REPORT OF THE HINDU LAW COMMITTEE

1941

MANAGER, GOVERNMENT OF INDIA PRESS, SIMLA.
1941.

NOTE.

The cost of this Committee, including the cost of printing the report and the appendices, is estimated to have been Rs. 30,000.

REPORT OF THE HINDU LAW COMMITTEE, 1941.

This Committee was appointed by a Resolution of the Government of India, dated January 25, 1941, with the following terms of reference :—

(a) to examine the Hindu Women's Rights to Property Act, 1937, with particular reference to :

(i) The Hindu Women's Rights to Property (Amendment) Bill, promoted by Mr. Akhil Chandra Datta ;

(ii) The Hindu Women's Rights to Property (Amendment) Bill, promoted by Mr. A. N. Chattopadhyaya and others ;

(iii) The Hindu Women's Rights to Property (Amendment) Bill, promoted by Dr. G. V. Deshmukh and Mr. Kailash Biharilal ;

(iv) The Hindu Women's Rights to Property Bill, promoted by Mr. N. V. Gadgil ; and

(v) The Hindu Women's Estate Bill, promoted by Dr. G. V. Deshmukh ;

and to suggest such amendments to the Act as would—

(1) resolve the doubts felt as to the construction of the Act ;

(2) clarify the nature of the right conferred by the Act upon the widow ; and

(3) remove any injustice that may have been done by the Act to the daughter ; and

(b) to examine and advise on—

(1) the Hindu Law of Inheritance (Amendment) Bill, promoted by Mr. K. Santanam ; and

(2) the Hindu Women's Rights to Separate Residence and Maintenance Bill, promoted by Dr. G. V. Deshmukh.

(*Vide* Appendix VI).

2. It may be mentioned that the Hindu Women's Rights to Property Act, 1937 (Central Act XVIII of 1937), was amended by Act XI of 1938. The reference to the Act of 1937 in the above Resolution is evidently to be construed as a reference to the Act as amended.

3. We commenced our first session on January 27, and the subsequent sessions on February 5, March 11, April 11, and May 19. Each of the sessions except the last occupied about two or three days ; but the session of May 19 was continued from day to day until the completion of the present report.

4. At our first meeting on January 27, in addition to settling programme and procedure, we discussed certain important constitutional points arising out of the Act of 1937. As the result, the following questions were referred by His Excellency the Governor-General to the

Federal Court for opinion under section 213 of the Government of India Act, 1935, namely,

(1) Does either the Hindu Women's Rights to Property Act, 1937 (Central Act XVIII of 1937), which was passed by the Legislative Assembly on February 4, 1937, and by the Council of State on April 6, 1937, and which received the Governor-General's assent on April 14, 1937,

or

the Hindu Women's Rights to Property (Amendment) Act, 1938 (Central Act XI of 1938), which was passed in all its stages after April 1, 1937,

operate to regulate :

(a) succession to agricultural land ?

(b) devolution by survivorship of property other than agricultural land ?

(2) Is the subject of devolution by survivorship of property other than agricultural land included in any of the entries in the three Legislative Lists in the Seventh Schedule to the Government of India Act, 1935 ?

5. The Federal Court gave its decision on April 22, 1941 : the answers returned were :

(1) The Hindu Women's Rights to Property Act, 1937, and the Hindu Women's Rights to Property (Amendment) Act, 1938,

(a) do not operate to regulate succession to agricultural land in the Governors' Provinces ; and

(b) do operate to regulate devolution by survivorship of property other than agricultural land ;

(2) The subject of devolution by survivorship of property other than agricultural land is included in entry No. 7 of List III, the Concurrent List.

6. For convenience of reference, the full text of the decision is printed in Appendix I to this report. The decision corrects the view expressed in some standard works on Hindu law, that the Act of 1937, as distinct from the Act of 1938, effectively regulates succession to all forms of property including agricultural land throughout British India. It is now established that the Act of 1937 as well as the amending Act of 1938 is effective only in respect of property other than agricultural land in Governors' Provinces. This is a large, but inevitable, subtraction from the face value of the Acts. On the other hand, the decision sets at rest doubts as to the validity of the Acts in other respects, and thus preserves the important principle embodied therein that Hindu widows shall henceforth be entitled to share the succession equally with their sons, although the extent of the right has inevitably had to be curtailed because of the limited powers of the Legislature which passed the Acts.

7. Until May 19, the Committee met only at intervals, the Members studying in their own homes after each meeting the questions for discus-

sion at the next. As the result of these preliminary meetings, we sent out a Questionnaire in three Parts :—

Part I (issued on or after March 7) to be answered before April 15, and

Parts II and III (issued on or after April 4), to be answered before May 15.

Part I dealt with the Acts of 1937 and 1938 and the connected Bills, while the other two Parts dealt with the other two Bills. A copy of the Questionnaire including all three Parts will be found in Appendix II to this report.

We thought it unnecessary to frame any questions arising out of the Federal Court's decision (*e.g.*, as to the number of completed transactions affected thereby), as it came out only on April 22, 1941, and the answers to any such questions would have been delayed beyond the time fixed for our report. Even on the Questionnaire issued, an important organisation did not find it possible to return answers until the first week of June.

8. We have tried to distribute the Questionnaire as widely as the time and staff at our disposal permitted ; we have addressed High Court Judges, distinguished lawyers and citizens, Members of the Central Legislature, High Court Bar Libraries, Heads of religious institutions, Women's Associations, Social Reform Associations, Pandits' Associations, and others. Besides sending out copies of the Questionnaire to individuals and associations, we were able, through the courtesy of the Press, to have copies published for general information in various newspapers and journals. We understand too that certain women's organizations had the Questionnaire translated into the vernacular and distributed widely. Thus every attempt has been made to give it the widest possible publicity. To all those who have helped us by sending answers, prepared in almost every instance with obvious care, we owe a deep debt of gratitude. Two learned Pandits have paid us the compliment of sending their answers in Sanskrit. We have studied every opinion received, and have given due weight to each, and we have adopted the following plan of tabulating the answers so as to ensure that none was ignored.

9. Starting with Part I of the Questionnaire we find that question 1 admits of at least four different answers. Thus, the answer may be that the Centre should legislate at once with respect to property other than agricultural land but the law should not come into force until some future date, dependent, in each Province, upon the date of the necessary supplemental Provincial legislation ; or, secondly, the answer may be that the Centre should legislate at once with respect to property other than agricultural land and bring the law into force at once throughout British India, leaving it to the Provinces to do whatever they think fit with respect to agricultural land. Or, thirdly, the answer may be that there should be no Central legislation at all until there are normal Legislatures in all the Provinces ; or, fourthly, that even the Acts of 1937 and 1938 should either be repealed or be kept in abeyance until the Provinces are prepared to enact the necessary supplemental legislation with respect to agricultural land.

10. The first of these answers we represent by the symbol 1 (A) ; the second by the symbol 1 (B) ; the third by 1 (C), and the fourth by 1 (D). Similarly with respect to the other questions, each possible

answer is indicated by a specific symbol, the first part of which shows the number of the main question, and the second part distinguishes the nature of the answer. With the aid of a table of symbols it is then easy to compress into a single group of symbols all the answers to all parts of the Questionnaire sent in by any one correspondent. The arrangement ensures that no opinion is ignored and at the same time shows at a glance the general trend of the opinions. For the information of the curious we reproduce in Appendix III (A) the table of symbols we have used and in Appendix III (B) a specimen page of the Register of Opinions (omitting names).

11. Before making any suggestions as to how the defects in the Acts of 1937 and 1938 should be removed, it is necessary to point out in some detail what these defects are. We should like to state at the outset that in speaking of defects we mean no reflection on the framers of the Acts. Anyone who has had experience of legislative drafting knows how difficult it is to say neither more nor less than what he means and the difficulty is all the greater when the draftsman has to confine himself to a single aspect of so complicated and inter-connected a structure as Hindu law. Some of the defects would perhaps be more correctly described as unforeseen effects. We would also readily concede that some of the cases of difficulty which we have imagined are not likely to be of frequent occurrence in actual practice. With these observations, we shall now proceed to point out the defects, major or minor, which we have been able to detect in the Acts ourselves or which have been brought to our notice by others.

(i) In view of the Federal Court's decision, both the Acts must henceforth be construed as applying, in Governors' Provinces, only to property other than agricultural land. There will, therefore, be in future at least two different sets of rules of succession in every Governor's Province, one for agricultural land and another for other kinds of property. The situation is further complicated by the fact that there is no definition of the term " agricultural land " in the Constitution Act. " Land " in entry 21 of the Provincial Legislative List is, it is true, explained as meaning rights in or over land and it may be that the term " agricultural land " occurring in the same entry is to be similarly construed, that is to say, as including all rights in or over agricultural land whether of the landlord or of the tenant. If this is correct, then upon the death of a Hindu Zamindar in Bengal, succession to the fisheries, markets, minerals and house property comprised in the Zamindari will be regulated by the Hindu law as modified by these Acts, while succession to the agricultural land therein will be regulated by the unmodified Hindu law. Where an estate is let out in *patni* with one consolidated rent for the whole, nice questions may arise as to the extent to which the Zamindar's interest must be deemed to be " agricultural land ". In the United Provinces there will be at least three sets of rules of succession : one for certain classes of tenancies as laid down in sections 21 to 26 of the Agra Tenancy Act, 1926, or the corresponding provisions of the United Provinces Tenancy Act, 1939, where the latter is in force ; another for rights in agricultural land other than such tenancies ; and a third for property other than agricultural land. The position will be similar in the Central Provinces and possibly elsewhere also. Judging from the debates in the Legislature, no one foresaw at the time the Acts were passed that they would produce these complications.

