R., 1 Bomb., 547. This seems to be in conformity with the rule in England; see *Cooper* v. *Bockett*, 4 Moore's P. C., 419; *Guillim* v. *Guillim*, 3 Sw. and Tr., 200; *Smith* v. *Smith*, L. R., 1 P. and D., 143; and *Beckett* v *Howe*, L. R., 2 P. and D., 1.

Where a testator admits execution of a will before the Registrar, if the witnesses attesting that admission sign their names in the presence of the testator, their attestation will be a sufficient compliance with the requirements of this section, and will remedy any defects in the original attestation of the will *Hurro Soondari Dabia* v. *Chunder Kant Bhattacharjea*, 6 C. L. R., 303; (S.C.) I. L. R., 6 Calc., 17; see also *In the Goods of Roymoney Dossee*, I. L. R., 1 Calc., 150.

The Court may judge from the circumstances and from the appearance of the document itself whether the name of the testator was or was not upon it at the time of the attestation—*In the Goods of Huckvale*, L. R., 1 P. and D., 375; *Guillim* v. *Guillim*, 3 Sw. and Tr., 200; (S. C.) 29 L. J., P. and M., 31; *Smith* v. *Smith*, L. R., 1 P. and D., 143; *Gaze* v. *Gaze*, 3 Curt, 451.

Where a testator produced a paper so folded that no writing on it was visible, and informed the witnesses that, in consequence of his wife's death, it was necessary to make a change in his affairs, and asked them to sign their names to it, which they did, and the testator did not sign in their presence, nor did they see his signature, Lord Penzance held, that there had been a sufficient acknowledgment—*Beckett* v. *Howe*, L. R., 2 P. and D., 1; but see *Hudson* v. *Parker*, 1 Rob., 14; *Shaw* v. *Neville*, 1 Jur., N. S., 408.

Where, however, there is no formal attestation-clause, and no affirmative evidence that, at the time of the attestation, the deceased's name was on the paper, the mere production of it to witnesses, with a request that they will sign it as a paper, is not sufficient to justify the Court in drawing the inference that it was already signed by the testator—*Fischer* v. *Popham*, L. R., 3 P. and D., 246.

It is not necessary, when the witnesses have seen the signature, that they should know that the document is a will—*Keigwin* v. *Keigwin*, 3 Curt., 607; *Gaze* v. *Gaze*, 3 Curt., 451; see *Holt* v. *George*, 3 Curt., 176.

An acknowledgment after the attestation is insufficient—*In the Goods of Olding*, 2 Curt., 865; *Cooper* v. *Bockett*, 3 Curt., 348; (S. C.) 4 Moore's P. C., 419; *Hindmarsh* v. *Charlton*, 8 H. of L., 160.

According to s 9 of the English Wills Act, upon which this third rule also is based, "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 of the testator, but no form of attestation shall be necessary."

e in the presence of two witnesses.—The signature must be or acknowledged in the presence of two witnesses.

The attesting witnesses must actually have seen the testator sign or affix his mark to the will. In England it was held, that where the witnesses had seen the testator write what the Court presumed to be his signature, although they had not actually seen the signature, the attestation was good—*Smith* v. *Smith*, L. R., 1 P. and D., 143. In that case the testator concealed the signature with a piece of blotting paper.

A signature by the testator after the attestation by the witnesses is not a compliance with the Act—*In the Goods of Olding*, 2 Curt., 865; *In the Goods of Byrd*, 3 Curt, 117. So it has been held in India in the following cases:—*In the matter of Hurro Sundari Dabia*, I. L. R., 6 Calc., 17; (S. C.) 6 C. L. R., 303; *Bissonath Dinda* v. *Doyaram Jana*, I. L. R., 5 Calc., 738; (S. C.) 5 C. L. R., 565; *Fernandez* v. *Alves*, I. L. R., 3 Bomb., 382, *Mussamut Khuttun Kooer* v. *Mussamut Poona Kooer*, 24 W. R., 322. In the first of these cases it was said that the requirements of the section would have been satisfied if the testatrix had admitted her signature before a Registrar of Assurances and had been identified before him by one of the witnesses to the signature, and both the Registrar and the identifier had signed their names to the See *In the Goods of Roymoney Dossee*, I. L. R., 1 Calc., 150.

A will was held to have been signed before the witnesses subscribed, although the confused recollection of the witnesses raised a doubt—*Cooper* v. *Bockett*, 3 Curt, 648; see *Brenchley* v. *Still*, 2 Rob., 162.

Where a will was signed by the testator after the witnesses had subscribed, and they subsequently placed seals opposite to their the will was held not to be properly attested—*In the Goods of* 3 Curt., 117.

The testator may acknowledge the signature made by another person for him—*In the Goods of Regan*, 1 Curt., 908.

The Court must be satisfied that the names of the alleged witnesses were subscribed out for the purpose of attesting the testator's signature—*In the Goods of Wilson*, L. R., 1 P. and D., 269; *Eckersley* v. *Platt*, *ib.*, 281; see *Griffiths* v. *Griffiths*, L. R., 2 P. and D., 300, where one of the witnesses signed opposite the word 'executor' and the other opposite the word '

other person. — The Bombay High Court has held that these refer to some person other than the attesting witnesses, and have accordingly decided that an attesting witness is not competent, under the first of the rules to this section, to sign a will for the testator by his direction—*In the Goods of Vanabhai Sorabji Avabhai* v. *Pestonji Nanabhai*, 11 Bom. H. C. R., 87.

Where a will is signed *for* the testator, it is advisable that the fact should be mentioned in the attestation-clause—*In the Goods of* 5 No. Cas., 618, cited in Agnew's Statute of Frauds, p. 309.

Signing by the witnesses.—The witnesses must sign in the presence of the testator, but it is not necessary that they should sign in the pre- f each other. This is now settled law in England; see *In the of Webb*, 1 Jur., N. S.,

Attestation-clause. — Although no particular form of clause is necessary (*Bryan* v. *White*, 2 Rob., 315; *In the Goods of Roymoney Dossee*, I. L. R., 1 Calc., 150), it is advisable to add one, for the absence of it makes a difference in the extrinsic evidence, which would be required to prove that the witnesses had seen the testator execute the will, and that they signed with the intention of attesting it at his request and in his presence, as clear and satisfactory evidence must be given on these points—*Roberts* v. *Phillips*, 4 E. and B., 457, *per* Lord Campbell.

The following is the usual form of attestation :—

"Signed by the above A. B. (the testator) in the presence of us, present at the same time, who have hereunto signed our names as witnesses thereto in the presence of the said A. B. (testator) and in the presence of each other.

Names of witnesses { *C. D.* / *E. F.*

See Act XXV of 1838, s. 7. Theobald, p. 119.

The directions in this Part of the Act are imperative—*Esaias* v. *Gabriel*, 3 All. H. C. R., 32.

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 part of his intentions, such document shall be considered as forming a part of the will or codicil in which it is referred to.

This section applies to Hindus, etc.—Act XXI of 1870, s. 2.

It follows the English rule, that a will or codicil, duly executed, may be made to take effect with reference to another instrument which is then said to be incorporated with it, as where a testator devises all his lands which were conveyed to him by certain indentures; see *Habergham* v. *Vincent*, 2 Ves., 204; see *per* Jessel, M. R., in *Burton* v. *Newbery*, L. R., 1 Chan. Div., 238. The rule of evidence on this subject is, that if there is in a will a latent ambiguity, it may be explained by parol evidence or by extrinsic documents—*Dillon* v. *Harris*, 4 Bligh., N. S., 358, *per* Lord Brougham.

The paper intended to be incorporated must be in existence (*Countess Ferraris* v. *Lord Hertford*, 3 Curt., 468; *In the Goods of Watkins*, L. R., 1 P. and D., 19), and its identity must be proved—*Allen* v. *Maddock*, 11 Moore's P. C., 427; see *Smart* v. *Prujean*, 6 Ves., 565.

Where, however, a document was not referred to as then existing, the Court refused, in the case of *In the Goods of Dillon*, L. R., 1 P. and D., 189, to allow parol evidence to show that the document was written before the will was signed.

Statements, however, of a testatrix, whether made before or after the execution of the will, are admissible to show what papers constitute the will—*Gould* v. *Lakes*, L. R., 6 P. Div., 1; *Sugden* v. *St. Leonards*, L. R., 1 P. Div., 154.

The Court has allowed the will of another person (*In the Goods of Darby*, 10 Jur., 164), the revoked will of another person (*In the Goods of the Countess of Durham*, 3 Curt., 57), a deed (*In the Goods of Dickens*, 3 Curt., 60), a list of plate written on the same sheet as the will (*In the Goods of Ash*, 2 Jur., N. S., 526), to be incorporated. See Agnew's Statute of Frauds, p. 346.

Where the deceased executed a will in India, which he deposited in a

bank there, and subsequently in England executed a codicil which contained the following clause,—"of which will I along with the codicil thereto, execute a copy and homologate and confirm the same in all particulars, except so far as altered or revoked by this codicil;" and at the time of the execution of the codicil the deceased produced a paper which he informed the witnesses was a copy of his will, it was held that the copy produced was incorporated in the codicil—*In the Goods of Mercer*, L. R., 2 P. and D., 91.

If a testator describes a deed in his will, and then proceeds to 'ratify and confirm' it, the deed will be incorporated—*Sheldon* v. *Sheldon*, 1 Rob., 88; *In the Goods of Harris*, L. R., 2 P. and D., 83.

Where the terms of reference in a will are not sufficiently precise, parol evidence is admissible to identify the paper referred to. Thus, in *Allen* v. *Maddock*, 11 Moore's P.C., 427, an unattested will was held to be incorporated in a duly executed codicil, which was headed—"This is a codicil to my last will and testament," no other will having been found. The Court, however, will not extend the principle of incorporation as laid down by the Privy Council in *Allen* v. *Maddock*, 11 Moore's P. C., 427; *In the Goods of Greaves*, 1 Sw. and Tr., 250.

Where the identity of the paper cannot be disputed, and the will refers to it as in existence, it will be presumed that the paper was in existence at the time of the execution of the will—In the Goods of Ash, 2 Jur., N. S.,

A testatrix, by her will, requested her trinkets to be divided "as I shall direct in a small memorandum." On her death, the will and two codicils, and a paper headed "Memorandum of trinkets referred to in my will" were found folded together in a locked portfolio. There was no evidence to show that the memorandum was in existence at the time it was executed, but there was evidence from which it might be inferred that it was in existence before the date of the last codicil, but that codicil did not refer to it. Sir C. Cresswell held, that the re-execution of the will by the last codicil could not make that a part of the will, which was no part of it before—*In the Goods of Mathias*, 3 Sw. and Tr., 100. In *In the Goods of Lady Truro*, L. R., 1 P and D., 201, where the authorities on this question were discussed, Lord Penzance said, p. 204:—"If the proposition laid down by the learned Judge in *In the Goods of Mathias* is a general one, that decision cannot be supported. I think that the proposition is not a general one, but must be read in reference to the case to which it refers;" and he laid down, that where the will, if read as speaking at the date of the codicil, contains language which would operate as an incorporation of a document, such document is entitled to probate by force of the codicil although not in existence until after the execution of the will.

It seems a document containing the words "This is a third codicil to my will" is not incorporated in a codicil of a subsequent date by the words "This is a fourth codicil to my will"—*Stockil* v. *Punshon*, L. R., 6 P. and D., 9.

A, while a married woman, made a will, which was invalid. Afterwards when a widow, she executed a document beginning with the words "This is a codicil to the last will and testament of me." The codicil was written on the same paper as the will, and it was proved that she left no other will. It was held that the will was incorporated in the codicil, and both documents were admitted to probate—*In the of Heathcote*, L. R., 6 P. and D., 30.

In *In the Goods of Petchill*, L. R., 3 P. and D., 153, probate was of two instruments called respectively the 'last will and testa- the later will not containing a revocatory clause.

See notes to s. 46, *ante*, p. 33, as to form of will.

A codicil which refers to a will of a particular date, and does not refer to a subsequent codicil, does not operate as a republication of that subsequent codicil—*Burton* v. *Newbery*, L. R., 1 Chan. Div., 234, dissenting from *Gordon* v. *Lord Reay*, 5 Sim., 274.

It does not follow that because papers are incorporated in the will, they must be included in the probate—*Sheldon* v. *Sheldon*, 11 Moore's P.C., 427 ; (S. C.), 1 Rob., 81. Thus, where the document referred to was a deed in the hands of trustees, who refused to produce it, probate was granted of the will alone—*In the Goods of Sibthorp*, L. R., 1 P. and D., 106.

Where two documents are referred to, but only one is found, effect will be given to that—*Dickenson* v. *Studolph*, 11 C. B., N. S., 341.

A testator cannot directly or indirectly reserve a power to himself in a will duly executed to dispose of property by a subsequent unattested instrument—*Habergham* v. *Vincent*, 2 Ves., 204. Where, however, a disposition of property is *complete*, the gift will be effectual, although it may be necessary that the testator, by some future act, should have to distinguish the legatee—*Stubbs* v. *Sargon*, 3 M. and C., 507. There the devise was to "the persons who shall be in copartnership with me at the time of my decease, or to whom I shall have disposed of my business."

Where a will and codicil have been in existence, and the will has been revoked, probate of the codicil will not be granted, unless the Court be satisfied that it was intended to operate separately - *In the Goods of Greig*, L. R., 1 P. and D., 72 ; see *In the Goods of Savage*, L. R., 2 P. and D., 78.

PART IX.*

OF PRIVILEGED WILLS.

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.

In the Goods of Hayes, 2 Curt., 338.

(*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.

* This Part does not apply to Hindus, etc. (Act XXI of 1870, s.

(*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.

In the Goods of Parker, 2 Sw. and Tr., 375.

.) *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.

, Earl of, v. *Lord Hugh Seymour*, cited in 2 Curt., 338: 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 based upon s. 11 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 the Act,"—that is, without the formalities required by the Act. The term 'soldier' was held to include persons in the military service of the East India Company—*In the of Donaldson*, 2 Curt., 3

Soldiers' Wills.—The privilege conferred by this section is confined to those who are actually engaged on an expedition, or upon actual warfare. Accordingly, an informal will of a soldier, made while living in barracks either in England (*Drummond* v. *Parish*, 3 Curt., 522), or in the Colonies, cannot be admitted to probate—*White* v. *Repton*, 3 Curt., 818.

So an informal will made at Bangalore by a soldier in command of the Mysore Division of the army stationed there, and who died whilst on a tour of inspection of the troops, was held not to be privileged—*In the Goods of Hill*, 1 Rob., 276. Probate was refused in the case of a will of a soldier ordered to join an expedition on active service, but who died before he commenced to march—*Bowles* v. *Jackson*, 1 Ecc. and Ad., 294, cited in Agnew's Statute of Frauds, 416. But where an officer was on his way from one regiment to another, both regiments being at the time on actual service, his will was held to be privileged—*Herbert* v. *Herbert*, 2 Jur., N. S. 24.

In *In the Goods of Tweedale*, L. R., 3 P. and D., 204, where the will of the testator was signed while he was employed as a soldier on actual military service, it was held, that material alterations, about the making of which no information could be obtained, were to be presumed to have been made during the continuance of such service, and the alterations were included in the probate.

It was held that the will of a soldier made under s. 11 of the Wills Act remains operative unless expressly revoked, although the maker of the will remains in England several years after the date of the will—*In the Goods of Leese*, 17 Jur., 216.

A minor is not competent, under this section, to make an unprivileged will. It is otherwise in case of minors subject to the Wills Act—*In the Goods of Farquhar*, 4 No. Cas., 631, cited in Agnew's Statute of Frauds, 417.

Any Mariner.—The term 'mariner or seaman' includes the whole naval profession—*Euston, Earl of*, v. *Lord Hugh Seymour*, cited in 2 Curt., 338, *per* Sir Wm. Wynne It has been applied to the purser of a man-of-war (*In the Goods of Hayes*, 2 Curt., 338), to a surgeon in the navy (*In the Goods of Saunders*, L. R., 1 P and D., 16), and to seamen in the merchant navy (*In the Goods of Millegan*, 2 Rob., 108; *In the Goods of Parker*, 2 Sw. and Tr., 375). See Agnew's Statute of Frauds, p. 418.

Being at Sea.—A will made on shore by the commander-in-chief of the Naval Force at Jamaica, who had an official residence on shore, was held not to be privileged—*Euston, Earl of*, v. *Lord Hugh Seymour*, cited in 3 Curt., 530; 2 Curt., 338. So probate of an informal will made by a sailor on the day he shipped while his vessel was still in a British port, was refused probate—*In the Goods of Corby*, 18 Jur., 634.

In *In the Goods of Lay*, 2 Curt., 375, the will of a seaman, who went on shore, his ship being on an expedition, and there died by an accident, and who made the will immediately after the accident, was allowed to pass as that of a seaman 'at sea' That case was distinguished from that of *Euston, Earl of*, v. *Lord Hugh Seymour*, on the ground that the testator in the latter case was living on shore and only occasionally went on board.

A codicil signed, but not attested, on board a Queen's ship in a *river*, by the commander-in-chief actually engaged in a naval operation, was admitted to probate—*In the Goods of Austen*, 2 Rob., 611. In this case the codicil incorporated a codicil signed by the testator on shore, but not attested. And a will made by a seaman on board a man-of-war permanently stationed in Portsmouth Harbour, was held to be privileged—*In the Goods of McMurdo*, L. R., 1 P. and D., 540.

An informal will of an invalided surgeon, written on board ship while on his way home, was admitted to probate—*In the Goods of Saunders*, L. R., 1 P. and D., 16.

A testamentary paper left by a mariner, who died on shore, headed "Instructions to be followed, if I die at sea or abroad," was refused probate on the ground that it was a conditional will—*Lindsay* v. *Lindsay*, L. R., 2 P. and D., 459. As to conditional wills, see notes to s. 46, *supra*, p. 38.

A letter written by a seaman in the merchant service in the Margate Roads, unattested and containing dispositive words, was admitted to probate—*In the Goods of Milligan*, 2 Rob., 108. So a letter by a master of a ship on his arrival at a port, in the course of a voyage (*In the Goods of Parker*, 2 Sw. and Tr., 375), has been admitted to probate.

As to the wills of mariners and seamen in the Royal Navy, see 28 and 29 Vict., c. 72; and as to wills of merchant seamen, see 17 and 18 Vict., c. 104, s. 200.

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.**

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 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 lifetime, 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.

The Statute of Frauds required three witnesses in the case of a nuncupative will or will by word of mouth It was also necessary under that Statute, that the testator should have called upon the witnesses to bear witness that the words spoken were his will, that there should have been what was called the *rogatio testium*.

The factum of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one in every single particular (*Lemann* v. *Bonsall*, 1 Add., 389; Williams on Executors, 123); and 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—*Ibid.*

A nuncupative testament may be made not only by the proper motion of the testator but also at the interrogation of another-Pt. I, s. 12, pl. 6; Williams on Executors,

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.

PART X.

OF THE ATTESTATION, REVOCATION, ALTERATION, AND REVIVAL OF WILLS.

Effect of gift to attesting witness.

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.

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

This section is based upon s. 15 of the Wills Act, 1 Viet, c. 26. See *Burton* v. *Newbery*, L. R., 1 Chan. Div., 234 It does not apply to Hindus, etc.—Act XXI of 1870 Accordingly, a legatee under a will of a Hindu, or other person to whom the Hindu Wills Act applies, will not lose his legacy by attesting the will.

Each witness attests only the instrument to which he puts his name—*Tempest* v. *Tempest*, 2 K. and J., 642; affirmed, 7 D M. G., 470. Accordingly a bequest of a legacy is not void because the legatee codicil which gives him nothing—*Gurney* v. *Gurney*, 3 Drew, 2 So a residuary legatee of a share of a residue does not lose his title by a codicil, which, by revoking legacies, indirectly benefits him increasing the residue—*Ibid*; see *Gaskin* v. *Rogers* L. R., 2 Eq., The use of the word 'thereby,' which occurs not only in this, but in the Wills Act, sufficiently indicates that it is only a benefit given by the particular instrument attested, which is avoided—*Gurney* v. 3 Drew., 209, *per* KENDERSLEY, V.C.

A gift to one witness is not rendered valid, because without him there was the full number of witnesses required by law—*Doe* v. *Mills*, 1 Moo. & R., 288. Thus, in *Wigan* v. *Rowland*, 11 Hare, 157, WOOD, V.C., held, that where the execution of a will was attested by two marksmen, and signed also by two other persons as witnesses, that the signature of the two latter must be deemed to have been affixed in attestation of the will and not merely as verifying the attestation of the marksmen, and that a legacy to the wife of one of them failed. In *Handfield* v. *Handfield*, 8 H. of L., 225, however, where a will properly signed and attested was written on the first three pages of a sheet of paper, and there were written on the top of the fourth page these words —"This last will and testament was written in our presence and in the presence of each by him," which were signed by the witnesses who had already attested, and by *G. B.*, who was a devisee under the will, it was held, that this was not such an attestation of the will as to deprive *G. B* of her legacy. So, in another case, the Court allowed evidence to be given to show that the signature of a person who signed after two persons in whose presence the will was executed, did not sign in order to attest the testator's signature. *In the Goods of Sharman*, L. R., 1 P and D., 661.

If the Court is satisfied that a witness signed with intent to attest, that will be sufficient to make him an attesting witness, although he signed also in the character of executor—*Griffiths* v. *Griffiths*, L. R., 2 P. and D., 300.

A bequest to a trustee, not for his personal benefit, is not invalidated by the fact of the will having been attested by his wife—*Cresswell* v. *l*, L. R., 6 Eq., 69.

In the case of *Anderson* v. *Anderson*, L. R., 13 Eq., 381, the testatrix gave a share of her residuary estate to *B*, and one of the attesting witnesses was *B's* wife; and subsequently, by a codicil, which was attested by other witnesses, she confirmed her will except in certain particulars mentioned. It was held, that the duly attested codicil had the effect of republishing and incorporating the will so as to render the gift to *B* valid, notwithstanding the attestation of the will by *B's* wife.

Uder the English Wills Act, s. 15, it has been held, that the marriage, after attestation of a will, of the devisee to the attesting witness does not affect the validity of the devise or bequest (*Thorpe* v. *Bestwick*, L. R., 6 Q. B. D., 311); and doubtless it would be so held under this Act.

In *Young* v. *Davies*, 2 Dr. and Sm., 107, where there was a gift to a class as joint tenants, one of whom attested the will, it was held, that the gift to the witness though forfeited was not undisposed of, but survived to the other joint tenants.

The explanation to this section follows the law as laid down in v. *Garney*, 3 Drew., 208; and *Tempest* v.

55. No person, by reason of interest in, or of his being an executor of, a will, is disqualified as a wit- to prove the execution

Witness not disqualified by interest or by being executor.

of the will or to prove the validity or invalidity thereof.

See Wills Act, 1 Vict., c. 26, ss. 16 and 17. This section applies to the wills of Hindus, etc. (Act XXI of 1870, s. 2)

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 her 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 section closely follows the wording of s. 18 of the Wills Act, 1 Vict., c. 26. It does not apply to Hindus, etc.—Act XXI of 1870. By s. 3 of that Act, marriage does not revoke a will or codicil to which that Act applies.

Formerly, in England, the marriage of a testator did not revoke his will; but, under certain circumstances, there was an implied revocation by marriage and the birth of issue. Section 18 of the Wills Act, however, enacted that every will should be absolutely revoked by the marriage alone of the testator.

Where the marriage is void, there is no revocation. Thus, where a testator, subject to the law of England, married his deceased wife's sister, it was held the will was not revoked—*Metle* v. *Metle*, 1 Sw. and Tr., 416.

The will of a Jew made subsequently to his first marriage, but previously to a second marriage, in the lifetime of his first wife, was held under this section to have been revoked by the second marriage—*Gabriel* v. *Mordakai*, I. L. R., 1 Calc., 148. The second marriage in this case was admittedly lawful.

The reason for the exception in this section appears to be, that the revocation by marriage of a will made in exercise of a power of appointment would not operate to the benefit of the family of the testator, but to the benefit of those who would be entitled in default of appointment. See *In the Goods of Fitzroy*, 1 Sw. and Tr., 133.

Even where, in the event of certain contingencies happening, the property appointed would not, in default of appointment, pass to the persons who would have taken in the case of intestacy, a will made in exercise of a power of appointment is not revoked by a subsequent marriage—*In the Goods of Fenwick*, L. R., 1 P. and D., 319. In that case, the persons who would have taken would have done so, not as upon an intestacy under the Statute of Distributions, but under a settlement. Where, however, under a settlement, freehold estates in default of appointment would have passed to the heir of the testatrix, it was

held that the will was revoked — *Vaughan* v. *Vanderstegen*, 2 Drew., 165, see p. 168.

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 s

(*a.*) *A* has made an unprivileged will; afterwards *A* .es 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 section follows s 20 of the English Wills Act. It seems also to include the provisions enacted by s. 19 of that Act, — *viz.*, that "no will shall be revoked by any presumption of an intention on the ground of an alteration of circumstances."

Revocation by another will or codicil. — Under the Statute of Frauds, a will of realty could only be revoked by a subsequent will or codicil by the testatrix in the presence of three or four witnesses (s. 6); while wills of personalty could not be revoked by mere parol, but might have been revoked by writing read to and allowed by the testator and proved to be so by three witnesses at least (s. 22) See *Ex parte Earl of Ilchester*, 7 Ves., 348.

Under this Act, as under the English Wills Act, a revoking will or codicil must be executed in the same manner as any other will or codicil.

If a *feme sole* makes her will, and afterwards marries, the marriage is a revocation and vacates the will; and although she should survive the husband, the will made before marriage will not revive upon his death without a republication — Williams on Executors, 63.

A distinction has been drawn between a 'will or codicil' and 'some writing.' Thus where, at the foot of his will the deceased wrote a memorandum to the effect that 'this will was cancelled this ,' and he duly executed the memorandum in the presence of two , it was held, that the memorandum was not a will or codicil but only a writing which could not be admitted to probate — *In the of Fraser*, L. R., 2 P. and D., 40; see also *In the Goods of* L. R., 1 P.

* This and sections 58—60 (inclusive) apply to Hindus, etc., in the Lower Provinces of Bengal, and in the towns of Madras and Bombay (Act XXI of

But where the testator, in a letter addressed to his brother, which was signed by him in the presence of two witnesses, directed his brother to obtain his will and burn it without reading it, it was held, that the letter was a writing duly executed, declaring an intention to revoke the will; and administration with the letter duly annexed was granted to the next-of-kin of the deceased—*In the Goods of Durance*, L. R., 2 P. and D., 406.

If a subsequent testamentary paper is only partly inconsistent with one of an earlier date, the latter instrument is only revoked as to those parts where it is inconsistent, and both papers are entitled to probate—*Lemage* v. *Goodban*, L.R., 1 P. and D., 57.

A gift of property to one person is of course revoked by a gift in a subsequent will or codicil of the same property to another—*Kermode* v. *MacDonald*, L. R., 3 Chan. App., 585; *Hitchens* v. *Basset*, 3 Mod., 206. But a will purporting to be the *last will*, but not containing an express clause of revocation, does not necessarily revoke a prior will—*Lemage* v. *Goodban*, L. R., 1 P. and D., 57; see *In the Goods of Howard*, L. R., 1 P. and D., 636; *Cutto* v. *Gilbert*, 9 Moore's P. C., 131. Where there is no express clause of revocation in a subsequent will, the question is what disposition did the testator intend—*Lemage* v. *Goodban*, L. R., 1 P. and D., 57. Where a subsequent will purports to be the *only* will of the testator, it may be revocation of a prior will—*Freeman* v. *Freeman*, 5 DeG., M. and G., 710, *per* KNIGHT BRUCE, V.C.

Where it was proved by parol evidence that a subsequent will, which could not be found, contained a clause revoking a former will, which was produced, the Court held that the will produced was revoked—*Wood* v. *Wood*, L. R., 1 P. and D., 309.

If separate powers of appointment are exercised by separate wills at different times, and the second will contains a revoking clause, evidence is admissible to show that the testator did not intend to revoke the appointment in the first will—*Re Meredith*, 29 L. J., P. and M., 155. So a second will relating only to the testator's own property will not revoke a will under which the testator has exercised a power of appointment—*Hughes* v. *Turner*, 4 Hagg, 52.

It is a principle that a will is not to be varied by a subsequent will or codicil, except so far as it may be absolutely necessary to give effect to the latter—*Norman* v. *Kynaston*, 3 D. G. F. and J., 29. Thus a specific bequest will be revoked by a subsequent bequest of all personalty, but a general legacy charged on land will be unaffected—*Kermode* v. *MacDonald*, L. R., 3 Chan., 585.

If there is no inconsistency, effect will be given to all the testamentary dispositions of the testator—*Plenty* v. *West*, 6 C. B., 201.

It being a maxim that no person can die with two testaments, where there are several testamentary instruments, they are all admitted to probate as together containing the last will and testament of the testator—*Masterman* v. *Maberley*, 2 Hagg., 235.

If there be two inconsistent wills of the same date, neither of which can be proved to be the last executed, they are both void for uncertainty—*Phipps* v. *Lord Anglesey*, 2 Atk., 57.

The nomination of executors in a second will does not necessarily impart an intention to revoke previous testamentary documents—*Stoddart* v. *Grant*, 1 Macq., H. of L. Ca., 172 (cited in Williams on Executors, 165-166, *per* LORD TAUNTON; and where the second will nominates additional or different executors, probate will be granted to all the executors if the wills are not inconsistent—*In the Goods of* 2 Sw. and Tr., 442; *Geaves* v. *Price*, 3 Sw. and Tr., 71.

Where a first will appointed executors, and afterwards the testator, by a second will, bequeathed all his property to a particular person without appointing executors, it was held, that the earlier will was —*Henfrey* v. *Henfrey*, 2 Curt., 468; affirmed 4 Moore's P. C., 29.

Revocation by some other writing.—A writing, by which a testator merely revokes a prior disposition, will not be admitted to probate (*In the Goods of Fraser*, L. R., 2 P. and D., 40), unless it be of a testamentary character (*In the Goods of Durance*, L. R., 2 P. and D., 406).

Intention to revoke by another will or codicil or by some writing.—The intention must clearly appear—*Ellis* v. *Bartram*, 25 Beav., 107; *Cleobury* v. *Beckett*, 14 Beav., 583. The revocation of a will under an erroneous assumption of facts will, in general, be inoperative, if the mistake appears on the face of the instrument—*Campbell* v *French*, 3 Ves., 321; see *Crosthwaite* v. *Dean*, L. R., 5 Eq., 245. In *Campbell* v. *French*, the testator gave legacies to the grandchildren of his sister, and afterwards revoked the legacies on the ground that the legatees were dead. It having been proved that the legatees were not dead, it was held that the legacies were not revoked. But a revocation of a will or codicil will be complete although the codicil will not in law have the effect the testator intended—*Quinn* v. *Butler*, L. R., 6 Eq., 225.

A will is not revoked by mere abandonment; there must be some unequivocal act of cancellation or obliteration by the testator himself or by some other person in his presence, and by his direction—*Andrew* v. *Motley*, 12 C. B., N. S., 514.

It is obvious that part only of a will may be revoked by a subsequent will or codicil, for the Act says,—"no will or *any part thereof* shall be revoked, &c." See *Clarke* v. *Scripps*, 2 Rob., 563, 567, *per* Sir J. Dodson. See notes to the definition of 'codicil,' p. 4, *supra*.

A codicil revoking a will does not necessarily revoke a prior codicil—*Farrer* v. *St. Catherine's College*, L. R., 16 Eq., 19.

Revocation by act of destruction.—All questions of revocation are questions to some degree of intention, for every act of revocation is said to be equivocal—*Smith* v. *Cunningham*, 1 Add., 455, *per* Sir J.

No act by which a testator may destroy or mutilate a testamentary instrument, operates as a revocation, unless the act be done *animo revocandi*—*Powell* v. *Powell*, L. R., 1 P and D., 212. But any act of cancellation or destruction is *primâ facie* done—*animo cancellandi*, *Rickards* v *Mumford*, 2 Phillim., p. 24, *per* Sir J. Nicholl. Evidence as to the intention of the act of destruction must be clear (*Eckersley* v. *Platt*, L. R., 1 P. and D., 281), and the act of voluntarily destroying the instrument implies the intention of revoking the whole effect —*Ibid.*

Where a testator erased his signature with an avowed intention of writing it in a better style, and therefore wrote it again not in the presence of the attesting witnesses, it was held, that the instrument was entitled to probate, the original signature being considered as restored—*Re Kennett*, 2 N. R., 461 (cited in Agnew's Statute of Frauds,

Probate of a will was refused where the signature of the testator had been cut out, and afterwards gummed into its former place—*Bell* v. *Fothergill*, L. R., 2 P. and D., 148. But where the names of the attesting witnesses had been cut out by the testator, who gave as his reason that he intended to alter his will or make a new one, and they were

afterwards replaced on the same day, the testator saying that the will would do for the present, probate was granted—*In the Goods of Eeles*, 32 L. J., Prob., 4.

In *Brunt* v. *Brunt*, L. R., 3 P. and D., 37, a testator, under an attack of *delirium tremens*, tore up his will. The pieces were preserved, and on his recovering, he was informed of what he had done, and answered that he must have been mad when he did the act, and that he would make a fresh will, and it was held that the will had not been revoked.

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. *Rutherdon*, 1 Rob 661, *per* Sir H. Jenner Fust. The destruction of a will by a third person must be by the testator's direction and in his presence—*ib.*; 1 Jarman on Wills, 147, 4th Edn. Where a codicil was burnt by the testator's order, but not in his presence, probate was granted of a draft copy—*In the Goods of Dadds*, D. and Sw., 290 (cited in Williams on Executors, p. 43).

The onus of proving that the cancellation was the act of the testator and with the intention of revoking the instrument, is on those who oppose the will—*Hitchings* v. *Wood*, 2 Moore's P. C., 355; see *Benson* v. *Benson*, L. R., 2 P. and D., 172. But where a will remains with the testator and cannot be found, the presumption is, that it was destroyed by him *animo revocandi*—*Eckersley* v. *Platt*, L. R., 1 P. and D., 281. But this presumption does not apply where the deceased was at the time of his death—*Sprigge* v. *Sprigge*, L. R., 1 P. and D.

Where a will is executed in duplicate, the presumption is, that the destruction of one part revokes the other—*Pemberton* v. *Pemberton*, 13 Ves., 310. Mutilations and alterations are presumed to have been made after the execution of the will—*Christmas* v. *Whingates*, 3 Sw. and Tr., 81.

If a testator destroy his will under a false impression that it was invalid—(*Giles* v. *Warren*, L. R., 2 P. and D., 401), or in a state of unsound mind (*Scruby* v. *Fordham*, 1 Add., 74), or of *delirium tremens* *Brunt* v *Brunt*, L. R., 3 P. and D., 37), or by mistake (*In the Goods of Thornton*, 2 Curt., 913), there is no revocation.

Doctrine of dependent relative revocation.—If an act of destruction be done with the sole intention of setting up and establishing some other testamentary paper, the *animus revocandi* has only a conditional existence; the condition being the validity of the paper intended to be substituted, there will be no revocation if that paper be not valid—*Powell* v. *Powell*, L. R., 1 P. and D., 209, *per* Sir J. P. Wilde; see *In the Goods of Weston*, L. R., 1 P. and D., 633.

In *Ex parte Earl of Ilchester*, 7 Ves., 372, Lord Alvanley said, that the rule to be gathered from the cases was, that, where it was 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, though if it had been a mere revocation it would have had effect, yet the object being only to make way for another disposition, if the instrument cannot have that effect, it shall not be a revocation. It makes no difference that the latter will is in favour of another person—*Ibid*; *Dancer* v. *Crabb*, L. R., 3 P and D., 98. See also *In the Goods of Fleetwood*, L. R., 15 Chan. Div., 594, 608-9.

The doctrine of dependent relative revocation applies only where a will is destroyed on the supposition that a subsequently executed will is valid. So that a will cancelled on the supposition that an earlier will is thereby revived, will not, on the failure of that condition, be revived — *Dickenson* v. *Swatman*, 30 L. J., P. and M., 84; but see

Where the act of cancellation or destruction is connected with the making of another will, so as fairly to raise the inference, that the testator meant the revocation of the old to depend upon the efficacy of the new disposition, such will be the legal effect of the transaction; and therefore, if the will intended to be substituted is inoperative from defect of attestation or any other cause, the revocation fails also, and the original will remains in force—*Dancer* v. *Crabb*, L. R., 3 P. and D., 98. In that case the testatrix, having her will in her hand, dictated the alterations she wished to make in the first part of her will to a friend, who took them down. She then tore off the portion she considered covered by the memorandum taken down. The memorandum, together with the rest of the will, she then locked up, believing them together to constitute a new will. It was held, that this was a case of dependent relative revocation. Probate was granted of the original will as contained in portion which remained, and the draft of the part which was destroyed. So, in *In the Goods of McCabe*, L. R., 3 P. and D., 94, it was held, that the Court might, where a testator had erased the name of a legatee and substituted another for it, receive evidence to show what the original name was, and restore it to the probate if satisfied that the testator only revoked the first bequest on the supposition that he had effectually substituted a new legatee.

Burning, &c. — A mere attempt to tear or burn is not sufficient, though made with intent to revoke—*Doe* v. *Harris*, 6 A. and E., 209.

'Tearing or otherwise destroying' includes cutting—*Hobbs* v. *Knight*, 1 Curt., 768. But cutting out a *particular part* of the will is a revocation of that part only—*Christmas* v. *Whingates*, 3 Sw. and Tr, 81; *In the Goods of Woodward*, L. R., 2 P. and D., 206. In the latter case, the first seven or eight lines of the will had been cut out, and the will was admitted to probate in its incomplete state.

Although the cutting off the signatures of the testator and witnesses at the end of a will or of the witnesses—(*In the Goods of Gullan*, 1 Sw. and Tr., 23; *Evans* v. *Dallow*, 31 L. J., P. and M., 128) is in general a total revocation, if done with intent to revoke, the mere crossing out of the testator's signature, there being no evidence on the point, is not a revocation — *Benson* v. *Benson*, L. R., 2 P. and D., 172; see *In the Goods of Lewis*, 1 Sw. and Tr., 31. But where a will consisted of several sheets, all of which were signed, it was held that the destruction of the last signature revoked the whole will—*In the Goods of Gullan*, 1 Sw. and Tr.,

Otherwise destroying.—This must be understood as intending some mode of destruction *ejusdem generis* with burning or tearing, and not a mere obliteration—*Stephens* v. *Taprell*, 2 Curt., 458, *per* Sir H. Jenner. The words 'cancelling' and 'obliterating' used in the Statute of Frauds were advisedly omitted from s. 20 of the Wills Act, upon which this section (57) is based; *see Re Brewster*, 29 L. J., P. and M., 69.

A will is not destroyed within the meaning of the section by being struck through with a pen, the name of the testator being crossed out, and the names of the attesting witnesses struck through—*Stephens* v. *Taprell*, 2 Curt., 465.

Lost Will.—If a will cannot be found, and the Court is satisfied that a will was not in existence at the time of the testator's death (*Finch* v. *Finch*, L. R., 1 P. and D., 371), the presumption in general arises that it was destroyed with intent to revoke—*Eckersley* v. [illegible] L. R., 1 P. and D., 281.

The presumption of revocation may be rebutted by evidence of declarations of the deceased—*Whitely* v. *King*, 17 C. B. (N. S.), 756; *Wharram* v. *Wharram*, 3 Sw. and Tr., 303.

The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence—*Sugden* v. *Lord St. Leonards*, L. R., 1 P. and D., 154; *Brown* v. *Brown*, 8 E. and B., 876. The evidence of a single witness, although interested, whose veracity and competency are unimpeached, will be sufficient—*Ibid.* Where the contents of a lost will are not completely proved, probate will be granted to the extent to which they are proved—*Ibid.* Declarations, written or oral, made either before or after, are admissible as secondary evidence of the contents of a lost will—*Ibid.* The case of *Sugden* v. *Lord St. Leonards* overruled that of *Quick* v. *Quick*, 3 Sw. and Tr., 442, by which it was decided that the declarations of the testator after execution were not admissible.

It was held in England under the old law, and also under the Wills Act, that a revocation of a will was in general a revocation of a codicil (*Grimwood* v. *Cozens*, 2 Sw. and Tr., 364), unless it was of such a character as to be completely independent of the will—*In the Goods of Greig*, L. R., 1 P. and D., 72. But it is now settled by the later cases that a codicil can only be revoked in the manner indicated by the section (20 of the Wills Act), and is not revoked by the revocation of a will—*In the Goods of Savage*, L. R., 2 P. and D., 78; *In the Goods of Turner*, *ib.*, 403; *Black* v. *Jolling*, L. R., 1 P. and D., 685.

Revocation of wills made for valuable consideration.—It has been held in England that a will made for valuable consideration cannot be revoked in equity—*Loffus* v. *Maw*, 3 Giff., 592; but see *Caton* v. *Caton*, L. R., 2 H. L., 127.

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

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

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 section is modelled upon s. 21 of the English Wills Act. It applies to Hindus, etc., under the Hindu Wills Act, XXI of 1870, s. 2. Under the Statute of Frauds, a will could be wholly or partially revoked by obliterations made by the testator or in his presence by his directions (s. 6).

Obliteration.—Under the Wills Act, as by this Act, obliterations, interlineations, or other alterations must be attested in the same manner as a will or codicil Where therefore an alteration is made, but not duly attested, the *original* will, so far as it can be deciphered, is unaffected (*In the Goods of Harris*, 1 Sw and Tr., 536); but parol evidence is not admissible to show what the original was, where it cannot be deciphered by means of magnifying glasses or otherwise—*Townley* v *Watson*, 3 Curt., 767. In that case the testatrix obliterated, *animo revocandi*, several passages of her will, so that none of the parts of the will obliterated could be distinguished upon the face of the will, and it was held that there was a complete revocation as to the parts obliterated.

The word '*apparent*' in the section means apparent on the face of the instrument itself, and not "capable of being made apparent by extrinsic evidence."—*Ibid, per* Sir H. Jenner Fust.

Although the section does not contain the words 'with the intention of revoking the same,' it is submitted that, as under the English Wills Act, it would be held that, to render obliterations or alterations a revocation wholly or partially of a will, there must be an intention on the part of the testator to revoke; see *Brooke* v *Kent*, 3 Moore's P. C., 334, where it was so held under the English Act. There a testator substituted a different sum from that originally given, and the sum substituted was not effectually given for want of compliance with the Statute; and the Privy Council held, that the original legacy was not revoked, and that evidence was admissible to show what the original legacy was.

Presumptions as to alterations.—Where there is no direct evidence to show when alterations have been made, the *primâ facie* presumption of law—it is now settled after some conflict of authority—is, that they were made after the execution of the will (*Cooper* v. *Bockett*, 4 Moore's P. C., 419; *Gunn* v. *Gregory*, 3 D. M. and G., 777; *In the Goods of James*, 1 Sw. and Tr., 238); and such alterations would, therefore, be inoperative unless duly signed—*In the Goods of Harris*, 1 Sw. and Tr., 536, see *supra*. So, where there are alterations made in a will, and there is a codicil which does not notice the alterations, the alterations are presumed to have been made after the codicil—*In the Goods of Countess of Morton*, 13 Jur., 1106; see *Rees* v. *Rees*, L. R., 3 P. and D., 84. But where a codicil confirms alterations made in a will, the alterations, as they exist at the time of the codicil, are rendered operative—*In the Goods of Mills*, 11 Jur., 1070.

The presumption of law may be rebutted by evidence showing that it was highly probable that the alterations were made before the execution—*Keigwin* v. *Keigwin*, 7 Jur., 840. Thus, evidence may be given of declarations by the testator before he executed the will of his intention to provide for the person benefited by the alterations (*Quick* v. *Quick*, 3 Sw. and Tr., 442), or where the name of an executor appeared over an erasure (*In the Goods of Sykes*, L. R., 3 P. and D., 26), to show that the alteration was made before execution; see *Keen* v. *Keen*, L. R., 3 P. and D., 105.

At one time the rule in England was, that declarations made after the will was executed were not admissible; see *Doe* v. *Palmer*, 16 Q. B., 747; *Johnson* v. *Lyford*, L. R., 1 P. and D., 46. But it is now settled by the recent case of *Sugden* v. *Lord St. Leonards*, L. R., 1 P. D., 154, by the Court of Appeal, that declarations, written or oral, made by a testator, both before and after the execution of his will, are, in the event of loss, admissible as secondary evidence of its contents. (MELLISH, L. J., dissented from the judgment of the Court as to declarations made after the execution of the will.)

Where there was no evidence as to when certain trifling alterations and interlineations were made, save that of an expert, whose opinion was, that they were written at the same time as the rest, the will was admitted to probate with the alterations—*In the Goods of Hindmarch*, L. R., 1 P and D., 307; see *In the Goods of Cadge*, L. R., 1 P and D., 543, where from the nature of certain interlineations, and the internal evidence furnished by the instrument itself, the Court concluded that they were made before execution.

Dependent relative revocation.—The principle of dependent relative revocation applies also in the case of obliteration and interlineation—*In the Goods of McCabe*, L. R., 3 P. and D., 94. See notes to preceding section, pp. 61-62.

Blanks.—Where a will has been drawn up with blanks left,—*e. g.*, for the names of the legatees and the amount of the legacies, the presumption is, that they were filled up before execution—1 Jarm., 4th Edn., 144; *Birch* v. *Birch*, 1 Rob., 675.

The mere circumstance of the amount of the legacy, or the name of the legatee, being inserted in different ink and in different handwriting, does not alone constitute an obliteration, interlineation or other alteration within the meaning of the Statute; nor does any presumption arise against a will being duly executed as it appears—*Greville* v. *Tylee*, 7 Moore's P. C., 320.

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.

This section, which deals with privileged wills, has been extended to Hindus, etc., by s. 2 of Act XXI of 1870, although ss. 52 and 53, which give the right to make privileged wills, have not been so extended.

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 partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown by the will or codicil.

of unprivileged will.

Extent of revival of will or codicil partly revoked and afterwards wholly revoked.

This section applies to Hindus, etc., Act XXI of 1870, s 2.

Under this section, as under s. 22 of the Wills Act, with which it corresponds with the additions of the words at the end, 'by the will or codicil,' a will or codicil cannot be revived by implication—*In the Goods of Steele*, L. R., 1 P. and D., 575. See Report of the Law Commissioners, Gazette of India for July 1st, 1864.

Intention.—To satisfy the words 'show an intention to revive the same,' the intention must appear on the face of the codicil, either by express words referring to a will as revoked, and importing an intention to revive the same, or by a disposition of the testator inconsistent with any other intention, or by some other expression conveying to the mind of the Court with reasonable certainty the existence of the intention—*In the Goods of Steele*, L. R., 1 P. and D., 575. A mere reference in a codicil to a revoked will by its date is insufficient to revive it—.

The tying (*e. g.*, by a piece of tape) of a duly executed codicil of a later date to testamentary papers duly executed, but revoked, is no ground for inferring the 'intention to revive,' as such intention can only be shown from the contents of the codicil itself—*Marsh* v. *Marsh*, 1 Sw. and Tr., 528.

Parol evidence is not admissible to show an intention on the part of the testator to revive the first will by destroying the second—*Major* v. *Williams*, 3 Curt., 432. Nor is parol evidence admissible to show that where a codicil expressly revives a will of a certain date, it was

intended to revive a will of another date—*Lord Walpole* v. *Earl of Cholmondely*, 7 T. R., 138; *In the Goods of Chapman*, 1 Rob, 1; 1 Jurm., 146.

The revoked will must be in existence, so that there can be no revival of a will which has been destroyed by the testator, or by his directions *animo revocandi*—*Rogers* v. *Goodenough*, 2 Sw. and Tr., 342-351.

It is not necessary that a second will, in order to revoke a former will, should contain a clause revoking all former wills. It is sufficient that it should be inconsistent with it—*Brown* v *Brown*, 8 E. and B., 876; *Boulcott* v. *Boulcott*, 2 Drew., 25.

Where a testator gave £100 to his executor, and by a subsequent codicil gave him £500 in substitution for the first gift, and then revoked the second gift, it was held, that the first gift was not set up again—*Boulcott* v. *Boulcott*, 2 Drew., 25 So, if a will give a legacy which was revoked or satisfied at the time of the codicil, the latter has not the effect of giving a fresh legacy—*Powys* v. *Mansfield*, 3 M. and C., 376.

Where a testatrix duly executed a will, and subsequently thereto two other wills, in both of which was contained a clause revoking all other wills, and she afterwards destroyed the two latter wills, it was held, that the first will was not thereby revived; and parol evidence was not admitted to show an intention to revive it—*Major* v. *Williams*, 3 Curt., 432.

Re-execution.—As to what amounts to a re-execution, see *Dunn* v. *Dunn*, L. R., 1 P. and D., 277. There *A* executed a will in 1837 appointing *B*, her nephew, an executor and residuary legatee. In 1861, she being desirous to deliver the will and her deeds to *B*, for safe custody, in the presence of a witness, *C* was sent for, and in his presence she delivered the will and deeds to *B*. Before delivery she subscribed her name at the foot of the will, and *C* and *B* subscribed theirs, the latter with the prefix 'executor' *A* gave no reason for signing her name. It was held that this was not a re-execution.

It has long been settled that the republication of a will is tantamount to the making of that will *de novo*. The will so republished is a new will (Williams on Executors, 220); and no republication is effectual unless by re-execution—*Hobbs* v. *Knight*, 1 Curt., 768.

Consequently the last will revokes any will of a date prior to that of the republication—*Serocold* v. *Hemming*, 2 Cas temp. Lee. 490; *Walpole* v. *Cholmondely*, 7 T. R., 138; Williams on Executors, 221.

Another consequence of a republished will being considered as a new will of the date of its republication, is, that its operation is extended to subjects which have arisen between its date and republication; see s 77, *infra*: Williams on Executors, 222-3. So a bequest will extend to *any person* to whom the description is applicable at the period of republication, though not so intended originally—*Perkins* v. *Micklethwaite*, 1 P. Wms, 275; Williams on Executors, 223.

A codicil duly executed will give effect and operation to unexecuted papers which have been written between the periods of the execution of the will and codicil, although the latter does not refer to the former, as where the testator, by his will, bequeathed articles of plate "specified in schedules A and B to be annexed to this document"—*In the Goods of Hunt*, 2 Rob, 622; Williams on Executors, 228.

A codicil intended to revive a destroyed will, will not revoke an intermediate will not being inconsistent therewith, and not a any intention to revoke it.

Where a testator, by a codicil, confirms his will, the will, t with all previous codicils, is taken to be confirmed—*Green* v. *Tribe*, L. R., 9 Chan. Div, 238.

PART XI.*

OF THE CONSTRUCTION OF WILLS.

61. Wording of will. **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.**

This section applies to Hindus, etc., under the Hindu Wills Act, XXI of 1870.

"The question in expounding a will is, not what the testator meant, but what is the meaning of his words. The use of the expression that the intention of the testator is to be the guide, unaccompanied with the constant explanation that it is to be sought in his words, and a rigorous attention to them, is apt to lead the mind, insensibly, to speculate upon what the testator may be supposed to have intended to do instead of strictly attending to the true question, which is what that which he has written means"—*per* LORD WENSLEYDALE in *Abbott* v. *Middleton*, 7 H. of L. 68, p. 114

Primarily, the words of a will are to be considered, but the meaning to be attached to them may be affected by surrounding circumstances, among which is the law of the country in which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the disposition he has made, had regard to that meaning, or to that effect, unless the language of the will or the surrounding circumstances displace that assumption—*Soorjeemoney Dassee* v. *Denobundoo Mullick*, 6 Moore's I. A., 526.

It is not necessary that any technical or artificial form of words should be used in a will—*per* LORD KENYON in *Hay* v *Coventry*, 3 T. R., 86. Thus, in *Doe* v. *Tofield*, 11 East, 246, the words 'all my *personal* estates' were held to pass real property, it being apparent on the will that the testator meant not what is technically understood as *personal* estate; and in *Attree* v. *Attree*, L. R., 11 Eq., 280, where a testatrix, after a gift of her house and garden, which were leasehold, and several pecuniary legacies, directed that 'all the rest' should be divided between certain persons named, it was held, that the words 'all the rest' included realty as well as personalty. See *Smyth* v *Smyth*, L. R., 8 Chan. Div., 561.

It is a rule of construction, however, that, if words of art are used, they are to be construed according to the technical sense, unless upon the whole will it is plain, that the testator did not so intend (*per* LORD ALVANLEY in *Thellusson* v. *Woodford*, 4 Ves., 329); and the Court is bound to carry the will into effect, provided it is consistent with the rules of law (*ibid*); and when a rule of law has affixed a certain determinate meaning to technical expressions, that meaning is to be given to them, unless the testator has, by his will, excluded, beyond all doubt, such construction—*Toorna* v. *Wentworth*, 11 Moore's P. C., 543. Accordingly,

* Of this Part, ss. 61 – 77 (both inclusive) apply to the wills of etc., under Act XXI of 1870, s. 2.

where technical words only have been used, the Court has no right or power to say that the testator did not understand the meaning of the words used, or to put a construction upon them different from that which has been long received or what is affixed to them by law. But if the testator use other words which manifestly indicate what the technical words import in the sense which the law has imposed upon them, that intention must prevail, notwithstanding he has used such technical words in other parts of the will—*per* BULLER, J., in *Hodgson* v. *Ambrose*, 1 Dougl., 341; see *Jesson* v. *Wright*, 2 Bligh, 56 and 57, where the rule is thus laid down by LORD REDESDALE: that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise. Thus the words 'heirs of the body' will yield to a particular intent that the estate should be for life only; but that must be clear and unequivocal—*Ibid*, 53.

The following additional general rules of construction are to be found in Williams on Executors, pp. 1085—1091:—

1. The construction of the will is to be made upon the entire instrument, and not merely upon disjointed parts of it; and consequently all its parts are to be construed with reference to each other—Williams on Executors, p. 1085; see s. 69, *infra*.

The wording of the will must be such that the intentions of the testator can be known therefrom.

2. The Court is bound to give effect to every word of the will without change or rejection, provided an effect can be given to it, not inconsistent with the general intent of the whole will taken together (*Gray* v. *Minnethorpe*, 3 Ves., 105; *Hall* v. *Warren*, 9 H. of L., 420; 2 Williams on Executors, 1088; see s. 72, *infra*); but if two parts of the will are totally inconsistent, the latter shall prevail—*Constantine* v. *Constantine*, 6 Ves., 102; see s. 75, *infra*.

3. To effectuate the clear intention of the testator as apparent upon the whole will, words and limitations may be transposed (*Green* v *Hayman*, 2 Chan. Ca., 10; *East* v. *Cook*, 2 Ves. Sen., 32); supplied (*Abbott* v. *Middleton*, 7 H. of L., 68; see s. 64); or rejected (*Boon* v. *Cornforth*, 2 Ves. Sen., 276; *Jesson* v. *Wright*, 2 Bligh, 1; but words in a will are not to be rejected unless there cannot be any rational construction of the words as they stand—*Chambers* v *Bradsford*, 19 Ves., 654, *per* LORD ELDON; Williams on Executors, 1089; see ss. 72 and 74, *infra*.

4. Where words are capable of a two-fold construction, the rule is, even in the case of a deed and much more in the case of a will, to adopt such as tend to make it good—*per* LAWRENCE in *Thellusson* v. *Woodford*, 4 Ves., 312; see *Martelli* v. *Holloway*, L. R., 5 H. of L., 532; Williams on Executors, 1092; see s. 71.

5. The intention of the testator is not to be set aside, because it cannot take effect to the full extent, but it is to work as far as it can—*per* BULLER, J., in *Thellusson* v. *Woodford*, 4 Ves., 325; see s. 72 *infra*.

Enquiries to determine as to ill.

62. For the purpose of determining questions as to what person or what property is denoted by any words used in

[illegible]

every material fact relating to the persons who claim to be in-

terested 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.

A, by his will, leaves to *B* "his estate called 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*.

In applying this section under the Hindu Wills Act, in which it has been embodied, the words 'son,' 'sons,' 'child,' and 'children' include an adopted child; and the word 'grandchildren' includes the children, whether adopted or natural-born, of a child, whether adopted or natural-born; a 'daughter-in-law' includes the wife of an adopted son. Act XXI of 1870, s. 6.

This section embodies what is laid down in Williams on Executors, p. 1158, see *Innes* v. *Sayer*, 3 Mac. and G., 606, 615; *Feltham's Trust*, 1 K. and J., 528; *Bernasconi* v. *Atkinson*, 10 Hare, 345; *Jeffries* v. *Michell*, 20 Beav., 15; *Waterpark* v. *Fennell*, 7 H. of L., 650; *Garner* v. *Garner*, 29 Beav., 114; *Webber* v. *Stanley*, 16 C. B., N. S., 698; and *Charter* v. *Charter*, L. R., 7 H. L., 364. In the last of these cases it was said that evidence of the circumstances, the habits and the state of the family of the testator, at the time he made his will, was admissible, so as to put the Court in the position of the testator in order to ascertain the bearing and application of the language which he had used, and to ascertain whether there existed any person or thing to which the whole description given in the will could, with sufficient certainty, be applied. It was also held in that case, that evidence of the declarations of the testator as to whom he intended to benefit, or supposed he had benefited, could only be received where the description of the legatee or of the thing bequeathed was equally applicable in all its parts to two persons or to two things; see also *In re Wolverton Estates*, L. R., 7 Chan. Div., 197. There a legacy was left by the testator to the children of his daughter other than Thomas Fisher, of B. street, Bath. There was a Thomas Fisher of B. street Bath, a marman; but there was also a Henry Tom Fisher, of B. street Bath, d it was held, that although Thomas Fisher answered the and his son's name was not Thomas but Tom, parol evidence

be given to show which was intended. See also *Farrer* v. *St. Catherine's Coll.*, L. R., 16 Eq., 19.

Where a legatee is once correctly described in a will, and the same name is mentioned again without any description, evidence is not admissible to show that a different person was intended—*Webber* v. *Corbett*, L. R., 16 Eq., 515.

Evidence, however, is admissible to show what is parcel and what is not. Thus, where a testator devised his *Briton Ferry Estate, with all manors*, &c., and afterwards described it as in Glamorganshire, evidence was held to be admissible to show that the estate comprised other lands in Brecon—*Doe* v. *Earl of Jersey*, 3 B. and C., 870. So evidence may be given to show, that after-acquired lands had been treated as additions to an estate devised—*Castle* v. *Fox*, L. R., 11 Eq., 542.

So, where the context shows that words have been used in a special sense, evidence may be given to show in what sense thy were used—*Millard* v. *Barley*, L. R., 1 Eq., 378. And if the testator has been in the habit of calling persons or things by particular names, evidence of this is in general admissible—*Lee* v. *Pain*, 4 Hare, 251.

In *Tombs* v. *Roch*, 2 Coll., 502, KNIGHT BRUCE, V. C., said,—Every will ought to be read as in effect embodying a declaration by the testator that the payment of his debts shall be, as far as possible, so arranged as not to disappoint any of the gifts made by it, unless the instrument a different intention.

Where the meaning of a will is doubtful, the Court may resort to evidence of the state of the testator's property; but where the words are plain, no such extrinsic aid can be resorted to—*Hensman* v. *Fryer*, L. R., 3 Chan., 420; *Page* v. *Leapingwell*, 18 Ves., 466.

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.

Stockdale v. *Bushby*, 19 Ves., 381; see *Mostyn* v. *Mostyn*, 17 Beav., 323.

(*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.

Newbolt v. *Price*, 14 Sim , 354 ; see *Gillett* v. *Gane*, L. R., 10 Eq , 29 ; *In re Nunn's Trusts*, L. R., 19 Eq., 331.

(*e*) 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., 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.

The testator having six grandchildren, makes a bequest to "his six grandchildren," and proceeding to mention them by their Christain 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 testator, receive a legacy of 1,000 rupees.

Tomkins v. *Tomkins*, 2 Ves. Sen., 564 ; *Garvey* v. *Hibbert*, 19 Ves., 124

In applying this section under the Hindu Wills Act, in which it has been embodied, the words 'son,' 'sons,' 'child,' and 'children' include an adopted child ; and the word 'grandchildren' includes the children, whether adopted or natural-born, of a child, whether adopted or natural-born ; and the expression 'daughter-in-law' includes the wife of an adopted son. Act XXI of 1870, s. 6.

The general rule is, that where the name or description of a legatee is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described, the mistake shall not disappoint the bequest—Williams on Executors, 1156. See also 1 Jarm., pp. 376—383.

So, where there is no doubt as to the person intended, a misdescription of character will not frustrate the bequest, unless the false character attributed by the testator has been acquired by fraud, which has deceived the testator—*Giles* v. *Giles*, 1 Keen, 685. Thus a reputed wife of the testator will take a legacy under the description of a wife, as if she had actually filled the character of lawful wife (*ibid*; *Pratt* v. *Mathew*, 22 Beav., 334) ; but where a legacy was given by a woman to a man, whom she believed to be her husband, a character which he had falsely assumed, the Court held, that the legacy did not pass—*Kennell* v. *Abbott*, 4 Ves., 802 ; see also *Melnish* v. *Milton*, L. R , 3 Chan. Div., 27 ; *Allen* v. *McPherson*, 1 H. L. C.,

Evidence of incontinence, however, is not admissible to defeat a legacy to the wife of the testator under the description of his chaste wife—*Kennell* v. *Abbott*, 4 Ves., 809.

The Court must be satisfied that the assumed character was the motive for the bounty before it deprives a legatee of the legacy—*Rishton* v. *Cobb*, 5 My. and Cr., 150. In *Schloss* v. *Stiebel*, 6 Sim., 1, a testator, after mentioning *A. S.*, whom he was engaged to marry, by name, and alluding to his intended marriage, bequeathed £3,000 to my wife, and *A. S.* was held entitled to the legacy.

As to mistakes in the description of a class of legatees, see illustration (*f*) and cases cited thereunder.

In *Harison* v. *Harison*, 1 Russ. and My., 72, the testator bequeathed "to the two sons and the daughter of *A B* £50 a piece." At the date of the will and the death of the testator, *A. B.* had one son and four daughters, and it was held that each of these five children was entitled to a legacy of £50.

In *Lane* v. *Green*, 4 DeG and Sm., 239, under a bequest to the *four* sons of *A*, he having three sons and a *daughter*, the daughter was held to be entitled as well as the

In *In re Redfern*, L. R., 6 Chan. Div., 133, the testator having two sons and five daughters, divided his property into sevenths, and bequeathed one-seventh to one son, and another seventh to the other son. He then bequeathed the "remaining five sevenths," during the respective lives of his daughters *A*, *B*, *C*, *D*, and *E*, in equal shares, for their separate use. He then, after the death of *A*, gave one-fifth of the fund to the children of *A*; after the death of *B*, one-fifth to the children of *B*; after the death of *C*, one-fifth to the children (not of *C*, but) of *D*; and after the death of *E*, one-fifth to the children of *E*, with power to the trustees "until the *share* of the said trust-monies of the issue of any of my said daughters should become *payable*, to apply the same by way of maintenance." Bacon, V. C. held, that a trust had been unintentionally omitted, and must be implied after the death of *C* for the children of *C*, similar to that which was given to the children of the other four daughters.

Bacon, V. C., observed, that the testator having seven children had made an equal division of all his estate among them. That was the plain meaning and intention of the will. The two sons had been given their shares without limitation. The daughters' interests, which were for life in equal shares, he protected against marital influence; and then he provided, or intended to provide, that, upon their death, their children should succeed to their shares. "I am," he said, "to gather the meaning of the testator from the words in which he has expressed his meaning—I am not to be deterred by any accidental omission from putting the true signification in the will, and I am not to substitute what some blundering attorney's clerk or law-stationer has written in the will, and treat that blunder as if it was the intention of the testator."

Similar principles were acted upon in *Sweeting* v. *Prideaux*, L. R., 2 Chan. Div., 413; in *In re Daniel's Settlement*, L. R., 1 Chan. Div., 375; and in *Greenwood* v. *Greenwood*, L. R., 5 Chan. Div., 954.

It is not, however, to be inferred from cases of this kind, that words may be inserted upon mere conjecture, in order to equalize estates created by several distinct and independent devises in favour of persons with respect to whom the testator has expressed no uniformity of purpose, though it may reasonably be conjectured that he had the same intention as to all—1 Jarm., 493 (4th Edn.)

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

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.

This section applies to Hindus, etc., under the Hindu Wills Act, XXI of 1870, s. 2.

It must be clear from the context what the omitted words are.

In *Kirkpatrick* v. *Kirkpatrick*, 13 Ves., 476, where there was a gift to *A* and *B*, and if either died before *twenty-one and without issue*, the share to go to the other, and if both died without issue, over, the words '*under twenty-one*' were supplied in the latter part.

So, where there was a gift of the interest of a sum of money to *A* for life, then to *B* for life, and on his death the principal to go to *his child or children*, but in case of *B* dying before *A*, the principal to go over, the words 'without *leaving any child*' were supplied—*Abbott* v. *Middleton*, 7 H. L. C., 68.

So, the words '*without issue*' were read as '*without leaving* issue'—*Radford* v. *Radford*, 1 Keen, 486; see *Lang* v. *Pugh*, 1 Y. and C., 718, where '*on marriage*' was read as '*at* 21 *or marriage*.'

In some cases words of limitation have been supplied (*Langston* v. *Langston*, 2 Cl. and Fin., 194); also words of inheritance, as where, under a limitation to the first son and for default of such issue to the second, third, and every other son, and the heirs of his or their bodies, the will was read so as to include the heirs of the body of the first son, as well as of the other sons—*Galley* v. *Barrington*, 2 Bingh., 387.

Under bequests to a class of persons, as the sons and daughters of a named person, a gift to one by her Christian name alone has been held sufficient—*Walker* v. *Tipping*, 9 Ha., 800.

So, if a testator arranges the clauses of his will in numerical order, words of limitation *at the end* of each clause may be held to have reference to all the antecedent devises *in that clause*—*Collings* v. *Eustace*, 4 M. and Sel., 58.

No words are to be supplied or rejected unless there cannot be any rational construction of the words as they stand—*per* Lord Eldon in *Chambers* v. *Brailsford*, 19 Ves., 654; see Williams on Executors, 1089.

The general rule of construction applicable to wills is, that words in are to be taken in their ordinary and grammatical sense, unless clear intention to use them in another sense can be collected.
v. *George*, 6 All. H. C. R., 219.

and change of words—In some cases, to effectuate the *clear* intention of the testator, a transposition of names will be allowed—*Moseley* v. *Massey*, 8 East, 149; *Doe* v. *Allcock*, 1 B. and Ald., 137. In *Hart* v. *Tulk*, 2 De G. M. and G., 300, where a testator, in a will which contained numbered schedules, referred to one number by mistake for another, the mistake was corrected.

The word '*or*' has been frequently changed into '*and*.' See v. *Peterson*, 3 Atk., 193; *Greated* v. *Greated*, 26 Beav., 621.

So '*and*' is sometimes read '*or*' (see *In re Saunders*, L. R., 1 Eq., 675; *Kirkbride's Trust*, L. R., 2 Eq., 400, as where there is a gift to a class of persons at a particular time *and* such of them as shall be living at a particular time—*Hetheringham* v. *Oakman*, 2 Y. and C. (Ch.), 299.

The change will not be allowed to defeat a vested legacy: thus, where a legacy is given over, if the legatee should die in the lifetime of *A* and *B*, the tenants for life, this means in the lifetime of both, and if he survive either, he will be entitled—*Day* v. *Day*, Kay, 703.

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

of erroneous description.

Illustrations.

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

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

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

This section, which is embodied in the Hindu Wills Act, XXI of 1870, s. 2, lays down the maxim, *falsa demonstratio non nocet*, which applies where there is a description of parcels consisting of sepa parts, the first of which is complete and correct, and the second inc plete and incorrect. See *Morrell* v. *Fisher*, 4 Exch., 591, see *West* v. *Lawday*, 11 H. L. C., 375.

The characteristic of cases within this rule or maxim 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 on only—*ibid*; see *Webber* v. *Stanley*, 16 C. B. (N. S), 755. Thus, if property is known by a particular name, as 'White Acre,' and is devised by that name, it will be sufficient although it may also be described as in the occupation of *A* and *B*, when in fact it is in that of *A* only—*Blaque* v. *Gold* 4 Cro. Car., 447.

In *Doe* v. *Allen*, 12 A. and E., 451, where the devise was to John, the grandson of *B*, charged with legacies to his brothers and sisters, and there were two grandsons of *B* named John, one of whom had brothers and sisters, and the other not, parol evidence was admitted in favour of the latter, the reference to the brothers and sisters being held

to be no part of the description. See *Doe* v. *Westlake*, 4 B. and Ald., 57.

A devise of lands at *A* held by *B* in the occupation of *C*, will not pass lands not in *C's* occupation, there being other lands in his occupation held under the testator (*Morrell* v. *Fisher*, 4 Exch., 591), for where there is property answering the description, no other property will pass—*Webber* v. *Stanley*, 16 C. B., N. S., 698. See notes to next section.

In *Sampson* v. *Sampson*, L. R., 8 Eq., 479, under a devise of *four* s, five were, upon the context, allowed to pass.

A misdescription of the tenure,—*e. g.*, freehold for leasehold, &c.,—is, in general, immaterial, if, in other respects, it is clearly identified (*Gully* v. *Davis*, 10 Eq., 562), unless there is other property answering the in the will—*Hall* v. *Fisher*, 1 Coll., 47. See next section.

When part of description may not be rejected as erroneous.

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.

Explanation.—In judging whether a case falls within the meaning of this section, any words which would be liable to rejection under the sixty-fifth section 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*.

A bequeaths to *B* "his marsh lands lying in *L*, and in the occupation of *X*, comprising 1,000 bighas 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 section, which is embodied also in the Hindu Wills Act, XXI of 1870, s. 2, lays down the principle that, in cases of ambiguous description, if there are several terms of description applied to the subject-matter of a devise or bequest, every such term may be material; and if there is property corresponding with that which is devised in every particular, such property alone will pass to the exclusion of other property *in part only* answering the description. For instance, where the testator recited that he was seised of certain lands at *A* subject to a mortgage, and he devised the said lands, this was held not to include lands at *A* which were not mortgaged—*Pullin* v. *Pullin*, 3 Bing., 47; *Smith* v. *Ridgway*, L. R., 1 Exch. Ch., 331. See, however, *Goodtitle* v. *Southern*, 1 M. and Sel., 299; *Down* v. *Down*, 7 Taun., 343, in the former of which cases, under the description of "my farm of White Acre in the occupation of *A*," other lands, part of the farm not in *A's* occupation, were held to pass.

Illustration (*a*) to this section follows the case of *Morrell* v. *Fisher*, 4 Exch., 591. See notes to preceding section.

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.

See *Doe* v. *Hiscocks*, 5 M. and W., 363; *Grant* v. *Grant*, L. R., 5 C. P., 727; *Fleming* v. *Fleming*, 1 H. and C., 242.

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 section is embodied in the Hindu Wills Act, XXI of 1870, s. 2.

The general rule is, that parol evidence of the testator's intention is not admissible unless there is a latent ambiguity (see notes to s. 62, *supra*). But parol evidence is admissible to show that there was no intention that the instrument should operate as a will (*Lister* v. *Smith*, 3 Sw. and Tr., 282); or that the testator was induced to make it by fraud (*Doe* v. *Allen*, 8 T. R., 147; see *Stickland* v. *Aldridge*,

9 Ves., 519); or where one codicil revokes prior ones, and another confirms them, to show that there is a mistake—*In the Goods of Thompson*, L. R., 1 P. and D., 8.

This rule is laid down in *Doe* v. *Hiscocks*, 5 M. and W., 363—368. It is only in cases of the description mentioned in this section that parol evidence of intention is admissible—*ib.*, 369. See notes to s. 63 and illustrations (*e*) and (*f*) to that section.

Where there is a devise of the Manor of Dale, and the testator had two manors of that name (*Doe* v. *Hiscocks*, 5 M. and W., 369), or there is a gift to one, and there are two persons who answer the description (*Careless* v. *Careless*, 1 Mer., 384), parol evidence of intention is admissible. See *Bennet* v. *Marshall*, 2 K. and J., 615.

Where the description in part applies to one person, and in part to another, evidence of intention is inadmissible—see *Doe* v. *Hiscocks*, 5 M. and W., 363; *Garner* v. *Garner*, 29 Beav., 114; and where there is a person who does *answer the description*, parol evidence is inadmissible to show that another, who does not, was intended—*Delmare* v. , 1 Ves., 412; *In the Goods of Peel*, L. R., 2 P. and D., 46.

Where no person properly answers the description, evidence is, in general, inadmissible—*Drake* v. *Drake*, 8 H. L. C., 172; see *Mostyn* v. , 5 H. L. C., 168, and s. 63, *supra*.

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 ad-

Extrinsic evidence inadmissible in cases of patent ambiguity or deficiency.

Illustrations.

(*a*.) A man has an aunt Caroline and a cousin Mary, and 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 the seventy-sixth section.

(*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.

is embodied in the Hindu Wills Act, XXI of 1870, s. 2

Parol evidence of intention is inadmissible in the case of patent ambiguities, as where there is a gift in blank (*Edmunds* v. *Waugh*, 4 Drew., 275, 278).

Where blanks are left for names, the bequest will be void for uncertainty (*Greig* v. *Martin*, 5 Jur., N. S., 329), though sometimes the persons intended may be identified from external circumstances—*Re Gregson's Trusts*, 10 Jur., N. S., 696. But where the names of some of the persons to whom a gift is made are left blank, the whole bequest will not be void—*Gill* v. *Bagshaw*, L. R., 2 Eq., 746.

In *Baylis* v. *Attorney-General*, 2 Atk. 239, Lord Hardwicke refused to allow parol evidence to explain the testator's intention, where there was a blank for the legatee's name; but in *Price* v. *Page*, 4 Ves., 680, where there was a blank only for the Christian name, evidence was allowed to show that the claimant was entitled. In the case of a blank for a Christian name, though the ambiguity would appear to be really patent, when evidence has been admitted for the purpose of supplying such a blank, it appears not to have been evidence of intention, but evidence of collateral matters, to show who was intended.

Re Gregson's Trusts, 2 H. and M., 504; (S. C.) 10 Jur., N. S., 696.

Parol evidence was admitted to show who was intended to be benefited by a legacy to "Mrs. G."—*Abbot* v. *Massie*, 3 Ves., 148.

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.

Meaning of any clause to be collected from entire will.

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 of which is called Black Acre, bequeaths the whole of his 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*."

Roe v. *Nevill*, 11 Q. B., 466.

This section is embodied in the Hindu Wills Act, XXI of 1870, s. 2.

"All parts of the will are to be construed with reference to each other,"—see *per* Wigram, V.C., in *Ford* v. *Ford*, 6 Hare, 492.

Although where two passages are directly opposed to each other, the

latter is to prevail (*Cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est*, Co. Litt., 1126), where there is a mere inconsistency, it is the duty of the Court to discover from the whole will the real meaning of the testator, and, if possible, to reconcile all its parts—*Brocklebank* v *Johnson*, 20 Beav., 213, *per* LORD ROMILLY, M.R. See *Egerton* v. *Earl Brownlow*, 4 H. L., 181; *Grey* v. *Pearson*, 6 H. L. Ca., 61.

Thus, if it appears from the entire will that general words used by the testator were not used in their general sense, the meaning of such words will be restrained in accordance with the testator's intention. See *Strong* v. *Teat*, 2 Burr., 912; see also next section. Whether a general intent, or a particular intent, expressed in a will is to prevail, must depend on the context of the whole will, in construing which, words of a technical kind are not necessarily to receive a technical meaning—*Jenkins* v. *Hughes*, 8 H. L. Ca., 571.

So, there are many cases upon the construction of wills or other documents, in which the spirit is strong enough to overcome the letter—cases in which it is impossible, for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict or an ordinary interpretation given to particular passages would disappoint and defeat the intention with which the instrument, read as a whole, persuades him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly—*Key* v. *Key*, 4 DeG. M. and G., 85, *per* KNIGHT BRUCE, L. J.

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.

tricted sense, and when in a sense wider than usual.

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*.

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 shipmate) 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 the case of *Cook* v. *Oakley*, 1 P. Wms.,

(c.) *A*, by his will, bequeathed to *B* all his ..... furniture, plate, linen, china, books, pictures, and all other goods of whatever kind; 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.

Wrench v. *Jutting*, 3 Beav., 521.

This section is embodied in the Hindu Wills Act, XXI of 1870, s. 2.

As to the first part of the section, see *Strong* v *Teat*, 2 Burr., 912, 920.

The words 'effects,' 'goods,' or 'chattels,' which in general comprise the whole estate of the testator, unless restrained by the context, when standing immediately associated with less comprehensive words, have, in some cases, been restrained to articles *ejusdem generis*. So the words 'estate' and 'property' have been confined to personalty by their juxtaposition with words descriptive of that species of property; see 1 Jarm., 751; see *Cook* v. *Oakley*, 1 P. Wms., 302; *Hawkings* v. , 13 Ves., 39, *Wrench* v *Jutting*, 3 Beav., 521.

to the second clause in this section.—In some cases words *primâ* descriptive of personal estate may, from the context, be held o comprise realty, -*e. g.*, 'all the rest' (*Attree* v. *Attree*, L. R., 11 Eq., 280); 'effects' (*Doe* v *White*, 1 Ea., 33); 'worldly *Wright* v. *Shelton*, 18 Jur., 445).

A devise of *rents and profits* will pass the whole interest in land if there are words of inheritance—*Johnson* v. *Arnold*, 1 Ves. Sen., 169. So, *prima facie*, a devise of the use of land gives the testator's interest in the land—*Cook* v. *Gerrard*, 1 Saun., 183, see *Rabbeth* v. *Squire*, 4 De G. and J., 406.

It may be of importance, in applying the second part of the section, to notice the sense which the following words and phrases usually bear:—

'Household goods' and 'furniture' will include pictures hung up and plate and house linen (2 P. Wms., 419), but not books (3 Atk., 201), or wines or other consumable articles (3 Ves. 311), or goods belonging to the testator in the way of trade (2 P. Wms., 332), or farming stock (29 L. J., Ch., 875), or tenant's fixtures (L. R., 10 Ch. D. 13; 1 Jarm., p. 757, note *b*)

'Goods' will pass all the personal estate of the testator—*Ryall* v. *Rolle*, 1 Atk., 180.

'Chattels' or 'effects' will also have the same effect standing alone—*Kendall* v. *Kendall*, 4 Russ. Chan. Ca., 360; *Campbell* v. *Prescott*, 15 Ves., 507.

'Household goods' will pass everything of a permanent nature,—*i.e.*, articles of household use which are not consumed in their enjoyment—*Kendall* v. *Kendall*, 4 Russ., Chan. Ca., 369.

'Household furniture' will pass all personal chattels that may contribute to the convenience of the householder, or the ornament of the house *Tempest* v. *Tempest*, 2 K. and J., 635), as plate, linen, china both useful and ornamental, also tenant's fixtures (*Manning* v *Style*, 3 P. Wms., 336); but not books (*Bridgman* v. *Dove*, 3 Atk., 202), nor wines (*Porter* v. *Tournay*, 3 Ves., 311).

'Utensils' will not pass plate or jewels—*Dame Latimer's case*, 1 Dyer, 59, pl. 15.

'Monies' does not of itself include stock—*Ommaney* v. *Butcher*, 1 Turn. and Russ., 272, *per* LORD ELDON; see *Petty* v. *Willson*, L. R., 4 Chan. App., 574. But the word 'money' may be so used as not only to include stock but other personal property—*Prichard* v. *Prichard*, L. R., 11 Eq., 232.

'Shares in a railway company' will pass stock in a railway company, unless there is an indication to the contrary—*Morrice* v. *Aylmer*, L. R., 7 H. L., 717.

'Securities for money' will pass stock in the funds (*Bescoby* v. *Pack*, 1 Sim. and Stu., 500); but while it is doubtful whether it will pass bank-stock (see *Ogle* v. *Knipe*, L R., 8 Eq., 434), it will include money placed at a banker's on deposit notes (*Hopkins* v. *Abbott*, L. R., 19 Eq., 222).

'Debts'—Under a bequest of "whatever debts may be due to me at the time of my death," it was held, that a bill of exchange, drawn in the testator's favour, and delivered by him to his banker, and a cash balance in his banker's hands, passed to the legatee—*Carr* v. *Carr*, 1 Mer., 541, note: see Williams on Executors, 1184, 1206.

Where a clause is open to two constructions, that which has some effect is to be preferred.

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

This section is embodied in the Hindu Wills Act, XXI of 1870, s. 2.

In *Atkinson* v. *Hutchinson*, 3 P. Wms., 259, LORD TALBOT said:—"Where words are capable of a twofold construction, even in the case of a deed, and much more of a will, it is just and reasonable that such construction should be received as tends to make it good." See *Turner* v. *Frampton*, 2 Coll., 331.

The same principle has been applied to cases where, upon one construction, a clause in a will appears to offend against the law of perpetuities, but where the clause is fairly capable of another construction, which avoids that objection—*Martelli* v. *Holloway*, L. R., 5 H. of L., 532.

In one case the Court 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—*Chapman* v. *Oliver*, 3 Burr., [illegible]

It is also a rule of construction, than which none is better established or obtains a more unhesitating assent, that where words are susceptible of several interpretations, we are to adopt that which will give effect to every expression in the context in preference to one that would reduce some of those expressions to silence. As where the testator gives to the next of *his kin* of his name (*Johnson's case*, 2 Cro. Eliz., 576), or to the next of his name and blood (*Leigh* v. *Leigh*, 15 Ves., 92), it is held, that the testator does not use the word 'name' as descriptive of his relations or family only, but means additionally to require, that the devisee or legatee shall bear his name—2 Jarm., 141. See *Doe* v. *Gallini*, 4 A. and E., 321.

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.

No part of will to be rejected as destitute of reasonable meaning if reasonable construction can be put on it.

This section is embodied in the Hindu Wills Act, XXI of 1870, s. 2.

No word that has a clear and definite operation in the disposal of the testator's property can be struck out—*Hall* v. *Warren*, 9 H. of L., 420, *per* Lord Campbell. Thus, if there be a devise in fee to *A. B.*, and in a subsequent part of the will a devise to *C. D.* for life, both parts of the will must stand, and in the construction of law the devise to *C. D.* shall be first—*Anon.*, Cro Eliz., 9; see *Doe* v. *Davies*, 4 M. and W., 599; Williams on Executors, 1088.

Where, however, two clauses or gifts in a will are irreconcilable, so that they cannot stand together, the last shall prevail; see s. 75, *infra*; *Constantine* v *Constantine*, 6 Ves, 100. But it is not to be understood from this rule that, because a testator uses in one part of his will words having a clear meaning in law, and in another part words inconsistent with the former, the first words are to be cancelled —*per* Lord Redesdale in *Jesson* v. *Wright*, 2 Bligh. 56. It is also a rule of law that a particular intent, although first expressed in a will, must give way to a general intent, the rule being, that technical words and words of a settled legal signification shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise—*Jesson* v. *Wright*, *ibid*, 49, 56, 57. Yet it was said, that the words "heirs of the body" will yield to a clear particular intent that the estate should be only for life, and that may be from the effect of words superadded or any expression showing the particular intent of the testator; but that must be clearly intelligible and unequivocal—*Ibid*, 53.

Rejection of words.—Particular words may, in some instances, be rejected, when they are inconsistent with the clearly expressed provisions of the will. Thus, where an *absolute* term of 99 years was limited to *J. C.*, with remainder, after the death of *J. C.*, to the first and other sons in tail-male, the words giving an *absolute* term to *J. C.* were rejected—*Coryton* v. *Helyar*, 2 Cox, 340. The words '*for their lives*' were rejected in a devise "to *A* and his heirs for their lives"—*Doe* v. *Stenlake*, 12 East, 515. So the word 'aforesaid' has been rejected where the objects to which it was applied had not been mentioned before—*Campbell* v. *Bouskell*, 27 Beav., 325.

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.

Interpretation of words repeated in different parts of will.

This section, which is also embodied in the Hindu Wills Act, is in accordance with the canon of construction, that where a testator has affixed a particular meaning to a word in one part of his will, it shall be construed as having the same meaning in all other parts of it, unless it violates the sense—*Rhodes* v. *Rhodes*, 27 Beav., 413. But this canon does not preclude the Court from putting a different construction on the same words when applied to different

See *Forth* v. *Chapman*, 1 P. Wms., 667; 2 Williams

on Executors, 1086. See *Ballin* v. *Ballin*, 9 C. L. R., 28 ; (S. C.) I. L. R., 7 Calc., 218, *per* WILSON, J.

In *Sibley* v. *Perry*, 7 Ves., 522, the testator made certain bequests to several persons, if living at his decease, and if not, he directed that their lawful *issue* should take the shares which their respective parents, if living, would have taken ; and he also made other bequests to the lawful issue, living at certain periods, of other persons. LORD ELDON held, it was clear as to the former class that children were intended, and that this was a ground for giving the word *issue* the same construction in the other bequests. Where the testator uses an additional word or phrase, it is to be presumed that he had an additional meaning—*Campbell* v. *Campbell*, 4 Bro. C. C., 15 ; see *Clavering* v. *Ellison*, 3 Drew., 472.

To prevent the operation of the rule in this section, the intention to the contrary must be strongly indicated—*Harrey* v. *Harvey*, 32 Beav., 445.

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.

Illustration.

The testator, by a will made on his deathbed, 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 the one hundred and fifth section, but it shall take effect so far as regards the gift to *C. D.*

This section follows the law as laid down in the judgment, in *Thellusson* v. *Woodford*, 4 Ves., 325, of BULLER, J., quoting LORD TALBOT in *Hopkins* v. *Hopkins*. It is embodied in the Hindu Wills Act, XXI of 1870, s 2.

In *Southey* v. *Somerville*, 13 Ves., 486, where the testator showed an anxious intention that two parts of his property should go together, it was found that as to one of the two parts the testator had no power of disposition, and it was held, that the devisee should take the other past, notwithstanding that the testator meant him to take it only in conjunction with the other.

The last of two inconsistent clauses prevails.

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

(*a.*) The testator, by the first clause of his will, leaves estate of Ramnagore 'to *A*'; and by the last clause his will, leaves it 'to *B* and not to *A*.' *B* shall have it.

(*b.*) If a man, at the commencement of his 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.

This section is embodied in the Hindu Wills Act, XXI of 1870, s. 2.

Where two clauses of a will are absolutely repugnant, the last prevails—*Ulrich* v. *Litchfield*, 2 Atk., 372; see *Kerr* v. *Clinton*, L. R., 8 Eq., 462. But all the parts of a will are to be read with reference to each other so as to give effect to every part of it (see s. 69, *supra*, p. 79), and apparent inconsistencies may, in this way, be reconciled. Thus, if an estate in one part of the will is given absolutely to *A*, and in another part to *B*; *A* and *B* will take jointly (*Ridout* v. *Pain*, 3 Atk., 486, 493; *Davis* v. *Bennet*, 30 Beav., 226); but this only where the gift is of some specific indivisible chattel—*Ulrich* v. *Litchfield*, 2 Atk., 375.

An absolute estate will, in some cases, be reduced to an estate for life to give effect to subsequent gifts—*Sheratt* v. *Bentley*, 2 M. and K., 149; see *Gravenor* v. *Watkins*, L. R., 6 C. P., 500. See notes to s. 72, *supra*.

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

Will or bequest void for uncertainty.

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.

This section is embodied in the Hindu Wills Act, XXI of 1870, s. 2.

A devise or bequest must be certain, or capable of being rendered certain, both as to the subject-matter and objects of it—*Mohun* v. *Mohun*, 1 Sw., 201, cited in 1 Jarm., p. 357.

Thus, where the particular *amount* or *part* is left uncertain, the gift will, in general, be void,—*e. g.*, where a handsome gratuity is given to the executors—*Jubber* v. *Jubber*, 9 Sim., 503. Effect, however, will be given to a legacy of a reasonable sum for trouble—*Jackson* v. *Hamilton*, 3 J. and Lat., 702; see *Oddie* v. *Brown*, 4 DeG. and J., 179. A bequest in the alternative of £50 or £100 is a good bequest of £100—*Seale* v. *Seale*, 1 P. W., 290.

As to the effect of a gift of such part as a legatee shall choose or select, the legatee may make his own selection; but there must be some selection, and the donee cannot take the whole—*Kennedy* v. *Kennedy*, 10 Ha., 438.

Where the amount is capable of being ascertained, as when there is a power of appointment or of applying property in a particular way, and there is a gift of so much as is not so appointed or applied, the gift is good—*Gude* v. *Worthington*, 3 DeG. and S., 389.

So, where an unascertained part is given for a void or illegal purpose, and the residue is given over, the gift of the residue will be good only if it can be ascertained how much would have been given for the void or illegal purpose—*Adam* v. *Cole*, 6 Beav.,

legacies in England, it seems, will not, in every c void by reason of the uncertainty of the object. Where there are two charities of the same name, the legacy will be divided between them— ...er v. *Childs*, Amb., 524: *Simon* v. *Barber*, 5 Russ., 112; see ... v. *Thompson*, 2 Y. and C., 295.

A bequest of 'some of my best linen' was held to be void for uncertainty—*Peck* v. *Halsey*, 2 P. Wm., 387.

A bequest of '£3,000 or thereabouts' to be raised by 'annual income' has been held good, the words 'or thereabouts' being considered to meet the difficulty which would arise in accumulating up to the exact amount—*Oddie* v. *Brown*, 4 DeG. and J., 179.

A bequest is not void where the amount is differently stated in different parts of the will, if it appear that one statement was evidently a mistake—*Phillipps* v. *Chamberlain*, 4 Ves., 51.

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 subject refer to property answering that ...

This section, which is also embodied in the Hindu Wills Act, XX of 1870, s. 2, is similar in effect to s. 24 of the Wills Act, 1 Vict., c. 26, which is as follows: "Every will shall be construed with reference to the real and 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."

Under that section a general devise of real estate will operate on all the property of that description—*O'Toole* v. *Browne*, 3 Ell. and B., 572.

Will speaking from death.—A release of all debts due to the testator is a release of all debts due at the death of the testator—*Everett* v. *Everett*, L. R., 7 Chan. Div. (C. A.), 428, *per* JAMES, COTTON and LL J.

Contrary Intention.—It is not necessary that the contrary intention should be expressed in so many words or in some way quite free from doubt. It is sufficient that it is to be gathered by adopting, in reference to the expressions used by the testator, the ordinary rules of construction applicable to wills. Thus, where, in a will bearing a particular date, the testator gave "all the estates of which I am *now* possessed," and used the word 'now' in other parts of the will, clearly alluding to the period at which he was making the will, it was held, that the testator had indicated a contrary intention so as to take the case out of the general rule, and that property acquired after the date of the will was not affected by the will—*Cole* v. *Scott*, 1 Mac. and G., 518.

A similar construction was put on the word 'now' in *Hutchinson* v. *Barrow*, 6 H. and N., 583.

Where the testator describes property 'of which I am seised,' that does not amount to an expression of intention to refer to property in his possession at the date of the will. See *Doe* v. *Walker*, 12 Mee. and W., 591; *Langdale* v. *Briggs*, 25 L. J., Chan., 100.

In *Goodlad* v. *Burnett*, 1 K. and J., 348, Wood, V. C., said:—"When I refer to a particular thing, such as a ring, or a horse, and bequeath it as 'my ring' or 'my horse,' it seems to me there might be considerable difficulty in saying that the 'contrary intention' to which the 24th section of the Wills Act refers, does not appear on the face of the will; but when a bequest is of that which is generic—of that which may be increased or diminished, then, I apprehend, the Wills Act requires something more on the face of the will for the purpose of indicating such 'contrary intention' than the mere circumstance that the subject of the bequest is designated by the pronoun 'my.'" In that case it was held, that a bequest of 'my new 3¼ per cent. annuities' comprised all the new 3¼ per cents. which the testatrix had at her death. See *Douglas* v. *Douglas*, 1 Kay, 400, where the description 'all the stock which I have purchased' was held to have reference to the date of the will, and not to the date of the death of the testator. See *Emuss* v. *Smith*, 2 DeG. and S. 722.

In *Re Gibson*, L. R., 2 Eq., 669, the testator, who was possessed of £1 000 guaranteed stock in the N. B. Railway, bequeathed 'my one thousand N. B. Railway Preference Shares,' and after his will sold his guaranteed stock, and subsequently acquired, by various purchases, other shares and stock in the N. B. Railway, it was held, that nothing passed by the bequest.

In *Wagstaff* v. *Wagstaff*, L. R., 8 Eq., 229, under a gift 'of any other property that I may now possess,' personalty acquired after the date of the will was held to pass. This case seems hardly consistent with the case of *Cole* v. *Scott*, *supra*; but in *Castle* v. *Fox*, L. R., 11 Eq., 542, Malins, V. C., expressed his dissent from the decision in *Cole* v. *Scott*.

This section, as also the corresponding section of the English Act, it is to be observed, does not apply to the objects of the testator's bounty, but only to the subject. Where the testator bequeathed certain funds to *A*, a widow, for life, or until her marriage, and, after her death or marriage, amongst her children, and *A* married again between the date of the will and the death of the testator, and he was aware of the marriage,—it was held, that *A* was not entitled to the income of the fund, but that the gift upon the marriage came at once into operation—*Bullock* v. *Bennett*, 7 DeG. M. and G., 283; see the remarks of Turner, L. J., in *Langdale* v. *Briggs*, 8 DeG. M. and G., 391.

As to period from which will speaks, with reference to the objects of the gifts under it.—The principle which governs the construction of expressions descriptive of a specific *subject* (as to specific legacies, see ss. 128–136, *infra*) of disposition, applies also to the objects of the gift. Thus, if a testator give an estate or sum of money to his son John, the gift will take effect in favour of his son of this name (if any) at the date of the will, and of him only. If, therefore, such son should die in the testator's lifetime, and the testator should afterwards have another son of the same name, who should survive him, such after-born son would not be an object of the gift—1 Jarm., 323; see *Foster* v. *Cook*, 3 Bro. C. C., 346.

The following propositions are laid down by Mr. Jarman, vol. I, 324.

A devise or bequest to the wife of *A*, who has a wife at the date of the will, relates to that person, notwithstanding any change of circumstances which may render the description inapplicable at a subsequent period, and by parity of reasoning, under *all* circumstances, confined to her; but if *A* have no wife at the date of the will, the gift embraces the individual sustaining that character at the death of the testator.

A gift to the testator's servants simply, without adding a condition 'that shall be in his service at his decease,' will take effect in favour of the servants at the date of the will—*Parker* v. *Marchant*, 1 Y. and C., 290.

In the absence of a controlling context, a gift to an unmarried woman for life, with remainder to her husband in fee, vests an indefeasible estate of inheritance in the person who first answers the description of her husband—*Radford* v. *Wills*, L. R., 7 Chan., 7.

Gifts to classes.—The will is to be held to speak from the death of the testator in reference to gifts to classes, or fluctuating bodies of persons: as to children or descendants, which applied to the persons answering the description at the death of the testator irrespectively of those to whom the description was applicable at the date of the will, but who subsequently died in the testator's lifetime—1 Jarm., 326.

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.

This section closely follows s. 27 of the Wills Act, 1 Vict., c. 26. It does not apply to Hindus, etc.—Hindu Wills Act, XXI of 1870, s. 2.

In the English Act, the words are "power to appoint in any manner he may think proper," instead of "power to appoint *by will* to any object he may think proper."

The section is confined to general powers. Thus, a power to appoint by will amongst *children* in such manner as the appointor shall think proper, is not within the section—*Clowes* v. *Audry*, 12 Beav., 604. Nor is a power to appoint by will among relations or friends—*Re Caplin's will*, 2 Dr. and Sm., 527. But a power to appoint by *will* only, which is expressly within the words of this section, was held to be within the words of the English Act—*Re Powell's Trusts*, 18 W. R. (Eng.), 228. So a power in a marriage settlement to appoint by deed or will to all and every "person or persons, child or children" is within the section—*Cofield* v *Pollard*, 5 W. R. (Eng.), 774. Shelford's Real Property Statutes, p. 526.

A general power given to the survivor of two persons may be exercised by a general devise in a will executed by the ultimate survivor during their joint lives—*Thomas* v. *Jones*, 2 Joh. and H., 475; see *Cave* v. *Cave*, 8 De G. M. and G., 131.

The true construction of this Statute (1 Vict., c. 26) coupling ss. 24 and 27 of the Statute (which correspond with ss. 77 and 78 of this Act) is, that a will may operate as an execution of all powers

in the testator immediately before his death. A person *sui juris* must be held to intend his will to operate on powers which he had, not at the date of executing it, but which he acquired before his death—*per* PAGE WOOD, V. C., *Thomas* v. *Jones*, 2 Joh. and H., 482.

Thus, general powers have been held to have been executed by wills dated prior to the creation of the powers—*Stillman* v. *Weedon*, 16 Sim., 26; *Patch* v. *Shore*, 2 Dr. and Sm., 589. But although a general residuary bequest would operate as an execution of a power in a subsequent settlement, still the Court has power, where the testator is himself the settlor, in construing both instruments, to consider the surrounding circumstances which might show that the will was not intended as an execution of the power—*In re Ruding's Settlement*, L. R., 14 Eq., 267.

A general residuary bequest will operate as an appointment—*Spooner's Trusts*, 2 Sim., N. S., 129; *Attorney-General* v. *Brackenbury*, 1 H. and C., 782; see *Bush* v. *Cowan*, 32 Beav., 228. But funds ineffectually appointed were held not to pass by a general residuary clause—*Wilkinson* v. *Schneider*, L. R., 9 Eq., 423; *Chandler* v. *Pocock*, L. R., 16 Chan. Div. (C. A.), 648.

In *Boyes* v. *Cook*, L. R., 14 Chan. Div. (C. A.), 53, *A*, by a separation-deed, settled his property, reserving to himself a general power of appointment by will over one-third of it, and declaring trusts as to the remaining two-thirds of it for his wife and children. By his will, executed several months previously to the separation-deed, *A* devised and bequeathed all his property to trustees, upon trust, for his wife and children. It was held (reversing the decision of MALINS, V. C.), that the will was a good execution of the power, and that the settlement, and the circumstances under which it was executed, could not be looked at to show a contrary intention. In this case *In re* [illegible] *ment*, L. R., 14 Eq., 266, was questioned. See *In re Clark's Estate*, L. R., 14 Chan. Div. (C. A.), 422.

A bequest of general pecuniary legacies is a bequest of property described in a general manner, and operates as an execution of a power—*In re Wilkinson*, L. R., 4 Chan., 587; see *Hurlstone* v. *Ashton*, 11 Jur., N. S., 725; see also *Re Davies's Trusts*, L. R., 13 Eq., 166. In the last of these cases WICKENS, V. C., said:—"Where a testator, with a general power of appointment, gives legacies and appoints an executor, he must be taken as exercising his general power to the extent to which the fund subject to it is required to make the legacies effective; and even where a testator, having such a power, makes a will directing the payment of his debts without more, and appointing an executor, the appointed fund is liable for the payment of his debts, if his own estate is insufficient. The same rule would, I conceive, apply in both these cases, though no executor were appointed" (p. 166).

It has not been decided whether an appointment of an executor without more would make the fund assets—*Ibid.*

Contrary intention.—Before the Wills Act it was necessary to show the intention to exercise the power. Under that and the present Act it is necessary to show a contrary intention in order to exclude the execution of the power. See *Lake* v. *Currie*, 2 DeG. M. and G., 536, 548.

In *Scriven* v. *Sandom*, 2 Joh. and H., 743, PAGE WOOD, V.C., said:—"There is no contrary intention within the meaning of the Statute (s. 27 of the Wills Act), unless you find something in the will inconsistent with a view that the general devise was meant as an execution of the power" (p. 744). "This," he went on to say, "is the only safe rule for discriminating between mere conjecture and the contrary intent required by the Statute." See *Pettinger* v. *Ambler*, L. R., 1 Eq., 510.

An appointment expressed to be made in exercise of every power enabling the appointor, does not extend to property which the appointor cannot appoint without the exercise of a power of revocation, if there be other property to which the appointment can apply—*Pomfret* v. *Perring*, 5 DeG. M. and G., 775.

In ascertaining whether a testator has shown a contrary intention not to execute a general power by a residuary gift, it makes no difference whether the settlement creating the power was made by the testator himself or by a stranger—*In re Clark's Estate*, L. R., 14 Eq. (C.A.), 422.

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, 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.

This section does not apply to Hindus, etc. See Hindu Wills Act, XXI of 1870, s. 2.

The leading authority for this construction is the case of *Brown* v. *Higgs*, 4 Ves., 708; 5 Ves., 495; and 8 Ves., 561, which was affirmed in the House of Lords. In that case there was a bequest "to such children of my nephew *S.*, as my nephew *J.* shall think most deserving, and that will make the best use of it; or to the children of my nephew *W.*, if any such there are or shall be." *J.* died in the lifetime of the testator, and it was held, that the children were entitled under the implied trust. See also *Borrough* v. *Philcox*, 5 My. and Cr., 72.

Where there is a gift over in default of appointment to the objects of the power or to other persons, of course the words of the power cannot operate to vest any estate in the objects of it by implication if there is no appointment—1 Sugden on Powers, p. 462 (2nd edn.); 1 Jarman, 552; *Smith* v. *Death*, 5 Madd., 371; see *per* CROMPTON, J., in *Roddy* v. *Fitzgerald*, 6 H. of L. Ca., 856.

Default of appointment.—This section appears to deal only with the case of a "power given by the will not being exercised," but it is submitted that it would equally apply to the case of a power being exer- [illegible] l, but improperly exercised.

In England, it has been held, that where a power is improperly exercised, what is ill-appointed goes as in default of appointment—*Routledge* v. *Dorril*, 2 Ves., 357; see *Fekrsen* v. *Simpson*, I. L. R., 4 Calc., 614. It is to be observed that the donee of a power may execute

it without referring to it or taking the slightest notice of it, provided that the intention to execute it appear—Sugden on Powers, p. [illegible] (8th edn.)

It is well settled, that a gift under a power, embracing objects within the line of perpetuities, is wholly void, and that the fund cannot be given to those to whom it might have been legally appointed—*Ibid*, p. 505; see *Jee* v. *Audley*, 1 Cox, 324.

The 77th section, as already pointed out, does not apply to the objects of the testator's bounty.

As to the time when the class to take in default is to be ascertained, the general principle seems to be this: If the instrument itself gives the property to a class, but gives a power to *A* to appoint in what shares and in what manner the members of that class shall take, the property vests until the power is exercised in all the members of the class, and they will all take in default of appointment; but if the instrument does not contain a gift of the property to any class, but only a power to *A* to give it, as he may think fit, among the members of that class, those only can take who might have taken under an exercise of the power. In that case, the Court implies an intention to give the property in default of appointment to those only to whom the donee of the power might give it—*per* KINDERSLEY, V. C., in *Lambert* v. *Thwaites*, L. R., 2 Eq., 155; see the cases there cited. In *Lambert* v. *Thwaites* certain property was settled on *A* and *B* for their joint lives, and on the death of the survivor, amongst all and every the children of *A*, in such shares as he might by will appoint. There were seven children living at the date of the settlement, one of whom died before *A*, who died without executing the appointment. It was held, that the representatives of the deceased child were entitled to a [illegible]

A gift to the children of the wife of *C* as she should appoint, is a present legacy to the children then born, subject to variation by the appointee, and cannot be extended to children born subsequently—*Coleman* v. *Seymour*, 1 Ves. Sr., 209.

When the gift of a fund is to *A* for life, with power to *A* to [illegible] of the capital as she shall direct by will, all children before *A's* death will take a share on default of appointment—*Grierson* v. *Kirsopp*, 2 Keen, 653 (see illustration to this section).

A gift to *A* for life, with remainder to his children as he shall appoint, goes to all the children born in the testator's lifetime and coming into being before *A's* death—*Crone* v. *Odell*, 1 Ba and Be., 449; Theobald on Wills, 146.

In *White's Trusts*, 1 John., 656, there was a bequest to trustees for *A* for life, and if he should die childless, upon trust to apply the sum for the benefit of the testator's children or their issue as the trustees should think fit, and there was no gift in default of appointment. No appointment was made, and the tenant-for-life survived the donees of the power and died childless, and it was held, that the period for ascertaining the class was the death of the tenant-for-life, and that the sum should accordingly be divided among such of the children and grandchildren as were living at that time. See *In re Phené's Trusts*, L. R., 5 Chan., 139.

Where the only gift is through the power, so that the class can only take by implication, only those of the class can take who could have taken under the appointment—*Walsh* v. *Wallinger*, 2 R. and M., 78. Accordingly, if the power be by will, and no appointment is made, only those who survive the donee of the power can take—*Ibid*.

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.

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.

This section does not apply to Hindus, etc. See Hindu Wills Act, XXI of 1870, s. 2.

the extent of the words 'relations' and 'near relations' it found necessary to narrow their signification by a construction it, in each case, to the next-of-kin under the Statute of ns, by which, in England, the succession, in case of intestacy, is regulated—*Walter* v. *Maunde*, 19 Ves., 424. In *Gower* v. *Mainwaring*, 2 Ves. Sr., 87, the words 'friends *and* relations' were held by Lord Hardwicke, to mean 'relations,' the word 'friends' being taken as synonymous with relations. So *In re Caplin's Will*, 2 Dr. and Sm., . C.) 34 L. J., Chan., 575, the words 'friends or relations' the same construction.

In *Smith* v. *Campbell*, 19 Ves , 403, Sir William Grant, M. R., said, that there was no uncertainty in the words 'nearest relations;' and he accordingly held, where the testator left a brother and sisters, and nephews and nieces, the children of a deceased brother, that the *nearest* of kin, without reference to the Statute, were exclusively entitled. By this Act, however, a bequest to 'nearest relations' is expressly declared to have the same effect as a bequest to 'relations.'

A devise to the testator's 'nearest relation' (in the singular) was held to be to the nearest relation at the time, or where there were more persons than one in the same degree, to all such persons in equal shares (*Marsh* v. *Marsh*, 1 Bro. C. C., 293), the word 'relation' in the singular number being treated as a *nomen collectivum* in the same sense as 'kindred'—*Pyot* v. *Pyot*, 1 Ves. Sr., 335, *per* Lord Hardwicke. In the last case the bequest was to "the nearest relation of the name of *P.*," and it was held there, that the name *P.* stood merely for the *stock*, and that a woman otherwise entitled did not lose her right by a change of name on marriage. See *Leigh* v. *Leigh*, 15 Ves., 92.

A gift to be divided among persons related to the testator is the same as a gift to relations—*Rayner* v. *Mowbray*, 3 Bro. C. C., 234.

'Relations by blood or marriage' was held to include those who are married to persons entitled under the Statute of Distributions (*Derisme* v. *Mellish*, 5 Ves., 529), but relations by marriage are not included in a bequest to relations generally—*Davies* v. *Baily*, 1 Ves. Sr , 84; *Harvey* v. *Harvey*, 5 Beav., 134; see *Frogley* v. *Phillips*, 30 Beav., 168; affirmed, 7 Jur. (N. S.), 349; *Hibbert* v. *Hibbert*, L. R., 15 Eq., 372.

A gift to deserving or *poor* relations will, in general, receive the same construction as a gift to relations—*Widmore* v. *Woodroffe*, Amb., 636.

In England, under a power to appoint to such of the '*family*' or 'relations' of a person as the appointee shall think fit, he is not restricted to the next-of-kin under the Statute of Distributions. But if the power is not exercised, they alone will take—*Harding* v. *Glyn*, 1 Atk , 469; 5 Ves., 501; *Re Caplin's Will*, 2 Dr. and Sm., 527; (S. C.) 34 L. J., Chan , 578.

So a power to appoint to 'the family or next-of-kin' is not restricted to the nearest of kin or statutory next-of-kin—*Snow* v. *Teed*, L. R., 9 Eq., 622.

The same construction with reference to the rules of distribution in case of intestacy, it is submitted, would apply under this Act in case of similar powers when no appointment is made. The bequest will be given *per capita* and not *per stirpes*—*Attorney-General* v. *Doyley*, 7 Ves., 58*n*; *Harding* v. *Glyn*, 1 Atk., 469. The case of *Pope* v. *Whitcombe*, 3 Mer., 689, is, *as reported*, *contra*, but no such point was decided—Sugden on Powers, 660.

The Statute of Distributions, in the construction of bequests of the nature described in the section, was made use of, not for the purpose of *regulating the distribution*, but for the purpose of ascertaining the objects.

The word 'family' was construed, in *Cruwys* v. *Colman*, 9 Ves., 319, to be equivalent to kindred or relations; also in *White* v. *Briggs*, 2 Ph., 583; *Grant* v. *Lynam*, 4 Russ., 292 In subsequent cases, however, it has been held, that the primary meaning of the word 'family' is 'children,' and that there must be some circumstances arising either in the will itself, or the situation of the parties, to

prevent that construction—*In re Terry's Will*, 19 Beav., 580; see the remarks of JAMES, V. C., in *Snow* v. *Teed*, L. R., 9 Eq., 624; *Burt* v. *Hellyar*, L. R., 14 Eq., 160. These later cases, however, do not apply to this section, which expressly treats 'family' as equivalent to 'relations.'

A gift to 'next-of-kin' or 'nearest of kin' under this section is the same as a gift to relations. It is otherwise in England, where a gift or limitation to next-of-kin *simpliciter*, is construed to mean the nearest of kin or nearest blood-relations of the testator, irrespective of the Statute of Distributions—*Elmsley* v. *Young*, 2 M. and K., 780; *Withy* v. *Mangles*, 10 C. and F., 215; *Hatton* v. *Foster*, L. R., 3 Chan., 505. Husband and wife are not of kin to each other, but under any of the limitations provided for by this section, they would be entitled to take. In England 'relation' does not include 'wife'—*Green* v. *Howard*, 1 Bro. C. C., 31.

The bequests under this section are only to have the effect provided for where there are *no qualifying terms*. The limitations are in themselves vague and flexible, and may be narrowed or enlarged by the context: thus, 'family' may in some instances mean 'children' (*Barnes* v. *Patch*, 8 Ves., 604), or 'heirs' (*Wright* v. *Atkyns*, 17 Ves., 255), or 'relations by marriage' (*MacLeroth* v. *Bacon*, 5 Ves., 159).

Primâ facie "the meaning of *next-of-kin* is next-of-kin at the death of the person whose next-of-kin is spoken of" (*per* LORD CRANWORTH, L. J., *Gundry* v. *Pinniger*, 1 D. M. and G., 506), and this construction will prevail, although following a life-estate, there is a gift to a class, and if none, *then* to the persons who would *then* be entitled to administer—*Cable* v. *Cable*, 16 Beav., 507; *Bullock* v. *Downes*, 9 H. of L. Ca., 1.

But it is otherwise when the context requires that the word 'then' should be referred to the death of tenants-for-life—*Wharton* v. *Barker*, 4 K. and J., 483. The general rule will not prevail where a contrary intention is indicated—*Lees* v. *Massey*, 3 D. F. and J., 113.

Where a representative 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.

Illustration.

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 a it in the first place to the discharge of such part of 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.

This section does not apply to Hindus, etc. See Act XXI of 1870, s. 2.

Under the section the 'representatives,' &c., of the particular person do not take the gift beneficially, but hold it as part of the estate which they represent—*Re Henderson*, 28 Beav., 656; *Stocks* v. *Dodsley*, 1 Ke., 325; *Long* v. *Watkinson*, 17 Beav., 471.

The words 'representatives' and 'legal representatives' are construed to mean executors or administrators (*Re Crawford's Trusts*, 2 Drew., 230); but they have, in some cases, been held to mean next-of-kin. Thus, where the bequest was to *A*, or, in the case of his death, to the legal representatives of *A*, his next-of-kin were held entitled—*Bridge* v. *Abbot*, 3 Bro. C. C., 224. The construction that the word 'representatives' does not mean executors or administrators, but next-of-kin, is applied in general where there is no prior life-estate preceding the gift to a person or his representatives—*Re Crawford*, 2 Drew., 230, *per* KINDERSLEY, V. C. (242).

An ultimate limitation to the next personal representative was held to mean the *nearest* of kin—*Stockdale* v. *Nicholson*, L. R., 4 Eq., 359; Cf. *Re Grylls Trust*, L. R., 6 Eq., 589.

The context may show that, by 'representatives' are meant next-of-kin, as where the gift is to them equally—*King* v. *Cleveland*, 4 D. and J., 477; see *Re Grylls Trust*, L. R., 6 Eq., 589. In a settlement the words "to pay to the legal representatives on a due course of administration" were held to amount to a direction to pay to the next-of-kin, and not to the executors or administrators—*Briggs* v. *Upton*, L. R., 7 Chan., 376.

A gift to "persons hereinafter appointed executors" in equal shares is a gift to them as individuals and beneficially—*Re Henshaw*, 10 Jur., N. S., 837; see *Harrison* v. *Harrison*, *ib.*, 611, where executors were held to take beneficially, there being no disposition of the residue.

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.

Bequest without words of limitation.

This section applies to Hindus, etc., under the Hindu Wills Act, XXI of 1870, s. 2.

In England, in wills prior to 1838, a devise of lands to a person without any words of limitation confers an estate for life only—*Hawk.*, 130. This technical rule having been found generally subversive of the actual intention of testators, it was enacted by s. 28 of the Wills Act, 1 Vict., c. 26, 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, unless a contrary intention shall appear by the will." The Courts, however, have always leaned towards enlarging indefinite devises in wills prior to, or not subject to, that Act—*Bolton* v. *Bolton*, L. R., 5 Exch., 145; *Pickwell* v. *Spicer*, L. R., 7 Exch. (Exch. Ch.), 105; and *Re Harrison's Estate*, L. R., 5 Chan., 408.

It has been held that s. 28 of the Wills Act only applies to estates vested in, or in the power of the testator, and not to estates or interests created *de novo* by the will—*Nicholls* v. *Hawkes*, 22 L. J., Chan., 255; (S. C.) 10 Hare, 342. In that case the testator devised his real estates to a devisee in fee, with certain annuities or annual rent-charges to two annuitants, and it was held, that the annuitants took the annuities for life. If the testator had merely the rent-charge in fee, a devise of it, without words of limitation, would have passed the testator's entire interest. "All the subsequent cases down to *Kerr* v. *Middlesex Hospital*, 22 L. J., Chan., 355, confirm the principle that a gift *simpliciter* is only an annuity for life"—*per* Wood, V. C., *ib.*, 256; see *Bent* v. *Cullen*, L. R., 6 Chan., 235. As to annuities, see s. 160, *infra*, which is in accordance with the principle enunciated

Where a testator gave to his niece the house she lived in, and grass for a cow in Gillfield, it was held, that she took an estate in fee-simple in the house—*Reay* v. *Rawlinson*, 29 Beav., 88.

Contrary Intention.—A contrary intention is not shown merely because another devise in the same will contains words of limitation—*Wisden* v. *Wisden*, 2 Sm. and Giff., 396. In *Grosvenor* v. *Watkins*, L. R., 6 C. P., 500, a contrary intention was gathered from the will from the fact that an estate to one devisee could not come into existence unless another estate were construed to be a life-estate. See *Brook* v. *Brook*, 3 Sm. and Giff., 280.

A devise of the *income* of land passes the fee—*Mannox* v. *Greener*, L. R., 14 Eq., 456

Hindu law.—According to Hindu law, a devise in general terms without words of inheritance, or with words imperfectly describing an estate of inheritance, will pass the entire estate of the testator, unless a contrary intention appears from the context—Mayne's Hindu Law, § 357, citing *Tagore* v. *Tagore*, 9 B. L. R., 395; *Sursutty* v. *Poorno Chunder*, 4 W. R., 55.

According to the general Hindu law, in case of wills to which the Hindu Wills Act is not applicable, under a gift of immoveable property, the wife of the testator takes only a life-estate without power of alienation over it; whereas under a gift of moveable property she takes an absolute estate—*Koonjbehari Dhur* v. *Premchand Dutt*, I. L. R., 5 Calc., 684; (S. C.) 5 C. L. R., 561. In order to give his wife a more absolute estate, it is necessary for the husband to give her in express terms a heritable right or power of alienation—*Ibid.*

83. Where property is bequeathed to a person with a bequest in the alternative to another person, 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 or to a class of persons.

Illustrations.

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

A bequest is made to *A* or to *B*. *A* dies after the date of the will, and before the testator. The legacy to *B*.

v. *Nucella*, 1 Russ., 165; *Attwood* v. *Alford*, L. R., 2 Eq, 479.

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

In case of the original gift being to a class living at the testator's death, with a substitutional gift confined to the children of the persons comprised in the class, the substitution will have no effect in regard to those who never became members of the class—*Shergold* v. *Bone*, 13 Ves., 370; *Smith* v *Farr*, 3 Y. and C., Exch, 328 So, where the gift is to a class *or* their issue, and the gift is clearly substitutional, the issue of members of the class who were dead at the date of the will will not take—*Congreve* v. *Palmer*, 16 Beav., 435.

The section itself seems to contemplate the gift being in the first instance to *a* person, and not to a class of persons or to several individuals *nominatim*. It would seem, however, that where there is a gift to several persons *nominatim*, with a substitution of their issue, the fact that one of the persons so named is dead, will not prevent his issue from taking—*Hannan* v. *Simms*, 2 DeG. and J., 151; *Ive* v. *King*, 16 Beav., 46; *Hobgen* v. *Neale*, L. R., 11 Eq., 48.

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

(*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.

(*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.

Girdlestone v *Doe*, 2 Sim., 225; *Porter's Trust*, 4 K and J., 188; v. *Ridehalgh*, L. R., 9 Eq, 395.
As to substitution, see Theobald, 345.

(*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.

See *Smith* v. *Smith*, 8 Sim, 353; *Re Hotchkiss's Trusts*, L. R., 8 Eq., 643; *Habergham* v. *Ridehalgh*, L. R., 9 Eq., 395.

In illustration (*f*), the class is ascertained at the testator's death; in this illustration, at *B's* death—*Ive* v. *King*, 16 Beav., 46; *Hobgen* v. *Neale*, L. R., 11 Eq., 48.

This section applies to Hindus, etc., under the Hindu Wills Act, XXI of 1870, s 2.

In England, under a gift to a person or class of persons, *or* to another person or class of persons, 'or' was formerly read '*and*,' the legatees taking equally—*Eccard* v. *Brooke*, 2 Cox, 213; *Horridge* v. *Fergusson*, Jac., 583. The principle, however, of these cases has not been followed, and now, in such cases, '*or*' is considered in general as substitutional, as in a gift to *A or* his issue or children, *A* will be entitled, if living at the death of the testator or period of distribution; if not, his issue or children will be entitled—*Montague* v. *Nucella*, 1 Russ., 165; *Gittings* v. *MacDermot*, 2 M. and K., 69; *Whitcher* v. *Penley*, 9 Beav., 477; *Blundell* v. *Chapman*, 10 Jur., N. S., 332. So under a gift to the children *or* grandchildren of *A*, if all the children of *A* are living, they alone will be entitled—*Margitson* v. *Hall*, 10 Jur., N. S., 89.

In some cases gifts in the alternative have been held void for uncertainty—1 Jarm., 372, 514.

It appears to be now established, that when there is a bequest to *A or* his heirs, the '*or*,' generally speaking, implies a substitution, so as to prevent a lapse—Williams on Executors, 1118-19, 1216.

A gift to *A or B*, or to *A* or his children, as *C* may appoint, is not substitutional, and in default of appointment it goes among all the appointees equally—*Penny* v. *Turner*, 2 Ph., 493; see *White's Trusts*, Joh., 656.

Contrary intention.—Where it appears from the will that the original and substituted legatees are to take co-ordinately, '*or*' will be read '*and*'—*Richardson* v. *Sprang*, 1 P. Wms., 433. There, the gift was to such of the testator's daughters *or* daughters' children as should be living at her son's death "without considering any superiority or eldership whatever."

So a gift to children living at the period of distribution *or their legal representatives* is construed a gift to children then living and the issue of those then dead—*King* v. *Cleveland*, 4 DeG. and J., 477; *Re Philp's Will*, L. R., 7 Eq., 151; *Burt* v. *Hellyar*, L. R., 14 Eq, 160; see *Wingfield* v. *Wingfield*, L. R., 9 Chan. Div., 658.

If the testator, at the time of making his will, must have been acquainted with the fact of the death of the parent to whom the gift is given in the first instance, the rule will be departed from—*Re Jordan*, 8 L. T., N. S., 307, cited by Theobald, 344—5.

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.

(*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*.

This section, which applies to every kind of property, agrees generally with the law in England as to personalty. It does not apply to Hindus, etc. See Hindu Wills Act, XXI of 1870, s. 2.

By the English law, the general rule is, that where the personal property is given in terms that would carry the fee-simple in land, the gift is absolute—*Appleton* v. *Rowley*, L. R., 8 Eq., 139. A bequest to 'A and his legal representatives' (*Taylor* v *Beverley*, 1 Coll., 108), to 'A and his heirs or representatives' (*Appleton* v. *Rowley*, L. R., 8 Eq, 139; *Lugar* v. *Harman*, 1 Cox, 250), gives the absolute interest, the additional words being merely words of limitation, and not of purchase. So a bequest to *A* and the heirs of his body will pass an absolute estate—*Seale* v. *Seale*, 1 P. W., 290.

Again, if there be a gift for life, and then to his executors or administrators or to his personal representatives (*Arern* v. *Lloyd*, L. R., 5 Eq., 383; *Alger* v. *Parrot*, L. R., 3 Eq., 328, or to *A* for life, and after his decease to the heirs male of his body, *A* takes an absolute estate—*Bulton* v. *Twining*, 3 Mer, 179.

By English law, however, where there is a bequest to 'A and his children' *simpliciter*, and there are no children living at the date of the will, but there are at the testator's death, *A* and such children will take jointly—*Buffar* v. *Bradford*, 2 Atk., 220; *De Witte* v. *De Witte*, 11 Sim., 41; *Mason* v. *Clarke*, 17 Beav., 126; *Wild's case*, 6 Rep., 16b, 17b; *Campbell* v. *Boushell*, 27 Beav., 325, *Byng* v. *Byng*, 10 H. L. Ca., 171. If there are no children then living, *A* takes absolutely, though he may afterwards have children—*Scott* v. *Scott*, 15 Sim., 47; *Wild's case*, *supra*. It seems, that a slight variation is sufficient to change the construction and give a life-estate to the parent with remainder to his children (*Ward* v. *Grey*, 26 Beav., 485), whether born in the testator's lifetime or after his decease—*Vaughan* v. *Marq. of Headfort*, 10 Sim., 639. 642; *Jeffrey* v. *De Vitre*, 24 Beav., 296.

In England, where real estate is devised to a man and his children, he having none at the time, the word 'children' is taken as a word of limitation. But if the parent has children at the time of the d
, *primâ facie*, he and his children take jointly.

The rule in *Wild's case* does not apply to personalty—*Audsley* v. , 1 D. F. and J., 226; *Agnew* v. *Matthews*, 1 Mad. H. C. R., 17.

The word 'issue' imports, *primâ facie*, all descendants. As regards al estate in England, it is in general construed as a word of limitation and as synonymous with 'heirs of the body.' See *Slater* v. *Dangerfield*, 15 M. and W., 263, 272. Under a bequest to *A* and his issue, an absolute interest passes to *A*—*Lyon* v. *Mitchell*, 1 Madd., 467; *Re Stanhope's Trusts*, 27 Beav., 201.

Contrary intention.—If it appears from the context of the will that the testator did not use the words as words of limitation, but that the parent and issue take concurrently (*Butler* v. *Ommaney*, 4 Russ., 70; *Clay* v. *Pennington*, 7 Sim., 370; *Law* v *Thorp*, 27 L. J., Chan., 649); or that the *issue*, &c., are to take on the testator's death as purchasers or by substitution (*Re Stanhope's Trusts*, 27 Beav, 201), the 'issue,' &c., will take by purchase.

So, where there is a gift of personalty to *A* for life, and after his death to his issue (*Knight* v. *Ellis*, 2 Bro C. C., 569; see illustration (c) to this section), or to *A* for life and the issue of her body lawfully begotten, on failure of which to revert to my heirs, *A* will take only a life-interest—*Ex parte Wynch*, 5 DeG. M and G., 188; *Goldney* v. *Crabb*, 19 Beav., 338; see *Herrick* v. *Franklin*, L. R., 6 Eq., 593.

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.

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

This section applies to Hindus, etc., under the Hindu Wills Act, XXI of 1870, s. 2.

A gift to a class implies an intention to benefit those who constitute the class, and to exclude all others; but a gift to individuals described by their several names and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named. In a gift to a class you look to the description and enquire what individuals answer to it, and those who do answer to it, are the legatees described . . If a testator give a legacy to be divided amongst the children of *A* at a particular time, those who constitute the class at the particular time will take; but if the legacy be given to *B*, *C*, and *D*, children of *A*, as tenants-in-common, and one die before the testator, the survivors will not take the share of the deceased child—*Barber* v. *Barber*, 3 My. and Cr., 688, *per* Lord Cottenham. Generally every person who *at the time of the testator's death* falls within the described class of 'children,' will be entitled; but where it appears from express declaration, or clear inference upon the will, that the testator intended to confine his bequest to those only who answered the description at the *date of the instrument*, such intention must be carried into effect—*Sherer* v. *Bishop*, 4 Bro C. C., 55. A Court of Equity, however, is always anxious to include all children in existence at the time of the testator's death, and particularly when he stands in the relation of parent to child. Presuming that he intended to do his duty in providing for all his children at his death, the Court will lay hold of any general expression to give effect to his presumed intention, and will not permit such general expression to be narrowed by the context—
v. *Cock*, 7 Ves., 609; *Freemantle* v. *Taylor*, 15 Ves., 363;

In re Deighton's Trust, L. R., 2 Chan. Div., 783 ; Williams on Executors, 1093-4.

A child *en ventre sa mère* is considered to be in existence at the testator's death (*Clarke* v. *Blake*, 2 Bro. C. C., 319 ; *Pearce* v. *Carrayton*, L. R., 8 Chan., 969 ; see *In re Emery's Estate*, L. R., 3 Chan. Div., 300 ; see s. 86, *infra*), and will be included in a bequest to children. Children not *en ventre sa mère*, and born afterwards, will not be included, although the bequest be to children 'begotten or to be begotten' or 'that may be born'—*Sprackling* v. *Ranier*, 1 Dick, 344 ; *Early* v. *Middleton*, 14 Beav., 453. "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"—s. 98, *infra*.

Any child who falls under the description at the period of distribution is entitled, although not born at the testator's death (*Hughes* v. *Hughes*, 14 Ves., 256) ; but no child born after the period is entitled (*Gimblett* v. *Purton*, L. R., 12 Eq., 427 ; see *Iredell* v. *Iredell*, 25 Beav., 485 ; *Bateman* v. *Gray*, L. R., 6 Eq., 215), even where the words 'born or to be born' are added—*Whitbread* v. *St. John*, 10 Ves., 152 ; *Parsons* v. *Justice*, 34 Beav., 598.

A testamentary gift by a married man to his 'family' should be read as a gift to his children to the exclusion of his wife—*In re Hutchinson*, L. R., 8 Chan. Div., 540

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

Construction of terms.

apply to a child in the womb who is afterwards born alive.

This section does not apply to Hindus, etc. See Hindu Wills Act, XXI of 1870, s. 2.

The words 'child' or 'children' are in general construed strictly as not extending further than the immediate descendants of the persons named—*Pride* v. *Fooks*, 3 DeG. and J., 252. They do not include grandchildren or great grandchildren—*Holland* v. *Wood*, L. R., 11 Eq., 91. The words may be used as words of limitation in the sense of issue—*Byng* v. *Byng*, 10 H. L. C., 171; see illus. (*a*) to s. 84, *supra*, and notes thereto.

'Children' *simpliciter* will include children by any marriage (*Critchett* v. *Taynton*, 1 R. and My., 541), unless there is a clear intention to exclude children by a particular marriage (*Stavers* v. *Barnard*, 2 Y. and C., 539). See *Isaac* v. *Hughes*, L. R., 9 Eq., 191.

It has been held, that where the gift is to the children of a person deceased, who has only grandchildren living at the time, that the grandchildren will take (*Berry* v. *Berry*, 3 Giff., 134), and they will take to the exclusion of great grandchildren (*Fenn* v. *Death*, 23 Beav., 73).

So 'grandchild' and 'grandchildren' are strictly construed and limited to their primary meaning of children of children—*Orford* (*Earl of*) v. *Churchill*, 3 V. and B., 59.

In *In re Blower's Trusts*, L. R., 6 Chan., 351, the Court, reversing the decision of STUART, V. C., L. R., 11 Eq., 97, confined nephews and nieces to their primary signification, so as not to include great nephews or great nieces.

'Cousins' *primâ facie* mean 'first cousins'—*Stoddart* v. *Nelson*, 6 DeG. M and G., 68. 'Cousins-german' do not include the descendants of first cousins—*Sanderson* v. *Bayley*, 4 M. and C., 56.

Under a gift to 'first and second cousins,' all of the degree of second cousins will be included—*Charge* v. *Goodyer*, 3 Russ., 140.

'Second cousin' does not include a first cousin once removed—
, *Corporation of*, v *Collins*, 15 Sim., 541.

The word 'issue' may be used as a word of limitation—*Slater* v.
, 15 M. and W., 263; see illus. (*a*) to s. 84, *supra*.

A gift to the 'issue of *A*' will comprise all those who can claim as
from, or through the person to whose issue the bequest is
v. *Norbury*, 13 Ves., 340; Williams on Executors, 1116.

Under a gift to *A's* widow for life, and after her decease to her 'offspring,' it was held, that *A's* children, who survived him, were entitled to the exclusion of grandchildren—*Lister* v. *Tidd*, 29 Beav., 618;
s v. *Beasley*, 3 Drew., 7.

It seems 'issue' will be restricted to mean children, if it appear that the testator intended so to use it, as where the word is coupled with 'parent'—*Sibley* v. *Perry*, 7 Ves., 522; *Martin* v. *Holgate*, L. R., 1 H. 175; *Heseman* v. *Pearse*, L. R., 7 Chan., 275; 2 Jarm., 106.

But the words 'issue lawfully begotten' will not limit the bequest to the issue of *A*—*Evans* v *Jones*, 2 Coll., 516.

A gift to 'the descendants of *A*, is a gift to all descendants living at the period of distribution, and they take *per capita*—*Crossly* v. *Clare*, Amb., 397; *Butler* v. *Stratton*, 3 Bro. C. C., 367.

According to the rule as to *half-blood*, which is the same in India as in England, gifts to *brothers and sisters* generally will include half-brothers and sisters, and their children will take under gifts to nephews and nieces—*Grieves* v. *Rawley*, 10 Ha., 63, 66. There must, however, be a blood-relationship, so that widows or widowers of deceased brothers or sisters will not be entitled under such gifts—*Hussey* v. *Berkeley*, 2 Ed., 194.

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.

Words expressing relationship denote only legitimate relatives, or failing such, relatives reputed legitimate.

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*.

(*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.

(*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.

(*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.

(*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 the child to be born of a woman, who never becomes his wife. The bequest is void.

In case of illegitimate children, the reputation of being the children of a particular person must, under this section, have been acquired at *the date of the will*. Accordingly, the cases in England of bequests to future illegitimate children born between the date of the will and the testator's death, being held good as to children who have acquired the reputation of being the children in question, do not apply. See *Occlestone* v. *Fullalove*, L. R., 9 Chan., 147; *In re Goodwin's Trusts*, L. R., 17 Eq., 345; see also the judgment of Lord Selborne and the *dicta* of Lords Chelmsford and Colonsay in *Hill* v. *Crook*, L. R., 6 H. of L., 278. The child in illustration (*g*) could not, of course, at the date of the will, have acquired the reputation of being the child of the testator.

Prior to the decision of *Occlestone* v. *Fullalove*, L. R., 9 Chan., 147, it was held, that a gift to prospective illegitimate children was void as being against public policy—*Medworth* v. *Pope*, 27 Beav., 71; *Pratt* v. *Matthew*, 22 Beav., 32

Illustration (*f*) follows the case of *Gordon* v *Gordon*, 1 Merivale,

In *Pratt* v *Matthew*, 22 Beav, 339. Lord Romilly said:—"It is, undoubtedly, true, that a child *en ventre sa mère* may acquire a name by reputation although illegitimate;" and a similar proposition was laid down by Lord St. Leonards in *In re Connor*, 2 J. and Lat., p. 460.

(*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.

Although a bequest, without reference to the parent, to the child of which a certain woman is *enceinte*, is good, as in this illustration, it seems that a gift to a child of which a woman is *enceinte* by *a particular person* is void for uncertainty,—*e.g.*, a bequest to 'such child as *A*' (not by the wife of the testator) may happen to be *enceinte* of by me." *Earle* v. *Wilson*, 17 Ves.,

This section does not apply to Hindus, etc. See Hindu Wills Act, XXI of 1870, s. 2.

The rule cannot be too broadly stated, that the description of 'child,' 'son,' 'issue,' and every word of that species must be taken *primâ facie* to mean legitimate child, son, issue—*per* Lord Eldon, *Wilkinson* v. *Adam*, 1 V. and B., 422, p. 462. This rule will not yield to mere conjecture or to anything short of the clearest evidence of an opposite intention—*per* Lord Chelmsford, in *Hill* v *Crook*, L. R., 6 H. L., 276. The intention may be shown in the will either by express designation or by

But extrinsic evidence can be received only for the purpose of g who had acquired the reputation of being the children

the person named in the will (*Wilkinson* v. *Adam*, 1 V. and B., 422; *Swaine* v. *Kennerley*, *ib.*, 469), and that the testator had knowledge of the fact of the reputation (*Re Herbert's Trust*, 1 John and H., 121; *Tytler* v. *Dalrymple*, 2 Mer., 419).

In the case, however, of *Barlow* v. *Orde*, 5 B. L. R. (P. C.), 1, in which the Court had to consider the meaning of the word 'children' in the will of a Col. Skinner, whose origin was unknown, and who died in 1841, leaving illegitimate children whom he had so recognized, the Privy Council held that English law did not apply to him, and that from the text and surrounding circumstances the word 'children' might be interpreted as referring to illegitimate children. The case of *Barlow* v. *Orde* was a case to which the Succession Act did not apply.

Illegitimate children.—In a bequest to 'all the children of *A*,' where there are both legitimate and illegitimate children, the latter are excluded, and no extrinsic evidence is admissible to show the intention of the testator—*Ellis* v. *Houston*, L. R., 10 Chan. Div., 236; *Cartwright* v. *Vawdry*, 5 Ves., 530. In *Laker* v. *Hordern*, L. R., 1 Chan. Div., 644, the testator gave all his property to his daughters, and there were illegitimate, but no legitimate, daughters; and BACON, V. C., held, that the illegitimate daughters took under the bequest; but that case was dissented from by MALINS, V. C., in *Ellis* v. *Houston*, on the ground (following *Dorin* v. *Dorin*, L. R., 7 H. L., 568) that as the testator was married, there was a possibility of his having legitimate daughters, who would take.

Where a testator made a special and distinct provision for *J. M.*, the illegitimate child of his daughter *A. J.*, the Court of Appeal held, that this was inconsistent with an intention to include *J. M.* in a subsequent general gift to *A. J.'s* children—*Megson* v. *Hindle*, L. R., 15 Chan. Div., 198.

The latter part of the section is not quite clear, as the last words, 'such relative' would, on a strict grammatical construction, appear to mean 'such legitimate relative.' If this be the proper construction, it would follow that where there were no legitimate relatives of the description in the will, the illegitimate 'child,' 'son,' 'daughter,' &c., must, in order to take under the will, have acquired the reputation of being the legitimate 'child,' 'son,' or 'daughter,' &c., at the date of the will. That such was the construction intended by the Legislature seems to be indicated by the marginal note to the section, that "words expressing relationship denote only legitimate relatives, or failing such, relatives *reputed legitimate*." This construction, however, is not borne out by the illustrations to the section, which follow the rule of English law, that where there are no legitimate relatives, the persons, who being illegitimate, have acquired at the date of the will the reputation, not necessarily of legitimacy, but of being the 'child,' 'son,' or 'daughter,' &c. (as the case may be) of the particular person, will take under the descriptions of 'child,' 'son,' or 'daughter,' &c.; see illustrations (*d*), (*e*), and (*f*), where the illegitimate children of *B* are declared to take under the description of 'children of *B*,' where they are reputed to be the *children* (not legitimate children) of *B*.—*Wilkinson* v. *Adam*, 1 V. and B., p. 452; *Earle* v. *Wilson*, 17 Ves., 528.

Intimation to the contrary in the will.—If illegitimate children are identified by name (see *Clifton* v. *Goodbun*, L. R., 6 Eq., 278; *Meredith* v. *Farr*, 2 Y. and C., 525), or other sufficient description, they will be entitled to take—*Metham* v. *D. of Devon*, 1 P. Wms., 529. Thus, where there is a bequest to the children of *A* now living, and *A* has only illegitimate children (*Dover* v. *Alexander*,

2 Hare, 252, *per* WIGRAM, V. C.), or to the children of a deceased person who had only illegitimate children (*Tytler* v. *Dalrymple*, 2 Mer., 419; *Edmunds* v. *Fenney*, 29 Beav., 233; Illustration (*d*)), or to the *children* (pl.) of a deceased person who had but *one* legitimate child and an illegitimate child (*Gill* v. *Shelley*, 2 Russ. and My., 336; *Leigh* v. *Byron*, 1 Sm. and Giff., 486), the illegitimate children will take under the will. Where the gift was to the testator's sister, by her maiden name, and her children, who were illegitimate, the children were held to be entitled—*Savage* v. *Robertson*, L. R., 7 Eq., 176; see *Laker* v. *Hordern*, L. R., 1 Chan. Div., 644. In *Wilkinson* v. *Adam*, 1 V. and B., 422 (already referred to), the testator, who was a married man, but had illegitimate children by *A*, after making specific devises to his wife, and also to *A*, devised the whole of his estate in trust for the children he might have by the said *A*, and the illegitimate children at the date of the will were held to be entitled. See also *Lepine* v. *Bean*, L. R., 10 Eq., 160.

The intention to include illegitimate children need not be expressed in language which is necessarily susceptible of only one interpretation, but it is sufficient if it is indicated in a way that excludes the probability of an opposite intention having existed in the mind of the testator—*per* Lord CHELMSFORD in *Hill* v. *Crook*, L. R., 6 H. of L., 277. In that case the testator's daughter had gone through the marriage ceremony with *A*, her deceased sister's husband, and the gift was to my "daughter *B*, the wife of *A*," and then for "the children of my said daughter *B*." *B* had children before the date of the will, and they were held to be entitled under the description of the will. There could be no possibility of *A* and *B* having legitimate children between them, as the marriage was invalid. The same rule would not apply if *A* and *B*, though unmarried at the date of the will, might have married and had legitimate children; see *In re Ayles' Trust*, L. R., 1 Chan. Div., 282. Again, illegitimate children will take with legitimate under a bequest to the children legitimate or illegitimate of *A*; the latter class, however, being confined to those born at the date of the will—*Barnett* v. *Tugwell*, 31 Beav., 232; 8 Jur., N. S., 787.

If it is once ascertained that illegitimate children are to take with legitimate children, a reference to the 'said children' will comprise both classes—*Owen* v. *Bryant*, 2 De G. M and G., 697; see, however, *Bagley* v. *Mollard*, 1 R and M., 581. Thus, also, a natural daughter, included by description in a prior class of daughters, was held entitled to take with legitimate daughters under a subsequent general gift to 'my daughters'—*Warts* v. *Cubbit*, 19 Beav., 421; *Tugwell* v. *Scott*, .. 141.

A bequest by an unmarried man or woman to his or her children can only take effect (if at all) in favour of illegitimate children, since, under s. 56 of this Act (see s. 18 of the Wills Act, 1 Vict., c. 26) a will not made in exercise of a power of appointment is revoked by the testator's marriage. This case is analogous to the where there is no possibility of legitimate children to satisfy the terms of the bequest. See *Pratt* v. *Mathew*, 22 Beav., 328.

If there is no evidence on the face of the will to show that illegitimate children are intended, only legitimate children of a living person will take under a gift to his children. Thus, where the testator bequeathed an annuity to the 'eldest child of *B*,' and *B* had several illegitimate children at the date of the will, who were known to the testator, but had no others, either then or at the testator's death, the bequest failed—*Godfrey* v. *Davis*, 6 Ves., 43. Where the testator had three illegitimate children and one legitimate child, a bequest to all and every, his child and children, at his death, was held not to

the illegitimate children, though there was a direction to pay each child one-fourth part of the income of his property—*Cartwright* v. *Vawdry*, 5 Ves., 530; *Re Wells*, L. R., 6 Eq., 599. So, in *Dorin* v. *Dorin*, L. R., 7 H. of L., 568, the testator, who had two illegitimate children by a certain woman, married her, and the day after his marriage made a will, in which, after leaving her his real and personal property for life, he said,—"I leave her at liberty to direct the disposal of the property amongst *our* children by will at her death in such manner as she shall think *fit*, and should she make no will I desire that the property shall be divided equally *among children by her*." He had no child born after the date of the will, but he lived for some time after making it, and always treated the two illegitimate children as his own children. The Court held, that subject to the life-interest of the wife, the real and personal property of the testator was undisposed of.

Where there is a bequest to the children of a person who has illegitimate children at the time of the will, the fact that that person is not likely from old age or any other cause to have other children, is not sufficient to entitle the illegitimate children to take under a bequest to their mother and her children—*Paul* v. *Children*, L. R., 12 Eq., 16; *In re Overhill's Trust*, 1 Sm. and Giff, 362, *per* STUART, V.C.

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:—

Rules of construction where a will purports to make two bequests to the same person.

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.

See *Duke of St. Albans* v. *Beauclerk*, 2 Atk., 638; *Suisse* v. *Lowther*, 2 Hare, 432.

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.

Holford v. *Wood*, 4 Ves., 76; *Garth* v. *Meyrick*, 1 Bro. C. C., 30; *Manning* v *Thesiger*, 3 M. and K., 29.

* This section and ss. 89 to 103 (both inclusive) apply to the of Hindus, &c., in the Lower Provinces of Bengal and in the towns of and Bombay—Act XXI of 1870, s. 2.

***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.**

Curry v. *Pile*, 2 Bro. C. C., 225.

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.

Hooley v. *Hatton*, 1 Bro. C. C., 389*n.*; *Cresswell* v. *Cresswell*, L. R., 6 Eq., 69; *Wilson* v. *O'Leary*, L. R. 12 Eq., 525; L. R., 7 Chan., 448.

Explanation.—In the four last rules, the word 'will' does not include a 'codicil.'

This section applies to Hindus, &c., under the Hindu Wills Act, XXI of 1870, s. 2.

It follows the English law. See Williams on Executors, 1295, 1302, and notes to *Hooley* v. *Hatton*, 2 White and Tud. L. C., 321.

The intention of the testator, when it can be collected from the will, overrides any presumption arising under these rules—*Yockney* v. *Hansard*, 3 Hare, 620. And although two legacies given by different instruments are equal, if they were intended by the testator to be cumulative (*Lobley* v *Stocks*, 19 Beav., 392), or if, though differing in amount, the latter was intended to be substitutional (*Russel* v. *Dickson*, 4 H. L. C., 293), the intention will be carried into effect. See *Whyte* v. *Whyte*, L. R., 17 Eq., 59; White and Tud. L. C., 334.

Where the gift was to trustees, and the legacies, which were of equal amount and given by the same will, were introduced by the words 'upon trust to pay,' and 'upon further trust to pay,' the legatee was held entitled to both—*Barkenshaw* v. *Hodge*, 22 W. R., 484, cited by Theobald, 36.

As to extrinsic evidence of intention.—Where the Court itself raises the presumption against double legacies, as where, for instance, two legacies of equal amount are given by one instrument, parol evidence is admissible to show that the testator intended the legatee to take both, for that is in support of the apparent intention of the will; but where the Court does not raise the presumption, as where, for instance, legacies of equal amount are given *simpliciter*, by different instruments, parol evidence is not admissible to show that the testator intended the legatee to take one only, for that is in opposition to the will. 2 White and Tud. L. C., 336.

In *Hurst* v. *Beach*, 5 Madd., 351, where a legacy of £300 was given by a will, and a legacy of £500 by a codicil, evidence was tendered to show that the testatrix did not mean the second legacy as a further gift of £500. Sir John Leach, M.R., said,—"Such evidence cannot be received, without breaking in upon the primary rule, that parol evidence is not admissible against the expressed effect of a written instrument." See *Gay* v. *Sharp*, 1 My. and K., 589; *Hall* v. *Hill*, 1 Dr. and War., 94, 116; and *Lee* v. *Pain*, 4 Hare, 216.

This section expressly declares that the rules shall apply if there is in the will to show what the testator i

Extrinsic evidence is

place itself in the position of the testator—*Martin* v. 2 Beav., 215; see s. 62, *ante*, and notes thereto.

* Gifts by distinct instruments, though equal in amount, if

(*a.*) *A* having ten shares, and no more, in the Bank of Bengal, made his will, which contained, 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.

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*.

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., 76; *Manning* v. *Thesiger*, 3 My. and K., 29.

(*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.

Yockney v. *Hansard*, 3 Hare, 622; *Curry* v. *Pile*, 2 Bro. C. C., 228.

(*e.*) *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.

Ridges v. *Morison*, 1 Bro. C. C., 388.

(*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. *Harroby*, 1 DeG. F. and J., 187; *Cresswell* v. *Cresswell*, L. R., 6 Eq., 69.

(*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.

Masters v. *Masters*, 1 P. Wms., 423.

(*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.

Hodges v. *Peacock*, 3 Ves., 735. Generally a difference in the way in which two gifts are given is in favour of their being cumulative. See Illus. (*g*).

(*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.

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.

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.

This is the case of *Leyton* v. *Bathe*, 3 M. and 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.

This is the case of *Boys* v. *Morgan*, 9 Sim., 289.

(*c.*) *A* bequeaths all his property to *B*, except certain stocks and funds, which he bequeaths to *C*. *B* is the residuary legatee.

This section applies to Hindus, etc., under the Hindu Wills Act, XXI of 1870, s. 2.

It is sufficient if the intention of the testator be plainly e
in the will, that the surplus of his estate, after payment of debts and

legacies, shall be taken by a person there designated—Williams on Executors, 1460, citing *Hearne* and *Wigginton*, 6 Madd., 120.

A testatrix made a will which she declared to be her 'last will and testament,' and thereby appointed an executor, and after giving legacies, proceeded as follows: "After these legacies and my doctors' bills and funeral expenses are paid, I leave (*sic*) to my sister *M. P.*" and this was held to be a good gift of the residue to *M. P.*—*Re Bassett's Estate*, L. R. 14 Eq., 54.

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.

Illustration.

A, by his will, bequeaths certain legacies, one of which is void under the hundred and fifth section, 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 zamindari, which belongs to him at the time of his death. *B* is entitled to the two legacies and the zamindari as part of the residue.

This section applies to Hindus, etc, under the Hindu Wills Act, XXI of 1870, s 2.

A residuary clause will comprise all property which is not effectually disposed of by the will, whether by reason of lapse, remoteness of the bequest, or otherwise—*Bernard* v. *Minshull*, 1 John., 276; see *Leake* v. *Robinson*, 2 Mer., 392

A will speaks from the death of the testator (s. 77, *supra*). Accordingly when property has ceased to answer the terms of a specific bequest, as where stock is specifically given, but in the lifetime of the testator is converted into money, it falls into the residue—*Mayfield* v. *Newton*, 2 Coll., 520 (note). When all *except* certain property is by a residuary clause, and the excepted property is given to a le who dies in the lifetime of the testator, the excepted property will pass under the residuary clause—*Evans* v. *Jones*, 2 Coll., 516; *Thompson* v. *Whitelock*, 4 DeG. and J., 490.

But where the bequest of the residue or any part of it fails, it does not again become subject to the residuary gift. Thus, where part of it lapses, it goes to the next-of-kin—*Lightfoot* v. *Burstall*, 10 Jur., N. S., 308; *Sykes* v. *Sykes*, L. R., 3 Chan., 301. See s. 95, *post*.

A testatrix gave certain lands in the parish of *H* to *A*, *B*, and *C*, as joint tenants-in-fee, and devised to the plaintiff "the rest of my freehold hereditaments in the parish of *H*, and all my freehold hereditaments in the parishes of, &c." The devise to *A*, *B*, and *C* having been declared void, it was held, that the lands comprised in that devise did not pass under the gift of the "rest of my freehold hereditaments in the parish of *H*," but was undisposed of—*Springett* v. *Jennings*, L. R., 6 Chan., 333. That case was decided under s. 25 of the Wills Act, which is similar, as to real property, to s. 90 of this Act. Mr

L. J., was of opinion, that the section only applied where there was "what might be called a universal residuary devise,—that is to say, a devise of all the residue of the testator's lands."

Residuary gift of surplus.—Where a will, after, making a number of bequests, directed that "should there be any surplus after the above expenditure," that surplus should go in a certain and legitimate way, it was held, that the gift of the 'surplus' was a gift of the residue, and that the preceding bequests would, in the event of their proving invalid, fall into the residue, and pass with it under the will—*Dwarkanath Bysack* v. *Burroda Persaud Bysack*, 1 C. L. R., 566; (S. C.) I. L. R., 4 Calc., 443; see *Chapman* v *Brown*, 6 Ves., 404; *Mitford* v. *Reynolds*, 1 Ph., 185; *Fisk* v. *Attorney-General*, L. R., 4 Eq, 521; *Sadler* v. *Turner*, 8 Ves, 617.

Under a residuary bequest, a legatee is entitled to immoveable as well as moveable property—*Munmohun Ghosal* v. *Pureshnath Roy*, 22 W. R., 174.

A residuary gift passes property over which the testator has a general power of appointment under s. 56, and which he has ineffectually attempted to appoint. Thus, where a testatrix, having a power of appointment over a sum of stock, appointed the stock to her sons, *A* and *B*, and she left the residue of her property to *A*, and *B* died before her,—it was held, that *A* was entitled as residuary legatee to the share intended for *B*—*Spooner's Trust*, 2 Sim., N. S., 129.

In England, where a testator shows an intention not to include certain property in a residuary bequest, effect will be given to his intention—*Circuitt* v. *Perry*, 23 Beav., 275; *Davers* v. *Dewes*, 3 P. Wms., 40. This section, however, unlike s. 25 of the English Wills Act, is imperative.

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.

This section applies to Hindus, etc., under the Hindu Wills Act, XXI of 1870, s. 2.

The Courts, from the earliest times, have always been inclined to decide that estates devised were vested—*Duffield* v. *Duffield*, 3 Bligh., N. S., 331, *per* Best, C. J.

"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 a 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*,—*i. e.*, without any intimation of a desire to suspend or postpone its operation, confers an immediately vested interest."—1 Jarm., 799. A mere direction to pay a legacy within twelve months or the like, does not postpone the vesting, for this merely gives the time usually allowed to executors realize the assets—*Garthshore* v. *Chalie*, 10 Ves., 13.

The use of the words 'to be paid' in this section would seem to confine its operation to pecuniary legacies; but it is submitted that the same principle which has always guided the English Courts would be applied here in the case not only of bequests of all kinds of moveable property, but also of devises of immoveable property.

The subject of vesting in case of legacies, where the payment or possession is postponed, or where the legacies are contingent on a specified uncertain event, is dealt with in Part XIII, *post*.

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.

So, where a bequest is to "*A* and his executors or administrators" (*Elliot* v. *Davenport*, 1 P. Wms., 83), or to *A* and his heirs or representatives, and *A* dies before the testator, or happens to be dead at the date of the will, the bequest lapses—*Appleton* v. *Rowley*, L. R., 8 Eq., 139. Such bequests, it is to be observed, give *A* the whole interest; see s. 84, *supra*.

(*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

(*d.*) A sum of money is bequeathed to *A* for life, and after his death to *B*. *A* dies in the lifetime of the testator. *B* survives the testator. The bequest to *B* takes effect.

(*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 lifetime 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

There is no evidence to show which died first. The legacy will lapse.

See Taylor on Evidence, pp. 208—11.

This section applies to Hindus, etc., under the Hindu Wills Act, XXI of 1870, s. 2.

The doctrine of lapse applies not only to personal estate, but also to real estate (*Goodright* v. *Wright*, 1 P. Wms., 397; *Brett* v. *Rigden*, Plow., 340), and to cases of appointments by way of devise or bequest under powers—*D of Marlborough* v. *Ld Godolphin*, 2 Ves. Sen., 61. In case of powers, the appointee must survive the donee of the power in order to take—*Freeland* v. *Pearson*, L. R., 3 Eq., 658.

If the devisee or legatee is dead at the date of the will, although the words are to "*M. his executors, administrators, and assigns*," the interest given will lapse—*Maybank* v *Brooks*, 1 Bro. C. C., 84; see illustration (*b*).

It has been held, that parol evidence is not admissible to show that the testator knew at the time of the making of the will that the legatee was dead *Maybank* v *Brooks*, 1 Bro. C. C., 84

A bequest to a debtor of the *debt* due from him will lapse like any other legacy—*Elliot* v. *Davenport*, 1 P. Wms., 83.

Intention of testator that legacy shall not lapse—In *Browne* v *Hope*, R., 14 Eq., 343, where the testator gave by will the residue of his tes to trustees, to pay the same to seven legatees named, in equal shares, as tenants in common, and their respective executors, administrators, and assigns, and declared that such shares should be vested in each legatee immediately upon the execution of the will,—it was held, that the share of one of the legatees who died after the date of the will, but before the testator, did not belong to her legal representative, but had lapsed Wickam, V. C., said,—"A testator may prevent a legacy from lapsing, but the authorities show he must do one of two things: he must in clear words exclude lapse, or he must clearly indicate who is to take in case the legatee should die in his lifetime" (p. 347).

Thus, a bequest to such persons as *A* shall by deed or will appoint, and, in default, to his next-of-kin, will go to the next-of-kin in the event of *A* predeceasing the testator—*Edwards* v. *Saloway*, 2 Ph., 625; *Jones* v. *Southall*, 32 Beav., 31.

A mere declaration that the gift shall not lapse is not effectual, see *Aspinall* v *Duckworth*, 35 Beav., 307; but if the testator, after such a declaration against lapse, gives a legacy to *A* and his executors and administrators, this will be sufficient to show that the executors and administrators were to take in the event of *A*'s death—*Sibble* v. *Cook*, 3 Atk., 572

Where a bequest is for the payment of debts to creditors, although the debts may have been discharged by a certificate in bankruptcy (*Re Sowerby's Trusts*, 2 K. & J., 630), or barred by limitation, there will no lapse in the case of creditors who do not survive the testator *Philips* v. *Philips*, 3 Hare, 281; *Williamson* v. *Naylor*, 3 Y. & C.,); but then representatives will take. Where creditors have released their debts, they must claim as voluntary legatees, and their legacies will be subject to the general rule—*Coppin* v. *Coppin*, 2 P. Wms., 295.

The doctrine of lapse applies to contingent bequests—see illustration (*e*). Thus, in the case of a bequest to *A* on his accomplishing his apprenticeship, and in case he should die before he accomplish his apprenticeship, then to the other children, *A* died having accomplished his

apprenticeship in the testator's lifetime. The legacy was held to lapse—*Humberstone* v. *Stanton*, 1 V. & B., 385; see *Williams* v. *Jones*, 1 Russ., 517.

Where a bequest is in the alternative, as to *A* or his heirs, or to *A* or his issue, or to *A* or his children, the '*or*' is in general construed as substitutional (see s. 83 and illustration (*e*) to that section, *supra*), and the bequest will not lapse by reason of *A*'s death in the lifetime of the testator—*Gettings* v. *M'Dermott*, 2 M. & K., 69; *Re Porter's Trusts*, 4 K. & J., 188.

Where there is a life-interest followed by a substitutionary gift, as where there is a bequest of a life-interest to *A*, followed by a bequest to *B* or his heirs, this has reference to *B*'s dying in the lifetime of *A*, not of the testator, and if *B* predeceases the testator, the bequest will lapse—*Corbyn* v. *French*, 4 Ves., 418, 435; see *Ridsell* v. *Ariel*, 3 Madd., 404, as qualified by *Re Porter's Trusts*, 4 K. & J.,

A legacy does not lapse if one of two joint legatees die before the testator.

93. If a legacy be given to two persons jointly, and one of them dies before the testator, the other legatee takes the whole.

Illustration.

The legacy is simply to *A* and *B*. *A* dies before the testator. *B* takes the legacy.

Buffar v. *Bradford*, 2 Atk., 220

This section applies to Hindus, etc., under the Hindu Wills Act, XXI of 1870, s. 2.

It is not necessarily confined to a bequest *to two* persons jointly, but is, it is submitted, equally applicable to the case of a bequest to any number of persons jointly—see *Morley* v. *Bird*, 3 Ves., 628.

Where a bequest is to two or more as joint tenants, and the gift to one is revoked (*Humphrey* v. *Taylcur*, Amb., 136), or where one of the joint tenants is incapable of taking, because he has witnessed the will (*Young* v. *Davies*, 2 Dr. & Sm., 167; 9 Jur., N. S., 399), the survivor or survivors take the whole—*Fell* v. *Biddolph*, L. R., 10 C. P., 701.

But where there is a gift to legatees as tenants-in-common, as where a fund is to be divided among them *nominatim* in equal shares, if any of them die before the testator, what was intended for those legatees will lapse into the residue—*Bagwell* v. *Dry*, 1 P. Wms., 700; *Page* v. *Page*, 2 P. Wms., 488; *Appleton* v. *Rowley*, L. R., 8 Eq., 139. Where, however, the gift is to a *class* of persons as tenants-in-common, such class to be ascertained at the death of the testator or at any other period; in such case those answering the description at the time fixed will take the whole, notwithstanding the death of any of the class in the lifetime of the testator—*Shuttleworth* v. *Greaves*, 4 My. and Cr., 38; *Leigh* v. *Leigh*, 17 Beav., 605; *Fitzroy* v. *Duke of Richmond*, 27 Beav., 186; *Ramsay* v. *Shelmerdine*, L. R., 1 Eq., 129; *Dimond* v. *Bostock*, L. R., 10 Chan., 358.

Where the bequest is to tenants-in-common, with a clause of survivorship, as to *A* and *B*, share and share alike, and if either should die without leaving issue, his share to go to the survivor, the share of *A* predeceasing the testator will not lapse—*Buckham* v. *Buckham* v. *Ruckham* v. *De la Mare*, 10 Jur., N. S.,

A direction that the shares of any members of a class who die before the testator leaving issue will not lapse, will not have the effect of causing the shares of those who die before the testator without issue to lapse—*Aspinall* v. *Duckworth*, 35 Beav., 307; Theobald, 448.

The rule as to the survivorship among joint tenants applies 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, these take as joint tenants also. See Hawkins, 111.

94. But where a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then, if any legatee dies before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.

Effect in such a case, of words showing testator's intention that [illegible] be

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.

This section applies to Hindus, etc., under the Hindu Wills Act, XXI of 1870, s 2.

Generally, all expressions importing division by equal or unequal shares, or referring to the devisees as owners of respective or distinct interests, and even words simply denoting equality, will operate to create a tenancy-in-common. Thus, it has long been settled, that the words 'equally to be divided' (*Doe d. Lavernage* v. *Vaughan*, 5 B. and Ald., 464; see illustration to this section, or 'to be divided' (*Peat* v. *Chapman*, 1 Ves. Sen., 542; *Ackerman* v. *Burrows*, 3 V. and B., 54), will create a tenancy-in-common. So a devise or bequest to several persons 'equally amongst them' (*Warner* v. *Hone*, 1 Eq. Ca Ab., 293), or 'equally' (*Denn* v. *Gasken*, 2 Cowp., 657) or 'in equal moieties' (*Harrison* v. *Foreman*, 5 Ves., 207), or 'share and share alike' (*Heathe* v. *Heathe*, 2 Atk., 122) or 'respectively' (*Folkes* v *Western*, 9 Ves., 456), or with a limitation to their heirs 'as they shall severally die' (*Sheppard* v. *Gibbons*, 2 Atk., 441), or to 'several,' 'between,' or 'amongst' them (*Lashbrook* v. *Cock*, 2 Mer., 70; *Attorney-General* v. *Fletcher*, L. R., 13 Eq., 128; *Campbell* v. *Campbell*, 4 Bro. C. C., 15), or 'to each of their several heirs' (*Gordon* v *Atkinson*, 1 De G. and S., 478), or to 'each' of several persons (*Hatton* v. *Finch*, 4 Beav., 186), has held to make the objects tenants-in-common. 2 Jarman on Wills,

In all these cases, on the death of any legatee, so much of the legacy as was intended for him will fall into the residue, unless, as pointed out in the note to the preceding section, the bequest be to the objects as a class, in which case the individuals composing the class at the death of the testator, or at the period fixed for distribution, are

among them, whatever be their number, to the entirety of the subject of the gift. See *Shaw* v. *M'Mahon*, 4 Dr. and War., 431 ; *Knight* v. *Gould*, 2 My. and K., 295 ; *Re Coleman*, L. R., 4 Chan. Div., 165 ; 2 Jarman on Wills, 264.

The Courts will always lean in favour of a tenancy-in-common—*Jolliffe* v. *East*, 3 Bro. C. C., 25; see *per* LORD THURLOW, p. 26. Thus, in the case of *Booth* v. *Alington*, 27 L. J., Chan., 117, where the bequest was upon trust to pay, assign, and divide the same upon the death of the testator's daughter, unto and equally between all her children, if more than one, as *joint tenants*, and if but one then to such child, STUART, V. C., held, on the context of the will, that the use of the words 'joint tenants' should not be allowed to control the intention of the testator to create a tenancy-in-common previously expressed in the words 'pay,' 'assign,' and 'divide'.

95. When lapsed share goes as undisposed of.

Where the share that lapses is a part of the general residue bequeathed by the will, that share shall go 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.

This section applies to Hindus, etc., under the Hindu Wills Act, XXI of 1870, s. 2.

The rule laid down in it is the well-known rule which is illustrated in the case of *Skrymsher* v. *Northcote*, 1 Swanst., 566.

There the testator gave his residuary estate to his two daughters, but directed that if either of them should die leaving no issue, out of the moiety of her so dying, £500 should be paid to *H*, and that "the remainder of that moiety" should be paid to the other sister. The testator revoked the gift of £500 without making any fresh disposition of it, and one of the sisters died leaving no issue. It was held, that the £500 went to the next-of-kin. SIR J. PLUMER, M. R., said: "It seems clear on the authorities that a part of the residue, of which the disposition fails, will not accrue in augmentation of the remaining parts as a residue of a residue; but instead of resuming the nature of residue, devolves as undisposed of. Residue means all of which no effectual disposition is made by the will *other than the residuary clause*; but when the disposition of the residue itself fails, to the extent to which it fails, the will is inoperative (p. 570); see also *Sykes* v. *Sykes*, L. R., 3 Chan., 301.

If the residue be undisposed of, it must be divided among all the next-of-kin, notwithstanding that the testator has, by his will, directed that one of them shall take no share in his property—*Johnson* v. *Johnson*, 4 Beav., 318.

There may be a particular residue as distinguished from a general residue, and the particular residuary legatee may be entitled to the benefit of any failure of gift out of the particular residue. Thus, under a gift of certain specified property to *A*, after payment of particular legacies and of the general residue to *B*, *A* is entitled to the legacies which fail—*De Trafford* v. *Tempest*, 21 Beav.,

96. Where a bequest shall have been made to any child or other lineal ant 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.

not lapse on his death in testator's lifetime.

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 section applies to Hindus, etc., under the Hindu Wills Act, s. 2; and in applying it under that Act, the words 'son,' 'sons,' 'child,' and 'children' include an adopted child; and the word 'grandchildren' includes the children, whether adopted or natural-born, of a child, whether adopted or natural-born; and the expression 'daughter-in-law' includes the wife of an adopted son—Act XXI of 1870, s. 6.

The section is practically the same as s. 33 of the Wills Act, 1 Vict, c. 26, the words 'other lineal descendant' being substituted for 'other issue.'

Like the corresponding section of the Wills Act, it does not tute for the predeceased legatee the lineal descendant whose ence is the event or condition which excludes the lapse, but it renders the subject of the gift the absolute property of the predeceased legatee, and therefore disposable by his will notwithstanding his death before the death of the testator—*Johnson* v. *Johnson*, 3 Hare, 157. In *Re Mason's Will*, 34 Beav., 495, it was considered doubtful by ROMILLY, M. R., whether the will of a legatee who predeceased his father, the testator, should be construed according to the event, or whether it should be construed as if the legatee had survived the testator, or, in words, as if the testator had predeceased the legatee.

the deceased, a legatee under the will of her father, died in lifetime, leaving issue living at his death and also a husband, who died before the father, having made a will, the Court granted administration to the son of the deceased as if she had died immediately after the death of the testator—*In the Goods of Councill*, L. R., 2 P. and D., 310.

If the legatee has not made a will, the property will devolve as his property would, on his intestacy—*Winter* v. *Winter*, 5 Hare, 306; *den* v. *Wisden*, 2 Sm. and Gif., 396; *Mower* v. *Orr*, 7 Hare, 473.

It makes no difference that the legatee was dead at the date of the v. *Orr*, 7

This section applies to a testamentary appointment under a general power, though there is a gift over in default of appointment (*Eccles* v. *Cheyne*, 2 K. and J., 676), but not under a special power—*Griffiths* v. *Gale*, 12 Sim., 354; *Freeland* v *Pearson*, L R, 3 Eq., 658. It does not apply to a gift to a *class* (*Olney* v *Bates*, 3 Drew, 323; *Browne* v. *Hammond*, Johns., 215), for, under a gift to a class, the share to which a child would have been entitled had it survived did not lapse in consequence of his death in the testator's lifetime. See notes to last preceding sections.

To prevent the lapse of a legacy under this section, it is not necessary that the lineal descendant, who is alive at the death of the testator, should be the same lineal descendant who was alive at the death of the legatee It is sufficient that any lineal descendant—*e. g.*, a grandchild of the legatee—should be in existence at the death of the testator—*In the Goods of Parker*, 1 Sw and Tr., 523. "I think," said Sir C. Cresswell in that case, "it is a fair presumption that the intention of the Act was to preserve the legacy whenever there be any issue of the legatee alive at the death of the testator," p. 525

It is to be observed that a legacy under this section is a vested interest in the legatee, and passes to his representatives or under his will, as the case may be, and not to the issue whose existence prevents the lapse—*In the Goods of Parker*, 1 Sw. and Tr., 523.

The provisions of this section against the lapse of legacies to children render it necessary for a testator intending that a legacy to one child shall go over to another in the event of the death of the first legatee to express that meaning by his will—*In re More's Trust*, 10 Hare, 178. *See Fullford* v. *Fullford*, 16 Beav., 565.

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.

Bequest to *A* for the benefit of *B* does not lapse by *A*'s death in testator's lifetime.

This section applies to Hindus, etc., under Act XXI of 1870, s. 2.

Where a devise which lapses comprises the legal or beneficial ownership only, its failure creates a vacancy in the disposition only to that extent Thus, if a testator devise lands to the use of *A* in fee, in trust for *B* in fee, and *A* die in the testator's lifetime, the legal estate comprised in the lapsed devise to *A* devolves on his representatives charged with a trust in favour of *B*, whose equitable interest under the devise is not affected by the death of the trustee—1 Jarm., 344.

So, where a bequest is made to a man as trustee for another person, the legacy will not lapse by the death of the trustee in the testator's lifetime—*Eales* v. *England*, 2 Vern., 468; *Oke* v. *Heath*, 1 Ves. Sen., 140.

Again, where there is a gift to *A* charged with a legacy to *B*, and *A* dies in the lifetime of the testator, *B* will be entitled to the legacy—*Wigg* v. *Wigg*, 1 Atk., 382.

On the other hand, a devise of the legal estate or interest to a trustee will not be rendered void, although the *cestui que trust* predecease the

testator—*Doe* v. *Edlin*, 4 Ad. and E., 582. Thus, where there is a devise to *A* charged with a legacy to *B*, provided *B* attain a parage, the devise to *A* is absolute, unless *B* attain that age—*Tregonwell* v. *Sydenham*, 3 Dow. H. of L. Rep., 194.

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.

Exception.—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise, the property shall at that time go to such of them as 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.

(*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.

A sum of money was bequeathed to *A* for her life, 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*.

(*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.

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.

Chapman v. *Blisset*, Cas. Temp. Talbot, 145; *Wyndham* v. *Wyndham*, 3 Bro. C. C., 58.

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*.

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.

This section is embodied in the Hindu Wills Act, XXI of 1870, s. 2, and in applying it under that Act, the words 'son,' 'sons,' 'child,' and children include an adopted child: and the word 'grandchildren' includes the children, whether adopted or natural-born, of a child, whether adopted or natural-born; and the expression 'daughter-in-law' includes the wife of an adopted son.—Act XXI of 1870, s 6.

It deals with the construction and operation of gifts to a class, some of whom come into existence between the death of the testator and the time when the gift takes effect. See illustrations (*d*), (*e*), and (*h*).

The class must be a described class.

In a gift to a class you look to the description and enquire what individuals answer to it, and those who do answer to it are the legatees described—*Barber* v. *Barber*, 3 My. and Cr., 688, *per* LORD COTTENHAM. Thus, every person who at the time of the testator's death falls within the described class of 'children,' will be entitled (*Sherer* v. *Bishop*, 4 Bro. C. C., 55); and it makes no difference that the bequest is to children 'begotten' or 'to be begotten'—*Storrs* v. *Benbow*, 2 M. and K. 46; (S.C.) 3 DeG. M. and G., 390.

According to English law, if there are no children born at the death of the testator, or at the period of distribution, all children subsequently born are let in (*Weld* v. *Bradbury*, 2 Ver., 705; *Shepherd* v. *Ingram*, Amb, 448; *Hatcheson* v. *Jones*, 2 Madd., 124; *Wyndham* v. *Wyndham*, 3 Bro. C. C., 58); but under this section, if there be no object in being answering to the description of the class, the bequest is void. See illustrations (*b*) and (*f*).

The rule applies where the gift is of a particular sum to each member of a class, and the class is fixed at the death of the testator—v. *Bramham*, 2 Cox, 384; *Butler* v. *Lowe*, 10 Sim., 317.

If there be a preceding life or other interest, the distribution of the fund is suspended, and the class entitled will be the children, or as the case may be, living at the death of the testator, and also those born afterwards, but before the determination of the life or other prior interest—*Middleton* v. *Messenger*, 5 Ves, 136; *Walker* v. *Shore*, 15 Ves., 122; *Barnaby* v. *Tassel*, L. R., 11 Eq., 363. As the interests vest in each member of the class as he comes into being, although he may die before the period of distribution (*Attorney-General* v. *Craspin*, 1 Bro. C. C., 386; *Middleton* v. *Messenger*, 5 Ves, 136), the representatives of such as have died since the death of the testator will be entitled along with those alive at the period of distribution. See illustrations (*d*) and (*e*).

Where the distribution is to be made when all attain, or when the youngest attains, a particular age, all children will be admitted, and not merely those who happen to be living when the youngest attains the particular age—*Maunsaring* v. *Beevor*, 8 Hare, 44; *Hughes* v. *Hughes*, 14 Ves, 256.

Where the period of distribution is postponed until the members of a class—*e. g.*, children—attain a particular age, the rule is to let *all* in until there must be a distribution of a share to *one*. Accordingly, if any member of the class has attained that age at the death of the testator, the class is then ascertained—*Hogger* v *Payne*, 23 Beav., 474. If no child has attained that age, the class is ascertained as soon as any one child does, and all members of the class born at the death of the testator, or coming into existence before the first attains the particular age, are entitled, to the exclusion of those born afterwards (*Andrews* v. *Partington*, 3 Bro. C. C., 401; *Barrington*, v. *Tristram*, 6 Ves., 345; *Oppenheim* v. *Henry*, 10 Hare, 441; *Whitbread* v. *St. John*, 10 Ves., 152). See *Locke* v. *Lamb*, L. R., 4 Eq, 372, where there was a bequest of a sum of stock to be divided between all the children of *A. B.*, as they should attain his or her age of 21 years; and it was held, that the fund was to go to such of the children of *A. B.* as were living when the first attained 21, and who had attained or who should attain 21.

If the testator merely declares that the interests are to be vested at 21, the class is ascertained at his death—*Berkeley* v. *Swinbourne*, 16 Sim., 275.

In *Maseyk* v. *Fergusson*, I. L. R., 4 Calc., 304, PONTIFEX, J., an opinion that this section applied only to vested interests.

PART XII.*

OF VOID BEQUESTS.

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.

Bequest to a person by a particular description, who is not in existence at the testator's death.

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 property 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.

* Sections 99 to 103 (both inclusive) of this Part apply to Hindus, etc., under the Hindu Wills Act, XXI of 1870, s. 2; and in applying it, the words 'son,' 'sons,' 'child,' and 'children' include an adopted child; and the word 'grandchildren' includes the children, whether adopted or natural-born, of a child, whether adopted or natural-born; and the expression 'daughter-in-law' includes the wife of an adopted son—Act XXI of 1870, s. 6.

(*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.

This section is embodied in the Hindu Wills Act, XXI of 1870, s. 2.

The exception to the section, which deals with the case of deferred [illegible]s, expressly declares, that, in case of a gift to persons described as standing in a particular degree of kindred to a specified individual, the gift is to take effect if any person answering the description comes into existence between the death of the testator and the time to which possession is deferred. Illustrations (*b*), (*c*), and (*d*) are examples of gifts deferred 'by reason of a prior bequest;' illustration (*e*) of a gift deferred 'otherwise.'

If this section stood alone, it would absolutely and without restriction empower a testator to give his property to unborn persons standing in any particular degree of kindred, provided those persons came into existence before the gift is to take effect in possession. . . . Sections 100 and 101 embody restrictions upon the power conferred by s. 99. By s. 100 a gift to an unborn person subject to a prior bequest is void, unless it be an absolute gift of the whole remaining interest of the testator. . . . . Section 101, which is general in its terms, invalidates any bequest which delays the vesting beyond a life or lives in being, and the minority of the donee who must be living at the close of the last life—*per* WILSON, J., in *Alangamanjori Dabee* v. *Sonamoni Dabee*, 9 C. L. R. 121. As to cases to which the Hindu Wills Act applies, see notes to s. 101, *infra*.

Hindu Law.—A bequest, in cases at least to which the Hindu Wills Act does not apply, by a Hindu, to a class of persons, some of whom are not in existence at the date of the testator's death, is wholly void; and the fact that some of the class are then living and capable of taking, will not allow the class to open out and let in any after-born members of the class—*Kherodemoney Dossee* v. *Doorgamoney Dossee*, I. L. R., 5 Calc., 405; (S. C.) 3 C. L. R., 315: see *Tagore* v *Tagore*, 9 B. L. R., 377; *Soudamineey Dossee* v *Jogesh Chunder Dutt*, I. L. R., 2 Calc., 262. See also *Leake* v. *Robinson*, 3 Mer., 363.

In *Kherodemoney Dossee* v. *Doorgamoney Dossee*, 3 C. L. R., 315, *A*, by his will, after giving several legacies, devised the rest and residue of his estate "to the son lately born to *B*, and to the son or sons that may hereafter be born to him." This devise was held to be invalid.

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.

Bequest to a person not in existence at the testator's death, subject to a prior bequest.

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 testator'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.

See notes to s. 99, *supra*, and s. 101, *infra*.

101. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one

Rule against perpetuity.

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 attains full age, the thing bequeathed is to belong.

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 lifetime of *A* and *B*, and the minority of the sons of *B*. The bequest after *B's* death is void.

(*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 lifetime 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 lifetime. 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.

This section and ss. 99, 100, 102, and 103 have been embodied in the Hindu Wills Act, XXI of 1870, by s. 2.

Section 101 is a restriction on the rule as to perpetuities under English law. By that law the vesting of property might be postponed for any number of lives in being and an additional term of 21 years afterwards, and for as many months in addition as are equal to the ordinary period of gestation, should gestation exist (*Jee* v. *Audley*, 1 Cox, 324 ; Fearne, Cont. Rem., 430); and the additional term of 21 years might be independent or not of the minority of any person to be entitled—*Cadell* v. *Palmer*, 1 Cl. and F., 372.

This section allows the vesting to be delayed beyond the lifetime of persons in being, for the period only of the minority, of some person born in their lifetime; and under s. 3 (p. 3, *supra*) the period of minority of persons governed by this Act is 18. The addition of an absolute period of 21 years has been done away with by the section.

In considering questions of remoteness, the question is not whether the limitation is good in the events which have happened, but whether it was good in its creation, and whether it must necessarily take effect within the limits prescribed by the law—*Jee* v. *Audley*, 1 Cox, 326, *per* LORD KENYON; *Hodson* v. *Ball*, 14 Sim., 558; *Lett* v. *Randall*, 3 Sm and G., 83; *Dungannon* v. *Smith*, 12 Cl. and F., 546; *Smith* v. *Smith*, L. R., 5 Ch., 342.

So, in the case of *Soudamuney Dossee* v. *Jogesh Chunder Dutt*, I L. R., 2 Calc., 268-9, PONTIFEX, J., said:—"In deciding questions of remoteness, it is an invariable principle of the English Courts to pay regard to possible and not to actual events; and the fact that a gift *might* include objects too remote or incapable of profiting directly by the testator's bounty, is held to be fatal to its validity. This principle is equally applicable to the interpretation of the wills of Hindus."

So in *Dungannon* v. *Smith*, PLATT, B., said:—"When a gift is infected with the vice of its possibly exceeding the prescribed limit, it is at once and altogether void both in law and equity. And even if in its actual event it should fall greatly within such limit, yet it is still as absolutely void as if the event, which would have taken it beyond the boundary, had occurred."

The Court will not allow evidence to be given to show that, at the date of the will, a married woman was past the age of child-bearing, for the purpose of showing that children then living were meant, so as to make valid a gift over, which otherwise was void for remoteness—*In re Sayer's Trusts*, L. R., 6 Eq, 319. The possibility of a woman being past the age of child-bearing is not a possible event for the purposes of determining whether a gift is void for remoteness or not—*Jee* v. *Audley*, 1 Cox, 324.

Hindu Law.—In cases to which the Hindu Wills Act does not apply, it would seem that gifts in favour of idols are not invalid, though the gifts be in their nature perpetual. See *Kumara Asuma Krishna Deb* v. *Kumara Kumara Krishna Deb*, 2 B. L. R., O. C., 47, *per* MARKBY, J.; *Tagore* v. *Tagore*, 9 B. L. R, 377; *Krishnaramani* v. *Anund Krishna*, 4 B. L. R., O. C., 231. But any provision for perpetual descent or for restraining alienation will be void—Mayne's Hindu Law, § 361. See *Promotho Dossee* v. *Radhika Persaud Dutt*, 14 B. L. R., 175.

Section 105 has not been made applicable to Hindus, &c. How far s. 101, which does apply, prevents legacies to religious and charitable endowments does not seem to have been decided.

In *Ellokassee Dossee* v. *Durponarain Bysack*, I. L. R., 5 Calc., 59, a Hindu, by his will, which was executed before the Succession Act, provided, that his sons, *B* and *C*, and the infant son of his

eldest son, the late *D* and his wife *E*, should succeed to the whole of his estate, in the following terms:—"These four persons shall receive equal shares. If any of these four persons die, which God avert, the survivors of them shall receive this estate in equal shares;" but if there be a son or a grandson surviving as the heir and representative of the party dying, such survivor shall succeed to his share, provided that "so long as my infant grandson shall not have attained his majority, the whole of my estate shall remain undivided." All the four persons named survived the testator, and it was held, that they took absolute interests in the shares, and that the estate was divisible on the infant son of *D* attaining majority. See *In re Hill's Trusts*, L. R., 12 Eq., 302; and compare *Soorjoomoney Dossee* v. *Denobundhoo Mullick*, 9 Moore's I. A., 123; see also *Olivant* v. *Wright*, L. R., 1 Chan. Div. (C. A.), 346.

Hindu Wills Act—In case of wills to which the Hindu Wills Act applies, *viz.*, wills made after the 1st of September, 1870, it has been held, that ss. 99—101 of the Succession Act being embodied in the later Act, must be allowed to have their full effect—*Alangamanjori Dabee* v. *Sonamoni Dabee*, 9 C. L. R., 121. That being so, the law as laid down in the *Tagore case*, which at the date of the passing of the Act had not been decided by the Privy Council, it will be observed, has been materially altered.

In the case of *Alangamanjori Dabee* v. *Sonamoni Dabee*, 9 C. L. R., 121, WILSON, J., held, that, under these sections, a gift to the unborn children of the testator's three unmarried daughters to take effect when these children attained their majority, was a valid gift.

It was argued in that case, that the gift was invalid by reason of the last proviso of s. 3 of the Wills Act, which provided that nothing in the Act contained "shall authorize any Hindu, Jaina, Sikh, or Buddhist to create in property any interest which he could not have created before the first day of September, 1870." WILSON, J., however, was of opinion, that to give this effect to s. 3 of the Hindu Wills Act was, wholly or partially, to overrule ss. 99—101 of the Succession Act, as embodied in s. 2 of the Hindu Wills Act; and in order to avoid so doing, he considered himself bound to hold that the words 'create any interest,' in the last proviso of s. 3, must be read as referring to the estate or interest which could be given, without reference to the further question to whom it could be given, that being a view which gives a meaning to the words of that section, while at the same time it allows the sections embodied in s. 2 of the Hindu Wills Act to take effect.

1.—In the case of *Kally Prosono Mitter* v. *Gopee Nath Kur*, 7 C. L. R., 241, it was held, that a recital by the testator of his desire to establish a perpetuity did not invalidate the subsequent trusts of the will, so far as they were otherwise good according to law. See *Dasi* v. *Ananda Krishna Bose*, 4 B. L. R. (O. C.), 231; *Dossee* v. *Motilal Mullick*, 5 C. L. R., 496.

notes to s. 3 of the Hindu Wills Act, *post*.

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.

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.

This section applies to Hindus, etc., under the Hindu Wills Act XXI of 1870, s. 2.

A gift by a Hindu to a person not ascertained, or capable of being ascertained, at the time of the death if the testator, cannot take effect. Accordingly, a gift to the unborn issue of the sons and grandsons of the testator must fail—*Srimati Bramayi Dasi* v. *Jages Chandra Dutt*, 8 B. L. R., 400. So, where there is a gift to a class, and some persons constituting that class cannot take in consequence of the remoteness of the gift or otherwise, the whole bequest must fail—*Ibid.*

All estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void So, in the *Tagore case*, 9 B. L. R., 377, it was held, that an estate which in England would be designated an estate-tail could not be created by a Hindu. An estate for life, however, may be created by a Hindu—*Ibid.*

The ground upon which this section, so far as it relates to the last preceding section, is based, is thus explained in the words of Rolfe, B.: "The reason why a gift to a class, as children or the like, is void, when it embraces some objects too remote is this: there is no intention to give to any number short of the whole class; and therefore, if the prescribed limit may be transgressed, the whole gift fails, because it does not *necessarily* take effect within the prescribed period"—*Dungannon* v. *Smith*, 12 Cl. and F., p. 575.

In *Leake* v. *Robinson*, 2 Mer., 363, a bequest to *A* for life, with remainder to a class, *viz.*, 'all and every the children of *A*' living at his death, at the respective ages of 25, was held void for remoteness as to all, though some of the class were born in the testator's lifetime. There Grant, M. R., said: "What I have to determine is, whether the class can take. I must make a new will for the testator if I split into portions his general bequest to the class, and say, that because the rule forbids his intention from operating in favour of the whole

class, I will make his bequest what he never intended it to be"—p. 390. See *Vawdry* v. *Geddes*, 1 R. and M., 203; *Rowland* v. *Tawney*, 26 Beav., 67.

A bequest of a principal fund to be divided equally amongst a class (the children of the testator's daughter), with a gift over in case of any of them dying under *twenty-four* without leaving issue, was held not to be void as too remote, but to give a present vested interest liable to be divested in case of death under 24 without leaving issue—*Blund* v. *Williams*, 3 M. and K., 411: see *Tatham* v. *Vernon*, 29 Beav., 604; and *Davies* v. *Fisher*, 5 Beav., 201.