(ii) It has been observed in a recent Bombay case (Akoba Laxman Pawar *v.* Sai Genu Laxman Pawar, 43 B.L.R. 338, 341) that the effect of s. 2 of the Act of 1937 (which, as amended by the Act of 1938, provides that notwithstanding any rule of Hindu law or custom to the contrary, the provisions of s. 3 shall apply where a Hindu dies intestate) is to remove the disqualification imposed by the rules of Hindu law upon unchaste widows. We have reason to believe that this was not what the promoter of the Act intended, for in answer to question 12 of Part I of our Questionnaire, he has said that if the widows provided for in the Act are unchaste, they should not inherit. We express no opinion whether the provision enacted is good or bad ; we shall have occasion to deal with it again in another connection (see para. 24) ; we merely point out here that it says more than the promoter intended. The majority of the answers we have received are that the disqualification should not be removed, and even amongst women there is a considerable body of opinion that it should remain. We have examined the debates in the Legislature to see whether the point was at all considered when the Bills were being discussed ; neither in the debates relating to the Act of 1937 nor to the Act of 1938 have we found any reference to this aspect of the matter. But, of course, Courts of law are precluded from referring to the debates in the Legislature and have to gather the intention of an enactment from the words actually used.

The rules of inheritance are inseparably connected with the rules of exclusion from inheritance and unless both subjects are considered together, there is this danger of enacting by inadvertence something to which the Legislature had not applied its mind at all. The moral is that when the Legislature seeks to deal with the subject of inheritance or even a portion of it, it must also consider, and if necessary deal with, all connected subjects at the same time.

(iii) Section 3 (1) of the Act of 1937, even as amended by the Act of 1938, is ambiguous in an important respect. It will be noticed that the body of the sub-section (1) provides that when a Hindu dies intestate, his widow shall be entitled to the same share as a son ; then follow two provisos in favour, respectively, of the widow of a pre-deceased son and the widow of a pre-deceased son's pre-deceased son. How are these provisos to be constructed ? Two constructions are possible : (a) that they operate merely as exceptions to the main provision, that is to say, as qualifications of the right of the deceased's own widow mentioned in the main paragraph, and are, therefore, inoperative except when he leaves a widow ; and (b) that they enunciate an independent rule operative in all cases, whether the intestate leaves a widow or not. Of these two alternative constructions, (a) is the one which accords better with the ordinary rules (Craies on Statute Law, 1936, pp. 196, 197), and it was perhaps the only possible construction before the amendments of 1938. It will be noticed that s. 2 of the Act of 1937 in its original form made it clear that s. 3 was to apply " where a Hindu dies intestate *leaving a widow* ". The italicised words were omitted by the Act of 1938. The Statement of Objects and Reasons annexed to the Bill of 1938 specifically stated that it was not the intention of the framers of the Act of 1937 that the daughter-in-law's right should depend upon the survival of her mother-in-law. Nevertheless, many lawyers including a Judge of a High Court still take view (a) even of the amended Act, (Courts being pre-

cluded from referring to the Statement of Objects and Reasons as a guide to interpretation) while the latest edition of Mayne favours view (b). It is not necessary for us to express any opinion on the point ; we think it sufficient to mention the ambiguity and point out its consequences. The ambiguity has in fact an important bearing on the position of the daughter. If (a) is the correct view, the widowed daughter-in-law is an heir only along with and in the presence of the widow ; but since under the ordinary Hindu law, in the presence of the widow, no daughter has any right, the position created by the Acts is that the widowed daughter-in-law is an heir only in circumstances which even before the Acts would have excluded the daughter. Of course the introduction of the daughter-in-law may delay the reversion more or less seriously and to that extent affect the daughter's reversionary rights ; but when there is no widow, the daughter is not affected at all. This is on view (a) ; on view (b), the position of the daughter is affected even when there is no widow. To take a concrete case : if the only survivors of the owner are his daughter and his widowed daughter-in-law, then on view (a), the former takes the estate, while on view (b), the latter takes it. Until, therefore, the ambiguity is removed it is not possible to say to what extent the Acts have prejudiced the rights of the daughter, or indeed of any remoter heir.

(iv) It has been contended in at least one standard work, (Golap Chandra Sarkar Sastri's Hindu Law, 1940, pp. 432, 527) that the estate granted to the pre-deceased son's widow by the first proviso to s. 3 (1) of the Act of 1937 (the Act of 1938 made no change in this proviso) is an absolute estate, and not a Hindu Woman's estate. The argument is that whereas the interest conferred by the main provision in sub-section (1) and also by sub-section (2) upon the deceased's own widow is expressly declared to be subject to the provisions of sub-section (3), namely, that the interest shall be the limited interest known as a Hindu Woman's estate, there is no such limitation in respect of the interest conferred on the pre-deceased son's widow by the first proviso to sub-section (1). We need not develop the argument further, but shall content ourselves with the remark that we doubt whether this particular construction was foreseen by the Legislature.

(v) There is considerable doubt as to the precise nature of the interest conferred upon the widow by s. 3 (2). The sub-section provides in effect that when a Hindu governed by the Mitakshara School of law dies, having at the time of his death an interest in joint family property, his widow shall have the same interest in the property as he himself had, except that hers will be a Hindu Woman's estate. There are two possible interpretations of this provision, leading to different results which can best be illustrated by taking a specific case. Let us suppose that a Hindu governed by the Mitakshara dies leaving a widow, a mother (whose husband died before 1937), and a brother, all members of a joint family. Before his death he and his brother were coparceners with rights of survivorship in the joint family property. By section 3 (2) the widow will have " the same interest " in the joint family property as her husband had. If this means that she will be a coparcener exactly as her husband was, the result will be that upon the brother's death the entire property will pass to her to the exclusion of the mother. But the subsequent description of the interest which she takes under the section as " a Hindu Woman's estate " indicates that it is not quite the interest of a Mitakshara coparcener. If, then,

the section must be taken to mean that the widow will have the same interest as her husband would have obtained upon severance from the joint family at the moment of death, the position will be different. For, upon such severance, rights of survivorship would come to an end, so that upon the subsequent death of the deceased's brother, the brother's share would pass to his mother and not to his widowed sister-in-law. We have had opinions in support of each of these interpretations from eminent lawyers, each side claiming that its own interpretation is the only one possible on the language of the Acts. The Federal Court in its decision on the recent reference has expressed some doubt as to the true position. " It may be ", observe their Lordships, " that the widow taking a share under the Act does not become a coparcener with the other sharers ". The Madras High Court also has refrained from deciding the point : " It is not necessary to decide whether the effect of this section is to make the widow a coparcener in the full sense of the word " [Commissioner of Income-Tax *v.* Lakshmanan Chettiar, I.L.R. (1941) Mad. pp. 104, 108]. Once again, we need not express any opinion of our own. But it is obvious that there is an ambiguity, and what is more, either position involves a fundamental change in the Mitakshara law of coparcenary and suvivorship. For, if we adopt the first interpretation and make the widow a coparcener exactly as her husband was, we shall be making a radical change in the conception of a Mitakshara coparcenary. A Mitakshara coparcenary consists only of males, each of whom has a right by virtue of his birth to the joint family property. The admission of the widow to the coparcenary will mean a change in both respects, for she is not a male and her right accrues, not by virtue of her birth, but as the result of her husband's death. If, on the other hand, we adopt the second interpretation, we are in effect saying that the death of an undivided member of a Mitakshara joint family automatically severs his interest and transfers it to the widow, making her a tenant-in-common in respect thereof. In other words, the position becomes more or less analogous to that of a Dayabhaga family. One more breach will, therefore, have been made in the doctrine of survivorship that upon the death of an undivided member of a Mitakshara joint family, his interest in the joint family property is extinguished and that of the other members of the coparcenary correspondingly enlarged. Whichever view we may decide to adopt, its consequences will require to be carefully worked out and provided for at the same time.

(vi) By virtue of section 3 (3) of the Act of 1937 (a provision which was left unamended by the Act of 1938) the estate devolving on a Hindu widow under the provisions of the section will only be " the limited interest known as a Hindu Woman's estate ". By virtue of section 2, the widow takes such an estate, notwithstanding any rule of Hindu law or custom to the contrary. Accordingly, a Jain or other widow who sometimes takes by custom her husband's property absolutely or a widow in Mithila who takes her husband's movables absolutely, will, under the Act, in future take only a limited estate. We doubt if this was the real intention of the framers of the Act, because the Act purports " to give better rights to women in respect of property ".

(vii) There is an ambiguity as to what is to happen when one of the widows succeeding under s. 3 of the Acts of 1937 and 1938 dies. Suppose, for instance, a Hindu dies intestate leaving a son, a widow, and a widowed daughter-in-law. Under the Acts in question, each of these three

heirs takes a one-third share of the intestate's separate property. Suppose, now, the widow dies. Hers being a Hindu Woman's estate, the share she took must go back after her death to the heir or heirs of the last male holder. Is it to go back only to the heir who would have taken it under the old Hindu law—that is to say, in the case put, to the son,—or is it to go back to the heirs under the new law—that is to say, in the case put, to the son and the daughter-in-law in equal shares ? We have received opinions in support of each of these interpretations from several lawyers.

(viii) We now come to something more than a mere drafting defect. Let us take the case of a Hindu dying intestate leaving a widow and an adopted son. By the terms of s. 3 (1) the widow is entitled to " the same share as a son ". On one view, the effect of these words is to give the widow the share of a son, without disturbing the ordinary rule of Hindu law that, in the absence of an actual son, the adopted son counts as an actual son, so that the result is that the widow and the adopted son each get a half-share of the estate. On another view the effect of the words is to give the widow the share which a son actually born to her (necessarily after the adoption) would have taken ; that is to say, she gets the share of an " after-born " son, which, except among Sudras in Madras and Bengal, is more than one-half.

There are other difficulties as well. Let us take a case where a Hindu (with separate property) dies intestate leaving only a widow. She thus takes the entire property. She then adopts a son ; what is to be the result ? The Acts of 1937 and 1938 are silent on this point and several views have been suggested :

(1) Since s. 3 (1) says that the widow is entitled to " the same share as a son ", the provision applies only when there is a son to share with her. When there is no son, the provision does not apply at all and the widow takes under the ordinary Hindu law. Therefore, the ordinary rule about divesting must apply and the adoption must divest the widow completely.

(2) If a son had been in existence at the time of the intestate's death, the widow would have taken a half-share ; she should, therefore, be in the same position as the result of the adoption : that is to say, the adoption should divest her of one-half of the property, leaving her the other half for her life (Mayne, 1940, p. 266).

(3) If there had been an adoption before the intestate's death, the widow would, on the second of the two views mentioned above, have taken an after-born son's share, *i.e.*, in Bengal, (except among Sudras), two-thirds of the estate. She should be in the same position, if there is an adoption after the intestate's death : that is to say, the adoption should divest her, in Bengal (except among Sudras) of only one-third of the estate.

(4) S. 3 (1) applies even when the widow alone is the heir, the words " shall be entitled to the same share as a son ", having the same meaning as " shall inherit in like manner as a son " (see Mayne, 1940, p. 717). That is to say, she takes the entire property by virtue of s. 3 (1) and since s. 2 states that the provisions of s. 3 shall apply notwithstanding any rule of Hindu law or custom to the contrary, she continues to be entitled to the entire property notwithstanding the rule of Hindu law that an adopted son divests the adopting widow of her estate. In other words, the adoption should not divest her at all.

Further complications arise where a widow adopts in the presence of a widowed daughter-in-law. What should be the shares of the three after such an adoption ? If on view (2) above we say that the shares should be the same as if there had been a son in existence at the time of the intestate's death, the daughter-in-law would be divested of a portion of what she had already taken. In other words, we should be putting it in the power of the mother-in-law to divest her daughter-in-law of a portion of her inheritance by making an adoption. The effect of view (3) would be similar. On view (1), the daughter-in-law gets nothing from the beginning while on view (4) the adopted son gets nothing as the result of the adoption. It is difficult to say which, if any, of these effects was intended by the Legislature. The fact of the matter is that under the ordinary Hindu law, neither the widow nor any remoter heir takes equally with a son. If a breach is made in this rule and the widow and some other heirs are admitted to a share along with a son, certain aspects of the subject of adoption will require to be reviewed. This is only another illustration of the fact that Hindu law is a complicated organic structure, the various parts of which are inter-connected so that an alteration of one part may involve the alteration of others.

(ix) Let us now take another case. A Hindu, *H*, governed by the Mitakshara School of Law has three sons *A*, *B*, and *C*. *B* and *C* take their shares of the joint family property and separate from *H* and *A* who continue joint ; afterwards *B* dies leaving a widow, *W*. Thereafter, the father, *H*, dies leaving self-acquired property. Now under the Acts of 1937 and 1938, *W* inherits " in like manner as a son ". If this means in like manner as *C*, she would get nothing in Madras and Bombay, the divided son being excluded by the undivided son. If it means in like manner as *A*, she would get a share. The Acts are not sufficiently specific on this point.

Or take this case. A Hindu (governed by the Mitakshara) has a son, *A*, who separates from him after taking his share of the joint family property ; after the partition he has another son, *B*. Then, *A* dies leaving a widow, *W*, and thereafter the father dies. Under the Acts in question, *W* inherits " in like manner as a son ". The only son then in existence is *B*. If, therefore, we interpret the provision as meaning that *W* inherits in like manner as *B*, she would get one-half of the property left by *B's* father. If, however, *A* had been alive at the time of his father's death, he would have got nothing, the rule of Hindu law being that a son begotten after partition takes the whole of his father's property, whether acquired before or after the partition, to the exclusion of the divided son. That is to say, *A's* widow gets under the Acts something which *A* himself, if alive, would not have got under the ordinary Hindu law. It is doubtful whether this was the intention of the framers of the Acts. These instances show that in drafting this kind of legislation we must bear in mind the consequences of partition in Mitakshara families—one more illustration of the inter-connection between the various parts of Hindu law.

(x) A Hindu dies leaving a widow of the same caste and a widow of an inferior caste. It will be noticed that this illustration pre-supposes the validity of an *anuloma* marriage, that is to say, a marriage where the husband is of a higher caste than the wife. The legality of such marriages has been questioned, but they are recognized as valid by custom

in Bombay. Our illustration must, therefore, be taken as occurring in a place where such marriages are recognized as valid. Under the Acts of 1937 and 1938, the two widows together are entitled to " the same share as a son ". What son is meant here ? Does the expression mean the same share as that of a son born to the widow of the higher caste, or the same share as that of a son born to the widow of the lower caste ? The result would be different in the two cases, because a son born to the widow of the lower caste is, under Hindu law, entitled to much less than the other son. And what are to be the shares of the two widows *inter se* ? For example, suppose there are two widows of different castes, one with three sons and the other with two : what is to be the total share which the two widows take and how is that total to be distributed between them in the event of partition ?

We must either provide for these complications in some way, or else revise the law relating to intercaste marriages and the rights of the widows and sons of such marriages—a further instance of the difficulties of piecemeal legislation.

(xi) It has been pointed out to us that as the provisions of the Acts relating to separate property apply only in the event of the owner dying intestate, a Hindu can, making a will in favour of some mistress, disinherit his widow, his widowed daughter-in-law, or anybody else. To give real relief on the lines of the Acts, therefore, involves, it is said, some limitation of the will-making power. This opens up another large subject.

(xii) If the rights given by the Acts to the heirs mentioned therein could have extended to the entire property of the deceased, there would have been no question of their claiming maintenance. But since it is now established that the rights can extend only to property other than agricultural land, it is important to know how far the claim to maintenance remains valid. This is not dealt with in the Acts, as the framers did not foresee that this problem would arise.

12. We need not continue any further this distasteful analysis of the technical defects of a legislative measure which was inspired by high motives and which, in spite of its faults, marks an important stage in the evolution of women's rights. Defects of this kind are inevitable in piecemeal legislation effecting fundamental changes in Hindu law. The only safe course is not to make any fundamental changes by brief, isolated Acts ; if fundamental changes have to be made, it is wisest to survey the whole field and enact a code, if not of the whole of Hindu law, at least of those branches of it which are necessarily affected by the contemplated legislation.

13. We have no desire to exaggerate the mischief of piecemeal legislation. Where fundamental changes are not in question, piecemeal legislation may have its value. We have had such legislation in the past, *e.g.* The Hindu Inheritance (Removal of Disabilities) Act, 1928, and The Hindu Gains of Learning Act, 1930, to mention only two. But the Acts of 1937 and 1938 do effect fundamental changes and hence the need for caution.

14. We realise that the advice to refrain from piecemeal legislation places the reformer in a dilemma. He is usually a man who sees some grave evil or injustice crying out for immediate remedy. If he proposes

legislation limited to that single purpose, he is warned of the dangers of legislating piecemeal. If he suggests the enactment of an entire code in which the proposed remedy can be embodied, he is told that a code of Hindu law belongs to the age of miracles. Naturally anxious to achieve some immediate result, he prefers piecemeal legislation, trusting that time will cure its defects.