A testator gave his residuary estate to trustees upon trust "to invest and pay, transfer or divide the same unto, between, or among the children of my brothers *A* and *B* respectively, to be paid, transferred to, and divided among them in the proportions and at the times hereinafter mentioned,—that is to say, the share of each and every son of my said two brothers shall be double that of each and every daughter, and the share of each son shall be paid to him or them respectively upon his or their attaining the age of 21 years, and the share of each daughter to be paid to her or them on her or their respectively attaining that age, or previously marrying, with benefit of survivorship among all the said sons and the daughters." The testator left him surviving a sister and his brothers *A* and *B*, who both died before the eldest of the testator's nephews or nieces attained the age of 21 or married. The widow and executrix of *A* instituted a suit to have it declared that the above bequest was void under sections 101 and 102 of the Succession Act, and that she, as executrix of *A*, was entitled to one-third of the estate and the accumulations thereon. The Court (PONTIFEX, J.) however, held, that the bequests were valid; that the legatees took vested interests, subject to be divested on death before the contingencies mentioned in the will happened, and that the period of distribution alone was postponed—*Maseyk* v *Fergusson*, I. L. R., 4 Calc., 304. In *Shum* v. *Hobbs*, 3 Dr., 93, which was distinguished by PONTIFEX, J., from *Maseyk* v. *Fergusson*, the testatrix gave a share of a residue "upon trust for her son for life, and after his death upon trust to transfer and pay the capital of the said funds unto and amongst the children, if only one, or both, or all the children, if more than one, of her said son," in manner thereinafter mentioned. Then followed a direction making the gift to her son void if he aliened or encumbered it, and giving over the dividends to the parties entitled in remainder. Then followed a declaration that the shares should be payable at 21 or marriage. KINDERSLEY, V. C., held, looking at the context of the will, that this was not a substantive gift with a simple direction to pay, but one general direction to pay at 21 or marriage, and that the interests of her son's children were not vested. See *Williams* v. *Clark*, 4 DeG. and S., 472; [illegible] v. *Robinson*, 2 Mer., [illegible]

... rules, some of which have already been mentioned, as to remote-, have been thus laid down by WOOD, V. C., in *Catlin* v. *Brown*, 11 [illegible]

"The first rule is, that an executory devise is bad, unless it be clear at the death of the testator that it must, of necessity, vest in some one, if at all, within a life in being and twenty-one years afterwards;" citing *Dungannon* v. *Smith*, 12 Cl. and F., 546, 570. (2) "The second rule is, that you must ascertain the objects of the testator's bounty by construing his will without any reference to the rules of law which prohibit remote limitations, and having, apart from any consideration of the effect of those rules in supporting or destroying the claim, arrived at the true construction of the will, you are then to apply the rules of

law as to perpetuities to the object so ascertained." (3) "Thirdly, if the devise be to a single person answering a given description, and any one member of the series intended to take may, by possibility, be a person excluded by the rule as to remoteness, then no person whatever can take, because the testator has expressed his intention to include all, and not to give to one, excluding others;" citing *Proctor* v. *The Bishop of Bath and Wells*, 2 H. B., 358. (4) "The fourth rule is, that where the devise is to a class of persons answering a given description, and any member of that class may possibly have to be ascertained at a period exceeding the limits allowed by law, the same consequence follows as in the preceding rule; and, for the same reason, you cannot give the whole property to those who are in fact ascertained within the period and might have taken if the gift had been to them *nominatim*, because they were intended to take in shares to be regulated in amount, augmented or diminished according to the number of the other members of the class, and not to take exclusively of those other members. Of this rule, the cases of *Jee* v. *Audley*, 1 Cox, 324, *Leake* v. *Robinson*, 2 Mer. 363, and *Gooch* v. *Gooch*, 14 Beav., 565, are illustrations" (5) "The fifth and last rule to which I need to advert is this,—that, where there is a gift or devise of a given sum of money or property to each member of a class, and the gift to each is wholly independent of the same or similar gift to every other member of the class, and cannot be augmented or diminished according to the number of the other members, then the gift may be good as to those within the limits allowed by law. This was settled in the case of *Storrs* v. *Benbow*, 2 M. and K., 46."

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 section applies to Hindus, etc., under the Hindu Wills Act, XXI of 1870, s. 2.

It is in accordance with the English law. All limitations ulterior or expectant upon limitations which are void for remoteness are themselves void; thus, if there is a limitation to the first or other son of *A* (who has no son) at twenty-three, and if he shall have no such son, over, both limitations will be void—*Proctor* v. *Bishop of Bath and Wells*, 2 H. B., 358; *Cambridge* v. *Rous*, 8 Ves., 24; *Beard* v. *Westcott*, 5 B. and Ald., 801; *Thatcher's Trusts*, 26 Beav., 365. The reason that the gift over is also void, is explained by LORD ST. LEONARDS in *Moneypenny* v. *Dering*, 2 DeG. M. and G., 182. Speaking of the gift over which was held void in the case of *Beard* v. *Westcott* (*supra*), he said:—"It was void, not because it was not within the line of perpetuity, but on the ground that the limitation over was never intended by the testator to take effect, unless the persons whom he intended to take under the previous limitation would, if they had been alive, have been capable of enjoying the estate; and that he did not intend that the estate should wait for persons to take in a given event where the person to take was actually in existence, but could not take."

On the other hand, if there be two alternative limitations, one branch of which is too remote, and the other of which is capable of taking effect, the Court will disregard the invalid limitation, and give effect to that which is legal—*Longhead* v. *Phelps*, 2 W. B., 704; *Evers* v. *Challis*, 7 H. L. C., 531; *Re Thatcher's Trusts*, 26 Beav., 365—as where there is a limitation on the contingency that *A* and *B* shall die without issue male, *or* that such issue male shall die without

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.

Exception.—Where the property is immoveable, 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.

(*a.*) The will directs that the sum of 10,000 rupees shall invested in Government securities, and the income accumulated for twenty 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 in-, 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 Sultanpur shall be accumulated for ten years, and that the accumulations 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 Sultanpur shall be accumulated for ten 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.

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.

This section does not apply to Hindus, etc., see Act XXI of 1870, s. 2.

It is a considerable restriction upon the English law as to accumulation. Formerly, in England, the power of preventing the *enjoyment* of property by directing an accumulation of the annual proceeds was confined within the limits established against perpetuities, *viz.*, for a life or lives in being and twenty-one years. This power was, however, further restricted by Statute 39 and 40 Geo. III, c 98, in consequence of the will of a Mr Thellusson, who directed the income of his property to be accummulated during the lives of all his children, grandchildren and great grandchildren, *who were living at the time of his death*, for the benefit of some future descendants who might be living at the decease of the survivor (*Thellusson* v. *Woodford*, 4 Ves., 227), thus keeping strictly within the rule which allowed any number of existing lives to be taken as the period for an executory interest—Williams's Real Property, 308, 10th Edn.

By the Statute just mentioned, the period of accumulation under wills was limited to the term of twenty-one years from the death of the testator, or during the minority or respective minorities of any person or persons who should be living or *en ventre sa mere* at the time of the death of the testator, or during the minority or minorities or respective minorities of any person or persons who, under the will or codicil, would, for the time being, if of full age, be entitled to the income directed to be accumulated.

This Act only allows accumulation (1) where the property is immoveable, and (2) where the accumulation is directed to be made *from the death of the testator*.

In England, in case of immoveable property, where accumulations are directed to be made from the death of the testator, the direction will not be void if it exceed the period allowed, but will be valid to the extent of the time allowed by this Act (*Re Lady Rosslyn's Trusts*, 16 Sim, 391; *Southampton (Lord)* v. *Hertford (M. of)*, 2 V. and B., 54; *Scarisbrick* v. *Skelmersdale*, 17 Sim., 187; *Ingorst* v. *Lowndes*, 11 Sim., 434); but it would seem, if the direction to accumulate exceed the limits laid down by s. 101, it will be void altogether.

Where the testator directed that the income of his property should be accumulated for the term of twenty-one years *from his death*, it was held that, in computing the term, the day of the testator's death was to be excluded.—See *Lester* v. *Garland*, 15 Ves., 248.

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.

Bequest to religious or charitable uses.

Illustration.

A having a nephew makes a bequest by a will not executed, nor deposited, as required—

For the relief of poor people;
For the maintenance of sick soldiers;
For the erection or support of a hospital;
For the education and preferment of orphans;
For the support of scholars;
For the erection or support of a school;
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;
For the formation or support of a public garden.

All these bequests are void.

This section does not apply to Hindus, etc., see Act XXI of 1870, s. 2.

It provides against deathbed bequests to charitable uses by persons having near relations. According to the table of consanguinity fixed by s. 24, *supra*, such deathbed bequests cannot be made by persons having a father, mother, son, daughter, grandfather, grandmother, grandson, grand-daughter, brother, or sister.

'Charity' has been defined to be a general public use—*Jones* v. *Williams*, Amb., 651.

Charitable Purposes.—Bequests, though in perpetuity, were according to Statute 43 Eliz. c. 4, for the following purposes: relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers

and mariners; schools of learning, free schools, and scholars in Universities; repair of bridges, ports, havens, causeways, churches, seabanks, and highways; education or preferment of orphans; towards relief, stock, or maintenance for houses of correction, marriages of poor maids, relief or redemption of prisoners or captives, aid for ease of poor inhabitants in payment of certain taxes.

Charitable uses, however, have not been confined to the objects comprised in the above enumeration. Thus, gifts for widows and orphans, or poor of a place (*Powell* v. *Attorney-General*, 3 Mer., 48; *Thompson* v. *Corby*, 27 Beav., 649), for building or endowing a hospital (*Pelham* v. *Anderson*, 2 Ed., 296), for the erection of waterworks (*Jones* v. *Williams*, Amb., 651), towards payment of the national debt (*Newland* v. *Attorney-General*, 3 Mer., 684), for the encouragement of good servants (*Loscombe* v. *Winteringham*, 13 Beav., 87), for deserving literary men who have been unsuccessful (*Thompson* v. *Thompson*, 1 Col., 395; see further, cases cited in note to *Loscombe* v. *Winteringham*, 13 Beav., 89, for educational purposes, were held to be valid. See *Wicker* v. *Hume*, 7 H. L. C., 124; *Beaumont* v. *Oliveira*, L. R., 4 Ch., 309

Bequests, to be valid as charitable bequests, must be for the benefit of the public generally, or of some section of the public—*Attorney-General* v. *Aspinall*, 2 My. and C., 622; *British Museum* v. *White*, 2 S. and S., 596. Accordingly, a bequest to be given in private charity (*Ommanney* v. *Butcher*, 1 Tur. and R., 260), or for the erection of a private tomb or monument (*In the Goods of Richard*, 31 Beav., 244; *Fowler* v. *Fowler*, 33 Beav., 616; *Hunter* v. *Bullock*, L. R., 14 Eq., 45), or for the benefit of a private company (*Attorney-General* v. *Haberdashers' Co.*, 1 M. and K., 420), are void, if offending against the rule of perpetuities, and invalid as charitable bequests.

Religious purposes. — Bequests for the propagation of religious doctrines of various sects (*Shrewsbury* v. *Hornby*, 5 Hare, 406), for ministers of religion (*Attorney-General* v. *Lawes*, 8 Hare 32), for the repairs of a church (*Hore* v. *Osborne*, L. R., 1 Eq., 585) have been held to be valid.

The following Statutes in England have relation to religious uses: — 23 Hen. VIII, c. 10; 1 Ed. VI, c. 14; 1 W. & M., c. 15; 55 Geo. III, c. 160; 2 & 3 Will. IV, c. 115, s. 1; and 8 & 9 Vic., c. 59.

In England, by the Statute of Mortmain, 9 Geo. III, c. 36, devises of real estate or personal property, savouring, as it is said, of the realty, for charitable purposes, are prohibited; but it has been held, that that Statute is not operative in India—*Mayor of Lyons* v. *E. I. Company*, 1 Moore's I. A., 175. Accordingly, the Courts here will carry out a charitable trust in the nature of a perpetuity when the subject is immoveable property, just as it would if it had been merely personal property—see *Broughton* v. *Mercer*, 14 B. L. R., 442. There the testator, an Englishman by birth and domicile, devised certain immoveable property in India to trustees in perpetuity, in trust for the support of hospitals in the North-Western Provinces. The Court held, that the devise was a valid devise as being a charitable trust within the scope of 43 Eliz., c. 4

Cy près doctrine as applied to charities.—Charities are so highly favoured in law, that they have always received a more liberal construction than the law will allow in gifts to individuals—*Mills* v. *Farmer*, 1 Mer., 55, 96; *Moggridge* v. *Thackwell*, 7 Ves., 36; 2 Story, § 1165. The principle of the rule of *cy près* is applied to charitable bequests where, from the objects being uncertain, or the persons who are to take not being *in esse*, or the bequest being unable to be carried into exact execution, or for other like causes, a literal execution becomes inexpedient or impracticable. The Court in such cases will carry out the will as nearly as it can according to the original purpose or (as the

technical expression is) *cy près*—2 Story's Eq. Jur., 1169; *Gower* v. *Mainwaring*, 2 Ves. Sen., 87, 89, *per* LORD HARDWICKE.

Thus, where a charity is so given that there can be no objects, the Court will order a different scheme; but if the objects *may* exist, although they do not at present exist, the Court will keep the fund for the original object—*Attorney-General* v. *Oglander*, 3 Bro. C. C., 166.

Where, however, a fund has, on the object for which it was provided becoming incapable of being carried out, been applied *cy près* to an object in itself beneficial, the Court will not subsequently change the application even to a purpose identical with the original object—*Attorney-General* v *Stewart*, L. R., 14 Eq., 17; see *Abbot* v. *Fraser*, L. R., 6 P. C., 96.

Where no objects exist answering the description, the Court will devote the subject of the bequest to other charities—*Longbottom* v. *Satoor*, 1 Mad. H. C. R., 429. So, where the objects of a charitable bequest cease to exist, a new scheme will be sanctioned by the Court—*Attorney-General* v. *City of London*, 1 Ves., 243; *Mayor of Lyons* v. *Advocate-General of Bengal*, L. R., 1 App. C., 91.

For cases in which the Court will execute the general intent of testator, see *Attorney-General* v. *Ironmongers' Co.*, 2 My. and K., 576; *Langford* v. *Gowland*, 3 Giff., 617; *Parfitt* v. *Hember*, L. R., 4 Eq., 443; *New* v. *Bonaker*, *ib.*, 655; *In re Prison Charities*, L. R., 16 Eq., 129; *Fisk* v. *Attorney-General*, L. R., 4 Eq., 521; *Dawson* v. *Small*, L. R., 18 Eq., 114; *In re Williams*, L. R., 5 Chan. Div., 735; see *Mayor of Lyons* v. *Advocate-General of Bengal*, I. L. R., 1 Calc. (P. C.), 303.

Superstitious uses.—The rule of English law which prohibits bequests of money to superstitious uses, as for a light or lamp in a church or chapel, or for the good of the soul of the testator, does not apply in India—*Judah* v *Judah*, 5 B. L. R., 433. Thus, in *Andrews* v. *Joakim*, 2 B. L. R., O. C., 148, PEARK. J., following *Das Mercee* v. *Cones*, 2 Hyde, 65, held, a bequest for the performance of masses in Calcutta to be valid

Hindu Law—This section has not been applied to Hindus. The existing law, therefore, as to superstitious uses remains intact. Grants of this nature have been repeatedly enforced by the Privy Council—*Ramtonoo Mullick* v. *Rungopal Mullick*, 1 Knapp, 245; *Jewan Doss* v. *Shah Kubeeroodeen*, 2 Moo. I. A., 390; *Sonatun Byack* v. *Sreemutty Juggutsoonderee*, 8 Moo. I. A., 66; *Juggotmohini Dossee* v. *Sokheemoy*, 14 Moo. I. A., 289. See Mayne's Hindu Law, § 361.

As to bequests to religious and charitable uses, see Mayne, §§

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

* This Part applies to the wills of Hindus, etc., in the Lower Provinces and the towns of Madras and Bombay—Act XXI of 1870, s. 2.

in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy. And in such cases the legacy is from the testator's death said to be vested in interest.

Explanation.—An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision 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.

(*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.

(*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.

This section applies to Hindus, etc., under the Hindu Wills Act, XXI of 1870, s. 2.

The law in England, as already stated in the notes to s. 91, *supra*, always leans in favour of early vesting; see *Duffield* v. *Duffield*, 3 Bligh, N. S., 260. This is especially the case with regard to real property, the vesting of which is governed by the Common Law. The rules in England as to legacies of personalty, have been, to a great extent, borrowed from the canon law. See judgment in *Hanson* v. *Graham*, 6 Ves., 239.

This and the next section seem to incline towards the English Common Law.

In cases of persons having an English domicile dying in India, the rules of English law as to personalty will still have to be applied. See s. 5, *supra*. As to the English law relating to personalty, see 2 Jarm., 791.

Estates and interests in property may be (1) vested in possession, (2) vested in interest, but not in possession, (3) contingent, or (4) conditional. A bequest is vested in possession when there is a present right to the immediate possession or enjoyment—see s. 91, *supra*. Vested in interest, but not in possession, where there is a present indefeasible right to the future possession or enjoyment, as in the case of a devise to *A* for life, remainder to *B*; where the bequest to *B* is vested, and in the event of his death transmissible to his representatives.

As to contingent bequests, see notes to next section, *infra*. Conditional bequests are dealt with in Part XVI, p. 148, *post*.

Bequests vested in interest, but not in possession, may be so vested subject to being divested, as where there is a present right defensible on the happening of a specified event,—*e.g.*, where there is a gift to an infant with remainder over in the event of his dying under twenty-one, in which case the infant has a vested interest subject to be divested on his death under age. See *O'Mahoney* v. *Burdett*, L. R., 7 H. L., 388. See the explanation and illustration (*f*) to this section; see also *Maseyk* v. *Fergusson*, I. L. R., 4 Calc., 308, and the cases there cited in argument.

Under a devise to *A* for so long, and until her son *B* attain the age of twenty-one, and after he shall have attained that age to *B* in fee, *B* takes a vested interest—*Taylor* v. *Biddall*, 2 Mod., 289. See illustration (*d*). In this case, the estate given to *B* is in fact a remainder taking effect on the determination of the preceding estate.

A devise to *A*, provided she lives to attain twenty-one, was held to be vested subject to being divested by *A's* death before that age—*Simmonds* v. *Cocks*, 29 Beav., 455.

Where a testator gave real and personal estate to *M. H.*, her heirs, executors, administrators, and assigns, absolutely if she should be living at the death of the testator's wife; but in case *M. H.* should die in the lifetime of the testator's wife without leaving issue, then over,—it was held, that *M. H.* took an absolute interest, liable to be divested only in the event of her death in the lifetime of the testator's widow without leaving issue. Under a devise to a widow for life if she does not marry, and if she marry again, over, the gift over vests immediately and takes effect either on the *death or* marriage, and is not contingent upon the latter event—*Luxford* v. *Cheeke*, 3 Lev., 126; *Meeds* v.

Wood, 19 Beav., 215. Similarly, a gift over following a gift to *A* for life, or until he become bankrupt, takes effect either on death or bankruptcy—*Etches* v. *Etches*, 3 Drew., 441. A different construction will be given if the gift over is solely dependent on marriage or bankruptcy—*Sheffield* v. *Lord Orrery*, 3 Atk., 282. See also *Underhill* v. *Roden*, L. R., 2 Chan. Div., 494.

It is not necessary that the gift over should be indefeasible. Thus, under a devise to *A*, and if he die without issue to *B*, if *A* die without issue, the gift to *B* will take effect, and if he should predecease *A*, his interest will devolve upon his heirs—*Pinbery* v. *Elken*, 1 P. W., 563; *Barnes* v. *Allen*, 1 Bro. C. C., 181. Illustration (*f*) is an example of the proposition thus stated.

Contrary intention. — If the testator himself direct that a legacy shall vest in interest at a particular time (*Glanvill* v. *Glanvill*, 2 Mer., 38), or direct that the legatee shall take if he attain a particular age, but not otherwise (*Knight* v. *Cameron*, 14 Ves., 389), the legacy will not vest before the time fixed.

The word 'vested,' however, is sometimes held to be used in the sense of 'payable,' as where the shares of members of a class are directed to be vested at a particular time, and there is a gift over to the other members of the class of the shares of those dying before that time without issue — *Taylor* v. *Frobusher*, 5 De G. and S., 191; *Re Edmonston's Estate*, L. R., 5 Eq., 389; *Williams* v. *Haythorne*, L. R., 6 Ch., 782.

A declaration that legatees shall become *beneficially interested* at a particular time, is not equivalent to a direction that their interests shall vest at that time. Such a declaration refers only to vesting in possession—*McLachlan* v. *Tait*, 28 Beav., 407.

Where a testator devised lands to *T* for life, and *from and after* his decease to his eldest son, if he should arrive at the age of 21 years, and in default of his having a son, over, the Court of appeal held, that, on the death of *T*, the eldest son took an estate in fee liable to be divested on his death under age—*Andrew* v. *Andrew*, L. R., 1 Chan. Div., 410. The words 'from and after' were held to mean immediately after.

There is a presumption, it seems, in favour of the vesting of residuary bequests—*Booth* v. *Booth*, 4 Ves., 399; *Jones* v. *Mackilwain*, 1 Russ., 220.

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.

Illustrations.

(*a.*) 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 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.

See *Stapleton* v. *Cheales*, Pr. Ch., 315. It is said the word 'when' cannot be considered so strongly indicative of contingency as the words or '*if*'—*Duffield* v. *Duffield*, 3 Bli., N. S., 331.

(*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*.

Austen v. *Halsey*, 13 Ves., 126.

(*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.

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

(*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 Sultanpur Khurd to *B*, if *B* shall convey his own farm of Sultanpore 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.

(*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.

This section applies to Hindus, etc., under the Hindu Wills Act, XXI of 1870, s. 2.

The word 'contingency' has reference in general to the happening of an event.

There is an important distinction between a contingent bequest and bequest vested in interest subject to being divested. In the latter case, if there is no prior interest, the legatee is entitled to the income during the term of suspense. In the former case, the person in whom the bequest is at a future time to be vested, has no interest in the income of the subject of the bequest—*Duffield* v. *Duffield*, 3 Bli., N. S., 330, *per* BEST, C. J.

The exact events on which a gift over is to take place must happen. Thus, under a gift to *C* "if *A* should die before *B* without leaving a widow or child, after his death and *B's* death," was held to fail, on *A's* surviving *B*, though he died without leaving a widow or child—*Holmes* v. *Cradock*, 3 Ves., 317; see *Re Sander's Trusts*, L. R., 1 Eq., 675.

A devise to *A*, provided she lives to attain twenty-one, has been held to be vested subject to being divested—*Simmonds* v. *Cocks*, 29 Beav., 455. So, where there is a gift to *A* for life, and if she marry again, over, the gift over is not contingent, but vests immediately—*Luxford* v. *Cheeke*, 3 Lev., 126; *Meeds* v. *Wood*, 19 Beav., 215.

But a legacy to *A*, to be paid as soon as he attains twenty-one, and in case he attains that age, *not otherwise*, is contingent—*Knight* v. *Cameron*,

14 Ves., 389. See *Browne* v. *Browne*, 3 Sm. and G., 568; *Holmes* v. *Prescott*, 10 Jur., N. S., 507; *Re Eddell's Trusts*, L. R., 11 Eq., 559.

The words which usually indicate conditions or contingencies with reference to age or time are these: 'provided,' 'if,' 'in case,' 'in the event of,' 'when,' 'as and when,' 'should,' 'on,' 'upon,' 'at,' 'from and after;' but it seems that a different effect has been attributed to such words in England according as they have been applied to realty or personalty. Thus, while a devise to *A*, provided he attains twenty-one, gives a vested estate liable to be divested—*Simmonds* v. *Cocks*, 29 Beav., 455, where a legacy was given to *A*, provided he attained twenty-one, with a gift over if he died under that age, the condition was held to be a condition precedent—*Atkinson* v. *Turner*, 2 Atk., 41.

In *Prescott* v. *Holmes*, 10 Jur., N. S, 507, all the previous cases are collected. Wood, V. C., in commenting on the cases in which 'when' or 'if' is used, observed, that if a testator gives personal property in that form, he clearly does not vest, while if he gives real estate, he clearly does (p. 512). This case was followed in *Re Eddell's Trust*, L. R., 11 Eq., 559. The general rule as to personalty is thus laid down in Williams on Executors, 1236:—"If the words 'payable' or 'to be paid' are omitted, and the legacy is given *at* twenty-one or, *if*, *when*, *in case*, or *provided*, the legatee attain twenty-one, or *on* his attaining that age, or any future definite period, this confers on him a contingent interest, which depends for its vesting and its transmissibility to his executors or administrators on his being alive at the period specified."

This rule is not strictly in accordance with the law as laid down by this and the preceding section, for it is clear in Illustration (*d*) that *D's* contingent interest would pass to his representatives in the event of his predeceasing *A*, *B*, or *C*, before any of them has attained the of 18.

Illustrations (*l*) and (*m*) are illustrations of the rule laid down by Sir J. Leach in *Vaudry* v. *Geddes*, 1 Russ. and My., 208, that where interest is given, it is presumed that the testator meant an immediate gift, because, for the purpose of interest, the particular legacy is to be immediately separated from the bulk of the property. See *Saunders* v. *Vautier*, 1 Cr. and Ph., 240; *Hoath* v. *Hoath*, 2 Bro. C. C., 4; *Pearson* v. *Dolman*, L. R., 3 Eq., 315.

Generally speaking, if the gift of maintenance be not co-extensive with the whole amount of the interest (*Presford* v. *Hunter*, 3 Bro. C. C., 416; *Re Ashmore's Trusts*, L. R, 9 Eq., 99), or if it be made out of another fund (see illustration (*m*) to this section), in neither case will the legacies vest prior to the arrival of the periods at which they are payable, for such provisions afford no presumption that the testator intended the legacies to vest before they became due—Williams on Executors, 1242. When the whole *interest* of a fund is given for maintenance, it has the same effect as if the *interest* had been given irrespective of maintenance—*Hoath* v. *Hoath*, 2 Bro. C. C., 4. Where, however, the principal and interest are blended together in one gift, and the principal is given on a contingency, as where there is a bequest of a specific sum and interest or accumulated interest to *A* as soon as he attains twenty-one, the entire gift is contingent—*Knight* v. *Knight*, 2 S. and S., 490; *Locke* v. *Lamb*, L. R., 4 Eq, 372.

It seems that a discretion to apply the interest to maintenance, or to accumulate it, will not vest the legacy of the fund (*Vaudry* v. *Geddes*, 1 R. and M., 203); nor a discretion to apply the whole or part not exceeding a fixed sum to maintenance—*Merry* v. *Hill*, L. R., 8 Eq., 619.

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.

Vesting of interest in a bequest to such members of a class as shall have attained a particular age.

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.

This section deals with gifts to a contingent class, which are to be distinguished from gifts to a class on a contingency. It applies to Hindus, etc, under the Hindu Wills Act, XXI of 1870, s. 2.

A gift to children who shall have attained 21, or to such children as shall have attained 21, is a gift to a contingent class; and no child who has not attained that age can have a vested interest (*Bull* v. *Pritchard*, 1 Russ., 213; *Leake* v. *Robinson*, 2 Mer, 363; *Thomas* v. *Wilberforce*, 31 Beav., 299; *Williams* v. *Haythorne*, L. R., 6 Ch., 782), the reason being as pointed out by BEST, C. J., in *Duffield* v. *Duffield*, 3 Bli., p. 333, that, until he attained the age of 21, no child completely answers the description of those who are to be legatees.

A gift of interest or income by way of maintenance, which in the case of a bequest to a class upon a contingency might have the effect of vesting the bequest (see exception to preceding section) will not have that effect in the case of a bequest to a contingent class—*Leeming* v. *Sherratt*, 2 Hare, 14; *Merry* v. *Hill*, L. R., 8 Eq., 619; *Re Ashmore's Trust*, L. R., 9 Eq., 99; see illustration to this section.

PART XIV.*

OF ONEROUS BEQUESTS.

109. Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully.

Onerous bequest.

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*.

* This Part applies to the wills of Hindus, etc., in the Lower Provinces of Bengal and the towns of Madras and Bombay—Act XXI of 1870, s. 2.

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

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.

This is the rule in England, as laid down in the cases of *Andrew* v. *Trinity Hall*, 9 Ves., 525, and *Warren* v. *Ruddall*, 1 J. and H., 1. It is no objection that the legatee, by repudiating an onerous bequest, will throw a burden on the testator's estate—*Moffett* v. *Bates*, 3 Sm. and G., 468.

Where, however, it appears from the will that it is the intention of the testator that beneficial and onerous bequests shall be taken together, that is, where the legacies are not separate or independent, the legatee must accept all or none—*Green* v. *Britten*, L. J., 42 Ch., 187; *Talbot* v. *Lord Radnor*, 3 M. and K., 252. Thus, in *Warren* v. *Ruddall*, 1 J. and H., 1, where the testator made several gifts to a devisee, one of which was a leasehold on which the testator was liable on his covenant to repair, Wood, V. C., said: "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" (p. 12).

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.

Bequest contingent upon a specified uncer- event, no time mentioned f- its

* This Part applies to the wills of Hindus, etc., in the Lower Provinces of Bengal and the towns of Madras and Bombay—Act XXI of 1870, s. 2.

Illustrations.

(*a.*) A legacy is beqeathed to *A*, and in case of his death, to *B*. If *A* survives the testator, the legacy to *B* does not take effect.

In *Edwards* v. *Edwards*, 15 Beav., 361-2, the Master of Rolls, in considering the case, as put by him, of a gift to *A*, and if he shall die to *B*, said: In such cases it may be considered to be settled, that the bequest may be read somewhat to this effect, —namely, a bequest to *A*, but if *A* shall die before the bequest becomes vested in him, then to *B*. So in *Home* v. *Pillans*, 2 My. and K., 20, BROUGHAM, L. C., said, —"A bequest to any person, and in case of his death to another, is an absolute bequest to the first legatee if he survives the testator, and this whatever be the form of expression, as 'if he die' or 'should he happen to die,' 'in case death should happen to him,' and so forth."

(*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.

The rule in these cases is illustrated by the cases of *Hinckley* v. *us*, 4 Ves., 160, and *Cambridge* v. *Rous*, 8 Ves., 13.

According to the English cases, if *A* in this case should die, whether before or after the death of the testator, without leaving a child, the gift over would take effect, and the legacy vest in *B*—*Edwards* v. *Edwards*, 15 Beav., 363, *per* ROMILLY, M. R.; *Allen* v. *Farthing*, cited in 2 Jarman, 783.

(*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.

This is the case of *Home* v. *Pillans*, 2 My. and K., 15, where the bequest was to *A* and *B*, when and if they should attain their ages of 21 years, and in the case of the death of either of them leaving children, the share of such of them so dying to their respective children. There the gift over was held to be restricted to the contingency of *A* or *B* dying under 21 without children, the period of distribution being, when *A* and *B* respectively attained 21. On attaining 21, *A* and *B* respectively took absolute interests in the gift.

See also *Gosling* v. *Townshend*, 17 Beav., 245; *Cooper* v. *Cooper*, 1 K. and J., 658.

(*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*.

This is in accordance with what is known as the fourth rule in *Edwards* v. *Edwards*, 15 Beav., 361, stated by ROMILLY, M. R., who held, that, in the case of a gift to *A* for life with remainder to *B*, and if he shall die without leaving children to *C*, the contingency had reference to the death of the tenant-for-life. This rule, however, has been ruled by the House of Lords in two recent cases: *O*

Burdett, L. R., 7 H. L., 388; and *Ingram* v. *Soutten*, *ib.*, 408; it being held, that the gift over will take effect upon the death of *B* at any time without issue, whether before or after the tenant-for-life.

(*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*.'

This is in accordance with the third rule in *Edwards* v. *Edwards*, 15 Beav., 361.

"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. When death is spoken of as a *contingent event*, a gift over on the event of death may well be considered to mean, not death at any time but death before a particular period,—*e. g.*, the period of distribution; and thus the gift over may be read as a gift by way of substitution and not of remainder."—Hawkins, 254.

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.

Bequest to such of certain persons as shall be surviving at some period not specified.

Illustrations.

(*a.*) Property is bequeathed to *A* and *B*, to be equally divided between them, or to the survivor of them. If both *A* and *B* survive the testator, the legacy is equally divided between them. If *A* dies before the testator, and *B* survives the testator, it goes to *B*.

In this illustration the gift is immediate, and the period of distribution is the testator's death—*Cripps* v. *Wolcott*, 4 Madd., 11.

Property is bequeathed to *A* for life, and after his death to *B* and *C*, to be equally divided between them, or to the survivor of them. *B* dies during the life of *A*; *C* survives *A*. At *A's* death the legacy goes to *C*.

Hearn v. *Baker*, 2 K. and J., 383. The period of division is the death of the tenant-for-life.

(*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

Rogers v. *Towsey*, 9 Jur., 575. In this illustration the ship is considered to refer to the death of the testator and death of the tenant-for-life, the words of survivorship and t condition of *B's* surviving the *testator* being in immediate connexion.

(*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*.

In this case the survivorship is taken from the special form of the gift to have reference to one of the remaindermen surviving *the other*, and not to their surviving the tenant-for-life. The legacy vests in *C* on the death of *B*, and accordingly on his death in *A's* lifetime, goes to his representative—*Scurfield* v. *Howes*, 3 Bro. C. C., 90; *White* v. *Baker*, 2 D. F. and J., 55.

Illustrations (*c*) and (*d*) are both examples of a contrary intention appearing on the will. In some cases, too, survivorship has reference to the period of vesting, as where a bequest was in trust to pay the income to children as they shall arrive at the age of twenty-one years, and then all the said children or the survivors of them to be let into full possession of the property, share and share alike, it was held, that the word 'survivors' upon the context of the will meant those surviving so as to attain their respective ages of twenty-one—*Crozier* v. *Fisher*, 4 Russ, 398; see also *Tribe* v. *Newland*, 5 DeG. and S, 236; *Corneck* v. *Wadman*, L. R., 7 Eq, 80.

The word 'survive' imports being alive at the time of the event indicated. Thus a limitation to *A* in default of children or remote issue who should survive *B*, means children or remoter issue living at *B's* death, and is not void for remoteness—*Gee* v. *Liddel*, L. R. 2 Eq., 341. Only those of the class who are alive at the time indicated are entitled, the issue of other deceased members being excluded: see *Davidson* v. *Dallas*, 14 Ves, 576; *Thompson* v. *Thompson*, 29 Beav., 654; *De Curagnol* v. *Liardet*, 32 Beav, 608. It is immaterial whether the word is 'survivors' or 'such as survive'—*In re Sharpe's Estate*, 1 D. J. and S., 453.

This section lays down the general rule established in *Cripps* v. *Wolcott*, 4 Madd., 11, that where property is given to the survivors or survivor of a class living at a particular time, the period of survivorship, as a general rule, refers to the time when the payment or distribution is to take place. "It is now settled," said LEACH, V. C. that "if a legacy be given to two or more, to be equally divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will that the survivorship is to be referred to the period of division; if there be no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy"—*Stevenson* v. *Gullan*, 18 Beav., 590; *Howard* v. *Collins*, L. R., 5 Eq., 349. If a previous estate be given the period of distribution is when such previous estate determines v. *Wolcott*, 4 Madd., 11; *Wordsworth* v. *Word*, 1 H L. C., 129; *Re Fox*, 35 Beav., 163; *Drakeford* v. *Drakeford*, 33 Beav., 43.

If the prior interests should determine in the lifetime of the testator, the result is the same as if the gift had been [illegible] immediate— *Spurrell* v. *Spurrell*, 11 Ha.,

Where then there is a gift to a person for life, with remainder to his children or such of them as shall be living at his decease (*Sturgess* v. *Pearson*, 4 Madd., 411), or to a person for life, and after his decease to his children *or the survivors* (*Browne* v. *Lord Kenyon*, 3 Madd., 410), the children of the life-tenant take vested estates subject to be divested in favor of such as survive the tenant-for-life. If all predecease the tenant-for-life, their representatives will take, for the event which was to divest them not having happened, the original gift remains. See *Browne* v. *Kenyon*, *per* SIR JOHN LEACH, V. C; see *Re Sander's Trusts*, L. R., 1 Eq., 675; *Harrison* v. *Foreman*, 5 Ves., 207.

Presumption as to Survivorship.—Whoever has to make out the case of death at any particular time, must prove it by affirmative evidence, and those who claim under a person who is said to have survived a particular period, must prove that fact—*In re Lewes' Trusts*, L. R., 6 Ch., 356. Where a person has not been heard of for seven years, there is a presumption of law that he is dead, but at what time within that period he died is not a matter of presumption but of evidence, and the *onus* of proving that the death took place at any particular time within the seven years lies upon the person who claims a right, to the establishment of which that fact is essential—*In re Phene's Trusts*, L. R., 5 Ch. App., 139.

It was further held in that case, that there was no presumption of law in favour of the continuance of life. This is contrary to the former rule laid down in *Nepean* v. *Doe*, 2 M and W., 912, that "the law presumes a person shown to be alive at a given time remains alive until the contrary be shown."—See *In re Walker*, L. R., 7 Ch., 120.

PART XVI.*

OF CONDITIONAL BEQUESTS.

upon impossible condition.

113. A bequest upon an impossible condition is void.

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.

So far as conditional bequests are concerned, this Act has got rid of the rules of the civil law which have been adopted by the Courts of Equity in England. As to bequests of personal property, the Commissioners, in their report, say:—"On the subject of conditions we have deemed it right to abstain from introducing into India the very refined distinction 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,

* This Part applies to the wills of Hindus, etc., in the Lower Provinces Bengal and the Towns of Madras and Bombay.—Act XXI of 1870, s. 2.

if expressed in one way, they ought to be permitted to take effect if expressed in another 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 by a gift over, it ought to be valid without a gift over, and not to be treated as if it had been inserted merely to frighten the tee by an unmeaning threat."

By the civil law, when a condition precedent to the vesting of a legacy is impossible, the bequest is single,—*i.e.*, discharged of the condition, and the legatee will be entitled as if the legacy were unconditional—Williams on Executors, 1269.

If a condition is impracticable, though not physically impossible, the legacy is void. Thus, where a testator bequeathed property to a married woman upon condition that she conveyed an estate devised to her by another testator to her separate use with a clause against anticipation, the Court held, that the fact of the woman not being competent to make a valid conveyance of the estate, was fatal to the bequest—*Robinson* v. *Wheelwright*, 6 DeG. M. and G., 535; see *Lowther* v. *Cavendish*, 1 Ed., 99.

114. A bequest upon a condition, the fulfilment of which would be contrary to law or to morality, is void.

Bequest upon illegal or immoral condition.

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 DeG. and S., 49. So, where there was a bequest of an allowance to a married woman, on condition that she lived apart from her husband, the condition was held to be contra *bonos mores*, and void—*Brown* v. *Peck*, 1 Ed., 140; see also *Cartwright* v. *Cartwright*, 3 DeG. M. and G., 982.

With regard to conditions precedent which are illegal, if performance requires an act which is *malum in se*, as to kill *A*, burn his house, or the like, then both by the Common Law and Civil Law, not only the condition, but the bequest itself, is void—Williams on Executors, 1270, citing Swinb., Part IV, s. 6, p. 16. But where the illegality consists merely in the performance of the condition being against a rule or policy of the law, there (although by the Common Law the devise as well as the condition is equally void as if there existed *malum in se*) by the Civil Law the condition only is void, and the bequest single and good—*Ibid.* This Act makes no distinction between conditions the performance of which requires an act which is *malum in se*, and conditions the performance of which requires an act which is against a rule or policy of the law, or *malum prohibitum*.

115. Where a will imposes a condition to be fulfilled before the legatee can take a a vested interest in the thing bequeathed, the condition

Fulfilment of condition precedent to the vesting of a legacy.

shall be considered to have been fulfilled if it has been substantially complied with.

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.

A general consent to any marriage is sufficient—*Mercer* v. *Hall*, 4 Bro. C. C., 326; *Pollock* v. *Croft*, 1 Mer., 181.

The condition is complied with by a first marriage, and does not extend to a second marriage contracted without the consent of the person whose consent is required in the condition—*Hatcheson* v. *Hammond*, 3 Bro. C. C., 128; *Crommelin* v. *Crommelin*, 3 Ves., 227.

Consent may be implied, as from the circumstance that the executor or trustee whose consent is made a condition, witnesses the reception of addresses of marriage, and intimates no disapprobation, for then the maxim, *qui tacit satis loquitur*, applies.—Williams on Executors, 1285, citing *Campbell* v. *Lord Netterville*, cited in 10 Ves., 243.

After a lapse of many years consent by trustees to a marriage will be presumed in the absence of any claim by the persons entitled to take advantage of the forfeiture—*In the Goods of Birch*, 17 Beav., 358.

(*b.*) 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.

In *Dawson* v. *Massey*, L. R., 2 Chan. Div., 753, where a bequest was to the children of the testator's sister on their marrying with the consent of their parents, it was held, that the consent mentioned in the will must be taken to be that of the parents or parent if any, and that a daughter who had married with the consent of her surviving parent took a vested interest.

So, where the consent of several trustees or executors is required, and one disclaims or renounces, it has been held that the others alone may consent—*Worthington* v. *Evans*, 1 Sim. and Stu., 165.

(*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.

Where a legacy is conditional on the consent of trustees, the consent of the majority is not sufficient—*Clarke* v. *Parker*, 19 Ves., 1, *per* Lord Eldon, p. 24.

(*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.

A consent once given without any condition is not to be retracted from caprice or perverseness (*Dashwood* v. *Peyton*, 18 Ves., unless it has been obtained through fraud or decei—*Merry* v. *I* 1 Eden, 1.

(*e.*) 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.

The consent after the marriage was immaterial, because no subsequent approbation could amount to a performance of the condition, or dispense with the breach of it. If there had been a general consent to any marriage, subsequent approbation, unless the consent were required to be in writing, would have been sufficient—*Pollock* v. *Croft*, 1 Mer., 181.

(*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.

Clarke v. *Berkeley*, 2 Vern., 720.

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 follows the general rule that conditions precedent must be literally performed—*Robinson* v. *Wheelwright*, 21 Beav., 214. In England it has been held, according to Civil Law, that a condition that a legatee shall pay a sum of money (*Lane* v. *Hyde*, 4 Beav., 468), within a given time, there being no gift over (*Hollinrake* v *Lister*, 1 Russ., 500, 508) is not construed strictly, if in fact he has done so in a *reasonable* time. So a condition to execute a release has been construed similarly (*Hollinrake* v. *Lister*, 1 Russ., 500); but if the condition to execute a release within a particular time be in the form of a conditional limitation, it was held, it must be complied with—*Simpson* v. *Vickers*, 14 Ves., 341. The principle on which the English Courts have acted in these last cases is, that the period for executing the release was merely ancillary to the accomplishing of that object and the procurement of that instrument was the end and substance of the condition.—Williams on Executors, p. 1273.

If the testator's intention be satisfied by an execution (of a condition precedent) in substance, *i.e.*, *cy près*, the performance will be sufficient. . . . . This extensive limitation of the general rule of strict performance has been admitted by the Civil Law in all cases, where it is apparent that testators paid more regard to the end or fulfilment of the condition than to the means prescribed for the execution. Roper. Leg., 767 (4th Edition).

116. Where there is a bequest to one person and a bequest of the same thing to another, if the prior bequest 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*.

Illustrations.

(*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. and B., 313; see the judgment of Sir W. Grant, M. R.

(*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.

v. *Ward*, 1 Ves. Sen., 420.

The principle on which this section and the following section are based, is thus explained by Mr. Justice Williams:—"Instances have frequently occurred in which the Court has concluded from the context of the will, that the intention of the testator is effectually fulfilled by regarding a clause of apparent condition as a clause of *conditional limitation*, so as to require, as in the case of a gift on a condition (see s. 107), 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 interest of the testator"—Williams on Executors, 1274-75.

As to the effect of an apparent intention on the part of the testator that the prior legacy shall fail in a particular manner before the second legacy can take effect, see next section.

In general, where there is a subsequent limitation, limited to take effect on the failure of a preceding one, if the preceding limitation is removed, or does not arise, the subsequent limitation will take effect. See *Arelyn* v. *Ward*, 1 Ves. Sen., 420; *Tennant* v. *Heathfield*, 21 Beav., 255. Thus, where there was a devise on condition that the devisee should execute a release in three months after the testator's death, but *if he should neglect to do so*, the devise to go over, and the devisee died in the lifetime of the testator, the devise over was held to take effect—*Arelyn* v. *Ward*, 1 Ves. Sen., 420. So in *Jones* v. *Lecomb*, 1 Eq. Cas. Abr., 245, where there was a bequest to child, of which the testator's wife was *enceinte*, and if child died under twenty-one, over, and the wife was not *enceinte*, it was held that the gift over took effect. See *Meadows* v. *Parry*, 1 V. and B., 124; *Re Green's Trusts*, 6 Jur., N. S., 479.

In *Murray* v. *Jones*, 2 V. and B., 313, a gift over, after various limitations to the children of the testatrix in the event of their all

dying under age and unmarried, was held to take effect, although the testatrix died without having had any child. So, where there was a bequest to *A*, and if he shall die to *B*, and *A* was dead at the [illegible] e was held to a

, L. R., 1 Eq., 79, there was a bequest after the death of *J* (to whom an annuity was given out of the fund) to *E* during her natural life, but in case of the death of *E* during the lifetime of *J*, then to *M* for life, and after the decease of *E* and *M*, then over. It was held by WOOD, V. C., that there was a sufficient indication of an intention to give a life-estate to *M* after the death of *E*, although *E* did not die in the lifetime of *J*.

The principle was also applied in the case of *Machinnon* v. *Sewell*, 2 M. and K., 202. There, there was a bequest to *A* for life, with ultimate remainder to the children of *A* living at her decease, to be paid to them after her death as they attained twenty-one, and *if all died before attaining twenty-one*, then over. One child of *A* attained twenty-one, but no child survived her, and it was held that the gift over took effect. See also *Tennant* v. *Heathfield*, 21 Beav., 255.

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.

This is the case of *Underwood* v. *Wing*, 4 DeG. M. and G., 633. By the law of England, the question of survivorship is matter of evidence, and not of positive regulation and enactment; and in the absence of evidence there is no conclusion of law on the subject. In the case of *Underwood* v. *Wing*, it was held, that the gift over was dependent on the event of the testator surviving his wife. "*Primâ facie*," it was said by the LORD CHANCELLOR, "the next-of-kin will be entitled to the personal estate, and their right will only be displaced by some person coming forward and showing a valid and effectual disposition taking it away from them.

See s. 107, *ante*.

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 speci-

Bequest over conditional upon the happening or not happening [illegible]

fied 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.

Section 115 is necessarily omitted, because of the provisions of s. 119.

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 divested and to go to *B* in case *A* shall die under 18.

See *Taylor* v. *Johnson*, 2 P. W., 506; and *Nicholls* v. *Osborn*, *ib.*, 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*.

A condition that a legatee should not dispute the will, in England as to personalty, was regarded as merely *in terrorem*; and, therefore, a legatee, by having contested the will, did not forfeit his legacy, unless there was a gift over upon breach of the condition—*Cleaver* v. *Spurling*, 2 P. W., 528. This doctrine was never applied in the case of devises of real estate; but, on the contrary, it was decided in *Cooke* v. *Turner*, 15 M. and W., 727, that such a condition annexed to a devise of land was valid and effectual without a gift over upon breach of the condition—2 Jar., 57-8.

(*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 divested 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.

Harrison v. *Foreman*, 5 Ves., 207. There *A* and *B* took vested interests, subject to being divested in favour of the survivor living at the death of *C*; but, inasmuch as neither survived *C*, the contingency which was to divest the legacy never happened. See *Wagstaff* v. *Crosby*, 2 Coll., 746; *Re Sander's Trusts*, L. R., 1 Eq., 675.

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.

This is the case of *Sturgess* v. *Pearson*, 4 Madd., 411. The Vice-Chancellor SIR JOHN LEACH said: "The vested interests first given by the will are, by the form of the expression, only defeated in case there shall 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 living at the mother's death."

119. An ulterior bequest of the kind contemplated by the last preceding section cannot take effect, unless the condition is strictly fulfilled.

Condition must be strictly fulfilled.

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 effect.

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.

(*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.

The ulterior bequests in s. 118, it is to be observed, are what are called conditions subsequent as distinguished from conditions precedent. When a condition is of the latter sort, the legatee has no vested interest until the condition is performed; when it is of the former, the interest of the legatee vests in the first instance, subject to be divested by the nonperformance or breach of the condition—Williams on Executors, 1265.

It has already been pointed out, see notes to ss. 117 and 118 (*d*), that, in order to divest a vested estate or interest by a gift over, the very event must happen; or, in other words, the condition must be strictly fulfilled—*Wagstaff* v. *Crosby*, 2 Coll., 746; *Re Sander's Trusts*, L. R., 1 Eq., 675.

If the required consent becomes unattainable by the death of the person or persons whose consent is required, a marriage without consent will not cause a forfeiture, where the condition is subsequent. As to real property, or legacies charged on real property, it was held in

England, that a marriage in such a case did occasion a forfeiture—*Peyton* v. *Bury*, 2 P. W., 626; *Collett* v. *Collett*, 35 Beav., 312.

The condition once complied with is released, and consent to a second marriage is not necessary—*Hutcheson* v. *Hammond*, 3 Bro. C. C., 158; *Crommelin* v. *Crommelin* 9 Ves., 227; see *Taylor* v. *Austen*, 1 Drew., 459 A legacy payable at 18, or on marriage with consent, is payable either at that age or on marriage with consent under it, although there is a gift over generally on marriage without consent—*Desbody* v. *Boyville*, 2 P. W., 547.

Original bequest not affected by invalidity second.

120. If the ulterior be not valid, the original bequest is not affected by it.

Illustrations.

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.

(*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 will.

The condition is contrary to public policy—*Cartwright* v. *Cartwright*, 3 DeG. M. and G., 982.

(*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.

Where a condition subsequent is impossible (*Lowther* v. Amb., 358; *Arkdale* v. *Rice*, 3 Madd., 256; *Walker* v. *Walker*, 2 DeG. F. and J., 255), or illegal (*Ridgway* v. *Woodhouse*, 7 Beav., 437; *Egerton* v. *Lord Brownlow*, 4 H. of L., 1), it is void, and the bequest is freed from it as though it had been given unconditionally. See Williams on Executors, 1270-71. Conditions which are repugnant to estates already given are void (*Bradley* v. *Peixoto*, 3 Ves., 325, *per* LORD ALVANLEY), as where there is a devise in fee followed by an absolute restraint upon alienation—*Hood* v. *Oglander*, 34 Beav., 523; *Hunt-Foulston* v. *Furber*, L. R., 3 Chan. Div., 255.

If the condition of an ulterior bequest be too vague for the Court to it, it is void—*Fillingham* v. *Bromley*, T. and R., 530; see *ing* v. *Ellison*, 7 H. L. C., 707.

So a gift which is absolute will not be affected by a subsequent gift over which is void for remoteness (*Ring* v. *Hardwick*, 2 Beav., 352; *Carver* v. *Bowles*, 2 R. and M., 306), the general rule of law being, that an absolute interest is not to be taken away by a gift over, unless that gift may itself take effect—*Green* v. *Harvey*, 1 Hare, 428, 431; *kins* v. *Weston*, 32 L. J., Ch., 396 and 609.

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.

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.

(*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.

(*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.

Ex parte Dickson, 1 Sim., N.S., 37; see *Biddulph* v. *Lees*, E. B. and E., 289.

(*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.

In accordance with the rule of the Civil Law, certain conditions subsequent were, in the case of personalty, held by the Courts in England to be void, and *in terrorem* merely if there were no gift over.

This and the preceding sections having got rid of that rule, under this Act, wherever a condition subsequent is valid if accompanied by a gift over, it is valid without a gift over, and is not to be treated as *in terrorem*.

See *Cooke* v. *Turner*, 15 M. and W., 727; *Evanturel* v. *Evanturel*, L. R., 6 P. C., 11.

122. In order that a condition that a bequest shall cease to have effect may be valid, it is necessary that the event to which it relates be one

Such condition must not be invalid under Section 107.

which could legally constitute the condition of a bequest as contemplated by the one hundred and seventh Section.

of legatee impossible or indefinitely postponing an act for which no time is specified, and on the nonperformance of which the subject-matter is to go over.

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.

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.

Where a testator devised certain property to devisees for life, if either of them should marry into the families to *R* or *G*, and if not, to *S*, and the devisees married, but not into the favoured families, it was held, that the gift over did not take effect, as the devisees had the whole of their lives to perform the condition—*Randal* v. *Payne*, 1 Bro. C. C., 55.

In that case the condition was a condition precedent. The performance of the act required, however, was indefinitely postponed.

Performance of condition precedent or subsequent within specified time.

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 nonfulfilment 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,

Further time allowed in case of fraud.

in which case such further time shall be allowed as shall be requisite to make up for the delay caused by such fraud.

Ignorance of a condition annexed to a gift by will does not protect the devisee from the consequences of not complying with the condition (*Astley* v. *Earl of Essex*, L. R., 18 Eq., 290), for it is a principle that a person who takes under a will cannot plead want of knowledge of the will as an excuse for not complying with its contents—*per* Jessel, M. R., *ib.*, 297. So, in *In re Hodge's Legacy*, L. R., 16 Eq., 92. Wickens, V. C., laid it down, that "neither ignorance, illness, nor neglect on the part of the executor to inform the legatee, can excuse him for not complying with the direction so as to entitle him to the gift" (p. 96).

Where, under a will, a person had a right of pre-emption for a given sum, provided he signified to the trustees within one month of the testator's death his option to purchase, and paid the purchase-money within a further period of two months, and he duly signified his option to the trustees, and applied to their solicitor for an abstract of the title, and the solicitor promised to take an early opportunity of seeing his client with reference to the application, but no abstract was furnished; and hearing nothing further, the donee of the right of pre-emption allowed the period of two months to elapse without paying the purchase-money, or taking any further steps in the matter,—it was held, that the purchase-money not having been paid, the right of pre-emption was lost—*Brooke* v. *Garrod*, 3 K. and J., 608; see *Simpson* v. *Vickers*, 14 Ves., 341, 348; *Avelyn* v. *Ward*, 1 Ves., 420; and notes to illustration (*g*) s. 115, *supra*. See s. 318, *supra*.

Fraud.—The proviso as to fraud in this section appears to have been suggested by an opinion expressed by Wood, V. C., in *Brooke* v *Garrod*, that if in that case (see facts stated, *supra*) there had been fraud on the part of the trustees, or possibly such laches on their part as the Court would consider to have been the sole cause of the donee of the right of pre-emption not complying, *modo et formâ*, with the conditions imposed by the will, the latter might have been entitled to relief.

Where an act is required to be done within a specified time from the testator's death, as to whether the day of the death is to be excluded, see *Gorst* v. *Lowndes*, 11 Sim., 434; and *Lester* v. *Galraud*, 15 Ves., 245. See also notes to s. 104, p. 133, *supra*.

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.

* This Part applies to Hindus, etc., in the Lower Provinces of Bengal, and in the Towns of Madras and Bombay—Act XXI of 1870, s. 2.

Illustration.

A sum of money is bequeathed towards purchasing a country residence for *A*, or to purchase an annuity for *A*, or to purchase a commission in the army for *A*, or to place *A* in any business. *A* chooses to receive the legacy in money. He is entitled to do so.

The principle upon which this section is based, is that a Court of Equity will not compel that to be done which the legatee may undo the next moment. See 1 Jarman, 397.

Thus, in *Stokes* v. *Cheek*, 29 L. J., Ch., 922, where the testator directed an annuity to be purchased, ROMILLY, M R, who directed the price of the annuity to be paid to the annuitant, said, "It is a useless form to direct a purchase if the annuity is immediately to be sold again." See *Ford* v. *Batley*, 17 Beav., 303; *Campbell* v. *Brownrigg*, 1 Ph., 301.

It makes no difference that there is a declaration in the will that the legatee is not to receive the capital in lieu of the annuity—*Stokes* v. *Cheek*, 28 Beav., 620; (S.C) 29 L. J, 9 Ch, 922.

Where a Hindu testator gave all his immoveable property to his sons, but postponed their enjoyment thereof by a clause that they should not make a partition for twenty years, it was held, that the restriction was void as being a condition repugnant to the gift—*Mokoondoo Lall Shaw* v. *Gonesh Chunder Shaw*, I. L. R., 1 Calc, 104.

Where a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment to secure certain objects for the benefit of the legatee, and where such object fails, the absolute gift prevails, and does not fall into the residue—*Administrator-General* v. *Apear*, I. L. R, 3 Calc., 553; see *Lassence* v. *Tierney*, 1 M. and G., 551; and *Kellet* v. *Kellet*, L. R, 3 H. L., 160; *Knox* v. *Botham*, 15 Sim., 82; *Gibbons* v. *Hills*, 1 Dick, 324; *Ford* v. *Batley*, 17 Beav., 303; *Kerr* v. *Middlesex Hospital*, 2 DeG. M. and G., 583. 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. Wms., 308; 1 Jarm., 396 (*s*); *Palmer* v. *Flower*, L. R., 13 Eq, 250; *Gough* v. *Bult*, 16 Sim., 45.

Other examples are the following:—Legacies to purchase a ring (*Apreece* v. *Apreece*, 1 V. and B., 364), or lands (*Hinton* v. *Pinke*, 1 P. Wms., 539), or stock (*Edwards* v. *Hall*, 11 Hare, 23), or for maintenance or education (*Webb* v. *Kelly*, 9 Sim. 472), or to bind the legatee as apprentice (*Barlow* v. *Grant*, 1 Vern., 255).

Direction that a mode of enjoyment of absolute bequest is to be restricted, to secure a specified benefit for the legatee.

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.

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 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.

"If a legatee," said LORD COTTENHAM in *Lassence* v. *Tierney*, 1 Mac. and G., 551, "leave a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails" (p. 562). The case of *Lassence* v. *Tierney* was followed by the House of Lords in the later case of *Kellett* v. *Kellett*, L. R., 1 E. and I. App., 161.

The intention that the gift should be absolute as between the legatee and the estate is, as in all cases of construction, to be collected from the will, and not from there being words which, standing alone, would constitute an absolute gift—*Lassence* v. *Tierney*, 1 Mac. and G., 551.

In *Palmer* v. *Flower*, L. R., 13 Eq., 250, the legacy was of a sum to be expended in the purchase of a commission in the army, and on the purchase of commissions in the army being abolished by royal warrant, it was held that the legatee was entitled to the sum given.

Where the object is not solely for the benefit of the legatee, but some other purpose also is expressed by the testator independent of the object of benefiting the legatee, the principle does not apply, and the legatee is not entitled to elect—*Re Skinner's Trusts*, 1 J. and H., 102.

Bequest of a fund for certain purposes, some of which cannot be fulfilled.

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.

If there be no absolute gift as between the legatee and the estate, and particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate as not having in such event been given away from it—*Lassence* v. *Tierney*, 1 Mac. and G., 562, *per* LORD COTTENHAM.

PART XVIII *

OF BEQUESTS TO AN EXECUTOR.

Legatee named as executor cannot take unless he shows 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 manifest 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.

A *voluntary interference with the assets*, whether with or without probate, will stamp a person as acting executor (Lewin on Trusts, 180), provided the interference is not such as to be plainly referrible to some other ground than the part execution of the trust (*ib.* 181); see v. *Watney*, L. R., 2 Eq., 418; and *Lewis* v. *Mathews*, L. R.,

This section applies generally to all gifts to a person named an executor by the will, whether expressed to be for his care or trouble, or to be given to him as executor or not. It lays down the old rule of construction applied in the Courts in England (*Harrison* v. [illegible], 4 Ves., 216; *Calvert* v. *Sebbon*, 4 Beav., 222), that when a

* This Part applies to the wills of Hindus, etc., in the Lower Provinces of Bengal and the towns of Madras and Bombay—Act XXI of 1870, s. 2.

legacy was given to an executor, to entitle himself to the he must take upon himself the duties of executor. In later years that rule has been somewhat relaxed in favour of legatees (*Cockerell* v. *Barber*, 2 Russ., 598), and now the rule in England appears to be, that, *primâ facie*, a gift to an executor was given to him as executor; but the presumption might be rebutted, as where a motive could be assigned, or could be fairly inferred for the legacy irrespective of the appointment of executor (*Jewis* v. *Lawrence*, L. R., 8 Eq., 345), as where the gift was to a person appointed executor as a relation (*Dix* v. *Reed*, 1 S. and S., 239), or as a mark of friendship (*Re Denby*, 3 DeG. F. and J., 350), or as a mark of respect (*Burgess* v. *Burgess*, 1 Coll., 367). The old rule, it was held, did not apply to a bequest of a residue—*Griffiths* v. *Pruen*, 11 Sim., 202; *Christian* v. *Devereux*, 12 Sim., 264.

Inability from bodily or mental infirmity to prove the will or take up the duties of executor, is no excuse—*Hanbury* v. *Spooner*, 5 Beav., 630; *Re Hawkins*, 33 Beav., 570.

"As a general rule, there must be unequivocal evidence of an intention to act, and that evidence is best given by the probate of the will. But I take it to be equally clear that *Harrison* v. *Rowley* is still law, and that it is not absolutely necessary to prove a will in order to entitle a person to a legacy as executor"—*per* KINDERSLEY, V.C., *Lewis* v. *Matheus*, L. R., 8 Eq., 281.

Intention.—In *Harrison* v. *Rowley*, 4 Ves., 212, one of the persons appointed executors died before probate had been obtained; but previous to his death he had given directions for the funeral of the testator, and it was held that, by so doing, he had manifested an intention to accept the office. In *Lewis* v. *Matheus* (*supra*) the executor, to whom a legacy was left for his trouble, was in Australia at the death of the testator, and sent home a power-of-attorney, under which another person administered the estate. The executor died without proving the will, and it was held, that he had sufficiently shown his intention to act under the trusts of the will, and that his representatives were entitled to the legacy.

Where a person appointed an executor renounced, but subsequently, before the real business of administering the estate was concluded, proved the will, it was held that he was entitled to the legacy.

The illustration to this section is based upon the judgment in *Harrison* v. *Rowley*, 4 Ves., 212.

PART XIX.*

OF SPECIFIC LEGACIES.

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.

Specific legacy defined.

* This Part applies to the wills of Hindus, etc., in the Lower Provinces of Bengal and the towns of Madras and Bombay—Act XXI 1870, s. 2.

Illustration.

(*a.*) *A* bequeaths to *B*—

"The diamond ring presented to him by

"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. So a residuary disposition of all the testator's personal estate in a particular country (*Nisbett* v. *Murray*, 5 Ves. 149), or a bequest of all the testator's goods and moveables whatsoever in a particular room (*Green* v. *Symonds*, 1 Bro. C. C., 128, note), is specific.

"The sum of 1,000 rupees in a certain chest."

Lawson v. *Stitch*, 1 Atk., 508.

"The debt which *B* owes him."

'is v. *Walker*, Ambl., 309; *Duncan* v. *Duncan*, 27 Beav., 386. See s. 164, *infra*.

"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. Wms., 538; see *Crockat* v. *Crockat*, 2 P. Wms., 164; *Pulsford* v. *Hunter*, 3 Bro. C. C., 416.

"The money due to him on the bond of *D*."

v. *Watson*, 11 Hare, 170.

"His mortgage on the Rampore factory."

"One-half of the money owing to him on his mortgage of Rampore factory."

"1,000 rupees, being part of a debt due to him from *C*."

"His capital stock of 1,000*l*. in East India Stock."

v. *Macguire*, 2 Bro. C. C., 108; *Norris* v. *Harrison*, 2 Madd., 279, 280.

"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."

Fryer v. *Morris*, 9 Ves., 360.

"All the wine which he may have in his cellar at the time of his death."

"Such of his horses as *B* may select."

Richards v. *Richards*, 9 Price, 226.

"All his shares in the Bank of Bengal."

See *Bothamley* v. *Sherson*, L. R., 20 Eq., 304.

"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."

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.

A, having property at Benares, and also in other places, bequeaths to *A* all his property at Benares.

The legacy is specific.

(*d.*) *A* bequeaths to *B*—

"His house in Calcutta;"

"His zamindari of Rampore;"

"His taluk of Ramnagar;"

"His lease of the Indigo factory of Sulkea;"

"An annuity of 500 rupees out of the rents of his zamindari of *W*."

A directs his zamindari of *X* to be sold, and the proceeds to be invested for the benefit of *B*.

Each of these bequests is specific.

Every devise of land is specific—*Forester* v. *Leigh*, Amb., 171; and a devise of a rent charge out of a term is as much a specific devise as if it had been of the term itself—*Long* v. *Short*, 1 P. Wms., 402.

It seems to have been considered in England that, after the Wills Act, 1 Vict., c. 26, which made the will speak from the death of the testator, a residuary devise of real estate was not specific (see *Daly* v. *Hartridge*, 1 Dr. and Sm., 241); but it is now settled, that such devises are still specific—*Hensman* v. *Fryer*, L. R., 3 Ch., 420; *Lancefield* v. *Iggulden*, L. R., 10 Ch., 136. Under this Act also a will speaks from the death of the testator—s. 77, *supra*.

The mere gift, however, of an annuity, or of a legacy to be paid out of or charged upon land, is not specific—*Mann* v. *Copeland*, 2 Madd., 223; but if a testator direct freehold or leasehold estate to be sold, and then dispose of the proceeds in such a manner as to show an intention that the legatees should take them specifically, the legacies will be specific—*Page* v. *Leapingwell*, 18 Ves., 463.

(*e.*) *A*, by his will, charges his zemindari of *Y* with an annuity of 1,000 rupees to *C*, during his life, and subject to this charge he bequeaths the zamindari to *D*. Each of these bequests is specific.

(*f.*) *A* bequeaths a sum of money
to buy a house in Calcutta for *B*:
to buy an estate in zillah Fureedpore for *B*:
to buy a diamond ring for *B*:
to buy a house 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."
"2,000 rupees to be paid in cash."
"So much money as will produce 5,000 rupees 4 per cent. Government securities."
These bequests are not specific.

The distinction between specific and general or pecuniary legacies is of great importance. The inclination of the Court is against construing a legacy as specific where there is a reasonable doubt of the intention of the testator—*Webster* v. *Hale*, 8 Ves., 410; *Kirby* v. *Potter*, 4 Ves., 748. In *Ashton* v. *Ashton*, 3 P Wms., 385, LORD TALBOT said, that "though specific legacies have, in some respects, the advantage of those that are pecuniary so as to be paid *in toto* and not in average on a deficiency of assets, yet, in other respects, they are distinguished to their disadvantage from pecuniary legacies, as, suppose they have been lost or aliened by the testator in his lifetime, they must then fail *in toto*,"—that is, in case of their being adeemed. See Chap. XXI, *infra*.

In cases of doubt, parol evidence of the state of the testator's funded property is admissible to determine whether a legacy is to be considered as general or specific—*Attorney-General* v. *Grote*, 2 Rus. and My., 699. It has been held, that a legacy may be specific even where it is declared in the will that "it shall not be deemed specific so as to be capable of ademption"—*Jacques* v. *Chambers*, 2 Coll., 435.

As to what is to be deemed a specific legacy, see further *Bothamley* v. *Sherson*, L. R., 20 Eq., 304, *per* JESSEL, M. R.

A bequest of all the testator's personal estate generally is not specific. The very terms of such a disposition demonstrate its generality (Williams on Executors, 1177); but if a man, having personal property elsewhere, bequeaths all his personal estate at a particular place, the legacy is specific, and all the personal property at that place will pass—*Sayer* v. *Sayer*, 2 Vern., 688; see *Gayre* v. *Gayre*, 2 Vern., 538, and the cases there cited.

Where a testator, who was possessed of three leasehold houses in *K* Street, bequeathed "two houses in *K* Street" in trust for *P* for life, and then to form part of the residuary estate, it was held, that two

of the houses passed under the gift, and that *P* was entitled to which he would take—*Tapley* v. *Eagleton*, L. R., 12 Ch. D., 683; see *Duckmanton* v. *Duckmanton*, 5 H. and N., 219.

(*g.*) *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

No one of these legacies is specific.

Bequest of a sum certain, where the stocks, &c., in which it is invested, are described.

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 w'''

A bequeaths to *B*—

"Ten thousand rupees of his funded property;"

"Ten thousand rupees of his property now invested in shares of the East Indian Railway Company;"

"Ten thousand rupees at present secured by mortgage of Rampore Factory."

No one of these legacies is specific.

In order that a legacy such as is spoken of in this section be construed as specific, it must clearly appear that the testator meant to bequeath the identical stock or funds.

Bequest of stock where the testator had at the date of his will an equal or greater amount of stock of the same kind.

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.

Illustration.

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.

In other words, whether a legacy which is invested in stocks or funds is a specific legacy or not is a question of intention. Therefore, where no explanation is given, it may be that the testator meant his executor to purchase, from the general estate, so much of the stock, &c., in the will described—*Partridge* v. *Partridge*, Cases Temp. Talbot, p. 226.

Legacies such as are dealt with in this section were held not to be specific in the cases of *Purse* v. *Snaplin*, 1 Atk., 413; *Partridge* v. *Partridge*, Cas. Temp. Talbot, 226; *Bronsden* v. *Winter*, Amb., 57; *Gillaume* v. *Adderly*, 385; *Sleech* v. *Torrington*, 2 Ves. Sen, 560; *Webster* v. *Hale*, 8 Ves., 410.

In *Purse* v. *Snaplin*, 1 Atk., 413, the testator gave £5,000 in a particular stock to *A*, and £5,000 in the same stock to *B*. At the time of making the will, and at his death, the testator had only £5,000 in the stock. It was held that the bequests were not specific. So a bequest of £2,000 S.S. stock (*Bronsden* v. *Winter*, Amb., 56), a legacy of £5,000 sterling or 50,000 current rupees, now invested in East India Company's bonds (*Gillaume* v. *Adderly*, 15 Ves, 384), were held not to be specific. In *Sibley* v. *Perry*, 7 Ves., 522, the executor was, within three months of the testator's decease, to transfer £1,000 stock in the three per cent. to certain persons. The legacy was held to be general.

It seems, that where a legacy of the kind referred to in this section is particularized by the word 'my,' or by any other expression which indicates the testator's intention of making it specific or individual, it is to be deemed specific—*Ashton* v. *Ashton*, 3 P. Wms., 384; see note to *Hinton* v. *Pinke*, 1 P. Wms., 538.

In *Ashton* v. *Ashton*, Cases Temp. Talbot, 152; *Jeffreys* v. *Jeffreys*, 3 Atk., 120; *Page* v. *Young*, L. R, 19 Eq., 501, legacies were held to be specific. In *Jeffreys* v. *Jeffreys*, the testator had, at the time he made his will, actually so much stock as would exactly answer the two legacies which he bequeathed. See also *Avelyn* v. *Ward*, 1 Ves., Sen., 424-5. In *Page* v. *Young*, L. R., 19 Eq, 501, a legacy was given in these words—"I give to *A* the interest of £4,500 money in the funds for her absolute use and benefit," followed by specific gifts to the same legatee, and the words "and at *A's* decease the funded property to *H*." The testatrix had, at the date of the will, an absolute interest in £4,000 consols. It was held that the gift was a specific gift to *A* for life with a gift over to *H* absolutely. MALINS, V. C., said, "I am of opinion, looking at the situation of the testatrix, that she intended it (the form of expression) to mean my money in the funds," that is, money already in the funds.

The illustration to this section is only consistent with the section itself, if it be taken, that there is nothing in the will from which it can be gathered that the intention of the testator was that the identical securities should go to the legatee. It seems to be directly opposed to the case of *Jeffreys* v. *Jeffreys*, 3 Atk, 120.

Bequest of money 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.

Illustr

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.

The illustration seems to be borrowed from the case of *Sadler* v. *Turner*, 8 Ves., 617. The testator in that case bequeathed to *A* and *B* £1,000 each, "which legacies I direct to be paid as soon as my property in India shall be realized in England," and it was held, that the legatees would have been entitled to satisfaction, although all the property of the testator should have been transmitted to England in his lifetime. So, where sums of money are bequeathed by a testator who has property in England and in 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 constitute the legacies specific.—*Kirkpatrick* v. *Kirkpatrick*, cited in *Roberts* v. *Pocock*, 4 Ves., 158; Williams on Executors, 1167.

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.

A general residuary clause is not the less general because it contains an enumeration of some of the particulars of which it may consist—*per* WIGRAM, V. C., *Pickup* v. *Atkinson*, 4 Hare, 628. There the testator, after a specific gift of certain leasehold houses, bequeathed "the rents and profits, dividends and interest" of all the residue of his property to his wife for life, with a gift over of the whole of the residue to other persons; see *Goodenough* v. *Tremamondo*, 2 Beav., 512, and *Taylor* v. *Taylor*, 6 Sim., 246.

Retention, in form, of specific bequest to several persons in succession.

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.

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.

In the case of *Pickering* v. *Pickering*, 4 Myl. and Cr., 289, upon the ruling in which this section is based, LORD COTTENHAM said,—"It is

clear that if a person gives certain property specifically to one person for life with remainder over afterwards, then, although, there is a danger that one object of his bounty will be defeated by the tenancy for life lasting as long as the property endures, yet there is a manifestation of intention which the Court cannot overlook." See *Thursby* v. *Thursby*, L. R., 19 Eq., 395, where the cases on this subject are collected.

Where trustees had a discretionary power "to sell so much and such part thereof as they might think necessary," it was held, that the tenant-for-life might enjoy specifically such parts as the trustees did not sell—*Sewell's Estate*, L. R., 11 Eq., 80.

It seems, however, that the argument in favour of specific enjoyment of things expressly enumerated is less strong where the gift is made through the machinery of trustees—*Craig* v. *Wheeler*, L. J., Ch., 374; see *Morgan* v. *Morgan*, 14 Beav., 72.

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.

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*.

This is the rule in *Howe* v. *Lord Dartmouth*, 7 Ves., 137.

In England the effect of the later decisions has been to allow small indications of intention to prevent the application of the rule—*Morgan* v. *Morgan*, 14 Beav., 82, *per* Lord Romilly. As to what will be taken as a sufficient indication in the will to exclude the operation of the rule, see *Thursby* v. *Thursby*, L. R., 19 Eq., 395; *Sutherland* v. *Cooke*, 1 Coll., 498; *Collins* v. *Collins*, 2 M. and K., 703; *Hinres* v. *Hinres*, 3 Hare, 609; *Wearing* v. *Wearing*, 23 ; *Skirving* v. *Williams*, 24 Beav., 275.

Where there is an indication of intention that the property is to be in its existing state, it must be so enjoyed—*Pickering* v. *Pickering*, 4 Myl. and Cr., 304, *per* Lord Cottenham.

some expression can be gathered from the will that the property is not to be enjoyed in its existing state, the rule must be applied—*Sutherland* v. *Cooke*, 1 Coll., 498; *Blann* v. *Bell*, 5 DeG. and Sm., 658; v. *Murkby*, 18 Beav., 196.

The mere absence of any direction to convert will not preclude the application of the rule—*Morgan* v. *Morgan*, 14 Beav., 72, 83.

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.

A specific legatee has the advantage, that, if the assets are deficient, he takes the very thing bequeathed to him without any abatement. On the other hand, if the testator sells the thing given, the legacy fails altogether; see note to *Hinton* v. *Pinke*, 1 P. Wms., 540.

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.

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.

The first of these legacies is the same as the 15th of the illustrations to s. 129, division (*a*).

As to the other legacy, see *Ford* v. *Fleming*, 2 P. Wms., 469.

* This Part applies to the wills of Hindus, etc., in the Lower Provinces of Bengal and the towns of Madras and Bombay—Act XXI of 1870, s. 2.

(*b.*) *A* bequeaths to *B*—

"Ten bushels of the corn which shall grow in his field of Greenacre:"

"Eighty chests of the indigo which shall be made at his factory of Rampore:"

"Ten thousand rupees out of his five per cent. promissory notes of the Government of India:"

An annuity of 500 rupees "from his funded property:"

"One thousand rupees out of the sum of 2,000 rupees due to him by *C*."

Kirby v. *Potter*, 4 Ves., 748.

A bequeaths to *B* an annuity, and directs it to be paid out of the rents arising from his taluk of Ramnagar.

In general, a legacy payable out of property, real or personal, is demonstrative—*Saville* v. *Blachet*, 1 P. Wms., 779. It is considered that there is a fixed independent separate distinct intent to give the legacy, the property being merely pointed out as the particular fund from which it is payable—*Mann* v. *Copeland*, 2 Madd., 223. In illustration (*e*) to s. 129, *ante*, p. 166, there is no such apparent separate intent to give the annuity in all events.

A bequeaths to *B* "10,000 rupees out of his estate at ," or charges it on his estate at Ramnagar.

Here the gross sum of Rs. 10,000 is charged on the estate merely, and the gift is therefore of so much money intended for the legatee at all events; see *Saville* v. *Blachet*, 1 P. Wms., 777; *Fowler* v. *Willoughby*, 2 Sm. and Stu., 354.

A gift, however, of a sum of money, part of the produce of real estate directed to be sold, followed by a gift of the residue of the purchase-money to others, is substantially a gift of the estate, and not a gift of legacies with a collateral charge on the estate; and these gifts are adeemed if the testator sell the estate in his lifetime—*Newbold* v. *Roadknight*, 1 R. and My., 677; *per* Sir Jhon Leach, M. R.

"Ten thousand rupees, being his share of the capital embarked in a certain ."

Attwater v. *Attwater*, 18 Beav., 330 See *Sparrow* v. *Josselyn*, 16 Beav., 135, where the testator directed that "the legacy of £10,000, my present capital in the business of banker at *C*, hereinbefore given to him, shall be paid to him, my said son *A*, it being my intention to give him such capital of £10,000 wherever the same may be;" and the legacy was held to be demonstrative. See also *Bevan* v. *Attorney-General*, 4 Giff., 361.

Each of these bequests is demonstrative.

Demonstrative legacies will not fail, although the particular fund, out of which they are directed to be paid, be called in, or be not in existence at the time of the testator's death; but will then be payable out of the general assets—*Vickers* v. *Pound*, 6 H. L. Ca., 885; *Gillaume* v. *Adderley*, 15 Ves., 384; see s. 140, *infra*. Such legacies are specific in one sense, and general in another: specific, as being given out of a particular fund, and not out of the estate at large; general, as con-

sisting only of definite sums of money and not amounting to a gift of the fund itself or any aliquot part of it—*Smith* v. *Fitzgerald*, 3 Ves., and B., 5, *per* GRANT, M. R. A demonstrative legacy, too, is so far specific that it will not be liable to abate with general legacies upon a deficiency of assets—*King* v. *Martin*, 2 Ves. Jun., 640; 2 Wms., 1165. It is liable to abate, however, when it becomes a general legacy by reason of the failure of the fund out of which it is payable—*Mullins* v. *Smith*, 1 Dr. and Sm., 210; *per* KINDERSLEY, V.C.

Where the subject-matter of a specific bequest produces income, the bequest carries the income accruing from the date of the testator's death, for the specific legacy vests from that time—*Jacques* v. *Chambers*, 2 Coll., 435, 440. A demonstrative legacy, however, does not carry income or interest from the testator's death—*Mullins* v. *Smith*, 1 Dr. and Sm., 204, 210. The distinction between demonstrative and other legacies is discussed at great length in the case of *Paget* v. *Huish*, 1 Hem. and Mil, 663.

138. Where a portion of a fund is specifically bequeathed, and a legacy is directed to be paid out of a fund, the subject of a specific legacy.

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.

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

Ademption explained.

* This Part applies to the wills of Hindus, etc., in the Lower Provinces of Bengal and the towns of Madras and Bombay—Act XXI of 1870, s. 2.

effect by reason of the subject-matter having been withdrawn from the operation of the will.

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.

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.

It is to be borne in mind that all cases of ademption of legacies arise from a supposed alteration of the intention of the testator—*Partridge* v. *Partridge*, Cases Temp Talbot, 227.

It is a consequence of the nature of a specific legacy that if the subject-matter of the legacy does not exist at the time of the testator's death, or only partially, the legacy will be wholly or partially extinguished or adeemed as the case may be—*Humphreys* v. *Humphreys*, 2 Cox, 185; *Hayes* v. *Hayes*, 1 Keen, 97. The general rule is, that the thing specifically bequeathed must remain in specie as described in the will—*Ashburner* v. *Macguire*, 2 Bro. C. C., 110.

Stock not purchased, but directed to be purchased, will not pass under a bequest of all the testator's stock, for the specific thing must be in existence at the time of the testator's death—*Thomas* v *Thomas*, 27 Beav., 537. A legacy is irretrievably adeemed by a sale of the stock, and will not be revived by a new purchase of similar stock—1 Rop. 3, 288; but see *Partridge* v. *Partridge*, Cases Temp. Tal., 227, and [illegible] v. *Ward*, 1 Ves. Sen., 426.

A testator, having certain debentures at the date of his will, thereby gave "all my debentures" upon certain trusts. After the date of the will, he exercised an option given to him by the company which had issued the debentures, and converted them into debenture stock of the same company; and it was held that the debenture stock did not pass by the will—*In re Lane*, L. R., 14 Ch. D., 856; see *In re Johnstone's Settlement*, *ibid*, 162.

Non-ademption of demonstrative legacy.

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.

Mann v. *Copeland*, 7 Madd., 223; *Vickers* v. *Pound*, 6 H. L. C., 885; *Mullins* v. *Smith*, 1 Dr. and Sm., 204-216.

The fund or stock on which a demonstrative legacy is charged is merely the primary fund out of which payment of the legacy is to be made.

This section is based on the principle laid down in *Gillaume* v. *Adderley*, 15 Ves., 384; *Vickers* v. *Pound*, 6 H. L., 885; *Campbell* v. *Graham*, 1 Ry. and M., 453.

Ademption of specific bequest of right to receive something from a third party.

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.

Illustrations.

(*a.*) *A* bequeaths to *B*—

"The debt which *C* owes him:"

"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 Rampore factory."

All these debts are extinguished in *A's* lifetime, some with and some without, his consent.

All the legacies are adeemed.

(*b.*) *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 ademeed.

Payment of a debt is an ademption of a specific bequest of that debt (*Rider* v. *Wager*, 2 P. Wms., 331), unless there be an express direction to the contrary in the will—*Earl of Thomond* v. *Earl of Suffolk*, 1 P. Wms., 461. It makes no difference whether the testator has himself called in the debt, or the debtor have paid it voluntarily—*Innes* v. *Johnson*, 4 Ves., 568, 574; *Stanley* v. *Potter*, 2 Cox, 180; see also *Humphreys* v *Humphreys*, 2 Cox,

The receipt of dividends on a bankruptcy of a debtor, whose debt has been specifically bequeathed by the creditor, operates only as an ademption *pro tanto* of the debt, the legatee being entitled to receive any further dividends that may be payable—*Ashburner* v. *Macguire*, 2 Bro. C. C., 113.

Illustration (*b*) is the case of *Barker* v. *Rayner*, 5 Madd., 208, affirmed on appeal, 2 Russ. Chan. Cas., 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

Ademption *pro tanto* by testator's receipt of part of entire thing specifically bequeathed.

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*.

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 of 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

Order of payment where a portion of a fund is specifically bequeathed to one legatee, and a legacy charged on the same fund to and the testator having received a portion of that fund, the remainder is insufficient to pay both

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.

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.

The specific legacy is to be paid at all events, whereas the fund, so far as the demonstrative legacy is concerned, is merely pointed out as the fund from which it is payable in the first instance. See the case of *Kermode* v. *McDonald*, L. R., 1 Eq., 459.

See note to s. 137, *supra*.

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.

The only rule to be adhered to is to see whether the subject of the specific bequest remained in specie at the time of the testator's death, for if it did not, then there must be an end of the bequest; and the idea of discussing the particular motives and intention of the testator in each case in destroying the subject of the bequest would be productive of endless uncertainty and confusion—*Humphreys* v. *Humphreys*, 2 Cox, 185, *per* Lord Talbot; Williams on Executors, 1329.

See ss. 150, 152 and 153, *infra*.

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 vernment of India."

A sells one-half of his 10,000 rupees in the loan in question.

One-half of the legacy is adeemed.

See *Ashburner* v. *Macguire*, 2 Bro. C. C., 113.

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 removal.

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.

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.

Neither of these legacies is adeemed.

In general, a bequest of goods in a particular place is adeemed by their removal to another place—*Green* v. *Symonds*, 1 Bro. C. C., 128, note. In *Heseltine* v. *Heseltine*, 3 Madd., 276, the testator bequeathed all his furniture at *D* and *W* to his wife, and after making his will removed to *B*, to which he transferred his furniture from *D* and *W*. LEACH, V.C., held, that the bequest was adeemed. It has been held, in England, also that removal of a thing specifically bequeathed for temporary purposes as for repairs (*Ld Brooke* v. *Warwick*, 2 DeG. and Sm., 425), or for safe custody, or preservation from fire, will not operate as an ademption —*Domrile* v. *Taylor*, 32 Beav., 604; *Chapman* v. *Hart*, 1 Ves., Sen., 273.

Nor will wrongful conversion by a third person defeat a specific legacy given by the testator—*Domrile* v. *Taylor*, 32 Beav., 604; see *Shaftesbury* v. *Shaftesbury*, 2 Vern., 747.

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

When removal of

the place is only referred to in order to complete the description of what the testator meant to bequeath.

Illustrations.

(*a.*) *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.

(*b.*) *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.

(*c.*) *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.

It must be a question of construction whether a locality referred to is essential to the bequest, or merely descriptive.

The nature of the place described, as in illus. (*c*), may be a criterion—*Chapman* v. *Hart*, 1 Ves. Sen., 273. Illus. (*b*) follows the case of *Land* v. *Devaynes*, 4 Bro. C. C., 537. There the removal of the furniture from time to time was for the temporary purpose of being used in the particular house in which the testator might be living. See preceding section.

The words "then lying in his lodgings in Calcutta" in the first illustration, are clearly descriptive. The case from which the illustration is taken is that of *Cunningham* v. *Ross*, 2 Cas. Temp. Lee., 272, where the bequest was of all the testator's bills, etc., lying in the lodgings he possessed in the house of Mrs. S. The words referring to locality were held to be descriptive only. Compare the case of *Le Grice* v. *Fitch*, 3 Mer., 50.

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.

the thing bequeathed is a valuable to be received from a third person; and the testator or his representative receives it.

Illustration.

A bequeaths to *B* whatever sum may be received from 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.

This section lays down the law according to the decision of STUART, V.C., in the case of *Clarke* v. *Browne*, 2 Sm. and G., 524. See *Lee* v. , 27 L. J., Chan., 824; and *Moore* v. *Moore*, 29 Beav., 496.

The decision in *Clarke* v. *Browne*, 2 Sm. and G., 524, was, however, questioned by JESSEL, M. R., in the recent case of *Harrison* v. *Jackson*, L. R., 7 Ch. D., 339. See *Le Grice* v. *Fitch*, 3 Mer., 50.

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*.) *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.

(*b*.) *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.

(*c*.) *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.

There is no ademption when stock specifically bequeathed is changed by Act of Parliament—*Partridge* v. *Partridge*, Cases Temp. Talbot, 227; *Oakes* v. *Oakes*, 9 Hare, 666. In the latter case, a bequest of all the testator's G. W. R. shares, of which he might be possessed at the time of his death, was held to pass all the G. W. R. stock into which the shares which he held at the time of making the will had by Act of Parliament been converted; but not G. W. R. stock purchased after the conversion.

Illustration (*b*) follows the principle laid down in the cases of *Lee* v. , 27 L. J., Chan., 824; and *Dingwell* v. *Askew*, 1 Cox, 427.

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.

Change of subject without testator's knowledge.

Illustration.

A bequeaths to *B* "all his three 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.

In *Basan* v. *Brundun*, 8 Sim., 171, the testator, seven days before his death, had directed his agents in England to invest, in any funds beneficial to the estate, certain sums of money which he had specifically bequeathed. Before receiving the instructions, the agents had, unknown to the testator, already invested the money in 4½ per cent. SHADWELL V.C., held, that, by this unauthorized act of the agents, there was no ademption.

So, where there has been a wrongful conversion or removal of the subject-matter of a specific bequest without the knowledge or sanction of the testator by a third person, the bequest is not adeemed—*Domvile* v. *Taylor*, 32 Beav., 604. See *Shaftesbury* v. *Shaftesbury*, 2 Vern., 747. See notes to s. 147, *supra*.

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.

Stock specifically bequeathed, lent to a third party on condition that it shall be replaced.

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.

Stock specifically bequeathed, sold but replaced, and belonging to the testator at his death.

In *Pattison* v. *Pattison*, 1 My. and Keen, 12, where the testator, made a specific bequest of "£50 long annuities, purchased with £1,000 left by the will of J. T.," sold the long annuities and purchased new annuities, which differed only from the long annuities by being terminable quarter of a year sooner, the legacy was held to be adeemed.

The confirmation of a will by a codicil will not revive a legacy which has been adeemed in the meantime—*Drinkwater* v. *Falconer*, 2 Ves. Sen., 623. See *Hopwood* v. *Hopwood*, 7 H. L., 728; and Wms., 1338.

According to English law, a legacy of stock adeemed by sale will not be revived by a purchase of similar stock by the testator—Williams on Executors, 1,330; see *Partridge* v. *Partridge*, Cases Temp. Talb., 227. There the testator, who bequeathed 1,000*l.* S. E. stock to *B*, was,

the time of making the will, possessed of £1,800 of such stock; but he afterwards reduced it to £200, and then again increased it to £1,600. It was held, that the after-purchased stock passed by the will to the legatee. LORD TALBOT said, "if the selling out stock is an evidence to presume an alteration of the intention of the testator, surely his buying in again is as strong an evidence of his intention that the legatee should have it again." See remarks upon this case by LORD HARDWICKE in *Aveleyn* v. *Ward*, 1 Ves. Sen., 426. See also *Drinkwater* v. *Falconer*, 2 Ves. Sen., 623.

In *Mathews* v. *Foulsham*, L. R., 2 Eq., 669, the testator, being at the time possessed of £1,000 guaranteed stock in the N. B. Railway, bequeathed to *A* "my one thousand N. B. Railway preference shares." After the date of his will he sold his N. B. guaranteed stock, but died possessed of shares and stock in the N. B. Railway acquired by several successive purchases exceeding the amount bequeathed to *A*. It was held by WOOD, V.C., that the bequest being specific had been adeemed; that a contrary intention, so as to exclude the operation of 1 Vict., c. 16, s. 24, appeared in the will, and that *A* was not entitled to have his legacy satisfied out of the N. B. shares and stock in the possession of the testator at the time of his death. WOOD, V.C., in referring to the fact that the subsequently purchased stock had not been purchased at one time, said: "This bit-by-bit purchase would not come within the reasoning of LORD HARDWICKE in *Aveleyn* v. *Ward*, 1 Ves. Sen., 423.

PART XXII.*

OF THE PAYMENT OF LIABILITIES IN RESPECT OF THE SUBJECT OF A BEQUEST.

Nonliability 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.

See s. 156, *infra*.

* This Part applies to the wills of Hindus, etc., in the Lower Provinces of Bengal and in the towns of Madras and Bombay—Act XXI of 1870, s. 2.

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 zemindari, 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.

In England, the gift of a specific article which is in pawn is a full gift, and the executor must redeem; see *Ashburner* v. *Macguire*, 2 Bro. C C., 111. Here, however, the law is different; see Illus. (*a*), which gives an example of a specific article which had been bequeathed to *B*, being at the time of the testator's death in pledge to a third person, and it is stated to be the duty of the executors, if the state of the testator's assets will allow them, to allow *B* to redeem the article. This section, moreover, applies both to moveable and immoveable property—see illus. (*b*) and s. 179, *infra*.

In England, in the case of personal property, it has been held, that where a specific legacy is pledged or charged by the testator, the legatee is entitled to have it redeemed or exonerated by the executor, and if the executor fail to perform that duty, the legatee is entitled to compensation to the amount of the legacy against the personal assets of the testator—*Knight* v. *Davis*, 3 My. & K., 358, *per* LEACH, M. R. This is so whether it be for the debt of the testator himself or not—*Bothamley* v. *Sherson*, L. R., 20 Eq., 304, *per* JESSEL, M. R. Under this section, where any property specifically bequeathed is subject at the death of the testator to any pledge, lien, or incumbrance created by the testator himself, the legatee, unless a contrary intention appear in the will itself, must accept it subject to the pledge, lien, or incumbrance. Important questions, therefore, may arise as to what is a sufficient indication of a contrary intention, and as the law in England, as enacted by Locke King's Act, 17 and 18 Vict., c. 113, s. 1, with reference to realty, is similar to that laid down by this section, the cases decided in England upon that Act may be here taken as a guide. Previously to 17 and 18 Vict., c. 113, the rule was that the personal estate of a deceased debtor was the primary fund to pay off a mortgage, unless it appeared from the will that the testator intended that the mortgaged property should be the primary fund—*Goodwin* v. *Lee*, 1 K. & J., 377. By that Statute, however, the devisee of real estate, "charged with the payment of any sum of money by way of mortgage, cannot claim payment of the mortgage out of personal assets, unless, as under this section, the testator shall by his will, deed, or other document have signified any contrary or other intention." It was held under that section that a lien for unpaid purchase-money was not a charge by way of mortgage under the Statute—*Hood* v. *Hood*, 26 L. J., Ch., 616; see *Barnewell* v. *Iremonger*, 1 Dr. & S., 243; but under a subsequent Statute, 30 and 31 Vict., c. 69, s. 2, however, the word 'mortgage' has been extended to include such a lien.

A general direction in a will that "all just debts be paid as soon as may be," was held not to be a sufficient expression of a contrary

intention—*Pembrooke* v. *Friend*, 1 John. and Hem., 132; *Brownson* v. *Lawrance*, L. R., 6 Eq., 1. It was held by Lord Chancellor Campbell in *Woolstencroft* v. *Woolstencroft*, 2 DeG. F. and J., 347, overruling the decision of Stuart, V. C., that a direction that all debts, &c., should be paid by the *executors*, followed by a gift of all the testator's real estates, which were subject to a mortgage, to trustees, who were also executors, did not show a contrary intention. So the mere expression of a direction that all the debts should be paid out of the personal estate was held not to be a sufficient expression of a contrary intention as to prevent a devisee of a mortgaged estate taking *cum onere* under Locke King's Act—*Howson* v. *Harrison*, 31 Beav., 207. But it seems that a direction to pay debts out of a particular fund is sufficient to show a contrary intention. In *Smith* v. *Smith*, 3 Giff., 263, the testator devised a house subject to a mortgage to his daughter, and bequeathed all his personal estate to trustees (of whom his daughter was one), and directed them to pay his debts thereout, and *subject thereto* to divide the residue among his children. Stuart, V. C., held, that it was the clear intention of the testator that the mortgage-debt should be paid out of the personal estate. He distinguished the case of *Woolstencroft* v *Woolstencroft* (*supra*) by the circumstance that, in the case before him, the devise of the mortgaged estate was to one of the executors who had been plainly directed to pay all the debts out of the personal estate. So, where a testator bequeathed his personal estate to trustees on trust to pay thereout all his debts, &c., and invest the residue upon the trusts therein mentioned, and he disposed of his real estate, part of which was subject to a mortgage, it was held, that the trust for the payment of the testator's debts showed a contrary intention, and that the mortgaged estate ought to be exonerated out of the personalty. In *Mellish* v. *Vallins*, 2 John. & Hem., 194, the bequest of personalty "subject to the payment thereout of all the testator's debt," following a devise of land mortgaged, which made no reference to the mortgage, was held to be a sufficient indication of an intention that the land should not be primarily liable to the payment of the mortgage-debt; see *Eno* v. *Tatham*, 3 DeG. J. and Sm., 443. In *Newman* v. *Wilson*, 31 Beav., 33, the devisee of a mortgaged estate was held entitled to have the mortgage paid out of the other real and personal estate devised for payment of debts: see *Maxwell* v. *Maxwell*, L. R., 4 H. L., 506.

In *Brownson* v. *Lawrance*, L. R., 6 Eq., 1, where the owner of an equity of redemption of two estates comprised in the same mortgage specifically devised one estate and left the other to pass by a residuary devise, it was decided by Lord Romilly, that he thereby signified a contrary intention, which made the residuary devise primarily liable for the whole of the mortgage. In *Gibbins* v. *Eyden*, L. R., 7 Eq., 374, Malins, V. C., points out that this case proceeded on the ground that a residuary devise was not specific. That such a devise is specific has been laid down in *Hensman* v. *Fryer*, L. R., 2 Eq., 627; and *Bothamley* v. *Sherson*, L. R., 20 Eq., 304.

Brownson v. *Lawrance* was also questioned in *Sackville* v. *Smyth*, L. R., 17 Eq., 153, by Jessel, M. R.

Where a particular fund is declared liable for the payment of debts or encumbrances, the devisee of a mortgaged estate is only entitled to be exonerated so far as that fund goes—*Rodhouse* v. *Mold*, 35 L. J., Ch., 67.

Now, in England, by Statute 30 and 31 Vict., c. 69, s. 1, it is enacted, as to wills made after 31st December, 1867, that "a general direction that the debts or all the debts of a testator shall be paid out of his estate, shall not be deemed to be a declaration of an intention

contrary to, or other than the rule established by the said Act (17 and 18 Vict., c. 113), unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate."

As to this enactment, GIFFARD, V. C., said,—"The meaning of that appears to be this, that if a testator wishes to give a direction, which shall be deemed a declaration of an intention contrary to the rule laid down by Mr. Locke King's Act, it must be a direction applying to his mortgage debts in such terms as distinctly and unmistakably to refer to, or describe them"—*Nelson* v. *Page*, L. R., 7 Eq., 25, 28.

This section, it is to be observed, refers only to pledges, liens, or incumbrances created by the testator himself. In England, a distinction was made between charges created by the testator himself and liabilities incident to the thing bequeathed. From the former, the legatee in England was entitled to exoneration. The latter are here dealt with by ss. 156 and 157, *infra*.

Completion of testator's title to things bequeathed to be at cost of his estate.

155. Where anything 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.

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.

If the purchaser of real estate dies without having paid the purchase-money, his heir-at-law or the devisee of the land purchased will be entitled to have the estate paid for by the executor or administrator—*Milner* v. *Mills*, Mosely, 123; *Broome* v. *Monck*, 10 Ves., 597; Williams on Executors, 1769. So, where the vendor has a good title, the devisee, if he pay for the estate, may call upon the executor to reimburse him from the personal estate—*Broome* v. *Monck*, 10 Ves., 614, 615.

If a contract be dissolved on account of the inability of the executors to complete it owing to the insufficiency of the personal estate left by the testator, the devisee of the lands agreed to be purchased may, in the event of assets subsequently coming in, compel the executors to apply the amount of the purchase-money to the purchase of other lands to be settled to the same uses—*Whittaker* v. *Whittaker*, 4 Bro. C.C., 30. Where, however, a good title cannot be made out, the devisee of the lands agreed to be purchased will not be entitled to the amount of the purchase-money—*Green* v. *Smith*, 1 Atk., 572; *Broome* v. *Monck*,

10 Ves., 597. In such a case "the Court cannot speculate upon what the deceased party would have done; but in these cases the enquiry must be whether, at his death, a contract existed by which he was bound, and which he would be compelled to perform; see *Curre* v. *Bowyer*, 5 Beav., 6 (note). That alone can give the heir of the purchaser (or the devisee) a right to call for the personal estate to be applied"—Williams on Executors, 1770. So, in the case of stock or shares, where the testator has contracted to pay certain sums in respect of shares which he has agreed to take in a particular company payments due at his death must be paid by his general estate—see *Day* v. *Day*, 1 Dr. and Sm., 261; *Addams* v. *Ferick*, 26 Beav., 384; see also s. 157, illust. (b), *infra*.

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.

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.

In England, by s. 2 of the Apportionment Act, 33 and 34 Vict., c. 35, "all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." And under that Statute, MALINS, V. C., held, that there must be an apportionment between the executor and the devisee of the rent of an estate devised by the testator—*Capron* v. *Capron*, L. R., 17 Eq., 288. Rents accruing due after the testator's death are payable by the legatee—*Fitzwilliams* v. *Kelly*, 10 Hare, 266. Compare the rule in England, that a specific legacy carries with it all the income and profits which may accrue upon it after the testator's death—*Maclaren* v. *Stanton*, 3 DeG. F. and J., 202. See next section.

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;

Exoneration of specific legatee's stock in a joint stock company.

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 accepts the bequest.

Illustrations.

(*a.*) *A* bequeaths 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.

Day v. *Day*, 1 Dr. and Sm., 261. See s. 155, *supra*.

(*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.

But a legatee of shares takes all benefits and advantages accruing by reason of their possession,—*e. g.*, a right to compensation in consequence of alleged concealment and misrepresentation on the part of the Company—*Cairon Co.* v. *Hunter*, L. R., 1 Sc. App.,

(*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.

The rule in England, as laid down in *Day* v. *Day*, 1 Dr. and 261, is, that where shares in joint stock companies are bequeathed, the legatee is liable to pay all calls made after the testator's death, but is entitled to have all unpaid calls which, at the testator's

death, were necessary to make him a complete shareholder, borne by the estate (p. 265). See *Addams* v. *Ferick*, 26 Beav., 384, and *Armstrong* v. *Burnet*, 20 Beav., 424, where LORD ROMILLY reviewed the cases on this subject. The cases in England are, it will be found, conflicting, but the rule in *Day* v. *Day* (*supra*) seems now to be followed; see *In re Box*, 1 H. and M., 552, *per* PAGE WOOD, V. C. Here only such calls or other payments as are due at the time of the testator's death are to be borne by the estate.

PART XXIII.*

OF BEQUESTS OF THINGS DESCRIBED IN GENERAL TERMS.

Bequest of thing 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.

Illustrations.

(*a.*) *A* bequeaths to *C 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. See *Bronsdon* v. *Winter*, Ambl., 57.

(*b.*) *A* bequeaths to *B* "*his* pair of carriage horses." *A* had no carriage horses at the time of his death. The legacy fails.

In *Evans* v. *Tripp*, 6 Madd., 92, SIR JOHN LEACH, V. C., said,—"A gift of 'my grey horse' will pass a black horse, which is not strictly grey, if it be found to have been the testator's intention that it should pass by that description; but if the testator has no horse, the executor is not to buy a grey horse."

PART XXIV.*

OF BEQUESTS OF THE INTEREST OR PRODUCE OF A FUND.

of the interest or of

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.

* This Part applies to the wills of Hindus, etc., in the Lower Provinces of Bengal and in the towns of Madras and Bombay—Act XXI of 1870, s. 2.

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.

Stretch v. *Watkins*, 1 Madd., 253.

(*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.

See *Gravenor* v. *Watkins*, L. R., 6 C. P., 500.

(*c.*) *A* bequeaths to *B* the rents of his lands at *X*. *B* is entitled to the lands.

Where the 'interest' or 'produce' of a fund is bequeathed to a legatee, or in trust for him "*without any limitation as to continuance*," the principal will be regarded as bequeathed also—Williams on Executors, 1200. In *Bent* v. *Cullen*, L. R., 6 Ch., 235, the testator gave to his wife £50 a year to be paid out of the interest, dividends, and produce arising from his personal property; and gave, after her decease, the said £50 to his two daughters and his grand-daughter, or the survivors. It was held, that there was a gift to the survivors of the principal, which would produce the annuity of £50. See *Stokes* v. *Heron*, 2 Dr. and War., 89; (S.C.) 12 Cl and Fin., 161; and *Kerr* v. *Middlesex Hospital*, 2 DeG. M and G., 576. See also s. 28 of the English Wills Act, 1 Vict., c. 26, and s. 82 of this Act, p. 95, *supra*. Thus, in *Elton* v. *Sheppard*, 1 Bro. C.C., 531, a gift of personalty to trustees to pay the interest to *A* without any other words of limitation, was held an absolute gift of the principal. See *Hawkins* v. *Hawkins*, 7 Sim., 173. So an indefinite gift of dividends gives the absolute property of stock, *per* GRANT, M. R., *in Page* v. *Leapingwell*, 18 Ves., 467. In *Southouse* v. *Bate*, 16 Beav., 133, a bequest of the dividends of a sum of stock to a woman for her separate use, with a direction that she might dispose of it by will, was held to be an absolute gift with a superadded power to dispose of it, which did not derogate or detract from the prior absolute gift.

Although the general rule is, as above stated, that an unqualified gift of the income of a fund vests an absolute and not merely a life-interest in the fund, it is always a question of construction whether the testator's intention was to give more than a life-interest—*Per* PARKER, V. C., *Blann* v. *Bell*, 5 DeG. and Sm., 663.

The section itself speaks only of the interest or produce of a *fund*, but it seems from illustration (*c*) to have been the intention of the Legislature, that it should have reference not only to what may be strictly described as a fund, but also to land producing rents.

A devise of the income of land has been held, in England, to pass the fee—*Mannox* v. *Greener*, L. R., 14 Eq., 456. Before the Wills Act, under a devise of 'the rent or profits' to *A*, without words of limitation, an estate for life only passed.

An intention that the enjoyment of the bequest should be of a limited duration in case of lands, will not be inferred from the fact that in other parts of the will words of inheritance had been used—*Wisden* v. *Wisden*, 2 Sm. and Giff., 396. See *Brook* v. *Brook*, 3 Sm. and Giff., 280. When, however, by the same will an estate was subsequently given which could not come into existence unless a prior devise should be construed to be a life-estate, the first devisee will take a life-interest only—*Gravenor* v. *Watkins*, L. R., 6 C. P., 500.

There is a marked distinction between the gift of the produce of a fund without limit as to time and a simple gift of an annuity. An annuity may be perpetual, or for life, or for any period of years; but, in the ordinary acceptation of the term used, if it should be said that a testator had left another an annuity of 100*l.* per annum, no doubt would occur of the gift being an annuity for the life of the donee—*Blewitt* v. *Roberts*, 1 Cr. & Ph., 280, *per* LORD COTTENHAM.

PART XXV.*

OF BEQUESTS OF ANNUITIES

Annuity created by will is payable for life only, unless a contrary [illegible] by

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.

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

* This Part applies to the wills of Hindus, etc., in the Lower Provinces of Bengal and in the towns of Madras and Bombay—Act XXI of 1870, s. 2.

entitled to an annuity of 500 rupees from *B's* death until his own death.

Where, however, there are circumstances affecting the construction, they are not to be disregarded, for they may be sufficient to show an intention to give the annuity indefinitely—*Potter* v. *Baker*, 15 Beav., 492, *per* ROMILLY, M. R. Thus, if there be limitations inconsistent with a mere life-interest, the annuity is perpetual—*Mansergh* v. *Campbell*, 3 DeG. and J., 237.

Though a simple gift of personalty, or of the dividends or annual proceeds of a specified fund, passes the absolute interest to the legatee without words of limitation (see preceding section, and *Stokes* v. *Heron*, 12 Cl. and Fin., 161; *Kerr* v. *Middlesex Hospital*, 2 DeG. M. and G., 576), yet where an annuity is so given, the annuitant t only for life—2 Jarm., 397-8.

If an annuity is to continue after the death of the annuitant, it to his executors—*Savery* v. *Dyer*, Amb., 139. Where there is a gift of an annuity, not out of property generally, but of property to produce it, the annuity is perpetual. In *Wilson* v. *Maddison*, 2 Y. and Coll., Ch. Ca., 372, a distinction was drawn between £30 a year charged on, and £30 a year part of, certain stock. In *Rawlings* v. *Jennings*, 13 Ves., 39, where the bequest was of "£260 a year, part of the monies I now have in bank securities;" and in *Stretch* v *Watkins*, 1 Madd., 253, where the bequest was of "£200 per annum,—that is to say, the interest of £4,000 of my 5 per cent. annuities," the annuities were held to be perpetual. See *Bent* v. *Cullen*, L. R., 6 Ch., 235; *Evans* v. *Walker*, L. R., 3 Ch. D., 211; Williams on Executors, 1201. See also *Lett* v. *Randall*, 2 DeG. F. and J., 388.

If a will clearly establishes a perpetual annuity, the estate in the annuity cannot be restricted by a codicil to a life estate, unless the expressions there used are clear and undoubted—*Stokes* v. *Heron*, 12 Cl. and Fin., 161. In that case the testator gave an annuity out of personal estate to *A* during the life of his executor. On *A's* death in the lifetime of the executor, it was held, that the annuity did not cease, but went to *A's* executors. Where, however, the gift is of the subject-matter which is to purchase an annuity, it has been held, that the legatee takes the annuity, when purchased, absolutely; or in other words, the annuity is perpetual. See next section; *Stokes* v. *Heron*, 12 Cl. and Fin., 161; *Rawlings* v. *Jennings*, 13 Ves., 39; *Stretch* v *Watkins*, 1 Madd., 253; *Clough* v. *Wynne*, 2 Madd., 188; and *Kerr* v. *Middlesex Hospital*, 2 DeG. M. and G., 576.

Contrary intention.—In England, the fact that the testator an appropriation of a requisite portion of personalty to make a fund for the purchase of annuities, is held to indicate a contrary intention; see *Lett* v. *Randall*, 2 DeG. F. and J., 388. Thus, where the testator made a bequest to his wife of "£200 per year, being part of the monies I now have in bank security," it was held, that the wife took an absolute interest in the bank stock. In *Kerr* v. *Middlesex Hospital*, 2 DeG. M. and G., 576, the testator gave certain annuities in the following terms:—"I desire that my executors shall purchase annuities for each of my two sisters, *E. B.* and *E. F.*, of £100 a year," and it was held, that the annuities were perpetual. See also *Ross* v. *Horer*, 2 Joh. and Hem., 470.

Under this section, however, a mere direction to purchase an annuity is not

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.

Period of vesting where will directs that an annuity be provided out of the proceeds of , or out of generally, or oney is bequeathed to be invested in the purchase of an annuity.

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. *Crauford*, 3 Swanst., 482.

(*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.

Generally, where the purpose of a gift is for the sole benefit of the donee himself, he can claim the gift without applying it to the purpose. Thus, where a sum of money is bequeathed to purchase for any person a ring (*Apreece* v. *Apreece*, 1 V. and B., 364), or a house (*Knox* v. *Hotham*, 15 Sim., 82), the legatee may claim the money; see 1 Jarm., 396. So also it has been held, where the purpose is to purchase an annuity—*Dawson* v. *Hearn*, 1 R. and My., 606; *Re Browne's Will*, 27 Beav., 324. It makes no difference whether the bequest be 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; 1 Jarm., 396, note (*s*). If the legatee dies before the money directed to be laid out in the purchase of an annuity for him, is so laid out, or before the fund is available (*Bayley* v. *Bishop*, 9 Ves., 6), the legacy, being vested, passes to his representatives—*Day* v. *Day*, 22 L. J., Ch., 878, 881. In *Power* v. *Hayne*, L. R., 8 Eq., 262, Malins, V. C., refused to follow *Day* v. *Day*. In the case before him, the testator directed his executors, after the death of his wife, to invest one-sixth of his residuary estate in the purchase of an annuity during the life of *J. P.*, and to pay the annuity to *J. P.* for his support and maintenance; and in case *J. P.* should anticipate, assign, charge or encumber the annuity, or become a bankrupt or insolvent, the testator directed that that

annuity should go to his other residuary legatees. *J. P.* died in the lifetime of the testator's widow, without having assigned or encumbered the annuity, or become bankrupt or insolvent. MALINS, V. C., held, that there was an intestacy as to one-sixth of the residuary estate on the death of the widow. The ground on which MALINS, V. C., refused to follow *Day* v. *Day* was, that if the trustees of the will had paid over the money, and afterwards the legatee had become bankrupt, they would have had to pay it over again, and that the intention of the testator would have been defeated. In *Day* v. *Day* there was a direction, after the death of the tenant-for-life, to lay out one-seventh of the estate for the life of Charles Day, and to pay such amounts, when and as the same should become payable, not by anticipation, to Charles Day for his life, for his own use, and a declaration that, in case Charles Day should have assigned, encumbered, or in any manner disposed of or anticipated, or should, at any time, dispose of or anticipate the annuity to be purchased, or in case he should at any time, either before or after the testator's death, become bankrupt, the trustees should hold the annuity in trust for other persons.

The fact that the legacy is to be provided out of the proceeds of the property, does not, under the preceding section, make the legacy perpetual (*Lett* v. *Randall*, 3 Sm. and Giff., 91; *Wilson* v. *Muddison*, 2 Y. and C., 372); nor does the fact of its being charged on a particular fund. But, in England, where money is bequeathed to be invested in the purchase of an annuity, as pointed out in the note to the preceding section, the legacy is perpetual.

The right given to the legatee to claim either the annuity or the money directed to be laid out on the purchase of it, is based upon the principle that equity will not compel to be done what the legatee may undo the next moment—1 Jarm., 368.

162. Where an annuity is bequeathed, but the assets of the testator are not sufficient to pay all the pecuniary legacies given by the will, the deficiency shall fall upon the annuity in the same proportion as upon the other pecuniary legacies given by the will.

This rule is in accordance with the law in England as laid down in *Hume* v. *Edwards*, 3 Atk., 693; *Lewin* v. *Lewin*, 2 Ves. Sen., 417, and other cases. In *Miller* v. *Huddlestone*, 3 Mac. and G., 523, LORD COTTENHAM thus explains the rule:—"The reason is, that the testator, in the absence of clear and conclusive proof to the contrary, must be deemed to have considered that his estate would be sufficient, and consequently not to have thought it necessary to provide against a deficiency by giving a priority, in case of a deficiency, to some of the objects of his bounty."

The *onus* is on the party seeking priority to make out that such priority was intended by the testator, and the proof of this must be clear and conclusive—*Miller* v. *Huddlestone*, 3 Mac. and G., 523. The principle will equally apply whether the annuity is to commence immediately on the death of the testator, or at a future period—*Nickisson* v. *Cockill*, 9 Jur., N. S., 975.

The annuity ought, in cases under this section, to be valued, and the annuitant will be entitled at once to the amount of the valuation, subject to an abatement in proportion to the abatement of the

niary legacies—*Wroughton* v. *Colquhoun*, 1 DeG. and Sm., 36 and 357; Williams on Executors, 1373, note (*f*).

The value of annuities is to be ascertained thus: If all the annuitants be living at the period of division, the value must be ascertained at the death of the testator. If they be all dead, the value must be taken to be the respective amounts of arrears; but if some be dead and others living, the value, as to the former, will be taken at the amount of their arrears, and as to the latter, at the amount of their arrears added to the calculated value of the future payments—*Todd* v. *Bielby*, 27 Beav., 353. In the case of a reversionary annuity which has come into possession, the value must be taken to be the present value of the annuity added to the amount of arrears due since it came into possession—*Potts* v. *Smith*, L. R., 8 Eq., 683.

Annuities must abate also among themselves; see *Innes* v. *Michell*, 2 Phill. Ch. C., 346.

The section makes no distinction between annuities payable on the death of the testator and annuities to be paid at some future time. The latter kind of legacies were held in England to abate with general legacies—*Innes* v. *Mitchell*, 9 Ves., 212.

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.

Where there is a gift of an annuity and a residuary gift, the whole of the annuity to be first satisfied.

The general rule is, that if there be a clear gift of a life-interest and of a reversion, and the estate proves insufficient, each party, the tenant-for-life and the reversioner, must bear the loss in proportion to his interest; but that if there is a gift of an annuity and a residuary gift, the annuity takes precedence and the whole loss falls on the residuary legatee.—*Per* TURNER, L. J., in *Croly* v. *Weld*, 3 DeG. M. and G., 995 The reason is, that a residuary legatee is entitled to nothing until the general legacies given by the will are fully satisfied (*Croly* v. *Weld*, 3 DeG. M. and G., 993); and annuities, as pointed out in the notes to the preceding section, in case of a deficiency of assets, rank with general legacies—*Miller* v. *Huddlestone*, 3 Mac. and G., 523. See Williams on Executors, 1366 *et seq*; *In re Lyne's Trusts*, L. R., 8 Eq., 482; *In re Tootal's Estate*, L. R., 2 Ch. D., 628; *Baker* *Farmer*, L. R., 3 Ch., 537

PART XXVI.*

OF LEGACIES TO CREDITORS AND PORTIONERS.

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.

Creditor *primâ facie* entitled to legacy as well as debt.

This is opposed to the rule of English law; see Williams on Executors, 1302 *et*

In their report the Commissioners say: "Here, as elsewhere, we departed from the English law 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 say for him that which he has not done or said for himself. We have accordingly discarded the rules by which the English Courts are compelled to presume, in the absence of any intimation to the contrary, that where 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 where a parent, 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 to be a satisfaction for fulfilment of the obligation (s. 165). We have in like manner discarded 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 ademes the legacy (s. 166). 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, a large discretion, the prosecution of a difficult enquiry, and the admission of parol evidence of the intentions of the testator."—*Gazette of India*, July 1st, 1864, p. 54.

The rule established in the English Courts of Equity is, that where a debtor bequeaths to his creditor a legacy equal to or exceeding the amount of his debt, it shall be presumed, in the absence of any intimation of a contrary intention, that the legacy was meant by the testator as a satisfaction of the debt—Williams on Executors, 1302. But where the legacy is of less amount than the debt, it shall not be deemed a part payment in satisfaction—*ibid*, note (*m*). The rule, however, though it has long prevailed, has met with the censure of several eminent Judges, and the Courts in England have inclined to lay hold of any minute circumstances whereupon to ground an exception to it—1302-3.

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 *primâ facie* entitled to legacy as well as portion.

* This Part applies to the wills of Hindus, etc., in the Lower Provinces of Bengal and in the towns of Madras and Bombay—Act XXI of 1870, s. 2.

child and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy as well as the portion.

Illustration.

A, by articles entered into in contemplation of his marriage with *B*, covenanted that he would pay to each of the daughters of the intended marriage a portion of 20,000 rupees on her marriage. This covenant having been broken, *A* bequeaths 20,000 rupees to each of the married daughters of himself and *B*. The legatees are entitled to the benefit of his bequest in addition to their portions.

This is a departure from the English law. See extract from the report of the Law Commissioners in the notes to preceding section.

As to English law, see Williams on Executors, 1306, and Theobald, 431.

166. No bequest shall be wholly or partially adeemed by a subsequent provision made by settlement or otherwise for the legatee.

No ademption by equent 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.

This also is a departure from the English law. See extract from the report of the Law Commissioners in the notes to s. 164.

As to the English law, see Williams on Executors, 1326 *et seq.*

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

Circumstances in which election takes

* This Part applies to the wills of Hindus, etc., in the Lower Provinces of Bengal and in the towns of Madras and Bombay—Act XXI of 1870, s. 2.

elect either to confirm such disposition or to dissent from it; and in the latter case, he shall give up any benefit which may have been provided for him by the will.

The doctrine of election may be thus stated: That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it. If, therefore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition; but if, on the contrary, he choose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights—1 Jarm., 443; Williams on Executors, 1447. In other words, a person cannot take under and against the same instrument. See *Dillon* v. *Parker*, 1 Swan., 359, and notes at pp. 381 and 394 of that report; *Miller* v. *Thurgood*, 33 Beav., 496; *Box* v. *Barrett*, L. R., 3 Eq., 244.

The doctrine, it may be observed, is not confined to wills, but embraces settlements and other dispositions—*Green* v. *Green*, 2 Mer., 86; *Bacon* v. *Cosby*, 4 DeG. and Sm., 2

There is no distinction for the purposes of election between personal estate and real estate, between specific and residuary legatees, or between legatees and the next-of-kin of an intestate—*per* James, L. J., *Cooper* v. *Cooper*, L. R., 6 Ch., 19. The doctrine of election applies to interests immediate, remote, contingent (see s. 169, illustrations (*b*) and (*c*) *infra*), or of value or not of value (*per* Lord Loughborough, *Wilson* v. *Townshend*, 2 Ves., 693; see also *Webb* v. *E. of Shaftesbury*, 7 Ves., 480); but it is only applicable as between a gift under a will and a claim *dehors* the will and adverse to it, and not as between one clause in a will and another clause in the same will—*Wollaston* v. *King*, L. R., 8 Eq., 165 Thus, there is no election, where under the same will a legatee takes several legacies, some of which are onerous (*Andrew* v. *Trinity Hall*, 9 Ves., 525, 533; *Warren* v. *Rudall*, 1 J. and H., 1), unless, it seems, there appear a contrary intention on the face of the will: *Talbot* v. *Earl of Radnor*, 3 M. and K., 254. In *Cooper* v. *Cooper*, L. R., 6 Ch., 15; L. R., 7 H. L., 53, a lady having a power of appointment over a fund, did in her lifetime appoint the fund among her three sons equally. By her will she devised the fund to her eldest son, and, one of her sons having died intestate, gave benefits out of her own property to the other surviving son and the children of the deceased son. It was held, that the younger surviving son and the children of the deceased brother were put to their election.

The proper course for ascertaining the value of such an interest is to apportion all the debts and all the administration expenses of the intestate over the whole of the assets of the intestate rateably, and in that way to find what proportion of the debts and expenses the particular property ought to bear—*per* Lord Cairns in *Cooper* v. *Cooper*, L. R., 7 H. L., 68, on appeal.

It is immaterial whether the testator or donor does or does not know that he has no right to dispose of the property in respect of which the

election takes place—*Whistler* v. *Webster*, 2 Ves., 371; *Welby* v. *Welby*, 2 V. and B., 199.

If a testator having a partial interest in a property disposes of the whole to the owner of the part, the legatee must elect—*Miller* v. *Thurgood*, 33 Beav., 496; see *Wilkinson* v. *Dent*, L. R., 6 Ch., 339.

The principle of the doctrine of election, it appears to be now settled in England, is compensation, not forfeiture; see 1 Jarm., 445-446, and the cases there cited. Under this section, however, the legatee, who is put to his election and elects against the will, forfeits all benefit under the will. See *Pickersgill* v. *Rodger*, L. R., 5 Ch. D., 171.

The intention of the testator to dispose of the property which is not his own should be clear: the intention must appear by demonstration plain by necessary implication (*Rancliffe* v. *Parkyns*, 6 Dow, 149, *per* Lord Eldon; Williams on Executors, 1447-8; 1 Jarm., 452-3); and that intention must in all cases appear by the will itself (*per* Lord Langdale, M. R., in *Clementson* v. *Gandy*, 1 Keen, 309), parol evidence being inadmissible for the purpose of showing it—*Stratton* v. *Bert*, 1 Ves., 285.

To raise an inference of election, it is not sufficient that the person knew of the instrument giving it. He must know also of his right to elect—*Morgan*, v. *Edwards*, 1 Bli., N. S., 401. A release of a debt due from a third person to a legatee will put the latter to his election—*Synge* v. *Synge*, L. R., 15 Eq., 389, on appeal L. R., 9 Chan., 128. A devise or bequest, however, upon condition that the devisee or legatee parts with his own property, does not put the legatee to election—*Muddleton* v. *Windross*, L. R., 16 Eq., 212. No election arises where the property in question is not acquired until after the death of the testator (*Grissel* v. *Swinhoe*, L. R., 7 Eq., 291; *Howells* v. *Jenkins*, 2 J. and H., 706); nor is there any election between what a man takes under a will and what he takes under a derivative title—*Cavan* (*Lady*) v. *Pulteney*, 2 Ves., 544; 3 Ves., 384.

It seems that parol evidence is not admissible for the purpose of raising a case of election. Thus, parol evidence will not be received to show that the testator had supposed himself the absolute owner of, and intended to include the same in the residuary bequest, certain property in which he had only a life-interest, for the purpose of raising a case of election against a legatee under the will, who also took an interest in such property under the settlement—*Clementson* v. *Gandy*, 1 Keen., 309; see 1 Jarm., 452, and *Stratton* v. *Bert*, 1 Ves., 285.

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,—*i.e.*, a disposing intention, not an intention to put the owner to his election, which supposes such intention—1 Jarm., 446.

A person is not bound to elect until the circumstances and value of the properties between which he has to elect are known to him—*Dillon* v. *Parker*, 1 Sw., 382 (*n*); *Newman* v. *Newman*, 1 Bro. C. C., 186; *Whistler* v. *Webster*, 2 Ves., 371; *Hender* v. *Rose*, 3 P. W., 123 (*n*). An election under a misconception of the extent of claims on the fund elected is not conclusive—*Kidney* v. *Coussmaker*, 12 Ves., 136. In order to ascertain the value of the funds, a legatee is entitled to have all necessary accounts taken—*Buttricke* v. *Broadhurst*, 3 Bro. C. C., 88; 1 Ves., 171; *Pusey* v. *Desbouverie*, 3 P. Wms., 315. See note to *Dillon* v. *Parker*, 1 Swan., 381. See also s. 173, *infra*.

As to what constitutes an election, the questions are, whether the parties acting or acquiescing were aware of their rights; whether they intended election; whether they can restore the individual

by the claim to the same situation as if the acts had never been performed. See s. 175, *infra*; Williams on Executors, 1455.

Election may be implied from circumstances—*Dillon* v. *Parker*, 1 Swan., 359; *Spread* v. *Morgan*, 11 H. of L., 588. As to what acts of acceptance or acquiescence constitute an implied election; see *Rumbold* v. *Rumbold*, 3 Ves., 65; *Simpson* v. *Vickers*, 14 Ves., 341.

Where there are several next-of-kin, each of them may have a separate right of election; but neither the election of the majority, nor that of the heir and administrator, will bind the others—*Fytche* v. *Fytche*, L. R., 7 Eq., 494. Where, however, the presumption of election is raised, it is binding upon those who claim under the person electing—*Dewar* v. *Maitland*, L. R., 2 Eq., 834.

In *Grissel* v *Swinhoe*, L. R., 7 Eq., 291, the testator, who was entitled, under a settlement subject to a life-interest, to a moiety of a fund, by will, after reciting (erroneously) that he was under the settlement "subject to the trusts therein contained" entitled to the whole, purported to bequeath the whole, and gave one moiety to the husband of the lady who was really entitled under the settlement to a moiety of the fund,—it was held, that the husband, who had become his wife's administrator, was not bound to elect between the legacy and his wife's moiety.

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.

Devolution of interest relinquished by the owner.

Where the legatee elects against the will, he forfeits all interest under it; see note to last section.

169. This rule will apply whether the testator does or does not believe that which he professes to dispose of by his will to be his own.

Testator's belief as to his ownership immaterial.

Whistler v. *Webster*, 2 Ves., 371; *Welby* v. *Welby*, 2 V. and B., 199.

Illustrations.

(*a.*) The farm of Sultanpur was the property of *C*. *A* bequeathed it to *B*, giving a legacy of 1,000 rupees to *C*. *C* has elected to retain his farm of Sultanpur, which is worth 800 rupees. *C* forfeits his legacy of 1,000 rupees, of which 800 rupees goes to *B*, and the remaining 200 rupees falls into the residuary bequest, or devolves according to the rules of intestate succession, as the case may be.

(*b.*) *A* bequeaths an estate to *B* in case *B's* elder brother (who is married and has children) shall leave no issue

171. A person taking no benefit directly under the will, but deriving a benefit under it indirectly, is not put to his election.

A person deriving a benefit indirectly not put to his election.

Illustration.

The lands of Sultanpur are settled upon *C* for life, and after his death upon *D*, his only child. *A* bequeaths the lands of Sultanpur 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 Sultanpur which accrued after the death of the testator and before the death of *C*. In his individual character he retains the lands of Sultanpur in opposition to the will.

See *Grissel* v. *Swinhoe*, L. R., 7 Eq., 291; and *Cooper* v. *Cooper*, L. R., 6 Ch. Div., 21, and L. R. 7 H. L., 53.

The doctrine of election does not preclude a party claiming by the will from enjoying a derivative interest to which he is entitled at law under a legal estate taken in opposition to the will. Thus, in England, a man may be tenant by courtesy of an estate-tail held by his wife in opposition to a will under which he accepts a legacy—Williams on Executors, 1448-9.

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.

A person taking under a will in his individual capacity may, in another character, elect to take in opposition to it.

Illustration.

The estate of Sultanpur is settled upon *A* for life, and after his death upon *B*. *A* leaves the estate of Sultanpur to *D*, and 2,000 rupees to *B* and 1,000 rupees to *C*, who is *B*'s only child. *B* dies intestate, shortly after the testator, without having made an election. *C* takes out administration to *B*, and as administrator elects to keep the estate of Sultanpur in opposition to the will, and to relinquish the legacy of 2,000 rupees. *C* may do this, and yet claim his legacy of 1,000 rupees under the will.

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 Sultanpur during her life.

A by his will bequeaths to his wife an annuity of 200*l.* during her life, in lieu of her interests in the estate of Sultanpur, 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.*

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 circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

When acceptance of a benefit given by a will constitutes an election to take under the will.

Illustrations.

(*a.*) *A* is owner of an estate called Sultanpur Khurd, and has a life-interest in another estate called Sultanpur Buzurg, to which, upon his death, his son *B* will be absolutely entitled. The will of *A* gives the estate of Sultanpur Khurd to *B*, and the estate of Sultanpur Buzurg to *C*. *B*, in ignorance of his own right to the estate of Sultanpur Buzurg, allows *C* to take possession of it, and enters into possession of the estate of Sultanpur Khurd. *B* has not confirmed the bequest of Sultanpur Buzurg to *C*.

(*b.*) *B*, the eldest son of *A*, is the possessor of an estate called Sultanpur. *A* bequeaths Sultanpur to *C*, and to *B* the residue of *A's* property. *B*, having been informed by *A's* executors that the residue will amount to 5,000 rupees, allows *C* to take possession of Sultanpur. He afterwards discovers that the residue does not amount to more than 500 rupees. *B* has not confirmed the bequest of the estate of Sultanpur to *C*.

This section is in accordance with the case of *Worthington* v. *s*, 20 Beav., 67, that, where there is full knowledge, election

may be presumed from acquiescence. See *Ardesoife* v. *Bennet*, 2 Dick., 463; *Dewar* v. *Maitland*, L. R., 2 Eq., 834.

Election is a question of intention, and, as already pointed out, pp. 198, 199, *supra*, it may be inferred from acts—*Edwards* v. *Morgan*, 1 Bli., N. S., 401. In England, in the case of *Sopwith* v. *Maughan*, 30 Beav., 235, where the legatee had been in receipt of a provision under the will for sixteen years, being ignorant of his right to elect, it was held, that he was not estopped. Under the next section of this Act, however, knowledge or waiver of enquiry will be presumed after two years.

Where the person who has to elect between two estates is in possession of both, no presumption of election can be drawn from the fact that he continues in possession—*Padbury* v. *Clark*, 2 Mac. and G., 298; *Spread* v. *Morgan*, 11 H. L. C., 588.

Unless "the circumstances which would influence the judgment of a reasonable man in making an election" are known to the person making the election, it will not be binding—*Dillon* v. *Parker*, 1 Swanst., 382 (*n*). A party bound to elect is entitled to know the circumstances and value of the properties and the extent of claims of any upon it—(*Wake* v. *Wake*, 1 Ves., 335; *Dillon* v. *Parker*, 1 Swanst., 382 *n.*); and in England, might sustain a bill to have all necessary accounts taken—Williams on Executors, 1455.

Presumption arising from enjoyment by legatee for two years.

174. Such knowledge or waiver of enquiry 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.

The presumption under this section may of course be rebutted. When it arises, it would seem to be binding upon those claiming under the person electing—*Dewar* v. *Maitland*, L. R., 2 Eq., 834.

In cases where the person bound to elect has died soon after the death of the testator, the Court, in the absence of evidence, in deciding whether there has or has not been an election, will be influenced by the consideration whether it was for the benefit of the person entitled to elect or disclaim; see *Harris* v. *Watkins*, 2 K. and J., 473.

It is to be observed that the period of two years limited by this section is a period of *actual* enjoyment of the benefits provided by the will.

Confirmation of bequest by act of legatee.

175. Such knowledge or waiver of enquiry 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

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.

Illustrations.

(*a.*) *A* being ill, and in expectation of death, delivers to *B*, to be retained by him in case of *A's* death—

A watch:

A bond granted by *C* to *A*:

A bank note:

A promissory note of the Government of India endorsed in blank:

A bill of exchange endorsed in blank:

Certain mortgage-deeds:

A dies of the illness during which he delivered these articles:

B is entitled to—

The watch:

The debt secured by *C's* bond:

Re Patterson, 10 Jur., N. S., 578.

The bank note:

Miller v. *Miller*, 3 P. W., 356.

The promissory note of the Government of India:

The bill of exchange:

Quære.—Whether a bill of exchange payable to order or not endorsed may be the subject of a valid *donatio mortis causa*. See 1st clause of the section; see also *Veal* v. *Veal*, 27 Beav., 303.

The money secured by the mortgage-deeds.

Duffield v. *Hicks*, 1 Bli., N. S., 497.

(*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.

See *Jones* v. *Selby*, Pr. Ch., 300; *Smith* v. *Smith*, 2 Str., 953.

(*c.*) *A* being ill, and in expectation of death, puts aside certain articles in separate parcels, and marks upon the

Sections 180—189 (both inclusive), and ss. 191—199 (both inclusive), and Parts XXX and XXXI, were made applicable to the wills of Hindus, &c., in the Lower Provinces of Bengal and in the towns of Madras and Bombay, by s. 2 of the Hindu Wills Act, XXI of 1870; but so much of that section as makes these sections and Parts, with the exception of s. 187, so applicable, has been repealed by s. 154 of the Probate and Administration Act.

The definitions of 'executor' and 'administrator' are to be found in s. 3, *supra*, p. 5. After the grant of probate or administration, the office and power of an executor and of an administrator are, for the most part, the same—Touch., 474. See *Blackborough* v. *Davis*, 1 P. Wms., 43.

Before 20 and 21 Vict., c. 77, s. 3, the power of granting administration in England to the personal estate of a deceased person was, by the Ecclesiastical Courts, vested in the Ordinary, the Judge of the Ecclesiastical Court, to whose jurisdiction the administration upon intestacy and the probate of wills belonged—31 Ed. III, c. 11; see 2 Stephens's Black. Com., 182, 8th Edn. By 20 and 21 Vict., c. 77, the jurisdiction of the Ordinary was transferred to the Probate Court.

It has been held that, under the Succession Act, the executor of an executor is not derivative executor of the original testator, even though such testator died before 1866,—that is, that property vested in a testator as executor of another does not vest in his executor—*DeSouza* v. *Secretary of State*, 12 B. L. R., 423. It is only the actual property of the deceased that vests in an executor or administrator—*Ibid.* See *Behary Lall Sandyal* v. *Juggomohun Gossain*, I. L. R., 4 Calc., 5; (S. C.) 2 C. L. R., 422.

In England, the executor of an executor who has proved the will represents the first testator, and cannot prove his own testator's will and refuse to administer the estate of the first testator (*Brooke* v. *Haymes*, L. R., 6 Eq, 25; see *Barr* v. *Carter*, 2 Cox, 429; *Twyford* v. *Trail*, 7 Sim., 92); but the executor of an executor does not represent the original testator, unless the first executor has proved the will—*Wankford* v. *Wankford*, 1 Salk., 299. The administrator of an executor does not represent the testator. If an executor dies intestate without having administered the estate of his testator, an administrator *de bonis non* of the testator must be appointed—Williams on Executors, 258; see *Savage* v. *Blythe*, 2 Hagg. App., 150.

Letters of administration granted by the late Supreme Court to Hindus conveyed no more estate than what by the Ecclesiastical law of England vested in the Ordinary or the administrator,—that is to say, personal estate only. The Succession Act and the Hindu Wills Act expressly exclude Hindus from the operation of the provisions in the first of these Acts relating to administration, save those respecting administration with a will annexed. The Certificate Act, XXVII of 1860, went even further to limit the effect of a certificate in the nature of administration granted by the Mofussil Courts to Hindus under the provisions of that Act—*Kadumbinee Dossee* v. *Koylash Kaminee Dossee*, I. L. R., 2 Calc., 431, *per* KENNEDY, J. (p. 443), see *Awkinfee* v. *Mee Nay*, 8 W. R., 1; *Seminthia Pillai* v. *Mootoosawmy*, *ibid*, 2. In the first of these cases a Hindu widow, who had obtained letters of administration from the High Court to the estate of her husband, who had left a minor son, was held not to be entitled in such character to maintain a suit in respect of immoveable property left by the deceased.

As to wills of Hindus not governed by the Hindu Wills Act, PHEAR, J., said: "Probate does not confer upon the executor of a

Hindu will any personal rights of property analogous in any way to an English estate or interest. The will gives just such powers of dealing with the property comprehended in it as its words express, and no more"—*Jayhali* v. *Shibnath Chatterjee*, 2 B. L. R., O. C., 1. See *Sreemutty Dossee* v. *Taracharn Coondoo Chowdhry*, Bourke, Pt. VII, 48; *Kherodemoney Dossee* v. *Durgamoney Dossee*, I. L. R., 4 Calc., 455; (S. C.) 3 C. L. R., 315; *Maniklal Atmaram* v. *Manchershi Dinsha*, I. L. R., 1 Bom., 269; and *Lallubhai Bapubhai* v. *Manukverbai*, I. L. R., 2 Bom., 388.

See s. 437 of the Code of Civil Procedure, Act X of 1877, as to the representation of beneficiaries in suits concerning property vested in executors or administrators.

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 administration may be granted with a copy of such copy annexed.

This section is incorporated in the Probate and Administration Act, V of 1881, of which Act it forms s. 5.

Probate to be granted to executor appointed by will.

181. Probate can be granted only to an executor appointed by the w[illegible]

section is incorporated in the Probate and Administration Act, V of 1881, being s. 6 of that [illegible]

As a general rule, any person may be appointed executor. An infant however young, may be appointed executor; but probate will not be granted to him during his minority,—s. 183, *infra*. In England, where an infant is appointed sole executor, administration is granted under 38 Geo. III, c. 87, s. 6, to his guardian, or such person as the Probate Court may think proper. Such person is called administrator *durante minore aetate*—Williams's Personal Property, 342. So a married woman may be appointed executrix (*Thrustout* v. *Coppin*, 2 W. B., 801; Williams on Executors, 236); but as to her acceptance of the office, see s. 183, *infra*.

A corporation also may be appointed executor; see *In the Goods of William Haynes*, 3 Curt., 75; Williams on Executors, 233. But where a corporation aggregate has been appointed executor of a will, the Court in England will grant letters of administration with the will annexed to a syndic duly appointed by the corporation to take the grant; but no grant will be made before the syndic is before the Court—*In the Goods of Darke*, 1 Sw. and Tr., 516.

Where a testator in India nominated his brother and Messrs. Cockerell & Co., East India Agents, London, and one *A. B.* to be his executors, and before his death, the firm of Cockerell & Co., which consisted of four members, had been dissolved,—Sir Jenner Fust held, that the

appointment was not of the firm collectively, but of the persons composing it individually, and that each of the members was entitled to be joined with the other executors—Williams on Executors, 233, citing *In the Goods of Fernie*, 6 Notes of Cases, 657.

Aliens may be executors—*Ibid.* A bankrupt also may be executor; but the Court will in some cases appoint a receiver (*Langley* v. *Hawk*, 5 Madd., 46), unless the person appointed have been known by the testator to have been a bankrupt—*Gladdon* v. *Stoneman*, 1 Madd., 143 (note.)

Lunatics and idiots are of course incapable of acting as executors or administrators, and if a person becomes *non compos*, the Court may commit administration to another—*Evans* v. *Tyler*, 2 Robert, 128; *Hills* v. *Mills*, 1 Salk., 36; Williams on Executors, 242. In England, if a sole executor or administrator becomes a lunatic, the Court will generally make a limited grant to his committee for his use and benefit during his lunacy—*In the Goods of Phillips*, 2 Ad., 336 note (*b*). In the case of an executor, administration with the will annexed may, with the consent of his committee, be granted to the residuary legatee during the lunacy—*In the Goods of Milnes*, 3 Ad, 55. Such contingencies have been provided for by s. 217, *infra*, in accordance with the English cases.

Where more than one paper is entitled to probate as containing the last will of the deceased (see *Lemage* v *Goodban*, L. R., 1 P. and D., 57: *In the Goods of Petchell*, L. R., 3 P. and D., 153), it is the practice to make the grant of probate to all the executors named in the several papers (*In the Goods of Morgan*, L. R., 1 P. and D., 323), unless the later papers repeal the appointment of executors made under the earlier papers—s. 185, *infra*. See *In the Goods of Donaldson*, L. R., 3 P. and D., 45.

In the case of a British-born subject dying and leaving assets in Moulmein, but no assets in Calcutta, and a will dated 5th August, 1865, before the Succession Act came into force, the High Court in Bengal refused to grant probate or letters of administration with the will annexed to his executrix—*Saunders* v. *Nga Shooy Geen*, 8 W. R., 3.

In England, where a testator, by his will, directed the legatees to appoint two persons to execute his testamentary bequests, the Court granted probate to the nominees of the legatees—*In the Goods of Cringan*, 1 Hagg, 548. So also where a testator authorized a person to nominate some one to see her will executed, and that person nominated himself, the Court granted him probate—*In the Goods of Ryder*, 2 Sw. and Tr., 128. Whether probate would be granted under this Act to an executor appointed in the manner suggested by the cases just cited, has not yet been decided. In the case of *Jackson* v. *Paulet*, 2 Rob., 344, however, it was objected, that probate could be decreed only to a person who was appointed nominee by the will; but the Court said the case was not like one where a testator in his will reserved to himself a power to deal hereafter with his will by writings not duly executed. See Williams on Executors, 251 (*n*)

An order made by a District Judge on an application for probate not being a final order, no reference for the opinion of the High Court upon such application can be made under s 617 of the Code of Civil Procedure (Act X of 1877)—*In the matter of Monohur Mookerjee*, I. L. R., 5 Calc., 756; (S. C.) 6 C. L. R., 228.

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.

Godolph., Pt. II, c. 5, s. 3, cited in Williams on Executors, 246.

(*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.

(*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.

This section has been incorporated in the Probate and Administration Act, V of 1881, as s. 7 of that Act.

An executor by implication is usually called executor *according to the tenor*.

'Necessary implication' means not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed -- *Wilkinson* v. *Adam*, 1 Ves. and B., 466, *per* LORD ELDON.

A testator by the first clause of his will directed his debts and testamentary expenses to be paid, and then gave all his personal estate to certain persons in trust to convert into money and receive it in such a manner as they should deem expedient, and to divide the proceeds amongst his children, with the exception of some furniture, which he gave to one of his daughters. It was held, that the trustees were executors according to the tenor—*In the Goods of Baylis*, L. R., 1 P. and D., 21. This case was followed by JACKSON and TOTTENHAM, JJ., in the case of *Monohur Mookerjee*, I. L. R., 5 Calc., 756; (S C.) 6 C. L. R., 228, where the son of the testator, though not expressly appointed an executor, was directed to receive and pay the testator's debts and get in and distribute his personal estate.

To constitute an executor according to the tenor, it seems there must be words importing a general power to receive and pay what is due to the estate—*In the Goods of Jones*, 2 Sw. and Tr., 155, *per* SIR C. CRESSWELL. Thus, where the whole personal property was left to a trustee in trust for a specific purpose, and no executor was named in the will, it was held that the trustee was not entitled to probate as executor according to the tenor—*Ibid.* So, a direction to a person to pay debts and funeral expenses, not out of the general estate, but out of a particular fund, will not constitute him executor according to the tenor (*In the Goods of Toomy*, 3 Sw. and Tr., 562; *In the Goods of Davis*, 3 Curt., 748); not even where the testator declares that the sum of money out of which the debts and funeral expenses are to be paid was all the property he possessed, for it might turn out that he was entitled to other property unknown to him, or in reversion.—*Per* SIR J. P. WILDE, *In the Goods of Toomy*, 3 Sw.

and Tr, 563. The rule to be gathered from the cases is, that, unless the Court be able to gather from the words of the will that a person named trustee therein is required to pay the debts of the deceased and generally to administer his estate, it will not grant probate to him as executor according to the tenor—*In the Goods of Punchard*, L. R., 2 P. and D., 369. See *In the Goods of Lowry*, L. R., 3 P. and D., 157.

Where a testator by his will appointed his wife, *H*, guardian of his infant children "in order that of all his property she should carry on the management (until the youngest son should attain the age of 22 years), and in the testator's name the management of his firm,"—*H* was held to be executrix by implication and entitled to probate—*Hamabai* v. *Bomanji Nasarvanji*, 7 Bom. H. C. R., A. C. J., 64. In *In the Goods of Radhika Mohun Sett*, 7 B. L. R., 563, probate of the will of a Hindu was granted to his widow and heiress, who was also universal legatee under the will, as executor by necessary implication, there being no executor mentioned in the will. See also the remarks of PONTIFEX, J., in *Mun Mohun Ghosal* v. *Pureshnath Roy*, 22 W. R., 175; and see s. 196, *infra*.

In England, it was said by LORD HARDWICKE, that a universal legatee was entitled to probate (*Androvin* v. *Poilblanc*, 3 Atkyns, 300); but it appears never to have been the practice to grant probate to a universal legatee—*In the Goods of Oliphant*, 1 Sw. and Tr., 525, where the Court held, that a universal legatee was entitled to administration with the will annexed, but not to probate.

Under words pointing at the office of an executor or at the rights of executor, persons may be held to be executors by implication, as where the testator says, "I commit all my goods to the administration of *A B*." (Godolph., Pt II, c. 5, s. 3), or to the disposition of *A B*—*Pemberton* v. *Cony*, Cro. Eliz., 164; Williams on Executors, 243.

The appointment of an executor may be either absolute or qualified. It may be limited in point of time, as to when the executor shall begin to exercise his office,—*e g*, upon the death or marriage of his son; or as to when he shall cease to act, as during the minority of his son or widowhood of his wife; or it may be limited in point of place, as where the testator has property in different countries and appoints different executors in each country; or it may be limited as to the subject-matter—*Lynch* v. *Bellew*, 3 Phillim., 424. See *In the Goods of Wakeham*, L.R. 2 P. and D., 395; *Rose* v. *Bartlett*, Cro. Car., 293, and Williams on Executors, pp. 253-4-5-6; see s. 219, *infra*, *et seq* Again, the appointment may be conditional,—*e g.*, on condition that the person named shall give security to pay the legacies and in general to perform the will before he acts as executor—Williams on Executors, 256. So also, if the testator by his will declare *A B* shall have his goods after his death," to pay his debts, and otherwise to dispose at his pleasure," *A B* is his executor (*Hemfry* v. *Hemfry*, 4 Moore's P. C. C., 33); or if the testator direct certain persons to pay debts, funeral charges, and the expenses of proving the will, these persons are executors according to the tenor (*In the Goods of Fry*, 1 Hagg. 80; see *In the Goods of Adamson*, L. R., 3 P. and D., 253); or if the testator, supposing his child, his brother, or his kinsman to be dead, say in his will—"Forasmuch as my child, my brother, &c., is dead, I make *A B* executor;" in this case, if the person whom the testator thought dead be alive, he shall be the executor—Godolph., Pt. II, c. 5, s. 3, cited in Williams on Executors, 246. Where the testator named his wife executrix, and *A B* to assist her, *A B* was held to be executor by the tenor—*Powell* v. *Stratford*, cited 3 Phillim., 118; Williams on Executors, 248. So, in *In the Goods of Brown*, L. R., 2 P. Div., 110, the testator executed a will containing a clause to the effect,—"I appoint my sister,

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.*

Persons to whom probate cannot be granted.

This section, omitting the last words "nor to a married woman without the previous consent of her husband," has been incorporated in the Probate and Administration Act, V of 1881, and forms s. 8 of that Act. The same words in s. 189, which is also incorporated in Act V of 1881 as s. 13, are also omitted in that Act. The words have been omitted, because, as the Committee say in their Report on the Probate and Administration Act, the imposition of such a condition would be inconsistent with the proprietary status accorded to married women among a large proportion of the persons for whom the Act is intended, and would confer a power on the husband which would, in many cases, be likely to be abused.

There is no objection to an infant being appointed executor; but probate will not be granted during his minority. Where, however, a minor is appointed *sole* executor, letters of administration with the will annexed may be granted to his legal guardian, or to such other person as the Court shall think fit, until he shall have completed the age of 18 years, at which period, and not before, probate of the will shall be granted to him—s. 215, *infra*. This is also in accordance with 38 Geo. III, c. 87, s. 6.

If there are several executors, one of whom is of full age, no administration during minority should be granted, as the executor, who is of full age, may execute the will—Williams on Executors, 486.

If there are two or more minors appointed executors, and there is no executor who has attained majority, in that case the Court will grant administration limited until one of them has attained the age of majority—s. 217, *infra*.

In cases to which this section of the Succession Act applies, probate will not be granted to a married woman without the *previous* consent of her husband. In England also the consent of the husband was necessary—*Thrustout* v. *Coppin*, 2 W. B., 801.

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*.

This section is incorporated in the Probate and Administration Act, V of 1881, being s. 9 of that Act.

Where several executors are appointed in conjunction, they are all considered in the light of an individual person, and by consequence the acts of any one of them in respect of the administration of the effects are deemed to be the acts of all—See Williams on Executors, 950; and s. 271, *infra*.

A testator may appoint several persons as executors in several degrees, as where he makes his wife sole executrix, but if she will not, or cannot be executrix, then he makes his son executor; and if his son will not or cannot be executor, then he makes his brother, and so on—Williams on Executors, 249. Thus, in *In the Goods of Lane*, 33 L. J., P. and M., 185, the testator appointed his son sole executor; but in the event of his going abroad, or being and remaining abroad for upwards of two calendar months, he appointed *B* his executor. The son, after the death of the testator, went abroad without taking probate, and there remained. The Court granted probate to *B*, but reserved power to the son to prove the will. See *In the Goods of Wilmot*, 2 Rob., 579, and *In the Goods of Langford*, L. R., 1 P. and D., 458; *In the Goods of Foster*, L. R., 2 P. and D., 304. See s. *et seq.*, as to appointment of executors for a limited purpose.

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.

Separate probate of codicil discovered after grant of probate.

Procedure when different executors are appointed by the codicil.

This section, which is also incorporated in the Probate and Administration Act, V of 1881, of which Act it is s. 10, is transcribed almost *verbatim* from Coote's Probate Practice, p. 53. The cases there cited are *Langdon* v. *Rooke*, 1 Notes of Cases, 254; and *Beatson*, 6 Notes of Cases, 13.

Where more than one paper is entitled to probate as containing the last will of the deceased, each person named executor in the several papers will be entitled to probate, unless his appointment is in any way repealed by a paper executed subsequently to that in which he is named—See *In the Goods of Morgan*, L. R., 1 P. and D., 323; *In the Goods of Donaldson*, L. R., 3 P. and D., 45; *Lemage* v. *Goodban*, L. R., 1 P. and D., 57; and *In the Goods of Petchell*, L. R., 3 P. and D., 153. The Court is always reluctant to exclude from probate executors whose appointment is revoked only by inference—*per* Sir J. P. Wilde, *In the Goods of Lowe*, 3 Sw. and Tr., 478. In that case, however, the testator by his will appointed *W. L.* and *W. B.* executors, and in a codicil named his wife "sole executrix of this my will," and the Court held, that the appointment of the widow was tantamount to a revocation of the appointment of the executors appointed by the will. See also *In the Goods of Baily*, L.R., 1 P. and D., 628.

The re-appointment in a subsequent will, which confirmed the former will, of one of the executors named in the former will, has been held not to amount to a revocation of the appointment of the other executors named in that will—*In the Goods of Leese*, 31 L. J., P. and M., 169.

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.

Accrual of representation to surviving executor.

Flanders v. *Clarke*, 3 Atk., 509; *Jacomb* v. *Harwood*, 2 Ves. Sen., 265; Williams on Executors, p. 950.

This section has been incorporated in the Probate and Administration Act, V of 1881, being s. 11 of that Act.

See ss. 271 and 272, *infra*.

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 the one hundred and eightieth section.

No right as executor or legatee can be established, unless probate or letters of administration shall have been granted by a competent Court.

This section has not been incorporated in the Probate and Administration Act, V of 1881.

It is necessarily applicable to a limited class of cases.

'Province,' as defined by s. 3, *supra*, p. 3, includes any division of British India having a Court of last resort. Accordingly, where a testator died in the Punjab, and his executor, without having obtained probate, granted a power-of-attorney to administer to the estate to a person in Calcutta, who applied for and obtained letters of administration with the will annexed, it was held, that, under this section, such letters had been wrongly granted. It was held also, that letters might be granted to the Administrator-General of Bengal—*In the Goods of Duncan*, I B. L. R., O. C., 3; see Administrator-General's Act, II of 1874, ss. 14, 16, 19, and 26, *post*. See also s. 242, *infra*.

A grant of a certificate to collect debts under Act XXVII of 1860, on a title afforded by a will, which gives the grantee the estate in respect of which the debts accrued, does not, it seems, establish a right as executor or legatee within the meaning of this section—*Kristo Chunder Mookerjee* v. *Chundee Pershad Banerjee*, 23 W. R., 252, *per* PHEAR and MORRIS, JJ.

Where a will, not made within the province, has been proved in a Court of competent jurisdiction, it is not necessary under this section, in order to establish a right as executor or legatee, to prove the will again within

the province. It is sufficient to obtain letters of administration with a copy of a copy properly authenticated by the Court by which probate has already been granted. The 'probate' intended by this section, was held by PONTIFEX and R. C. MITTER, JJ., to mean the copy of a will certified under the seal of a Court of competent jurisdiction with the grant of administration to the estate of the deceased—*Mun Mohun Ghossal* v. *Pureshnath Roy*, 22 W. R., 174. Such a probate, the Court was of opinion, the sole residuary devisee (see s. 90, *supra*) under the will might obtain as executor by implication.

If a will were made in a foreign country and proved there, disposing of personal property in England, it was necessary for the executor to prove it in England also (*Tourton* v. *Flower*, 3 P. Wms., 369).

Where a testator by his will, which was dated after the Hindu Wills Act came into force, directed such portion of his estate as his executor might direct to be applied in a particular way, and did not dispose of the residue, the executor renounced, and the sole heiress of the testator thereupon filed a suit for construction of the will,—it was objected that probate had not been taken out, and that, under this section, the plaintiff could not enforce any right under the will. WHITE, J., however, allowed evidence of the execution of the will to be given, declared the gift to be void for uncertainty, and directed the usual administration accounts to be taken—*Surbomongola Dabee* v. *Mohendronath Nath*, I. L. R., 4 Calc., 508.

As regards the Administrator-General of any of the Presidencies, the High Court at the Presidency-town is to be deemed a Court of competent jurisdiction within the meaning of this section and s. 190—Act II of 1874, s. 14.

By s. 437 of the Code of Civil Procedure, it is enacted: "In all suits concerning property vested in a trustee, executor or administrator, the trustee, executor or administrator shall represent the persons beneficially interested in such property; and it shall not ordinarily be necessary to make such persons parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made such parties." By s. 179, *supra*, p. 206, the whole of the property of the deceased person vests in the executor or administrator.

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.

This section is incorporated in the Probate and Administration Act, V of 1881, being s. 12 of that Act.

Although probate establishes the will as from the testator's death, it is merely operative as the authenticated evidence, and not at all as the foundation of the executor's title; for he derives all his title from the will itself, and the property of the deceased vests in him from the testator's death—Williams on Executors, 297.

A grant of probate or of administration is in the nature of a decree *in rem*, and actually invests the executor or administrator with the character which it declares to belong to him. Accordingly, a grant of probate is conclusive against all the world. It may be shown that the grant was revoked, for that is the further act of the same Court; or that it was forged, for that shows it was not the act

of the Court at all; or that it was granted by a Court that had no jurisdiction, for then it is a nonentity. But it cannot be shown that the testator was mad or *the will* was forged, for those facts might have been alleged in opposition to the grant of administration—2 Smith L. C., 827, citing *Noel* v. *Wells*, 1 Lev., 235-6; see *per* BULLER, J., in *Allen* v. *Dundas*, 3 T. R., 125; and *Allen* v. *McPherson*, 1 H. L. Ca., 191; see also *Brajanath Dey Sirkar* v. *S. M. Anandamayi Dasi*, 8 B. L. R., 208.

The estate of an executor, as already stated, flows from the will, and an executor may, before probate, act as effectually, in almost all matters relating to his office, as if probate had been granted—*Rogers* v. *James*, 7 Taun., 147; *Wankford* v. *Wankford*, 1 Salk., 301. In the latter case it was held also by LORD HOLT, that an act done by an executor is valid, provided the will is ultimately proved, although the executor, who did the act, died without proving the will; and that case was followed in *Brazier* v. *Hudson*, 8 Sim., 67. Before probate an executor may seize and take into his hands any of the testator's effects; pay or release debts; distrain for rent due to the estate (*Whitehead* v. *Taylor*, 10 A. and E., 210); sell, release or assign, or otherwise dispose of the testator's effects; assent to or pay legacies—see Williams on Executors, 307. On a sale before probate, however, a purchaser is not bound to pay his purchase-money until probate has been obtained—*Newton* v. *Metropolitan Ry. Co.*, 1 Dr. and S., 583. And according to the preceding section, where it is necessary for an executor to establish his title in any Court of Justice, it is necessary for him to produce the probate or letters of administration. Moreover, the rules of procedure in this country render it impossible for an executor to maintain a suit before proving the will, as in all cases not only must the plaint filed by him allege his representative capacity in which he sues, but he must file the document upon which he relies; see Act X of 1877, s. 58. In England also, an executor, except in cases upon his actual possession as executor, cannot maintain an action before probate. See s. 242 of this Act, *infra*.

Hindu Law.—A grant of probate in the case of wills of Hindus before the Hindu Wills Act, conferred no title upon the executor. The executor derived his title from the will itself, and probate was merely evidence of his title, as a decree of the Court granting it would be,—that is, between the parties and those privy to the suit in which the decree was made—*Sharo Bibi* v. *Baldeo Das*, 1 B. L. R, O. C., 24. See *Jaykali Debi* v. *Shibnath Chatterjee*, 2 B. L. R. (O.C.), 1.

In the case of a Hindu will, in 1867, KEMP and GLOVER, JJ., held, that although letters of administration with the will annexed might be equivalent to probate, yet that neither was by itself sufficient to prove the genuineness of a will which was contested—*Teen Couree Dossee* v. *Hurrechur Mookerjee*, 8 W. R., 308.

This section is now no longer embodied in the Hindu Wills Act (see Probate and Administration Act, V of 1881, s. 154), but it is incorporated, as stated above, in the latter Act.

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.

This section, omitting the words "nor to a married woman without the previous consent of her husband," is incorporated as s. 13

of the Probate and Administration Act, V of 1881. For the reason for the omission, see note to s. 183, *supra*, p. 212.

Minors.—If the person who, in case of intestacy, under the Statute, would be entitled to a grant of letters of administration is a minor, the Probate Court in England, in cases where there is a sole executor who is a minor, generally grants administration to his guardian limited to his minority (Williams on Executors, 456, 486, *et seq.*); but the Court has always exercised a discretion to grant letters to whom it might think fit (*Smith's case*, 2 Stra., 891), and in many cases it has granted administration to persons not guardians of the minor—*Lovell* v. *Cox*, cited in *West* v. *Willby*, 3 Phillim., 379.

Where there are several persons in equal degree entitled to administration, the Court does not in all cases grant letters to one who may be of age. Thus, in *Carteright's case*, 1 Freem., 258, cited in Williams on Executors, 487), the intestate died leaving four grandchildren, one of whom was of age and the others minors; and the Court granted administration to the mother as guardian to the three *durante minore ætate*, although it was strongly urged that she who was of age, being capable, ought to have been preferred. The ground of the decision was, that all being equally entitled to distribution, the interest of the three minors preponderated.

Where the administration is limited, the administrator represents the testator's estate to the extent of the authority granted—*Faulkner* v. *Daniel*, 3 Hare, 199.

Persons of unsound mind—Lunatics and idiots are incapable of acting either as executors (s. 183, *supra*) or administrators—*Evans* v. *Tyler*, 2 Rob., 128. The case of a lunatic being appointed sole executor, sole universal, or sole residuary legatee, or being entitled to letters of administration, is provided for by s. 217, *infra*.

Where a person who has been appointed executor, or to whom letters of administration have been granted, becomes *non compos*, the Court may grant administration to another—*Evans* v. *Tyler*, 2 Rob., 128.

Married women.—In England, and here in cases to which this section of the Succession Act applies, a married woman cannot be appointed administratrix except with the previous consent of her husband—*Bubbers* v. *Harby*, 3 Curt., 50.

The Probate and Administration Act is silent as to married women.

It is no incapacity under this Act that the next-of-kin is an alien, or an insolvent, or a felon.

In England, bankruptcy was held to be a disqualification (*Hills* v. *Mills*, 1 Salk., 36), unless the testator knew the person appointed to have been a bankrupt (*Gladdon* v. *Stoneman*, 1 Madd., 143, note); and previous to the Succession Act it seems to have been so held by the late Supreme Court—*In the Goods of Jackson*, Morton's Rep., 28.

The Court at all times prefers a sole to a joint administration, and where a joint grant is made to the widow and one of the next-of-kin, all the other next-of-kin must consent that the grant shall be so made (*In the Goods of Newbold*, L. R., 1 P. and D., 286, *per* Sir J. P. Wilde), because it is infinitely better for the estate, as administrators must join, and be joined in every act, which would not only be inconvenient to themselves, but what is of more consequence, must be inconvenient to those who have demands on the estate either as creditors or as entitled in distribution—*Warwick* v. *Greville*, 1 Phill., 126, *per* Sir John

Caeteris paribus, a man accustomed to business is to be preferred as administrator (*Williams* v. *Wilkins*, 2 Phill., 100); and a male is pre-

ferred to a female—*Iredale* v. *Ford*, 1 Sw. and Tr., 305. The Court, too, will usually grant administration to the nominee of the majority of interests—*In the Goods of Stainton*, L. R., 2 P. and D., 212, *per* LORD PENZANCE.

The fact of one of the next-of-kin being also a creditor is a reason against his being preferred in a contest for the administration, either with the widow or any other next-of-kin—*Webb* v. *Needham*, 1 Add., 498.

As to cases in which the Administrator-General is entitled to letters of administration, see Act II of 1874, *post*.

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, unless administration previously granted by a competent Court.

This section has not been incorporated in the Probate and Administration Act, V of 1881.

In *In the Goods of Ram Chand Seal*, I. L. R., 5 Calc., 2; (S. C.) 4 C. L. R., 290, it was argued, that inasmuch as it was not compulsory for Hindus to take out letters of administration, letters might be granted to Hindus limited to particular property; but PONTIFEX, J., held, that if Hindus take out letters of administration at all, they must take out general letters.

As to the right of the Administrator-General to obtain letters of administration in the case of Hindus, Mahomedans or Buddhists, or other persons exempted from the operation of this Act under s. 332, see Administrator-General's Act, II of 1874, s. 17.

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.

This section is incorporated as s. 14 in the Probate and Administration Act, V [illegible]

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.

This section is incorporated as s. 15 in the Probate and Administration Act, V of 1881.

The authority of the administrator is derived from the *grant* of the letters of administration, and in this respect is unlike that of the executor, which is derived, not from the probate, but from the will itself—*Woolley* v. *Clark*, 5 B. and Ald., 744. It follows from this distinction that, as a general rule, acts done by an administrator before the grant of letters of administration, are not binding—*Middleton's case*, 5 Co. 28 (*b*); see also *per* Powys, J., in *Wankford* v. *Wankford*, 1 Salk., 301. In *Morgan* v. *Thomas*, 8 Exch., 307, Parke, B., said: "An act done by a party who afterwards becomes administrator to the prejudice of the estate, is not made good by subsequent administration. It is only in those cases where the act is for the *benefit* of the estate that the relation back exists, by virtue of which the administrator is enabled to recover against such persons as have interfered with the estate, and thereby to prevent it from being prejudiced and despoiled."

The title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate, so that he may recover against the wrong-doer who has seized or converted the goods of the intestate after his death in an action of trespass or trover—*Tharpe* v *Stallwood*, 5 M. and G., 760; *Foster* v. *Bates*, 12 M. and W., 233. When letters have been granted, the administrator is entitled to all the rights which the intestate had at the time of his death vested in him, although no right of action accrues to the administrator until he has obtained letters of administration—*Pratt* v. *Swaine*, 8 Barn. and Cres., 287.

Grant of administration where executor has not renounced.

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,

Exception.

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.

This section has been incorporated as s. 16 in the Probate and Administration Act, V of 1881.

An executor cannot be compelled to accept the office of executor, but under this section he may be called upon to accept or refuse the executorship. No period is fixed within which the citation is returnable. Under the rules and orders of the High Court at Fort William, all citations issued at the instance of parties applying for probate or letters of administration, are returnable in four days from the day of service, if the parties to be cited live within the town of Calcutta or ten miles thereof; and in case the parties live above ten miles from Calcutta, the citation shall be made returnable on such day certain as the Court or a Judge thereof shall direct—Belchambers's Rules and Orders, pp. 272, 273.

Citations, it seems, may be by advertisement where the party cited has left the country and has not been heard of, and has no attorney, agent or correspondent—*Kenworthy* v. *Kenworthy*, 32 L. J., P. and M., 107.

Although an executor has his election whether he will accept or refuse the executorship, yet he may determine such election by acts which amount to administration (Williams on Executors, 280; *Long* v. *Symes*, 3 Hagg., 774); as where he deals with the goods and effects of the testator in a manner which shows an intention in him to take upon himself the executorship, or does acts which will make a man liable as executor *de son tort* (see s. 265, *post*).

In England, where one or more executors had renounced, it was not necessary, on the death of the surviving executor of those who proved the will, to issue citations to the executors who had renounced—*Harrison* v. *Harrison*, 1 Rob., 406; *Venables* v. *E. I. Co.*, 2 Exch., 633.

194. The renunciation may be made orally in the presence of the Judge, or by a writing signed by the person renouncing, and when made shall preclude him from ever thereafter applying for probate of the will appointing him executor.

Form and effect of renunciation of executorship.

This section is incorporated as s. 17 in the Probate and Administration Act, V of 1881.

It appears to be based upon s. 79 of 20 and 21 Vict., c. 77, by which it was enacted, that the rights of an executor, on his renouncing probate, should cease, and the representation of the testator should go as if he had not been named.

An executor cannot in part refuse. He must refuse entirely, or not at all—Williams on Executors, 286.

A renunciation, it has been held, is not effective until it has been recorded—*Long* v. *Symes*, 3 Hagg., 771. So, where an executor by his will renounced probate of the will of his testator, it was held, that until the will was filed, the renunciation was not final, and might be withdrawn—*In the Goods of Morant*, L. R., 3 P. and D., 151. In England, a renunciation may be retracted at any time before a grant of administration has passed the seal of the Court (*McDonell* v. *Prendergast*, 3 Hagg., 212; *Harrison* v. *Harrison*, 1 Rob., 406), but not afterwards—Williams on Executors, 288.

An executor cannot renounce after he has taken probate—*In the Goods of Veiga*, 32 L. J., P. P. and M., 9.

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.

Procedure where executor renounces or fails to accept within the time limited.

This section is incorporated as s. 18 in the Probate and Administration Act, V of 1881.

As to the persons who are entitled to administration in case of intestacy, and the order in which they are so entitled, see ss. 200—206, *infra*.

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 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.

Grant of administration to universal or residuary legatee.

This section has been incorporated as s. 19 in the Probate and Administration Act, V of 1881.

Residuary legatee—The prevailing reason for the preference of the residuary legatee may be, that the residuary legatee stands *in loco haeredis*, for though he has not the official powers of the *haeres*, they having been transferred to the executor, he has his beneficial interest in the estate. Another reason is given by Sir J. Nicholl, who observes: "The residuary legatee is the testator's choice; he is the next person in his election to the executors—*Atkinson* v. *Barnard*, 2 Phill., 318. Inasmuch, too, as his bequest can have no realization until all the debts and all the other legacies have been paid, he is influenced above all other legatees, if honestly inclined, in effecting a faithful and complete administration of the estate"—*Repington* v. *Holland*, 2 Lee, 256; Coote's Prob. Pract., 65.

Even where there is no prospect of any residue, the residuary legatee is entitled to administration in preference as well to the next-of-kin (*Thomas* v. *Butler*, 1 Ventr., 217), as also to the legatees and annuitants—*Atkinson* v. *Barnard*, 2 Phill., 318. So he is entitled though only residuary legatee in trust—*Hutchinson* v. *Lambert*, 3 Add., 27; Williams on Executors, 470-471. But where a residuary legatee, who is merely a trustee, fails to represent a testator, the practice in England is to grant letters of administration not to his representative, but to such person or persons as have the beneficial interest in the residuary estate—*Hutchinson* v. *Lambert*, 3 Add., 27.

If there be several residuary legatees, any one may take administration without the consent of, or notice to, the other—Coote's Prob. Pract., 66; *Taylor* v. *Shore*, Jones, 162.

It is to be observed that, in England, where the executor dies leaving a will, after having proved the will of his testator, but before he has administered all the estate, his executorship devolves upon his executor; see notes to s. 179, *supra*. It is not so, however, in India—*DeSouza* v. *Secretary of State*, 12 B L. R., 423; *Behary Lall Sandyal* v. *Juggomohun Gossain*, I. L. R., 4 Calc., 5; (S. C.) 2 C. L. R., 422. See s. 229, *infra*.

legatee.—Probate of a will of a Hindu was granted under this Act to a universal legatee as executrix by implication, there being no executor appointed by the will—*In the Goods of Radhika Mohun Sett*, 7 B. L. R., 563. In England it never seems to have been the practice to grant probate to a universal legatee—

In the Goods of Oliphant, 1 Sw. and Tr., 525; see *Androvin* v. *Poilblanc*, 3 Atk., 298. In the case of *Radhika Mohun Sett*, PAUL, J., in granting probate to the universal legatee, indeed stated, that the applicant was at least entitled to administration with the will annexed. See s. 182, *supra*, p. 209.

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.

Right to administration of representative of deceased residuary legatee.

See Williams on Executors, 471; *Jones* v. *Beytagh*, 3 Phill., 635.

This section has been incorporated as s. 20 in the Probate and Administration Act, V of 1881.

So, if an executor be also residuary legatee, and die before probate, or intestate before he has fully administered the estate, administration with the will annexed will be granted, not to the next-of-kin, but to his personal representative—*Isted* v. *Stanley*, Dyer, 372 (*a*); Williams on Executors, 471.

The representative, however, of a residuary legatee for life has no interest. Thus, where a testator appointed his wife residuary legatee for life, and after her death appointed his daughter substituted residuary legatee, it was held, that the husband of the daughter was entitled to administration in preference to the representative of the mother—*Weldrill* v. *Wright*, 2 Phill., 243.

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.

Grant of administration when there is no executor, nor residuary [illegible]

This section has been incorporated as s. 21 in the Probate and [illegible] Act, V of [illegible]

If none of the persons to whom, under this section, administration may be granted appear and entitle themselves to letters of administration or to a grant of letters of administration, or if a person who entitles himself to a grant of administration neglects to give such security as may 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 of the Presidency (Act II of 1874, s. 20, *post*); but the

Administrator-General 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 a legatee, other than an universal legatee or a friend of the deceased—Act II of 1874 s. 15, *post*.

199. Letters of administration with the will annexed shall not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned, calling on the next-of-kin to accept or refuse letters of administration.

Citation to be issued before grant of administration to any legatee other than universal or

This section has been incorporated as s. 22 in the Probate and Administration Act, V of 1881.

The rule is, that when a person has a prior title to a grant he must be cited before administration is committed to any other—Williams on Executors, 474. Thus, where there is an executor, administration will not be granted to any other person until a citation has been issued calling upon the executor to accept or renounce the executorship—s. 193, *supra*.

A legatee or creditor must cite both the executor and the residuary legatees or the next-of-kin if the residue has not been disposed of—Coote's Prob. Pract., 225. Under s. 15 of Act II of 1874, where a creditor applies for administration, a citation must, it seems, be issued to the Administrator-General. Under the rules of the High Court at Fort William also, "where a creditor applies, a special citation shall issue to the widow, if any, and next-of-kin, provided they shall be resident within the jurisdiction or have any known agent within the jurisdiction; and a general citation shall also issue to all persons interested in the goods of the deceased, and all such citations shall be served personally upon such known when they are within the jurisdiction" (Belchambers's Rules and Orders, p. 272):—and "when a widow applies for administration, a citation shall to the next-of-kin; and when the next-of-kin applies, a citation shall issue to the widow, if any, and another to the next-of-kin next entitled."—Belchambers's Rules and Orders, p. 271.

The brother of the deceased, the father being alive, has no interest in the goods of the deceased, and consequently has not a title to administer equal to that of a creditor or legatee—*In the Goods of Smallwood*, MSS., July 20th, 1868, *per* NORMAN, J., cited in Belchambers's Rules and Orders, p. 271.

As to the issue and publication of citations, see s. 250, *infra*; *Kenworthy* v. *Kenworthy*, 32 L. J., P. and M., 107; Belchambers's Rules and Orders, p. 273.

According to the rules of the High Court at Fort William, citations are returnable within four days from the date of service if the parties to be cited live within the town of Calcutta or ten miles thereof. If the parties live beyond that distance, the time within which the citation is returnable is at the discretion of the Court—Belchambers's Rules and Orders, p. 272.

200. When the deceased has died intestate, those who are connected with him,

or consanguinity are entitled to administration.

sanguinity, are entitled to obtain letters of administration of his estate and effects in the order and according to the rules hereinafter stated.

This section and ss. 201—207, both inclusive, have not been incorporated in the Probate and Administration Act, V of 1881.

In place of these sections the latter Act contains the following provision—"When the deceased has died intestate, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate. When several such persons apply for administration, it shall be in the discretion of the Court to grant it to one or more of them. When no such person applies, it may be granted to a creditor of the deceased."—Section 23. See the Act *in extenso*, *post*.

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, or has committed adultery, or has been barred by her marriage-settlement of all interest in her husband's estate; there is cause for excluding her from the administration.

The Court will not, at any rate without notice, pass over the widow who has been legally separated from her husband by reason of his cruelty, in granting administration to his estate—*In the Goods of Ihler*, L. R., 3 P. and D., 50.

In England, it has been held, that where a widow who has eloped from her husband or cohabited in his lifetime with another man [*Fleming* v. *Pelham*, 3 Hagg., 217 note (*b*)], or has lived separate from her husband (*Lambell* v. *Lambell*, 3 Hagg., 568), there is good cause for excluding her from administration—Williams on Executors, 423. A divorce by a foreign Court is sufficient to exclude a woman from administering to the estate of the husband from whom she has been divorced—*Ryan* v. *Ryan*, 2 Phill., 332; *In the Goods of Davies*, 2 Curt., 628; Williams on Executors, 424.

(*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.

This section has not been incorporated in the Probate and Administration Act, V of

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.

This section has not been incorporated in the Probate and Administration Act, V of 1881.

The Court at all times prefers a sole administration to a joint administration (*Warwick* v. *Greville*, 1 Phill., 126); and it is only where circumstances are sufficiently strong that it will be induced to exercise a discretion in favour of a joint grant—*In the Goods of Richards*, L. R., 2 P. and D., 217; see Coote's Prob. Pract., 196; and *In the Goods of Browning*, 2 Sw. and Tr., 634; *In the Goods of Richardson*, L. R., 2 P. and D., 245, 246; and *In the Goods of Grundy*, L. R., 1 P. and D., 460.

In *In the Goods of Richards*, L. R., 2 P. and D., 216, the deceased died intestate, leaving a widow and several minor children by a former wife. During his lifetime he had been assisted in his business by his brother. On the other hand, his widow, to whom he had been married but a short time, was entirely unacquainted with its management. These circumstances were held not to be sufficient to authorize the Court to grant joint administration to the widow and to the brother as guardian of the minor children. See *In the Goods of Newbold*, L. R., 1 P. and M., 285.

The consent of all persons interested is not a sufficient ground for departing from the general rules as to grants of administration—*In the Goods of Richardson*, L. R., 2 P. and D., 244.

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 one of the class of persons so entitled, she shall be solely entitled to administration.

Grant of administration where no widow, or widow excluded.

Proviso.

This section has not been incorporated in the Probate and Administration Act, V of 1881

204. Those v
equal degree of kindred to the deceased, are equally entitled to administration.

Deceased's kindred of equal degree, equally entitled to administration.

This section has not been incorporated in the Probate and Administration Act, V of 1881.

Where there were grounds for believing that one brother was indebted to the estate of a deceased brother, the lower Court, it was held by the High Court (PEACOCK, C. J., and MITTER, J.), exercised a wise

discretion in refusing to grant letters of administration to that brother jointly with other brothers of the deceased—*In the Goods of Stephen*, 1 B. L. R., Short Notes, iii.

An applicant for letters of administration to the estate of a widow having concealed the existence and claims of the relatives of the deceased husband of the widow was ordered in the case of *Jaikisondas Gopaldas* v. *Harikisondas*, I. L. R., 2 Bomb., 9, on the application being [illegible], to pay the costs of caveats entered by these persons.

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.

Right of widower to administration of wife's estate.

This section has not been incorporated in the Probate and Administration Act V, of 1881.

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.

Grant of administration to a creditor.

This section has not been incorporated in the Probate and Administration Act, V of 1881

By s. 15 of Act II of 1874, the Administrator-General of the Presidency is entitled to administration in preference to a creditor.

A creditor is entitled to administration even where his debt is barred—*Rhodes* v. *Smethurst*, 6 M. and W., 351; *Coombs* v. *Coombs*, L. R., 1 P. and D., 288. In England, it is the practice, where administration is granted to a creditor whose right of action is barred by limitation, to make a condition that he shall give a bond to distribute the assets *pro rata* among all the creditors—*Coombs* v. *Coombs*, L. R., 1 P. and D., 288. It is immaterial what the amount of the debt is, except where two or more creditors contend *inter se* for a grant—Coote's Prob. Pract., 112.

Under the present Limitation Act, XV of 1877, s. 28, the *right* of a creditor is barred by limitation.

In *Harrison* v. *All persons in general*, 2 Phill, 249, it was said:—"The Court does sometimes grant to more creditors than one, but it prefers that one should be fixed upon." In *In the Goods of Smithson*, 36 L. J., P. and M., 77, the Court granted administration to the nominee of the principal creditors of an intestate upon justifying security and a bond to pay all debts *pro rata* being given. Where the next-of-kin have renounced, and creditors are entitled to administration, the next-of-kin have no right to suggest to the Court which of the creditors should be preferred.—*Ibid*, *per* Sir J. P. Wilde.

Where a creditor has been duly appointed, the next-of-kin cannot, during his lifetime, take the administration from him; but upon his death they may come in and claim administration *de bonis non*—*Sheffington* v. *White*, 1 Hagg, 702.

The Court will not grant administration of an intestate's estate to a person who had bought up a debt after the death of the intestate—*Baynes* v. *Harrison*, 1 Deane, 16.

In England, letters may be granted to the executors of a creditor—*Mees* v. *Beyingh*, 3 Phill., 635.

It is unnecessary for the assignee of an insolvent to obtain a grant, inasmuch as the estate vests in him by Statute. See Insolvent Act, 11 and 12 Vict., c. 21, s. 7.

According to the rules of the High Court at Fort William, in all petitions by creditors for letters of administration, it shall be stated particularly how the debt arose and whether the party has any and what security for the debt; and no administration shall be granted to any person claiming as a creditor when the debt arises from the balance or the supposed balance of an open or unsettled account, or where the creditor has security for the debt—Rule 683, Belchambers's Rules and Orders, p. 272.

In a case where a loss to the estate was likely to occur if a grant of administration were delayed, the Court made a grant *ad colligenda bona* to a creditor; but directed that, after payment of necessary charges, the balance should be deposited in the registry until a general grant should issue, and that meanwhile citations should issue to the next-of-kin—*In the Goods of Stewart*, L. R., 1 P. and D., 727.

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.

This section has not been incorporated in the Probate and Administration Act, V of 1881.

It accords with the law on the subject in England—*Enohin* v. *Wylie*, 10 H. of L. Cas 1. See *per* LORDS CRANWORTH and CHELMSFORD, *Preston* v. *Melville*, 8 Cl. and Fin 1. Moveable property, however, must, as in England, be *distributed* according to the law of the domicile of the deceased—s 4, *supra*.

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

Probate of copy or draft of lost will.

* So much of this Part as relates to grants of probate and letters of administration with the will annexed was made applicable to wills of Hindus, &c., in the Lower Provinces of Bengal and in the towns of Madras and Bombay, by s. 2, Act XXI of 1870. By s. 154, however, of the Probate and Administration Act, it is no longer embodied in the Hindu Wills Act. The effect of the provisions of the Wills Act as to probate, it was held, was to make probate of the will evidence of the will against all persons interested under the will—*Brajanath Dey Sirkar* v. *S. M. Anandamayi Dasi*, 8 B. L. R., 209.

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.

This section has been incorporated as s. 24 in the Probate and Administration Act, V of 1881.

The contents of a lost will, like those of any other instrument, may be proved by secondary evidence—*Sugden* v. *Lord St. Leonards*, L. R., 1 P. Div., 154; see *Brown* v. *Brown*, 8 E. and B., 876. In England, where a will has been lost or mislaid since the testator's death, the executor applying for probate of a copy or draft must produce proof by affidavit that the original was duly executed; that it was in existence after the testator's death, and has since been lost; and that the copy or draft is a true one—Coote's Prob. Pract., 122.

A grant of probate granted under this section is general in its powers, but limited in duration.

Where probate of a copy of a will is applied for, no consent on the part of the next-of-kin of the testator is required (Coote's Prob. Pract., 123), but see *In the Goods of Denston*, 3 Curt., 741. In England, however, where the Court is asked to grant probate of a copy, the executors may be called upon to propound the will, unless the next-of-kin consent to probate being granted on motion—*In the Goods of Barber*, L. R., 1 P. and D., 267.

In *Burls* v. *Burls*, L. R., 1 P. and D., 472, evidence of the contents of a lost will was supplied by the production of the draft and of parol testimony of persons who had read the will. Sir J. P. Wilde held, that the parol evidence must be placed side by side with the draft, and out of them together the Court must extract the contents of the will to be proved. In this case the executrix, it may be observed, was condemned in costs, it having been through her negligence that the original was lost.

If a person who has himself destroyed a testamentary paper after the death of the alleged testator, asks for probate of the substance of the will as contained in a copy or otherwise, the Court will expect the fullest and most satisfactory proof of all the facts necessary to be established—*Moore* v. *Whitehouse*, 3 Sw. and Tr., 567.

Where the will has been destroyed in the lifetime of the testator, it must of course be proved that it was by mistake or without his privity or consent (*Davis* v. *Davis*, 2 Add., 224; *Trevelyan* v. *Trevelyan*, 1 Phill., 149), for, where the will has been left in the possession of the testator himself, the legal presumption is, that he destroyed it himself *animo revocandi*—*ibid*, 226.

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.

This section has been incorporated as s. 25 in the Probate and Administration Act, V of 1881.

Declarations, written or oral, made by a testator both before and *after* execution of his will are, in the event of its loss, admissible as secondary evidence of its contents—*Sugden* v. *Lord St. Leonards*, L. R., 1 P. Div., 154 (Cockburn, C. J., Jessel, M. R., James, L. J., and Baggallay, J. A., Mellish, L. J., dissenting as to declarations made after the execution of the will). In that case, which overruled the case of *Quick* v. *Quick*, 3 Sw. and Tr., 442, the contents of a lost will were held to be proved by the evidence of a single witness who was interested, but whose veracity and competence were unimpeached.

Verbal and written declarations, or statements made by a testator in and about the making of his will, when accompanying acts done by him in relation to the same subject, are admissible as evidence of the contents of the will—*Johnson* v. *Lyford*, L. R., 1 P. and D., 546. Even where there is a draft, parol testimony of the contents of the will may be received, and from the parol evidence placed side by side with the draft, the Court will extract the contents of the will to be proved—*Burls* v. *Burls*, L. R., 1 P. and D., 472.

Where a codicil has been lost or destroyed, its contents may be proved in the same manner as the contents of a will.

In all cases the validity of the execution must be shown as well as the substance or contents of the will—*In the Goods of Ripley*, 1 Sw. and Tr., 68; *In the Goods of Gardner*, 1 Sw. and Tr., 109; Coote's Prob. Pract., 124. See *In re Nobodoorga*, 7 C. L. R., 387.

Where the contents of a lost will are not completely proved, probate will be granted to the extent to which they are proved—*Sugden* v. *Lord St. Leonards*, L. R., 1 P. Div., 154. See *Sly* v. *Sly*, L. R., 2 P. D., 91. So, where a codicil has been lost since the death of the testator without a copy having been made or the draft kept, and its contents or substance cannot be shown, the Court will grant probate of the will limited until the original codicil or an authentic copy thereof shall be brought in—Coote's Prob. Pract., 124-5.

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.

This section has been incorporated as s. 26 of the Probate and Administration Act, V of 1881.

The procedure laid down by this section is the same as that followed in similar circumstances in England; see Coote's Prob. Pract., 125. The circumstances must be alleged upon affidavit, and if the copy has been transmitted to a person other than the executor, he will be required to join the executor in the affidavit—*Ibid*; *In re Nobodoorga*, 7 C. L.

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.

This section has been incorporated as s. 27 in the Probate and Administration Act, V of 1881.

In *In the Goods of Metcalfe*, 1 Add , 343, letters of administration were granted until the last will and testament of the deceased (stated by himself, a few days before his death, to be in India), or an authentic copy thereof, should be transmitted from India to England. See Williams on Executors, 520, *et seq.*

The English Probate Court granted probate of certain papers forming part of the will of a deceased, the other papers being in India, reserving power to the executor to prove the other papers on his undertaking to do so—*In the Goods of Robarts*, L. R., 3 P. and D., 110.

(*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.

This section has been incorporated as s. 28 in the Probate and Administration Act, V of 1881, the word 'agent' being there substituted for that of 'attorney'

Where a person solely entitled to administration is resident within the jurisdiction, the Court will not grant administration to his attorney for his use and benefit - *In the Goods of Burch*, 2 Sw. and Tr., 139. But where the estate was trust-property only, the Court allowed the attorney of a person who was residing in England to take out administration—*In the Goods of Bullar*, 39 L. J., P. and M., 26. In *In the Goods of Roberts*, 1 Sw. and Tr., 64, the Court granted administration to the nephew of the person entitled, the latter being of advanced age and unwilling to take upon himself the burden of administration.