15. We ourselves think that the time has now arrived to attempt a code of Hindu law. We do not suggest that all parts of the law should be taken in hand at once. The most urgent part, namely, the law of succession (including, of course, women's rights in that connection) may be taken up first ; then the law of marriage ; and so on. After the law relating to each part has thus been reduced to statutory form, the various Acts may be consolidated into a single Code. We suggest this as a reasonable compromise between piecemeal legislation and wholesale codification. In the old days, this task of codifying the law from time to time was performed for us by successive law-givers and commentators who by a judicious process of selection and exposition of the ancient texts moulded the law to the needs of the time, while appearing to make no change. Many instances of this process are familiar to every student of Hindu law ; but one of them is so striking that it will bear repetition. The author of the Mitakshara, in treating of the right of a widow to inherit the property of her son-less husband, opens with the text of Yajnyavalkya which admits that right. But he finds various other texts, including one of Manu, which are not in the widow's favour. The commentator, thus confronted with conflicting texts, explains away Manu and the others as referring to cases where the husband was joint with his coparceners at the time of his death and takes Yajnayvalkya as referring to other cases : he then declares it to be a settled rule that the widow is the heir in these other cases. In the very next Section, he has to deal with the right of the daughter's son to inherit to his maternal grandfather. Here, he finds the authorities reversed : Yajnyavalka makes no mention of the daughter's son, while Manu is in his favour. This time Vijnaneswara prefers Manu and by an unsurpassed feat of exposition reconciles the text of Yajnyavalkya with Manu's view thus : Yajnyavalkya's text reads " The wife and the daughters *also,* etc." ; by the import of the particle " also ", says Vijnaneswara, the daughter's son (who is not mentioned in the text at all) succeeds to the estate on failure of daughters ! We mention this instance to show how far our ancient commentators were prepared to stretch the limits of interpretation in order to bring the law into accord with the facts and needs of their own time.

16. This was how the Hindu law evolved in the past and kept abreast of current needs and current sentiment. But we have no longer Smritikaras, and commentators of the old type ; instead, we have the Legislature, and the Courts of Law. The Courts of Law, however, do not exercise the same freedom of interpretation in moulding the law as did our ancient commentators ; indeed, it is now settled that they must take the law as interpreted by these commentators even where the interpretation is not fairly deducible from the earliest authorities. This practically means that Hindu law, excepting in so far as the Legislature may intervene, is to be arrested in its growth at the point at which it was left by Vijnaneswara, Jimutavahana, and other recognized commentators,

the latest of whom flourished in the 18th century. And as for custom, which is one of the sources of Hindu law, the Courts now refuse to recognize any customs that are not ancient. It follows, therefore, that the main agency for altering the law according to the changing needs of the community must in future be the Legislature. But it is essential that the Legislature must, like our law-makers of old, deal with the subject as a whole, viewing each part in its proper relation to other parts, and bringing to the discharge of this task comprehensive scholarship as well as zeal. The aim must be to produce a logical and coherent code of Hindu law. We do not under-rate the difficulties of such a project. We are not unmindful of Mayne's warning uttered nearly seventy years ago : " The age of miracles has passed, and I hardly expect to see a code of Hindu law which shall satisfy the trader and the agriculturist, the Punjabi and the Bengali, the Pandits of Benares and Rameswaram, of Amritsar and of Poona. But, I can easily imagine a very beautiful and specious code, which should produce much more dissatisfaction and expense than the law as at present administered ". The position has, however, changed since he wrote. Today many of the rules of Hindu law are fairly well-settled and the points on which opinion is still divided, invite rather than discourage codification. A little over twelve years ago the late Sir Dinshaw F. Mulla in his preface to the sixth edition of his " Principles of Hindu law " observed : " These and other matters on which there is still a conflict of authority indicate the necessity of codifying the Hindu law if the Hindu community is anxious to save enormous sums of money wasted in litigation in the process of crystallizing the Hindu law. I for one do not believe that it is impossible to codify the Hindu law. The codification may involve difficulties, but they are not insurmountable ". These observations, coming as they do from so eminent an authority, are entitled to the greatest weight and have largely influenced us in our recommendations. Baroda codified the several branches of Hindu law between 1905 and 1911 and has had a consolidated Hindu Code since 1937 and a retired Chief Justice of the Baroda High Court informs us that it has " proved a boon to the people ". More recently, Mysore codified the law relating to Women's Rights in Regulation X of 1933, and here again, so far as we are aware, the Regulation is working satisfactorily. The eminent Madras lawyer who has revised the latest edition of Mayne's Hindu law has also been led to a revision of Mayne's views on codification ; for, in the Golden Jubilee Number of the Madras Law Journal (1941) he writes : " At the outset I would like to stress the urgent need for codification of Hindu law. This has long been overdue..... Rules of Hindu law are quite susceptible of codification and there are no insuperable difficulties in that connection either because of the distribution of powers under the Government of India Act or otherwise ". We are impressed by these opinions and precedents and we consider, therefore, that an attempt should be made towards gradually codifying Hindu law for British India. We do not regard the existence of various Schools of law in the several Provinces of India as an insuperable obstacle to codification. Codification does not necessarily mean the abolition of the Schools : the aim should be uniformity where possible and divergence where inevitable.

17. Our plan for a comprehensive Code may have the effect of delaying reform ; but even delayed reform is better than piecemeal legislation which has to be amended and recast every few years. Indeed, many of

the women's organizations to whom we issued our Questionnaire have, in their replies, asked for a thorough revision of the entire law, though with particular reference to women's rights, rather than legislation in small doses. If we may say so, we have been greatly impressed by the earnestness and moderation of many of these Associations. Those who know anything of Hindu women know that their lives are usually a round of duties, leaving little room for any thought of rights. When, therefore, even a few of them ask for better rights, no one can wish to be anything but helpful. But as they themselves realise, the need is for a comprehensive, co-ordinated solution rather than for quick remedies.

18. To the impatient reformer we would commend the example of Switzerland in evolving the present Swiss Civil Code. Until 1874, Swiss Civil Law was in the hands of the Cantons of which the Federation is composed. By the Federal Constitution Act of that year, power was given to the Centre to enact legislation on certain branches of Civil Law ; but with the exception of these branches, Civil Law remained with the Cantonal authorities. It varied greatly in different parts of the country ; French Law pre-dominated in certain Cantons ; Austrian Law in certain other Cantons ; German Law in yet others ; and in the rest, customary law modified by occasional statutes. The inconvenience resulting from this want of uniformity became more and more acutely felt as inter-Cantonal relations developed. Accordingly, in 1898 the Constitution was amended so as to authorize the Central Legislature to unify the whole of the Civil Law in Switzerland. In the meantime, a great jurist was commissioned to prepare a preliminary draft which occupied him from 1893 to 1899. The draft was published, and another Commission was appointed to consider the criticisms received and to revise the draft. This Commission consisted not only of jurists, but also representatives of all sections of thought in Switzerland, sub-Committees being formed to consider certain parts of the code. Not until 1904 was the final draft submitted to Parliament. The debates in Parliament continued for three years. Finally, in 1907 the code was passed by a unanimous vote in both Houses. But, it did not come into force until January 1, 1912. (Ivy Williams, " The Sources of Law in the Swiss Civil Code ", 1923, Introduction, pp. 13—15.)

19. There is more than one lesson to be learnt from this example : first, that it is worthwhile spending time and labour in order to get a good Code ; secondly, that all sections of thought must be given a hearing if a proper Code is to be enacted ; thirdly, that neither regional differences nor even Constitutional difficulties are insuperable barriers.

20. The question now arises, what is to be done with the Acts of 1937 and 1938 until such time as a comprehensive law of succession can be prepared ? Are they to be left to their operation with all their defects ? One solution that has been pressed upon us by some, though very few, of those who have answered our Questionnaire, is that the Acts should be repealed. This extreme step we are not prepared to recommend. The Acts have established an important principle, the germ of which goes back to the time of Jaimini 2,500 years ago. Let us glance rapidly at the course of this evolution. In one of Jaimini's aphorisms (c. 600 B.C.) we find it stated that as husband and wife have been declared joint owners of property, their activities should be joint. Sabara's commentary on this aphorism is to the following effect : " The wife is