It is necessary under this, as under s. 213, that the attorney or agent applying for letters of administration should be within the jurisdiction of the Court—*In the Goods of Nesbitt*, 4 B. L. R., App., 49. It seems, however, to be otherwise in England, where an attorney, though resident abroad, may obtain a grant under his power, provided his sureties are resident in England—*In the Goods of Leeson*, 1 Sw. and Tr., 463; but see *In the Goods of Reed*, 3 Sw. and Tr., 441. But if both

principal and attorney reside in the same place out of the jurisdiction, the Court will not make a grant to the attorney—Coote's Prob. Pract., 126.

A British subject died in England possessed of property both in England and in India, leaving a will, by which he appointed four persons to be his executors in England, and *W. D.* to be his executor in India, "the latter accounting to the former for his intromissions, upon which he will charge a commission of 3 per cent." Probate was granted to the four English executors, but *W. D.* renounced probate. Thereupon an application was made in India for letters of administration with the will annexed to be granted to the attorney of the four English executors. PHEAR, J., held, that the English executors were intended by the testator to have power of administering the assets in India as well as in England, and that, therefore, their attorney was entitled to letters of administration—*In the Goods of Leckie*, 15 B. L. R., 8 Appx., 8. In the case of *Velho* v. *Leite*, 33 L. J., P. and M., 107, a testator, who was a domiciled Portuguese, by his will appointed *A* and *B* his executors in Portugal, and *C* and *D* his executors in England, and the Court held, that the fact that one of the latter executors was resident in Portugal, the words 'in Portugal' and 'in England' were equivalent to 'for Portugal' and 'for England' respectively.

Where administration is granted in pursuance of a power, the grant must follow the terms of the power. Accordingly, where a party entitled to administration is abroad, and has given a simple power-of-attorney to his agent to take out administration for his use and benefit, administration will be granted in the same terms as it would have been granted to the principal himself—*In the Goods of Goldsburgh*, 1 Sw. and Tr., 295. So, if the letter of attorney contain a power of substitution and the attorney exercise it, the substitute may take the grant—Coote's Prob. Pract., 129, citing *Palliser* v. *Ord*, Bunb. Exch. Rep., 166.

The words for 'the use and benefit' do not exclude those who are beneficially interested; and the person to whom a grant is made for the use and benefit of another who is out of the jurisdiction is liable to be sued by the parties beneficially interested in the estate in the same way as if he had obtained letters of administration in his own right—*Chambers* v. *Bicknell*, 2 Hare, 536. In that case it was unsuccessfully contended that the attorney was only accountable to his principal.

In England, if the attorney be appointed by one only of two or more executors, a grant is made to such attorney to the use and benefit of his constituent, and until he shall duly apply for and obtain probate of the will to be granted to him.—Coote's Prob. Pract., 128. It is not necessary to revoke letters of administration granted to an attorney on the principal applying for and obtaining probate, as the grant ceases and expires by the executor returning to the jurisdiction and taking probate—*In the Goods of Cassidy*, 4 Hagg., 360.

'Province,' as defined both by this Act and by the Probate and Administration Act, V of 1881, s. 3, includes any division of British India having a Court of the last resort—s. 3, *ante*.

213. When any person to 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 abovementioned.

Administration with the will annexed to attorney of an absent person, who, if present, would be entitled to administration.

This section has been incorporated as s. 29 in the Probate

Administration Act, V of 1881, the word 'agent,' as in the preceding section, being there substituted for that of 'attorney.'

As to persons entitled, if present, to administration with the will annexed, see ss. 195 and 196, *supra*, pp. 220, 221.

According to the rules of the High Court at Fort William, when application is made by the attorney of an executor or administrator resident in England, Scotland, or Ireland, or at any other place beyond the jurisdiction of the Court, the original will or an exemplification thereof, or an exemplification of the letters of administration, shall be annexed to the petition, and the power-of-attorney shall be verified to the satisfaction of the Court or a Judge—Rule 686 of Belchambers's Rules and Orders, p. 273.

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.

This section has been incorporated as s. 30 in the Probate and Administration Act, V of 1881, the word 'agent,' as in the two preceding sections, being there substituted for that of 'attorney.'

In England, the attorney of one of many residuary legatees may take administration with the will annexed without notice to the other residuary legatees; and the attorney of one of many next-of-kin may take administration in like manner without notice to the other next-of-kin—Coote's Prob. Pract., 129. But under this section it would seem administration is only to be granted where no person entitled equally with the person giving the power-of-attorney is willing to act.

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.

This section has been incorporated as s. 31 in the Probate and Administration Act, V of 1881.

Probate cannot be granted to a minor—s. 183, *supra*, but an administrator during minority has all the powers of an ordinary administrator—s. 274, *infra*.

In England, where a sole executor or sole residuary legatee is under age, the person entitled in preference to all others is the guardian appointed by the will or deed of the father under 12 Car. II, c. 24, ss. 8 and 9—*In the Goods of Morris*, 2 Sw. and Tr., 360. Next in order is

the guardian of the estate (not the person) of a minor appointed by the High Court of Chancery, or a guardian appointed by a competent foreign Court. If there be no such guardian, the Court itself will appoint a curator or guardian from the next-of-kin of the minor for the purpose of taking the grant—*Rich* v. *Chamberlayne*, 1 Lee, 135; *In the Goods of Ewing*, 1 Hagg., 381 ; Coote's Prob. Pract., 129,130.

In England, a natural guardian of a sole minor executor or residuary legatee does not appear to be recognized as entitled as such to administration with the will annexed.

This section speaks of the *legal* guardian,—that is, possibly, a testamentary guardian appointed by the father under s. 47, *supra*, p. 40, or a guardian appointed by the Court to take charge of the minor's estate,—*e. g.*, under Act XL of 1858, in cases to which that Act is applicable. It is to be observed that s. 47 does not apply to Hindus; see Act XXI of 1870, s. 2.

Where a grant is made to a guardian appointed by a foreign Court in England, the appointment must be proved by a copy of the order under which it is made, authenticated by the seal of the Court—*In the Goods of Jones*, 28 L. J., P. and M , 80.

The Court will not grant administration to one out of several testamentary guardians without the consent of the others—Coote's Prob. Pract., 130.

If two persons are appointed by the Court guardians of an infant during the minority or until further order, the guardianship is at end on the death of one of them, and there must be a new appointment (*Bradshaw* v. *Bradshaw*, 1 Russ., 528); but in England it has been held, that a testamentary guardianship survives, although there are no express words of survivorship in the appointment—*Eyre* v. *Shaftesbury*, 2 P. Wms., 104.

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.

Administration until one of several minor executors or residuary legatees attains majority.

This section has been incorporated as s. 32 in the Probate and Administration Act, V of 1881.

See Coote's Prob. Pract., 133.

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 intestate's estates, be a lunatic, letters of administration with or without the will annexed, as the case may be,

Administration for use and benefit of lunatic *jus habens*.

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.

This section has been incorporated as s. 33 in the Probate and Administration Act, V of 1881, with an alteration including minors as well as lunatics.

In England, it was the practice of the Ecclesiastical Court to grant administration for the use and benefit of a lunatic, although the person alleged to be so had not been found a lunatic by inquisition; but when such a case occurred, the Court required affidavits stating the fact of lunacy, and that no inquisition had been had, and, of course, no committee appointed. The Court then granted administration to the next-of-kin of the lunatic for the use and benefit of the lunatic pending the lunacy, and it required sureties in double the amount of the property, and such sureties must have justified—Williams on Executors, 524.

This Act also seems to contemplate administration being granted for the use and benefit of a lunatic, although he has not been found to be such by a commission, for it provides for the case of there not being a person to whom the care of the estate of the alleged lunatic has been committed; whereas in all cases where a person is adjudged to be of unsound mind under 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 Court of Judicature*), a manager of the estate is appointed (s. 9). See also Act XXXIV of 1858. Act XXXV of 1858 has been, by Act XV of 1874, declared to apply to the whole of British India except the Scheduled Districts.

It may be useful to note the practice in England. There, if a sole executor be a lunatic, administration with the will annexed will be granted to his committee for his use and benefit during his lunacy—*In the Goods of Phillips*, 2 Add., 336, note (*b*). The production of the commission proves the committee's title and also the lunacy of the ward. If there be two committees, both must take, or one must renounce—Coote's Prob. Pract., 135. If the committee consent (*In the Goods of Milnes*, 3 Add., 55), or if there be no committee, the grant will be made to the residuary legatee—Coote's Prob. Pract., 136. If the residuary legatee be a lunatic (there being no executor), the grant will be made to the committee of his estate, if he have one, or to the next-of-kin; but the next-of-kin must file a declaration and give justifying security—*Ibid.* In case of intestacy, administration will be granted to the committee, if there be one, or if not, to the next-of-kin of the lunatic, next-of-kin of the intestate, or the husband of the intestate, as the case may be. In like manner, where the intestate's widow is a lunatic, administration will be granted to the committee, if there be one, or if not, to her next-of-kin. See *Alford* v. *Alford*, 1 Deane, 324; *In the Goods of Penny*, 1 Rob., 426.

The Act under which a manager of the estate of a lunatic is appointed in India is Act XXXV of 1858, which has already been referred to. The English Courts recognize a committee appointed by a foreign Court—Coote's Prob. Pract., 136.

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 section has been incorporated as s. 34 in the Probate and Administration Act, V of 1881.

It is the same, with only slight verbal alterations, as s. 70 of the English Probate Act of 1875, 20 and 21 Vict., c. 77. The cases, therefore, which have been decided upon that Statute will be in point here. In *Horrell* v. *Witts*, L. R., 1 P. and D., 103, Lord Penzance is said to have observed: "The practice has always been that this Court will only grant administration when a necessity for the grant has been made out. This is laid down in the case of *Bellew* v. *Bellew*," 4 Sw. and Tr., 62; (S. C.) 34 L. J., P. and M., 125. In the case cited by Lord Penzance it was said, that administration *pendente lite* would be granted whenever the Court of Chancery would appoint a receiver. See Coote's Prob Pract., 138. In *Mortimer* v. *Paull*, L. R., 2 P. and D., 85, the Court refused to appoint an administrator *pendente lite*, where there was a person named in the will as executor whose appointment was not questioned, and who could discharge the functions of an administrator.

The Court will make the grant to one of the parties with the consent of the other (*Parish Schoolmasters of Scotland* v. *Frazer*, 2 Hagg., 615; *DeChatelain* v. *DePontigny*, 1 Sw. and Tr., 34, or to a nominee of both when they agree in their nomination (*Northey* v. *Cock*, 1 Add., 329), or jointly to a nominee of each (*Hellier* v *Hellier*, 1 Lee, 281; Coote's Prob. Pract., 138 and 139); but where neither of the parties to the suit applies, the Court, under s. 70 of Act 20 and 21 Vict., c. 77, it has been held, has power to appoint an administrator *pendente lite* in contested testamentary and administration-suits on the application of a person who is not a party to such suit—*Tichborne* v. *Tichborne*, L. R., 1 P. and D., 730. In that case an administration-suit was likely to be protracted, and the Court appointed the administrator *pendente lite* at the instance of a creditor who was not a party to suit.

Where it is just and proper to do so, the Court will appoint an administrator *pendente lite*, although a receiver may have been appointed by the Court of Chancery, in a suit pending between the same parties and affecting the same property as the testamentary or administration-suit—*Tichborne* v. *Tichborne*, L. R., 1 P. and D., 730.

As to the control of the Court, it was directed in the case of *Charlton* v. *Hindmarsh*, 1 Sw. and Tr., 519, that the administrator *pendente lite* should not discharge debts until they had been passed by the Registrar. Except with the special leave of all parties interested, the Court cannot give an administrator appointed *pendente lite* special power to pay an annuity by way of maintenance to one of the residuary legatees, although one of the next-of-kin—*Whittle* v. *Keats*, 35 L. J., P. and M., 54.

(c.) *For Special Purposes.*

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.

Probate limited to purpose specified in the will.

This section has been incorporated as s. 35 in the Probate and Administration Act, V of 1881.

The first part of the section is taken from Coote's Prob. Pract., 142. In *In the Goods of Cooper*, 1 Deane, 9, where the testator directed that her will was to take effect only in a particular event, which had not happened, but might happen, the Court granted general probate.

220. If any 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.

Administration with the will annexed limited to a particular purpose.

This section, which is taken from Coote's Prob. Pract., pp. 148-9, has been incorporated as s. 36 in the Probate and Administration Act, V of 1881.

The grant follows the terms of the power—*In the Goods of Goldsborough*, 1 Sw. and Tr., 295, *per* Sir C. Cresswell.

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.

Administration limited to property in which a person has a beneficial interest.

This section has been incorporated as s. 37 in the Probate and Administration Act, V of 1881.

In England, also, where a person dies leaving personal property of which he was sole or surviving trustee, there being no personal representative, administration may be granted limited to that property. The grant is usually limited to the right, title, and interest of the deceased in the property in question—Coote's Prob. Pract., 150-151.

Here the grant may be to the beneficiary or *cestui que trust*, or to some other person on his behalf. In England, where there are persons entitled to represent the deceased trustee, such persons must first be cited (*Pegg* v. *Chamberlain*, 1 Sw. and Tr., 527; *In the Goods of Barker*, 1 Curt., 592), and it would seem that it would be so here, unless they should have actually renounced. If there be several parties interested in the fund, the grant will be limited to the interest of the *cestui que trust* making the application, unless the other *cestuis que trust* assent to the grant extending to their respective interests—*Pegg* v. *Chamberlain*, 1 Sw. and Tr., 527. If only some of the parties elect, the grant will be made to their nominee to the extent of their shares, and the dissentient party or parties are at liberty afterwards to apply for a grant limited to the remaining shares of the fund—Coote's Prob. Pract., 151. So, if the person applying have only a life-interest, the grant will be limited to the receipt of the dividends or other produce of the property—*Ibid.*

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.

This section has been incorporated as s. 38 in the Probate and Administration Act, V of 1881.

The terms of this section are similar to the rules which guide the Court in England. See Coote's Prob Pract., 152.

A limited administration is not sufficient in a case which, from its nature and character, according to the practice of the Court, involves general enquiries as to the next-of-kin, or general enquiries as to assets and creditors—*Penny* v. *Watts*, 2 Ph., 149. Thus, in *Dowdeswell* v. *Dowdeswell*, L. R., 9 Ch. D., 294, *W*, claiming to be one of the next-of-kin of an intestate, took out letters of administration to her estate, and divided the residue among the supposed next-of-kin including himself. Afterwards *W* died, and then the plaintiff, who claimed to be sole next-of-kin, and disputed the title of *W* and the other supposed next-of-kin, brought a suit against *W's* executors, calling upon them to refund a fixed sum of money which had been agreed on as the net residue of the intestate's estate come into the hands of *W* as administrator, and praying that, so far as might be necessary, the estate of the intestate might be administered by the Court. An administrator *ad litem* was made a defendant. It was held by the Appeal Court, affirming the decision of HALL, V. C.,

that although the only object of the suit was to establish the title of the plaintiff as sole next-of-kin, a general administrator of the intestate's estate was a necessary party to the will and not merely an administrator *ad litem*. COTTON, L. J., said: "Where you want an administration of an estate, you must have not a mere limited administrator, but a general administrator,—that is to say, a person constituted by the proper authorities for the purpose of collecting and dealing with the assets, and the distinction is obvious between a case of administration and a case where a plaintiff simply wishes to establish that he has a claim against a person who is dead for the purpose of defending the estate. In that case a limited administrator is sufficient, because the suit involves no kind of administration, but simply the decision of the question whether or no the plaintiff has or has not a good claim against the estate of the deceased."—p. 304. See *In the Goods of Chanter*, 1 Rob., 274; *Davis* v. *Chanter*, 2 Ph., 550.

In England, administration limited to a suit is also granted to the nominee of a plaintiff who is about to *commence* proceedings—Coote's Prob. Pract., 152.

Under a grant of this kind the grantee has only authority to carry on the suit, and has no right to receive the fruits of it—*In the Goods of Dodgson*, 1 Sw. and Tr., 260.

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 section has been incorporated as s. 39 in the Probate and Administration Act, V of 1881. It is founded upon ss. 1 and 3 of Statute 38 Geo. III, c. 87. That Statute applied only to executors (*In the Goods of Harrison*, 2 Rob., 184); but it was afterwards made applicable in similar circumstances to all cases where letters of administration had been granted by the English Probate Act, 1857, 20 and 21 Vict., c. 77, s. 74.

The words 'at the expiration of twelve months,' which are to be found also in the English Statute, have been held to mean at or *after* the expiration of that period which, under that Statute, is to commence, not from the grant of probate or letters of administration, but from the testator's death—*In the Goods of Ruddy*, L. R., 2 P. and D., 330.

In *In the Goods of Hampton*, L. R., 1 P. and D., 1, the executor being out of the jurisdiction, the Court made a grant of administration with the will annexed to the father and guardian of infant legatees limited

to the interest of those legatees in the unadministered estate. In another case a limited grant was made to the personal representative of a legatee—*In the Goods of Collier*, 2 Sw. and Tr., 444; 31 L. J., P. and M., 63. See *In the Goods of Cooper*, L. R., 2 P. and D., 21; and *In the Goods of Baynes*, 7 Jur., N. S., 832.

The authority of an administrator appointed under this section does not become void upon the death of the executor or administrator (*Taynton* v. *Hannay*, 3 Bos. and Pull., 26), the grant being made, not for a limited time, but for a limited purpose,—*viz.*, for the purpose of the person appointed becoming a party to a suit and carrying the decree which may be made therein into effect—*Rainsford* v. *Taynton*, 7 Ves., 460.

If the executor return he ought to be made a party to a suit in the usual course; the proceedings are not to be put an end to, but the temporary administrator may account, have costs, and be discharged—Williams on Executors, 516. But payment of a debt to an administrator appointed during the absence of an executor is a good payment, even after the return of the executor, provided the debtor who paid the money had no notice of the return—*Walker* v. *Woollaston*, 2 P. Wms., 579, citing *Hodge* v. *Clare*, 4 Mod., 14.

Where an absent executor dies, and an administrator has been appointed during his absence, the practice seems to be for his executor or his administrator (if any one apply to be made such) to apply to be made a party to the suit, and then the Court will deal with the matter as on the return of an absent executor or administrator—*Rainsford* v. *Taynton*, 7 Ves., 460.

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.

Administration limited to collection and preservation of deceased's property.

This section has been incorporated as s. 40 in the Probate and Administration Act, V of 1881.

Grants such as are provided for by this section are also made in England. Thus, in a recent case, where it was for the benefit of the absent or unknown next-of-kin, the Court directed an administrator *ad colligenda bona* to dispose of the property or any portion of it by sale—*In the Goods of Schwerdtfeger*, L. R., 1 P. Div., 424. So, in *In the Goods of Clarkington*, 2 Sw. and Tr., 380, the Court, under special circumstances, made a grant to a creditor *ad colligenda bona* limited to collect the personal estate of the deceased, to give receipts for his debts on the payment of the same, and to renew the lease of his business premises, which would expire before a general grant could be made. The Court, however, refused to give the administrator a power to dispose of the premises and of the good-will of the business.

In the case of *In the Goods of Stewart*, L. R., 1 P. and D., 727, the estate consisted of timber, which was likely to deteriorate, and of trade debts, and the Court made a grant *ad colligenda bona* to a creditor; but directed that, after payment of necessary charges, the balance should be deposited in the registry until a general grant should issue.

Administration *ad colligenda bona* will be granted not only to any one whom the Court considers for the occasion eligible, but will also be made to the persons who are entitled to a full grant, or to entire strangers whom mere chance has brought into the affair—Coote's Prob. Pract., 156; see also pp. 157 and 158.

Grants of this kind may be made limited to the sale of a ship, or to the protection of cargo or other matters relating thereto, to sums due and to become due on bills of exchange—Coote's Prob. Pract., 157; see *In the Goods of Don M. Gudolle*, cited 3 Sw. and Tr., 22.

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 it.

Appointment as administrator of person other than the one who under ordinary circumstances would be entitled.

This section is incorporated as s. 41 in the Probate and Administration Act, V of 1881. It is founded upon s. 73 of the English Probate Act of 1857 (20 and 21 Vict., c. 77). In the English Act, however, the words are "and it shall appear to the Court to be necessary or convenient *in any such case by reason of the insolvency of the estate of the deceased or other special circumstances*;" but it has been said that the insolvency of the estate is given as an example of the special circumstances which might induce the Court to grant administration under the section—*In the Goods of Farrands*, L. R., 1 P. Div., 441, *per* HANNEN, J.

Insolvency is not here mentioned as a special circumstance which might render it necessary or convenient to make a grant under this section, but is probable that where it did exist the Courts here would follow the English cases.

The following decisions upon the English Act may be in point in cases arising upon this Act:

A grant cannot be made unless there are special circumstances to justify it—*In the Goods of White*, 2 Sw. and Tr., 457. There the persons entitled to administration could not be communicated with by reason of the blockade of the ports of the Southern States, but the Court refused to grant administration to another as the property was not perishable.

A general statement upon affidavit that it is necessary, for the preservation of the personal estate and effects of the deceased, that administration should be granted, will not be sufficient. The Court must be satisfied that it is necessary and convenient that the grant should be made—*In the Goods of Cooke*, 1 Sw. and Tr., 267.

Where there were only two next-of-kin and persons entitled to distribution, and one of them renounced and the other was a lunatic, and his next-of-kin also renounced on his behalf, the Court granted administration to a person who, according to the ordinary practice of the Court, had no right, observing that the terms of s 73 (of the English Act) were very general, and gave the most extensive powers to the Court to make grants under special circumstances to persons who would not, but for that section, be entitled to them. See *Hawke* v. *Wedderburne*, L. R., 1 P. and D., 594.

Administration has been granted under the English Act in the following cases:—Where the sole person entitled was a resident of Australia, and the property required immediate management and protection—*In the Goods of Jones*, 1 Sw. and Tr, 13; where an aged uncle and aunt were the only persons entitled to distribution, and they consented to their son being appointed—*In the Goods of Roberts*, *ibid*, 64; where the person entitled was resident in Madras, and wrote a letter to a cousin directing him to secure the amount of the property—*In the Goods of Drinkwater*, 2 Sw. and Tr., 611; where the intestate's son, who had gone to Australia, had not been heard of for seven years, and the intestate died two and-a-half years before the seven years expired, and no representation had been taken out to the father, and it was uncertain whether the son had died before or after his father—*In the Goods of Peck*, 2 Sw. and Tr., 506; where an executor was named in the will, but no person of the name could be found—*In the Goods of Sawtell*, 2 Sw. and Tr., 448; where the intestate's father, who, if alive, could have been entitled to administer, had not been heard of for more than seven years, and the intestate had died within the seven years—*In the Goods of Smith*, 2 Sw. and Tr., 508; where the next-of-kin was a pauper lunatic—*In the Goods of Findlay*, 3 Sw. and Tr., 265; where the person solely interested in, and the sole party entitled to represent, the estate of the deceased died without taking out a grant, and his personal representative filed a renunciation, and a consent to the grant being made to a creditor of the person originally interested in, and entitled to a grant—*In the Goods of Fraser*, L R, 1 P. and D., 327; where an executor appointed by the will became bankrupt and left England for Australia, and the property was small—*In the Goods of Cooper*, L. R., 2 P. and D., 21; where there was no one among the next-of-kin or persons entitled to distribution, or creditors willing or able to act—*In the Goods of Bateman*, L. R., 2 P. and D., 243; where the deceased died in India, and portion of his assets, which were administered there by the Administrator-General there, who paid the other portion to his widow, who was resident in India, were transmitted to England for distribution among those entitled, administration being granted as to the money sent to England to one of the persons interested—*In the Goods of*

..., L. R., 2 P. and D., 244. Thus, where the next-of-kin were unable to agree among themselves as to which of them should take administration of the estate of the deceased, and all were willing that administration should be granted to a particular person who had no interest, the Court refused to concede to the application – *Teague* v. *Wharton*, L. R., 2 P. and D., 360. See *In the Goods of Fairweather*, 2 Sw. and Tr., 588; and *In the Goods of Hals*, L. R., 3 P. and D., 207.

In *Haynes* v. *Matthews*, 1 Sw. and Tr., 462, SIR C.
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... In England he had no
, and his personal estate there was ...
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the amount thereof being sworn under
brought by one of the six executors as

estate

(*d.*) *Grants with 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.

Probate or administration with the will annexed, subject to exception.

This section has been incorporated as s. 42 in Administration Act, V of 1881.

Thus, if a testator appoint one executor ...

latter may take probate save and except th
if there be no such executor, the residuary

tration (with the will annexed) of all and singular the effects of the deceased under the same exception—Coote's Prob. Pract., 160.

Where a testatrix having executed a will was advised that a bequest to her daughter should be secured to her separate use, and she gave directions that a testamentary paper to that effect should be prepared, a paper was thus prepared purporting to be her last will and testament and containing a clause revoking all former wills. The testatrix was not aware that the paper contained such a clause, and it was not read over to her. The clause was said to have been inserted *per incuriam*, and was omitted from the probate—*In the Goods of Oswald*, L. R., 3 P. and D., 162. But unless words have been inserted by fraud or mistake without the knowledge of the testator, the Court cannot correct the will either by the omission of words or by the insertion of other words—*Harter* v. *Harter*, L. R., 3 P. and D., 11.

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.

Coote's Prob. Pract., 160. This section has been incorporated as s. 43 in the Probate and Administration Act, V of 1881.

Where a testator has made his will for a particular or limited purpose only,—*e g*, the administration of a fund vested in himself as trustee, the administration of an estate vested in himself as executor, or the administration of his own property in some particular district or country, and has died intestate as regards all other property of his own or vested in him, the next-of-kin (without waiting for the executor to take the limited probate to which he is entitled under such circumstances) may take administration of all and singular the deceased's effects, save and except what the testator has himself excepted.

In like manner, the husband of a testatrix, who has made her will under a power, may take administration, save and except what she had power to dispose of by her will and has disposed of by it, before the executor proves the will—Coote's Prob. Pract., 161.

It seems that grants of probate and administration with exceptions are usually made in the first instance without the parties waiting for the limited grants being taken. Where the latter have been made, it is more usual that the probate or administration be *cæterorum* (of the rest)—Coote's Prob. Pract, 161. See following section.

(*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 section has been incorporated as s. 44 in the Probate and Administration Act, V of 1881.

A grant of the rest, or a grant *cæterorum* as it is technically denominated, is a grant of probate or administration following upon a limited grant. It is made under the same conditions as a grant with exception—Coote's Prob. Pract., 162. Thus, if a testator has appointed one executor for a specific 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—*Ibid.*

If a limited grant has been 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 deceased's effects—*Ibid.*

If a deceased had 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 of the effects of the deceased—*Ibid.*

(*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.

This section has been incorporated as s. 45 in the Probate and Administration Act, V of 1881.

Grants of effects unadministered are technically called 'grants *de bonis non*,' or '*de bonis non administratis*'.

By s. 196, *supra*, it is provided that "when an 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." See notes to ss. 179 and 196, *supra*.

Under this Act, as already pointed out, the executor of an executor is not derivative executor of the original testator, even though that testator died before 1866. So that in the words of MACPHERSON, J., in *De Souza* v. *Secretary of State* (12 B. L. R., 423).—"Upon the death of the executor or administrator of a deceased person, the estate of the latter is absolutely unrepresented until some one comes forward and gets a grant of letters of administration." In England, the law is different. There, where there is a sole or sole surviving executor who has proved the will, his executor represents the first testator, though his administrator does not—See Williams on Executors, 258.

The word 'may' is not to be construed as merely permissive, but as directory, and as showing the course which the Legislature intends shall be adopted—*De Souza* v. *Secretary of State*—*ubi supra*, *per* , J.

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.

Rules as to grants of effects unadministered.

Coote's Prob. Pract., 163. This section has been incorporated as s. 46 in the Probate and Administration Act, V of 1881.

As to the persons entitled to grants of administration, see s. 196, *supra*, *et seq*. See also Williams on Executors, p. 480 *et seq*.

Should any mistake have been made in the original grant, the Court will make the necessary correction: thus, where an original grant of administration was made by the Court to one of the next-of-kin of a testator on its own construction that he had not disposed of his residuary estate, 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. and Tr., 290; Coote's Prob. Pract., 163-4.

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.

Administration when a limited grant has expired, and there is still some part of the estate unadministered.

This section has been incorporated as s. 47 of the Probate and Administration Act, V of 1881. It relates to supplemental, or as they are also technically called *cessate*, grants This form of grant, although only required where the deceased's estate has not been fully administered, is distinguished from a grant *de bonis non* as being a re-grant of the whole of the deceased's estate just as it was sworn to and embraced by the original grant. Accordingly, the estate, on the second grant being applied for, must be sworn under the same amount as that for which the original grant was taken, though a part of the estate may actually have been disposed of by the first grantee—*Abbott* v. *Abbott*, 2 Phill., 578. See *In the Goods of Fozard*, 3 Sw. and Tr., 175; Coote's Prob. Pract., 171.

The following are examples of cases in which supplemental grants may be made (see Coote's Prob. Pract., 172-173):—

(1.) Where an executor has been appointed for a limited period, and that period has elapsed, a substituted executor, if there be such, takes probate.

(2.) Where administration (with the will annexed) has been granted for the use and benefit of a lunatic executor, the grant ceases on the executor becoming sane, and he is entitled to probate.

If in the last case the administrator should have died, further administration for the use and benefit of the executor is granted. If, however, the lunatic should have died, the grant of adminstration ceases, and administration with the will annexed is granted to the person entitled thereto.

(4.) A similar course is followed in the analogous case of a grant of administration to a guardian for the use and benefit of an executor during his minority.

(5.) Where administration has been granted to the attorney of the executor, it ceases on the latter duly applying for and obtaining probate of the will. It also ceases on the death of the attorney.

(6.) When probate has been granted of the substance of a will limited until the original will or an authentic copy thereof be brought into the registry, the grant ceases on the original or an authentic copy thereof being discovered and brought into the registry, and the executor will take probate of the original or of the authentic copy, as the case may be.

So, if administration is granted *pendente lite*, it ceases on the determination of the suit.

.) *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.

This section has been incorporated as s. 48 in the Probate and Administration Act, V of 1881.

The name of the deceased may have been misspelled, the status of the deceased misstated, or the time of the deceased's death or the amount of the estate misrepresented. So, in limited grants there may have been a misdescription of the property to be administered, or there may have been misrecital of the power under which a will has been made, or of a deed by which a trust has been created—Coote's Prob. Pract., 175.

In the case of *In the Goods of White*, I. L. R., 4 Calc., 582, a probate was amended by inserting the word 'Ward' instead of that of 'White.' In *In the Goods of Towgood*, L. R., 2 P. and D., 408, the Court allowed a probate to be amended, after it had issued, by the addition of a fuller description of the testator than was given therein in the first instance.

If the original grant has been lost or is inaccessible, a notation or alteration is made upon an exemplification of it—Coote's Prob. Pract., 178.

In the case of an administrator applying to amend the grant of letters by increasing the amount, as stated, of the deceased's property and effects, further security from him would be required. See Rule 703, Bel-

chambers's Rules and Orders, p. 281. Under this Act it has been held, that an executor is bound to give security upon a grant of administration to him—*In re Juggodeshari Dabi*, 8 C. L. R., 397; (S. C) I. L. R., 7 Calc., 84 (but see Act V of 1881, s. 78), and possibly further security might be required from him should he amend the probate by increasing the statement of the deceased's effects.

In *In the Goods of Allchin*, L. R., 1 P. and D., 664, the Court made a memorandum to be endorsed on a probate, after it had issued, as to the true date on which a will was executed, when it was satisfied that the date given in the probate was erroneous.

Alterations have also been made in regard to the executor or administrator where omissions or mistakes have been made in the name or otherwise. See Coote's Prob. Pract., 179.

All facts stated in explaunation of such omissions or mistakes are proved by affidavit—Coote's Prob. Pract., 180.

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.

Procedure where codicil discovered after grant of administration with will annexed.

This section has been incorporated as s. 49 in the Probate and Administration Act, V of 1881.

In England, the following procedure is laid down by Mr. Coote:—If a codicil be found after probate of a will has been granted, a separate probate is granted of that codicil, and the first probate undergoes no alteration or amendment. If, however, 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, it may be amended by engrossing the former into it—Coote's Prob. Pract., citing Dr. Lushington in *Sheldon* v. *Sheldon*, 3 No. Ca., 255-256.

(*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.

'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.

The person to whom probate was, or letters of administration were, granted has subsequently become of unsound mind.

This section has been incorporated as s. 50 in the Probate and Administration Act, V of 1881.

"The Court," says Mr. Coote, "as having the fullest authority on the subject, is not necessarily or absolutely *functa officio* 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"—Prob. Pract., 186.

It was said by MARKBY, J., in the case of *Komollochun Dutt* v. *Nilrutton Mundle*, I. L. R., 4 Calc., 360; (S. C.) 4 C. L. R., 175: "The duty of the Judge upon an application being made under this section (234) somewhat depends upon what has passed on the previous grant of probate. Clearly, however, the first thing for him to do is to direct notice to be given to the executor, and all persons interested under the will, or claiming to have any interest in the estate of the deceased. It is also clear from s. 261, that the executor will be the plaintiff in the regular suit which the Judge will then have to try, and the object of this is clear. It is in order to enable the Judge, if he thinks proper, to call upon the executor to prove the will again in the presence of the objector, notwithstanding the prior probate, just as in England he may be called upon to prove the will in solemn form. But a discretion is left to the Judge. Where there has been already full

enquiry as to the genuineness of the will, the Judge will probably take, as he would have a right to take, the previous grant of probate as *primâ facie* evidence of the will, and so shift the onus on to the objector. But if there had been no previous contention, and the will had only been proved summarily, or, in what is called common form in England, that is, without any opposition and merely *ex parte*, to the satisfaction of the Judge, who can know nothing of the circumstances or the state of the family, then he ought, in all ordinary cases, to have the will regularly proved afresh so as to give the objector an opportunity of testing the evidence in support of the will before being called upon to produce his own evidence to impeach it."

A grant of probate is not in the nature of a summary proceeding to be contested by a regular suit in the Civil Court—*Mayho* v. *Williams*, 2 N. W. P. H. C. R., 268. The grant must be contested in the Court out of which the grant issued, and it must be contested before the Court sitting as a Court of Probate, and not in the exercise of its ordinary civil jurisdiction—*Ibid*, p. 274, *per* TURNER, Offg. C. J.

Where an executor of a forged or revoked will obtains probate, or a minor obtains probate on the suggestion or tacit understanding that he is of full age, or an executor obtains probate of a will of a living person (*In the Goods of Napier*, 1 Phill., 83), the probate will be revoked. See Coote's Prob. Pract., 187; *Trimlestown* v. *Trimlestown*, 3 Hagg. Ec. R., 243.

In *Warren* v. *Kelson*, 28 L. J. (P. & M.), N. S., 124, the Court of Chancery having, after grant made, differed from the Prerogative Court in its construction of the will, the Court of Probate revoked the grant and gave a fresh one to the person who was entitled to the residuary estate by the decision of the Court of Chancery. In *In the Goods of Morris*, 2 Sw. and Tr., 360, cited in Coote's Prob. Pract., 29, administration granted to the elected guardian of the children of the intestate was recalled, there being a testamentary guardian who had not renounced. Where one of two executors became lunatic, the probate was brought in and a fresh one granted—*In the Goods of Marshall*, 1 Curt., 297. See *In the Goods of Phillips*, 2 Add., 335; and *In the Goods of Newton*, 3 Curt., 428. In *In the Goods of Ferrier*, 1 Hagg., 241, the tenant-for-life having assigned his interest to the remainderman after taking administration with the will annexed, the grant was revoked and fresh administration granted to the remainderman.

The Court never revokes a grant made to a wrong person except where the person, having the right to the grant which is to take its place, asks for that and is also prepared to take it at the same time that he makes his application to revoke—Coote's Prob. Pract., 191. Thus, in *Phillips* v. *Alcock*, 2 Lee, 97, where a husband had obtained administration to the estate of his deceased wife as intestate, and two wills were afterwards produced, the Court refused to revoke the administration until one of the wills had been proved to be good in law.

In England, on revoking a grant, the Court requires it to be produced and delivered to the Registrar, so that it may be cancelled, unless this be impracticable, as where the person to whom the grant was made has left the country (*Baker* v. *Russell*, 1 Lee, 167), or cannot be found—*In the Goods of Langley*, 2 Rob., 407.

Upon the revocation of letters of administration which have been lost, an undertaking will be required from the person to whom they were granted, that if they be found he will bring them in, and that they will not be acted upon—*In the Goods of Carr*, 1 Sw. and Tr., 111.

In certain cases the Court will not revoke an original grant, but will make a subsidiary grant, as where a sole executor becomes a lunatic, in which case a new grant will be made to the committee of the lunatic for his use and benefit until he shall become of sound mind, or if there be no committee, to the residuary legatee. So also, in the case of a sole administrator becoming of unsound mind, a similar grant will be made. See Coote's Prob. Pract., 193; *In the Goods of Binckes*, 1 Curt., 286.

Who may apply for revocation of probate.—Persons who seek to contest a will must prove an interest sufficient to entitle them to a *locus standi* in Court, but the want of interest is an objection which should be taken at the earliest possible stage of the proceeding (*Mayho* v. *Williams*, 2 N. W. P. H. C. R., 268), and it seems a legatee under a will has an interest sufficient to maintain a suit for the revocation of probate—*Ibid.* A creditor who has, prior to a grant of probate, attached property to which his judgment-debtor would naturally be entitled as heir of the alleged testator, has such an interest in the property of the deceased as to entitle him, on probate of an alleged will being granted, to apply under this section for revocation of the probate for just cause—*Umanath Mukerjee* v. *Nilmoney Singh Deo*, 7 C. L. R., 337; (S. C.) I. L. R., 6 Calc., 429, following *Komollochun Dutt* v. *Nilrutton Mundle*, I. L. R., 4 Calc., 360; (S. C.) 4 C. L. R., 175. See also *In re Bhobosoondari Dabee*, I. L. R., 6 Calc., 460, where a judgment-creditor attached certain property belonging to his debtor, who was the next-of-kin of the deceased. The widow of the deceased applied for probate of an alleged will of her husband, and it was held, that the judgment-creditor was entitled to oppose the grant of probate.

Where probate of the will of a deceased mohunt had been granted to the favourite *chela* who had been appointed by the testator to be malik of all the properties comprised in the endowment, it being provided by the will that if anything were done prejudicial to the interests of the endowment, or contrary to Hindu practice, religion, or usages, the property should vest in such disciple of his who should be competent and virtuous,—it was held, that the Court had no power to revoke the probate on the ground that the *chela* to whom it had been granted had taken to an immoral course of conduct, and in consequence had been excluded from the community of mohunts—*Mohun Dass* v. *Lutchmun Dass*, I. L. R., 6 Calc., 11; (S. C.) 6 C. L. R., 265. It was pointed out that the proper course in such a case would be to bring a suit under the Religious Endowment Act, or any other suit for a declaration that the person to whom probate had been granted had disqualified himself for the office. If in that suit a decree was obtained and duly certified to the Court which granted probate, that Court would, it seeems, direct the revocation of the probate.

In the case of *Komollochun Dutt* v. *Nilrutton Mundle*, I. L. R., 4 Calc., 360; (S. C.) 4 C. L. R., 175, the Court was of opinion that a person interested by assignment in the estate of a deceased person might, where a will had been set up and proved at variance to his interests, apply for revocation of the probate of the will. See *Baijnath Sahai* v. *Desputty Singh*, I. L. R., 2 Calc., 208; (S. C.) 25 W. R., 489.

Costs.—Where letters of administration are revoked, the administrator will not get his costs of an administration-suit instituted by him with knowledge that another person claimed to administer—*Houseman* v. , L. R., 1 Ch. D.,

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.

This section has been incorporated as s. 51 in the Probate and Administration Act, V of 1881.

A grant of probate must be contested before the Court out of which it issued sitting as a Court of Probate, and not in the exercise of its ordinary civil jurisdiction. And, the fact that a grant is contested on the ground of the execution of the will having been obtained by fraud will not, it has been held, deprive the District Court, as a Court of Probate, of jurisdiction to determine an application to revoke the probate—*Mayho* v *Williams*, 2 N. W. P. H. C. R., 268 In *In re Bhobosoondari Dabee*, I. L. R., 6 Calc., 460, however, WHITE, J., made the following remarks.—"The only grounds upon which probate can be impeached in a Civil Court are those stated in s 44 of the Evidence Act,—*viz.*, that the probate was granted by a Court not competent to grant it, or that it was obtained by fraud or collusion, which means fraud or collusion upon the Court, and perhaps also fraud upon the person disinherited by the will (*Barnesly* v. *Powel*, 1 Ves. Sen., 119, 284); but it cannot be shown that the will was never executed by the testator, or was procured by a fraud practised upon him."

The jurisdiction in granting probates and letters of administration under this section in Assam is vested, not in the Deputy Commissioner, but in the Judicial Commissioner—*Thakoor Kristo Surma* v. *Basoodeb Ghoshamee*, 12 W. R., 424.

The High Court has concurrent jurisdiction in the exercise of all the powers conferred by this Act upon the District Judge (s. 264, *infra*).

Section 44 of the Evidence Act, I of 1872, is as follows:—"Any party to a suit or other proceeding may show that any judgment, order, or decree which is relevant under s. 40, 41, or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

A District Court has no jurisdiction to admit the will of a Mahomedan to probate—*Fatimunnissa Begum* v. *Mir Hamza Ali*, 6 C. L. R., 391.

Power to appoint delegate of District Judge to deal with non-contentious cases.

[235A. The High Court may, from time to time, appoint such judicial officers within any district as it thinks fit, to act for the District Judge as delegates, to grant probate, and letters of

* So much of this Part and Part XXXII as relates to grants of probate and letters of administration with the will annexed, and Parts XXXIII to XL (both conclusive), so far as they relate to an executor and an administrator with the will annexed, notwithstanding s. 331, *infra*, were made, by s. 2 of the Hindu Wills Act, to apply to Hindus, etc., in the Lower Provinces of Bengal and in the towns of Madras and Bombay; but the portion of that section making these Parts of this Act so applicable has since been repealed by s. 154 of the Probate and Administration Act

administration in non-contentious cases within such local limits as it may from time to time prescribe:

Provided that, in the case of High Courts not established by Royal Charter, such appointment be made with the previous sanction of the Local Government.

Persons so appointed shall be called 'District Delegates.']

This section, which is s. 52 in the Probate and Administration Act' V of 1881, has been added after s. 235 by s. 2 of the District Delegates Act, VI of 1881.

District Judge's as to the grant 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.

This section is incorporated as s. 53 in the Probate and Administration Act, V of 1881.

By s. 25 of the English Probate Act (Statute 20 and 21 Vict., c. 77), it was enacted:—

"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 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 inquired into and done under this Act, as are by law invested in the High Court of Chancery for such purposes in relation to any suit or matter depending in such Court."

That section of the English Act was held not to constitute an order of the Probate Court for payment of money a charge on land within Statute 1 and 2 Vict., c. 110, s. 13—*Pratt* v. *Ball*, 1 DeG. J. and Sm., 141; Williams on Executors, 300.

In *Crispin* v. *Cumano*, L. R., 1 P. and D., 622, an order was made in a testamentary suit on the defendant, both as executor of the original defendant and as being himself a party, to pay the taxed costs. The costs not having been paid within the time appointed, and the defendant being abroad, a writ of *sequestration* issued against his real and personal estate. A large amount of stock was standing in the books of the Bank of England to the credit of the defendant as executor of the original defendant in the suit, and a dividend was due thereon. It was held, that the Court of Probate had no authority to make an order upon the Bank (without its assent) to pay over the dividends to the sequestrators.

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.

District Judge may order any person to produce testamentary papers.

This section has been incorporated as s. 54 in the Probate and Administration Act, V of 1881.

The exemplification of a will falls under this section, and may be ordered to be produced and brought in—*In the Goods of Newton*, 8 B. L. R., App. 76.

As to penalties, see chap. x of the Indian Penal Code, Act XLV of 1860. See s. 26 of the English Probate Act of 1857 (20 and 21 Vict., c. 77).

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.

Proceedings of District Judge's Court in relation to probate and administration.

This section has been incorporated as s. 55 in the Probate and Administration Act, V of 1881.

Mr. Stokes, in his edition of the Succession Act, expresses an opinion that, having regard to definition of 'District Judge' in s. 3, *supra*, p. 3, as "the Judge of a principal Civil Court of original jurisdiction," this section applies to proceedings of High Courts in their testamentary and

intestate jurisdiction. There does not appear to have been any decision upon the question. By the rules, however, of the High Court, Calcutta, it was provided, that the procedure in all cases, which should be brought before the Court in the exercise of its original testamentary and intestate jurisdiction, should be regulated, as far as the circumstances of the case admit, by the rules of procedure laid down in the Indian Succession Act of 1865, whether the Act itself applies to the case or not; and to cases in which such rules are inapplicable, the procedure should be regulated by Act VIII of 1859 as amended by Act XXIII of 1861.—Rule 65, Belchambers's Rules and Orders, p. 89.

An order made by a District Judge on an application for probate not being a final order, no reference for the opinion of the High Court upon such application can be made under s. 617 of the Civil Procedure Code—*In the matter of Monohur Mookerjee*, I. L. R., 5 Calc., 756: (S. C.) 6 C. L. R., 228.

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 section is not incorporated in the Probate and Administration Act, V of 1881.

A manager under this section is not a legal representative, and cannot institute or defend a suit; see Act II of 1874, s. 64.

See Regimental Debts Act, 26 and 27 Vict., c. 57, ss. 7 and 8, *post*.

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

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.

fixed place of abode, or any property, moveable or immoveable, within the jurisdiction of the .]

This section has been incorporated as s. 56 in the Probate and Administration Act, V of 1881.

When application is made to the Judge of a district in which

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 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.

This section has been incorporated as s. 57 in the Probate and Administration Act, V of 1881.

Probate and letters of administration may be granted by Delegate.

[**241A.** Probate and letters of administration may, upon application for that purpose to any District Delegate, be granted by him in any case in which there is no contention, if it appears by petition (verified as hereinafter mentioned) that the testator or intestate, as the case may be, at the time of his death, resided within the jurisdiction of such Delegate.]

This section has been added by s. 3 of the District Delegates Act, VI of 1881. It also forms s. 58 in the Probate and Administration Act, V of 1881.

Conclusiveness of probate or letters of

242. Probate or letters of administration shall have effect over all the property and estate, moveable or immove-

out 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.

[Provided that probate and letters of administration granted by a High Court after the first day of April, 1875, shall, unless otherwise directed by the grant, have like effect throughout the whole of British India.]

This section, as amended by Act XIII of 1875 and Act II of 1874, has been incorporated, with slight additions in the proviso, as s. 59 in the Probate and Administration Act, V of 1881.

The proviso in brackets has been added by Act XIII of 1875, s. 2.

The expression 'High Court' in this section shall mean and be deemed always to have meant—"(*a*) a High Court for the time being established under 24 and 25 Vict., c. 104; (*b*) the Chief Court of the Punjab; (*c*) the Court of the Recorder of Rangoon"—Act II of 1874, s. 1.

Grants of letters of administration to an Administrator-General, it was held, are not affected by the Amending Act, XIII of 1875, but are still granted under Act II of 1874; and, accordingly, such grants, though general in form, are still limited to his own Presidency—*In the Goods of Hewson*, I. L. R., 4 Calc., 770; (S. C.) 4 C. L. R., 42. See s. 66 of Act II of 1874. But now, under s. 3 of the Administrator-General's Act, IX of 1881, the High Court may direct, by its grant, that probate or letters of administration granted to an Administrator-General of one Presidency shall have effect throughout either or both of the other Presidencies.

The rights, duties, and privileges of the Administrator-General are in no way affected by the provisions of the Probate and Administration Act; see the saving clause, s. 149, of that Act, *post*.

In *In the Goods of Shama Churn Mullick*, I. L. R., 1 Calc., 52, where the testator died in 1872, leaving a will dated 20th November, 1865, and left property within the local jurisdiction of the High Court at Calcutta and also within the local jurisdiction of the High Court at Bombay, probate was granted to the executors as to the property situate in Calcutta. An application was subsequently made by the executors for a grant of probate limited to the property in Bombay, and a certificate under s. 3 of Act XIII of 1875 (s. 242*A* of this Act) was asked for. The Court held, that it was not empowered, under Act XIII of 1875, to grant probate limited to property in any province or presidency. Again, in a reference under the Court Fees Act, it was held that, except under special circumstance, letters of administration to the estate of a deceased Hindu must be taken out in respect of the immoveable, as well as the moveable, property forming part of the estate, and duty paid on the value of the whole—*In the Goods of Grish Chunder Mitter*, I. L. R., 6 Calc., 483; (S. C.) 7 C. L. R., 593. (In the reports of this case the earlier cases on this subject will be found collected.) But, in the High Court, Calcutta, after the first day of April 1875, all grants of probate or letters of administration under the Succession Act of 1865, and all grants of probate or letters of administration with the will annexed under the Hindu Wills Act, 1870, shall, unless otherwise ordered, be drawn up by the Registrar with effect limited to the province of Bengal—Belchambers's Rules and Orders, No. 701, p. 280, dated the 21st June, 1875. As to probates and letters of administration granted in respect of estates of Hindus, see the Probate and Administration Act, V of 1881, s. 59, *post*.

Prior to the Hindu Wills Act, a grant of probate of the will of a Hindu conferred no title upon the executor. It was evidence of the executor's title, so far only as a decree of the Court granting it would be, namely,—between the parties and those privy to the suit in which the decree is made—*Sharo Bibi* v. *Baldeo Das*, 1 B. L. R. (O. C.), 24. See now the Probate and Administration Act, V of 1881.

In *In the Goods of Bibi Mutra*, 1 Morton's Rep., 75, Peel, C. J., said: "In granting administrations to native estates, the interference of the Courts originally proceeded upon the supposition of the consent of the parties interested;" and in *In the Goods of Moonshee Hossein Ali* (Fulton's Rep., 339-40), he said: "The power of this Court to grant probates and administrations in native estates, where there is property within the local jurisdiction, has of late been expressly recognized." See *In the Goods of Sumboochunder Mitter*, 1 Taylor and Bell, 39-40; *Mohar Ranee Peishwa* v. *E. I. Co.*, *ib.*, 29

an application for probate, as long as it is made *bonâ fide*, it is not the province of the Court to go into questions of title with reference to the property of which the will purports to dispose—*Behary Lall Sandyal* v. *Juggo Mohun Gossain*, I. L. R., 4 Calc., 1; (S. C.) 2 C. L. R., 422. A grant of probate as pointed out in that case by Garth, C. J., does not confer upon the executor any title to property which his testator had no right to dispose of. It only perfects the representative title of the executor to the property which did belong to the testator and over which he had a disposing power. See *In re Noboloorga*, 7 C. L. R., 387.

Section 188 is not now embodied in the Hindu Wills Act; see s. 154 of the Probate and Administration Act, V of 1881, in which, however, it is incorporated as s. 5. See s. 188, *supra*, and notes thereto.

Duty.—By Sched. I, cl. 11 of the Court Fees Act, VII of 1870, a duty of 2 per cent. must be paid on the amount or value of the property in respect of which probate or letters of administration shall be granted, if such amount or value exceeds 1,000 rupees. See *In the Goods of George*, 6 B. L. R., Appx., 138.

[242A. Whenever a grant of probate or letters of administration is made by a High Court with such effect as last aforesaid, the Registrar or such other officer as the High Court making the grant thinks fit, shall send to each of the other High Courts a certificate to the following effect:—

Transmission of certificate by High Court to other Courts.

I, *A. B.*, Registrar [*or as the case may be*] of the High Court of Judicature at [*or as the case may be*], hereby certify that, on the day of 18 , the High Court of Judicature at *or as the case may be*] granted probate of the will [*or* letters of administration of the estate] of *C. D.*, late of deceased, to *E. F.* of and *G. H.* of , and that such probate [*or* letters]

has [*or* have] effect over all the property of the deceased throughout the whole of British India; and such certificate shall be filed by the High Court receiving the same.]

This section was added by s. 2 of Act XIII of 1875.

It has been extended to Courts other than High Courts by s. 60 of the Probate and Administration Act, V of 1881.

With every certificate to be sent to a High Court under the provisions of this section, the Registrar shall send a copy of the inventory of the property and effects of the deceased—Belchambers's Rules and Orders, No. 705, p. 282.

Conclusiveness of application for probate or administration, if properly made and verified.

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.

This section is incorporated as s. 61 in the Probate and Administration Act, V of 1881.

By the rules in force in the High Court, Calcutta, applications for probate in common form of a written and perfect will, written or subscribed by the testator's own hand, shall be made by petition with the will, and the affidavit of the executor annexed, stating the time of the testator's death, that the writing annexed is, as he believes, the last will of the deceased, that he is the executor therein named, and that the deceased, if a British subject, left effects within the jurisdiction of that Court, and if other than a British subject, within the Calcutta jurisdiction of that Court, and such other proof, if any, as the Court may -Rule 678, Belchambers's Rules and Orders, p. 369.

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; [and when the application is to a District Delegate, the petition shall further state that the deceased, at the time of his death, resided within the jurisdiction of such Delegate].

The words in brackets have been added by s. 4 of the District Delegates Act, VI of 1881.

The section, thus amended, has been incorporated as s. 62 in the Probate and Administration Act, V of 1881.

It is sufficient for the purpose of giving jurisdiction under this section that the property, alleged by the petition to have been situate within the jurisdiction of the Judge, should have been in the possession of the testator at the time of his death—*Run Bahadur Singh* v. *Moharanee Rajrup Koer*, 4 C. L. R., 498.

The Limitation Act does not apply to applications for probate—*In re Ishan Chunder Roy*, I. L. R., 6 Calc., 707; (S. C.) 8 C. L. R., 52; *Gobind Chund Gossami* v. *Rungun Money Dassee*, 6 C. L. R., 345, (S. C.); I. L. R., 6 Calc., 60.

By the rules in force in the High Court, Calcutta, every petition for probate or letters of administration shall contain, in addition to the particulars required by this Act, a statement containing such details as will show fully how and on what principle the value is calculated or arrived at—Belchambers's Rules and Orders, No. 700, dated the 1st March, 1873, p. 280.

In what cases translation of will to be annexed to the petition.

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."

Verification of translation made by any person other than the Court translator.

This section has been incorporated as s. 63 in the Probate and Administration Act, V of 1881.

By the rules in force in the High Court, Calcutta, in cases where the will is written in any of the eastern or foreign languages and characters, there shall be a translation thereof annexed by one of the sworn interpreters of the Court, if it be a language for which an interpreter is appointed, or if it be any other language, then by any person competent to translate the same, in which last case such translation shall be accompanied by an affidavit of the translator that he read and perfectly understands the language and character of the original, and that the same is a true and accurate translation.—Rule 679, Belchambers's Rules and Orders, pp. 269-70.

See Coote's Prob. Pract., 210-13.

Petition for letters of administration.

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 [*or* District Delegate] to whom the application is made, and the amount of assets which are likely to come to the petitioner's hands; [and when the application is to a District Delegate, the petition shall further state that the deceased at the time of his death resided within the jurisdiction of such Delegate].

The words in brackets have been added by ss. 4 and 9 respectively of the District Delegates Act, VI of 1881.

The section, as amended, has been incorporated as s. 64 in the Probate and Administration Act, V of 1881.

By the rules of the High Court, Calcutta, applications for letters of administration shall be by petition, stating the time and place of the deceased's death, the family or other relatives of the deceased, and their respective residences, and in case they shall be absent from the jurisdiction of the Court, whether they have any known agent within the jurisdiction of the Court in which the petitioner claims to administer, and the amount of the assets which are likely to come into his hands; which petition shall be verified by affidavit to be filed therewith and the necessary citations shall then issue, and the application shall be advertised on Monday in three successive weeks of the Gazette of India—Rule 680, Belchambers's Rules and Orders, pp. 270-71.

See Administrator General's Act, II of 1874, s. 6.

Additional statements in petition for pro- &c.

[246A. Every person applying to a High Court for probate of a will, or letters of administration of an estate intended to have effect through-

out British India, shall state in his petition, in addition to the matters respectively required by s. 244 and s. 246 of this Act, that, to the best of his knowledge and belief, no application has been made to any other High Court for probate of the same will or for letters of administration of the same estate, intended to have such effect as last aforesaid,

or, when any such application has been made, the High Court to which it was made, the person or persons by whom it was made, and the proceedings (if any) had thereon.

And the High Court to which any application is made under the proviso to s. 242 of this Act, may, if it think fit, reject the same.]

This section, which has been added to the Indian Succession Act by Act XIII of 1875, s. 3, has been incorporated as s. 65 in the Probate and Administration Act, V of 1881.

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."

This section is incorporated as s. 66 in the Probate and Administration Act, V of 1881.

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").

This section has been incorporated as s. 67 in the Probate and Administration Act, V of 1881.

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.

ıent for mak- averment in petition or declaration.

This section has been incorporated as s. 68 in the Probate and Administration Act, V of 1881.

For law for the punishment of giving or fabricating false evidence, see the Indian Penal Code (Act XLV of 1860), chap. xi.

250. In all cases it shall be lawful for the District Judge [*or* District Delegate], 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 [*or* District Delegate] issuing the same may direct.

District Judge may examine petitioner in person and require further evidence, and issue citations to inspect the proceedings.

Publication of citation.

The words in brackets have been inserted by s. 9 of Act VI of 1881 s Act).

The section, as amended, has been incorporated as s. 69 in the Probate Administration Act, V of

Probate, Grant of.—Having regard to the fact that a grant of probate is not irrevocable (see s. 234, *supra*, p. 247), and to the importance of a deceased testator's estate being represented as speedily as possible, proof of the execution of his will is sufficient to warrant the grant of probate when the application is unopposed—*In re Noboodoorga*, 7 C. L. R., 387; see *In re Shustee Churn Patuck*, 23 W. R., 103; for where an application for probate of a will is made *bonâ fide*, it is not the province of the Court to go into questions of title with reference to the property of which the will purports to dispose—*Behary Lall Sandyal* v. *Juggomohun Gossain*, 2 C. L. R., 422; (S. C.) I. L. R., 4 Calc., 1; see *Jogesh Chunder Chakravarti* v. *Umatara Debya*, 2 C. L. R., 577; *Nanhu Koer* v. *Somiun Thakur*, 8 C. L. R., 287. The grant of probate does not prejudice the rights of any person who claims the property—*Behary Lall Sandyal* v. *Juggomohun Gossain*, I. L. R., 4 Calc., 1; (S. C.) 2 C. L. R., 422.

In *Obhoy Churn Mustafi* v. *Uma Churn Mustafi*, 1 C. L. R., 362, a will, which was contested on the ground alleged by the caveator that the testator was not conscious at the time of making it, bore an endorsement thereon made by the Registrar (the will being registered) on the day of its execution, stating that the will had been acknowledged by the testator. The Judge admitted the will to probate on the strength of the endorsement alone. The caveators offered no evidence, and no witnesses were examined on behalf of those seeking probate. MARKBY and MITTER, JJ., held, that the Judge ought not to have admitted the will to probate without taking evidence.

In the case of *Byjnath Shahai* v. *Desputty Singh*, I. L. R., 2 Calc., 208; (S. C.) 25 W. R., 489, where the alleged adopted son of the testator applied for probate of the will, the creditors of the person who would have been the heir in default of adoption came in and opposed the grant of probate; but the Court (KEMP and BIRCH, JJ.) held, that they were not parties having any interest in the estate of the deceased, and were therefore not entitled to oppose the grant of probate. In the case, however, of *Komullochun Dutt* v. *Nilrutton Mundle*, 4 C. L. R., 175; (S. C.) I. L. R., 4 Calc., 360, MARKBY, J., in giving the judgment of the Court, said: "If we thought that the decision in *Byjnath Shahai* v. *Desputty Singh* went as far as to hold that a purchaser or an attaching creditor could not apply for revocation of a probate, we should, as at present advised, refer the point to be settled to a Full Bench, because we should disagree from such a ruling." In *Komullochun Dutt* v. *Nilrutton Mundle*, the Court was of opinion that a person interested by assignment in the estate of the deceased may, where a will has been set up and proved at variance to his interests, apply for the revocation of the probate of the will so set up.

Any person who can show that he is entitled to maintain a suit in respect of property over which probate would have effect, possesses a sufficient interest to entitle him to enter a *caveat* and oppose a grant of probate—*Per* FIELD, J., in *Bhoboosoondari Dabee*, I. L. R., 6 Calc., 460. Thus, the mortgagee under a mortgage executed by the next-of-kin of the deceased after his death, of property which was alleged by the widow, who propounded a will, to have formed part of her husband's estate, is entitled to oppose the grant of probate—*Ibid.*

In the case of *Uma Nath Mookerjee* v. *Nilmoni Singh Deo Bahadur*, 7 C. L. R., 337, (S. C.) I. L. R., 6 Calc., 429, MORRIS and PRINSEP, JJ., held, that a creditor, who had, prior to the grant of probate, attached property to which his judgment-debtor would naturally be entitled as heir of the alleged testator, had such an interest in the property of the deceased as to entitle him to apply under s. 234 of this Act for revocation of the probate for just cause. See

A person, who is not the next heir, and who has no interest in the estate of the testator, has no right to oppose the grant of probate or dispute the validity of the will—*In the matter of Mee Tsee*, 15 W. R , 351.

Costs.—Where the difficulty had been created by the testator himself, the costs of probate and litigation of both parties were ordered to come out of the estate—*Charter* v. *Charter*, L. R., 7 H. of L., 364; in lower Court, L. R., 8 Ch. D., 218.

[**251.** Caveats against the grant of probate or administration may be lodged with the District Judge or a District Delegate; and immediately on any caveat being lodged with any District Delegate, he shall send a copy thereof to the District Judge; and immediately on a caveat being entered with the District Judge, a copy thereof shall be given to the District Delegate, if any, within whose jurisdiction, it is alleged, the deceased resided at the time of his death, and to any other Judge or District Delegate to whom it may appear to the District Judge expedient to transmit the same.]

Caveats against or

This section, which, as it now stands, is incorporated as s. 70 in the Probate and Administration Act, has been substituted by s. 5 of the District Delegates Act, VI of 1881, for the original section (251) of this Act, which was as follows:—"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 ."

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.

This section has been incorporated as s. 71 in the Probate and Administration Act, V of 1881.

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 [*or* officer] to whom the application has been

After entry of caveat, no proceeding be taken on the petition until after

made [*or* notice has been given of its entry with some other Delegate], until after such notice to the person by whom the same has been entered as the Court shall think reasonable.

The words in brackets have been added by s. 6 of Act VI of 1881 (District Delegates Act).

The section, as amended, is incorporated as s. 72 in the Probate and Administration Act, V of 1881.

Under the rules of the High Court at Calcutta, a caveat must be supported by affidavit within eight days, stating the right and interest of the caveator and the grounds of objection to the application. Unless such affidavit be so filed, the caveat will not prevent the granting of probate or letters of administration; and no affidavit can be filed after the expiration of eight days without the special leave of the Court or a Judge thereof—Belchambers's Rules and Orders, p. 275, rule 688.

[253A. A District Delegate shall not grant probate or letters of administration in any case in which there is contention as to the grant, or in which it otherwise appears to him that probate or letters of administration ought not to be granted in his Court.

District Delegate when not to grant probate or administration.

nation.—By 'contention' is understood the appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding.]

This section has been added by s. 7 of Act VI of 1881 (District Delegates Act). It is incorporated as s. 73 in the Probate and Administration Act, V of 1881.

[253B. In every case in which there is no contention, but it appears to the District Delegate doubtful whether the probate or letters of administration should or should not be granted, or where any question arises in relation to the grant, or application for the grant of any probate or letters of administration, the District Delegate may, if he thinks proper, transmit a statement of the matter in question to the District Judge, who may direct the District Delegate to proceed in the matter of the application, according to such intructions as to the Judge may seem necessary, or may forbid

Power to transmit statement to District Judge in doubtful cases where no contention

any further proceeding by the District Delegate in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Judge.]

This section has been added by s. 7 of Act VI of 1881 (District Delegates Act). It has been incorporated as s. 74 in the Probate and Administration Act, V of [illegible]

[253C. In every case in which there is contention, or the District Delegate is of opinion that the probate or letters of administration should be refused in his Court, the petition, with any documents that may have been filed therewith, shall be returned to the person by whom the application was made, in order that the same may be presented to the District Judge, unless the District Delegate thinks it necessary, for the purposes of justice, to impound the same, which he is hereby authorized to do; and in that case the same shall be sent by him to the District Judge.]

Procedure where there is contention or District Delegate refuses probate or letters of administration should be refused in his Court.

This section has been added by s. 7 of Act VI of 1881 (District Delegates Act). It is incorporated as s. 75 in the Probate and Administration Act, V of 1881.

254. When it shall appear to the Judge [*or* District Delegate] 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 [*or* Delegate appointed for granting probate or letters of administration in (*here insert the limits of the Delegate's jurisdiction*),] 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

Form of such grant.

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."

The words in brackets have been inserted by ss. 8 and 9 of Act VI of 1881 (District Delegates Act).

The section, as amended, has been incorporated as s. 76 in the Probate and Administration Act, V of 1881.

Upon a *bonâ fide* application for probate of a will, it is not the vince of the Court to which the application is made to go into questions with reference to the power of the testator to make a disposition of the property of which the will purports to dispose.—*Nanku Koer* v. *Somirun Thakur*, 8 C. L. R., 287, following *Bekary Lall Sandgal* v. *Juggo Mohun Gossain*, I. L. R., 4 Calc., 1; (S.C.) 2 C. L. R., 422. See *Komallochun Datt* v. *Nilrutton Mundle*, I. L. R., 4 Calc., 360; (S.C.) 4 C.L.R., 175.

Grant of letters of administration to be under seal of Court.

255. And wherever it shall appear to the District Judge [*or* District Delegate] that letters of administration to the estate of a person deceased, with or without a copy of the will annexed, should be granted, he will grant the same under the seal of his Court in manner following:—

Form of such grant.

"I, , Judge of the district of [*or* Delegate appointed for granting probate or letters of administration in (*here insert the limits of the Delegate's jurisdiction*], 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."

The words in brackets have been inserted by ss 8. and 9 of Act VI of 1881 (District Delegates Act).

The section, as altered, is incorporated as s. 77 in the Probate Administration Act, V of 1881.

Formerly, the grant of letters of administration was "of the goods, and credits;" see Belchambers's Rules and Orders, p. 274.

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.

Contrary to the practice in England, it has been held by the High Court in Calcutta, having regard to the definition of 'probate' in s. 3 and to the words of this section, that executors, as well as administrators, are liable to give security—*In the matter of Juggodishari Dabi*, I. L. R., 7 Calc., 84; (S. C.) 8 C. L. R., 397.

It seems, however, that it has been the uniform practice previously in the High Court, Calcutta, to grant probate without taking a bond from the executors; and in the case of *Run Bahadur Singh* v. *Moharanee Rajrup Koer*, 4 C. L. R., 498, where it was asked that the grant of probate *should be conditional upon the executor furnishing security, the Court (*Ainslie *and* Bholanauth, *JJ.) refused to depart from that practice.*

The Madras High Court considered that a bond could not be taken from a person to whom probate was granted—Proceedings, December 22nd 1866, 3 Mad. H. C. R., Appx., x.

Notwithstanding the decisions upon this section it does not seem to have been the intention of the Legislature to depart from the rule of English law in framing the section; for, in the Statement of Objects and Reasons to the Probate and Administration Act, V of 1881, the Legal Member of the Council says: "The Indian Succession Act, following the English law, provides for the taking of security for the due discharge of his office only from an administrator, it being considered that, in the case of an executor, who is selected by the testator himself, such security can safely be dispensed with."

In the Probate and Administration Act, however, it has been thought necessary to give the Court discretion to take security even from an executor, on the ground, it seems, that, amongst the classes to which that Act applies, cases, it was apprehended, might occasionally occur in which it might be expedient that security should be given. See s. 78 of that Act, which in other respects follows s. 256 of this Act.

The bond in the form adopted under the section by the High Court in Calcutta is now given to the Chief Justice, and extends to the whole estate—Belchambers's Rules and Orders, p. 274.

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 interested, the full amount recoverable in respect of any breach thereof.

This section is incorporated as s. 79 in the Probate and Administraton Act, V of 1881. It follows the language of the English Act, 20 and 21 Vict., c. 77, s. 83.

In *In the Goods of Saunders*, 6 All. H. C. R., 62, a petition was presented for the transfer of an administration-bond under this section, on the allegation that the administratrix had refused to pay certain moneys due to the petitioners on a promissory note given to them by the deceased. The Court (PEARSON and TURNER, JJ.) were of opinion, that it was competent to make an order assigning the bond and empowering the assignee to sue upon it as trustee for the benefit of creditors, but inasmuch as it appeared that the assets in the hands of the administratrix were sufficient to pay off the note, the final hearing of the petition was postponed until a suit should have been brought on the note. See *Marshman* v. *Brookes*, 32 L. J., P. and M., 25; *In the Goods of Jones*, 32 L. J., P. and M., 26.

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.

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.

This section has been incorporated as s. 80 in the Probate and Administration Act, V of 1881.

It would seem that letters of administration with the will annexed may, under this section, be granted after the expiration of seven clear days from the death of the testator—*In the Goods of Watson*, I. L. R., 1 Calc., 149. There PHEAR, J., held, that "letters of administration" did not include letters of administration with the will annexed.

259. Every District Judge [*or* District Delegate] shall file and preserve all original wills of which probate or letters of administration with the will annexed may be granted by him among the records of his Court, until some public registry for

Filing of original wills of which probate or letters of administration with will have been

In cases where a will is contested, the Court is bound to consider not only whether the alleged will was executed by the testator, but whether the will is valid or invalid, and whether probate of the will ought to be granted. Every consideration which ought to induce the Court to refuse probate of the will must be taken into account—*Annoda Dabi* v. *Jugutmoni Dabi*, 6 C. L. R., 176; see *Saroda Soondaree* v. *Muddun Mohun Shaha*, 24 W. R.,

Probate, revocation of.—A grant of probate must be contested by a suit in the Court out of which the grant issued, and it must be contested before the Court sitting as a Court of Probate, and not in the exercise of its ordinary civil jurisdiction—*Mayho* v. *Williams*, 2 All. H. C. R., 268.

Where probate has been wrongly granted, the proper course is to apply to Court by which it has been granted to revoke the probate. In that case the executor and the other persons who have acted upon the faith of the probate are protected by s. 262 of Succession Act. The grant of probate is a decree of Court which no other Court can set aside except for fraud or want of jurisdiction—*Komullochun Dutt* v. *Nilruton Mundle*, I. L. R., 4 Calc., 360; (S. C.) 4 C. L. R, 175, MARKBY, J.

who seek to contest a will must prove an interest to entitle them to a *locus standi* in the Court. A legatee, it seems, has a sufficient interest to maintain a suit for revocation of probate—*Mayho* v. *Williams*, 2 All. H. C. R., 268.

The person objecting must be defendant. Accordingly, where the father of an infant objected to probate on behalf of an infant without having obtained permission of the Court to institute proceedings on behalf of the infant, it was held, that the infant had no right upon the death of his father to appeal against the order made—*Mrinamayi Dabia* v. *Jogodeshuri Dabia*, I. L. R., 5 Calc., 450; (S. C.) 5 C. L. R., 361.

A Hindu, before the passing of the Hindu Wills Act, could not be called upon to prove a will in solemn form, unless he had applied for probate and thus submitted to the jurisdiction of the Court—*In re Tiruvalur K. Mundali*, 1 Mad. H. C. R., [illegible]

262. Where any probate is, or letters of administration are, revoked, all payments *bonâ fide* made to any executor or administrator under

Payment to executor or administrator before probate or letters revoked.

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 an 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

Right of such executor or administrator to recoup himself for payments.

administration shall be afterwards granted might have lawfully made.

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.

This section has been incorpo ated as s. 86 in the Probate and Administration Act, V of 1881.

Where, after an application for probate had been granted on an objection made, a subsequent order was passed that the case be reopened, that probate be suspended "for a certain time," and the executor bring in his evidence to prove his right to obtain probate,—it was held by GARTH, C. J., and McDONELL, J., that there was no appeal from the order—*Brojonath Pal* v. *Dasmoney Dassee*, 2 C. L. R., 589.

An order made by a District Judge on an application for probate not being a final order under this section, cannot be referred for the opinion of the High Court under s. 617 of the Code of Civil Procedure, Act X of 1877.—*In the Goods of Monohur Mookerjee*, I. L. R., 5 Calc., 756; 6 C. L. R. 228.

But when a reference was actually made, the High Court, as a Court of concurrent jurisdiction (see next section), dealt with it as an original application—*Ibid.*

264. The High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge.

Concurrent jurisdiction of High Court.

This section has been incorporated as s. 87 in the Probate and Administration Act, V of 1881.

As a Court of concurrent jurisdiction, the High Court dealt with a case which had been improperly referred to it, under s. 617 of the Civil Procedure Code, by a District Judge—*In the Goods of Monohur Mookerjee*, I. L. R., 5 Calc., 756; (S. C.) 6 C. L. R. 228.

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

Executor of his own wrong.

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* This Part has not been incorporated in the Probate and Administration Act, V of 1881.

office of executor, while there is no rightful executor or administrator in existence, thereby makes himself an executor of his own wrong.

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.

One who, being neither executor nor administrator, intermeddles with the estate of a deceased person, is called an executor of his own wrong, or an executor *de son tort.*

A very slight circumstance of intermeddling with the goods of the testator will make a person executor *de son tort.* Thus, if a man sells any of the goods, or if he takes the goods to satisfy his own debt or legacy, or demands the debts of the deceased, or makes acquittances for them or receives them, he will become an executor *de son tort*—Williams on Executors, 260–263.

So, if a man *pays* the debts of the deceased with the money of the deceased or carries on the business of the deceased, or if he sue as executor, or if in an action brought against him as executor he pleads in that character, this will make him an executor *de son tort*—Williams on Executors, 263.

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.

There are many acts which a stranger may perform without incurring the hazard of being involved in an executorship *de son tort*, such as locking up the goods for preservation, directing the funeral in a manner suitable to the estate which is left, and defraying the expenses of such funeral out of the deceased's effects, making an inventory of the property, feeding his cattle, repairing his houses, or providing for his children—Williams on Executors, 265-2

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.

) *A* having been appointed agent by the deceased in 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.

(*c.*) *A* sues as executor of the deceased, not being such. He is an executor of his own wrong.

In the case of *Paull* v. *Simpson*, 9 Q. B., 365, where a lessee intestate during the term, and his widow entered without taking out

administration and paid the rent, and afterwards her son-in-law took the premises with her concurrence and with the assent of the landlord, and paid rent and continued to occupy during the remainder of the term, it was held, that although the widow might have been chargeable as executrix *de son tort*, her son-in-law had not made himself executor *de son tort* by taking the premises from her—Williams on Executors, 267.

In *Williams* v. *Heales*, L. R., 9 C. P., 177, it appeared that, in 1810, a lease for 61½ years was granted by the predecessors in title of the plaintiff to one "*H. G.*, his executors, administrators, and assigns." In 1814 *H. G.* died intestate. His widow administered to his estate and remained possessed of the estate till her death in 1843. After her death, *G. S. H.*, the father of the defendant, who had married a daughter of *H. G.*, without any administration, took possession and received the rent, paying the ground-rent, and he continued to do so till his death in 1856. After the death of *G. S. H.*, the defendant received, and continued to receive, the rent, paying the ground-rent and dividing the balance between the two sisters and himself—no further administration having been taken out. He continued to do this down to the expiration of the lease, when he delivered up the premises to the plaintiffs out of repair. The Court was of opinion, that the defendant had done more than the defendant in *Paull* v. *Simpson*, and was executor *de son tort* of the term.

If a man take the goods of the deceased by mistake supposing them to be his own, he will not be executor *de son tort* (Williams on Executors, 268); nor if he take them as agent for the rightful executor—*ibid.* See *Sykes* v. *Sykes*, L. R., 5 C. P., 113.

If an executor *de son tort* hands over part of the property, of which he has wrongfully possessed himself, to a second person, that person may possibly be sued in equity; but he is not liable as executor *de son tort*—*Hill* v. *Curtis*, L. R., 1 Eq., 90; *Paull* v. *Simpson*, 9 Q. B., 365. An executor *de son tort* cannot discharge himself unless he hands over the property to the rightful representative before an action is brought—*Hill* v. *Curtis*, L. R., 1 Eq., 90. So in equity, if an executor can prove a settled account with the rightful representative before suit, it is a sufficient answer to a bill in equity against him for an account—*Ibid.*

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 administrators, and payments made in a due course of administration.

Liability of an executor of his own wrong

Where a man has so acted as to become in law an executor *de son tort*, he thereby renders himself liable not only to an action by the rightful executor or administrator, but also to be sued by a creditor of the deceased or by a legatee; for an executor *de son tort* has all the liabilities, though none of the privileges, that belong to the character of executor—Williams on Executors, 269.

He may be sued to the extent of the specific assets he has received, although there is no legal personal representative—*Coote* v. *Whittington*, L. R., 16 Eq., 534, following *Rayner* v. *Koehler*, L. R., 14 Eq., [illegible] and dissenting from *Cary* v. *Hills*, L. R., 15 Eq., 79. He is only

liable, however, to the extent of the goods which he has administered — Williams on Executors, 271.

The agent of an executor *de son tort* does not discharge himself by accounting in respect of his dealings as agent with the deceased's estate, to his principal; for the rule, that the possession of an agent is the possession of a principal has no application to the case of a wrong-doer—*Sharland* v. *Mildon*, 5 Hare, 469. There *A*, who was employed by the widow of the testator to collect the debts due to the estate, collected the debts and paid the money over to the widow, believing she was the administratrix. The widow died without having obtained letters of administration, and it was held, that *A*, not having accounted to the legal representative of the testator, was liable as executor *de son tort*

In England, an executor *de son tort* cannot give in evidence under *plene administravit*, or specially plead a retainer for his own debt, for otherwise the creditors of the deceased would be running a race to take possession of his goods without taking administration to him—Williams on Executors, 273 Under this Act (see s. 282, *infra*), an executor has no right of retainer for his own debt in preference to other debts

The act of an executor *de son tort* is good against the true representative only where it is lawful, and such an act as the true representative was bound to perform in due course of administration—*Buckley* v.

PART XXXIII.

OF THE POWERS OF AN EXECUTOR OR ADMINISTRATOR.

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.

In respect of causes of action surviving the

due at the time of his death.

This section has been incorporated as s. 88 in the Probate and Administration Act, V of

By s. 44, Rule (*b*) of the Civil Procedure Code, Act X of 1877, it is provided: "No claim by or against an executor, administrator or heir as such, shall be joined with claims by or against him personally, unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues, or is sued as executor, administrator or heir."

By s. 179 of this Act, *supra*, the whole of the property vests in the executor or administrator as such, and by s. 437 of the Civil Procedure Code it is provided, that, "in all suits concerning property vested in an executor or administrator, the executor or administrator shall represent the persons beneficially interested in the property, and that it shall not ordinarily be necessary to make such persons parties to the suit; but that the Court may, if it think fit, order them or any of them to be made such parties."

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.

Demands and rights of action in favour of or against deceased, to and against executor or administrator.

Illustrations.

(*a*.) A collision takes place on a railway in consequence of some neglect or default of the officials, and a 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 section has been incorporated as s. 89 in the Probate and Administration Act, V of 1881, omitting illustration (*b*).

Act XII of 1855 provides, that executors may sue and be sued in certain cases for wrongs committed in the lifetime of a deceased person. See *Powell* v *Rees*, 7 A. and E., 426, and *Richmond* v. *Nicholson*, 8 Scott's Ca., 134. See 3 and 4 Will. IV, c. 42, s. 2.

Act XIII of 1855 further makes provision for suits for compensation to families for loss occasioned by the death of a person caused by actionable wrongs. That Act corresponds with LORD CAMPBELL's Act, 9 and 10 Vict., c 93. See Acts XII and XIII of 1855 *in extenso*,

Section 438 of the Civil Procedure Code provides: "Where there are several executors or administrators, they shall be made parties to a suit against one or more of them, provided that executors who have not proved their testator's will and executors and administrators beyond the local limits of the jurisdiction of the Court need not be made parties."

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 of deceased's

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.

Lord St. Leonards, in his Treatise on Vendors and Purchasers (Vol. II, p. 56, 9th edn.), considers it doubtful whether it is safe to take an assignment of a specific legacy from the executor without the concurrence of the specific legatee, lest the executor should have assented to the bequest, and he cites *Tomlinson* v. *Smith*, Finch, 378; see s 293, *infra*. But Mr Coote (Mortg., 178 n. (*e*) observes, that this was a case of gross fraud, and concludes from al the cases, that if a purchaser or mortgagee shall *bonâ fide* deal with an executor within a reasonable time after the testator's death, and obtain possession of the muniments of title, a specific legatee would never be permitted at law or in equity to set up the executor's assent against the sale or mortgage, for by sale and delivery the title of the purchaser or mortgagee is complete. However, the general rule certainly is, that, at law, the title to any specific thing bequeathed rests upon the assent of the executor absolutely in the legatee. And even in equity, if the legatee, after the assent, were to assign to a *bonâ fide* purchaser, the title of the assignee would be better than that of any subsequent purchaser from the executors—Williams on Executors, 938 note (*t*).

A purchaser, however, cannot deal with an executor for the purchase of a chattel specifically bequeathed, if the purchaser have notice that there were no debts of the testator, or that they have since been discharged—*Ewer* v. *Corbet*, 2 P. W., 149; Lewin on Trusts, 419.

(*b.*) The executor, in the exercise of his [illegible] mortgages a part of the immoveable estate of the [illegible] The mortgage is valid.

This section has been incorporated as s. 90 in the Probate and Administration Act, V of 1881, but with important alterations making the consent of the Court necessary to every disposition of the property made by an executor or administrator.

It embodies the law in England as to personalty. Generally speaking, an executor or administrator in his own lifetime may dispose of and alien the assets of the testator; he has absolute power over them for this purpose, and they cannot be followed by the creditors of the deceased—*Whale* v. *Booth*, 4 T. R., 625. In that case Lord Mansfield said:—"It would be monstrous if it were otherwise, for then no one could deal with an executor."

So an executor or administrator may mortgage the assets—See Williams on Executors, 938; *Mead* v. *Orrery*, 3 Atk., 239. He may also pledge a part of the assets for the purpose of better enabling him to administer the estate, and it would seem that the pledgee may sell the things pledged if they are not redeemed within the proper time—Williams on Executors, 939; *Russel* v. *Plaice*, 18 Beav., 28-29.

A purchaser from an executor is not bound to see to the application of the purchase-money—*McLeod* v. *Drummond*, 17 Ves., 154.

In *Scott* v. *Tyler*, 2 Dick., 725, Lord Thurlow said:—"It is of great consequence that no rule should be laid down here which may impede executors in their administration or render their dispositions of the testator's effects unsafe or uncertain to a purchaser. His title is complete by sale and delivery: what becomes of the price is no concern of his. This observation applies equally to mortgages or pledges, and even to

the present instances where assignable bonds were merely without assignment "—See Williams on Executors, 939.

The power given to an executor by this section, it is to be observed, is unqualified. He may dispose of the property of the testator as he thinks fit.

In the case of a will made, after the Succession Act came into force, by an Englishman domiciled in India, charging the testator's estate with the payment of debts, the executors borrowed money wherewith to discharge debts incurred by them in the administration of the estate; and in their capacity of executors gave a bond for the repayment of the amount borrowed on a particular date, and at the same time mortgaged all their right, title, and interest in certain real estate of the testator as further security, giving a power of sale on default being made to the mortgagee. By a third instrument, they further constituted the lender their true and lawful attorney to sell the real estate mortgaged. Default having been made, the mortgagee, under such power-of-attorney, conveyed the real estate and all the estate and interest of the executor therein, free from the mortgage, to a third person in consideration of a sum of Rs. 35,000. The purchaser, who was resisted in his attempts to get possession by one of the legatees of the testator, brought a suit for a declaration of his title and for possession of the property comprised in the conveyance. The legatee contended that the executors had no authority to confer a power of sale; but a Full Bench of the High Court at Allahabad held (STUART, C. J., dissenting), that the executors had such a power under s. 269 of the Indian Succession Act, and that the conveyance was accordingly valid and operated to transfer the property to the purchaser—*Seale* v. *Brown*, I. L. R., 1 All., 710. See *Russel* v. *Place*, 18 Beav., 21; 18 Jur., 254; 23 L. J., Ch., 441.

Where an executor, in order to save the estate from sale in execution of a decree against his testator, raised a loan upon a mortgage of the testator's estate, it was held, that even if the executor had funds with which he might have paid off the decree, the mortgagee's claim was good, unless he knew of the existence of such funds, or might, by the exercise of ordinary diligence, have known of them—*Kalee Narain Roy Chowdhry* v. *Ram Coomar Chand*, W. R. for 1864, p. 99.

Hindu Law.—The executor of the will of a Hindu, to which the Hindu Wills Act did not apply, took nothing from the grant. His title was founded solely and simply on the will; see *Sharo Bibi* v. *Baldeo Dass*, 1 B. L. R., O. C., 24; *Tiruralur* v. *Kirustnappa Mudali*, 1 Mad. H. C., 59. In *Srimati Jaykali Debi* v. *Shibnath Chatterjee*, 2 B. L. R., O. C., 1, PHEAR, J., said: "It is clear that probate does not confer upon the executor of a Hindu will any personal rights of property analogous in any way to an English estate or interest. The will gives him just such powers of dealing with the property comprehended in it as its words express, and no more." See *Sreemutty Dossee* v. *Turachurn Coondoo Chowdhry*, Bourke, Part VII, 48; *Hoonooman Prasad Pandey* v. *Musst. Babuee Munraj Kunwaree*, 6 Moore's I. A., 393. See *Lal Chand Ramdyal* v. *Gumtibai*, 8 Bom. H. C. R., 150, 151; and *Dhun Roy* v. *Broughton*, 15 B. L. R., O. C., 7.

In the case of *Greender Chunder Ghose* v. *Mackintosh*, 4 C. L. R., 194, PONTIFEX, J., held, that although neither in the case of the heir, nor of the devisee of a Hindu, has there been a distinct statutory provision as in England, that lands may be followed in the hands of a purchaser unless he were a *bonâ fide* alienee, the question as to how far lands purchased from a Hindu heir or devisee are liable in the hands of the purchaser stands on the same ground as a similar question under English law. By that law property *bonâ fide* aliened before action brought can be followed into the possession of a purchaser from the heir or devisee, if it can be proved that the purchaser knew (1) that

there were debts of the ancestor or testator left unsatisfied; and (2) that the heir or devisee to whom he paid the purchase-money intended to apply it otherwise than in payment of just debts. See 1 Will. IV, c. 47, and 3 and 4 Will. IV, c. 104; *Corser* v. *Cartwright*, L. R., 7 E. and I., App., 731. The decision of PONTIFEX, J., was appealed against, but the Appellate Court left the decision, so far as this point is concerned, untouched.

Where an executor takes possession of a testator's property under a will containing a void residuary devise and bequest, his possession may, from the very commencement, be adverse to the heir-at-law who claims the residue as on an intestacy—*Kherodemoney Dossee* v. *Doorgamoney Dossee*, 2 C. L. R., 112; and 3 C. L R., 315.

If a testator appoints persons to be his executors and trustees, and directs them to do certain acts which can only be done by the owners of his residuary estate, the trustees will take that estate, though there be no express devise to them—*Treepoorasoondery Dossee* v. *Debendronath Tagore*, I. L. R., 2 Calc., 45.

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.

This section has been incorporated as s. 91 in the Probate and Administration Act, V of 1881.

An executor or administrator shall not be permitted, either immediately or by means of a trustee, to be the purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost advantage made by him of the subject so purchased—*Hall* v. *Hallet*, 1 Cox, 134. The same principle applies to an executor *de son tort*.

An executor ought not to take an assignment of a legacy from a legatee under the will, and it seems such an assignment is void. See *Vaughan* v. *Heseltine*, I. L R., 1 All. (F.B.), 753.

Powers of several executors or administrators 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 the several executors has power to a debt due to the deceased.

Jacomb v. *Harwood*, 2 Ves. Sen., 267.

(*b.*) One has power to surrender a lease.

(*c.*) One has power to sell the property of the moveable or immoveable.

(*d.*) One has power to assent to a 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.

This section has been incorporated as s. 91 in the Probate and Administration Act, V of 1881.

According to s. 184, *supra*, when several executors are appointed, probate may be granted to them all simultaneously or at different times. See s. 438 of the Civil Procedure Code, Act X of 1877.

Co-executors, however numerous, are regarded in law as an individual person, and by consequence the acts of any one of them in respect of the administration of the effects, are deemed to be the acts of all, for they have all a joint and entire authority over the whole property—Williams on Executors, 950. In England also it has been held, as it is expressly laid down in this section, that the position of one of several administrators is the same as that of one of several executors—*Wilkland* v. *Fenn*, cited 2 Ves. Sen., 267. Although where executors join in a personal contract, they are bound in the same way as other persons in whom the property is vested, and although one may dispose of the assets so as to bind the others, they cannot severally make a new contract so as to bind each other—*Per* Lord Abinger, C.B., in *Turner* v. *Hardey*, 9 M and W., 773.

Illustration (*f*) to this section may be taken as an illustration of a direction to the contrary, controlling the operation of the section. As pointed out by Mr. Stokes in his edition of the Succession Act, p. 173, the section taken with this illustration will render it unsafe for any one to deal with a single executor, unless he sees the probate and ascertain *either* that no other executors were appointed by the testator, *or* that the will contained no such direction as that mentioned in the illustration.

One of several executors may settle an account with a person accountable to the estate, and in the absence of fraud the settlement will be binding on the others, though dissenting—*Smith* v. *Everett*, 27 Beav., 446. See *Turner* v. *Hardey*, 9 M. and W., 770; Williams on Executors, 950-954; *Charlton* v. *Durham*, L. R., 4 Ch., 433. So also one executor may assent to a legacy (Williams on Executors, 887), or grant or assign a term or other property—*Simpson* v. *Futteridge*,

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.

This section is incorporated as s. 93 in the Probate and Administration Act, V of

It is in accordance with the cases of *Flanders* v. *Clarke*, 1 Ves., 9, and *Hudson* v. *Hudson*, Cas. Temp. Talb., 127—See Williams on Executors,

273. The administrator of effects unadministered has, with respect to such effects, the same power as the original executor or administrator.

Powers of administrator of effects unadministered.

This section is incorporated as s. 94 in the Probate and Administration Act, V of 1881. See Williams on Executors, 888-9.

274. An administrator during minority has all the powers of an ordinary administrator.

Powers of administrator during minority.

This section is incorporated as s. 95 in the Probate and Administration Act, V of 1881.

As to the powers of an administrator during minority, see s.

275. When probate or letters of administration have been granted to a married [illegible] has all the powers of an ordinary executor or a trator.

Powers of married executrix or

This section has been incorporated as s. 96 in the Probate and Administration Act, V of 1881.

Under this Act probate or letters of administration cannot to a married woman without the previous consent of her ; see ss 183 and 189, *supra* Under the Probate and Administration Act such consent is not necessary; see ss. 8 and 13 of that Act

By s. 439, the Civil Procedure Code provides:—"Unless the Court directs otherwise, the husband of a married administratrix or executrix shall not be a party to a suit by or against her" The fact that probate or administration has been granted to a married woman would imply the previous consent of her husband in cases to which the Succession Act is applicable.

PART XXXIV.

OF THE DUTIES OF AN EXECUTOR OR ADMINISTRATOR.

276. It is the duty of the 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 fu-

This section, with slight modification, has been incorporated as s. 97 in the Probate and Administration Act, V of 1881; see s. 279,

In *Mullick v. Mullick*, 1 Knapp, 245, where the will of the testator gave no direction as to how the obsequies were to be performed, it was held, that the Court had only to consider upon the evidence whether the sums allowed for the performance were more than had usually been expended at the funerals of persons of the same rank and fortune. See Williams on Executors, 972–6.

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 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.

Inventory and account.

This section has been incorporated as s 98 in the Probate and Administration Act, V of 1881.

Under s. 62 of the latter Act, a person applying for probate or letters of administration must state the amount of assets which are likely to come to his hands. See Williams on Executors, 977–

According to the rules of the High Court at Calcutta, in all cases in which executors or administrators shall neglect to file their inventories or accounts for two months beyond the time allowed to them by law, the Registrar is ordered to issue the necessary citations and other process to compel the filing of the same and to charge the parties making default with the costs thereof.—Rule 690, Belchambers's Rules and Orders, p. 276.

Mr. Belchambers, in his note to this rule, points out, that no citation has been issued by the Registrar *ex-officio* since 1848.

In England, also, it seems neither an executor nor an administrator bits any inventory unless cited for that purpose at the instance of a party interested—Williams on Executors, 979; *Middleton* v *Rushout*, 1 Phil., 244.