entitled to the wealth earned by the husband, and *vice versa*. ..... Therefore, gift of money even earned by the husband cannot be valid, if the wife's consent is not obtained ". (Dr. Dwarkanath Mitter's " The Position of Women in Hindu Law ", 1913, pp. 86, 87). Apastamba, who is said to have composed his Dharmasutras in the 5th century B.C., has an aphorism to similar effect : he speaks of the jointness of husband and wife, from the time of marriage, in the ownership of wealth as well as the spiritual fruit of their acts. Clearly, therefore, in this early period the wife was regarded as joint owner of property with her husband. It would seem, however, that this ownership was not recognized after the husband's death, because Apastamba himself does not mention the widow amongst her husband's heirs. Baudhayana who, according to scholars, was slightly earlier in date than Apastamba, expressly rejected the widow's claim on the authority of an enigmatic Vedic text which, in the opinion of those most competent to judge, had really no reference to property rights at all. This is the well-known ' nirindriya ' text which has been discussed at great length in Dr. Mitter's " The Position of Women in Hindu Law ", pp. 434—449. Baudhayana took it to mean that women were incompetent to inherit ; but modern scholars agree with Vidyaranya that it meant no more than that women were not entitled to a portion of the *soma juice* at a *soma* sacrifice. It is sad to reflect that the general exclusion of women from inheritance over a large part of India up to the present day should ultimately rest on Baudhayana's interpretation of an obscure Vedic text relating to the *soma* sacrifice. However, the point is that Baudhayana did not recognize the widow as an heir. Manu also (c. 150 B.C.) has not mentioned her as an heir. It seems a little curious that, although the wife's co-ownership with the husband during his life appears to have been recognized in some of the most ancient texts which have come down to us, her right to inherit was not recognized even in Manu's time. It has been conjectured that this was due to the fact that remarriage in some form or other was common in those early days. From the time of Apastamba, however, owing in part to the influence of Buddhism, the ascetic ideal began to permeate Hinduism, and one of its results was the emergence of a loftier view of marriage. Mutual fidelity until death came to the ideal (see, for example, Manu IX, 101). But a lofty ideal of marriage ill-consorts with a low standard of property rights : if the widow is expected to be true to her deceased husband till death, she must be assured of the means of subsistence during her widowhood. Accordingly we find Yajnyavalkya (c. 150 A.D.) putting the widow first in the list of heirs to her sonless husband. Brihaspati, who flourished between 200 and 400 A.D., supplied a logical basis for this position by his celebrated dictum that according to scripture and tradition, the widow is the surviving half of her dead husband, and that while one-half of him thus survives, no other person can take his property. Visvarupa (c. 9th century A.D.), the earliest commentator on Yajnyavalkya, attempted to carry the argument a step further and to apply it not merely to the widow of the owner, but also to the widows of his sons and grandsons by advocating that when a father makes a partition of property amongst his sons, he should also allot a share to the widows of his deceased sons and grandsons—presumably on the basis that these widows represent the surviving halves of their respective husbands. Jimutavahana (13th century A.D.) made the last notable contribution to this process when he categorically declared : " Nor is there any proof of the position that the wife's right in her

husband's property, accruing to her from her marriage, ceases on his death ". (Dayabhaga XI, i. 26).

21. So far, however, the theory that the wife's right in her husband's property continues after his death or that she represents his surviving half appears to have been limited to the case where he left no son. If there was a son, she was entirely excluded. But obviously if the widow is the living half of her husband, not even a son ought to take the whole of his property : she ought to get one-half and the son might take the other half. Widow and son should share equally. The Acts of 1937 and 1938 embody this principle ; it is not merely humanitarianism, but is also the logical outcome of ideas embedded deep in Hindu tradition. It is a principle which once established ought not to be lightly abandoned. We cannot, therefore, contemplate the repeal of these Acts, whatever their technical defects, unless something is put in their place. They were passed by both Houses of the Legislature without a division ; their practical effect except in Mitakshara families with joint family property, is perhaps not much, as they can be put out of action by a will ; their main value in our eyes lies in the principle above-mentioned ; and that, we think, must be conserved. But even apart from such considerations as these, we cannot ignore the fact that the Acts have conferred rights on the faith of which important transactions have already doubtless been entered into, and every effort should therefore be made to preserve those rights intact.

22. Repeal being unthinkable, we have to address ourselves to the question of amending the Acts. Obviously only the more urgent amendments need be considered now, the others being left over until a general review of the law of succession can be undertaken. For example, one of the most difficult questions, arising, though indirectly, out of the Acts is that of admitting the daughter to a share along with the son in the property left by the father. The answers which we have received in reply to our Questionnaire have disclosed the complexity of the problem. Most of them are in favour of giving the daughter a share, though not necessarily equal to that of a son. In favour of this view may be cited several ancient texts, notably one of Manu : " A son is even as one's own self, and the daughter is equal to the son ; so long as she is there as the father's own self, how can any other take the property ?" (Manu IX, 130.) That is one side of the shield. On the other side we have to bear in mind such facts as these : that under Hindu law the son is under a legal obligation to maintain, amongst others, his aged parents, while a daughter is not ; that the daughter is better placed than the son as an heir to her mother's estate ; that the daughter also inherits to her husband and even his father and his grandfather (by virtue of the Acts of 1937 and 1938), while the son has no corresponding rights in respect of the property of his wife or her father or her grandfather ; and so on. In addition there is an economic factor in the problem ; it has been pointed out by several correspondents that in a poor country like India, the distribution of a man's estate amongst the widow, the son, the son's widow, the daughter, and possibly the mother as well, will inevitably result in the dissipation of such little property as there is in the country. Whatever may be the ultimate solution of this problem we feel that it can

be investigated adequately only in an inquiry embracing the whole law of succession.

23. Our immediate aim must be more modest. So far as the Acts of 1937 and 1938 are concerned, our task according to our terms of reference is to suggest such amendments as would :

(1) resolve the doubts felt on the construction of the Acts ;

(2) clarify the nature of the right conferred by them upon the widow ; and

(3) remove any injustice that may have been done by them to the daughter.

In addition we must also consider the requirements of the situation resulting from the Federal Court's recent decision.

24. The nature of the doubts and obscurities that have to be removed has been sufficiently indicated by us in the paragraphs dealing with the defects of the Acts. We have in compliance with our terms of reference prepared a draft of the necessary amendments, or rather of a Bill entirely recasting the Acts (Appendix IV)*, but we feel doubtful as to the urgency or the wisdom of such amending legislation in present circumstances. As we have already pointed out, there are several provisions in the Acts, which permit of more than one interpretation ; but whichever interpretation we seek to establish by our proposed legislation is bound to be attacked by one side or the other. For example, section 2 of the Acts may be capable of two interpretations. One is that the expression " notwithstanding any rule of Hindu law or custom to the contrary " refers only to those rules or customs which relate to the matters specifically dealt with in section 3 and that as this section does not specifically deal with the subject of personal disqualifications, the clause has no reference to any rule excluding the widow from inheritance on the ground of some personal disqualification, such as unchastity in the husband's lifetime. On this view an unchaste widow would be disqualified for succession even under the Acts. The other view, advocated in the latest edition of Mayne and followed by the Bombay High Court in the case already cited [see para. 11 (ii)] is that the expression refers to all rules and has accordingly the effect of removing the unchastity disqualification. It is obvious that if we attempt to resolve the doubt by expressly reaffirming the disqualification, there will be a storm of criticism from those who would like to see the disqualification removed. Those who advocate the repeal of the disqualifying rule do so, not so much because they disapprove of the rule itself, but rather because the rule is liable to be abused by unscrupulous reversioners. Thus, an innocent widow who contemplates selling off a portion of her husband's estate out of dire necessity is often unable to do so, because some distant relation who happens to be the next reversioner, threatens her that if she attempts to carry out her intention he will take the case to Court and challenge her title on the ground of her unchastity. The more innocent and simple the widow, the less capable she is of standing up to such threats. We are told that this species of blackmail is practised with success in a large number of cases which, because of its very success, do not come to Court. It is mainly on this ground that most of those who advocate the removal of the disqualification base their case, and they will probably resist any attempt to nullify the Bombay decision. If, on the other hand, we try to make

*Not printed.

it clear beyond controversy that the disqualification is to go, there will be equally violent criticism from those who wish to retain it. This is a subject on which Hindu opinion is extremely sensitive. Our own solution of the difficulty presented by these opposing sections of opinion is a compromise which, while recognizing (in deference to the majority of the opinions received by us) that the disqualification should remain, provides, as a safeguard against abuse, that the chastity of a Hindu woman during her husband's lifetime shall not be questioned after his death except in certain special circumstances. These special circumstances are (a) the existence of a will by the husband disinheriting the wife on the ground of unchastity and (b) the existence of a finding of unchastity by a Court in a proceeding to which both husband and wife were parties and in which the question of her chastity was in issue. But the compromise, like most compromises, may not immediately satisfy either side.

25. As another example we may take section 3 (2) of the Acts. As we have already pointed out, the Acts leave it ambiguous whether the interest which the widow takes upon the death of her husband in the joint family property is that of a coparcener with rights of survivorship or that of a tenant-in-common without such rights. The Federal Court in its recent judgment has guardedly observed that it may be that the widow taking a share under the Act does not become a coparcener with the other sharers. The Madras High Court has left the point undecided. If, in these circumstances, we attempt to clear up the ambiguity by making the widow definitely a coparcener, there will be a body of critics who will say that we have rushed in where Courts had feared to tread and have made a revolutionary change in the composition of the Mitakshara coparcenary. If, on the other hand, we attempt to clear up the ambiguity by making the widow definitely a tenant-in-common, there will be another set of critics who will say that we have destroyed the Mitakshara joint family. In either case the clarification may provoke acrimonious controversy.

26. It is unnecessary to multiply these examples. Any clarification necessarily means the establishment of one controversial position in preference to others and must necessarily evoke criticism from the disappointed quarters. We feel that this is not the time for controversial legislation. If there are obscurities and anomalies in the Acts, let the Courts remove them as and when occasion arises, so that the shock of each decision has time to die down before the next one comes. We do not think that it would be wise or worthwhile for Government to sponsor legislation likely to arouse bitter controversy—especially at the present time—merely for the sake of removing the defects in an isolated Act or two. The better plan would be to leave the Acts to their operation for the present and to replace them as early as possible by a comprehensive law on the subject of succession enacted at leisure and embodying solutions on which there is a substantial measure of agreement. There is more room for give-and-take and therefore more chance for agreed solutions when one is dealing with the entire law of succession than with half-a-dozen uncoordinated sections relating to widows' rights.