[277A. In all cases where it is sought to obtain a grant of probate or letters of administration intended to have effect throughout the whole of British India, the executor or the person applying for administration, after the first day of April, 1875, to the effects of any person dying in British India

Inventory to include property in any part of British India.

and leaving property in more than one province, shall include, in the inventory of the effects of the deceased, his moveable or immoveable property situate in each of the provinces :

And the value of such property in the said provinces respectively shall be separately stated in such inventory, and the probate or letters of administration shall be chargeable with a fee corresponding to the entire amount or value of the property affected thereby wheresoever situate within British India.]

This section, which was inserted by s. 5 of Act XIII of 1875, has, with slight verbal alterations, been incorporated as s. 99 in the Probate and Administration Act, V of 1881.

The following rule obtains in the High Court, Calcutta : "In all cases in which it is sought to obtain an unlimited grant of probate or letters of administration, it must be stated in the petition that, so far as the petitioner has been able to ascertain and is aware, there are no property and effects besides those specified as required by s. 277A of the Indian Succession Act; and the petitioner shall undertake, in case of its being afterwards found that there are other properties and effects, that he will pay the court-fee payable in respect thereof, and also in the case of letters of administration, that he will give such further bond (of the nature contemplated by s. 256 of the Succession Act), with a surety or sureties as he may at any time be called on by the Registrar to give"—Belchambers's Rules and Orders, p. 281.

278. The executor or administrator shall collect, with reasonable diligence, the property of the deceased and the debts that were due to him ..+

Duty of executor or administrator as to property of, and debts owing to, the deceased

This section has been incorporated as s. 100 in the Probate and Administration Act, V of 1881.

If by unduly delaying to bring an action the executor or administrator enables a debtor of the deceased to avail himself of the Statute of Limitations, he will be personally liable—Williams on Executors, 990; *Hayward* v. *Kinsey* 12 Mod., 573. See illustration (*b*) to s. 328, *infra*.

There is no fixed period within which executors and administrators must realize assets outstanding upon improper investment. The period at which the loss is to be calculated depends on the particular nature of the property and the evidence of the case—*Hughes* v. *Empson*, 22 Beav., 181. But an executor will be responsible if he allow money to remain on personal security longer than is absolutely necessary—*Powell* v *Evans*, 5 Ves., 839.

If the assets are accidentally lost or destroyed, the executor will not, in general, be liable (*Jones* v *Lewis*, 2 Ves. Sen., 240). It is otherwise where he ought to have sold or converted the assets, and they are subsequently lost—*Clough* v. *Bond*, 3 M. and C., 497; *Fry* v. *Fry*, 27

An executor cannot carry on the trade of his testator except for the purpose of winding it up; but he may, and in some cases is bound to, complete contracts entered into by his testator—*Collinson* v. *Lister*, 20 Beav., 355.

Where a trader by his will has directed his executors or trustee to carry on his trade and to employ a specific portion of the trust-estate for the purpose, the rule is, that although the executor or trustee is personally liable for debts incurred by him in carrying on the trade pursuant to the will, he has the right to resort for his indemnity to the specific assets so directed to be employed, but no further—*In re Johnson*, L. R., 15 Ch. Div., 548.

An executor will be personally liable if he leave outstanding a debt due to the testator from a defaulting co-executor—*Styles* v. *Guy*, 1 Mac. and G., 422; *Candler* v. *Tillett*, 22 Beav., 257.

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.

Expenses to be paid before all debts.

This section has been incorporated as s. 101 in the Probate and Administration Act, V of 1881.

See s. 276, *supra*.

Under the Regimental Debts Act, 26 and 27 Vict., c. 57, s 21, where any property comes into the hands of any Administrator-General under that Act, he shall administer the same in accordance with the provisions of that Act relating to preferential charges; and by s. 4 of the Statute, the following classes of expenses and debts, in the case of an officer or soldier dying on service, shall be considered preferential charges on his personal estate and 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. And where the death occurs out of the United Kingdom,

Servants' wages not exceeding two months' wages to each , and

(4) Household expenses incurred within a month before the death or the last issue of pay to the deceased, whichever is the shorter period.

s. 5 of the Statute, the surplus only of the personal property, after the preferential charges, shall be deemed personal estate.

280. The expenses of obtaining probate or letters of administration, including the costs incurred for, or in respect of any judicial proceed-

Expenses to be paid next after such expenses.

ings that may be necessary for administering the estate, are to be paid next after the funeral expenses and deathbed charges.

This section has been incorporated as s. 102 in the Probate and Administration Act, V of 1881.

Where a testator directed that his 'testamentary expenses' should be paid out of a specified part of his estate, the costs of a suit to administer were held to be included under testamentary expenses—*Penny* v. *Penny*, L. R., 11 Ch. D., 440. See *Miles* v. *Harrison*, L. R., 9 Ch., 316, 323; *Harloe* v *Harloe*, L. R., 20 Eq., 471; *Ralf* v. *Carrick*, L. R., 5 Ch. Div., 984–998. But see *contra*, *In re Biel's Estate*, L. R., 16 Eq., 577.

The term 'executorship expenses' means expenses incident to the proper performance of the duty of an executor, and includes costs incurred by executors in obtaining the advice of solicitors or counsel as to the distribution of their testator's estate; also the costs of the executors and other parties in an action, whether instituted by the executors themselves or by a beneficiary, for the administration of the estate: also the funeral expenses, also expenses incurred by the executors for the protection of specific legacies, and payments by the executors in discharge of debts falling due from the testator's estate after his death—*Sharp* v. *Lush*, L. R., 10 Ch. D., 468.

'Executorship expenses' are not distinguishable from 'testamentary expenses'—*ibid*, *per* Jessel, M. R.

281. Wages due for services rendered to the deceased within three months next preceding his death by any labourer, artizan, or 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

This section is embodied, with an alteration, as s. 103 in the Probate and Administration Act, V of 1881.

In England, such debts as are given priority under this section were considered by some authorities to be entitled to a preference among other simple contract debts; but simple contract debts themselves were postponed until after all debts of record and by specialty had been paid—See Williams on Executors, 1029, note (*f*).

It will be observed that s. 103 of the Probate and Administration Act adds the words "according to their respective priorities (if any)" at the end of the section. This seems to have been suggested by the case of *Nil Komul Shaw* v. *Reed*, 17 W. R., 513; (S. C.) 12 B. L. R., 287.

As to what persons may be included in the term 'domestic servants,' see *Dhamo Sirang* v. *Upendro Mohun Tagore*, 8 B. L. R., 244; *Bhim Das* v. *Upendro Mohun Tagore*, 9 B. L. R., App., 5; and *Vithoba Malhari* v. *Corfield*, 3 Bom. H. C. R., Appx., 21. As to 'labourers' and 'artizans,' see Act XIII of

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 on any other account. But the executor or administrator shall pay all such debts as he knows of, including his own, equally and ratably, as far as the assets of the deceased will extend.

Save as aforesaid, is to be paid and rateably.

This section is incorporated as s. 104 in the Probate and Administration Act, V of 1881.

It does not, it has been held, interfere with the right of a decree-holder to have his decree satisfied out of the property of a deceased person to the exclusion of other creditors, after deducting the expenses chargeable under ss 279 and 281—*Nil Komul Shaw* v. *Reed*, 17 W. R., 513; (S. C.) 12 B. L. R., 287.

The Law Commissioners in their report 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. 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 laborer, 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"—*Gazette of India*, July 1st, 1864.

Retainer by Executor.—In England, in the case of *Richmond* v. *White*, L. R., 10 Ch. D, 727, where an executor, who was a creditor of the testator, claimed to retain his own debt out of the moneys paid into the credit of an action by the residuary legatees for administration, in priority to the costs of the action and the debts of the creditors, it was said, that the right of an executor to retain his own debt was not a right which the Court was disposed to extend. The Court refused to allow the right of retainer. Here an executor has no right of retainer in priority to other creditors.

It would appear that an administrator who pays such debts *as he knows of* otherwise than equally and ratably as far as the assets of the deceased will extend in accordance with this section, will be personally liable for any loss occasioned to a creditor of the deceased by such improper distribution of the assets (*Asiatic Banking Corporation* v. *Amador Viegas*, 8 Bom H C R., 20); but in order to charge him, his knowledge must be actual as distinguished from constructive or imputable knowledge—*Ibid*.

In distributing the assets, an executor or administrator must be careful to pay such debts as have a priority first; for, on a deficiency of assets, if he has, with notice, paid other debts first, he must answer the preferential debts out of his own estate—See Williams on Executors, 993 and 1033. A testator cannot himself, by the terms of his will, change the legal order of distribution of his assets, as by directing a distribution equally among all his creditors—*Turner* v *Cox*, 8 Moore's P. C., 288. An executor may voluntarily pay a debt of inferior nature before one of a superior of which he had no notice, provided a reasonable time has elapsed since the testator's death, for, such payment, if precipitate, would be evidence of fraud—Williams on Executors, 1033. See *Nosotti* v. *Jefferson*, 9 Jur., N. S., 656.

Act. — In England, an executor is not bound to plead the Statute of Limitations against the demand of one claiming to be a creditor of the estate, and it seems that this also is the law in England in regard to an administrator. See *Coombs* v. *Coombs*, L. R., 1 P. and D., 289; *Vane* v. *Rigden*, L. R., 5 Chan.,

In Madras it was held, in the case of *The Administrator-General* v. *Hawkins*, I. L. R., 1 Mad, 267, that the Administrator-General is authorized to pay a barred debt. See *Ritchie* v. *Stokes*, 2 Mad. H. C. R., 255, 474; Williams on Executors, 865. In Bombay also it has been held, that an executor may pay a debt justly due by his testator though barred by the Statute of Limitations; and that he will in equity be allowed credit for the payment—*Tillakchand Hindumal* v. *Jitamal Sudaram*, 10 Bom. H. C. R., 206.

An executor under a will to which the Hindu Wills Act did not apply, it was held, had no power by acknowledgment to revive a debt barred by limitation except as against himself. See *Gopal Naran Mozoomdar* v. *Muddomutty Guptee*, 14 B. L. R., 21.

By s 28 of the present Limitation Act, XV of 1877, at the determination of the period limited for instituting a suit for possession of any property, the right to the property is extinguished. It may be questioned whether, having regard to this section, an executor or administrator would now be justified in paying a barred debt. See *Mohesh Lal* v. *Busunt Kumaree*, I. L. R., 6 Calc., 355; (S. C.) 7 C. L. R., 121.

Application of moveable property to payment of debts, where the deceased's domicile 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.

So in England it was held, as to personal property, that the priorities of creditors are to be regulated by the law of the country in which the testator was domiciled, though the personal assets may be situate in

* This section has not been incorporated in the Probate and Administration Act, V of

another country—*Wilson* v. *Dunsany*, 18 Beav., 293. See *Miller* v. *Administrator-General*, I. L. R., 1 Calc., 421.

Under the rules of priority in England, the assets are distributable in the following order:—

(1.) Funeral expenses.

(2.) Expenses of probate, &c.

(3.) Debts.

(*a*) Solicitor's lien.

(*b*) Debts due to the Crown.

(*c*) Debts to which particular Statutes give priority.

(*d*) Debts of record—judgments, decrees, Statutes, and recognizances.

(*e*) Debts by specialty.

(*f*) Debts by simple contract—Williams on Executors, 992—1032.

Voluntary bonds (*Rumsden* v. *Jackson*, 1 Atk., 292), unless ed for value, when they rank as ordinary bonds. See v. *Mortimer*, 4 D. and J., 447. As to voluntary contract debts, see *Dawson* v *Kearton*, 3 Sm. and G., 191; Lewin on Trusts, p. 71, 6th Edn.

Creditor paid in part 283 to ment in- ore shar- in proceeds of im- 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

* This section has not been incorporated in the Probate and tration Act, V of 1881.

distributed ratably amongst all the creditors without distinction in proportion to the amount which may remain due to them.

The equitable doctrine of marshalling, which applies in the where there are two claimants and two funds, both of which are available to one claimant, but only one to the other, is here made applicable. The former is compelled to resort to that fund which the other cannot reach. See *Galton* v. *Hancock*, 2 Atk., 436; Williams on Executors, 1719 *et seq*.

285. Debts of every description must legacy.

This section has been incorporated as s. 105 in the Probate and Administration Act, V of 1881.

As the whole of the estate is liable in the hands of the executor to the payment of the debts of the testator, the executor must take care to discharge them before he satisfies any description of legacy—Williams on Executors, 1346. In *Spode* v. *Smith*, 3 Russ. Ch. Cas., 511, it was held, that if an executor, acting *bona fide* under the conviction that the assets were amply sufficient for the payment of the testator's debts, permits specific legatees to retain or possess themselves of articles bequeathed to them, he will be answerable for the value of those articles with interest, if there should ultimately be a deficiency of assets, although the deficiency should be caused by subsequent events which he had no reason to anticipate. Even voluntary bonds must be paid by the executor in preference to legacies—*Jones* v. *Powell*, 1 Eq. Ca. Abr., 84, Pl 2; *Hales* v. *Cox*, 32 Beav., 118; Williams on Executors, 1347.

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 become due.

Executor or administrator not bound to pay legacies without indemnity.

This section has been incorporated as s. 106 in the Probate and Administration Act, V of 1881.

There may be an outstanding covenant of the testator which, though not yet broken, may or may not be broken. Should such covenant be broken, the executor would be liable to answer the damages *de bonis propriis*—Williams on Executors, 1350. Hence the necessity for an executor taking an indemnity. See s. 304, *infra*.

In *Dean* v. *Allen*, 20 Beav., 1, ROMILLY, M. R., expressed an opinion, that where the estate is administered in Court, and an executor acts under the orders of the Court, he will be protected from liability in all cases, and this appears to be now fully established—*England* v. *Tredegar*, L. R., 1 Eq., 344. See *Brewer* v. *Pocock*, 23 Beav., 310. See also 22 and 23 Vict., c. 35, s. 29.

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.

Abatement of general legacies.

Executor not to pay one legatee in preference to another.

Williams on Executors, 1365.

This section has been incorporated as s. 107 in the Probate and Administration Act, V of 1881.

The general estate being primarily liable, all that is not specifically bequeathed must be exhausted before specific legatees can be called upon to contribute. See *Baker* v *Farmer*, L. R., 3 Ch., 537. Strictly speaking, there is no residue until all debts and legacies have been paid. A residuary legatee, therefore, cannot call upon general legatees to :—*Re Lyne's Estate*, L. R., 8 Eq., 482.

As to necessary expenses, see ss. 279, 280, *supra*, and *Sharp* v. *Lush*, L. R., 10 Ch. Div , 468.

The general rule in England that there is no preference in payment among general legacies is to be understood as applying only among 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 or of the relinquishment of any right or interest, such legacy will be entitled to a preference of payment over the other general legacies, which are mere bounties—Williams on Executors, 1370-1. The debt or interest must, however, be in existence at the testator's death—*Burridge* v. *Bradyl*, 1 P. W., 127; *Blower* v. *Morret*, 2 Ves. Sen., 420; *Heath* v. *Daendy*, 1 Russ., Ch. Ca., 543. The rule does not apply to a bequest to pay the debts of the testator's where the creditors have received a composition of less than their amount (*Coppin* v. *Coppin*, 2 P. W., 296); nor to a bequest to pay the debts of a third person, whether a relative or not—*Shirt* v. 16 Ves.

There is no privilege from abatement, on the ground that a general legacy is to a wife or child otherwise unprovided for (*Blower* v. *Morret*, 2 Ves. Sen , 420), or to an executor for his care and trouble—*Fretwell* v. *Stacy*, 2 Vern , 434; *Attorney-General* v. *Robins*, 2 P. W., 25. So, in case of a deficiency, charitable legacies will abate with general legacies—*Attorney-General* v. *Robins*, 2 P. W , 22; *Duncan* v. *Watts*, 16 Beav., 204. If, however, an intention can be collected that particular legacies shall have a preference, that intention must be followed (*Lewin* v. *Lewin*, 2 Ves. Sen., 416); but a mere direction that a legacy is to be paid in the first place, or immediately, or a direction as to the time of payment, will not save legacies from abatement—*Blower* v. *Morret*, 2 Ves. Sen., 420. But where the testator directs that a particular legacy shall be paid at all events, or that a particular legatee shall be paid her legacy in full (*Marsh* v. *Evans*, 1 P. W., 668), or having given several legacies, he adds, that as there will be a considerable surplus he gives

further legacies (*Attorney-General* v. *Robins*, 2 P. W., 24), the particular legacy, or the first given legacies, shall have a preference. See *Johnson* v. *Johnson*, 14 Sim., 313; *Stammers* v. *Halilley*, 12 Sim, 42.

The fact that the time for payment of a legacy is deferred, will not other legacies priority in the distribution of assets—*Nickisson* v. *Cockill*, 9 Jur., N. S., 975.

The onus lies on the party seeking priority to make out clearly and conclusively that such priority was intended—*Miller* v. 3 Mac. and G., 513.

In England, annuities charged on personal estate are dealt with as general legacies and abate with them (*Miller* v. *Huddlestone*, 3 Mac. and G., 513; *Hume* v. *Edwards*, 3 Atk., 693); and by s. 291, *infra*, annuities are for the purposes of abatement to be treated as general.

The value of the annuities must be ascertained for the purposes of abatement—*Hume* v. *Edwards*, 3 Atk., 693. As to the mode of ascertaining their value, see *Todd* v. *Bethy*, 27 Beav., 353; and *Potts* v. *ith*, L. R., 8 Eq., 683. See s. 162 *ante*, pp. 193-4.

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.

Nonabatement of specific legacy when assets sufficient to pay debts.

This section has been incorporated as s. 108 in the Probate and Administration Act, V of 1881.

Even where a specific bequest is charged with the payment of a pecuniary legacy and of all the testator's just debts and funeral and testamentary expenses, the general undisposed of residue will be applicable in the first place to the payment of the charge—*Hewett* v. *Snare*, 1 DeG. and Sm., 833.

Specific legatees of a particular fund may abate *inter se* (*Sleech* v. *Torrington*, 2 Ves. Sen., 564; *Page* v. *Leapingwell*, 18 Ves., 463; *Re Jeffrey's Trusts*, L. R., 2 Eq., 68); and the same principle applies where the fund is appointed by will under a power—*Miller* v. *Huddlestone*, L. R., 6 Eq., 65.

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

Right under demonstrative legacy, when the assets are sufficient to pay debts and ne-

against the general assets as for a legacy of the amount of such unpaid remainder.

Acton v. *Acton*, 1 Mer., 178.

This section has been incorporated as s. 109 in the Probate and Administration Act, V of 1881.

A demonstrative legacy is liable to abate when it becomes a general legacy by reason of the failure of the fund out of which it is payable—*Mullins* v. *Smith*, 1 Dr. and Sm., 210, *per* KINDERSLEY, V. C.; see *Creed* v. *Creed*, 11 Cl. and Fin., 509.

Ratable 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 ratably 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*.

This section has been incorporated as s. 110 in the Probate and Administration Act, V of 1881.

See Williams on Executors, 1377; *Sleech* v. *Torrington*, 2 Ves. Sen., 561, 564.

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.

This section has been incorporated as s. 111 in the Probate and Administration Act, V of 1881.

As to the mode of ascertaining the value of annuities, see *Todd* v. *Bielby*, 27 Beav., 353; *Potts* v. *Smith*, L. R., 8 Eq., 683; and s. 162,

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 *D*. *C* is not entitled to receive the rents without the assent of the executor.

This section has been incorporated as s. 112 in the Probate and Administration Act, V of 1881.

The executor is responsible to the creditors for the satisfaction of their demands to the extent of the whole estate without regard to the testator's having directed that a portion of it shall be applied to other purposes. Hence, as a protection to the executor, the law imposes the necessity that every legatee, whether general or specific, whether of chattels real or personal, must obtain the executor's assent to the legacy before the title as legatee can be complete and perfect—Williams on Executors, 1378; see *Mead* v. *Ld Orrery*, 3 Atk., 238 240. Before the assent of the executor, however, the legatee has an inchoate right to the legacy such as is transmissible to his own personal representatives, in case of his death before it is paid or delivered—Williams on Executors, 1378.

An executor may assent to or pay legacies before probate on Executors, 307); and he is bound to assent as soon as the funeral and testamentary expenses and debts have been paid—*Greene* v. *Greene*, 3, I. R. Eq., 102, *per curiam*; Lewin on Trusts, 7th Edn., p 432, note. The assent to a legacy by one of several executors is sufficient. So also if one of several executors be a legatee, his single assent to his own legacy will vest the complete title on himself—Williams on Executors, 952. See *Cole* v. *Miles*, 10 Hare, 179.

Where executors have set apart and appropriated assets to meet a legacy, they cannot retain or impound any part of the appropriated assets to meet a debt from the legatee to the general estate of the testator—*Ballard* v. *Marsden*, L. R., 14 Ch. D., 374. In that case, Fry, J., observed: "When the executors set apart the legacy, it ought to be considered as set apart, so as to facilitate the dealing with it by the legatee for every purpose."

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 to specific le-

Assent may be verbal, and either express or implied.

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.

Wentworth, Off. Ex., 414, 14th edn.; Williams on Executors, 1381.

(*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*.

Here the particular estate and the remainder constitute but one estate—*Welden* v. *Elkington*, Plowd., 521.

(*d.*) Executors die after paying all the debts of the testator, but before satisfaction of specific legacies. Assent to the legacies may be presumed.

For in the absence of evidence, the executors shall be taken to have acted in conformity with their duty—Williams on Executors, 1383.

(*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.

Williams on Executors, 1383.

This section has been incorporated as s. 113 in the Probate and Administration Act, V of 1881.

Upon assenting to a specific bequest given to them in trust, executors forthwith become trustees (*Dix* v. *Burford*, 19 Beav., 409, and, in England, the Statute of Limitations will be no answer to a suit to enforce payment of the legacy—*Phillipo* v. *Munnings*, 2 My. and Cr., 309; see s. 10 of Act XV of 1877, which, however, deals only with trusts.

In England, as in India, under this section, the assent of an executor to a bequest is a question of fact—*Mason* v. *Farnell*, 12 M. and W., 674.

294. The assent of 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.

Illustrations.

(*a.*) *A* bequeaths to *B* his lands of Sultanpur, which, at the date of the will, and at the death of *A*, were subject to a mortgage for 10,000 rupees. The executor assents to the bequest, on condition that *B* shall, within a limited time, pay the amount due on the mortgage at the testator's death. The amount is not paid. There is no

(*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.

It is valid because the condition is void,—see Williams on Executors, 1384.

This section has been incorporated as s. 114 in the Probate and Administration Act, V of 1881.

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.

assent

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

This section has been incorporated as s. 115 in the Probate and Administration Act, V of

When an executor has assented to a legacy to himself in trust, the bequest ceases to be part of the testator's assets—*Dix* v. *Burford*, 19 Beav., 412.

According to s. 128, *supra*, 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 manifest an intention to act as executor.

If there be a legacy to one of several executors, he may take it of his own assent without that of the others—Williams on Executors, 1384.

The second clause of this section is taken from the judgment of Gibbs, C. J., in *Doe* v. *Sturges*, 7 Taunt., 223.

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.

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*.

This section has been incorporated as s. 116 in the Probate and Administration Act, V of 1881.

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

Illustration.

A by his will directs his legacies to be paid within six months after his death. The executor is not bound to pay them before the expiration of a year.

This section has been incorporated as s. 117 in the Probate and Administration Act, V of 1881. The rule which it lays down is a rule of convenience adopted by the English Courts to give the executor sufficient time to inform himself of the state and the amount of his testator's assets and discharge the debts of the deceased. See *Wood* v. *Penoyre*, 13 Ves., 333. It does not prevent the vesting of the legacies—*Garthshore* v. *Chalie*, 10 Ves., 13. It applies, although the testator should have directed that payment of the legacies should be made before the expiration of a year from his death—*Brooke* v. , 6 Madd., 358. There the testator directed the legacies to be within six months of his decease. See *Benson* v. *Maude*, Madd., 15.

Pecuniary legacies bear interest from the expiration of the year, although the fund may not be disposable until afterwards (*Pearson* v. *Pearson*, 1 Sch. and Lef, 12), and the executor is not to pay interest for any time within the year, although during that time he may have received interest—

Where the testator has given an absolute discretion to his to postpone the sale and conversion of his estate, they are not bound by the ordinary rule to convert the property within a year, even though some of the property consists of shares in an unlimited company; nor are they liable, in the absence of *mala fides*, for loss arising to the from nonconversion— *In re Norrington*, L. R., 13 Ch. D.,

PART XXXVI.

OF THE PAYMENT AND APPORTIONMENT OF ANNUITIES.

Commencement of annuity when no time fixed by will.

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.

This section has been incorporated as s. 118 in the Probate and Administration Act, V of 1881.

See *Gibson* v. *Bott*, 7 Ves., 96-97; and *Fearns* v. *Young*, 9 Ves., 553.

When payment of annuity to be paid quarterly or monthly first falls due.

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.

This section has been incorporated as s. 119 in the Probate and Administration Act, V of 1881.

See *Storer* v. *Prestage*, 3 Madd., 167, and *Houghton* v. *Franklin*, 1 Sim and Stu., 390; Williams on Executors, 13

payment of an annuity directed to be made within a given time, or on a day certain.

300. Where there is a direction that the first payment of an annuity shall be within one month or any other division of time from the death of the testator, or on a day certain, the successive payare to be made on the anni-

PART XXXVII.

OF THE INVESTMENT OF FUNDS TO PROVIDE FOR LEGACIES

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 sum bequeathed where a legacy, not specific, is given for life.

This section has been incorporated as s. 121 in the Probate and [illegible] Act V of 1881.

The rule as to specific legacies will be found in s. 309, *post*.

The Supreme and High Courts of Bombay do not seem to have adopted any Government security accessible to a private executor or trustee in such a manner as to form an authoritative guide to him in the administration of the estate in his hands (see the judgment of GREEN, J., in *De Souza* v. *De Souza*, 12 Bom. H. C. R., 195); nor does it appear that any rule has been passed under this section by the other High Courts.

By 23 and 24 Vict., c. 38, s. 12, trustees and executors in England may, in the absence of express prohibition in the instrument of trust, invest trust-funds in, amongst other things, stock of the Bank of England or Ireland, or in East India stock.

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.

Investment of amount of general legacy paid at a future time.

Intermediate interest.

This section has been incorporated as s. 122 in the Probate and Administration Act, V of 1881.

So, in England, although the legacy is not immediately payable, yet the person entitled may come into Court and pray that a sufficient sum may be set apart to answer the legacy when it shall become due—[illegible] v. *Annesly*, 2 Atk., 57, *per* Lord Hardwicke.

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.

Procedure when no fund is charged with or appropriated to an annuity.

This section has been incorporated as s. 123 in the Probate and Administration Act, V of 1881.

Although a sum be appropriated for the payment of an annuity, in England, it seems that, where the annuity is charged on the general estate, the legatee will not suffer by a depreciation in the value of the fund appropriated. Thus, in *May* v. *Bennett*, 1 Russ. Ch. Ca., 370, a testator having directed his executors to lay out in what Government securities they pleased as much money as would produce a certain annual interest, and having given that annual interest to his wife during her life, in case she did not marry again, the executors invested in 5 per cents a sum which yielded dividends exactly equal to the specified income. Those dividends being afterwards diminished by the conversion of 5 per cents into 4 per cents, the widow was held entitled to have the deficiency made good either by the sale, from time to time, of portions of the appropriated stock, or out of any other part of the residue which could be made available. See also *Gordon* v. [illegible], 6 Madd., 342.

Where the legatee assents to the appropriation of a particular fund, the failure thereof, whether partial or total, would probably be at his risk —Williams on Executors, 1409, note (*k*).

304. Where a bequest is contingent, the exe-

of amount of bequest.

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.

This section has been incorporated as s. 124 in the Probate and Administration Act, V of 1881.

The principle upon which it is based, as pointed out by LEACH, V C., in *Webber* v. *Webber*, 1 Sm. and St., 312, 313, is, that the legatee being entitled to receive a certain sum, only in the event upon which the legacy is contingent happening, the legacy is not capable of being secured by the present appropriation of any sum of stock.

See *Thomas* v. *Montgomery*, 1 Russ. and My., 729.

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 for life, without direction to invest in particular securities.

This section has not been incorporated in the Probate and Administration Act, V of 1881.

The rules and decisions of the English Court of Chancery relative to the duty of an executor to convert, in the absence of any special direction to that effect in the will, do not, without great qualifications, apply, it was said, in the Bombay High Court; see *D'Souza* v. *D'Souza*, 12 Bom. H C R., 184 In that case—a case, however, to which the Succession Act was not applicable—the will of a Portuguese, who died in 1862, contained no direction for conversion, nor any indication of an intention on the part of the testator that the residuary devisees and legatees should enjoy the residue *in specie* so as to exempt the executors from the duty of conversion, and the executors did not convert certain shares belonging to the testator, which subsequently became much depreciated in value. The executors were held not to be liable for the to the estate.

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

Investment of residue bequeathed to a for life, with [illegible] in

his death invested in securities of the specified kind shall be converted into money and invested in such securities.

This section has been incorporated as s. 125 in the Probate and Administration Act, V of 1881.

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 entitled to the income of [illegible] when so invested shall receive interest at the rate of four per cent. per 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.

Time and manner of the conversion and investment.

This section has been incorporated as s. 126 in the Probate and Administration Act, V of 1881, the rate of interest being altered in the latter Act to 6 per cent, instead of 4 per cent under this Act.

In England, where an executor or trustee is expressly directed to convert the estate, either immediately or within a reasonable time, and he retains investments made by the testator without reasonable excuse, he will be charged, in the case of loss or depreciation, with the amount which such investment would have produced if disposed of at the time when the conversion ought to have been made. See *Howe* v. *Earl of Dartmouth*, 7 Ves., 137; *Bruce* v *Stokes*, 11 Ves., 319; and cases in 2 Smith's L. C., 519. In *Thornton* v. *Ellis*, 15 Beav., 193, railway shares were directed to be converted into consols as between the tenant-for-life and the remainderman, there being nothing in the will to entitle the first tenant to enjoy the shares *in specie*. See the stronger case of *Lushington*, 5 Hare, 171, where the trustees had absolute [illegible] to leave property in its present state of investment.

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 [*or*

[illegible] where minor is entitled to immediate payment or possession of bequest, and there is no direction to pay to any person on his behalf.

by whose District Delegate] the probate was, or letters of administration with the will annexed were, granted, to the account of the legatee, unless the legatee 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.

This section has been incorporated as s. 127 in the Probate and Administration Act, V of 1881.

The words in brackets have been inserted by s. 8 of Act VI of 1881, District Delegates Act.

By s. 32 of the Official Trustee's Act, XVII of 1864, it was provided that, "if any infant or lunatic shall be entitled to any gift or legacy or residue or share thereof, it shall be lawful for the executor or administrator by whom such legacey, residue or share may be payable or transferable, or the party by whom such gift may be made, or any trustee of such gift, legacy or residue or share to pay or transfer the same to the Official Trustee appointed under this Act (XVII of 1864), provided that the leave of the High Court to make such payment shall be first obtained by motion made on petition. Any money or property paid or transferred to the Official Trustee or vested in him under this section (32) shall be subject to the same provisions as are contained in this Act as to other property vested in such Official Trustee under the provisions thereof."

In England also, where the legatee is an infant, the executor cannot safely pay him or any other person on his account, until he attains twenty-one, unless under the provisions of Statute 36 Geo. III, c. 52, s. 32. See Williams on Executors, 1403, and *Cooper* v. *Thornton*, 3 Bro. C.C., 96,

As to allowances for maintenance the general rule is, that where a bequest is vested and immediate, so that the legatee if he were of age would be entitled to receive his legacy at the end of the year from the testator's death, the Court will order maintenance out of the interest of the legacy, although no express provision be made for maintenance and even though the income be expressly directed to accumulate, provided the parents of the infant legatee are unable to maintain him. But no such allowance will be made by the Court if the parents be of ability—Williams on Executors, pp. 1416-17. See *Greenwell* v. *Greenwell*, 5 Ves., 194; *Collis* v. *Blackburn*, 9 Ves., 470, and other cases cited by Mr. Justice Williams. Ability, it seems, must be understood in the sense of ability to maintain and educate according to the fortune and expectations of the infant—Williams on Executors, p. 1417, note (*o*).

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*.

(*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 death of *C* belongs to *B*, and must, unless he is a m 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.

This section has been incorporated as s. 128 in the Probate and Administration Act, V of 1881.

The principle upon which the rule laid down by this section is l, is, as stated by Mr. Justice Williams, that specific legacies are considered as separated from the general estate and appropriated at the time of the testator's death, and consequently from that period whatever produce accrues upon them and nothing more or less belongs to the legatee—Williams on Executors, 1429.

...ssidu...y legatee entitled to produce of residuary fund from testator's death.

310. The legatee under a general residuary bequest is entitled to the produce of the residuary
death.

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.

Illustrations.

(*a.*) The testator bequeaths the residue of his property to *A*, a minor, to be paid to him when he shall complete the age of 18. The income from the testator's death belongs to *A*.

(*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.

This section has been incorporated as s. 129 in the Probate and Administration Act, V of 1881.

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.

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., 99.

(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.

Wilson v. *Maddison*, 2 Y. and C., 372.

(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.

Beckford v. *Tobin*, 1 Ves. Sen., 310. See *In re Richards*, L. R., 8 Eq,

This section has been incorporated as s. 130 in the Probate and Administration Act, V of 1881.

The executor has a year allowed within which to reduce the into possession. On the expiration of the year interest is p that time, unless some other period is fixed by the will. Actual

payment may, in many instances, be actually impracticable within that time, yet, in legal contemplation, the right to payment exists, and with it the right to interest and actual payment— *Wood* v. *Penn*, 1 Ves., 334, *per* GRANT, M. R.

A direction to pay as soon as possible does not entitle the legatee to interest from an earlier date— [illegible]

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.

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.

This section has been incorporated as s. 131 in the Probate and Administration Act, V of 1881.

In England, the exception does not apply where the testator is grand-parent of the legatee, unless he be in *loco parentis*—*Hall* v. *Harrison*, 2 Ath., 328.

of interest.

313. The rate of interest shall be four per cent. per annum.

[illegible] as s. 132 in the Probate and [illegible]on Act, V of 1881, the rate of interest in the latter Act fixed at 6 per cent. instead of 4 per cent. under the Act.

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 within first year after testator's death.

This section has been incorporated as s. 133 in the Probate and Administration Act, V of 1881.

Under s. 298, *ante*, where no time is fixed by the will, the first payment of an annuity is to be made at the expiration of a year from the testator's death. See *Batten* v. *Earnley*, 2 P. Wms., 163; *Lawson* v. *Lawson*, 18 Beav., 7.

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 on money directed to produce annuity.

This section has been incorporated as s. 134 in the Probate and Administration Act, V of 1881.

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.

This section has been incorporated as s. 135 in the Probate and Administration Act, V of 1881.

In England also, where the payment of a legacy by an executor is under compulsion of a suit, he is entitled to compel the legatee to refund in case of a deficiency of assets—*Newman* v. *Barton*, 2 Vern., 205; Williams on Executors, 1456.

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.

This section has been incorporated as s. 136 in the Probate and Administration Act, V of 1881.

Where the legacy has been paid voluntarily, and the assets prove insufficient to pay all the legacies, the executor, if solvent, must himself pay the rest of the legacies—*Orr* v. *Kaines*, 2 Ves. Sen., 193. In that case STRANGE, M. R., thus laid down the rule:—"Whenever an executor pays a legacy, the presumption is that he has sufficient to pay all the legacies; and the Court will oblige him, if solvent, to pay the rest, and not permit him to bring a bill to compel the legatee, whom he voluntarily paid, to refund." (See s. 323, *infra*.) If an executor have paid legacies, and debts, of which he had no notice, afterwards appear, in this case, he can compel the legatees to refund in proportion if there be not assets sufficient to discharge the debts—s. 319, *infra*.

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

Refund when legacy has become due on performance of a condition within further time allowed under section 124.

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.

This section has been incorporated as s. 137 in the Probate and Administration Act, V of 1881.

Further time for the performance of a condition is allowed under s 124, *ante*, p. 158, where the legatee has been prevented by fraud from the performance of a condition imposed upon him.

When each legatee is compellable to refund in proportion.

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.

This section has been incorporated as s 138 in the Probate and Administration Act, V of 1881.

Distribution of assets.

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.

Creditor may follow assets.

This section has been incorporated, with slight alterations, as s. 139 in the Probate and Administration Act, V of 1881. It corresponds with s. 29 of Statute 22 and 23 Vict., c. 35 (an Act further to amend Law of Property and relieve T

By Rule 539, Belchambers's Rules and Orders, p. 225, "Every advertisement for creditors or other persons having any claim upon, or interest in, the distribution of any assets to be administered by the Court, which shall be issued pursuant to any decree or order, shall direct every such creditor or other persons, within a time to be therein fixed, to send the Registrar his name and address and the full particulars of his claim or interest, and a statement of his account and the nature of the security (if any) held by him. The time for adjudicating on the claims shall be fixed by the advertisement."

The form of advertisement for the creditors of a deceased person to come in with their claims under the above rule is as follows:—

"Pursuant to a decree [*or* an order] of the High Court of Judicature at Fort William in Bengal, in its Ordinary Original Civil Jurisdiction, made in [*set out the number and title of the suit or title of the matter*], the creditors of *A. B.*, late of [*residence and additions thus:* No. 6, Park Street, in the Town of Calcutta, merchant], who died on or about the month of 188 , are on or before day of 188 , to send to the office of the Registrar of this Court on its Original Side, their names, addresses, and descriptions, the full particulars of their claims, a statement of their accounts, and the nature of their securities (if any) held by them, or in default thereof, they will be peremptorily excluded from the benefit of the said decree [*or* order].

"Every creditor holding any security may produce or transmit the same to the Registrar with the particulars of his claim, or shall produce the same before the Hon'ble Mr. Justice , in the Court-house, on the day of 188 , at of the clock in the noon, being the time for adjudicating on the claims.

(Sd.) *A. B.*,

Belchambers's Rules and Orders, p. 451. *Registrar.*"

If a creditor does not come in till after the executor has paid away the residue, he is not without remedy. If he has a mind to sue the legatees and bring back the fund, he may do so, but he cannot affect the legatees except by suit, and he cannot affect the executor at all—*Gillespie* v. *Alexander*, 3 Russ. Ch. Ca., 136-7, *per* Lord Eldon.

As in England, an unsatisfied creditor in India has a right to make a satisfied legatee refund, whether or not the funds of the testator at the time of his death were sufficient to pay both debts and legacies, and whether the legatee was paid voluntarily or under compulsion—*Hodges* v. *Waddington*, 2 Ventr., 360; *Marck* v. *Russel*, 3 My. and Cr., 31. See next section. But the right of a creditor to make legatees refund may be lost by laches, acquiescence, or such conduct as would make it highly inequitable for the Court to allow him to assert such right (*Ridgway* v *Newstead*, 30 L. J., Ch., 889), or it may be barred by the limitation provided by next section of this Act.

It would seem that a purchaser of a legacy which had been paid and delivered cannot be compelled to refund or pay any portion of a debt subsequently established against the testator's estate—*Noble* v. 24 Beav.,

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

Within what period a creditor may call upon a legatee to refund.

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.

This section has been incorporated as s. 140 in the Probate and Administration Act, V of 1881, omitting the words "within two years after the death of the testator, or one year after the legacy has been ...."

Suits under this and the preceding section, and under ss. 139 and 140 of the Probate and Administration Act, V of 1881, are now governed by the general Limitation Act, XV of 1877, which, by art. 137, sched ii, as amended by Act V of 1881, s. 156, provides a period of three years from the date of payment or distribution.

In England no particular period is limited.

The rule, that legatees called upon to refund are only liable to pay their respective proportions of the debt, applied in *Gillespie* v *Alexander*, 3 Russ. Ch Ca., 130, was held in *Davies* v. *Nicolson*, 2 DeG. and J., 693, not to be applicable where the estate is not administered by the Court.

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 obligo 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.

This section has been incorporated as s. 141 in the Probate and Administration Act, V of 1881.

The rule laid down is thus explained in the 1st volume of Roper on Legacies, p. 459 :—"If the assets be originally sufficient to satisfy all the legacies, and one of the legatees procures from the executor, either by means of, or without, a suit, payment of his legacy, and afterwards the executor waste the estate so as to render it deficient to discharge the remaining bequests, those legatees cannot oblige the satisfied legatee to refund ;—first, because the payment was not a *devastavit* by the executor, and secondly, because the legatee is protected by the principle that *vigilantibus non dormientibus jura subveniunt*." So *a fortiori* there can be no right on the part of the unpaid legatees to call upon the satisfied legatees for a contribution where the loss has occurred, not by the conduct of the executor, but merely from accidental circumstances—*Fenwick* v. *Clarke*, 31 L. J., Ch., 731, *per* TURNER, L. J.

If the assets had become deficient before the satisfied legatee was paid, it would seem, in England at least, that the

may call upon him to refund—*Peterson* v. *Peterson*, L. R., 3 Eq., 111. The burden of proof in such a case would be on the claimants to show that the wasting took place before the payment—*Ibid.*

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.

Proceeding against executor, if solvent.

section has been incorporated as s. 142 in the Probate and Administration Act, V of 1881.

The remedy in the first instance is against the executor, because, by discharging one legacy he has admitted assets for the payment of all—1 Roper on Legacies, 459, 4th edn.; *Orr* v. *Kaines*, 2 Ves. Sen., 194. The assets being deficient, the payment was a *devastavit* by the executor. If he be unable to pay, then, as it is a rule of equity that upon a deficiency of assets all general legatees shall proportionally abate, the Court will entertain a suit by the unsatisfied legatees to compel him who has been paid to refund—1 Roper on Legacies, 459, 4th edn. See s. 317, *supra*.

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.

Limit to the refunding of one legatee to another.

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.

This section has been incorporated as s. 143 in the Probate and Administration Act, V of

325. The refunding shall in all cases be without interest.

Refunding to be without interest.

This section has been incorporated as s. 144 in the Probate and Administration Act, V of 1881.

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.

...e of the de-'s property after payments to be paid to residuary le-

This section has been incorporated as s. 145 in the Probate and Administration Act, V of 1881.

Although the residuary legatee dies before the payment of debts and before the amount of the surplus is ascertained, yet it shall devolve upon his personal representative—Williams on Executors, 1460. See s. 91, *ante*, p. 112.

PART XL.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR DEVASTATION.

327. When an executor or administrator mis-applies the estate of the ... or subjects it to loss or damage, he is liable ... or damage so occasioned.

Liability of executor or administrator for devastation.

Illustrations.

(*a.*) The executor pays out of the estate an unfounded claim. He is liable to make good the loss.

(*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

This section has been incorporated as s. 146 in the Probate and Administration Act, V of 1881.

Devastarit by Co-executor.—An executor who does any act, with an innocent motive, by which the property gets into the hands of another executor, is equally answerable with his co-executor for any loss—*Langford* v. *Gascoigne*, 11 Ves., 333. It is otherwise when he has remained merely passive—*Ibid*; *Dix* v. *Burford*, 19 Beav., 412. In *Shipbrook* v. *Hinchinbrook*, 11 Ves., 252, it was held, that executors might be charged for negligence by joining in a transfer to a co-executor upon his representation that it was required for payment of debts; but that they were not liable so far as they could prove that the money transferred was applied to that purpose, although the executor got possession of other funds, part of the assets, not which funds he had wasted.

In *Booth* v. *Booth*, 1 Beav., 125, an executor who permitted his co-executor, who was the brother of the testator, to carry on a trade, in the hope that there would be more profit made by this mode of dealing with the assets, and that it would be more advantageous for those interested under the will, was held liable for losses which had occurred. The rule is, that a trustee who stands by and sees a breach of trust committed by his co-trustee becomes responsible for that breach of trust—*Ibid, per* LORD LANGDALE, M. R. See *Horton* v. *Brocklehurst* (No. 2), 29 Beav., 510.

The appointment by trustees of one of their number to be factor or agent would not of itself make them liable for his defaults; but by so making him their agent, they would be liable for his defaults as agent in the same way as they would be liable for the defaults of any other person whom they might appoint to the office (*Home* v. *Pringle*, 8 Cl and Fin., 264); and this proposition is true also of co-executors—*Toplis* v. *Harrell*, 19 Beav., 423.

Improper sale.—An executor will be held responsible if he improperly sells his testator's assets at an undervalue (*Rice* v. *Gordon*, 11 Beav., 265); but if an executor act *bonâ fide* in selling, he will not be held responsible even if the sale be at an undervalue—*Selby* v. *Bowie*, 9 Jur., N. S., 425.

But where executors act in the honest exercise of their discretion as to the time of selling property of a very uncertain and speculative character, they ought not to be made personally responsible for the loss arising from their not having sold within the twelve months—*Marsden* v. *Kent*, L. R., 5 Ch. D., 598. In *Buxton* v. *Buxton*, 1 My. and C., 80, an executor who allowed part of a testator's assets to remain invested in Mexican bonds for a year and seven months after the testator's death, and eventually sold the bonds at a lower price than might have been obtained by a sale at an earlier period, but appeared to have acted throughout with diligence and good faith, was held, under the circumstances, not to be liable for the loss consequent on his not having sold them sooner. In *Graybarn* v. *Clarkson*, L. R., 3 Ch., 605, where the testator, who held shares in an unlimited liability company, directed his executors to convert his estate with all convenient speed, the executors were held responsible for an omission to sell within twelve months, no reason having been suggested for the delay. In *Selby* v. *Bowie*, 9 Jur., N. S., 425, KNIGHT BRUCE, L. J., thus laid down the law on this subject: "Where an executor acts honestly, it is not every act of imprudence, nor every act of bad management, that is sufficient to charge him. There must in each case be some gross act of what the law calls wilful default—some gross and striking inattention to his duty through which loss has been sustained by those for whom he is trustee."

In dealing with the leaseholds of a testator or intestate, an executor or administrator may grant an underlease, if necessary, for the due administration of the property, but cannot give an option of purchase at a future time—*Oceanic Steam Navigation Co.* v *Sutherberry*, L. R., 16 Ch. D. (C. A.), 236.

.—Executors who, for upwards of a year after their testator's death, allowed a considerable portion of the assets to lie unproductive in the hands of a banker who failed, were, under the circumstances, charged with the loss—*Moyle* v. *Moyle*, 2 Russ. and My., 710. See *Rehden* v. *Wesley*, 29 Beav., 213. Executors, however, may allow a reasonable balance to remain at their bankers, and they will not be held responsible for any loss by reason of the bankers becoming bankrupt (*Swinfen* v. *Swinfen* (No. 5), 29 Beav., 211); nor will executors responsible where acting from necessity, or according to the regular

of business they employ an agent who misapplies money entrusted to him (*Edmunds* v. *Peak*, 7 Beav., 239; *Bacon* v. *Bacon*, 5 Ves., 334); but they are liable where they unnecessarily allow a person to receive money, and that person misapplies it—*Ghost* v. *Waller*, 9 Beav., 497. See *Bostock* v. *Floyer*, L. R., 1 Eq., 26. In *Bacon* v *Bacon*, an executor living in London remitted money of the testator to the attorney in the country of the testator to pay the debts due from estate, and the money was misapplied, and the executor was

Although, in equity, where the assets of a testator have come into hands of an executor and are afterwards lost to the estate, the executor, it seems, stands in the position of a gratuitous bailee, and therefore cannot be charged without some wilful default (*Job* v. *Job*, L. R., 6 Ch. D., 562), yet executors will be liable for any loss or damage accruing after the time by which they ought to have sold the property—*Fry* v. *Fry*, 27 Beav., 144. They will be liable also if, having assets in hand, they allow debts carrying interest to remain unpaid—*Hall* v. *Hallet*, 1 Cox, 134.

will also be liable if they invest their testator's money in improper or unauthorized securities—See *Walker* v. *Symonds*, 3 Swan., 63; *Stickney* v. *Sewell*, 1 M. and C., 8.

See ss. 301—307, *supra*, and the notes to s. 278, *supra*, pp. 283-4.

328. When an executor or administrator occasions a loss by neglecting to get in any part of the property of the deceased, he is liable to make good the amount.

For neglect to get in any part of the deceased's property.

Illustrations.

(*a.*) The executor absolutely releases a debt due to 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.

(*b.*) The executor neglects to sue for a debt till the debtor is able to plead the Act for the limitation of and the debt is thereby lost to the estate. The is liable to make good the amount.

This section has been incorporated as s. 147 in the Probate and Administration Act, V of 1881.

ought not, without great reason, to permit money to upon personal security longer than is absolutely necessary, and they will be charged with a loss from their neglect to call in money lent by their testator on bond—*Powell* v. *Evans*, 5 Ves., 839. See *Lowson* v. *l*, 2 Bro. C.C., 156.

Carrying on Business.—"It is a rule without exception," said Lord ASHBURTON, M. R., in *Kirkman* v. *Booth*, 11 Beav., 280, "that, to authorize executors to carry on a trade, or to permit it to be carried on, with the property of a testator held by them on trust, there ought to be most distinct and positive authority and direction given by the will itself for that purpose."

Although an executor generally cannot, unless authorized by the will, carry on the trade of his testator, he may do so for the purpose of winding it up—*Collinson* v. *Lister*, 20 Beav., 356. In some cases also he is bound to complete contracts entered into by his testator.

329. [*Repealed by Act VII of* 1870.]

330. [*Repealed by Act VII of* 1870.]

PART XLI.

MISCELLANEOUS.

Succession to property of Hindus, Muhammadans or Buddhists, and certain wills, intestacies and marriages, not affected by this Act.

331. The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, 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.

As to Hindus and Buddhists, see now the Hindu Wills Act, XXI of 1870, s. 2. Mahomedans have a law of their own as to wills.

The term 'Hindu' in this section means and includes a Jain, and Jains consequently, in matters of succession, are not governed by this Act—
1 v. *Makhan Lal*, I. L. R, 3 All., 55.

A Native Christian is not a 'Hindu' within the meaning of this section—*Joseph Vathiar*, 7 Mad. H. C. R., 121. See *Abraham* v. *Abraham*, 9 M. I. A., 239. So, in *Ponnusami Nadan* v. *Dorasami Ayyan*, I. L. R, 2 Mad 209, the Indian Succession Act was held to govern the succession in native Christian families.

In the case of *Ko Kya Daine*, 10 W. R., 417; (S.C.) 2 B. L. R., A. C., 79, it was held in 1868, that, under this Act, probate might be granted of the will of a Buddhist made after the 1st January, 1866. It was not, however, considered necessary that a will of a Buddhist should be executed according to the formalities required by this Act.

But it was held in 1869, that the High Court had no power to grant probate of the will of a Hindu in any case in which, according to the Hindu Law of Inheritance, the testator had no power to make a will—
Adam Shaw, 11 W. R., 413.

Power of Governor General to exempt any race, sect, or tribe in British India from the

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*.

Under this section Native Christians in the Province of Coorg have been exempted from the provisions of the Succession Act retrospectively from the 16th March, 1865—*Gazette of India*, July 25, 1868, p. 1094.

When any person exempted from the provisions of this section dies leaving assets within the jurisdiction of a District Judge, the District Judge is, in the first place, to take the charge of the property, and report to the Administrator-General. See Act II of 1874, s.

THE PARSI SUCCESSION ACT.

No. XXI of 1865.

*An Act to define and amend the law relating to Intestate Succession among the Parsis.**

Preamble.

WHEREAS it is expedient to define and amend the law relating to intestate succession among the Parsis; It is enacted as follows:—

Division of property widow and children of intestate.

1. Where a Parsi dies leaving a widow and children, the property of which he shall have died intestate 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 widower and children of intestate

2. Where a female Parsi dies leaving a widower and children, the property of which she shall have died intestate 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 children of no widow.

3. When a Parsi dies leaving children, but no widow, the property of which he shall have died intestate shall be divided amongst the children, so that the share of each son shall be four times the share of each daughter.

Division amongst children of female intestate leaving no widower.

4. When a female Parsi dies leaving children, but no widower, the property of which she shall have died intestate shall be divided amongst the children in equal shares.

Division of predecease child's share among

5. If any child of a Parsi 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

* This Act is declared to apply to the whole of British India, Scheduled Districts—Act XV of 1874, s. 3.

taken if living at the intestate's death in such manner as if such deceased child had died immediately after the intestate's death.

It is not a condition precedent to the application of this section that the predeceased son of a Parsi intestate should have left both a widow and children. Thus, where an intestate Parsi left him surviving a widow, sons, daughters, children of a predeceased son and the widow of another predeceased son, who had died without issue, and a posthumous daughter was afterwards born to the intestate, it was held, that the last-mentioned widow was entitled to one moiety of the share in the intestate's property, which her husband would have taken had he survived the intestate; and that the other moiety of such share devolved on the surviving issue of the intestate including the posthumous daughter and the children of his other predeceased son—*Manchanji K. Dacar* v *Mithibai*, I. L. R., 1 Bom., 506.

Division of property when intestate leaves widow or widower, but no lineal descendants.

6. Where a Parsi 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.

See *Eratha Kaikhasru* v. *Jerbai*, I. L. R., 4 Bom., 537.

Division of property when intestate leaves widow nor nor lineal des-

7. When a Parsi 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.

Where there is no kin, the Crown would, of course, take as *ultimus*

8. The following portions of the Indian Succes-

Exemption of Parsis from parts of Indian Succession Act, 1865.

Parsis (that is to say)—the whole IV, excepting section 25, the whole of Part V, and section 43.

In excluding from application to Parsis s. 42 of the Indian Succession Act, which repeals the English rule as to advancement contained in the Statute of Distributions, it was not the intention of the Legislature to preserve the last-mentioned rule in force for the Parsi community.—*Danjibai B. Gujrat* v. *Naraziai*, I. L. R., 2 Bom., 75.

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.

Widows and children rank before brothers and sisters.—*Eraska Kaikhasru* v. *Jerbai*, I. L. R., 4 Bom., 537.

(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 remarried at or before the death of the intestate.

(11.) Brother's widow, if she have not remarried at or before the death of the intestate.

(12.) Paternal grandfather's son's widow, if she have not remarried at or before the death of the intestate.

(13.) Maternal grandfather's son's widow, if she have not remarried at or before the death of the intestate.

(14.) Widowers of the intestate's deceased daughters, if they have not remarried 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.

THE HINDU WILLS ACT.

No. XXI OF 1870.

An Act to regulate the Wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal and in the Towns of Madras and Bombay.

Preamble.

WHEREAS it is expedient to provide rules for the execution, attestation, revocation, revival, interpretation, and probate of the wills of Hindus, Jainas, Sikhs, and Buddhists in the territories subject to the Lieutenant-Governor of Bengal and in the towns of Madras and Bombay; It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Hindu Wills Act, 1870."

Certain portions of Act X of 1865 extended to wills of Hindus, Sikhs, and Buddhists.

2. The following portions of the Indian Succession Act, 1865, namely,—

sections 46, 48, 49, 50, 51, 55, and 57 to 77 (both inclusive),

sections 82, 83, 85, 88 to 103 (both inclusive),

sections 106 to 177 (both inclusive) [and s. 187],

shall, notwithstanding anything contained in section 331 of the said Act, apply—

Extent of Act.

(*a*) to all wills and codicils made by any Hindu, Jaina, Sikh, or Buddhist, on or after the first day of September, one thousand eight hundred and seventy, within the said territories, or the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(*b*) to all such wills and codicils made outside those territories and limits, so far as relates to immoveable property situated within those territories or

This section is here printed as altered by s. 154 (*post*, p. 376) of the Probate and Administration Act, V of 1881.

The only powers conferred on Mofussil Courts being in respect of wills made on or after the 1st day of September 1870, probate of a will made by Hindu prior to that date could not, it was held, under this Act, be [illegible]d by a Mofussil District Court.—*Lachman Bharti* v. [illegible], 6 C. L. R., [illegible].

The Probate and Administration Act, V of 1881, which now applies in the case of every Hindu, Mahammadan, Buddhist, and person exempted under s. 332 of the Indian Succession Act, dying before, on, or after the 1st of April 1881, provides, that except in cases to which this Act (Hindu Wills Act) applies, no Court in any local area beyond the limits of the towns of Calcutta, Madras, and Bombay and the territories for the time being administered by the Chief Commissioner of British Burmah, and no High Court in exercise of the concurrent jurisdiction over such local area conferred by that Act (the Probate and Administration Act) shall receive applications for probate or letters of administration until the Local Government has, with the previous sanction of the Governor-General in Council, by a notification in the official Gazette, authorized it so to do—Act V of 1881, s. 2, *post*, p. 325.

The power of a Hindu before the Hindu Wills Act to make a testamentary disposition of whatever was his absolute property, was clearly established. See *Narottam Juggivan* v. *Narsandas Harkisandass*, 3 Bom. H. C. R., 6; *Mulraz Luchmia* v. *Chalekany Vencata Rama* 2 Moore's I. A., 54; *Nagalutchmee Ummal* v. *Gopoo Nardarjee Chetty*, 6 Moore's I. A., 309; *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*, 12 Moore's I. A., 1. And before the Hindu Wills Act no particular formalities were required in the execution or attestation of Hindu wills.—*Vinayak Narayan Jog* v. *Govindrav Chintaman Jog*, 7 Bom H C R., 224; *Mancharji Pestonji* v. *Narayan Lukshumanji*, 1 Bom H C R., 77; *Crimeas Ammal* v. *Vijayammal*, 2 Mad. H. C. R., 37. So that, before that Act, a Hindu might have made a nuncupative will of either immoveable or moveable property,—*Crimeas Ammal* v. *Vijayammal*, 2 Mad H. C. R., 37.

In Bombay it was held, that a nuncupative will made in 1871, after the Hindu Wills Act came in force by a Hindu, but not dealing with any immoveable property to which this Act applied, was valid.—*Bhagvan Dullabh* v *Kala Shankar*, I. L. R., 1 Bom., 611.

A will by a Hindu executed before the 1st September 1870 was held in Bombay not to be invalid, because his signature was not attested—*Radhabai* v. *Ganesh Tatya Gholap*, I. L. R. 3 Bom., 7; *Mancharji Pestonji* v. *Narayan Lukshumanji*, 1 Bom H C R., 77.

So, before the Hindu Wills Act, the will of a Hindu might be revoked by parol, and where definite authority was given by him to destroy the will with the intention of revoking it, that was in law a sufficient revocation, although the instrument was not in fact destroyed.—*Maharajah Pertab Narain Singh* v. *Maharance Subhao Koer*, I. L. R., 3 Cal. (P. C.), 626; (S. C.) 1 C. L. R., 113.

3. Provided that marriage

or codicil:

And that nothing herein contained shall authorize a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right of maintenance of which, but for section 2 of this Act, he could not deprive them by will:

[*And that nothing herein contained shall vest in the executor or administrator with the will annexed of a deceased person any property which such persons could not have alienated inter vivos.* Repealed by s. 154 of Act V of 1881].

And that nothing herein contained shall affect any law of adoption or intestate succession:

And that nothing herein contained shall authorize any Hindu, Jaina, Sikh, or Buddhist to create in

property any interest which he could not created before the first day of September one thousand eight hundred and seventy.

In cases to which the Indian Succession applies, every will, except a will made in the 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 the executor or administrator of the testator, or to the person entitled in case of intestacy, is revoked by marriage—Act X of 1865, s. 56, *ante*, p. 57.

The second proviso to this section is in accordance with the principle of the decision of the Judicial Committee of the Privy Council in the case of *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dassee*, 8 Moore's I A., 66, where it was laid down that the extent of the power of disposition of a Hindu testator is to be regulated by Hindu law. It was also held in that case, that a Hindu could not, by his will, interfere with his widow's right to maintenance As to the persons who are entitled to maintenance, see Mayne's Hindu Law, §§ 374-5 *et seq.*

In the case of *Tagore* v. *Tagore*, 9 B. L. R., 377, the Judicial Committee, without deciding how far the testamentary power as to ancestral property could supersede the claim of a son to maintenance, considered, that the claimant in that case had received an adequate maintenance Where a testator disinherits his son, it was held that it was not necessary that there should be an express declaration of the testator's desire or intention to disinherit his sons if there is an actual gift to some other persons in clear and unequivocal terms—*Prosonno Coomar Ghose* v. *Turracknath Sirkar*, 10 B. L R., 267, dissenting from the case of *Rooplall Khettry* v. *Mohima Churn Roy*, 10 B L R., 371. In these cases the wills were executed before the Hindu Wills Act came into operation. See *S. M. Soorjeemoney Dassee* v *Denobundo Mullick*, 6 Moore's I A., 526.

"It has been often ruled in the Supreme Court that a Hindu may dispose by will of property wholly acquired by his own exertions, and also of separate property acquired by partition of family property or by the non-existence, or, if any did ever exist, the extinction of coparceners or joint tenants, and no distinction of which, I am aware, has ever been taken between it and self-acquired property either in point of descent or of alienability. On the other hand, it has often been held there, that he cannot dispose by will of undivided family property or of any share therein so long as that share remains unsevered from the family stock."—Mayne, § 348 (see *Gangabhar* v. *Ramana*, 3 Bom. H. C. R. (A. C.), 66; *Adaram Sidaran* v. *Ram Pundopt*, 11 Bom. H. C. R., 76). Mr. Mayne goes on to say: "The result apparently would be, that the right of devise is co-extensive with that of alienation, except where, in an undivided family, the right of devise conflicts with the law of survivorship, in which case the former gives way"—Hindu Law, s. 349. See *Beer Pertab Sahee* v. *Maharajah Rajender Pertab*, 12 Moore's I. A., 1.

The third proviso to this section (printed in italics) has been repealed by s. 154 of the Probate and Administration Act, V of 1881. And now, by s. 4 of that Act, in cases to which that Act applies, "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. But nothing herein contained shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person."

The first part of the section just quoted, it will be observed, is taken from s. 179 of the Indian Succession Act, page 206, *ante*.

The last proviso to this section must be read as referring to the estate or interest which could be given, without reference to the further question to whom it could be given—*Mangamanjori Dabee* v. *Sonamoni Dabee*, 9 C. L. R., 121, *per* WILSON, J. In that case a gift to the unborn children of the testator's three unmarried daughters to take effect when these children attained their majority, was held to be a valid gift. See the

to s. 4 of Act V of 1881, *post*, p. 327. According to that decision, it

will be observed, that the Hindu Wills Act, which was passed before the decision of the Judicial Committee of the Privy Council in the Tagore case, has made a material alteration in the law as laid down by the Judicial Committee in that case. See notes to s. 101 of the Indian Succession Act, *ante*, pp. 127-8.

All estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such.—*Soorjeemoney Dossee* v. *Denobundhoo Mullick*, 6 Moore's I. A., 52.

See notes to s 46 of the Indian Succession Act, p. 36, *ante*, as to the power of a Hindu widow to dispose by will of accumulations in her hands at the time of her death.

Partial repeal of Bengal Regulation V of 1799, section 2.

On and from that day, section 2 of Bengal Regulation V of 1799 shall be repealed so far as relates to the executors of persons who are not Mohammadans, but are subject to the jurisdiction of a District Court in the territories subject to the Lieutenant-Governor of Bengal.

Saving of rights of Administrator-General.

5. Nothing contained in this Act shall affect the rights, duties, and privileges of the Administrators-General of Bengal, Madras, and Bombay respectively.

Interpretation-clause.

6. In this Act and in the said sections and Parts of the Indian Succession Act, all words defined in section 3 of the same Act shall, unless there be something repugnant in the subject or context, be deemed to have the same meaning as the said section 3 has attached to such words respectively :

And in applying sections 62, 63, 92, 96, 98, 99, 100, 101, 102 and 103 of the said Succession Act to wills and codicils made under this Act, the words 'son,' 'sons,' 'child,' and 'children,' shall be deemed to include an adopted child ; and the word 'grandchildren' shall be deemed to include the children, whether adopted or natural born, of a child, whether adopted or natural born ; and the expression 'daughter-in-law' shall be deemed to include the wife of an adopted son :

This section is here printed as altered by s. 154 of the Probates and Administration Act, V of 1881, *post*, p. 376. Prior to that Act, s. 182 of the Indian Succession was also to be interpreted according to the provisions of this section. The last paragraph of this section, as it originally

In order to make a gift under a will good by Hindu law, the except in the case of an adopted child or a child *en ventre sa mere*, be a person in existence capable of taking at the time when the gift takes effect. A child adopted after a man's death in pursuance of a power by him, is in contemplation of law begotten by him.—*Tagore* v. 9 B. L. R., 377.

THE PROBATE AND ADMINISTRATION ACT.

No. V OF 1881.

(Received the assent of the Governor-General on the 21st January, 1881.)

An Act to provide for the grant of Probates of Wills and Letters of Administration to the estates of certain deceased persons.

Preamble.

WHEREAS it is expedient to provide for the grant of probate of wills and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act, 1865, does not apply; It is hereby enacted as follows:—

The Indian Succession Act, X of 1865, which, by s. 2, was declared to constitute, except as provided by the Act itself, or by any other law for the time being in force, the law of British India applicable to all cases of intestate and testamentary succession, does not apply to intestate or testamentary succession to the property of any Hindu, Muhammadan, or Buddhist, nor to any will made, or any intestacy occurring, before the 1st day of January, 1866—Act X of 1865, s. 331, *ante*, p. 314.

CHAPTER I.

PRELIMINARY.

Short title.

1. This Act may be called "The Probate and Administration Act, 1881:"

Local extent.

It applies to the whole of British India;

Commencement.

and it shall come into force on the first day of April, 1881.

Personal application.

2. Chapters II to XIII, both inclusive, of this Act shall apply in the case of every Hindu, Muhammadan, Buddhist, and person exempted under section 332 of the Indian Succession Act, 1865, dying before, on, or after the said first day of April, 1881:

Provided that nothing herein contained shall be deemed to render invalid any transfer of property duly made before that day:

Provided also that, except in cases to which the Hindu Wills Act, 1870, applies, no Court in any local area beyond the limits of the towns of Calcutta, Madras, and Bombay and the territories for the time being administered by the Chief Commissioner of British Burma, and no High Court in exercise of the concurrent jurisdiction over such local area hereby conferred, shall receive applications for probate or letters of administration until the Local Government has, with the previous sanction of the Governor-General in Council, by a notification in the official Gazette, authorized it so to do.

Chapters II to XIII will apply to Native Christians of the Province of Coorg, who were exempted under s. 332 of the Succession Act from the provisions of that Act retrospectively from the 16th March, 1865—*Gazette of India*, July 25th, 1868, p. 1094.

The Hindu Wills Act, XXI of 1870, applies, notwithstanding anything contained in s 331 of the Succession Act (*a*) to all wills and codicils made by any Hindu, Jaina, Sikh or Buddhist, on or after the 1st day of September, 1870, within the territories subject to the Lieutenant-Governor of Bengal, or the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and (*b*) to all such wills and codicils made outside those territories, and so far as relates to immoveable property situated within those territories or limits—Act XXI of 1870, s 2. The following notification dated the 1st April, 1881, was published, by order of the Lieutenant-Governor of Bengal, in the *Calcutta Gazette* of 6th April 1881 —

In exercise of the power conferred by s 2, Act V of 1881, His Honor the Lieutenant-Governor of Bengal, with the previous sanction of the Governor-General in Council is pleased hereby to authorize the High Court of Judicature at Fort William in Bengal, throughout the territories subject to the Lieutenant-Governor of Bengal, and all District Judges as defined in the said Act within the said territories, and such judicial officers as the said High Court may, from time to time appoint as District Delegates, to receive applications for probate and letters of administration.

By another notification, the Chief Commissioner of Assam, with the previous sanction of the Governor-General in Council, has authorized the High Court of Judicature at Fort William in Bengal, throughout the territories subject to the Chief Commissioner of Assam, and all District Judges as defined within the said territories, and such judicial officers as the said High Court may, from time to time, appoint as District ates, to receive applications for probate and letters of
-Englishman, 15th September, 1881.

Interpretation-clause.

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

'Province.'

'Province' includes any division of British India having a Court of the last resort:

Assam does not come within this definition—*Thakoor Kristo Adhikaree* v. *Basoodeb Goshamee*, 12 W. R.,

'Minor' means any person subject to the Indian Majority Act, 1875, who has not attained his majority within the meaning of that Act, and any other person who has not completed his age of eighteen years; and 'minority' means the status of any such person:

'Minor.'
'Minority.'

By s. 2 of the Indian Majority Act, IX of 1875, it is enacted that every minor, of whose person or property a guardian has been or shall be appointed, shall be deemed to have attained his majority when he shall have completed his age of twenty-one years, and not before. See *Raj Coomar Roy* v. *Alfuzuddin Ahmed*, 8 C. L. R., 419.

'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:

'Will.'

'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.'

See note to the definition of 'will' and 'codicil' in s. 3 of the Indian Act, p. 4, *ante*.

'Specific legacy' means a legacy of specified property:

'Specific legacy.'

'Demonstrative legacy' means a legacy directed to be paid out of specified porperty:

'Demonstrative lega-

definitions of 'specific legacy' and 'demonstrative legacy' are taken from s. 137 (explu.) of the Indian Succession Act, p. 171, *ante*.

'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.'

'Executor' means a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided:

'Administrator' means a person appointed by competent authority to administer the estate of a deceased person when there is no executor: and

'Administrator.'

See notes to the definitions of 'executor' and 'administrator' in s. 3 of the Indian Succession Act, p. 5.

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

notes to the definition of 'District Judge' in s. 3 of the Indian Succession Act, p. 3, *ante*.

CHAPTER II.

OF GRANT OF PROBATE AND LETTERS OF ADMINISTRATION.

Character and property of executor or administrator as such.

4. 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.

But nothing herein contained shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person.

The first part of this section is s 179 of the Indian Act; see the notes to that section, *ante*, p 206. The proviso is new

Prior to this Act, in cases to which the Hindu Wills Act and the Indian Succession Act did not apply, probate could only be granted under the Supreme Court Charters, but the representative status conferred by such grant fell far short of that conferred by similar grants in the case of deceased European British subjects In the case of wills of Hindus not governed by the Hindu Wills Act probate conferred no right of property analogous to estate or interest conferred upon an English executor—*Jaykali* v. *Sibnath Chatterjee*, 2 B L R (O C), 1 *per* PHEAR, J

In *Kherodemoney Dasee* v. *Doorgamoney Dasee*, I L R., 4 Calc, 155, (S. C.), 3 C. L R., 315, MARKBY, J., said —"There is no doubt that the word 'vest' is not an appropriate one to describe the position of a Hindu executor in a will made prior to the Hindu Wills Act. 't has been frequently held, that the mere appointment of a person as executor to a Hindu does not cause any property to vest in him at all, and that, if as executor he is entitled to hold the property, he holds only as manager" —I. L. R, 4 Calc., 468

There is no such thing as succession properly so called in an undivided Hindu family. The whole body of such a family, consisting of males and females, constitutes a sort of corporation, some of the members of which are coparceners, that is, persons who, on partition, would be e to demand a share, while others are only entitled to maintenance. Until they elect to claim a partition, the property continues upon the members of the family for the time being by survivorship, and not by succession—Mayne's Hindu Law, § 243, and see § 397.

The proviso in this section saves the rights of the members of a joint family.

Administration with copy annexed of authencopy of will proved abroad.

5. When a will has been proved and deposited in a Court of competent jurisdiction, situated beyond the limits of the Province, whether in the [illegible] dominions, or in a foreign

country, and a properly authenticated copy of the will is produced, letters of administration may be granted with a copy of such copy annexed.

This is s. 180 of the Indian Succession Act, *ante*, p. 208. It was originally embodied in the Hindu Wills Act, but now, by s. 154 of this Act, ss. 180—189 (inclusive). 191—199 (inclusive), and Parts XXX and XXXI and Parts XXXIII to XL (both inclusive) so far as they were made applicable, have been taken out of the Hindu Wills Act, it being no longer necessary to retain them.

Probate only to appointed executor.

6. Probate can be granted only to an executor appointed by the will.

This is s. 181 of the Indian Succession Act. See notes to that section, *ante*, pp. 208-9.

Appointment, express or implied.

7. 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.

(*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.

(*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.

This is s. 182 of the Indian Succession Act. See cases collected under that section, pp. 210-11, *ante*.

Persons to whom probate cannot be granted.

8. Probate cannot be granted to any person who is a minor or is of unsound mind.

This is s. 183 of the Indian Succession Act, omitting the words 'nor to a married woman without the consent of her husband.' See *ante*, p. 212.

words have been omitted, because the imposition of such a condition would have been inconsistent with the proprietary *status* accorded to married women among a large proportion of the persons for whom this Act is intended, and would confer a power on the husband which would, in many cases, be likely to be abused. See Report of the

There is nothing to prevent a minor being appointed an executor. Where a minor is sole executor or sole residuary legatee, provision for the administration of the estate, during his minority, is made by s. 31, *infra*. Section 32 provides for the administration of the estate during the minority of several executors or residuary legatees.

In cases to which this Act applies, there is nothing to prevent probate being granted to a married woman.

Grant of probate to several executors simultaneously or at different times.

9. When several 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, then to *A*.

This is s. 184 of the Indian Succession Act. See notes to that section, p. 213, *ante*.

Separate probate of codicil discovered after grant of probate.

10. 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.

Procedure when different executors appointed by codicil.

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.

This is s. 185 of the Indian Succession Act. See notes to that section, p. 213, *ante*.

Accrual of representation to surviving exetutor.

11. 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.

This is s 186 of the Indian Succession Act See *ante*, p. 214.

Effect of probate.

12. Probate of a will, when granted, establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such.

This is s. 188 of the Indian Succession Act. See the cases collected under that section, *ante*, pp. 215-6.

Sections 187 and 190 of the Indian Succession Act, which make it compulsory to obtain probate or administration, have not been incorporated in this Act.

13. Letters of administration cannot be granted to any person who is a minor or is of unsound mind.

To whom administration may not be granted.

This is s. 189 of the Indian Succession Act, omitting the words 'nor to a married woman without the previous consent of her husband;' consequently there is nothing to prevent letters of administration being granted to a married woman in the case of a will to which this Act applies. See notes to s. 8, *supra*, and to s. 189 of the Indian Succession Act, *ante*, pp. 217-218.

14. 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.

Effect of letters of administration.

This is s. 191 of the Indian Succession Act.

Section 190 of the Indian Succession Act which makes it compulsory to take out administration, has been omitted from this Act.

15. Letters of administration do not render valid acts not validated by any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate.

This is s. 192 of the Indian Succession Act. See the notes to that section, p. 219.

16. 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 has or 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.

This is s. 193 of the Indian Succession Act. See notes to that section.

17. The renunciation may be made orally in the presence of the Judge, or by a writing signed by the person renouncing, and when made shall

Form and effect of renunciation of executorship.

preclude him from ever thereafter applying for probate of the will appointing him executor.

This is s. 194 of the Indian Succession Act. See notes to that section, p. 220, *ante*.

An executor who has renounced may, it seems, retract his renunciation; but the Court will not permit him to do so unless he can show that such retraction will be for the benefit of the estate or of those interested under the deceased's will.—*In the Goods of Gill*, L. R., 3 P. and D., 113. If the renunciation has not been filed, it may be retracted at any time before filing.—*In the Goods of Morant*, L. R., 3 P. and D., 151.

Procedure where executor renounces or fails to accept within time limited.

18. 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.

This is s. 195 of the Indian Succession Act

As to the persons entitled to administration, see s. 23, *infra*.

Grant of administration to universal or residuary legatee.

19. 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.

This is s. 196 of the Indian Succession Act. See the notes to that section, p. 221, *ante*. See s. 45, *infra*.

Right to administration of representative of deceased residuary legatee.

20. 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.

This is s. 197 of the Indian Succession Act. See notes to that section, p. 222, *ante*.

21. 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.

Grant of administration where no executor, nor residuary legatee, nor representative of such legatee.

This is s. 198 of the Indian Succession Act; see notes to that section, *ante*, pp. 222—3.

See Act II of 1874, ss. 15 and 20 as to the right of the Administrator-General to letters of administration.

22. Letters of administration with the will annexed shall not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned, calling on the next-of-kin to accept or refuse letters of administration.

Citation before grant of administration to legatee other than universal or residuary

This is s. 199 of the Indian Succession Act. See notes to that section, *ante*, p. 223.

As to 'next-of-kin,' see Administrator-General's Act, II of 1874, s. 3.

23. When the deceased has died intestate, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.

To whom administration may be granted.

When several such persons apply for administration, it shall be in the discretion of the Court to grant it to any one or more of them.

When no such person applies, it may be granted to a creditor of the deceased.

The sections of the Indian Succession Act, which determine the persons to whom, under that Act, administration may be granted, are ss. 200-207. These sections, however, are based in part upon a law of intestate succession, differing from that of the classes to which this Act

applies. It was, therefore, impossible to incorporate these sections in this Act. With reference to this section, the Legal Member of Council says: "The only safe rule it seems possible to lay down for these classes (the classes to which this Act applies) is the broad one, that the grant shall follow the interest; that when several persons inheriting portions of the estate claim administration, the Judge may grant it to one or other of them as he thinks fit; and that, when no such person applies, he may grant it to a creditor." See Statement of Objects and Reasons.

In the case of *Nittyakali Dabea* v. *Kedar Nath Chatterjee*, 5 C L. R., 368, where two widows of an intestate applied for a certificate of administration under Act XXVII of 1860, the Court said that the usual and reasonable practice was, that the administration should be granted only to one person, and it directed accordingly

The cases in which the rights of rival claimants to certificates under Act XXVII of 1860 have been decided will be found collected under s. 3 of that Act,

As to the right of the Administrator-General, see s. 15 of Act II of 1874, *post*.

CHAPTER III.

OF LIMITED GRANTS.

(*a.*)—*Grants limited in duration.*

Probate of copy or draft of lost will.

24. 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.

This is s. 208 of the Indian Succession Act, *ante*, pp. 227-8.

That section was incorporated in the Hindu Wills Act, though now, by s. 154 of this Act, it has been excepted from application under that Act. It was held, that the effect of its being incorporated in the Hindu Wills Act was to make probate of the will evidence against all persons interested in the will—*Brajanath Dey Sirkar* v. *S. M. Anandamayi Dasi*, 8 B L. R., 209. The effect of the section under this Act will be the same.

25. 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.

This is s. 209 of the Indian Succession Act. See notes to that section, , p. 229.

Probate of copy where original exists.

26. 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 delivered 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.

This is s. 210 of the Indian Succession Act. See notes to that section, *ante*, p. 229.

Administration until will produced.

27. 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.

This is s. 211 of the Indian Succession Act. See notes to that section, *ante*, p. 230.

(*b.*) *Grants for the Use and Benefit of others having Right.*

Administration with will annexed to attorney of absent executor.

28. 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 agent of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself.

This is s. 212 of the Indian Succession Act, the word 'agent' being substituted for that of 'attorney.'

The agent applying for administration must be within the jurisdiction of the Court—*In the Goods of Nesbitt*, 4 B. L. R., Appx., 49. See further the notes to s. 212 of the Succession Act, *ante*, pp. 230-1.

'Province' in this and ss 29 and 30 includes any division of British India having a Court of the last resort—s. 3, *supra*, p. 325.

Administration with

29. When any person to whom, if present, letters of administration with the will annexed might be granted, is absent from the province, letters of administration with the

annexed may be granted to his agent, limited as abovementioned.

This is s. 213 of the Indian Succession Act, the word 'agent' being substituted for that of 'attorney.' As to the persons who, if present, are entitled to administration with the will annexed, see ss. 18 and 19.

See notes to s. 213 of the Succession Act, *ante*, pp. 231-2.

Administration to attorney of absent person entitled to administer in case of intestacy.

30. 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 agent of the absent person, limited as before mentioned.

This is s. 214 of the Indian Succession Act, the word 'agent' being substituted for that of 'attorney.'

If there be a person equally entitled with the absent person to administration, and willing to act, letters of administration would not, it seems, be granted to the agent of the other. See Coote's Prob. Pract., 129.

Administration during minority of sole executor or residuary legatee.

31. 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 has attained his majority, at which period, and not before, probate of the will shall be granted to him.

This is s. 215 of the Indian Succession Act.

Probate cannot be granted to a minor—s. 8, *supra*

An administrator during minority has all the powers of an ordinary administrator—s. 95, *infra*.

See notes to s. 215 of the Indian Succession Act, *ante*, pp 232-3.

Section 47 of the Indian Succession Act which gives a father, whatever his age, power to appoint a guardian of his infant children, does not apply to Hindus—see Act XXI of 1870. The 'legal guardian' in case of Hindus would seem to be a guardian appointed by the Court.

Administration during minority of several executors or residuary legatees.

32. 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 has attained his majority.

This is s. 216 of the Indian Succession Act, except that the words 'has attained his majority' have been substituted for 'have completed the age of eighteen years.'

See the definitions of 'minor' or 'minority' under this Act—s. 3, *supra*, p. 326.

33. 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 intestate's estates, applicable in the case of the deceased, be a minor or lunatic, letters of administration with or without the will annexed, as the case may be, shall be granted to the person to whom the care of his estate has been committed by competent authority, or, if there be no such person, to such other person as the Court thinks fit to appoint, for the use and benefit of the minor or lunatic, until he attains majority or becomes of sound mind, as the case may be.

This is s. 217 of the Indian Succession Act, with an alteration including minors as well as lunatics. See the notes to that section, *ante*, p. 234.

As to lunatics, see Acts XXXIV and XXXV of 1850, and XV of 1874. As to minors, see Act IX of 1879 (Court of Wards Act).

34. Pending any suit touching the validity of the will of a deceased person, or *pen-* 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 s. 218 of the Indian Succession Act. See notes to that section, *ante*, p. 235.

(*c.*)—*For Special Purposes.*

35. 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 agent to take administration on his behalf, the letters of administration with the will annexed shall accordingly be limited.

This is s. 219 of the Indian Succession Act, the word 'agent' being substituted for 'attorney.'

36. If an executor appointed generally give an authority to an attorney to prove a will on his behalf, and the authority is

Administration with will annexed limited to particular purpose.

purpose, the letters of administration with the will annexed shall be limited accordingly.

This is s 220 of the Indian Succession Act. The grant follows the terms of the power—*In the Goods of Goldsborough*, 1 Sw. and Tr., 2:

37. Where a person dies, leaving property of which he was the sole or survi-

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no beneficial interest on his own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the beneficiary, or to some other person on his behalf.

is s. 221 of the Indian Succession Act, with a slight verbal alteration. See the notes to that section, pp. 236-7, *ante*.

38. 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 limited to suit.

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 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 suit, and until a final decree shall be made therein and carried into complete execution.

This is s. 222 of the Indian Succession Act. See the notes to that section, *ante*, p. 237.

39. 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 or have been granted is absent from the province within which the Court that has granted the probate or letters of administration

it-becoming party to suit to be brought against administrator.

is situate, such Court may grant, to any person whom it thinks 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 s. 223 of the Indian Succession Act. See the notes to that section, *ante*, pp. 238-9.

Administration limited to collection and preservation of deceased's property.

40. In any case in which it appears 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 thinks 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.

This is s. 224 of the Indian Succession Act. See notes to that section, *ante*, pp. 239-40.

Appointment, as administrator, of person other than one who, under ordinary circumstances, would be entitled to administration

41. When a person has died intestate, or leaving a will of which there is no executor willing and competent to act, or where the executor is, at the time of the death of such per-

and it appears to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof other than the person who, under ordinary circumstances, would be entitled to a grant of administration, the Judge may, in his discretion, having regard to consanguinity, amount of interest, the safety of the estate, and probability that it will be properly administered, appoint such person as he thinks fit to be administrator;

and in every such case letters of administration may be limited or not as the Judge thinks fit.

This is s. 225 of the Indian Succession Act. See notes to that section, *ante*, pp. 240.

(*d.*)—*Grants with Exception.*

Probate or administration with will annexed subject to exception.

42. Whenever the nature of the case requires that an exception be made, probate of a will, or letters of administration with the will shall be granted subject to such exception.

This is s. 226 of the Indian Succession Act, *ante*, p. 242. See Coote's Prob. Pract., 160.

Administration with exception.

43. Whenever the nature of the case requires that an exception be made, letters of administration shall be granted subject to such exception.

This is s. 227 of the Indian Succession Act, *ante*, p. 243. See Coote's Prob. Pract., 161.

(*e.*)—*Grants of the Rest.*

Probate or administration of rest.

44. 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.

This is s. 228 of the Indian Succession Act. See note to that section, *ante*, p. 243.

The word 'may' in this section is not merely permissive, but directory of the course which the Legislature intended should be followed. See *DeSouza* v. *Secretary of State*, 12 B. L. R., 423.

(*f.*)—*Grants of Effects unadministered.*

Grant of effects unadministered.

45. If the executor to whom probate has been granted has died leaving a part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate.

This is s. 229 of the Indian Succession Act. See note to that section p. 244, *ante*, and s. 19 of this Act, p 331, *supra*.

Rules as to grants of effects unadministered.

46. 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.

This is s. 230 of the Indian Succession Act. See note to that section, *ante*, p. 245.

and still some part of estate unadministered.

47. 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.

This is s. 231 of the Indian Succession Act. See note to that section, pp. 245-6, *ante*. Coote's Prob. Pract., 171-3.

CHAPTER IV.

ALTERATION AND REVOCATION OF GRANTS.

What errors may be by Court.

48. 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.

This is s. 232 of the Indian Succession Act. See note to that section, , p. 246.

Procedure where codicil discovered after grant of administration with will annexed.

49. 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.

This is s. 233 of the Indian Succession Act.
See s. 10, p. 329, *supra*, as to the procedure where a codicil is discovered after probate.

Revocation or annulment for just cause.

50. The grant of probate or letters of administrattion may be revoked or annulled for just cause.

'Just cause.'

Explanation.—Just cause is—

1*st*, that the proceedings to obtain the grant were defective in substance ;

2*nd*, that the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case;

3*rd*, 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 ;

4*th*, 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.

This is s. 234 of the Indian Succession Act. See the cases cited in the note to that section, *ante*, pp. 245-250.

CHAPTER V.

OF THE PRACTICE IN GRANTING AND REVOKING PROBATES AND LETTERS OF ADMINISTRATION.

Jurisdiction of District Judge in granting and revoking probates, &c.

51. The District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his district.

This is s. 235 of the Indian Succession Act. See note to that section, *ante*, p. 251.

Under s 87, *infra*, the High Court has concurrent jurisdiction with the District Judge.

Power to appoint Delegate of District Judge with non-contentious cases.

52. The High Court may, from time to time, appoint such judicial officers within any district as it thinks fit to act for the District Judge Delegates to grant probate letters of administration in non-contentious cases, within such local limits as it may from time to time prescribe :

Provided that, in the case of High Courts not established by Royal Charter, such appointment be made with the previous sanction of the Local Government.

Persons so appointed shall be called 'District Delegates.'

This is s 235A of the Indian Succession Act, in which it was inserted s. 2 of the District Delegates Act, VI of 1881.

District Judge's powers as to grant of probate and administration.

53. 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.

This is s 236 of the Indian Succession Act. See the notes to that s, *ante*, p. 252.

District Judge may order person to produce testamentary papers.

54. 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 him to attend for the purpose of being examined respecting the same,

and he 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 s. 237 of the Indian Succession Act.

The exemplification of a will may be directed to be produced under this section — *In the Goods of Newton*, 8 B. L. R., App., 76.

As to penalties, see Indian Penal Code, Act XLV of 1860, chap. x.

Proceedings of District Judge's Court in relation to probate and administration.

55. 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.

This is s. 238 of the Indian Succession Act. See notes to that section, *ante*, pp. 253-4.

When probate or administration may be granted by District Judge.

56. 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 appears by a petition, verified as hereinafter mentioned, of the person applying for the same that the testator or intestate, as the case may be, had at the time of his decease a fixed place of abode, or any property, moveable or immoveable, within the jurisdiction of the Judge.

This is s. 240 of the Indian Succession Act.

District in which deceased had no fixed abode.

57. 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, the Judge may, in his discretion, 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, grant them absolutely, or limited to the property within his own jurisdiction.

This is s. 241 of the Indian Succession Act.

Probate and letters of administration may be granted by Delegate.

58. Probate and letters of administration may, upon application for that purpose to any District Delegate, be granted by him in any case in which there is no contention, if it appears by petition (verified as hereinafter mentioned) that the testator or intestate, as the case may be, at the time of his death had his fixed place of abode within the jurisdiction of such Delegate.

This is s. 241A of the Indian Succession Act, to which it was added by s. 3 of the District Delegates Act, VI of 1881.

Conclusiveness of probate or letters of administration.

59. Probate or letters of administration shall have effect over all the property, 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 :

Effect of unlimited probates, &c., granted by certain Courts.

Provided that probates and letters of administration granted by a High Court established by Royal Charter, or by the Chief Court of the Panjáb, or by the Court of the Recorder of Rangoon, shall, unless otherwise directed by the grant, have like effect throughout the whole of British India.

The first part of this section is s. 242 of the Indian Succession Act. To s. 242, the following proviso was added by Act XIII of 1875, s. 2:—

'Provided that probates and letters of administration granted by a High Court after the first day of April, 1875, shall, unless otherwise directed by the grant, have like effect throughout the whole of British India.'

That proviso was further added to, or explained by, s. 1 of Act II of 1874, so as to correspond with the proviso to this section.

notes to s. 242 of the Indian Succession Act, pp. 256-7.

Transmission of certificate by Court granting unlimited probate, &c., to other Courts.

60. Whenever a grant of probate or letters of administration is made by a Court with such effect as last aforesaid, the Registrar, or such other officer as the Court making the grant appoints in this behalf, shall send to each of the other Courts empowered to make such grants a certificate to the following effect :—

I, *A B.*, Registrar [*or as the case may be*] of the High Court of Judicature at [*or as the case may be*], hereby certify that, on the day of 188 , the High Court of Judicature at [*or as the case may be*] granted probate of the will [*or* letters of administration of the estate of *C. D.*, late of , deceased, to *E. F.* of and *G. H.* of , and that such probate [*or* letters] has [*or* have] effect over all the property of the deceased throughout the whole of British India;

and such certificate shall be filed by the Court receiving the same.

This section makes the same provision for the transmission of a certificate by any Court granting unlimited probate or letters of administration as was made by s. 242A. of the Succession Act, in case of a High Court granting such probate or letters.

usiveness of application for probate or . if properly made and verified

61. 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.

This is s. 243 of the Indian Succession Act. See note to that section, *ante*, p. 258.

Petition for probate.

62. Application for probate or for letters of administration with the will annexed shall be made by a petition distinctly written in English or in the langunge in ordinary use in proceeding before the Court in

the application is made, with the will, or, in the cases mentioned in sections twenty-four, twenty-five and twenty-six, a copy, draft or statement of the contents thereof annexed and stating

the time of the testator's death,

that the writing annexed is his last will and testament, or, as the case may be,

that it was duly executed,

the amount of assets which are likely to come to the petitioner's hands ;

and, where the application is for probate, that the petitioner is the executor named in the will.

In addition to these particulars, the petition shall further state,

when the application is to the District Judge, that the deceased, at the time of his death, had a fixed place of abode, or had some property situate within the jurisdiction of the Judge ; and

when the application is to a District Delegate, that the deceased, at the time of his death, had a fixed place of abode within the jurisdiction of such [illegible]ate.

This is s. 244 of the Indian Succession Act, as amended by s 4 of the District Delegates Act, VI of 1881. See notes to s. 244 of the former Act, *ante*, p. 259.

In what cases translation of will to be annexed to petition.

63. In cases wherein the will, copy or draft is written in any language other than English, or than that in ordinary use in proceedings before the Court, there shall be a translation thereof annexed to the petition by a translator of the Court, if the language be one for which a translator is appointed ; or, if the will, copy or draft 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 :—

Verification of translation by person other than Court translator.

"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."

This is s. 245 of the Indian Succession Act. See notes to that [illegible]

Petition for letters of administration.

64. Application 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,

the amount of assets which are likely to come to the petitioner's hands.

In addition to these particulars, the petition shall further state,

when the application is to a District Judge, that the deceased, at the time of his death, had a fixed place of abode or had some property situate within the jurisdiction of the Judge; and,

when the application is to a District Delegate, that the deceased, at the time of his death, had a fixed place of abode within the jurisdiction of such Delegate.

This is s. 246 of the Indian Succession Act, as amended by ss. 4 and 9 of the District Delegates Act, VI of 1881.

Additional statements in petition for probate, &c.

65. Every person applying to any of the Courts mentioned in the proviso to section fifty-nine for probate of a will or letters of administration of an estate, intended to have effect throughout British India, shall state in his petition, in addition to the matters respectively required by sections sixty-two and sixty-four, that, to the best of his belief, no application has been made to any other Court for a probate of the same will or for letters of administration of the same estate, intended to have such effect as last aforesaid,

or, where any such application has been made, the Court to which it was made, the person or persons by whom it was made, and the proceeding (if any) had thereon.

And the Court to which any application is made under the proviso to section fifty-nine may, if it think fit, reject the same.

This is s. 246A of the Indian Succession Act.

66. 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 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."