27. We must now say a few words on the injustice apprehended on behalf of the daughter by the various Members of the Legislature who have

given notice of remedial Bills. There is no doubt that in certain conceivable contingencies the Acts in question have, by introducing the daughter-in-law as an heir prejudiced to some extent the rights of the daughter, the extent of the injury done depending upon the particular construction of the Acts that may be adopted [see paragraph 11 (iii) of this report]. But even if we take the view most unfavourable to the daughter, it is not enough to confine our attention to certain classes of cases where her rights have been injured ; it is also necessary to see whether there may not be other classes of cases in which her rights have improved as the result of the Acts ; and it is only upon balancing the losses and gains that we can come to any conclusion as to the net result of the Acts. For the purpose of such an analysis, we shall take the case of Bengal, the Province from which the remedial Bills have mainly emanated.

28. The only competing heirs that we need consider in this connection are the deceased's widow, his son, the son's wife, and the daughter. For convenience, we shall designate the first three of these as *A*, *B*, and *C*. Let us now investigate the position of the daughter as it was before the Acts and as it is under the Acts, in each of the following classes of cases : (1) when *A* alone is the other survivor, (2) when *B* alone is the other survivor, (3) when *C* alone is the other survivor, (4) when *A* and *B* are the other survivors, (5) when *A* and *C* are the other survivors, (6) when *B* and *C* are the other survivors, and (7) when *A*, *B* and *C*, besides the daughter, all survive the deceased owner. These seven categories exhaust all the possibilities.

(1) Let us take the first case first. When the widow alone survives (besides the daughter), the daughter's position is in no way affected by the Acts ; so that in this case, there is neither gain nor loss to the daughter.

(2) Similarly, when the son alone survives, there is neither gain nor loss to the daughter : she was entirely excluded from inheritance before the Acts and continues to be so excluded even now.

(3) When the daughter-in-law alone survives, the daughter's position is prejudiced by the Acts if we adopt the second of the two possible constructions mentioned in paragraph 11 (iii) of this report. In this case, therefore, there is loss to the daughter.

(4) When the survivors are the widow and the son, the daughter gains under the Acts ; for before the Acts, the son would have completely and for ever excluded the daughter. Even upon the death of the son, the daughter would not have inherited, because in Bengal the sister is not an heir to her brother. But under the Acts the widow gets a half-share and upon her death, if the son has died in the meantime, the daughter will take the half-share as the next reversioner. This is, therefore, a case of gain to the daughter.

(5) If the survivors are the widow and the son's widow, the daughter's position is prejudiced as compared with her pre-Act position, because the introduction of the daughter-in-law may have the result of delaying the reversion to a greater or less extent. This is, therefore, a case of loss to the daughter.

(6) If the survivors are the son and his wife, the daughter's position is in no way affected by the Acts : there is neither loss nor gain.

(7) Finally, if the survivors are the widow, the son, and the son's wife, the daughter stands to gain, because she has now a chance of succeeding to a half-share upon their death (if the widow dies after the son), whereas she had none before. To summarise, the position may be indicated as in the following table, where in the first column *A* stands for the widow, *B* stands for the son, and *C* stands for the son's wife ; and in the second column, minus (—) stands for loss, plus (+) stands for gain, and zero (0) for neither loss nor gain.

Survivors of the deceased besides the daughter.	Whether daughter gains, or loses, or neither.
A	0
B	0
C	—
AB	+
AC	—
BC	0
ABC	+

29. It will be seen from the table that of the seven possible classes of cases, in three the daughter's position is not affected at all by the Acts ; in two others she loses and in two others she gains. It is, therefore, difficult to say how far on balance any injustice has been done to her by the Acts. The two Bills, one promoted by A. C. Datta and the other by Mr. A. N. Chattopadhyaya and others, concern themselves with only one of these seven classes of cases, the case, namely, where the daughter-in-law and the daughter alone survive the deceased owner. It is undoubtedly true that in this type of case the daughter's rights, on one interpretation of the Acts, have been gravely prejudiced, for, whereas before the Acts were passed, she would have excluded the daughter-in-law, she is now excluded by her. But there is the important consideration that even if the Acts have weighted the scale too much in favour of the son's widow, the father can more than restore the balance by making a will in favour of the daughter. After all, how does the daughter come by her right to exclude the daughter-in-law ? In the natural course of events, as will be explained immediately, she would not have had that right even under ordinary Hindu law. For if the daughter-in-law's husband had died after his father—which is the normal course of events—the latter's property would first have passed to her husband and then to her, and she would in that case have excluded the daughter. Merely because she has had the misfortune to lose her husband earlier, should she lose her inheritance as well ? Widowhood is one of the most terrible misfortunes that can befall a Hindu woman, for which a precarious right of inheritance (precarious, because it can be defeated by a will), is hardly any compensation. A daughter, whether married or still unmarried, has something to look forward to in life, while a widowed daughter-in-law has comparatively little. Even where the

daughter is herself a widow, she is not necessarily worse off, for in that case she too must be a widowed daughter-in-law in another family, with corresponding rights of inheritance. We would also suggest that an unmarried daughter's rights to maintenance and marriage expenses are not really affected by the Acts, for she can enforce them against the property in the hands of the widowed daughter-in-law. The Acts do not in terms affect the ordinary principle of Hindu law that every heir is legally bound to provide, out of the estate which descends to him or to her, maintenance for all those whom the late proprietor was legally or morally bound to maintain. Viewing the problem in all its aspects, we ourselves feel that the injustice done to the daughter and other heirs by promoting the widowed daughter-in-law over their heads is not of so clear or pressing a character as to need immediate relief and that it may well await the general review of the law of succession which we have proposed. But we are bound to state that the large majority of our correspondents have advocated the immediate admission of the daughter to an equal share with the daughter-in-law where these alone are the surviving heirs. In deference to their views and in compliance with our terms of reference we have, therefore, included a provision for this purpose in our draft of the clarifying Bill (Appendix IV).*

30. We must now proceed to deal with what we consider to be the most pressing problem that we have to solve, namely, that arising out of the Federal Court's decision. Let us not be misunderstood. To us at least that decision has come as no surprise : indeed, the fact that the parent Act of 1937 could not apply to agricultural land was pointed out as long ago as January 1938 in the columns of the *Hindu* of Madras. It was reiterated in February of the same year by another writer in the *Hindustan Times*. Nevertheless when, in March and April 1938, the Legislature amended the Act of 1937, it omitted to make any reference to this necessary and inevitable limitation and continued to refer to " property " in general, as if its powers extended to all forms of property. Our present problem has been created by this omission of the Legislature and not by the Court that has had the difficult task of interpreting the legislation : the Court's decision has merely brought the problem to the surface. Taking the Acts at their face value, a good many persons have apparently advanced money to widows or otherwise dealt with them, even where the property concerned was agricultural land : what is to happen to these mortgages and other transfers ? In a statement to the Press the Advocate-General of a certain Province avers that " hundreds and thousands of cases of succession by Hindu women have occurred and in innumerable cases, third persons have dealt with those women as inheritors of their husbands' or sons' properties on the footing that they are owners thereof, though to the limited extent of a widow's estate.". (*Hindustan Times*, May 13, 1941.) It is said that the Federal Court's decision will have the effect of upsetting these completed transactions and the suggestion has accordingly been made that there should be retrospective legislation covering agricultural land. We have had no time to ascertain the actual figures, but we assume that there have been a good many cases of the kind. It may, of course, be said that these third parties ought to have been more circumspect than to assume that the Acts applied to agricultural land as well as other property ; but we have to remember that even standard books on Hindu law made the same assumption, at least as to the operation of the Act of 1937, and that the unqualified

*Not printed.

language of the Acts was misleading. On the other hand, it is also possible that there have been some transactions between *sons* and third parties in respect of agricultural lands on the correct assumption that the sons had full rights therein ; in such cases retrospective legislation curtailing those rights would be unfair. The best course we can think of is to legislate with retrospective effect but with a saving clause in respect of the latter class of transactions. We have attempted two draft Bills on these lines [Appendix V-A and V-B (not printed)]. One of the drafts (Appendix V-A) is meant for the case where the Centre decides to leave the Acts of 1937 and 1938 unamended ; the other where the Centre decides to amend the Acts on the lines indicated in Appendix IV (not printed). It will be noticed that the Bills seek to legislate in respect of agricultural land not only for the past, but also for the future : legislation as to the past is necessary to cover the completed transactions already referred to, and legislation as to the future is necessary if women are to have the full rights which the Acts meant to confer on them and also if the rules of succession for all forms of property are to be the same as far as possible.

31. How is this legislation to be enacted ? The Centre cannot normally legislate upon succession to agricultural land. The provisions of Section 103 of the Government of India Act, 1935, which enable the Central Legislature to legislate with respect to matters in the Provincial Legislative List upon resolutions by the Provincial Legislatures are not of much avail in present circumstances, when the normal Legislatures are not functioning in most of the Governors' Provinces. It follows, therefore, that the legislation proposed can be enacted only by means of Governors' Acts in most of the Provinces and by the Provincial Legislatures in the rest.

32. We must now say a few words about each of the Bills referred to us. The Bills promoted by Mr. A. C. Datta and by Mr. A. N. Chattopadhyaya have already been dealt with ; they are mainly concerned with the removal of the injustice done to the daughter and we have, in deference to the majority of opinions received by us, included a provision for this purpose in our draft of the clarifying Bill [Appendix IV (not printed)]. The other three Bills, one promoted by Dr. G. V. Deshmukh and Mr. Kailash Biharilal, the second promoted by Mr. N. V. Gadgil and the third by Dr. G. V. Deshmukh, do not suggest any doubt or obscurity in the Acts of 1937 and 1938 ; nor do they seek to remove any injustice done by the Acts ; they seek rather to confer certain new rights on women either by giving them an absolute estate, instead of the usual limited estate, or by giving retrospective effect to the Acts in question from 1935. The majority of those who have answered our Questionnaire favour the idea of an absolute estate and we have reason to believe that even conservative opinion would not be opposed to giving women an absolute estate in respect of *movables*. There is a weighty body of opinion among Indian scholars that the doctrine of the Hindu Woman's limited estate has no real foundation in the Smritis and is unknown to the Mitakshara. One writer has described it as the most prolific source of litigation in our Courts ; another calls it the greatest single obstacle to the emancipation of Hindu women. (See Dr. Mitter's " The position of Women in Hindu Law ", pp. 525—534 ; Sir M. Venkatasubba Rao in the Madras Law Journal, 1941. Golden Jubilee Number, pp. 40—43 ; and Golap Chandra Sarkar Sastri's Hindu Law, 1940, p. 564.) It is a matter for serious consideration how far a doctrine of this kind should continue to find a place in Hindu law, at any rate in the Mitakshara jurisdictions. Before the Acts of 1937 and 1938,

there might have been some practical justification for it, because a widow, without any sons to advise her, might be easily duped into parting with her inheritance. But under these Acts, she inherits a share even in the presence of sons, and in parting with that share she can take the advice of her sons. However, our terms of reference do not permit us to suggest any amendments for enlarging rights in the way contemplated in these Bills and we need not therefore pursue the matter further.

33. We have next to advise upon two other Bills, one promoted by Mr. Santanam and the other by Dr. Deshmukh. Mr. Santanam's Bill is intended to rectify an alleged oversight in the Hindu law of Inheritance (Amendment) Act of 1929 and to give rights of inheritance to five new heirs, in preference to the sister and the sister's son. One immediate objection to the Bill is that its effect, in the Governors' Provinces, would be to introduce the new heirs only as regards property other than agricultural land, unless these Provinces can be induced to enact parallel legislation regarding agricultural land. On the merits, it is true that the opinions of a majority of our correspondents are in favour of the postponement of the sister to the new heirs ; but the comparatively small number of those who have answered this part of our Questionnaire suggests that there is no strong current of opinion either way. In the circumstances, we do not think that the subject-matter of this Bill is of such urgency that it cannot be put off until a general review of the whole law of succession. We, therefore, recommend that this Bill should await the general review.

34. There remains Dr. Deshmukh's Bill for granting separate residence and maintenance to a married woman in certain circumstances. Most of the circumstances specified in the Bill are such that even under the existing law a married woman has this right. The one important case in which she has no such right at present and in which the Bill seeks to give her the right is where her husband takes a second wife. The majority of opinions received by us are in favour of making a second marriage null and void if there is a valid marriage subsisting at the time : in other words, in favour of nullifying bigamous marriages altogether. A certain number of others do not wish to go quite so far, and are content with the provision made in the Bill that where the husband takes a second wife, his first wife should have the right to separate residence and maintenance. A smaller minority consider that bigamy should not only not be prohibited but that the first wife should not have the right to separate maintenance. Except perhaps a few, the advocates of the total abolition of polygamy would probably favour the provision in the Bill, if abolition is not immediately practicable. In accordance, however, with our bias against piecemeal legislation, we think that this Bill also, with all the issues which it raises (see Part II of our Questionnaire), should await the general review of the law of marriage which we have proposed as part of the process of codification. We cannot forget that a small reform is often the enemy of a great one. It alleviates the symptoms and thus lulls the patient into the belief that his disease has been cured. The granting of separate maintenance to a superseded wife is a small reform compared with the restoration of monogamy as a rule of Hindu law, in conformity with Manu's ideal of "mutual fidelity until death.". We say restoration advisedly, for we believe that according to early Hindu law, monogamy was the approved rule and polygamy an exception requiring legal justification. There is no reason why the Statute-Book should not reflect, as far as possible, the highest ideals of the race.

35. We shall now summarise briefly our report. We first point out in as much detail as is worthwhile, the defects in the Acts of 1937 and 1938. We then state our opinion that the only satisfactory solution is to avoid piecemeal legislation and to take up as early as possible the codification of Hindu law beginning with the law of succession, followed by the law of marriage. We next discuss what should be done with these two Acts pending codification. We find that there can be no question of repealing them. If they are not repealed, they will either have to be amended or left unamended. In our view, amendment will mean raising immediately all the controversies latent in the Acts, and is, therefore, inadvisable in present circumstances. We prefer that all energies should be bent upon the execution of the general project of codification. This larger plan offers more time and opportunity for examination and reconciliation of conflicting views, besides avoiding the risks of piecemeal legislation. If, however, it is considered that the Acts ought not to be left unamended even for the time being, we give the rough draft of an amending Bill (Appendix IV).* Whether the Acts are amended or left unamended, it is necessary to persuade the Governors' Provinces to enact parallel legislation for agricultural land with retrospective effect. This is necessary—

(a) in order to give widows the full measure of the benefit which the framers of the Acts contemplated ;

(b) to avoid a multiplicity of rules of succession ; and, most of all,

(c) to protect transactions already entered into on the faith of the Acts.

We give in Appendix V,* the rough draft of a Bill for Governors' Provinces (1) in case the Centre leaves the Acts unamended, and (2) in case the Centre amends the Acts. As regards the various Bills referred to us, our own feeling is that they may well await the codification that we have suggested.

36. The recommendation which we should like to stress most strongly is that relating to the preparation, in gradual stages, of a complete code of Hindu law beginning, as we have said, with the law of succession, to be followed by the law of marriage and in due course by the other topics of Hindu law. It is true that even these large groups are to some extent interconnected ; but it will be easier for the draftsman to see what he is doing if he deals, for example, with the whole law of succession than with isolated rules relating to the property rights of widows. This plan would also offer a better chance of agreed solutions on disputed points, for the larger the field, the more room there is for compromise. The aim should be, as far as possible, to arrive at agreed solutions and to avoid anything likely to arouse acrimonious controversy. This need not mean any real slowing down of the pace of reform ; for true reform proceeds by persuasion rather than coercion. Our own experience leads us to believe that a substantial measure of agreement will be possible, provided reformer and conservative resolve to appeal to the best in each other. After all, no one, however conservative his instincts, can fail to be moved by a real human problem. A number of persons have written to us giving details of actual cases and asking us what we mean to do about them. There is the case of the girl married to a semi-lunatic, of course without her consent and without any hope of freedom : the writer gives full details and concludes with the appeal, " Gentlemen, you can make any use of this unhappy case ; but please see that the law is amended, if not for her, at least for others."

*Not printed.

Then there is the case of the widowed daughter-in-law whom a well-to-do father-in-law has kicked out of his house—apparently for no other reason than that her husband is dead—and who now asks us whether she should apply to Government for maintenance. It is noteworthy that even the Acts of 1937 and 1938 grant no relief in such a case. They only grant her certain precarious rights of inheritance after the father-in-law's death, but nothing in his life-time ; his obligation to maintain her still remains a moral obligation only. Then there is the problem of the modern young man, who has been married at an early age and who, after years of education, finds that the girl to whom he has been married is no real companion to him and therefore takes an educated woman for a second wife. What is to happen to the first one ? Apparently, the number of such cases is rapidly growing. How are all these evils to be prevented or cured ? We cannot believe that if concrete instances such as these are proved in sufficient number, even the most conservative Hindu will refuse his assent to an adequate amendment of the law. We may mention here, as a sign of the times, that very recently we received answers to the Second Part of our Questionnaire from an orthodox Association which, although it is not prepared to go so far as to make bigamous marriages invalid, recommends that " suitable changes in the Civil Procedure Code, Criminal Procedure Code, and the Specific Relief Act, regarding grant of injunctions preventing a husband from marrying another wife, etc., should be effected.". We cannot therefore believe that even conservative opinion will be entirely unresponsive.

37. Nor, on the other hand, can we believe that the thoughtful reformer will wish to lay violent hands on the ancient structure of Hindu law except for proved necessity. It is a spacious structure, with many Schools ; and by a judicious selection and combination of the best elements in each, he should be able to evolve a system which, while retaining the distinctive character of Hindu law, will satisfy the needs of any progressive society.