This is s. 247 of the Indian Succession Act.

67. Where the application is for probate, or for letters of administration with the will annexed, 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 witness to 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)."

This is s. 248 of the Indian Succession Act.

68. If any petition or declaration which is hereby required to be verified contains any averment which the person making the verification knows or believes to be false, such person shall be 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.

Punishment for false averment in petition or declaration.

This is s. 249 of the Indian Succession Act.

As to the punishment for giving or fabricating false evidence, see Indian Penal Code, Act XLV of 1860, chap. xi.

69. In all cases it shall be lawful for the District Judge or District Delegate, if he thinks fit,

District Judge may examine petitioner in

to examine the petitioner in person upon oath, 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.

Publication of citation.

The citation shall be fixed up in some conspicuous part of the Court-house, and also in the office of the Collector of the District, and otherwise published or made known in such manner as the Judge or Delegate issuing the same may direct.

This is s. 250 of the Indian Succession Act, as amended by s. 9 of the District Delegates Act, VI of 1881. See the notes to s. 250 of the former Act, *ante*, pp. 263-4.

Caveats against grant of probate or administration.

70. Caveats against the grant of probate or letters of administration may be lodged with the District Judge or a District Delegate; and immediately on any caveat being lodged with any District Delegate, he shall send a copy thereof to the District Judge; and immediately on a caveat being entered with the District Judge, a copy thereof shall be given to the District Delegate, if any, within whose jurisdiction it is alleged the deceased had his fixed place of abode at the time of his death, and to any other Judge or District Delegate to whom it may appear to the District Judge expedient to transmit the same.

This section has been substituted by s. 5, of the District Act, VI of 1881, in the place of the original s. 251, of the Indian Succession Act

Form of caveat.

71. 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 ."

This is s. 252 of the Indian Succession Act.

72. No proceeding shall be taken on a petition for probate or letters of administration after a caveat against the grant thereof has been entered

No proceeding on petition until after notice to caveator.

gate to whom the application has been made, or notice thereof has been given of its entry with some other Delegate, until after such notice to the person by whom the same has been entered as the Court shall think reasonable.

This is s. 253 of the Indian Succession Act, as amended by s. 6 of the District Delegates Act, VI of 1881. See note to that section, *ante*, p. 265.

73. A District Delegate shall not grant probate or letters of administration in any case in which there is contention as to the grant, or in which it otherwise appears to him that probate or letters of administration ought not to be granted in his Court.

District Delegate when not to grant probate or administration.

Explanation.—By 'contention' is understood the appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding.

This is s. 253A of the Indian Succession Act, in which it was inserted by s. 7 of the District Delegates Act, VI of 1881.

74. In every case in which there is no contention, but it appears to the District Delegate doubtful whether the probate or letters of administration should or should not be granted, or when any question arises in relation to the grant, or application for the grant, of any probate or letters of administration, the District Delegate may, if he thinks proper, transmit a statement of the matter in question to the District Judge, who may direct the District Delegate to proceed in the matter or the application, according to such instructions as to the Judge may seem necessary, or may forbid any further proceeding by the District Delegate in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Judge.

Power to transmit statement to District

This is s. 253B of the Indian Succession Act, in which it was inserted by s 7 of the District Delegates Act, VI of

Procedure when there is contention, or District Delegate thinks should be refused in his Court.

75. In every case in which there is contention, or the District Delegate is of opinion that the probate or letters of administration should be refused in his Court, the petition, with any documents that may have been filed therewith, shall be returned to the person by whom the application was made, in order that the same may be presented to the District Judge; unless the District Delegate thinks it necessary, for the purposes of justice, to impound the same, which he is hereby authorized to do; and in that case the same shall be sent by him to the District Judge.

This is s. 253C of the Indian Succession Act, in which it was inserted by s. 7 of the District Delegates Act, VI of 1881.

Grant of probate to be under seal of Court.

76. Whenever it appears to the Judge or District Delegate that probate of a will should be granted, he shall grant the same under the seal of his Court in manner following :—

Form of such grant.

"I, , Judge of the District of , [*or* Delegate appointed for granting probate or letters of administration in (*here insert the limits of the jurisdiction*)], 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 six months from the date of this grant, and also to render a true account of the said property and credits within one year from the same date.

The day of 18 ."

This is s. 254 of the Indian Succession Act, as amended by ss. 8 and 9 of the District Delegates Act, VI of 1881. See note to that *ante*, p 267.

77. Whenever it appears to the District Judge or District Delegate that letters of administration to the estate of a person deceased, with or without a copy of the will annexed, should be granted, he shall grant the same under the seal of his Court in manner following:—

Grant of letters of ——— to be under seal of Court.

"I , Judge of the District of [*or* Delegate appointed for granting probate or letters of administration in (*here insert the limits of the Delegate's jurisdiction*], 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 six months from the date of this grant, and also to render a true account of the said property and credits within one year from the same date.

Form of such grant.

The day of 18 ."

This is s. 255 of the Indian Succession Act, as altered by ss. 8 and 9 of the District Delegates Act, VI of 1881.

78. Every person to whom any grant of letters of administration is committed, and, if the Judge so direct, any person to whom probate is granted, 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 from time to time by any general or special order directs.

Administration-bond.

This section embodies s. 256 of the Indian Succession Act, with an alteration expressly giving the Court a discretion to take a bond from an executor upon probate being granted to him. This discretion has been given on the ground that, amongst the classes to which this Act applies, cases would occasionally occur in which it would be expedient to take security from executors. Even under s. 256 of the Indian Succession

Act it was held that the Court might require an executor to security (*In the matter of Juggodeshuri Dabi*, I. L. R., 7 Calc., 84; 8 C. L. R., 397); but it never was the practice in the High Court in to take security from an executor on a grant of probate—*Run ... Singh* v. *Moharance Rajrup Koer*, 4 C. L. R., 498. The Madras High Court considered that, under the Succession Act, a bond could not be taken from an executor to whom probate was granted—Proceedings, December 22nd, 1866, 3 Mad. H. C. R., Appx., 10. See notes to s. 256 of the Indian Succession Act, *ante*, p. 268.

Assignment of administration-bond.

79. 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 proper person, 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 interested, the full amount recoverable in respect of any breach thereof.

This is s. 257 of the Indian Succession Act. See note to that section, *ante*, p. 269

Time before which probate or administration shall not be granted.

80. 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.

This is s. 258 of the Indian Succession Act.

'Letters of administration' in this section do not include letters of administration with the will annexed—*In the Goods of Wilson*, I. L. R., 1 Calc., 149.

Filing of original wills of which probate or administration with will annexed granted.

81. Until a public registry for wills is established, every District Judge and District Delegate shall file and preserve among the records of his Court all original wills of which probate or letters of administration with the will annexed may be granted by him: and the Local Government shall make regulations for the preservation and inspection of the wills so filed as aforesaid.

The corresponding section in the Indian Succession Act is s. 259, the wording of which is slightly different.

No special registry of wills has, it seems, been established. Under the Registration Act, III of 1877, s. 27, a will may be deposited at any time. See ss. 42—46 of that Act.

82. 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.

, &c., until same revoked.

This is s. 260 of the Indian Succession Act.

83. In any case before the District Judge in which there is contention, the proceeding shall take, as nearly as may be, the form of a 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.

This is s. 261 of the Indian Succession Act. See the notes to that section, *ante*, p. 271.

84. 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;

Payment to executor or administrator before probate or administration revoked.

and the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself out of the assets of the deceased 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.

Right of such executor or administrator to recoup himself.

This is s. 262 of the Indian Succession Act.

85. Notwithstanding anything hereinbefore contained, it shall, except in cases to which the Hindu Wills Act, 1870, applies, be in the discretion of the Court to make an order refusing, for reasons to be recorded by it in writing, to grant any application for letters of administration made under this Act.

Power to refuse letters of administration.

This section is new.

86. Every order made by a District Judge or District Delegate 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 of District Judge.

This is s. 263 of the Indian Succession Act. See notes to that section, *ante*, p. 272.

87. The High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge.

Concurrent jurisdiction of High Court.

This is s. 264 of the Indian Succession Act. See note to that section, *ante*, p. 272.

CHAPTER VI.

OF THE POWERS OF AN EXECUTOR OR ADMINISTRATOR.

88. An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same powers for the recovery of debts due to him at the time of his death, as the deceased had when living.

In respect of causes of action surviving deceased, and debts due at death.

This is s. 267 of the Indian Succession Act with a slight alternation. See notes to that section, *ante*, p. 275.

89. All demands whatever, and all rights to prosecute or defend any suit or other proceeding, existing in favour of or against a person at the time of his decease, survive to and against his executors or

Demands and rights of suits of or against deceased survive to and or ad-

administrators, except causes of action tion, 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.

Illustration.

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 instituted any suit. The cause of action does not survive.

This is s. 268 of the Indian Succession Act, omitting illustration See notes to that section, *ante*, p. 276, and Acts XII of 1855 and XIII of 1855, *post*.

Power of executor or administrator to dispose of property.

90. An executor or administrator has power, with the consent of the Court by which the probate or letters of administration was or were granted, to dispose of the property of the deceased, either wholly or in part, in such manner as he thinks fit:

Provided that the Court may, when granting probate or letters of administration, exempt the executor or administrator from the necessity of obtaining such consent as to the whole or any specified part of the assets of the deceased.

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 with the consent of the Court. The sale is valid.

The executor, in the exercise of his discretion, s a part of the immoveable estate of the deceased with the consent of the Court. The mortgage is valid.

The first part of this section makes an important alteration in the law as administered under the corresponding section (269) of the Indian Succession Act, in so far that it has made the consent of the Court necessary to every disposition of property made by an executor or administrator. It seems to have been considered unsafe to extend to an executor or administrator in the mofussil the full powers conferred by the Succession Act.

The proviso, which is new, will prevent unnecessary expense being incurred by giving the Court power to exempt the executor or administrator from the necessity for applying for its consent in each case. words 'with the consent of the Court' in illustration (*b*) are new.

the notes to s. 269 of the Indian Succession Act, *ante*, pp. 277—9.

Purchase by executor or administrator of deceased's property.

91. 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.

This is s. 270 of the Indian Succession Act. See notes to that section, *ante*, p. 279.

Powers of several executors or administrators exercisable by one.

92. When there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary in the will or grant of letters of administration, 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.

(*b.*) One has power to surrender a lease.

(*c.*) One has power to sell the property of the deceased, moveable or immoveable.

(*d.*) One has power to assent to a 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.

This is s. 271 of the Indian Succession Act. See note to that section, *ante*, p. 280.

Survival of powers on death of one of several or administrators.

93. Upon the death of one or more of several executors or administrators, all the powers of the office become, in the absence of any direction to the contrary in the will or grant of letters of administration, vested in the survivors or survivor.

This is s. 272 of the Indian Succession Act. It is in accordance with the case of *Flanders* v. *Clarke*, 1 Ves Sen, 9.

Powers of administrator of effects unadministered.

94. The administrator of effects unadministered has, with respect to such effects, the same powers as the original executor or administrator.

This is s. 273 of the Indian Succession Act.

95. An administrator during minority has all the powers of an ordinary administrator.

Powers of administrator during minority.

This is s. 274 of the Indian Succession Act. See s. 32, *supra*, p. 335.

96. When probate or letters of administration shall 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 is s. 275 of the Indian Succession Act. See ss. 8 and 13. *supra*, pp. 328 and 330; and note to s. 275 of the Indian Succession Act, *ante*, p 281.

CHAPTER VII.

OF THE DUTIES OF AN EXECUTOR OR ADMINISTRATOR.

97. It is the duty of an executor to provide funds for the performance of the necessary funeral ceremonies of the deceased in a manner suitable to his condition, if he has left property sufficient for the purpose.

to deceased's funeral ceremonies.

While it is the duty of an executor under s. 276 of the Indian Succession Act to perform the funeral of the deceased in a suitable manner, under this section, it is his duty only to provide funds for the performance of the necessary ceremonies.

See *Mullick* v. *Mullick*, 1 Knapp, 245.

98. 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 has or 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 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 have come to his hands, and the manner in which they have been applied or disposed of.

Inventory and account.

This is s. 277 of the Indian Succession Act. See *ante*, p. 282.

Under s. 62 of this Act a person applying for probate or letters of administration must state the amount of assets which are likely to come to his

Inventory to include property in any part of British India.

99. In all cases where it is sought to obtain a grant of probate or letters of administration intended to have effect throughout the whole of British India, the executor, or the person applying for administration, shall include in the inventory of the effects of the deceased all his moveable or immoveable property situate in British India:

And the value of such property situate in each province shall be separately stated in such inventory, and the probate or letters of administration shall be chargeable with a fee corresponding to the entire amount or value of the property affected thereby wheresoever situate within British India.

This, with slight verbal alterations, is s. 277A of the Indian Succession Act. See notes to that section, *ante*, p. 283.

Executor to collect property of, and debts owing to, deceased.

100. 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.

This is s. 278 of the Indian Succession Act.

As to the liability of an executor or administrator where loss has been occasioned by undue delay in collecting the assets, see the cases collected in the note to s. 278 of the Indian Succession Act, *ante*, pp. 283-4. See also notes to ss. 327-28, *ante*, pp. 311 *et seq.*

Expenses to be paid before all debts.

101. Funeral expenses to a reasonable amount, according to the degree and quality of the deceased, and deathbed charges, including fees for medical attendance, and board and lodging for one month previous to his death, are to be paid before all debts.

This is s. 279 of the Indian Succession Act.

Expenses to be paid next after such expenses.

102. The expenses 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 deathbed charges.

This is s. 280 of the Indian Succession Act.

As to what expenses have been allowed as 'testamentary expenses' and 'executorship expenses,' see note, p. 285, *ante*.

Wages for certain services to be next paid, and then other debts.

103. 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 according to their respective priorities (if any).

This is s. 281 of the Indian Succession Act, with the addition of the words "according to their respective priorities (if any)."

The addition appears to have been suggested by the case of *Nilkomul Shaw* v. *Reed*, 17 W. R., 513, (S.C.) 12 B. L. R., 287, in which it was held, that s. 282 of the Indian Succession Act (which corresponds with the next section of this Act) in no way interfered with the right of a person who has obtained a decree against an executor or administrator to have his decree satisfied out of the assets of the deceased.

As to what persons are included in the terms 'domestic servant,' 'labourer' or 'artizan,' see note to s. 281 of the Indian Succession Act, *ante*, p. 285.

Save as aforesaid, all debts to be paid equally and ratably.

104. Save as aforesaid, no creditor is to have a right of priority over another.

But the executor or administrator shall pay all such debts as he knows of, including his own, equally and ratably, as far as the assets of the deceased will extend.

This is s. 282 of the Indian Succession Act, omitting the words "by reason that his debt is secured by an instrument under seal or on any other account," after the words "over another" in the first clause.

See notes to s. 282 of the Indian Succession Act, *ante*, pp. 286-7.

Debts to be paid before legacies.

105. Debts of every description must be paid before any legacy.

This is s. 285 of the Indian Succession Act. See note to that section, *ante*, p. 289.

Executor or administrator not bound to pay

106. If the estate of the deceased is subject to any contingent liabilities, an executor or administrator is not bound to pay a sufficient indemnity to meet the liabilities whenever they may become due.

This is s. 286 of the Indian Succession Act. See notes to that section, p. 2[illegible]

Abatement of general

107. If the assets, after payment of debts, necessary expenses, and specific lega-

the general legacies in full, the latter shall abate or be diminished in equal proportions;

and, in the absence of any direction to the contrary in the will, the executor has no right to pay one legatee in preference to another, 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.

This is s. 287 of the Indian Succession Act.

As to necessary expenses, see ss. 101 and 102, *supra*, p. 359. See also note to s. 287 of the Indian Succession Act, *ante*, pp. 290-1.

108. 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.

Non-abatement of specific legacy when assets sufficient to pay debts.

This is s. 288 of the Indian Succession Act. See the notes to that section, *ante*, p. 291.

109. 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.

Right under demonstrative legacy when sufficient to pay and necessary ex-

This is s. 289 of the Indian Succession Act. See notes thereto, *ante*, p. 292.

110. If the assets are not sufficient to answer the debts and the specific legacies, an abatement shall be made from the latter ratably in proportion to their respective amounts.

Ratable abatement of specific legacies.

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 [illegible] *C*.

This is s. 290 of the Indian Succession Act.

Legacies treated as general for purpose of abatement.

111. 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.

This is s. 291 of the Indian Succession Act.

As to the mode of ascertaining the value of an annuity, see *Todd* v. *Beilby*, 27 Beav., 353; *Pott* v. *Smith*, L. R., 8 Eq., 683, and the notes to s. 62 of the Indian Succession Act, *ante*, pp. 193-4.

CHAPTER VIII.

OF THE EXECUTOR'S ASSENT TO A LEGACY.

Assent necessary to complete legatee's title.

112. The assent of the executor is necessary to complete a legatee's title to his

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.

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.

This is s. 292 of the Indian Succession Act. See the notes thereto, *ante*, p. 293.

Effect of executor's assent to specific legacy.

113. 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.

(*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.

(*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.

(*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*.

(*d.*) Executors die after paying all the debts of the testator, but before satisfaction of specific legacies. Assent to the legacies may be presumed.

(*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.

This is s. 293 of the Indian Succession Act.

114. 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.

Illustrations.

(*a.*) *A* bequeaths to *B* his lands of Sultanpur, which, at the date of 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.

This is s. 294 of the Indian Succession Act.

115. 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 of executor to his own legacy.

Assent shall be implied if in his manner of administering the property he does any act which is referable to his

Implied assent.

character of legatee and is not referable to his character of executor.

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.

This is s. 295 of the Indian Succession Act. See notes thereto, *ante*, pp. 295-6.

Effect of executor's assent.

116. The assent of the executor to a legacy gives effect to it from the death of the testator.

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*.

This is s. 296 of the Indian Succession Act.

Executor when to deliver legacies.

117. An executor is not bound to pay or deliver any legacy until the expiration of one year from the testator's death.

Illustration.

A by his will directs his legacies to be paid within six months after his death. The executor is not bound to pay them before the expiration of a year.

This is s. 297 of the Indian Succession Act.

The rule laid down by this section is a mere rule of convenience. It does not prevent the vesting of legacies—*Garthshore* v. *Chalie*, 10 Ves., 13. It applies although the testator should have directed the legacies to be paid before the expiration of a year from his death—*Brooke* v. *Lewis*, 6 Madd., 358. See the notes to s. 297 of the Indian Succession Act, *ante*, pp. 296-7.

CHAPTER IX.

OF THE PAYMENT AND APPORTIONMENT OF ANNUITIES.

Commencement of annuity when no time fixed by will.

118. Where an annuity is given by the will, and no time is fixed for its commencement, it shall commence from

payment shall be made at the expiration of a year next after that event.

This is s. 298 of the Indian Succession Act.

When annuity to be paid quarterly or monthly, first falls due.

119. 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 executors think fit, be paid when due ; but the executor shall not be bound to pay it till the end of the year.

This is s. 299 of the Indian Succession Act.

Date of successive payments when first payment directed to be made within given time, or on day certain.

120. 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 ;

Apportionment where annuitant dies between times of payment.

and if the annuitant dies in the interval between the times of payment, an apportioned share of the annuity shall be paid to his representative.

This is s. 300 of the Indian Succession Act See note to that *ante*, p. 298.

CHAPTER X.

OF THE INVESTMENT OF FUNDS TO PROVIDE FOR LEGACIES.

Investment of sum bequeathed where legacy, not specific, given for life.

121. 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.

This is s. 301 of the Indian Succession Act. See *ante*, p 298.

It does not appear that any rules under this section have been by any of the High Courts.

122. 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.

Investment of general legacy, to be paid at future time.

The intermediate interest shall form part of the residue of the testator's estate.

Intermediate interest.

This is s. 302 of the Indian Succession Act. See *ante*, p. 299.

123. 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,

Procedure when no fund charged with, or appropriated to, annuity.

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.

This is s. 303 of the Indian Succession Act See the notes thereto, *ante*, p. 299.

124. 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 (if any) on his giving sufficient security for the payment of the if it shall become due.

...r to residuary ...e or contingent bequest.

This is s. 304 of the Indian Succession Act. The principle upon which it is based is pointed out in the note to that section, *ante*, p. 300.

125. 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 for life, with direction to invest in specified securities.

This is s. 306 of the Indian Succession Act.

126. Such conversion and investment as are contemplated by the last preceding section shall be made at such times and in such manner as the executor in his discretion thinks fit :

Time and manner of conversion and investment.

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 six per cent. per 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.

Interest payable until investment.

This is s. 307 of the Indian Succession Act, the rate of interest, however, being altered from 4 per cent. to 6 per cent.

See the notes to s. 307 of the Indian Succession Act, *ante*, p. 301.

127. Where, by the terms of a bequest, the legatee is entitled to the immediate payment or possession of the money or thing bequeathed, but is a minor, and there is no direction in the will to pay it to any person on his behalf, the executor or administrator shall pay or deliver the same into the Court of the District Judge by whom, or by whose District Delegate, the probate was, or letters of administration with the will annexed were, granted, to the account of the legatee, unless the legatee 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 ;

Procedure where minor entitled to immediate payment or possession of bequest, and no direction to pay to person on his behalf.

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.

This is s. 308 of the Indian Succession Act.

See s. 32 of Act XVIII of 1864 (The Official Trustee's Act), and the notes to s. 308 of the Indian Succession Act, *ante*, p. 302.

CHAPTER XI.

OF THE PRODUCE AND INTEREST OF LEGACIES.

Legatee's title to produce of specific legacy

128. 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*.

(*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.

This is s. 309 of the Indian Succession Act.

See Williams on Executors, 1429.

y legatee's to produce of residuary fund.

129. The legatee under a general residuary bequest is entitled to the produce of the residuary fund from the testator's death.

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.

Illustrations.

(*a.*) The testator bequeaths the residue of his property to *A*, a minor, to be paid to him when he shall complete the age of 18. The income from the testator's death belongs to *A*.

(*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.

This is s. 310 of the Indian Succession Act.

130. 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 fixed for payment of general legacy.

Exceptions.—(1.) Where the legacy is bequeathed in satisfaction of a debt, interest runs from the death of the testator.

(2.) Where the testator was a parent or a more remote ancestor of the legatee, or has put in the place of a parent of the legatee, the shall bear interest from the death of the testator.

(3.) Where a sum is bequeathed to a minor with a direction to pay for his maintenance out of it, interest is payable from the death of the testator.

This is s 311 of the Indian Succession Act. See the note thereto, *ante*, pp. 304-5.

131. Where a time has been fixed for the payment of a general legacy, interest begins to run from the time so fixed.

Interest when time fixed.

The interest up to such time forms part of the residue of the testator's estate.

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, or unless the will contains a direction to the contrary.

This is s. 312 of the Indian Succession Act, *ante*, p. 305.

Rate of interest.

132. The rate of interest shall be six per cent. per annum.

In the corresponding section (313) of the Indian Succession Act, the rate of interest is four per cent.

No interest on arrears of annuity within first year after testator's death.

133. No interest is payable on the arrears of an annuity within the first year from the death of the testator, although a period earlier than the expiration of that year may have been fixed by the will for making the first payment of the annuity.

This is s. 314 of the Indian Succession Act.
See s. 118 of this Act, *supra*, p.

Interest on sum to be invested to produce annuity.

134. 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.

This is s. 315 of the Indian Succession Act.

CHAPTER XII.

OF THE REFUNDING OF LEGACIES.

Refund of legacy paid under Judge's orders.

135. An executor who has paid a legacy under the order of a Judge, is entitled to call upon the legatee to refund in the event of the assets proving insufficient to pay all the legacies.

This is s. 316 of the Indian Succession Act.

No refund if paid voluntarily.

136. 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.

This is s. 317 of the Indian Succession Act. See notes to that section, *ante*, p. 306.

137. 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, under the second clause of this section, been allowed 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 becomes due on performance of condition within further time allowed.

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 is requisite to make up for the delay caused by such fraud.

This section embodies ss. 318 and 124 of the Indian Succession Act.

138. 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 compellable to refund in proportion.

This is s. 319 of the Indian Succession Act.

139. Where an executor or administrator has given such notices as the High Court may, by any general rule to be made from time to time, prescribe, 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

Distribution of assets.

so distributed to any person of whose claim he has not 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.

Creditor may follow assets.

This is s. 320 of the Indian Succession Act, with a slight alteration as to the notices to be given. Under the Succession Act, the notices instead of being such as the "High Court may, by any general rule to be made from time to time prescribe," are to be such as would have been given by the High Court in an administration-suit.

The form for advertisements prescribed by the High Court at Calcutta will be found in the notes to s. 320 of the Indian Succession Act, *ante*, p. 308.

140. A creditor who has not received payment of his debt may call upon a legatee who has received payment of his legacy to refund, whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies, and whether the payment of the legacy by the executor was voluntary or not.

Creditor may call upon legatee to refund.

This section corresponds with s. 321 of the Indian Succession Act. Under the latter section, however, a limitation as to the time within which the creditor might call for the refund was provided, *viz.*, "within two years after the death of the testator, or one year after the legacy has been paid."

Now, suits under ss. 139 and 140 of this Act, and under ss. 320 and 321 of the Indian Succession Act, are governed by the General Limitation Act, as amended by s. 156 (*post*) of this Act. See Act XV of 1877, sched. ii, art. 43.

141. 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.

legatee, not sa- compelled to under section

This is s. 322 of the Indian Succession Act. See the note thereto, p. 309-10.

142. 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.

When unsatisfied legatee must first proceed against executor, if solvent.

This is s. 323 of the Indian Succession Act. See notes thereto, *ante*, p. 310. See also s. 136 of this Act, *supra*, p. 370.

143. 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.

Limit to refunding of one legatee to another.

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.

This is s. 324 of the Indian Succession Act.

144. The refunding shall in all cases be without interest.

Refunding to be without interest.

This is s. 325 of the Indian Succession Act.

145. 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.

Residue after usual payments to be paid to residuary legatee.

This is s. 326 of the Indian Succession Act.

CHAPTER XIII.

OF THE LIABILITY OF AN EXECUTOR OF ADMINISTRATOR FOR DEVASTATION.

146. 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.

Liability of executor or administrator for devastation.

Illustrations.

(*a.*) The executor pays out of the estate an unfounded claim. He is liable to make good the loss caused by the payment.

(*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 caused by the neglect.

(*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.

As to *devastavit* by co-executors, improper sales by executors, and loss arising from negligent dealing with the assets, see note (*ante*, p. 311, *et seq*) to s. 327 of the Indian Succession Act, from which this section has been taken.

For neglect to get in any part of property.

147. When an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount.

Illustrations.

(*a.*) The executor absolutely released 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 so lost.

(*b.*) The executor neglects to sue for a debt till the debtor is liable 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 of the debt.

This is s. 328 of the Indian Succession Act.

As to carrying on a trade with the assets of the deceased, see note to the Succession Act, *ante*, pp. 313-4.

CHAPTER XIV.

MISCELLANEOUS.

Provisions applied to administrator with will

148. In Chapters VIII, IX, X, and XII of this Act the provisions as to an executor shall apply also to an administrator with the will annexed.

Saving-clause.

149. Nothing herein contained shall—

(*a*) validate any testamentary disposition which would otherwise have been invalid ;

(*b*) invalidate any such disposition which would otherwise have been valid ;

(*c*) deprive any person of any right of maintenance to which he would otherwise have been entitled ; or

(*d*) affect the rights, duties, and privileges of the Administrator-General of Bengal, Madras or Bombay.

Compare s. 3 of the Hindu Wills Act, and see *Alangamanjori Dabee* v. [illegible], 9 C. L. R., 121.

As to the duties and privileges of the Administrator-General, Act II of 1874, and Act IX of 1881

Probate and administration in case of persons exempted from Succession Act, to be granted only under this Act.

150. No proceedings to obtain probate of a will or letters of administration to the estate of any Hindu, Muhammadan, Buddhist or person exempted under section 332 of the Indian Succession Act, 1865, shall be instituted in any Court in British India except under this Act.

As to what persons have been held to be exempted under s. 332 of the Indian Succession Act, see notes, p. 315, *ante*.

Repeal of portions of Act XXVII of 1860.

151. In Act No. XXVII of 1860 (*an Act for facilitating the collection of debts on successions, and for the security of parties paying debts to the representatives of deceased persons*), sections 15 and 16 and the proviso to section 13 shall be repealed.

Grant of probate or [illegible]tration to su[illegible] certificate un[illegible] XXVII of 1860, or Bombay Regulation VIII of 1827.

152. The grant of probate or letters of administration under this Act in respect of any property shall be deemed to supersede any certificate previously granted in respect of the same property under the said Act No. XXVII of 1860, or Bombay Regulation No. VIII of 1827; and when, at the time of the grant of such probate or letters, any suit or other proceeding instituted by the holder of such certificate regarding such property is pending, the person to whom such grant is made shall, on applying to the Court in which such suit or proceeding is pending, be entitled to take the place of such holder in such suit or proceeding:

Provided that, when any certificate is superseded under this section, all payments made to the holder of such certificate in ignorance of such supersession shall be held good against claims under the probate or letters of administration.

Amendment of Court-fees Act.

153. In the Court-fees Act, 1870, Schedule I, Nos. 11 and 12, in the third column, after the words "amount or value," the following shall be inserted, namely:—

"Provided that when, after a certificate has been granted as aforesaid in respect of any estate, probate or letters of administration is or are granted in respect of the same estate, the fee payable in respect of such latter grant shall be reduced by the amount of the fee paid in respect of the former grant."

Amendment of Hindu Wills Act.

154. The following amendments shall be made in the Hindu Wills Act, 1870 (namely):—

(*a.*) For the portion of section two commencing with the words "sections one hundred and seventy-nine," and ending with the words "administrator with the will annexed," the words "and section one hundred and eighty-seven" shall be substituted.

(*b.*) The third clause of section three and the last clause of section six shall be repealed.

(*c*). In section six, for the words "one hundred and three and one hundred and eighty-two" the words "and one hundred and three" shall be substituted.

Validation of grants of probate and administration made in British Burma.

155. All grants of probate of the will or letters of administration to the estate of any deceased Hindu, Muhammadan or Buddhist, or any person exempted under section 332 of the Indian Succession Act, 1865, which, before this Act comes into force, have been made in British Burma, shall, whenever such grant would have been lawful if this Act had been in force, be deemed to have been made in accordance with law.

This section was intended to remove all doubt as to the validity of certain grants of probate and administration made in British Burmah. See Statement of Objects and Reasons, dated the 16th May.

See *In the Goods of Kokya Dine*, 2 B. L. R. (A. C.), 79; (S. C.) 10 W. R., 417; *In the Goods of Fuckeroodeen Adam Saw*, 11 W. R., 413.

156. In the second schedule to the Indian Limitation Act, 1877, No. 43, after the figures "321" the following shall be inserted, namely—"or under the Probate and Administration Act, 1881, section 139 or 140."

Amendment of Act XV of 1877.

THE REGIMENTAL DEBTS ACT, 1863.

(STATUTE 26 AND 27 VICT., C. 57.)

An Act to consolidate and amend the Acts relating to the payment of Regimental Debts, and the distribution of the Effects of Officers and Soldiers in case of Death, and to make like Provision for the cases of Desertion and Insanity, and other Cases.

[21*st July*, 1863.]

WHEREAS it is expedient to consolidate and amend the provisions now in force relating to the payment of regimental debts, and the distribution of the e of officers and soldiers dying on service, and provisions having been found beneficial, it is also expedient to make like provision for the security and application of the effects of deserters and others, and of officers and soldiers becoming insane on service :

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Short title.

1. This Act may be cited as the Regimental Debts Act, 1863.

Interpretation of terms.

2. In this Act—

The term 'officer' means (except where it is otherwise expressed) a commissioned officer of Her Majesty's army, or of Her Majesty's *Indian* army :

The term 'soldier' means (except where it is otherwise expressed) a soldier of Her Majesty s
a *European* soldier of h
including a warrant and a non-commissic

The term 'representation' includes probate letters of administration, with or without
ed, and the corresponding documents or
according to the law of *Scotland*, or other law in in any place where this Act operates :

The term 'representative' means any person taking out representation :

The term 'the Secretary of State for War' means such one of Her Majesty's Principal Secretaries of State for the time being as Her Majesty thinks fit to intrust with the seals of the War Department :

The term '*India*' means the territories for the time being vested in Her Majesty under the Act of the year 1858, "for the better government of *India*" :

21 & 22 Vict., c. 106.

The term 'the Secretary of State for *India* in Council' means one of Her Majesty's principal Secretaries of State acting with the Council of *India* under that Act :

The term 'person' includes a corporation and any body of persons.

3. The enactments described in the schedule to this Act shall be repealed ; but this repeal shall not affect the past operation of any such enactment, or anything already done, or any right, title, obligation, or liability already accrued thereunder, or any remedy or proceeding for the enforcement thereof.

Repeal of enactments in schedule.

PART I.—DEATH ON SERVICE.

Preferential Charges.

4. 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 :—

Definition of Preferential Charges on Property—Military Debts, &c.

(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 eighteen 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.

Surplus only of personal estate to be deemed personal estate.

5. The surplus only of the personal property of an officer or soldier dying on service, remaining over after payment of preferential charges, shall be considered the personal estate of the deceased, with reference to the calculation of probate duty, or of any other tax or percentage, or for any of the purposes of administration or distribution.

Questions respecting amount, payment, &c., of preferential charges to be decided by Secretary of State, or in *India* by Military Secretary to Government of Presidency.

6. If in any case a doubt or difference arises as to any particular expense or debt being a preferential charge or not, —or as to any alleged preferential charge having been in fact incurred, or being due, in the whole or in part, or not,—or as to the priority among or payment of any preferential charges, where the property is insufficient to pay all in full, or where those of one class exceed the amount allowed for that class,—or otherwise in relation to any preferential charge or the payment thereof,—the decision of the Secretary of State for War, where the death occurs elsewhere than in *India*, and of the Military Secretary to the Government of the Presidency in which the deceased was quartered, where the death occurs in *India*, or of such officer or person as the Secretary of State or Military Secretary respectively

deputes by writing under his hand to act for him in this behalf, shall be final, and shall be binding on all persons for all purposes.

Collection and Disposal of Effects.

On death of officer or on service, committee of officers to secure effects.

7. Immediately on the death of an officer or soldier on service, such committee of officers as may be prescribed by Royal Warrant, according to the circumstances of different cases, hereinafter called the Committee of Adjustment, shall secure all such of his effects as—

Where the death occurs in the *United Kingdom*, are in camp or quarters; and

Where the death occurs out of the *United Kingdom*, are within the station, colony, or command.

If preferential charges not paid, power to committee to sell and convert effects, and to get in credits, and, after payment of expenses, to secure surplus.

8. Provided, that if the representative of the deceased, or his widow (if any), or any of his next-of-kin, pays in full the preferential charges, the Committee of Adjustment shall not further interfere in relation to the property.

If such payment is not made, then, within one month after the death, the Committee of Adjustment may and shall, without any representation taken out, and as if they were the representatives of the deceased, and to the exclusion of all other authorities and persons whomsoever, sell or convert into money such parts of the effects of the deceased as do not consist of money,—and also where the death occurs out of the *United Kingdom*, get in and give receipts (which shall be effectual discharges) for all or any of the credits forming part of the estate of the deceased, and being payable or recoverable in *India*, or in the colony or possession in which the deceased was quartered (as the case may be), and, if they think fit, sue for and recover any of such credits,—and, after paying thereout the expenses attending the discharge of their duties, shall pay thereout the preferential charges, and secure the surplus of the

effects, or effects and credits, as remaining over after all such payments

In *India*, power for committee to deliver over effects to Administrator-General.

9. Where the death occurs in *India*, the Committee of Adjustment may, in such cases, under such circumstances, and at such time or

Royal Warrant, according to the circumstances of different cases, deliver over the effects secured by them to the Administrator-General for the Presidency in which the deceased was quartered.

Disposal of Surplus.

Remittance of surplus by committee.

10. The Committee of Adjustment shall, according to the circumstances of the case, remit or lodge the surplus aforesaid to or in the hands of such Paymaster or other officer or person, at such time or times, in such manner, and together with such accounts, vouchers, reports, and information, as may be prescribed by Royal Warrant.

As to the payment of surplus where deaths in *India* or elsewhere.

11. Where the death occurs elsewhere than in *India*, or the death occurs in *India*, the deceased being (in the latter case) a soldier of Her Majesty's army, then the Paymaster or other officer or person aforesaid shall dispose of the surplus as follows :—

(1.) Where the amount exceeds one hundred pounds, he shall pay it over to the representative of the deceased, if present at head-quarters ; and if there is none, shall forthwith remit it to the Secretary of State for War :

(2.) Where the amount does not exceed one hundred pounds, it shall not be necessary for any purpose that representation to the deceased be taken out ; but if representation is taken out, such Paymaster or other officer or person shall pay the amount over to the representative, if present at head-quarters :

(3.) Where the amount does not exceed one hundred pounds, and representation is not taken out, then such Paymaster or other officer or person

shall dispose of the amount, or part thereof, (in such manner as may be prescribed by Royal Warrant for such cases,) for the benefit of the widow and of the children or other near relatives (if any) of the deceased, or of some of such persons being present at head-quarters; and if there are no such persons, or any part of the amount aforesaid is not so disposed of for their benefit, he shall forthwith remit the whole amount, or the part thereof not so disposed of (as the case may be), to the Secretary of State for War.

Provision where death occurs in *India*, the deceased not being a soldier.

12. Where the death occurs in *India*, the deceased not being a soldier of Her Majesty's army, the following provisions shall take effect :—

(1.) The Paymaster or other officer or person aforesaid shall, as soon as may be after receiving the surplus aforesaid, publish such notice (stating the amount of the surplus and other particulars respecting the deceased and his property) as may be prescribed by Royal Warrant, together with a notice stating that all claims by creditors against the property of the deceased are to be lodged with such Paymaster or other officer or person, who shall retain the surplus for two months after the first publication of such Gazette notice as aforesaid, and shall receive and record all claims lodged with him accor lingly :

(2.) If claims are so lodged, not exceeding in the whole such absolute amount, or such proportion of the surplus as may be prescribed by Royal Warrant, according to the circumstances of different cases, then such Paymaster or other officer or person shall, at the expiration of the said two months, proceed to discharge the demands of the claimants who have lodged claims with him, unless, under the special circumstances of the case of the deceased, it appears to him inexpedient or unjust to do so :

(3.) In that case, or in case the claims lodged exceed in the whole the absolute amount or the proportion aforesaid, then such Paymaster or other officer or person shall, without discharging those claims, or any of them, transfer the surplus aforesaid to the Administrator-General for the Presidency:

(4.) Where such Paymaster or other officer or person does not so transfer the surplus, he shall dispose thereof, or of so much thereof as remains after the discharge of any claims, as follows :—

Where the amount exceeds one hundred pounds, he shall pay it over to the representative of the deceased in *India*, if any ;

Where the amount does not exceed one hundred pounds, it shall not be necessary for any purpose that representation to the deceased be taken out in *India* ; but if representation is taken out there, such Paymaster or other officer or person shall pay the amount over to the representative in *India* ;

Where the amount does not exceed one hundred pounds, and representation in *India* is not taken out, such Paymaster or other officer or person shall dispose of the amount, or part thereof, in *India*, (in such manner as may be prescribed by Royal Warrant for such cases,) for the benefit of the widow and of the children or other near relatives (if any) of the deceased, or of some of such persons, being in *India* ;

(5.) Subject to the foregoing provisions, such Paymaster or other officer or person shall, at the expiration of such time, not exceeding in any case six months, as may be prescribed by Royal Warrant, remit the surplus, or so much thereof as remains in his hands after discharging any claims, from *India* to *England*, as follows :—

In the cases of officers of Her Majesty's army constituting the staff corps of the three Presidencies, and in the cases of officers and *European* soldiers of Her Majesty's *Indian* army, to the Secretary of State for *India* in Council—

In other cases, to the Secretary of State for War.

Disposal of Residue by Secretary of State.

13. The Secretary of State for War, or the Secretary of State for *India* in Council, as the case may be, on receiving any such surplus or part of a surplus as is hereinbefore directed to be remitted, shall cause an account to be made up, as soon as may be, of the total

On receipt of surplus at war or *India* office, notices to be published in *London Gazette*, &c., as to amount to credit

amount to the credit of the deceased, including the amount of the surplus or part of a surplus so remitted, together with all arrears of pay, batta, grants, and other allowances in the nature thereof, and thereupon shall cause to be published, as soon as conveniently may be, in the *London Gazette*, and also in any newspaper or otherwise as may seem fit, a notice stating the total amount to the credit of the deceased as aforesaid, hereinafter called the residue, and such other particulars respecting the deceased and his property as may seem fit, together with a notice stating the mode in which any application respecting the residue is to be made to the Secretary of State for War, or to the Secretary of State for *India* in Council, as the case may be.

Residue exceeding £100 to be paid to representative of deceased.

14. Where the residue exceeds one hundred pounds, the Secretary of State for War, or the Secretary of State for *India* in Council, as the case may be, shall dispose of the residue by paying it over to the representative of the deceased.

Residue not exceeding £100 to be paid to representative, if any.

15. Where the residue does not exceed one hundred pounds, it shall not be necessary for any purpose that representation to the deceased be taken out; but in any case the Secretary of State for War, or the Secretary of State for *India* in Council, as the case may be, may, if it seems fit, require representation to be taken out; and if on that requisition or otherwise, representation is taken out, then he shall dispose of the residue by paying it over to the representative.

Where residue does not exceed £100 and no representation, War or *India* office empowered to pay it over for benefit of widow, &c., or to ——— it for benefit of children, &c.

16. Where the residue does not exceed one hundred pounds, and representation is not taken out, then, after the expiration from the first publication of the required notice in the *London Gazette* of three months in the case of an officer, and of one month in the case of a soldier, the Secretary of State for War, or the Secretary of State for

India in Council, as the case may be, shall dispose of the residue as follows :—

(1.) He shall, if he thinks fit, pay the over to any person showing herself or himself, to the satisfaction of the Secretary of State for War, or the Secretary of State for *India* in Council, as the case may be, to be the widow of the deceased, or to be the child or any relative of the deceased, or to be entitled to take out representation to the deceased,—to the end that the residue may be applied by the person to whom it is so paid over in due course of administration, and the same shall be so applied accordingly (for which application the Secretary of State for War, or the Secretary of State for *India* in Council, as the case may be, may require such security as seems fit) :

(2.) Or else, where the deceased leaves any child or near relative him surviving, the Secretary of State for War, or the Secretary of State for *India* in Council, as the case may be, shall retain the residue in his hands on behalf of such child or near relative, and shall invest the residue, or any part thereof, in such manner as may be prescribed by Royal Warrant, and shall apply the sums invested, and the income thereof, or any part thereof respectively, from time to time, for the maintenance, education, or advancement, or otherwise for the benefit of such child or near relative, in such manner as may seem fit, subject to such regulations as may be laid down by Royal Warrant.

Debts.

17. Notwithstanding anything hereinbefore contained, where the residue does not exceed one hundred pounds, and representation to the deceased is not taken out, the Secretary of State for War, or the Secretary of State for *India* in Council, as the case may be, shall, before disposing of the residue or any part thereof, in manner aforesaid,—or after so disposing of the residue or any part thereof, if and so far as the disposition thereof is capable of revocation,—apply the

Provision in last-mentioned case for payment of debts out of residue.

residue, or so much as may be requisite, in or towards payment of any debt of the deceased of which he has notice, subject to the following conditions :—

First.—That the debt accrued due within three years before the death :

Second.—That payment of it is claimed within two years after the death :

Third.—That the claimant proves the debt to the satisfaction of the Secretary of State for War, or of the Secretary of State for *India* in Council, as the case may be.

Any person claiming to be a creditor of the deceased shall not be entitled to obtain payment of his debt out of any money that may, under this Act, be in the hands of the Secretary of State for War, or of the Secretary of State for *India* in Council, by any means or proceedings whatever, except by means of a claim lodged with such Secretary of State, and proceedings thereon, under and according to this Act.

Nothing in the present section shall prejudicially affect the claim of any creditor in respect of a debt incurred before the commencement of this part of this Act.

Undisposed of Residues.

Residues undisposed of for 6 years to be applied towards compassionate fund.

18. If in any case the residue or any part thereof remains, for one year after the first publication of the required notice in the *London Gazette*, in the hands of the Secretary of State for War, or of the Secretary of State for *India* in Council, as the case may be, undisposed of or unappropriated, then, as soon as conveniently may be after the end of that year, the Secretary of State for War, or the Secretary of State for *India* in Council, as the case may be, shall cause to be published in the *London Gazette* a notice similar to the original required notice, *mutatis mutandis*, and so for six successive years from the publication of the original notice ; and if in any case the residue, or any part thereof, remains in the hands of the Secretary of State for War, or the Secretary of State for *India* in

Council, as the case may be, undisposed of or unappropriated for six months after the publication of the last of such required notices in the *London Gazette*, then, at the expiration of the said six months, he shall apply the same, together with any income or accumulations of income accrued therefrom, in such manner in or towards the creation or maintenance of such compassionate or other fund for the benefit of widows and children or other near relatives of soldiers dying on service, as may be prescribed by Royal Warrant.

Provided, that the application under the present section of any residue, or part of a residue, undisposed of or unappropriated as aforesaid, shall not be deemed to bar any claim of any person to the same, or any part thereof, that may be established at any time after such application.

Medals and Decorations.

Medals and decorations excepted;

19. Medals and decorations belonging to an officer or soldier dying on service shall not be considered to be comprised in the personal estate of the deceased with reference to the claims of creditors or for any of the purposes of administration under this Act or otherwise; and, notwithstanding anything in this or any other Act contained, the same, when secured by the Committee of Adjustment, shall be held and disposed of according to regulations laid down by Royal Warrant.

To be disposed of according to Royal Warrant.

Exception as to Regimental Paymaster.

Special provision for case of death of Regimental Paymaster.

20. The case of a Regimental Paymaster dying on service shall, notwithstanding anything hereinbefore contained, be provided for as follows:—

(1.) That cases shall be deemed wholly excepted out of the foregoing provisions of this Act, save so far as they define and give preference to and regulate the payment of and provide for decisions respecting preferential charges, and as they relate to the duties

and powers of the Committee of Adjustment, and to medals and decorations :

(2.) The duties and powers of the Committee of Adjustment in relation to the property shall nevertheless, in the case of a Regimental Paymaster, be deemed to arise in full, immediately and unconditionally, on the death, and to continue notwithstanding the payment of the preferential charges by any person :

(3.) Money in the possession or under the control of a Regimental Paymaster at his death shall not be considered to be comprised in his effects for the purposes of this Act :

(4.) The surplus in the hands of the Committee of Adjustment shall, in the case of a Regimental Paymaster, be dealt with by them as may be prescribed by Royal Warrant, and not according to the foregoing provisions of this Act.

Administrators-General and other Official Administrators.

Restriction on interposition of official administrators.

21. An Administrator-General for a Presidency in *India*, or a Registrar of any Court in *India* or in any of Her Majesty's colonies or possessions abroad, or any other Official Administrator, notwithstanding any law regulating his office independently of this Act, shall not interpose in any manner in relation to any property of an officer or soldier dying on service, except in the cases expressly provided for in this Act, or unless expressly required to do so by a Committee of Adjustment, or some other officers or persons acting under this Act.

Duties of administrators.

Where, under this Act, any property comes to the hands of any such Administrator-General, Registrar, or other Official Administrator, he shall administer the same in accordance with the provisions of this Act relating to preferential charges and the other provisions of this Act, and subject thereto, according to the law regulating his office independently of this Act.

Where any money coming, under this Act, to the hands of any such Administrator-General, remains in

his hands after discharge of all debts and liabilities, he shall remit the same to the Secretary State for *India* in Council at such time and in such manner as he directs, to be retained or to be paid over to the Secretary of State for War, as the case may require, and to be disposed of according to the provisions of this Act, as the residue or part of the residue of the property of the deceased.

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 perferential 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.

Miscellaneous.

Money remitted not to be assets in place where remitted to.

22. Any property of an officer or soldier dying on service, coming under this Act to the hands of any Paymaster or other officer or person, shall not, by reason of so coming, be deemed assets or effects at the place in which that Paymaster or other officer or person is stationed or resides, and it shall not be necessary by reason thereof that representation should be taken out in respect of that property for that place.

Where, under this Act, any such property is to be paid or delivered over to the representative of a deceased officer or soldier or other person entitled to receive the same,—

if such payment or delivery is to be made in *India*, then the Military Secretary to the Government of the Presidency in which the deceased was quartered;

and if such payment is to be made elsewhere than in *India*, then the Secretary of State for War, or the Secretary of State for *India* in Council, as the case may be,—

may order that such property be transmitted to any other place where the same can be more conveniently paid or delivered over as aforesaid; and the obedience to any such order by any Paymaster or other officer

or person in whose hands such property is, shall be a sufficient discharge to him, and he shall not be liable in any manner by reason of such property having been in his hands and having been transmitted under any such order.

Deduction of arrears of subscription to military and orphan funds.

23. Nothing in this Act shall be deemed to prevent the Secretary of State for *India* in Council, on the death of an officer of Her Majesty's *Indian* army, from deducting in the Pay Office, from any arrear of pay due to the deceased, the amount of any arrears of subscription due by the deceased to the military and orphan funds, or either of them.

Exemption from duty.

24. The personal estate of an officer or soldier dying on service in *India*, not exceeding one hundred pounds after payment of preferential charges, and administered and disposed of under this Act without representation being taken out, shall not be liable to the payment of any duty either in *India* or in the *United Kingdom*; but this provision shall not affect any exemption from duty existing independently hereof.

Creditor administering not entitled to claim property.

25. A creditor, as such, shall not be deemed a person entitled to take out representation to the deceased within the meaning of this Part of this Act; nor shall a creditor taking out representation, as such, be entitled, by virtue of such representation, to claim from the Secretary of State for War, or the Secretary of State for *India* in Council, any part of the property of the deceased.

Deposit in Court of Probate, &c., of original wills in hands of Secretary of State, and declarations of intestacy.

26. Where any original will of an officer or soldier dying on service comes to the hands of the Secretary of State for War, or of the Secretary of State for *India* in Council, and representation under the same is not taken out, then the Secretary of State for War, or the Secretary of State for *India* in Council, as the case may be, may cause the same to be deposited as follows :—

Where the domicile of the testator was in *England*

or in *India*, or in any of Her Majesty's colonies or possessions abroad, or in any foreign country, then in the place for the time being appointed in *London* or *Middlesex* for the deposit of original wills brought into the Court of Probate ;

Where the domicile of the testator was in *Ireland*, then in the place for the time being appointed in *Dublin* for the deposit of original wills brought into the Court of Probate ;

Where the domicile of the testator was in *Scotland*, then in the office of Commissary Clerk of the Commissary Court of the County of *Edinburgh* ;

Where an officer or soldier dies on service intestate, and under this Act any residue of his property comes to the hands of the Secretary of State for War, or of the Secretary of State for *India* in Council, for disposal, and representation to the deceased is not taken out, then the Secretary of State for War, or the Secretary of State for *India* in Council, as the case may be, may, if it seems fit, cause a declaration of the intestacy of such officer or soldier to be deposited in the place or office where the original will of such officer or soldier (if any) would be deposited as aforesaid.

In every such case the Secretary of State for War, or the Secretary of State for *India* in Council, as the case may be, may cause to be deposited, together with such original will or declaration of intestacy, an inventory showing the personal property of the deceased, and the application thereof, as far as the same may be known.

Where the original will of any officer or soldier who has, before the commencement of this Part of this Act, died on service, is in the hands of the Secretary of State for War, or of the Secretary of State for *India* in Council, *he may, if it seems fit, at any time cause the same to be deposited* in the place or office where the original will of such officer or soldier would be deposited as aforesaid if he had died after the commencement of this Part of this Act.

Every such original will, declaration of intestacy, and inventory shall be preserved and dealt with, and may be inspected, subject and according to any

general or other rules or orders for regulating such preservation, dealing, and inspection, and for fixing any fees to be payable in respect thereof, as may be from time to time made in that behalf by the Court, Judge, or other authority empowered to make general or other rules or orders for like purposes in relation to other documents deposited in the same place or office.

PART II.—DESERTION AND OTHER CASES.

[This Part, consisting of ss. 27—30, inclusive, it is unnecessary to reproduce here.]

PART III.—INSANITY.

[This Part, consisting of ss. 31—34, inclusive, deals with the management of the effects of insane persons, and may be omitted here.]

PART IV.—GENERAL PROVISIONS.

Validity of payments, sales, &c., under this Act.

35. Every payment or application of money, and every sale or other disposition of property, made by the Secretary of State for War, or by the Secretary of State for *India* in Council, or by any Committee of Adjustment, or by any Paymaster or other officer or person, in pursuance of this Act or of any Royal Warrant for carrying this Act into effect, shall be good and valid as against all persons whomsoever; and every such Secretary of State, and every officer belonging to any such Committee, and every such Paymaster, officer, or person as aforesaid, shall be, by virtue of this Act, absolutely discharged from all liability in respect of the money or other property so paid, applied, or disposed of.

Indemnity to officers and others acting under it.

Further regulations by Royal Warrant.

36. Her Majesty may, from time to time, by warrant under the Royal Sign Manual, do all such things as are hereinbefore directed or authorized to be done by Royal Warrant, and also prescribe such regulations as may seem fit, for the better execution of any of the purposes of this Act.

Every Royal Warrant made under this Act shall be laid before both Houses of Parliament within fourteen

days after the making thereof, if Parliament is then sitting; and if not, then within fourteen days after the commencement of the next sitting of Parliament.

Commencement of Act.

37. This Act shall, with respect to the making of any Royal Warrant under it, take effect from its passing, and in all other respects shall take effect from the time appointed for its commencement in the Royal Warrant first made under it.

SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Title.	Extent of Repeal.
Geo. III, c. 73..	An Act for regulating the payment of regimental debts and the distribution of the effects of officers and soldiers dying on service, and the receipt of sums due to soldiers.	Sections 1, 2, and 3.
6 Geo. IV, c. 61 ...	*An Act to amend two Acts of the fifty-eighth year of His late Majesty, for regulating the payment of regimental debts and the distribution of the effects of officers and soldiers dying on service, and the receipt of sums due to soldiers; and of the fourth year of His present Majesty, for punishing mutiny and desertion of officers and soldiers in the service of the East India Company.*	The whole.
11 Geo. IV, & Will. IV, c. 41 ...	An Act to make further regulations with respect to army pensioners.	Section 5, except as to pension or prize money.
20 & 21 Vict., c. 66	An Act for punishing mutiny and desertion of officers and soldiers in the service of the East India Company, and for regulating in such service the payment of regimental debts and the distribution of the effects of officers and soldiers dying in the service.	Sections 61 to 66, both inclusive.
& 27 Vict., c. 8..	An Act for punishing mutiny and desertion, and for the better payment of the army and their quarters.	Sections 93 to 102, both inclusive.

The following Warrant and Regulations have been issued under Statute 26 and 27 Vict., c. 57 :

ROYAL WARRANT AND REGULATIONS

Under the Regimental Debts Act, 1863.

VICTORIA R.

26 & 27 Vict , c. 57.

Whereas it is by the Regimental Debts Act, 1863, enacted (among other things) that we may, from time to time, by warrant under our Royal Sign Manual, do all such things as are in that Act directed or authorized to be done by Royal Warrant, and also prescribe such regulations as may seem fit for the better execution of any of the purposes of the Act :

And whereas it is by the same Act further enacted that the Act should, with respect to the making of any Royal Warrant under it, take effect from its passing, and in all other respects should take effect from the time appointed for its commencement in the Royal Warrant first made under it ; and no such Warrant has heretofore been made :

Now, therefore, we do by this Warrant, under our Royal Sign Manual, in pursuance of the said Act, and by virtue and in exercise of the powers thereby vested in us, and of every other power enabling us in this behalf, declare it to be our will and pleasure—

I. That this our Royal Warrant and the Regulations hereunto annexed, to be administered and interpreted by our Secretary of State for War and our Secretary of State for *India* in Council (as the case may require), shall, subject to and in conjunction with the Regimental Debts Act, 1863, be the sole and standing authority on the matters in these our Royal Warrant and Regulations comprised.

II. That the Regimental Debts Act, 1863, and these our Royal Warrant and Regulations, shall commence and take effect on the first day of March, 1865.

III. That where and so far as the Regimental Debts Act, 1863, or these our Royal Warrant and Regulations do not particularly prescribe the manner in which any sum of money is to be disposed of or invested, then, and in every such case, until by

further Warrant under our Royal Sign Manual we otherwise direct, the same shall be disposed of or invested as if the Regimental Debts Act, 1863, had not been passed.

IV. That, until by further Warrant under our Royal Sign Manual we otherwise direct, medals and decorations belonging to an officer or soldier dying on service shall be disposed of as our Secretary of State for War may, according to the circumstances of different cases, think fit.

Given at our Court at St. James's, the 30th day of September, 1864, in the twenty-eighth year of our reign.

By Her Majesty's command,

DE GREY AND RIPON.

REGULATIONS.

Preliminary.

1. *Terms used in these Regulations have the same meaning as they have when used in the Regimental Debts Act, 1863.*

I.—DEATH.

[*Section 7 of the Act.*]

2. Where the deceased was an officer employed on the staff, the Committee of Adjustment is to consist of two officers, to be appointed by the officer commanding on the station, one of whom is to be, if practicable, a field officer.

3. Where the deceased was an officer not employed on the staff, the Committee of Adjustment is to consist of the Major of the Regiment or the officer doing the Major's duty in his absence, and two other officers of the regiment not under the rank of Captain (unless officers of the rank or of the regiment cannot conveniently be had) to be appointed by the commanding officer of the regiment or by the officer commanding in the station.

4. Where the deceased was a soildier, the Committee of Adjustment is to consist of the officer com-

manding the troops or company to which the deceased belonged, and two other officers of the regiment to be appointed by the commanding officer.

[*Section* 8 *of the Act.*]

5. The Committee of Adjustment are, in all cases, as soon as practicable after the death, to make an inventory of the property, and an account of the debts and credits, of the deceased.

6. The inventory and account are to be made in duplicate, on the forms supplied, and each of the duplicates is to be certified by the Committee of Adjustment.

One of the duplicates is to be dealt with as hereafter in these regulations directed.

Where the death occurs in *India*, the second of the duplicates is to be sent to the Military Secretary to the Government of the Presidency in which the deceased was quartered, and is to be delivered by him to the Administrator-General for the Presidency in cases where § (3) of section 12 of the Act applies, and is to accompany the remittance of the surplus in cases where § (5) of the same section applies.

Where the death occurs elsewhere than in *India*, the second of the duplicates is to be kept with the regimental or other proper records.

7. The effects secured are to be kept in a place of security until duly sold or otherwise disposed of.

8. The effects secured are to be disposed of at fair and open auction at the most favorable opportunity,—in the case of an officer, in the presence of a member of the Committee of Adjustment; and in the case of a soldier, in the presence of the officer commanding the troop or company.

9. The practice of employing a non-commissioned officer in selling by auction such of the effects of a deceased officer or soldier as are not otherwise disposed of, is to be adhered to only in cases in which it appears to be most advantageous for the estate of the deceased.

When much trouble and responsibility are thrown upon the man by his being so employed, a commission, payable out of the effects, at a rate varying

from two to five per cent. on the amount of the produce of the sale, according to the greater or less degree of trouble and responsibility thereby caused, may be paid to him, and charged in the statement of the accounts of the deceased, the man's receipt for the amount being annexed thereto, together with the certificate of the commanding officer that his employment as auctioneer was most advantageous for the estate, and that the duties performed by him justify the remuneration charged.

10. Where the Committee of Adjustment withdraw from interference in relation to the property of the deceased in consequence of the representative of the deceased, or his widow, or some of his next-of-kin, paying in full the preferential charges, the Committee are forthwith to forward, together with the inventory and account, a report of the facts and circumstances as follows :—

Where the death occurs elsewhere than in *India*, or the death occurs in India, the deceased being (in the latter case) a soldier of the Her Majesty's army,—to the Secretary of State for War :

Where the death occurs in *India*, the deceased not being a soldier of Her Majesty's army,—to the Military Secretary to the Government of the Presidency in which the deceased was quartered.

[Section 9 of the Act.]

11. The Committee of Adjustment (in *India*) are to deliver over the effects secured by them to the Administrator-General, only in case they apprehend that considerable difficulty or delay may arise in or about the collection or realization of the effects and credits of the deceased, in consequence of the character of any investment, or in consequence of it being requisite to institute some action or suit in relation to the property of the deceased, or in case there is some other peculiar circumstance connected with the property making it in the judgment of the Committee expedient to take that course.

12. Where the Committee of Adjustment deliver over effects to an Administrator-General, they are to do so as soon as practicable after they have determined to take that course.

13. Where the Committee of Adjustment deliver over effects to an Administrator-General, they are forthwith to forward, together with the inventory and account, a report of the facts and circumstances as follows :—

Where the deceased was a soldier of Her Majesty's army,—to the Secretary of State for War.

In other cases,—to the Military Secretary to the Government of the Presidency in which the deceased was quartered.

[*Section* 10 *of the Act.*]

14. Where the deceased was an officer employed on the staff, and the death occurs elsewhere than in *India*, the Committee of Adjustment are to remit or lodge the surplus as follows :—

Where the death occurs in the *United Kingdom*, they are to remit the surplus to the General Agent for the recruiting service in *London:*

Where the death occurs at any station abroad (except in *India*), they are to lodge the surplus in the commissariat chest, taking a receipt for the amount from the officer in charge of the commissariat chest, which receipt, together with the inventory and the account of debts and credits, they are to transmit to the Secretary of State for War, making at the same time a full report of their proceedings to the officer commanding on the station.

15. Where the deceased was an officer not employed on the staff, and the death occurs elsewhere than in *India*, the Committee of Adjustment are to lodge the surplus in the hands of the Regimental Paymaster, who is to credit the amount in the next regimental pay list.

16. Where the deceased was a soldier of Her Majesty's army, then, whether the death occurs in *India* or elsewhere, the Committee of Adjustment are to lodge the surplus in the hands of the Regimental Paymaster, who is to credit the amount in the next regimental pay list or casualty return.

17. Where the death occurs in *India*, the deceased not being a soldier of Her Majesty's army, the Committee of Adjustment are to remit the

besides that stated in the casualty return, but not actually realized when the return is made.

If any such other property is known, a statement of the particulars thereof, made out in duplicate, is to be forwarded with the casualty return, and a memorandum is to be annexed thereto of the steps that have been taken for recovering or realizing the same under the Act.

If no such other property is known, a memorandum to that effect is to be made on the casualty return.

24. Where a deceased officer or soldier leaves a will, then, if representation is not taken out, the original will, and if representation is taken out, a complete and authenticated copy of the will, is to be sent along with the inventory, account, and other papers by the Committee of Adjustment, and is to be transmitted to the Secretary of State for War or the Secretary of State for *India* in Council, as the case may require.

Where the original will is sent, a complete and authenticated copy of it is to be first made under the direction of the Committee of Adjustment, and is to be kept with the regimental or other proper records.

[*Section* 12 *of the Act*, § (1).]

25. The notice under section 12 of the Act, § (1), is to be published by advertisement in the Government Gazette of the Presidency in which the deceased was quartered.

26. The notice is to be in the following form, with such variations as circumstances require:—

THE REGIMENTAL DEBTS ACT, 1863, SECTION 12, § (1).

Notice is hereby given—

First.—That information has been received by me of the deaths of the officers, non-commissioned officers, and soldiers named and described in the subjoined table.

Secondly.—That there have been received by me, as the surplus of their respective properties, the amounts set opposite their respective names in the same table.

Thirdly.—That all claims by creditors against the respective properties of the deceased are to be lodged with me within two calendar months from the date of this notice.

(Signed) A. B.,
Military Secretary.

Calcutta, the *day of*

(The table above referred to.)

[*Section* 12 *of the Act*, § (2).]

27. The power of the Military Secretary to discharge demands of such claimants as lodge claims with him is to arise in the following cases:—

(1.) If the surplus does not exceed 1,000 rupees, and the claims lodged do not exceed in the whole 10 per cent. on the amount of the surplus.

(2.) If the surplus exceed 1,000 rupees, and the claims lodged do not exceed in the whole the sum of 100 rupees.

[*Section* 12 *of the Act*, § (5).]

28. The Military Secretary is to make the prescribed remittance, under section 12 of the Act, § (5), within six calendar months after the first publication of the notice prescribed by § (1) of that section.

[*Section* 13 *of the Act.*]

29. The notice under section 13 of the Act is to be in the following form, with such variations as circumstances require :—

THE REGIMENTAL DEBTS ACT, 1863, SECTION 13.

Notice is hereby given—

First.—That information has been received at this office of the deaths of the officers, non-commissioned officers, and soldiers named and described in the subjoined table.

Secondly.—That there are now standing to their respective credits in the books of this office, as the residues of their respective properties, the amounts set opposite their respective names in the same table, which amounts comprise the sums received as the surplus of their respective properties, and all arrears of pay, batta, grants, and other allowances whatever.

Thirdly.—That any application respecting the said respective residues is to be made to the Secretary of State by letter addressed to the Under-Secretary of State at this office.

By order of the Secretary of State for War [*or* for *India* in Council.]

(Signed) A. B.

War office, Pall Mall, London, S.W.,
[*or, India Office, London*, S.W.]
The day of

(The table previously referred to.)

No.	Christian name and surname in full of officer, non-commissioned officer, or soldier deceased.	Branch of service to which deceased belonged.	No. of regiment.	Rank of deceased.	Place of death.	Date of death.	Amount of residue.	Whether deceased known to have left a will or not.	Other particulars respecting deceased and his property: and remarks.	No.
1										1
2										2
3										3
4										4

[*Section* 20 *of the Act.*]

30. In the case of a regimental Paymaster, the Committee of Adjustment is to consist of the Commanding Officer, the Quartermaster, and the senior Captain (present at head-quarters) of the regiment.

The Committee of Adjustment are forthwith to remit the surplus to the Secretary of State for War.

II.—Desertion, Apprenticeship, and Felony.

(Part II of the Act, omitted.)

III.—Insanity.

(Part III of the Act, omitted.)

The following General Order was issued on the 2nd February 1865, by His Excellency the Governor-General of India in Council :—

Fort William, 2nd February, 1865.

No. 116 *of* 1865.—In publishing for general information the following Despatch from the Right Hon'ble the Secretary of State, No. 41, dated 23rd November 1863, His Excellency the Governor-General in Council is pleased to announce that the Royal Warrant and Regulations No. $\frac{1759}{83}$.* dated 30th September, 1864, issued in pursuance of the "Regimental Debts Act, 1863," will come into operation in *India* on the 1st March 1865, from and after which latter date all previous regulations repugnant to the provisions of the said Act and Warrant will cease to have effect.

* War Office Circular, No. 875.

2. Copies of the Act and Warrant will be issued to Corps and Departments.

Legislative. India Office,

No. 41. *London, 23rd November*, 1864.

To His Excellency the Right Hon'ble the Governor-General of India in Council.

With reference to the concluding paragraph of my Despatch, No. 29, dated 23rd September last, I here-

with transmit to you a copy of the Regimental Debts Act, 1863, and three copies of the Royal Warrant which has been issued under it. As you have been already informed, the Warrant should be promulgated after the Mutiny Act of 1864 shall have come into force, in order to avoid any difficulty which might arise from supersession of the regulations laid down in the Warrant by those provisions of the Mutiny Act which relate to the same subject, and which it is intended by the Warrant to repeal. The Warrant, when promulgated, will, with the Regimental Debts Act, be the sole and standing authority on the matters comprised in them, and care will be taken to exclude from the Annual Mutiny Act, in future, any provisions bearing on the subject of the administration of the estates of deceased officers and soldiers.

2. In regard to the mode of proceeding on the death of an officer or soldier leaving effects, the Regimental Debts Act and the Royal Warrant contain the necessary instructions. In all cases a Committee of Adjustment will be appointed, who, in the case of a soldier of Her Majesty's army, as defined in section 2 of the Act, will proceed, in disposing of the surplus of the personal estate of the deceased, in the manner prescribed by section 11 of the Act and clause 16 of the Warrant; and in all other cases whatsoever (including the estates of commissioned officers of Her Majesty's army, of commissioned officers who constitute the staff corps of the three Presidencies, and of warrant and non-commissioned officers and soldiers who have preferred the conditions of local service) will proceed as directed in section 12 of the Act and clause 17 of the Warrant, by which last-mentioned provision the Military Secretary to the Government of the Presidency in which the deceased was quartered is declared to be the 'officer' to whom, under section 10 of the Act, the surplus is to be remitted, or with whom it is to be lodged.

3. Section 9 of the Act authorizes the Committee of Adjustment, in certain cases, to deliver over the effects received by them to the Administrator-General for the Presidency in which the deceased was

quartered. What those circumstances are, are indicated in clause 11 of the Warrant. The course is one to which Committees of Adjustment in all probability will not find it necessary frequently to resort.

4. The course to be followed by the Military Secretary on receipt of the personal estate of the deceased is pointed out in section 12 of the Act and clauses 25, 26, 27, and 28 of the Warrant.

5. The payment of arrears to the Military and Orphan Funds is provided for by section 23 of the Act.

6. The only other provision of the Act to which I consider it necessary to call your attention is that part of section 21 which fixes the maximum percentage to be taken by the Administrator-General at three per cent. With reference to this enactment, you will probably consider it expedient formally to declare, by an Act of the Legislature, that section 26 of the *Indian* Act, VIII of 1855, shall not be applicable to the estates of deceased officers and soldiers delivered over to the Administrator-General by the Military Secretary, or by a Committee of Adjustment.

I have, &c., C. WOOD.

H. W. NORMAN, *Colonel*,
Secy. to the Govt. of India.

By Notification No. 500 of 1870, Military Department, Government of India, on the death of a soldier (whether warrant officer, non-commissioned officer, or private, &c.), on the unattached list, or attached to a department or office, a Committee of Adjustment will assemble to secure his effects, and will proceed in the manner prescribed in the Royal Warrant and Regulations under the Regimental Debts Act, 1863.

The Committee of Adjustment are, as soon as practicable, to send one of the duplicates of the inventory and of the accounts, and to remit the surplus—

To the officer commanding the sappers and miners, —in the case of soldiers borne on the rolls of the company of royal engineers attached to that corps.

To the officer commanding the battery of royal artillery,—in the case of soldiers borne on the roils of a battery of royal artillery.

To the regimental Paymaster,—in the case of soldiers borne on the rolls of a regiment.

To the Military Secretary to Government,—in the case of *European* soldiers of Her Majesty's *Indian* army.

The surplus is to be disposed of by the commanding officer or Paymaster in the manner prescribed in the Regimental Debts Act, 1863, the inventory and accounts being annexed to, and any balance remitted in, the next monthly casualty return to the Secretary of State for War.

The surplus of estates of soldiers of Her Majesty's *Indian* army will be disposed of by the Military Secretary to Government, the inventory and accounts being annexed to, and any balance remitted to the Secretary of State for *India* in a monthly casualty return.

THE ADMINISTRATOR-GENERAL'S ACT.

Act No. II of 1874.

An Act to consolidate and amend the law relating to the office and duties of Administrator-General.

Preamble.

WHEREAS it is expedient to consolidate and amend the law relating to the office and duties of Administrator-General;

It is hereby enacted as follows:—

PART I.

PRELIMINARY.

(*b*) the territories for the time being respectively under the administrations of the Chief Commissioners of Oudh, the Central Provinces, British Burma, Ajmere and Mairwára, Assam, and the Andaman and Nicobar Islands;

(*c*) such of the dominions of Princes and States aforesaid as the Governor-General in Council may, by notification in the *Gazette of India*, from time to time direct.

'Presidency of Madras.' 'Presidency of Madras' includes

(*a*) the territories for the time being under the government of the Governor of Fort St. George in Council;

(*b*) such of the dominions aforesaid as the Governor-General in Council may, by notification in the *Gazette of India*, from time to time direct;

(*c*) Coorg;

(*d*) Mysore.

'Presidency of Bombay' 'Presidency of Bombay' means

(*a*) the territories for the time being under the government of the Governor of Bombay in Council;

(*b*) such of the dominions aforesaid as the Governor-General in Council may, by notification in the *Gazette of India*, from time to time direct;

(*c*) the Haidarabad Assigned Districts.

'Presidency Town' means the town of Calcutta, Madras or Bombay, as the case may be.

'Presidency Town.'

'Government' means the Governor-General in Council, so far as the Act relates to the Presidency of Bengal; the person for the time being administering the executive Government of the Presidency of Fort St. George, so far as the Act relates to the Presidency of Madras; and the person for the time being administering the executive Government of the Presidency of Bombay, so far as the Act relates to the Presidency of Bombay.

'Government.'

'Letters of Administration' shall include any letters of administration, whether general or limited, or with a will annexed, and letters *ad colligenda bona*.

of Adminis-

'Next-of-kin' includes a widower or widow of a deceased person, or any other person according to the practice of the Courts, would be entitled to letters of administration in preference to a creditor or legatee of the deceased.

'Next-of-kin.'

See s. 80 of the Indian Succession Act, *ante*, p. 92.

'Officer' means a commissioned officer of Her Majesty's army, or of Her Majesty's Indian army.

'Officer.'

'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.

'Soldier.'

'Assets' includes immoveable, as well as moveable, property.

'Assets.'

PART II.

OF THE OFFICE OF ADMINISTRATOR-GENERAL.

Administrators-General of the Presidencies in the three Presidencies.

4. In each of the Presidencies of Bengal, Madras 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.

5. 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 in Council:

the Administrator-General of Madras, by the Government of Fort St. George; and

the Administrator General of Bombay, by the Government of Bombay.

Qualification of future and continuance of existing incumbents.

6. Any person hereafter appointed to the office of Administrator-General or officiating Administrator-General of any of the said Presidencies shall be a member of the Bar of England or Ireland, or

of the Faculty of Advocates in Scotland ; but any person now holding such office shall continue to hold the same, subject to the provisions contained in the other sections of this Act.

Administrator General not an officer of Court.

7. The Administrator-General shall not be deemed in that capacity to be an officer of any High Court.

Probates, &c., granted by Supreme Courts to Ecclesiastical Registrars to have same effect as if granted to Administrator-General.

8. All probates and letters of administration granted by any of the late Supreme Courts of Judicature to the Ecclesiastical Registrar of such Court in virtue of his office, 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 the Administrator-General.

No Administrator-General to be Ecclesiastical Registrar

Administrator-General not to hold any other office without sanction of Government.

9. 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 Eccles Registrar: nor, without the express sanction of Government, any other office together with that of Administrator-General :

Provided that the Administrator-General of the Presidency may be appointed Official Trustee under Act No. XVII of 1864 (*to constitute an office of Official Trustee*):

Provided also, that the Administrator-General of Bengal may hold the office of Receiver of the High Court of Judicature at Fort William.

Penalty for trading.

10. It is hereby declared to be an offence punishable in manner provided by section one hundred and sixty-eight of the Indian Penal Code, for any Administrator-General to trade or traffic for his own benefit, or for the benefit of any other person, unless so far as

Exception.

appears to him to be expedient for the due management of the estates which come into his charge under the provisions of this Act, 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.

Security to be given by Administrator-General.

11. Unless the Governor-General in Council, or the Government, with the sanction of the Governor-General in Council, otherwise orders, every Administrator-General hereafter to be appointed shall give security to the Secretary of State for India, 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:

Substitution of security or sureties.

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 relates to the due execution of his office for the time then to come.

No security nor oath to be required from Administrator-General.

12. No Administrator-General shall be required by any Court to enter into any administration bond, or to give other security to the Court on the grant of any letters of administration to him in virtue of his office.

No Administrator-General shall be required to verify, otherwise than by his signature, any petition presented by him under the provisions of this Act; and if the facts stated in any such petition are not within the Administrator-General's own personal knowledge, the petition may be subscribed and verified by any person competent to make the verification.

Whoever makes a statement in any such petition which is false, and which he either knows or believes

to be false, or does not believe to be true, shall be deemed to have intentionally given false evidence in a stage of a judicial proceeding.

Appointment of officiating Administrator-General.

13. Whenever any person holding the office of Administrator-General obtains leave of absence, the Government may 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 for the time being in force, and he shall be deemed to be Administrator-General for the time being under this Act, and shall be liable to give security under section eleven in like manner as if he had been appointed Administrator-General.

PART III.

OF THE RIGHTS, POWERS AND DUTIES OF THE ADMINISTRATOR-GENERAL

(a.)—Grants of Letters of Administration and Probate to the Administrator-General.

As regards Administrator-General, High Court at Presidency-town to be deemed a Court of competent jurisdiction within meaning of Act X of 1865, ss. 187 and 190.

14. So far as regards the Administrator-General of any of the Presidencies of Bengal, Madras and Bombay, the High Court at the Presidency-town shall be deemed to be a Court of competent jurisdiction within the meaning of sections one hundred and eighty-seven and one hundred and ninety of the Indian Succession Act, 1865, wheresoever within the Presidency the property to be comprised in the probate or letters of administration may be situate.

By s. 5 of the Hindu Wills Act, XXI of 1870, it is provided, that nothing in that Act shall affect the rights, duties, and privileges of the Administrators-General of Bengal, Madras or Bombay. A similar provision is contained in the Probate and Administration Act, V of 1881, s. 119.

Administrator-General entitled to letters of administration, unless granted to next-of-kin.

15. Any letters of administration, or letters *ligenda bona*, hereafter to be granted by the High Court of Judicature at any Presidency-town, shall be granted to the Administrator-

General of the Presidency, unless they are granted to the next-of-kin of the deceased.

to creditor, non-universal legatee or friend.

The Administrator-General of the Presidency shall be deemed by all the Courts in the Presidency to have a right to letters of administration in preference to that of any person merely on the ground of his being a creditor, a legatee other than an universal legatee, or a friend of the deceased.

Under this section the Administrator-General would be entitled to letters of administration to the estate of a person, who is illegitimate, dying intestate — *DeMello* v. *Broughton*, 11 B. L. R., Appx., 6. See Notification, No. 2189, dated 31st March 1873, 11 B. L. R., 7 note.

The right of the Administrator-General to letters of administration in preference to the persons mentioned in this section applies, it would seem, only in cases governed by the Succession Act. Sections 187 and 190 of that Act, which make it compulsory to obtain probate or administration, and also ss. 209—287, which lay down the order according to which the various persons interested are entitled to administration on intestacy, are omitted from the Probate and Administration Act, V of 1881.

'Next-of-kin' in the section means the nearest of kin absolutely, not the nearest of kin *in India*—*Per* NORMAN, J., *In the Goods of Smallwood*, 20th July, 1868, where a brother, the nearest of kin in India, was held not to be entitled in priority to the Administrator-General, there being a father and mother alive in England—See Broughton's Custody and Preservation of Estates of Deceased Persons, p 7.

other than Hindus, &c., is to be by Administrator-General.

16. *If any person, not being a Hindu, Muhammadan,* [Parsi] or Buddhist, or a person exempted under the Indian Succession Act, 1865, section three hundred and thirty-two, from the operation of that Act, shall have died, whether within any of the said Presidencies or not, and whether before or after the passing of this Act, and shall have left assets exceeding at the date of the death or within one year thereafter the value of one thousand rupees within any of the said Presidencies,

and if no person to whom the Court would have jurisdiction to commit administration of such assets has, within one month after his death, applied in such Presidency for probate of his will, or for any letters of administration of his estate,

the Administrator-General of the Presidency in which such assets are, shall, within a reasonable time after he has had notice of the death of such person, and of his having left such assets as aforesaid, take

such proceedings as may be necessary to obtain from the High Court at the Presidency-town letters of administration to the effects of such person, either generally or with a will annexed, as the case may require.

Whenever the Administrator-General of the Presidency takes proceedings under this section, it shall be sufficient if the petition required by section two hundred and forty-six of the Indian Succession Act, 1865, states

(*a*) the time and place of the deceased's death to the best of the petitioner's knowledge or belief,

(*b*) that the deceased left some property within the Presidency as hereinbefore defined, and

(*c*) the amount or value of assets which are likely to come into the petitioner's hands.

The High Court in Bengal has no power, under this section, to grant letters of administration to the attorney of the executor of a deceased in respect of assets situate in the Punjab—*In the Goods of Duncan*, 1 B. L. R. (O.C.), 3. In such a case, however, letters of administration may be granted to the Administrator-General of Bengal—*Ibid.*

This section does not prohibit the Administrator-General from administering estates of *less* than Rs. 1,000—*Hogg* v. *Mendieta*, 1 Bom., 622.

The word 'Parsi,' in brackets, has been inserted by Act IX of 1881, s. 2.

See s. 36, *post*.

Power to direct Administrator-General to apply for administration.

17. Whenever any person, whether a Hindu, Muhammadan, [Parsi] or Buddhist, or not, shall have died leaving assets within the local limits of the ordinary original civil jurisdiction of the High Court at the Presidency-town, 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, legatee, next-of-kin or otherwise, or

upon the application of a friend of any minor so interested, or

upon the application of the Administrator-General,

if the applicant satisfies the Court that danger is to be apprehended of the misappropriation, deterioration or waste of such assets unless letters of administration of the effects of such person are granted,

to make an order, upon such terms as to indemnifying the Administrator-General against costs and other expenses as the Court thinks fit, directing the

Administrator-General to apply for letters of administration of the effects of such person:

Provided that, in the case of an application being made under this section for letters of administration to the effects of a deceased Hindu, Muhammadan, [Parsi], or Buddhist, or person exempted as aforesaid, 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 Court shall make such order as to the costs of the application as it thinks just.

:ration to ... Hindus, &c., granted under section.

Costs of unnecessary application.

The word 'Parsi,' in brackets, has been inserted in this section by Act IX of 1881, s. 2.

The bare possibility that the Statute 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—*In the Goods of Girdar Das* v. *Vallaba Das*, 1 Mad H. C. R., 234

A debtor to the estate, it seems, cannot apply for an order under this section—*Ibid.*

When ordinary letters of administration are granted under this Act (but not under this section) to the Administrator-General, his title does not relate back to the death of the deceased, nor to the date of the Judge's order directing such letters to be issued, but accrues only as from the date of the grant of the letters—*Lalchand Randayal* v. *Gumtibai*, 8 Bom. H. C. R. (O. C.), 140. In that case the Administrator-General applied for letters of administration at the desire of the widow of the testator, a Hindu. It was unnecessary there for the Court to consider whether letters of administration granted to the Administrator-General under this section conferred on him any greater authority or estate than an ordinary administrator of the estate of a Hindu would have—p 152. See, however, s. 191 of the Indian Succession Act, *ante*, p. 218, and s. 14 of the Probate and Administration Act, *ante*, p. 330.

18. Whenever any person, whether a Hindu, Muhammadan, [Parsi], or Buddhist, or not, shall have died, whether before or after the passing of this Act, leaving assets within the local limits of the ordinary original civil jurisdiction of any of the said High Courts, and such Court is satisfied that danger is to be apprehended of the misappropriation, deterioration or waste of such property, before it can be ascertained who may be legally entitled to the succession to such property, or whether the Administrator-General is entitled to letters of administration to such deceased person,

Power to enjoin Administrator-General to collect and hold assets until right of succession or administration is ascertained.

the Court may 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 centum* upon the amount of all moveable assets collected or received by him in pursuance of such order, and also to reimburse himself for all payments made by him in respect of the assets which a private administrator of such assets might lawfully have made ;

Rate of commission payable in such case.

and in case letters of administration of any such property are afterwards granted to the Administrator-General, the said commission of one *per centum* 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 to take possession of such property, and, if necessary, to maintain a suit for the recovery thereof.

The word 'Parsi,' in brackets, has been added by Act IX of 1881, s. 2.

An order under this section, whilst in force, is like probate or letters of administration, so far as respects the title under it to get in the property of the deceased—*Hogg* v. *Harry Dass Dutt*, 1 Boul., 654

Probate to be granted to executor appearing in the course of proceedings taken by Administrator-General.

). If in the course of proceedings to obtain letters of administration under the provisions of section sixteen or section seventeen,

any executor appointed by a will of the deceased appears according to the practice of the Court and proves the will and accepts the office of executor,

or if any person appears according to such practice and makes out his claim to letters of administration as next-of-kin of the deceased, and gives such security as is 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 or intestate expenses thereof.

Costs of proceedings taken by Administrator-General to be paid out of estates.

20. If no person appears according to the practice of the Court and entitles himself to probate of a will, or to a grant of letters of administration as next-of-kin of the deceased,

If no executor or appear or y security, administration to be granted to Administrator-General.

or if the person who entitles himself to a grant of administration neglects to give such security as may 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.

The Administrator-General is entitled under this and s. 15 to a grant in preference to an ordinary pecuniary legatee.

21. 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 estate and effects of any officer, soldier, or other person subject to any Articles of War, in all cases in which such estate and effects do not exceed in the whole five hundred rupees, charging the estate with a commission of three *per centum* only.

Administrator-General in certain cases to secure and distribute the effects of soldiers.

It shall not be necessary for the Administrator-General to take out letters of administration in cases referred to in this section: but he shall have the same powers with regard to all such assets as he would have had if he had taken out such letters.

When the Administrator-General applies for letters of administration to the effects of any officer, soldier or other person subject to the Articles of War, the Court may grant letters of administration

to grant Administrator-General letters limited to purpose of dealing with assets in accordance with Re-

limited to the purpose of dealing with such effects in accordance with the provisions of the Regimental Debts Act, 1863, or any other law for the time being in force relating to the payment of regimental debts and the distribution of the effects of officers dying on service.

See Regimental Debts Act, 1863, *ante*, p. 378.

Administrator-General not precluded from applying for letters in any case within one month after death.

23. Nothing in this Act is intended to preclude the Administrator-General from applying to the Court for letters of administration in any case within the period of one month from the death of the deceased.

Effect of probate or letters granted to Administrator-General.

23A. Probate or letters of administration granted by the High Court at Calcutta, Madras or Bombay to the Administrator-General of the Presidency of Bengal, Madras or Bombay, as the case may be, shall have effect over all the property and estate, moveable or immoveable, of the deceased throughout such Presidency, 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 such Administrator-General: Provided that the High Court may direct, by its grant, that such probate or letters of administration shall have like effect throughout either or both of the other Presidencies.

Whenever a grant of probate or letters of administration is made by a High Court to the Administrator-General, with such effect as last aforesaid, the Registrar of such Court shall send to each of the other two High Courts a certificate that such grant has been made, and such certificate shall be filed by the Court receiving the same.

This section has been inserted by s. 3 of Act IX of

After revocation, letters of administration granted to Administrator-General to be deemed as to him to have been voidable only.

24. If any letters of administration granted to the Administrator-General under the provisions of this Act be revoked or recalled, the same shall, so far as regards the Administrator-General and all persons acting

his authority in pursuance thereof, be deemed to have been only voidable; except as to

Exception.

nistrator-General or other person as aforesaid, after notice of a will or of any other fact which would render such letters void:

Provided that no notice of a will or of any other fact which would render any such letters void, shall affect the Administrator-General or any person acting under his authority in pursuance of such letters, 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 to be revoked, nor unless such proceedings be prosecuted without unreasonable delay.

Proviso.

25. If any letters of administration granted under this Act 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.

Validity of payments made by Administrator-General prior to revocation of administration.

26. If an executor or next-of-kin of the deceased, who has not been personally served with a citation, or who has not had notice thereof in time to appear pursuant thereto, 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 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:

... and grant of probate, &c., to executor or next-of-kin

Provided that no letters of administration granted to the Administrator-General shall be revoked or recalled for the cause aforesaid, except in cases in

Time within which application to revoke such administration be made.

which a will or codicil of the deceased is proved in the Presidency, unless the application for that purpose be made within six months after the grant to the Administrator-General, and the Court be satisfied that there has been no unreasonable delay in making the application, or in transmitting the authority under which the application is made.

Costs of obtaining administration, &c., may, on revocation, be ordered to be paid to Administrator-General out of assets.

27. If any letters of administration granted to the Administrator-General in pursuance of this Act 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 otherwise 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 :

Provided that, in any such case, when the deceased has left a will appointing an executor, and probate of the will has been granted by any Court in the Presidency to such executor within three months after the death, or when the widow or next-of-kin has, within one month if resident within the Presidency, or within three months if resident beyond the Presidency, obtained from any such Court letters of administration to the estate and effects of the deceased, then, and in either of such cases, the Administrator-General shall (without prejudice to the provisions contained in sections seventeen and eighteen) not be entitled to receive or retain any commission out of any assets belonging to such estate and situate within the jurisdiction of the Court by which probate or administration has been granted as last aforesaid.

See *In the Goods of Simpson*, 1 Mad H. C R. 171. In the case of *Somasundaram Chetti* v. *Administrator-General*, I. L R., 1 Mad., 148, it was held, that an order passed by a single Judge of the High Court, allowing the Administrator-General a commission at a particular rate, was subject to appeal under s 15 of the Letters Patent. Where there has been only collection but no distribution, and an order is made under the section, the order ought, in accordance with the rule laid down in s. 54 of the Act, to award only half of the full commission of 5 per cent.—*Ibid.*

28. When the Administrator-General has given such notices as would have been 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 had not notice at the time of such distribution; and no notice of any claim shall affect him unless proceedings to enforce such claim are commenced within one month after the giving of such notice and prosecuted without unreasonable delay.

Nothing herein contained shall prejudice the right of any creditor or other claimant to follow the assets or any part thereof in the hands of the persons who may have received the same respectively.

This section has been substituted by s. 4 of Act IX of 1881, for the original s. 28 of this Act, which was as follows:—

"Whenever the Administrator-General declares a dividend among such creditors of the deceased as have proved their debts, and notifies the payment of such dividend by advertisement in the official Gazette, no creditor of the deceased who has not previously to such declaration and advertisement proved his debts shall be entitled to participate as such in the assets wherewith such dividend is made.

"Any payment or delivery of assets to any legatee or to any person entitled in distribution, which is 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 is made, shall be allowed to the Administrator-General as against all creditors and other claimants against the estate, of whose debts or claims he has not had notice before making such payment or delivery:

"Provided that nothing herein contained shall exempt the person to whom such payment or delivery is made from any liability to refund to which he would otherwise be liable:

"Provided also, that no notice of any debt or claim shall affect the Administrator General, unless proceedings to enforce the debt or claim are commenced within one month after the giving of such notice, and are prosecuted without unreasonable delay."

of administration to be granted to Administrator-General by his name of office.

All letters of administration granted to any Administrator-General in virtue of his office shall be granted to him by his name of office,

Authority given by letters.

and all letters of administration heretofore granted to the Ecclesiastical Registrar or Administrator-General officially, or granted to any Administrator-General in virtue of his office, shall authorize the Administrator-General

for the time being of the same Presidency to act as administrator of the estate to which such letters relate.

This section authorizes the Administrator-General to act *as administrator of the estate to which such letters relate*. The Act is silent as to the area over which the grant once made is to operate. In *In the Goods of Hewson*, 4 C. L. R., 42; (S. C.) I L. R., 4 Calc., 770, the question arose whether, since the passing of Act XIII of 1875, in the case of the Administrator-General, letters of administration were confined to the province in which the grant was made. It was held in that case, that grants of letters of administration to Administrators-General, now, as formerly, though general in form, were limited to the Presidency of the Administrator-General to whom they were granted, such grants being, it was held by GARTH, C. J., and WHITE, J., governed entirely by this Act, and unaffected by Act XIII of 1875.

See notes to s. 242 of the Succession Act.

In *In the Goods of Shamachurn Mullick*, I. L. R., 1 Calc., 52; (S. C.) 24 W. R., 206, where probate limited to Bengal had already been ..... previously to 1st April, 1875, in Calcutta, an application was made to t same Court for a grant of probate limited to property which the testat... had left in Bombay. The Court (GARTH, C. J., and MACPHERSON, J.), affirming an order made by MARKBY, J., held, that, under Act XIII of 1875, the application could not be granted.

Grant of probate to Administrator-General named as executor by virtue of his office.

30. Every probate granted to any Administrator-General, of a will wherein he is named as executor by virtue of his office, shall be granted to him by his name of office, and shall authorize the Administrator-General for the time being of the same Presidency to act as executor of the estate to which such probate relates.

Transfer by private executor or administrator of interest under probate or letters of administration.

31. Any private executor or administrator may, with the previous consent of the Administrator-General of the Presidency in which the property comprised in the probate or letters of administration is situate, by an instrument in writing under his hand, bearing a stamp of ten rupees and notified in the local Gazette, transfer all estates, effects, and interests vested in him by virtue of such probate or letters to the Administrator-General by his name of office;

and thereupon the transferror shall be exempt from all liability as such executor or administrator, as the case may be, for any act or omission in respect of the said property after the date of the said transfer;

and the Administrator-General for the time shall have the rights and be subject to the liabilities which he would have had, and to which he would

have been subject, if the probate or letters of administration, as the case may be, had been granted to him by his name of office at the date aforesaid.

Nothing herein contained shall be taken to exempt any such transferror from liability for acts and omissions in respect of the said property prior to the transfer.

Appointment of Official Trustee as trustee of assets carried to separate accounts.

32. Whenever the Administrator-General carries over assets to separate accounts in his books, he shall notify the fact in the local official Gazette; and he may, with the consent of the Official Trustee, and subject to such rules as the Governor-General in Council may from time to time prescribe in this behalf, appoint the Official Trustee to be the trustee of such assets; and upon such appointment such assets shall vest in the Official Trustee and his successors in office, and be held by him and them upon the same trusts as the same assets were held immediately before such appointment. And for the purposes of Act No. XVII of 1864 such assets shall be deemed to have been vested in the Official Trustee under section ten of that Act.

Vesting of estates, &c., in successor of Administrator-General.

33. All estates, effects, and interests which, at the time of the death, resignation or removal from office of any Administrator-General, are vested in him by virtue of such letters of administration, probates or transfers as aforesaid, shall, upon every such death, resignation or removal, cease to be vested in him, and shall vest in his successor in office immediately upon his appointment thereto.

All books, papers, and documents kept by such Administrator-General by virtue of his office or as such executor or transferree as aforesaid, shall be transferred to and vested in his successor in office.

its by and against the Administrator-General.

to sue and be sued in his name of office.

34. All suits and other proceedings 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 or other proceeding heretofore or here-

Suit not to abate by death, &c.

after commenced by or against [illegible] ral, 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 by or against his successor immediately upon his appointment, in the same manner as if no such death, resignation or removal had occurred:

Proviso as to costs.

Provided that nothing hereinbefore contained shall render any such successor personally liable for any costs incurred prior to the order for continuing the suit against him.

Creditors' suits against Administrator-General.

35. If any suit be brought by a creditor against any Administrator-General in his representative character, the plaintiff shall be liable to pay the costs of the suit down to and including the decree, upon proof by affidavit or otherwise that not than one month previous to the institution of the suit he had applied in writing to the Administrator-General, stating the amount and other particulars of the claim, and supporting the same by such evidence as, under the circumstances of the case, the Administrator-General was reasonably entitled to require, and that the Administrator-General had refused or neglected to register the claim according to the practice of his office.

If in any such suit judgment is pronounced in favour of the plaintiff, he shall, nevertheless, be only entitled to payment out of the assets of the deceased equally and ratably with the other creditors.

Where a suit was instituted against the widow of a deceased debtor, and certain sale-proceeds attached before judgment, the Administrator-General, before judgment, took out letters of administration and was made a party in place of the widow. A decree was made in due course, but before execution the sale-proceeds were directed to be paid over to him. The High Court held, that, under s. 33 of Act XXIV of 1867, with which this section corresponds, the plaintiff's decree was entitled to rank only with other creditors'—*Hanimbalu Sannappa* v. *Cook*, 6 Mad H.C R., 346.

(c.)—*Grant of Certificates by the Administrator-General.*

In what case Administrator-General may grant certificate.

36. Whenever any person [*not being a Hindu, Muhammadan, or Buddhist, or exempted under the Indian Succession Act, 1865, section three hundred and thirty-two, from the operation of that Act*] shall have died, whether within any of the said Presidencies or not, whether before or after the passing of this Act, and whether testate or intestate, and shall have left assets (whether moveable or immoveable, or both) within any of the said Presidencies, and the Administrator-General of such Presidency is satisfied that such assets do not exceed in the whole one thousand rupees in value, he may, after the lapse of one month from the death, *if he thinks fit*, or before the lapse of the said month, if he is requested so to do by writing under the hand of the executor or the widow or other person entitled to administer the effects of the deceased, grant to any person claiming otherwise than as a creditor to be entitled to a share of such assets, certificates under his hand entitling the claimant to receive the property therein mentioned, belonging to the estate of the deceased, to a value not exceeding in the whole one thousand rupees :

No certificate to be where probate or administration taken out, or in respect of money in Government Savings Bank.

Provided that no certificate shall be granted under this section where probate of the deceased's will or letters of administration of his effects has or have been granted, or in respect of any sum of money deposited in a Government Savings Bank.

words in brackets have been repealed by s. 5 of Act IX of 1881.
See Act XXVII of 1860, s. 2, and Act XXVI of 1855.

37. If, in cases falling within section thirty-six, no person claiming otherwise than as a creditor to be entitled to a share of the effects of the deceased obtains, within three months, a certificate from the Administrator-General under the same section, or letters of administration to the estate and effects of

the deceased, the Administrator-General may administer the estate and effects without letters of administration, in the same manner as if such letters had been granted to him ;

and if he neglect or refuse to take upon the administration of the estate and effects, he 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 share of the effects of the deceased,

and such certificate shall have the same effect as a certificate granted under the provisions of the same section, and shall be subject to all the provisions of this Act which are applicable to such certificate ;

Proviso.

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 ; [and such deceased was not a Hindu, Muhammadan, Parsi, or Buddhist, or exempted under the Indian Succession Act, 1865, section three hundred and thirty-two, from the operation of that Act.]

The words in brackets have been added by s. 5 of Act IX of 1881.

Administrator-General not bound to grant certificate unless satisfied of claimant's title, &c.

38. The Administrator-General shall not be bound to grant any [certificate under section thirty-six or thirty-seven] unless he be satisfied of the title of the claimant and of the value of the assets of the deceased, either by the oath or affirmation of the claimant (*which oath or affirmation the Administrator-General is hereby authorized to administer or take*), or by such other evidence as he requires.

The words in brackets [ ] have been substituted by s. 6 of Act IX of 1881, for the words 'such certificate.' The words in italics have been repealed by the same section.

Copy of certificate with receipt annexed, when signed by certifi-

39. A copy of any such certificate with a receipt annexed shall, when such copy and receipt are signed by the person to whom the certificate has been granted, be a full discharge

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.

Such schedules shall be filed of record in such High Court, and shall, within fourteen days afterwards, be published in the official Gazette of the Presidency by the Administrator-General ;

and copies thereof in triplicate shall be delivered by such Administrator-General to the Government, and shall be sent by such Government to the Secretary of State for India, in order that such Secretary may, if he think fit, order the same to be deposited at the India Office for public inspection, and cause notices to be published in the *London Gazette* and other leading newspapers, that such schedules are open to inspection there, or make such other orders respecting the same as he thinks fit.

PART IV.

OF THE AUDIT OF THE ADMINISTRATOR-GENERAL'S ACCOUNTS.

Government to appoint auditors.

45. The Government shall, from time to time, appoint 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 thinks fit.

Auditors to examine [illegible] and report to [illegible]nt.

46. The auditors shall examine the schedules and accounts, and report to the Government—

(*a*) Whether they contain a full and true account of everything which ought to be inserted therein,

(*b*) whether the books which by this Act, or by any such general rules and orders as hereinafter mentioned, are directed to be kept by the Administrator-General, have been duly and regularly kept, and

(*c*) whether the assets and securities have been duly kept and invested and deposited in the manner

prescribed by this Act, or by any such rules and orders to be made as aforesaid.

Auditors to have power to summon witnesses and to call for &c.

47. Every auditor shall have power to summon as well the Administrator-General as any other person whose presence he thinks necessary to attend him from time to time, and to examine the Administrator-General or other person if he thinks fit, on oath or affirmation to be by him administered; and to call for all books, papers, vouchers and documents which appear to him to be necessary for the purposes of the said reference.

If the Administrator-General or other person when summoned refuses, or, without reasonable cause, neglects to attend or to produce any book, paper, voucher or document so required, or attends and refuses to be sworn or make an affirmation, or refuses to be examined, the auditors shall certify such neglect or refusal in writing to the High Court at the Presidency-town;

Penalty for non-attendance.

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 said High Court.

Costs of preparing schedules, &c., how to be paid.

48. 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 relate.

Such costs and expenses, and the portion thereof to be contributed by each of the said estates, shall be ascertained and settled by the auditors, subject to the approval of the Government, and shall be paid out of the said estates accordingly by the Administrator-General.

If accounts appear incorrect.

49. If upon any such reference and examination the Auditors 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 depo-

PART V.

OF THE COMMISSION OF THE ADMINISTRATOR-GENERAL.

52. The Administrator-General of each of the said Presidencies, under any letters of administration granted to him in his official character, or under any probate granted to him of a will wherein he is named as executor by virtue of his office, or under any probates or letters of administration vested in him by section eight or section thirty-one, shall be entitled to receive a commission at the following rates respectively, namely :—

Administrators-General to be remunerated by commission.

The Administrator-General of Bengal at the rate of three *per centum*, and the Administrators-General of Madras and Bombay respectively at the rate of five *per centum*, upon the amount or value of the assets which they respectively collect and distribute in due course of administration.

53. The last preceding section shall not apply to cases in which the property of an officer or soldier dying on service comes to the hands of the Administrator-General of any of the said Presidencies under the ninth or the twelfth sections of the Statute called "The Regimental Debts Act, 1863 ;"

Section 52 not to apply to property of officers and soldiers dying on service coming to hands of Administrator-General.

For ss. 9 and 12 of the Regimental Debts Act, see *ante*, pp. 382, 383.

and such Administrator-General shall not take a percentage on any such property exceeding three *per centum* on the gross amount coming to his hands after the passing of the Administrator-General's Act, 1865, if preferential charges as defined by the fourth 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 entitled to a commission only three per cent. on gross amount of such property.

See s. 21 of the Regimental Debts Act, 1863, *ante*, p. 389.

54. The Administrator-General shall be entitled to reimburse himself for any payments made by him in respect of any estate in his charge, which a private

Expenses, &c., he is to cover.

administrator of such estate might have lawfully made; but save as aforesaid, the commission to 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.

How payable.

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 distributes any assets in the due course of administration, and may be retained by him upon such distribution.

Commission retained to be deemed a 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.

—The carrying of assets to separate accounts in the books of the Administrator-General notified as hereinbefore provided, and the transfer of assets to the Official Trustee, shall each be deemed to be a distribution within the meaning of this section.

Where there has been only collection and no distribution, an order made under s. 27, *supra*, by the Court, allowing to the Administrator-General commission, should award only half of the full commission. See *Chetti* v. *Administrator-General*, I. L. R., 1 Mad., 148.

Commission of the Administrator-General of Bengal may be raised and again reduced.

55. The Governor-General in Council may from time to time order the rate of commission hereinbefore authorized to be received by the Administrator-General of Bengal to be raised to any rate not exceeding five *per centum* upon the amount or value of the assets which he collects and distributes in due course of administration, and again to be reduced.

The Governments of the Presidencies of Fort St. George and Bombay respectively

of the

be reduced and

the

Governor-General in Council, from

rate of commission hereby authorized to be received by the Administrators-General of Madras and Bombay respectively to be reduced, and again to be raised :

Proviso.

Provided that the commission so to be received shall not at any time exceed five *per centum* of the assets collected, and that no person now holding the office of Administrator-General of Bengal, Madras 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 centum* in respect of all assets collected and actually administered by him.

Commission on assets collected beyond Presidency.

55A. Notwithstanding anything hereinbefore contained, an Administrator-General of a Presidency obtaining probate or letters of administration operating in another Presidency, shall be entitled to the same rate of commission in respect of the collection and distribution of assets collected in such Presidency as the Administrator-General of such Presidency would have been entitled to if such assets had been collected and distributed by him, and to no higher rate.

This section has been inserted by s. 7 of Act IX of 1881.

not to be charged by executor or administrator other than the Administrator-General.

56. No person other than the Administrator-General acting officially shall receive or retain any commission or fees 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 or High Court at Fort William in Bengal since the passing of Act No. VII of 1849 (*for the appointment of an Administrator-General in Bengal*), or by either of the Supreme or High Courts at Madras and Bombay since the passing of Act No. II of 1850 (*to amend and extend to Madras and Bombay Act No. VII of* 1849), or which have been, or shall be, granted by any Court of competent jurisdiction within the meaning of sections one hundred and eighty-seven and one hundred and ninety of the Indian Succession Act, 1865 ;

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.

Bequest in favour of executors not affected.

It seems to have been the practice of private firms in Calcutta and elsewhere as agents to take out letters of administration to estates in this country under powers of attorney from executors and next-of-kin in Europe, and to charge commission on the estates.

This practice of charging commission was declared by WILSON, J., to be illegal, and prohibited by this section—*In re Cowie*, 7 C. L. R., 19; (S.C.), I. L. R., 6 Calc., 70.

PART VI.

MISCELLANEOUS.

57. The Government may, from time to time, make rules consistent with the provisions of this Act,

Power to make rules.

(*a*) for the safe custody of the assets and securities which come to the hands or possession of the Administrator-General;

For custody of assets.

(*b*) for the remittance to the India Office of all sums of money payable or belonging to persons resident in Europe, or, in other cases where such remittance are required;

For remittance of money.

(*c*) generally for the guidance of the Administrator-General in the discharge of his duties;

For guidance of Administrator-General.

and may by such rules, 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 are made and published, the rules now in force in each of the said Presidencies, so far as the

Proviso as to rules now in force.

same are not inconsistent with this Act, shall be of the same force and effect as if the same had been made and published hereunder.

Publication of new rules.

58. Such rules shall be published in the *Gazette of India*, the *Fort St. George Gazette*, or the *Bombay Government Gazette*, as the case may be, and the several Administrators-General shall obey and fulfil the same, and the same shall be a full authority and indemnity for all persons acting in pursuance thereof.

Power to decide when commission shall be deemed payable.

59. The Governor-General in Council may from time to time, either by general rule, or by special order in a particular case, decide any question as to the time at which any commission accruing to the Administrator-General in his official capacity shall be deemed to have been payable; and such decision shall bind every Administrator-General and the estates held by him in his official capacity.

Orders of Court to be to decrees.

60. Any order made under this Act by any Court shall have the same effect and be executed in the same manner as a decree.

Power to examine on oath.

60A. The Administrator-General may, whenever he desires, for the purposes of this Act, to satisfy himself regarding any question of fact, examine upon oath or affirmation (which he is hereby authorized to administer or take) any person who is willing to be so examined by him regarding such question.

This section has been inserted by s. 8 of Act IX of 1881.

evidence.

Whoever, having been sworn or having taken an affirmation under this Act, makes, upon any examination authorized by this Act, a statement which is false, and which he either knows or believes to be false, or does not believe to be true, shall be deemed to have intentionally given false evidence in a stage of a judicial proceeding.

med for to be to Government.

62. All assets in the official charge of the Administrator-General of any of the said Presidencies, and appearing from the official books and accounts of the Ecclesiastical Registrar and

of the Administrator-General of any of those Presidencies, or from the official books and accounts of any 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 Comptroller-General of accounts or to the Accountant-General to the Government of Fort St. George or Bombay, as the case may be, and carried to the account and credit of the Government of India for the general proposes of government ;

and the receipt of the said Comptroller-General or Accountant-General, as the case may be, shall be a full indemnity and discharge to the said Administrator-General for any such transfer or payment :

Provided that this Act shall not authorize the transfer or payment of any such proceeds as aforesaid pending any suit heretofore or hereafter instituted in respect thereof.

Proviso.

63. If any claim be hereafter made to any part of the securities, monies or proceeds carried to the account and credit of the Government of India under the provisions of this Act, and if such claim be established to the satisfaction of the Comptroller-General or the Accountant-General to the Government of Fort St. George or Bombay, as the case may be, the Government of India shall pay to the claimant the amount of the principal so carried to its account and credit or so much thereof as appears to be due to the claimant.

Mode of proceeding by claimant to recover so

If the claim be not established to the satisfaction of the said Comptroller-General or Accountant-General, as the case may be, the claimant may apply by petition to the High Court at the Presidency-town against the Secretary of State for India, and after taking evidence, either orally or on affidavit in a summary way as the Court thinks fit, the Court shall make such order on the petition for the payment of such portion of the said principal sum as justice requires, and such order shall be binding on all parties to the suit,

and the Court may direct by whom the whole or any part of the costs of each party shall be paid.

District Judge in certain cases to take charge of property of deceased persons, and to report to Administrator-General.

64. Whenever any person, other than a Hindu, Muhammadan, [Parsi] or Buddhist, or a person exempted under the Indian Succession Act, 1865, section three hundred and thirty-two, from the operation of that Act, dies leaving assets within the limits of the jurisdiction of a District Judge, the District Judge shall report the circumstance without delay to the Administrator-General of the Presidency, stating the following particulars so far as they may be known to him :—

(*a*) the amount and nature of the assets,

(*b*) whether or not the deceased left a will, and, if so, in whose custody it is,

and, on the lapse of one month from the date of the death,

(*c*) whether or not any one has applied for probate of the will of the deceased or letters of administration to his effects.

The District Judge shall retain the property under his charge, or appoint an officer under the provisions of the Indian Succession Act, 1865, section two hundred and thirty-nine, to take and keep possession of the same until the Administrator-General has obtained letters of administration, or until some other person has obtained such letters or a certificate from the Administrator-General under the provisions of this Act, when the property shall be delivered over to the person obtaining such letters of administration or certificate, or, in the event of a will being discovered, to the person who may obtain probate of the will.

The word 'Parsi' in brackets, has been inserted by Act IX of 1881.

Act not to require administration of estates of soldiers, unless Administrator-General authorized by Military Secretary or Committee of Adjustment.

65. 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, unless when the Administrator-General is duly authorized or required so to do by the Military Secretary to Government, or by a Committee of Adjustment or other officers or persons

acting under any law for the time being in force relating to the payment of regimental debts ;

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 Her Majesty in India, or of any Articles of War.

Indian Succession Act and Indian Companies' Act not to affect Administrator-General.

66. Nothing contained in the Indian Succession Act, 1865, or the Indian Companies' Act, 1866, shall be taken to supersede or affect the rights, duties and privileges of the Administrators-General and officiating Administrators-General of Bengal, Madras, and Bombay respectively.

Saving of provisions of Presidency Police Acts as to petty estates.

And nothing contained in the Indian Succession Act, 1865, or in this Act, or in the said Act No. XXIV of 1867, shall be deemed to affect, or to have affected, any provisions for the time being in force relating to the moveable property under two hundred rupees in value of persons dying intestate within any of the Presidency-towns, which shall be or has been taken charge of by the Police for the purpose of safe custody.

So, under s. 5 of the Hindu Wills Act, XXI of 1870, it is provided, that nothing in that Act should affect the rights, duties, and privileges of the Administrators-General of Bengal, Madras, and Bombay. See also s. 149 of the Probate and Administration Act, V of 1881.

ACT No. XIII of 1875.

An Act to amend the law relating to Probates and Letters of Administration.

Preamble.

WHEREAS, under the Indian Succession Act, 1865, the effect of an unlimited grant of probate or letters of administration made by any Court in British India is confined to the province in which such grant is made: And whereas it is expedient to extend over British India the effect of such grants when made by a High Court: And whereas it is also expedient to amend the Court Fees Act, 1870, as to probates, letters of administration, and certificates of administration: It is hereby enacted as follows:—

Addition to Act No. X of 1865, section 3.

1. To section 3 of the Indian Succession Act, 1865, the following words shall be added (namely):—"and for the purposes of sections 242, 242A, 246A, and 277A, shall include the Court of the Recorder of Rangoon."

Addition to Act No. X of 1865, section 242.

2. To section 242 of the Indian Succession Act, 1865, the following proviso shall be added (namely):—

Effect of unlimited probates, &c., granted by High Court.

"Provided that probates and letters of administration granted by a High Court after the first day of April, 1875, shall, unless otherwise directed by the grant, have like effect throughout the whole of British India."

See notes to s. 242 of the Indian Succession Act, *ante*, p.

This section does not apply to grants of administration to an Administrator-General—*In the Goods of Hewson*, 4 C. L. R., 42; (S.C.) I. L. R., 4 Calc., 770.

This Act does not empower a Judge of the High Court to grant a limited probate extending to goods in another province, after an unlimited grant has already been made before the Act passed extending only to goods in the province of Bengal—*In the Goods of Shama Churn Mullick*, 24 W. R., 206; (S.C.), I. L. R., 1 Calc., 52.

Addition to Act No. X of 1865.

3. The following section shall be inserted after the said proviso (namely) :—

Transmission of certificate by High Court granting probate, &c., to other Courts.

"242A. Whenever a grant of probate or letters of administration is made by a High Court with such effect as last aforesaid, the Registrar or such other officer as the High Court making the grant appoints in this behalf shall send to each of the other High Courts a certificate to the following effect :—

I, *A. B.*, Registrar [*or as the case may be*] of the High Court of Judicature at , [*or as the case may be*], hereby certify that, on the day of 187 , the High Court of Judicature at [*or as the case may be*] granted probate of the will [*or* letters of administration of the estate] of *C. D.*, late of , deceased, to *E. F.*, of , and *G. H.*, of , and that such probate [*or* letters] has [*or* have] effect over all the property of the deceased throughout the whole of British India ;

and such certificate shall be filed by the High Court receiving the same."

Addition after section 246 of Act X of 1865.

4. After section 246 of the Indian Succession Act, 1865, the following section shall be inserted (namely) :—

Additional statements in petition for probate, &c.

"246A. Every person applying to a High Court for probate of a will or letters of administration of an estate, intended to have effect throughout British India, shall state in his petition, in addition to the matters respectively required by section 244 and section 246 of this Act, that to the best of his belief no application has been made to any other High Court for a probate of the same will or for letters of administration of the same estate, intended to have such effect as last aforesaid,

or, where any such application has been made, the High Court to which it was made, the person or persons by whom it was made, and the proceedings (if any) had thereon.

And the High Court to which any application is made under the proviso to section 242 of this Act may, if it think fit, reject the same."

Addition after section 277 of Act X of 1865.

5. After section 277 of the Indian Succession Act, 1865, the following section shall be inserted (namely) :—

Inventory may include property in any part of British India.

"277A. In all cases where it is sought to obtain a grant of probate or letters of administration intended to have effect throughout the whole of British India, the executor, or the person applying for administration after the first day of April, 1875, to the effects of any person dying in British India and leaving property in more than one province shall include in the inventory of the effects of the deceased his moveable or immoveable property situate in each of the provinces :

And the value of such property situate in the said provinces, respectively, shall be separately stated in such inventory, and the probate or letters of administration shall be chargeable with a fee corresponding to the entire amount or value of the property affected thereby wheresoever situate within British India."

Addition to Act No. VII of 1870.

6. After section nineteen of the Court Fees Act, 1870, the following chapter shall be inserted (namely) :—

"CHAPTER IIIA.

"PROBATES, LETTERS OF ADMINISTRATION AND CERTIFICATES OF ADMINISTRATION.

Relief where too high court-fee has been

"19A. Where any person on applying for the probate of a will or letters of administration has estimated the property of the deceased to be of greater value than the same has afterwards proved to be, and has consequently paid too high a court-fee thereon, if within six months after the true value of the property has been ascertained, such person produces the probate or letters to the chief controlling

revenue authority of the province in which the probate or letters has or have been granted,

and delivers to such authority a particular inventory and valuation of the property of the deceased, verified by affidavit or affirmation,

and if such authority is satisfied that a greater fee was paid on the probate or letters than the law required,

the said authority may—

(*a*) cancel the stamp on the probate or letters, if such stamp has not been already cancelled ;

(*b*) substitute another stamp for denoting the court-fee which should have been paid thereon ; and

(*c*) make an allowance for the difference between them as in the case of spoiled stamps, or repay the same in money, at this discretion.

Relief where debts due from a deceased person have been paid out of his estate.

"19 B. Whenever it is proved to the satisfaction of such authority that an executor or administrator has paid debts due from the deceased to such an amount as, being deducted out of the amount or value of the estate, reduces the same to a sum which, if it had been the whole gross amount or value of the estate, would have occasioned a less court-fee to be paid on the probate or letters of administration granted in respect of such estate than has been actually paid thereon under this Act,

such authority may return the difference, provided the same be claimed within three years after the date of such probate or letters.

But when, by reason of any legal proceeding, the debts due from the deceased have not been ascertained and paid, or his effects have not been recovered and made available, and in consequence thereof the executor or administrator is prevented from claiming the return of such difference within the said term of three years, the said authority may allow such further time for making the claim as may appear to be reasonable under the circumstances.

"19C. Whenever such a grant of probate or letters of administration has been or is made in respect of the whole of the property belonging to an estate, and the full fee chargeable under this Act has been or is paid thereon, no fee shall be chargeable under the same Act when a like grant is made in respect of the whole or any part of the same property belonging to the same estate;

Relief in case of several grants.

Whenever such a grant has been or is made in respect of any property forming part of an estate, the amount of fees then actually paid under this Act shall be deducted when a like grant is made in respect of property belonging to the same estate, identical with or including the property to which the former grant relates.

Executors obtaining a second grant of probate subsequent to the enactment of the Court-fees Act of 1870 (the first grant having been taken out previously to that enactment) are not exempted from the payment of the *ad valorem* duty chargeable under that Act, although the full fee then chargeable by law had already been paid at the time of the first probate being granted—*In the Goods of Gasper*, I. L. R., 3 Calc., 733. See also *In the Goods of Chalmers*, 6 B. L. R., 137. In *In the Goods of Gasper* it was held, that the duty already paid was not the fee chargeable under the Court-fees Act, and that accordingly s. 6 (19c) of Act XIII of 1875 did not apply.

See *In the Goods of March*, I. L. R., 4 Calc., 725.

"19D. The probate of the will, or the letters of administration of the effects, of any person deceased heretofore or hereafter granted shall be deemed valid and available by his executors or administrators for recovering, transferring or assigning any moveable or immoveable property whereof or whereto the deceased was possessed or entitled, either wholly or partially as a trustee, notwithstanding the amount or value of such property is not included in the amount or value of the estate, in respect of which a court-fee was paid on such probate or letters of administration.

Probates declared valid as to trust-property though not covered by court-fee.

"19E. Where any person, on applying for probate or letters of administration, has estimated the estate of the deceased to be of less value than the same has afterwards proved to be, and has, in consequence, paid too low a court-

n for case low a court- has been paid on

fee thereon, the chief controlling revenue authority of the province in which the probate or letters has or have been granted, may, on the value of the estate of the deceased being verified by affidavit or affirmation, cause the probate or letters of administration to be duly stamped on payment of the full court-fee which ought to have been originally paid thereon in respect of such value and of the further penalty, if the probate or letters is or are produced within one year from the date of the grant, of five times, or if it or they is or are produced after one year from such date, of twenty times, such proper court-fee, without any deduction of the court-fee orginally paid on such probate or letters :

Provided that, if the application be made within six months after the ascertainment of the true value of the estate and the discovery that too low a court-fee was at first paid on the probate or letters, and if the said authority is satisfied that such fee was paid in consequence of a mistake or of its not being known at the time that some particular part of the estate belonged to the deceased, and without any intention of fraud or to delay the payment of the proper court-fee, the said authority may remit the said penalty, and cause the probate or letters to be duly stamped on payment only of the sum wanting to make up the fee which should have been at first paid thereon.

Administrator to give proper security before letters stamped under section 19 E.

"19F. In case of letters of administration on which too low a court-fee has been paid at first, the said authority shall not cause the same to be duly stamped in manner aforesaid until the administrator has given such security to the Court by which the letters of administration have been granted as ought by law to have been given on the granting thereof in case the full value of the estate of the deceased had been then ascertained.

&c., not full court-fee on &c., within six

"19G. Where too low a court-fee has been paid on any probate or letters of administration in consequence of any mistake, or its not being known

of

cular part of the estate belonged to the deceased, if any executor or administrator acting under such probate or letters does not, within six months after the first day of April, 1875, or after the discovery of the mistake or of any effects not known at the time to have belonged to the deceased, apply to the said authority and pay what is wanting to make up the court-fee which ought to have been paid at first on such probate or letters, he shall forfeit the sum of one thousand rupees, and also a further sum at the rate of ten rupees per cent. on the amount of the sum wanting to make up the proper court-fee.

"19H. The provisions of sections 19A to 19G (both inclusive) shall, *mutatis mutandis*, apply to certificates granted under Act No. XL of 1858 *(for making better provision for the care of the persons and property of Minors in the Presidency of Fort William in Bengal)* or Act No. XX of 1864 *(for making better for the care of the persons and property of in the Presidency of Bombay)* and to the holders of such certificates."

Sections 19A to 19G applied to certificates under Acts XL of 1858 and XX of 1864.

THE DISTRICT DELEGATES ACT.

ACT No. VI OF 1881.

An Act to make further provision for the grant of Probate and Letters of Administration in non-contentious cases.

Preamble.

WHEREAS it is expedient to make further provision for the grant of probate and letters of administration in non-contentious cases; It is hereby enacted as follows :—

Short title.

1. This Act may be called "The District Delegates Act, 1881" :

It extends to the whole of British India ;

Commencement.

and it shall come into force on the first day of April, 1881.

Addition of section after section 235 of Succession Act.

2. After section 235 of the Indian Succession Act, 1865, the following section shall be added :—

Power to appoint Delegate of District Judge to deal with non-contentious cases.

"235A. The High Court may, from time to time, appoint such judicial officers within any district as it thinks fit, to act for the District Judge as Delegates, to grant probate and letters of administration in non-contentious cases, within such local limits as it may from time to time prescribe :

"Provided that, in the case of High Courts not established by Royal Charter, such appointment be made with the previous sanction of the Local Government.

"Persons so appointed shall be called 'District Delegates.'"

Addition of section after section 241 of same Act.

3. After section 241 of the said Act, the following section shall be added :—

Probate and letters of may be by Delegate.

"241A. Probate and letters of administration may, upon application for that purpose to any District Delegate, be granted by

there is no contention, if it appears by petition (verified as hereinafter mentioned) that the testator or intestate, as the case may be, at the time of his death resided within the jurisdiction of such Delegate."

Addition to sections 244 and 246 of same Act.

4. To sections 244 and 246 of the said Act, respectively, the following words shall be added:—

"and when the application is to a District Delegate, the petition shall further state that the deceased at the time of his death resided within the jurisdiction of such Delegate."

Substitution of section for section 251 of same Act.

5. For section 251 of the said Act, the following section shall be substituted:—

Caveats against grant of probate or administration.

"251. Caveats against the grant of probate or administration may be lodged with the District Judge or a District Delegate; and immediately on any caveat being lodged with any District Delegate, he shall send a copy thereof to the District Judge; and immediately on a caveat being entered with the District Judge, a copy thereof shall be given to the District Delegate, if any, within whose jurisdiction it is alleged the deceased resided at the time of his death, and to any other Judge or District Delegate to whom it may appear to the District Judge expedient to transmit the same."

Amendment of section 253 of same Act.

6. In section 253 of the said Act, after the word 'Judge' the words 'or officer,' and after the word 'made' the words 'or notice has been given of its entry with some other Delegate,' shall be inserted.

Addition of sections after section 253 of same Act.

7. After section 253 of the said Act, the following sections shall be added:—

District Delegate when not to grant probate or administration.

"253A. A District Delegate shall not grant probate or letters of administration in any case in which there is contention as to the grant, or in which it otherwise appears to him that probate or letters of administration ought not to be granted in his Court.

"*Explanation.*—By 'contention' is understood the

appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding.

"253B. In every case in which there is no contention, but it appears to the District Delegate doubtful whether the probate or letters of administration should or should not be granted, or when any question arises in relation to the grant, or application for the grant, of any probate or letters of administration, the District Delegate may, if he thinks proper, transmit a statement of the matter in question to the District Judge, who may direct the District Delegate to proceed in the matter of the application, according to such instructions as to the Judge may seem necessary, or may forbid any further proceeding by the District Delegate in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Judge.

to transmit to District in doubtful cases where no contention.

"253C. In every case in which there is contention, or the District Delegate is of opinion that the probate or letters of administration should be refused in his Court, the petition, with any documents that may have been filed therewith, shall be returned to the person by whom the application was made, in order that the same may be presented to the District Judge; unless the District Delegate thinks it necessary, for the purposes of justice, to impound the same, which he is hereby authorized to do; and in that case the same shall be sent by him to the District Judge."

Procedure where there is contention, or District Delegate thinks probate or letters of administration should be refused in his Court.

8. In the said Act, sections 254 and 255, respectively, after the words 'I, Judge of the District of ,' the words '(*or* Delegate appointed for granting probate or letters of administration in (*here insert the limits of the Delegate's jurisdiction*))'; and in section 308, after the words 'District Judge, by whom' the words 'or by whose District Delegate' shall be inserted.

Amendment of sections 254, 255 and 308 of same Act.

9. In the said Act, sections 246, 250, 255 and 259, after the words 'District Judge,' and in section 250 and section 254 (when it first occurs) after the word 'Judge,' the words 'or District Delegate' shall be inserted respectively.

oduction of the 'or District De- ' in certain sections of same Act.

THE ADMINISTRATOR-GENERAL'S ACT.

ACT No. IX OF 1881.

An Act to amend the Administrator-General's Act, 1874.

Preamble.

WHEREAS Hindus, Muhammadans, and Buddhists are exempted from the operation of certain provisions of the Administrator-General's Act, 1874, but are subject to the operation of certain other provisions of the said Act, and it is expedient that Parsis should be exempted from, and be subject to, the operation of the said Act to the same extent as Hindus, Muhammadans and Buddhists; and whereas it is expedient to amend the said Act in other particulars hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Administrator-General's Act, 1881:"

Commencement.

and shall come into force at once.

Amendment of sections 16, 17, 18 and 64 of Act No. II of 1874.

2. In sections 16, 17, 18 and 64, respectively, of the said Act, between the word 'Muhammadan' and the words 'or Buddhist,' wherever they occur, the word 'Parsi' shall be inserted.

New section inserted after section 23 of same

3. After section twenty-three of the same Act, the following section shall be inserted:

——— of probate of letters granted to Administrator-General.

Probate or letters of administration granted by the High Court at Calcutta, Madras or Bombay to the Administrator-General of the Presidency of Bengal, Madras or Bombay, as the case may be, shall have effect over all the property and estate, moveable or immoveable, of the deceased throughout such Presidency, 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 such Administrator-General: Provided that the High Court may direct, by its grant, that such probate or letters of administration shall have like effect throughout either or both of the other Presidencies.

"Whenever a grant of probate or letters of administration is made by a High Court to the Administrator-General, with such effect as last aforesaid, the Registrar of such Court shall send to each of the other two High Courts a certificate that such grant has been made, and such certificate shall be filed by the Court receiving the same."

New section substituted for section 28 of same.

4. For section twenty-eight of the same Act, the following section shall be substituted:—

Distribution of assets.

"28. When the Administrator-General 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 had not notice at the time of such distribution; and no notice of any claim shall affect him unless proceedings to enforce such claim are commenced within one month after the giving of such notice and prosecuted without unreasonable delay.

"Nothing herein contained shall prejudice the right of any creditor or other claimant to follow the assets or any part thereof in the hands of the persons who may have received the same respectively."

Amendment of sections 36 and 37 of same.

5. In section thirty-six of the same Act, the words 'not being a Hindu, Muhammadan or Buddhist, or exempted under the Indian Succession Act, 1865, section three hundred and thirty-two, from the operation of that Act' shall be repealed; and in section thirty-seven of the same Act, after the words 'effects of the deceased,' the following shall be inserted, namely:—

'and such deceased was not a Hindu, Muhammadan, Parsi or Buddhist, or exempted under the Indian Succession Act, 1865, section three hundred and thirty-two, from the operation of that Act.'

Amendment of section 38 of same.

6. In section thirty-eight of the same Act, for the words 'such certificate' the words 'certificate under section thirty-six or thirty-seven' shall be substituted; and the words 'which oath or affirmation the Administrator-General is hereby authorized to administer or take' shall be repealed.

New section inserted after section 55 of same.

7. After section fifty-five of the same Act, the following section shall be inserted:—

Commission on assets collected beyond Presidency.

"55A. Notwithstanding anything hereinbefore contained, an Administrator-General of a Presidency obtaining probate or letters of administration operating in another Presidency shall be entitled to the same rate of commission in respect of the collection and distribution of assets collected in such Presidency as the Administrator-General of such Presidency would have been entitled to, if such assets had been collected and distributed by him, and to no higher rate."

New section inserted before section 61 of same

8. Before section sixty-one of the same Act, the following section shall be inserted:—

Power to examine on oath.

"60A. The Administrator-General may, whenever he desires, for the purposes of this Act, to satisfy himself regarding any question of fact, examine upon oath or affirmation (which he is hereby authorized to administer or take) any person who is willing to be so examined by him regarding such question."

9. Nothing herein contained shall affect any probate, letters of administration, or certificate granted or vested under the said Act before the passing of this Act.

ACT No. XII of 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, &c., may sue in certain cases for wrongs committed in the lifetime of deceased.

1. An action may be maintained by the executors, administrators, or representatives of any person deceased, for any wrong committed in the lifetime of such person, which has occasioned pecuniary loss to his estate, for which 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 lifetime 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 pay-

* See Statute 3 and 4 Will IV, C. 42, s. 2.

able in like order of administration as the simple contract debts of such person.

(*a*) See Limitation Act, XV of 1877, sched. ii, art. 20.

(*b*) By art. 33, sched. ii of Act XV of 1877, a suit under this Act against an executor, administrator, or other representative may be brought within two years from the time when the wrong complained of was done.

Death of either party not to abate suit.

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.*

An Act to provide compensation to families for occasioned by the death of a person caused by actionable wrong.

Preamble.

WHEREAS no action or suit is now maintainable in any Court against a person who, by his wrongful act, neglect, or default, may 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:—

Action for compensation to the family of a person for loss occasioned to it by his death by actionable wrong.

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, and in every such action, the Court may give such damages, as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose

* This Act is to some extent copied from Stat. 9 and 10 Vict, c. (Lord Campbell's Act). Section 3 is new, as also the second proviso to s.

benefit such action shall be brought, and the amount so recovered, after deducting all cost 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.

Where a sum of money has been accepted by the person injured in full satisfaction and discharge of all the claims and causes of action he had against the persons by whom the injury was caused, a suit will not lie under this Act, if he should subsequently die from the injury within a year—*Reed* v. *G. E. Ry. Co.*, L. R., 3 Q. B., 555.

As to the mode of calculating the damages see *Rowley* v. *L. & N. W. Ry. Co.*, L. R., 8 Exch., 221; *Vinayek Raghunath* v. *G. I. P. Ry. Co.*, 7 Bom. H. C. R. (O. C.), 113; *Ratan Bai* v. *G. I. P. Ry Co.*, *ib.*, 120; (S. C.) on appeal, 8 *ib.*, 130.

As to what amounts to neligence, see *Lyell* v. *Gunga Dai*, I. L. R., 1 All. (F. B.), 60.

In England, there is a conflict of decision as to whether the Admiralty Court has jurisdiction in suits under the English Act: see *Smith* v. *Brown*, L. R., 6 Q. B., 729, on the one hand, and *The Sylph*, L. R., 2 A. and E., 24; *The Fieldfare*, L. R., 2 A. and E., 325; *The Beta*, L. R., 2 P. C., 447; and *The Franconia*, L. R. 82 P. D., 8, on the other.

Not more than one action to be brought to be commenced within twelve months.

2. Provided always that not more than one action or suit shall be brought for and in respect of the 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.

for loss to the may be added.

This last proviso is new. See Limitation Act, XV of 1877, sched. ii, art. 21.

Plaintiff shall deliver particulars, &c.

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.

This section is new.

Construction of Act.

4. The following words and expressions are intended to have the meanings hereby assigned to 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 grandfather and grandmother; and the word 'child' shall include son and daughter, and grandson and grand-daughter and step-son and step-daughter.

ACT No. XXVII OF 1860.*

An Act for facilitating the collection of debts on successions, and for the security of parties paying debts to the representatives of deceased persons.

Preamble.

WHEREAS it is expedient to consolidate and amend certain Acts now in force which provide greater security for persons paying to the representatives of deceased Hindus, Mahomedans, and others not usually designated as British subjects debts which are payable in respect of the estates of such deceased persons, and which facilitate the collection of such debts by removing all doubts as to the legal title to demand and receive the same; It is enacted as follows :—

Acts repealed.

[*I. Act XX of* 1841 *(for facilitating the collection of debts on successions, and for the security of parties paying debts to representatives of deceased persons); so much of Act VIII of* 1842 *as relates to the said Act XX of* 1841; *Act X of* 1851 *(to amend Act XX of* 1841 *for the administration of personal estate of deceased persons); and Act VIII of* 1854 *(to explain and amend Act X of* 1851 *and Act XX of* 1841) *are hereby repealed; except as to certificates granted and acts done under the authority of the said laws before the passing of this Act.*]

Repealed by Act XVI of 1874.

* By s. 2 of Act XXIV of 1867, this Act was repealed except as to Hindus, Muhammadans, and Buddhists, and persons exempted under the Indian Succession Act of 1865, s. 332, from the operation of that Act.

Under this Act a Native Christian is not entitled to a certificate—*Re Joseph Vathiar*, 7 Mad. H. C. R., 121. See also *Abraham* v. *Abraham*, 9 Moore's I. A., 193, 239.

Under s. 322 of the Succession Act, Native Christians in the Province of Coorg are exempted from the provisions of that Act, retrospectively, from the 16th March, 1865—*Gazette of India*, July 25th, 1868, p.

II. No debtor of any deceased person shall be compelled in any Court to pay his debt to any person claiming to be entitled to the effects of any deceased person or any part thereof, except on the production of a certificate to be obtained in manner hereinafter mentioned or of a probate or letters of administration, unless the Court shall be of opinion that payment of the debt is withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled.

No debt recoverable without a certificate.

Debtor.—A person having in his possession the surplus sale-proceeds of property which belonged to the deceased, is a debtor within the of this section.—*Bachoo Doss* v. *Mungal Doss*, 24 W. R., 203.

The devisee under the will of a testator may sue for rent in the C tor's Court without taking out a certificate *Bance Madhub Ghose* v. *Thak or Doss Mundul*, B L R F B No p 588. But the representative of a minor to whom a debt has been bequeathed cannot sue to recover the money, unless probate of the will of the testator shall out, or a certificate obtained under this Act to realize the to the estate of the testator.—*Sheo Jan Mohaldar* v 3 C. L R., 462, (S C) I. L R., 4 Calc., 645.

and to be "vexatiously withheld" within y because the debtor omits to pay it *C* v. *Gocool Chunder Bhuttacharjee*, I L. R., 6 Calc., 370.

A son adopted in pursuance of an *anaemota puttro* some time death of his adoptive father does not require, and is not entitled to obtain, a certificate under this Act to enable him to collect the debts ac in respect of the property left by his adoptive father while gement of his adoptive mother *Narain Mal* v. , I. L. R., 5 Calc., 251. The estate of the adoptive father ately on the adoption in the adopted son and debts accrued due after the father's death are recoverable by the son in his own right not as the representative of his adoptive father.—*Ibid*

III. The District Court within the jurisdiction of which the deceased shall have ordinarily resided at the time of his death, or if at that time he had no fixed place of residence, then within the jurisdiction of which any part of the property of the deceased may be found, shall have authority to grant a certificate under this Act. The applicant in his petition shall set forth his title. The Court shall issue notice of application, inviting claimants, and fixing a day for hearing the petition, and upon the appointed day, or as soon

e how to be

after as may be convenient, shall determine the right to the certificate and grant the same accordingly.

In the case of *Mirza Daud Ali* v. *Syed Nadir Hosscin*, 3 B. L. R. (A.C.), 46, a testator, who was trustee of certain 'wuqf' property, made a will relating only to such property, and appointed an executor. The executor was held to be entitled to a certificate under this Act with regard to the trust-property only, the legal representative being considered entitled to a certificate in respect of any other property left by the deceased.

The Court has, under this section, a discretion to grant a certificate to such person among rival claimants as, under the circumstances of the case, may appear best entitled to it—*Rani Raisunnissa Begum* v. *Rani Khujunnissa*, 4 B. L. R. (A.C.), 149; (S. C.), 10 W. R., 462. Mere nearness of kin is no reason by itself for the grant of a certificate to a particular person—*Moonshee Sonaiee* v. *Kachari Sajotulla*, 4 B. L R. (A C.), 149, note. See *Jamsedji Karasji* v. *Motibai*, 2 Bom. H. C. R., 398. Where an application made for a grant of a certificate is opposed by a party who alleges he has a preferable right to it, the Court should adjudicate the question of title with a view to determine which party has the preferential right to the certificate—*In re Sheetanath Mookerjee*, I L. R., 6 Calc., 303. See *Mussamut Anundee Koer* v. *Bachoo Singh*, 20 W R., 476; *In re Oodoychurn Mitter*, I. L. R., 4 Calc., 411; *Koonjbehary Chowdhry* v. *Gocool Chunder Chowdhry*, I. L. R., 3 Calc., 616; *Sitanath Mookerjee* v. *Ramgopal*, 7 C. L. R., 475; *Rani Raisunnissa Begum* v. *Rani Khujunnissa*, 10 W. R., 462.

In the case of *Kalee Chunder Surma* v. *Gobind Pershad Surma*, 12 W. R., 454, the Court held, that the Judge was bound, where an application for a certificate was made by one claiming title under an alleged will, or was opposed on the ground that the will was not genuine, to decide the question of the genuineness of the will. The decision, it was considered, however, could not be conclusive if a regular suit were afterwards brought—*ibid*. See also *In the matter of Koonj Beharee Ghur*, 11 W. R., 171; *Daud Ali Beg* v. *Nadir Hosscin*—*ib.*, 388, where similar decisions were come to by the Court.

Ordinarily, where the deceased was a member of a joint family, the managing member of the family would be the person best entitled to a certificate under this Act—*Chowdhry Kripasindhoo Doss* v. *Radha Churn Doss*, 23 W. R., 234.

The disciple, spiritual brother, or preceptor of an ascetic, it has been decided, is entitled to collect his debts—*Gureeb Doss* v. *Mungul Doss*, 14 W. R., 383; but in a later case it was held, that the Court cannot grant a certificate to collect the debts of an endowment on the death of the incumbent—*Bhyrub Bharutter Mohunt, petitioner*, 21 W. R., 340.

The Court will not grant a certificate to collect a share in a debt—*Mussamut Biace Boodhun* v. *Jan Khan*, 13 W. R., 265; *Waselun Huq* v. *Gouhuroonissa Bibee*, 10 W. R., 105, (S C.) 1 B. L R. (S. N.), 7; *Srimati Amirunnissa Barkat* v. *Srimati Afrattunnissa*, 3 B. L R. (A.C.), 404; *Brychan Sahoo* v. *Ganesh Sahoo*, 2 All. H. C. R., 439.

Where a person has no fixed place of residence at the time of his death, the Judge of the district in which his debts are, has authority to grant a certificate under this Act—*Golam Sobhan* v. *Mahomed Raup*, 20 W R., 286.

In a case where the illegitimate sons of a deceased person applied for a certificate, and it appeared that the deceased had made an assignment of his property to them and acknowledged them as his sons, the Court granted the certificate in preference to the childless widows of the brother and nephew of the deceased—*Predhan Ram* v. *Mussamut Jeria Koer*, 17 W. R., 189.

In the case of *Bishnee Doss* v. *Mungul Doss*, 24 W R., 203, it was held, that, under this Act, certificates should be granted in those cases only in which it is shown that the deceased, at the time of his death, had debts owing to him; but in a more recent case (*Beemul Doss* v. *Mungul Doss*, ib., 211), the same Judges (GLOVER and R. C. MITTER, JJ.) were of opinion, that the current of authorities on this subject laid it down that a petition for a

certificate need do nothing more than prove the title to collect the debts of the deceased, if any. See also *Radhika Churn Sen* v. *Judoo Nath Gossamee*, 20 W. R., 412; *Re Kalinath Dutt*, 8 W. R., 12; *Re Rama Kalee Dossee*, 10 W. R., 4; and *Musst. Bhugobutty Koer* v. *Bholanath Thakoor*, 8 W R., 317. In a still more recent case, however, MACPHERSON and MORRIS, JJ., held, that the existence of debts, as well as the title of the claimant, ought to be proved—*Uchhuba Dossia* v. *Nittyanund Shaha*, 24 W. R., 463.

The High Court of Calcutta suspended a certificate which had been granted in a case where no list of debts had been filed—*Mir Fyaz Ali* v. *Taleb Ali*, 18 W. R., 330. See *Mussamut Anundee Koer* v *Bachoo Singh*, 20 W. R., 476; *Radhika Churn Sen* v. *Jadoonath Gossamee*, ib., 412.

The certificate is conclusive of the representative character of the holder against all debtors—*Re Rama Kalee Dossee*, 10 W. R., 4, and *Musst. Bhugobutty Koer* v *Bholanath Thakoor*, 8 W R., 317. *Waslun* v. *Gowhurroonissa Bibee*, 10 W R., 105.

This Act does not empower a Judge to grant a joint certificate to two persons—*Mussamut Goora* v. *Kehree Singh*, 4 All H C R., 60.

Under Mithila law, the mother of a minor is entitled to a in preference to the father—*Jussoda Koer* v. *Lallah Nettya* I. L. R., 5 Calc., 43.

Proximity of residence and of kinship are not such considerations as should warrant a Judge in granting a certificate under the Act to any person in preference to another who has *prima facie* the better title to the beneficial ownership of the debts—*In the matter of Baboy Churn Mitter*, I. L. R., 4 Calc., 411. See *Gobind Persad Talookdar* v *Mohesh Chunder Surmah Chuttack*, 15 B L R., 35; (S C) 23 W R., 117.

A certificate of guardianship under Act XL of 1858 is not sufficient to entitle a guardian to sue for a debt due to a minor in respect of his father's estate. He must take out a certificate under this Act or, if the father have left a will of which probate may be taken out, he must obtain probate—*Shodon Mohaldar* v *Romzan Mohaldar* 3 C L R., 463.

A grant of probate under the Probate and Administration sedes a certificate granted under this Act or under Bombay VII of 1827—Act V of 1881, s. 152, *ante*.

IV. The certificate of the District Court shall be [illegible] sive of the r[illegible]

Effect of [illegible] to

deceased, and shall afford full indemnity to all debtors paying their debts to the person in whose favor the certificate has been granted.

This Act being an Act for facilitating the collection of debts due to the estates of deceased persons and for the greater security of persons paying such debts a certificate once granted is conclusive of the holder's title to represent the estate against all debtors of the deceased. All that the Court has to consider upon an application for a certificate is the right of the applicant to receive it—*Begchan Sahoo* v *Ganesh Sahoo*, 2 All. H. C R., 439. The certificate does not determine any question of [illegible] It merely protects the debtors of a deceased person from where they have paid a certificate-holder—*Mussamut Jokun* v *Bhugwanee*, 3 All H. C. R., 320. See Act V of 1881, s. 125 *ante*.

In the recent case of *Sreemutty Uma Dayee* v *Gokoolanund Das Mahapatra*, 2 C. L R., 51, the Judicial Committee of the Privy Council said that the effect of a certificate having been granted was at most to confirm or put the grantee in possession of the property left by the deceased until displaced by a decree in a regular suit. See *Waslun Huq* v. *Gowhurroonissa Bibee*, 10 W. R., 105.

A decision under this Act does not preclude the unsuccessful party from contesting the validity of a will in a regular suit—*Anund Mohun Moulick* v. *Indromonee Chowdhrain*, 16 W. R., 2

Court may take security from grantee of certificate.

V. The Court may take such security as it shall think necessary from any person to whom it shall grant a certificate for rendering an account of debts received by him, and for indemnity of persons who may be entitled to the whole or any part of the moneys received by virtue of such certificate whose right to recover the same by regular suit against the holder of the certificate is not affected by this Act.

It is entirely in the discretion of the Court whether it will or will not require security (*Mharabai* v. *Vithobak Gulve*, 7 Mad H C. R., App. xxvi); and no appeal lies on a question of the deposit of security by a person declared to be entitled to a certificate under the Act—*Monmohinee Dassee* v. *Khetter Gopaul Dey*, I. L. R., 1 Calc., 127; *Mohinee Chowdhrain* v. *Dino Bundhoo Chowdhry*, 17 W. R., 566. See *Musst. Soonea* v. *Ram Saha*, 2 All. H. C. R., 146, where it was held, that an appeal would not lie under s 6 merely for the purpose of reducing the amount of security ordered to be deposited.

Sudder Court may certificate on by District , or direct further

Court may certificate in supersession of the certificate granted by the District Court.

VI. The granting of such certificate may be suspended by an appeal to the Sudder Court, which Court may declare the party to whom the certificate should be granted, or may direct further proceedings for the investigation of the title as it shall think fit. The Court may also, upon petition, after a certificate shall have been granted by the District Court, grant a fresh certificate in supersession of the certificate granted by the District Court. Such fresh certificate shall not affect any payments made to the person to whom any former certificate may have been granted, without notice that the same has been superseded, but shall entitle the person named therein to receive all moneys that may have been recovered under the first certificate from the person to whom the same may have been granted.

The mode provided by this section is the only procedure by which a certificate may be annulled A suit will not lie for that purpose (*Payyamda A. P Ibragi* v. *Pudamadatanel*, 5 Mad. H. C R., 283); nor are the provisions of the Civil Procedure Code for review of judgment applicable to an order granting a certificate—*Sira* v. *Chinamma*, 5 Mad. H. C. R., 417.

An appeal will not lie under this section merely for the purpose of ng the amount of security required by the Court, but when an has been properly instituted under it, the Court may vary the s to security—*Mussumat Soonea* v. *Ram Saha*, 2 All H. C. R., 146.

The appeal contemplated in s. 6 is limited to persons in conflict as

claimants with the original petitioner only—*Komola Kaminee Debee*, 24 W. R., 92.

No appeal lies from an order of a District Judge refusing an application to recall a certificate granted by him under this Act—*In the matter of Nanuk Pershad*, I. L. R., 6 Calc., 40; (8 C.) 6 C. L. R., 388.

There is no appeal from the order of a District Court as to the form of a certificate—*Baneo Madhub Mookerjee* v. *Nilamber Banerjee*, 8 W. R., 376.

The Court will not recall a certificate on the ground that there is an heir in a nearer degree to the deceased than the certificate-holder, the object of the Act not being to assist parties in establishing a disputed right or title—*Anbeer Chunder Bundo* v. *Ramkanye Dass Biswas*, 17 W. R., 171.

VII. Every certificate shall give authority to the person to whom the same is granted throughout the Presidency within which the same is granted, and no certificate subsequently granted in respect of the same property shall be valid or effectual, except as hereinafter mentioned.

Local extent of power by certificate.

A certificate under this Act (XXVII of 1860) authorizes the holder of it to collect debts due to the deceased, but not to recover property which belonged to the deceased from a person wrongfully in possession—*Anbinfee* v. *Mee Nay*, 8 W. R., 1. See *Sreenath Pandey* v. *Heetonarain*, ib., 2.

A certificate to collect debts does not itself constitute the person holding it the legal representative of the deceased within the meaning of s. 366 of the Code of Civil Procedure. But when any person such a certificate obtains thereby property belonging to the dec... may be treated as a legal representative liable in respect of such ... Act X of 1877, s. 366, Explanat...

VIII. If the estate of the deceased shall include any Government securities or public company, the certificate may empower the person certified as aforesaid to receive interest or dividends thereon, or on any of them, or to negotiate the same or any of them: in such case the certificate shall describe the securities and shares in respect of which such powers are given, and such powers shall not be vested by the certificate except by express words.

Government securities or companies.

IX. In the case of disputes among persons claiming to be jointly entitled to be proprietors of any Government securities as the representatives of any deceased person, the District Court, whenever sufficient cause shall be shown, and on the request of any such claimant, may, so far as concerns the said securities, grant a certificate under this Act to such person as shall be from time to time appointed by the

... trus-
case of disputed succession.

Local Government to act as trustee under this section, and shall specify in such certificate the several persons appearing to him to be such proprietors and their several shares; and the said trustee, by virtue of such certificate, shall be entitled to receive and give discharges for the interest accruing due on such securities, and shall account for and pay the sum to the several persons specified in the certificate to be thereunto entitled, according to the shares therein set forth, and shall be empowered to act in all other respects concerning the said securities as agent for such persons, and shall be entitled to receive such commission, not exceeding one per centum, on the sums received and paid by him, as the Local Government shall think fit. Provided nevertheless that the right of any other person to recover the whole or any part of the moneys so paid by regular suit against all or any of the persons to whom the same have been paid, shall not be affected by this Act.

Proviso.

Appropriation of securities if dispute be not settled within two years.

X. If any such disputes among persons claiming to be proprietors of Government securities are not ended within two years from the date of the certificate granted under the last preceding section, the said trustee may apportion the principal sum of the said securities ratably among the parties appearing from the certificate to be proprietors thereof, and may apply for and receive new securities from the proper officer appointed to issue the same in the respective names of the several parties certified to be entitled thereto; provided that such new securities shall be issued only according to the rules in use for the regulation and issue of such Government securities, and the receipt of the said trustee for such new securities, by endorsement on the old securities or otherwise, shall be a legal discharge to the Government against the disputing parties claiming to be entitled to the several amounts for which such securities shall be issued. Provided always that, if the amount of any Government securities in dispute, or any part

Proviso.

thereof, shall not be sufficient to admit of their ratable division according to the rules applicable to the issue of such securities, the said trustee may sell and dispose of the disputed securities, or such part as shall be necessary under this provision, and apportion the proceeds thereof among the parties entitled to receive the same.

Effect of certificate granted by trustee.

XI. Every certificate granted to the trustee appointed under Section IX shall be taken to supersede and annul any previous certificate so far as such previous certificate relates to the said Government securities.

Payments under certificate void by reason of previous certificate

XII. When a certificate shall have been granted, in cases in which such certificate would be valid but for the previous grant of a certificate, all payments made to the person holding the latter certificate in ignorance of the grant of the previous certificate, shall be held good against claims under such previous certificate.

Certificate in respect of property of deceased Hindus, Mahomedans, &c., void after grant of probate or letters

XIII. With regard to the property of a deceased Hindu, Mahomedan, or other person not usually designated by the term 'British subject,' no certificate in respect of any such property shall be valid if made after a probate or letters of administration granted in respect of the same, [*provided assets belonging to the deceased were, at the time of his death, within the local jurisdiction of the Court granting the probate or letters of*

in italics has been repealed by s. 151 of the Probate and Administration Act, V of 1881

Certain payments under certificate granted after grant of probate or letters, protected.

XIV. Where a certificate shall have been granted, in cases in which such certificate would be valid but for a probate or letters of administration previously granted, all payments made to the person holding the certificate in ignorance of the previous granting of the probate or letters of administration, shall be held good against claims

under the probate or letters of administration so previously granted.

By s. 152 of the Probate and Administration Act, V of 1881, it is pro-

The grant of probate or letters of administration under this Act in respect of any property shall be deemed to supersede any certificate previously granted in respect of the same property under the said Act No. XXVII of 1860, or Bombay Regulation No. VIII of 1827; and when, at the time of the grant of such probate or letters, any suit or other proceeding instituted by the holder of such certificate regarding such property is pending, the person to whom such grant is made shall, on applying to the Court in which such suit or proceeding is pending, be entitled to take the place of such holder in such suit or proceeding:

Provided that, when any certificate is superseded under this section, all payments made to the holder of such certificate in ignorance of such supersession shall be held good against claims under the probate or letters of administration."

Probate or letters void after grant of certificate.

[*XV. No probate or letters of administration shall be valid for the purpose of the recovery of debts, or for the security of debtors, after a certificate granted in respect of the same property for which such probate or letters of administration shall have been granted, provided assets belonging to the deceased were, at the time of his death, within the jurisdiction of the Court granting such certificate.*]

Proviso.

Certain payments under probate or letters, after grant of certificate revoked.

[*XVI. Where probate or letters of administration may have been granted in cases in which such probate or letters of administration would be valid but for the previous grant of a certificate, all payments made in ignorance of the previous grant of the certificate shall be held good against claims under such previous certificate.*]

These sections in italics have been repealed by s. 151 of the Probate and Administration Act, V of

XVII. Curators appointed under Act XIX of 1841, who may be invested with certain powers which are conferred on persons obtaining certificates under this Act, shall not exercise any powers which, but for that Act, would lawfully belong to persons obtaining certificates, or to executors or administrators, where a certificate, probate, or letters of administra-

Curator prohibited from exercising certain powers.

tion has been actually obtained; but all persons who may have paid debts or rents to a curator authorized by a Court to receive the same shall be indemnified, and the curator shall be responsible for the payment of the same to the person who has obtained a certificate, the executor or administrator, as the case may be.

Effect of probates and letters granted to re- of British

XVIII. All probates and letters of administration granted by any Supreme Court of Judicature in cases in which any assets belonging to deceased persons were, at the time of their deaths, within the local jurisdiction of the Court granting the probate or letters of administration, shall have the effect of probate and letters of administration granted in respect of the property of British subjects, but for the purpose of the recovery of debts only and the security of debtors paying the same, except so far as is in this Act provided.

This section is nearly *verbatim*, s. 14 of Act XX of 1841.

As to the effect of that Act, see *Lalchand Ramdyal v. Gunibai*, 8 Bom. H. C. R., 150-1.

Effect of certificates British re- in Foreign

XIX. A certificate of administration granted by the British representative accredited to any Foreign Prince or State, shall, as regards the residents within the territories of such Prince or State, have the same effect in respect to Government securities as a certificate granted to a Native subject of Her Majesty under the provisions hereinbefore contained.

Local extent of power by such certifi-

XX. Every certificate of administration granted under the last preceding section shall, as regards the Government securities, give authority to the to whom the same shall be granted throughout the British territories in India, and have the same effect throughout the said territories as a certificate granted under Section VII of this Act has within the Presidency within which the same is granted.

XXI. Any Court or officer authorized to grant a certificate may, from time to time,

Extension of certificate.

ment security or bank-share not originally specified therein, and every such extension shall have the same effect as if the Government security or bank-share to which the certificate shall be extended had been originally specified therein.

XXII. Upon the extension of a certificate, security may be required in the same manner as upon the original grant of a certificate.

Security upon extension.

XXIII. Nothing in this Act contained shall be held to extend to the property of any person usually designated as a British subject.

Act not to apply to British subjects.

XXIV. The following words and expressions in this Act shall have the meaning hereby assigned to them, unless there be something in the subject or context repugnant to such construction (that is to say)—

Interpretation.

Words importing the singular number shall include the plural number, and words importing the plural number shall include the singular number.

Number.

Words importing the masculine gender shall include females.

Gender.

The words 'District Court' shall mean the principal Civil Court of original jurisdiction of a zillah or district.

'District Court.'

The words 'Sudder Court' shall be deemed to include the highest Civil Court of appeal in any part of the British territories in India not subject to the control and superintendence of a Sudder Court.

'Sudder Court.'

THE OUDH ESTATES ACT.

ACT No. I OF 1869.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor General on the* 12

An Act to define the rights of Talukdars and others in certain estates in Oudh, and to regulate the succession thereto.

Preamble.

WHEREAS, after the re-occupation of Oudh by the British Government in the year 1858, the proprietary right in divers estates in that province was, under certain conditions, conferred by the British Government upon certain talukdars and others; and whereas doubts may arise as to the nature of the rights of the said talukdars and others in such estates, and as to the course of succession thereto; and whereas it is expedient to prevent such doubts, and to regulate such course, and to provide for such other matters connected therewith as are hereinafter mentioned; It is hereby enacted as follows:—

I.—Preliminary.

Short title.

Act.

1. This Act may be cited as "The Oudh Estates Act, 1869," and shall extend only to the estates hereinafter referred to.

-clause.

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

'Transfer.'

'Transfer' means an alienation *inter vivos*;

'Will.'

'Will' means the legal declaration of the intentions of the testator with respect

to his property affected by this Act, which he desires to be carried into effect after his death ;

'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.'

'Signed' applies to the affixing of a mark;

'Signed.'

'Registered' means registered according to the provisions of the rules relating to the registration of assurances for the time being in force in Oudh;

'Registered.'

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

'Minor.'

'Minority.'

'Taluqdar' means any person whose name is entered in the first of the lists mentioned in section eight;

'Taluqdar.'

'Grantee' means any person upon whom the proprietary right in an estate has been conferred by a special grant of the British Government, and whose name is entered in the fifth or sixth of the lists mentioned in section eight;

'Estate' means the taluqa or immoveable property acquired or held by a taluqdar or grantee in the manner mentioned in section three, section four, or section five, or the immoveable property conferred by a special grant of the British Government upon a grantee;

'Heir' means a person who inherits property otherwise than as a widow, under the special provisions of this Act; and 'legatee' means a person to whom property is bequeathed under the same provisions;

'Heir.'

Words expressing relationship denote only legitimate relatives, but apply to children in the womb who are afterwards born alive.

II.—Rights and liabilities of Taluqdars and Grantees.

Taluqdars to have heritable and transferable rights in their estates.

3. Every taluqdar with whom a summary settlement of the Government revenue was made between the first day of April 1858 and the tenth day of October 1859, or to whom, before the passing of this Act and subsequently to the first day of April 1858, a taluqdari sanad has been granted,

shall be deemed to have thereby acquired a permanent, heritable, and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or kabuliyat executed by such taluqdar when such settlement was made,

or which may have been or may be decreed to him by the Court or an officer engaged in making the first regular settlement of the province of Oudh, such decree not having been appealed from within the time limited for appealing against it, or, if appealed from, having been affirmed,

subject to all the conditions affecting the taluqdar contained in the orders passed by the Governor General of India on the tenth and nineteenth days of October 1859 and republished in the first schedule hereto annexed, and subject also to all the conditions contained in the sanad under which the estate is held.

Subject to certain conditions.

See *Gouri Shunkur* v. *Maharajah of Bulrampore*, L. R., 6 I. A., 7; *Shunkur Sahai* v. *Rajah Kashi Pershad*, L. R., 4 I. A.,

Rights and liabilities of persons named in second schedule.

4. Every person whose lands the proclamation issued in Oudh in the month of March 1858 by order of the Governor General of India specially exempted from confiscation, and whose names are contained in the second schedule hereto annexed, shall be deemed to possess in the lands for which such person executed a kabuliyat between the first day of April 1858 and the first day of April 1860 the same right and title which he would have pos-

sessed thereto if he had acquired the same in the manner mentioned in section three; and he shall be deemed to hold the same subject to all the conditions affecting taluqdars which are referred to in the said section, and to be a taluqdar for all the purposes of this Act.

See the Proclamation *in extenso*, *infra*, p. 490.

Grantees' rights and liabilities.

5. Every grantee shall possess the same rights and be subject to the same conditions in respect of the estate comprised in his grant as a taluqdar possesses and is subject to, under section three, in respect of his estate.

Saving of certain rights.

6. Nothing in sections three, four and five, or in the said orders, or in any sanad, shall be deemed to bar a suit for redemption,

(*a*) where the instrument of mortgage was executed on or after the thirteenth day of February 1844 and fixed no term within which the property comprised therein might be redeemed, or

(*b*) where the instrument of mortgage fixed a term within which the property comprised therein might be redeemed, and such term did not expire before the thirteenth day of February 1856.

Heirlooms.

7. If a taluqdar or grantee, or any heir or legatee of a taluqdar or grantee, desire that any elephants, jewels, arms or other articles of moveable property belonging to him shall devolve along with his estate, he shall take an inventory of such articles. Such inventory shall be signed by him and deposited in the office of the Deputy Commissioner of the District wherein such estate or the greater part thereof is situate; and thereupon such of the said articles as shall not have been transferred shall (so far as may be possible) be used and enjoyed by the person who, under or by virtue of this Act, is for the time being in actual possession or in receipt of the rents and profits of the said estate or the greater part thereof, otherwise than as mortgagee or lessee.

III.—Lists of Taluqdars and Grantees.

Preparation of lists of taluqdars and grantees.

8. Within six months after the passing of this Act, the Chief Commissioner of Oudh, subject to such instructions as he may receive from the Governor General of India in Council, shall cause to be prepared six lists, namely:—

First.—A list of all persons who are to be considered taluqdars within the meaning of this Act;

Second.—A list of the taluqdars whose estates, according to the custom of the family on and before the thirteenth day of February 1856, ordinarily devolved upon a single heir;

Third.—A list of the taluqdars, not included in the second of such lists, to whom sanads or grants have been or may be given or made by the British Government up to the date fixed for the closing of such lists, declaring that the succession to the estates comprised in such sanads or grants shall thereafter be regulated by the rule of primogeniture;

Fourth.—A list of the taluqdars to whom the provisions of section twenty-three are applicable;

Fifth.—A list of the grantees to whom sanads or grants have been or may be given or made by the British Government, up to the date fixed for the closing of such list, declaring that the succession to the estates comprised in such sanads or grants shall thereafter be regulated by the rule of primogeniture;

Sixth.—A list of the grantees to whom the provisions of section twenty-three are applicable.

Publication of lists.

9. When the lists mentioned in section eight shall have been approved by the Chief Commissioner of Oudh, they shall be published in the *Gazette of India*. After such publication, the first and second of the said lists shall not, except in the manner provided by section thirty or section thirty-one, as the case may be, be liable to any alteration in respect of any names entered therein.

Supplementary list.

If, at any time after the publication of the said lists, it appears to the Governor General of India in Council that the name of any person has been wrongly omitted from, or wrongly entered in, any of the said lists, the said Governor General in Council may order the name to be inserted in the proper list, and such name shall be published in the *Gazette of India* in a supplementary list, and such person shall be treated in all respects as if his name had been from the first inserted in the proper list.

None but persons named in lists to be deemed taluqdars or grantees.

10. No persons shall be considered taluqdars or grantees within the meaning of this Act other than the persons named in such original or supplementary lists as aforesaid. The Courts shall take judicial notice of the said lists and shall regard them as conclusive evidence that the persons named therein are such taluqdars or grantees.

A person who has been registered as a taluqdar under this Act, and has thereby acquired a taluqdaree right in the whole property, may, nevertheless, have made himself trustee of a portion of the beneficial interest in lands comprised within the taluqa for another, and be liable to account accordingly—*Thakoor Hurdeo Bux* v. *Thakoor Jawahir Singh*, L. R., 4 I. A., 178. See *Shunkur Sahai* v. *Rajah Kashi Pershad*, *ibid*, 198 ; *of Childaree* v. *Government of India*, il

IV.—Powers of Taluqdars and Grantees to transfer and bequeath.

Taluqdars and grantees may transfer and bequeath.

11. Subject to the provisions of this Act, and to all the conditions under which the estate was conferred by the British Government, every taluqdar and grantee, and every heir and legatee of a taluqdar and grantee, of sound mind and not a minor, shall be competent to transfer the whole or any portion of his estate, or of his right and interest therein, during his lifetime, by sale, exchange, mortgage, lease or gift, and to bequeath by his will to any person the whole or any portion of such estate, right and interest.

A married woman may make a bequest under this Act of any property which she could alienate by her own act during her life.

Persons who are deaf or dumb or blind are not thereby incapacitated for making a transfer or bequest under this Act, if they are able to know what they do by it.

One who is ordinarily insane may make a transfer or bequest under this Act during an interval in which he is of sound mind.

No person can make a transfer or bequest under this Act while he is in such a state of mind, whether from drunkenness, or from illness, or from any other cause, that he does not know what he is doing.

A transfer and 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 transferror or testator, is void.

Compare ss. 46 and 48 of the Indian Succession Act, *ante*.

Rule against perpetuity.

12. No transfer or bequest under this Act shall be valid whereby the vesting of the thing transferred or bequeathed may be delayed beyond the lifetime of one or more persons living at the decease of the transferree or testator 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 transferred or bequeathed is to belong.

Compare s. 101 of the Indian Succession Act.

do.

13. No taluqdar or grantee, and no heir or legatee of a taluqdar or grantee, shall have power to give or bequeath his estate, or any portion thereof, or any interest therein, to any person not being either—

(1) a person who, under the provisions of this Act, or under the ordinary law to which persons of the donor's or testator's tribe and religion are

subject, would have succeeded to such estate or to a portion thereof, or to an interest therein, if such taluqdar or grantee, heir or legatee, had died intestate, or

(2) a younger son of the taluqdar or grantee, heir or legatee, in case the name of such taluqdar or grantee appears in the third or the fifth of the lists mentioned in section eight,

except by an instrument of gift or a will executed and attested, not less than three months before the death of the donor or testator, in manner herein provided in the case of a gift or will, as the case may be, and registered within one month from the date of its execution.

V.—Transfers and Bequests.

Transfers and bequests to taluqdars or heirs.

14. If any taluqdar or grantee shall heretofore have transferred or bequeathed, or if any taluqdar or grantee, or his heir or legatee, shall hereafter transfer or bequeath, the whole or any portion of his estate to another taluqdar or grantee, or to such younger son as is referred to in section 13, cl. 2, or to a person who would have succeeded according to the provisions of this Act to the estate or to a portion thereof if the transferror or testator had died without having made the transfer and intestate, the transferree or legatee and his heirs and legatees shall have the same rights and powers in regard to the property to which he or they may have become entitled under or by virtue of such transfer or bequest, and shall hold the same subject to the same conditions and to the same rules of succession as the transferror or testator.

Transfers and bequests to persons out of line of succession.

15. If any taluqdar or grantee shall heretofore have transferred or bequeathed, or if any taluqdar or grantee or his heir or legatee shall hereafter transfer or bequeath, to any person not being a taluqdar or grantee, the whole or any portion of his estate, and such person would not have succeeded according to the provisions of this

Act to the estate or to a portion thereof if the transferror or testator had died without having made the transfer and intestate, the transfer of and succession to the property so transferred or bequeathed shall be regulated by the rules which would have governed the transfer of and succession to such property if the transferree or legatee had bought the same from a person not being a taluqdar or grantee.

Transfers to be in writing, signed and attested.

16. No transfer of any estate, or of any portion thereof, or of any interest therein, made by a taluqdar or grantee or by his heir or legatee under the provisions of this Act, shall be valid, unless made by an instrument in writing signed by the transferror and attested by two or more witnesses.

Further requisites to validity of gifts *inter vivos*

17. If any such transfer be made by gift, the gift shall not be valid unless, within six months after the execution of the instrument of gift, the gift be followed by delivery by the donor, or his representative in interest, of possession of the property comprised therein, nor unless the instrument shall have been registered within one month from the date of its execution.

* or

18. No taluqdar or grantee, and no heir or legatee of a taluqdar or grantee, shall have power to give his estate, or any portion thereof or interest therein, to religious or charitable uses, except by an instrument of gift executed not less than three months before his death, and subject to the provisions contained in section 17.

16—18 have no retrospective effect—*Hurpurshad* , L. R., 3 I. A.

VI.—Testamentary Succession.

..... of Succes- Act applied to wills

19. Sections 49, 50, 51, 54, 55, and 57 to 77 (both inclusive), and sections 82, 83, 85, and 88 to 98 (both inclusive) of the Indian Succes-

sion Act (No. X of 1865), shall apply to all wills and codicils made by any taluqdar or grantee, or by his heir or legatee, under the provisions of this Act, for the purpose of bequeathing to any person his estate, or any portion thereof or any interest therein : Provided that marriage shall not revoke any such will or codicil : Provided also that nothing herein contained shall affect wills made before the passing of this Act.

In applying the said sections to wills and codicils made under this Act, all words hereinbefore defined, and occurring in such sections, shall (unless there be something repugnant in the subject or context) be deemed to have the same meaning as this Act has attached to such words respectively.

20. No taluqdar or grantee, and no heir or legatee of a taluqdar or grantee, having a child, parent, brother, unmarried sister, or a nephew, being the naturally born son of a brother of such taluqdar or grantee, heir or legatee, shall have power to bequeath his estate or any part thereof or any interest therein exceeding in amount or value the sum of two thousand rupees to religious or charitable uses, except by a will executed not less than three months before his death, and registered within one month from the date of its execution.

Compare s. 105 of the Indian Succession Act, *ante*.

VII.—Intestate Succession.

21. In the next following section, unless where there is something repugnant in the context, the words 'son,' 'descendants,' 'daughter,' and 'brother' apply only to *najib-ul-tarfain*, and the word 'widow' applies only to a woman belonging to the *ahl-i-bradari* of her deceased husband.

'Son,' 'descendants,' 'daughter,' 'brother,' 'widow,' defined.

22. If any taluqdar or grantee whose name shall be inserted in the second, third, or fifth of the lists mentioned in section eight, or his

Special rules of succession to intestate taluqdars and grantees.

heir or legatee, shall die intestate as to his estate, such estate shall descend as follows, viz.:—

(1.) To the eldest son of such taluqdar or grantee, heir or legatee, and his male lineal descendants, subject to the same conditions and in the same manner as the estate was held by the deceased ;

(2.) Or if such eldest son of such taluqdar or grantee, heir or legatee, shall have died in his lifetime, leaving male lineal descendants, then to the eldest and every other son of such eldest son successively, according to their respective seniorities, and their respective male lineal descendants, subject as aforesaid ;

(3.) Or if such eldest son of such taluqdar or grantee, heir or legatee, shall have died in his father's lifetime without leaving male lineal descendants, then to the second and every other son of the said taluqdar or grantee, heir or legatee, successively, according to their respective seniorities, and their respective male lineal descendants, subject as aforesaid ;

(4.) Or in default of such son or descendants, then to such son (if any) of a daughter of such taluqdar or grantee, heir or legatee, as has been treated by him in all respects as his own son, and to the male lineal descendants of such son, subject as aforesaid ;

Wherever it is shewn by sufficient evidence that a taluqdar, not having male issue, has so exceptionally treated the son of a daughter as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son, if one existed, and would not ordinarily be conceded to daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such daughter's son will be held to succeed to the taluqdaree estate under the 4th clause of .—*Pertab Narain Singh* v. *Subhao Koer*, L. R., 4 I. A., 228.

(5.) Or in default of such son or descendants, then to such person as the said taluqdar or grantee, heir or legatee, shall have adopted by a writing executed and attested in manner required in case of a will and registered, subject as aforesaid ;

(6.) Or in default of such adopted son, then to the eldest and every other brother of such taluqdar or grantee, heir or legatee, successively, according

to their respective seniorities, and their respective male lineal descendants, subject as aforesaid ;

(7.) Or in default of any such brother, then to the widow of the deceased taluqdar or grantee, heir or legatee ; or, if there be more widows than one, to the widow first married to such taluqdar or grantee, heir or legatee, for her lifetime only ;

(8.) And upon the death of such widow, then to such son as the said widow shall, with the consent in writing of her deceased husband, have adopted by a writing executed and attested in manner required in case of a will and registered, subject as aforesaid ;

(9.) Or on the death of such first married widow, and in default of a son adopted by her with such consent and in such manner as aforesaid, then to the other widow, if any, of such taluqdar or grantee, heir or legatee, next in order of marriage, for her life, and on the death of such other widow, to a son adopted by her with such consent and in such manner as aforesaid ; or in default of such adopted son, then to the other surviving widows according to their respective seniorities as widows, for their respective lives, and on their respective deaths, to the sons so adopted by them respectively, and to the male lineal descendants of such sons respectively, subject as aforesaid ;

(10.) Or in default of any such widow or of any son so adopted by her, or of any such descendant, then to the male lineal descendants, not being *najib-ul-tarfain*, of such taluqdar or grantee, heir or legatee, successively, according to their respective seniorities and their respective male lineal descendants, whether *najib-ul-tarfain* or not ;

(11.) Or in default of any such descendant, then to such persons as would have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of such taluqdar or grantee, heir or legatee, are subject.

Nothing contained in the former part of this section shall be construed to limit the power of alienation conferred by section eleven.

See *Brij Indar Bahadur Singh* v. *Rance Janker Koer*, L. R., 5 I. A., 1.

23. Except in the cases provided for by section twenty-two, the succession to all property left by taluqdars and grantees, and their heirs and legatees, dying intestate, shall be regulated by the ordinary law to which members of the intestate's tribe and religion are subject.

— .... of succession to intestate taluqdars and grantees.

VIII.—Maintenance.

24. When any taluqdar or grantee, or his heir or legatee, dies leaving him surviving such relatives as are hereinafter mentioned, the person for the time being in the possession of his estate or the rents and profits thereof shall be liable to pay to each of such relatives, during his or her life, or for such other period as is hereinafter mentioned, by twelve equal monthly payments, an annuity in accordance with the custom of the country not exceeding such amount as is hereinafter mentioned : Provided that such relative was at the date of the death of the deceased living together with him : Provided also that such relative is and continues to be without any other adequate means of maintenance.

..... of surviving relatives of taluqdars and grantees.

If any part of such estate shall have been transferred or bequeathed by the deceased, the person for the time being in possession of such part, or of the rents and profits thereof, shall be liable to pay proportionate parts of the said annuities during the continuance thereof respectively.

25. In the case of the grandparents, parents, and senior widows of the deceased, the maximum amount of the annuity shall be as follows :—

Grandparents, parents, and senior widows.

(*a*) where the annual revenue payable to Government in respect of the estates is or exceeds 1,50,000 rupees—a sum not exceeding 6,000 rupees :

(*b*) where such revenue is or exceeds 1,00,000 rupees, but is less than 1,50,000 rupees—a sum not exceeding 2,400 rupees :

(*c*) where such revenue is or exceeds 50,000 rupees, but is less than 1,00,000 rupees—a sum not exceeding 1,200 rupees :

(*d*) where such revenue is or exceeds 25,000 rupees, but is less than 50,000 rupees—a sum not exceeding 600 rupees :

(*e*) where such revenue is or exceeds 15,000 rupees, but is less than 25,000 rupees—a sum not exceeding 360 rupees :

(*f*) where such revenue is or exceeds 7,000 rupees, but is less then 15,000 rupees—a sum not exceeding 240 rupees ; and

(*g*) where such revenue is less than 7,000 rupees—a sum not exceeding 180 rupees.

Junior widows.

In the case of a junior widow of the deceased, the maximum amount of the annuity shall be one-half of the maximum amount to which a senior widow of the deceased would be entitled under the former part of this section.

Brothers and minor sons.

26. In the case of brothers and minor sons of the deceased, the maximum amount of the annuity shall be a sum not more than 1,200 rupees.

Nephews.

In the case of nephews of the deceased, being fatherless minors, the maximum amount of the annuity shall be a sum not more than 600 rupees.

Unmarried daughters, widows of sons and brothers and inferior widows.

27. In the case of unmarried daughters of the deceased, widows of his sons and brothers and his widows not of his *ahl-i-bradari*, the maximum amount of the annuity shall be a sum not more than 360 rupees.

of an-

28. Subject to the provisions hereinbefore contained, the said annuities shall continue,

(*a*) in the case of a minor son or a minor nephew, till he ceases to be a minor ;

(*b*) in the case of a daughter or widow, till she voluntarily leaves the household of the heir or legatee of the deceased, or would, according to the

custom of the country, cease to be entitled to maintenance, and

(*c*) in all other cases, till the annuitant dies.

IX.—Miscellaneous.

Persons empowered to adopt.

29. Every Muhammadan taluqdar, grantee, heir or legatee, and every widow of a Muhammadan taluqdar or grantee, heir or legatee, with the consent in writing of her deceased husband, shall, for the purposes of this Act, have power to adopt a son whenever, if he or she were a Hindu, he or she might adopt a son.

Such power shall be exercisable only by writing executed and attested in manner required by section nineteen in case of a will and registered.

Alteration of rules of intestate succession in cases of taluqdars and grantees named in list 3 or list 5.

30. Any taluqdar or grantee whose name has been entered in the third or fifth of the lists mentioned in section eight, or his heir or legatee, may, at any time hereafter, present to the Chief Commissioner of Oudh a declaration in writing, executed and registered in the manner required by this Act for the execution and registration of an instrument of gift, that he is desirous that the succession to his estate shall, in case of his intestacy, cease to be regulated in the manner described in section twenty-two, and that it shall in future be regulated by the ordinary law to which members of his tribe and religion are subject.

On receiving such declaration, the said Chief Commissioner shall cause to be inserted the name of such taluqdar or grantee, heir or legatee, in the fourth or sixth (as the case may be) of the lists mentioned in section eight, and shall cause a note thereof to be made in the proper place in the third or fifth (as the case may be) of the said lists, and the succession to such estate shall thenceforward, in case of intestacy, be regulated in the manner provided by section twenty-three.

Reverter to ordinary law of succession.

31. Any taluqdar or grantee, heir or legatee, may, at any time hereafter, present to the Chief Commissioner of Oudh a declaration in writing, executed and registered in the manner required by this Act for the execution and registration of instruments of gift, that he is desirous that his estate should in future be held subject to the ordinary law of succession to which members of his tribe and religion are subject.

On receiving such declaration, the Chief Commissioner shall cause a note thereof to be made in the proper places in each of the lists mentioned in section eight in which the name of such taluqdar or grantee, heir or legatee, has been entered, and thenceforward none of the provisions of this Act shall apply to such estate, which shall thenceforward be held subject in all respects to the ordinary law of succession to which members of his tribe and religion are subject.

Saving of rights of creditors.

32. Nothing hereinbefore contained shall affect any right which the creditors of any person making a transfer or bequest under the provisions of this Act would have possessed as against the property comprised in such transfer or bequest if this Act had not been passed.

Awards as to compensation and maintenance.

33. And whereas bodies of taluqdars have in several cases made awards respecting the provision to be made for certain relatives of taluqdars, and it is expedient to render such awards legally enforceable,—it is hereby further enacted that every such award shall, if approved by the Financial Commissioner of Oudh and filed in his Court within six months after the passing of this Act, be enforceable as if a Court of competent jurisdiction had passed judgment according to the award and a decree had followed upon such judgment.

SCHEDULES.

FIRST SCHEDULE.

(See Section 3.)

From C. BEADON, Esq., Secretary to the Government of India, Department, to C. J. WINGFIELD, Esq., Chief Commissioner of Oudh, —(No. 6268, dated 10th October,

No. 1091, dated the 4th June.
No. 1377, dated the 15th July.

I AM directed by the Governor-General in Council to acknowledge the receipt of your Secretary's letters noted in the margin, relative to the taluqdari settlement of Oudh.

2. His Excellency in Council, agreeing with you as to the expediency of removing all doubts as to the intention of the Government to maintain the taluqdars in possession of the taluqas for which they have been permitted to engage, is pleased to declare that every taluqdar with whom a summary settlement has been made since the re-occupation of the province, has thereby acquired a permanent hereditary and transferable proprietary right, *viz.*, in the taluqa for which he has engaged, including the perpetual privilege of engaging with the Government for the revenue of the taluqa.

3. This right is, however, conceded, subject to any measure which the Government may think proper to take for the purpose of protecting the inferior zamindars and village occupants from extortion, and of upholding their rights in the soil in subordination to the taluqdars.

4. The Governor-General in Council desires that you will have ready, by His Excellency's arrival at Lucknow, a list of the taluqdars upon whom a permanent proprietary right has now been conferred; and that you will prepare
to be issued to these taluqdars at that time. The
will be given by, and will run in the name of, the Chief Commissioner, acting under the authority of the Governor-General.

5. I am directed to add that, as regards zamindars and others, not being taluqdars, with whom a summary settlement has been made, the orders conveyed in the limitation Circular, No. 31 of the 28th of January, 1859, must not be strictly observed. Opportunity must be allowed at the next settlement to all disappointed claimants to bring forward their claims, and all such claims must be heard and disposed of in the usual manner.

II.

From C. BEADON, ESQ., Secretary to the Government of India, Foreign Department, with the Governor-General, to the Chief Commissioner of Oudh,—(No. 23, dated 19th October, 1859.)

I AM directed by His Excellency the Governor-General to acknowledge the receipt of your demi-official letter of the 15th instant, enclosing a form of sanad to be given to the taluqdars of Oudh, granting them a full and permanent proprietary right in the taluqas for which they have severally been permitted to engage at the summary settlement.

2. This form of sanad is generally approved, and a revised copy, with some few alterations, is herewith enclosed for adoption and for careful translation into the Hindustani language, in which the sanads will be prepared.

3. The sanads declare that while, on the one hand, the Government has conferred on the taluqdars and on their heirs for ever the full proprietary right in their respective estates, subject only to the payment of the annual revenue that may be imposed from time to time, and to certain conditions of loyalty and good service, on the other hand, all persons holding an interest in the land under the taluqdars will be secured in the possession of the subordinate rights which they have heretofore enjoyed.

4. The meaning of this is that, when a regular settlement of the province is made, wherever it is found that zamindars or other persons have held an interest in the soil intermediate between the ryot and the taluqdar, the amount or proportion payable by the intermediate holder to the taluqdar, and the net jama finally payable by the taluqdar to the Government, will be fixed and recorded after careful and detailed survey and inquiry into each case, and will remain unchanged during the currency of the settlement, the taluqdar being, of course, free to improve his income and the value of his property by the reclamation of waste lands (unless in cases where usage has given the liberty of reclamation to the zamindar), and by other measures of which he will receive the full benefit at the end of the settlement. Where leases (pattas) are given to the subordinate zamindars, they will be given by the taluqdar, not by the Government.

5. This being the position in which the taluqdars will be placed, they cannot, with any show of reason, complain if the Government takes effectual steps to re-establish and maintain in subordination to them the former rights, as those existed in 1855, of other persons whose connexion with the soil is in many cases more intimate and more ancient than theirs; and it is obvious that the only effectual

protection which the Government can extend to these inferior holders, is to define and record their rights and to limit the demand of the taluqdar as against such person during the currency of the settlement to the amount fixed by the Government as the basis of its own revenue demand.

6. What the duration of the settlement shall be, and what proportion of the rent shall be allowed in each case to zamindars and taluqdars, are questions to be determined at the time of settlement.

The Governor-General agrees in your observation that it is a bad principle to create two classes of recognized proprietors in one estate, and it is likely to lead to the alienation of a larger proportion of the land-revenue than if there were only one such class. But whilst the taluqdari tenure, notwithstanding this drawback, is about to be recognized and re-established, because it is consonant with the feelings and traditions of the whole people of Oudh, the zamindari tenure intermediate between the tenures of the taluqdar and the ryot is not a new creation, and it is a tenure which, in the opinion of the Governor-General, must be protected.

SECOND SCHEDULE.

(See Section 4.)

(1)—Drig Bejay Singh, Rajah of Balrampore.
(2)—Rao Hardeo Baksh Singh, of Katiari.
(3)—Kashi Parshad, Taluqdar of Sissendi
(4)—Jhabba Singh, Zamindar of Gopal Khera.
(5)—Chandan Lal, Zamindar of Moraon (Baiswara).

LORD CANNING'S PROCLAMATION OF 15TH MARCH, 1858.

THE Army of His Excellency the Commander-in-Chief is in possession of Lucknow, and the city lies at the mercy of the British Government, whose authority it has for nine months rebelliously defied and resisted.

This resistance, began by a mutinous soldiery, has found support from the inhabitants of the city and of the province of Oudh at large. Many who owed their prosperity to the British Government, as well as those who believed themselves aggrieved by it, have joined in this bad cause, and have ranged themselves with the enemies of the State.

They have been guilty of a great crime, and have subjected themselves to a just retribution.

The capital of their country is now once more in the hands of the British troops.

From this day it will be held by force which nothing can withstand, and the authority of the Goverument will be carried into every corner of the province.

The time, then, has come at which the Right Hon'ble the Governor-General of India deems it right to make known the mode in which the British Government will deal with the taluqdars, chiefs, landholders, of Oudh, and their followers.

The first care of the Governor-General will be to reward those who have been steadfast in their allegiance at a time when the authority of the Government was partially overborne, and who have proved this by the support and assistance which they have given to British officers.

Therefore, the Right Hon'ble the Governor-General hereby declares, that Drig Bejay Sing, Rajah of Balrampur, Kulwant Sing, Rajah of Pudnaha, Rao Hurdeo Bux Sing, of Katiari, Kashi-

parshad, taluqdar of Sissendi, Jahar Sing, zemindar of Gopal Khan, and Chaude Lal, zemindar of Maurawan (Baiswara), are henceforward the sole hereditary proprietors of the land which they held when Oudh came under British rule, subject only to such moderate assessment as may be imposed upon them, and that these loyal men will be further rewarded in such manner and to such extent as, upon consideration of their merits and their position, the Governor-General shall determine.

[See *Hurpurshad* v. *Sheo Dyal*, L. R., 3 I. A., 259, as to the effect of this paragraph of the Proclamation]

A proportionate measure of reward and honor, according to their deserts, will be conferred upon others in whose favour like claims may be established to the satisfaction of the Government.

The Governor-General further proclaims to the people of Oudh, that, with above-mentioned exceptions, the proprietary right in the soil of the province is confiscated to the British Government, which will dispose of that right in such manner as to it may seem fitting.

To those taluqdars, chiefs, landholders, with their followers, who shall make immediate submission to the Chief Commissioner of Oudh, surrendering their arms, and obeying his orders, the Right Hon'ble the Governor-General promises that their lives and honor shall be safe, provided that their hands are not stained with English blood murderously shed. But as regards any further indulgence which may be extended to them, and the condition in which they may hereafter be placed, they must throw themselves upon the justice and mercy of the British Government.

To those amongst them who shall promptly come forward and give to the Chief Commissioner their support in the restoration of peace and order, this indulgence will be large, and the Governor-General will be ready to view liberally the claims which they may thus acquire to a restitution of their former rights.

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