38. It is a Code of this kind that we contemplate : a Code which shall base its law of succession on the ideas of Jaimini rather than of Baudhayana and its law of marriage on the best parts of the Code of Manu rather than those which fall short of the best ; a Code which shall recognize that men and women are equal in status with appropriate obligations as well as rights ; a Code which, generally speaking, shall be a blend of the finest elements in the various Schools of Hindu Law ; a Code, finally, which shall be simple in its language, capable of being translated into the vernaculars and made accessible to all. Such a Code will doubtless take time and many minds will have to collaborate in its preparation. But there must be many competent men and women in India who would be glad to assist in the execution of so majestic a task affecting the personal law of nearly two hundred million people.

B. N. RAU,
Chairman.

DWARKANATH MITTER,
J. R. GHARPURE.
V. V. JOSHI.
} *Members.*

SIMLA,
June 19, 1941.

APPENDIX I.

IN THE FEDERAL COURT.

No. 1 of 1941.

In the Matter of the Hindu Women's Rights to Property Act, 1937 (Central Act XVIII of 1937) and the Hindu Women's Rights to Property (Amendment) Act, 1938 (Central Act XI of 1938),

and

In the Matter of a Special Reference under Section 213 of the Government of India Act, 1935.

OPINION.

Gwyer, C. J.—This is a Special Reference which His Excellency the Governor-General has been pleased to make to the Court under s. 213 of the Constitution Act. The questions referred are :—

(1) Does either the Hindu Women's Rights to Property Act, 1937 (Central Act XVIII of 1937), which was passed by the Legislative Assembly on February 4, 1937, and by the Council of State on April 6, 1937, and which received the Governor-General's assent on April 14, 1937,

or

the Hindu Women's Rights to Property (Amendment) Act, 1938 (Central Act XI of 1938), which was passed in all its stages after April 1, 1937,

operate to regulate

(a) succession to agricultural land ?

(b) devolution by survivorship of property other than agricultural land ?

(2) Is the subject of devolution by survivorship of property other than agricultural land included in any of the entries in the three Legislative Lists in the Seventh Schedule to the Government of India Act, 1935 ?

There being no "opposite party" properly so-called to this Reference, it was not considered necessary or useful to serve any parties with notice of the Reference. But, as the Court desired to hear the various possible viewpoints presented and argued, it suggested to the Advocate-General of India the desirability of inviting brief statements from the Advocates-General of the Provinces, containing the point of view that each of them wished to present and arguments in support thereof. The Advocate-General of India has filed a statement on behalf of the Government of India and he has also placed on the file statements from the Advocates-General of seven of the Provinces. As the Court further intimated that besides hearing the Advocate-General of India it would be prepared to hear two more counsel, the Advocates-General of Madras and the United Provinces appeared and took part in the argument. The Court is indebted to all the learned counsel for the assistance which they have afforded it.

The doubts which have led to the Reference arise from the fact that the Bill which became the Hindu Women's Rights to Property Act, 1937 (Act XVIII of 1937), which for convenience is hereafter referred to as Act No. XVIII, was passed by the Legislative Assembly of the Indian Legislature on the 4th of February 1937, that is, before Part III of the Constitution Act came into operation and at a time when the powers of the Legislature were plenary, but was passed by the Council of State only on the 6th of April 1937, that is, after Part III had come into operation, and received the Governor-General's assent only on the 14th of April, 1937. After the 1st April, 1937, the Central Legislature was

precluded from dealing with the subjects enumerated in List II of the Seventh Schedule to the Constitution Act, so far as the Governors' Provinces were concerned. Laws with respect to the "devolution of agricultural land" could be enacted only by the Provincial Legislatures (entry No. 21 of List II), and "wills, intestacy and succession, save as regards agricultural land" appeared as entry No. 7 of List III, the Concurrent List. Act No. XVIII, read with the amending Act of 1938, endeavoured to improve the position of Hindu widows in two classes of case : (a) where by the operation of the principle of survivorship the widow is excluded from enjoyment of the share of her husband in property which he held jointly with other coparceners ; and (b) where, even apart from the rule of survivorship, the widow is excluded from claiming any share in her husband's estate by reason of the existence of sons, grandsons or great grandsons of the deceased who under the law take in preference to the widow. Provision is also made for securing a share to a widow even in cases where her husband had predeceased the last male owner [s. 3 (1), first proviso]. The Act purports to deal in quite general terms with "property" or "separate property" ; it does not distinguish between agricultural land and other property and is therefore not limited in terms to the latter. It may be mentioned that some aspects of the questions now referred have already been discussed in one or two cases (see, for instance, *Janak Dulari* v. *Sri Gopal*, 1939, I. L. R. All. 912) on the assumption that the Bill had been passed even by the Council of State before the new Constitution came into force. From the dates given in the present Reference it will be seen that this assumption is not correct. It may be added that the validity and operation of the amending Act of 1938 (Act No. XI of 1938) call for no separate discussion, since it does not enact any independent provisions, but merely makes some amendments in the Act of the previous year.

Of the questions referred, Question (2) will in effect be answered by the views to be expressed in the course of the discussion of Question (1) ; and it is therefore not separately considered. In the statements filed before the hearing and in the course of the arguments, the following contentions were raised with respect to Question (1) :—

(i) That Act No. XVIII was never properly passed at all, in view of the stage at which it was taken up and dealt with by the Council of State and the Governor-General.

(ii) That the Act was in any view *ultra vires* the Indian Legislature, so far as its operation might affect agricultural land in the Governors' Provinces.

(iii) That if the Act should be held to be only in part *ultra vires*, it would not on the authorities be permissible to sever the good from the bad, so as to allow it at any rate to operate in respect of property other than agricultural land in the Governors' Provinces.

(iv) That even if it were permissible to uphold the Act to a limited extent, the provision in s. 3 (2) relating to the interest of the deceased in Hindu joint family property would be *ultra vires* the Indian Legislature, on the ground that the mention of "succession" in entry No. 7 of List III of the Seventh Schedule does not include or authorize legislation in respect of the benefit which accrues to the members of a Mitakshara joint Hindu family under the rule of survivorship.

In addition to the constitutional points above summarized, a suggestion was made on the construction of the Act that it does not provide for the devolution of any property by survivorship nor confer on the widow a right by survivorship, though it gives her the same interest in the joint property as her deceased husband had. This does not seem to be tenable. It is true that s. 3 of the Act does not use the word "survivorship", and it may be that the widow taking a share under the Act does not become a coparcener with the other sharers ; but there can be no doubt

that in the cases in which it gives to the widow of a deceased coparcener a right to a share in the joint property which she did not possess under the pre-existing law, it takes away to that extent the benefit of the rule of survivorship which would have accrued to the remaining coparceners. The Reference must therefore be dealt with on the footing that so far as its effect goes, the Act does legislate "with respect to" the law of survivorship. It can make no difference for this purpose whether the measure confers on one person a benefit by way of survivorship or takes away from another the benefit of survivorship.

On the first contention, the Court is satisfied that no objection can be taken to the validity of the Act, on the ground only that it was introduced into the Legislature and passed by the Legislative Assembly before Part III of the Constitution Act came into force. Part XIII of the Constitution Act contains certain provisions entitled "Transitional Provisions", which are to apply "with respect to the period elapsing between the commencement of Part III of this Act and the establishment of the Federation". It is then enacted by s. 317 that the provisions of the Government of India Act, 1919, set out (with certain amendments consequential on the provisions of the Constitution Act) in the Ninth Schedule, are to continue to have effect, that is, during the transitional period, notwithstanding the repeal of the earlier Act by the Constitution Act. Among the provisions thus continued are the provisions of the earlier Act relating to the Indian Legislature; and it is clear that the Indian Legislature which was in existence immediately before the coming into force of Part III of the Act was continued in existence after that date, and was in all respects the same Legislature, though its legislative powers were no longer as extensive as they had previously been.

One of the provisions included in the Ninth Schedule is that a Bill shall not be deemed to have been passed by the Indian Legislature unless it has been agreed to by both Chambers either without amendment or with such amendments only as may be agreed to by both Chambers. It is common ground that the Hindu Women's Rights to Property Bill was agreed to without amendment by both Chambers of the Indian Legislature, and as soon as it received the Governor-General's assent, it became an Act [Ninth Schedule, para. 68 (2)]. Not until then had this or any other Court jurisdiction to determine whether it was a valid piece of legislation or not. It may sometimes become necessary for a Court to inquire into the proceedings of a Legislature, for the purpose of determining whether an Act was or was not validly passed; for example, whether it was in fact passed, as in the case of the Indian Legislature the law requires, by both Chambers of the Legislature before it received the Governor-General's assent. But it does not appear to the Court that the form, content or subject-matter of a Bill at the time of its introduction into, or of its consideration by, either Chamber of the Legislature is a matter with which a Court of law is concerned. The question whether either Chamber has the right to discuss a Bill laid before it is a domestic matter regulated by the rules of the Chamber, as interpreted by its Speaker, and is not a matter with which a Court can interfere, or indeed on which it is entitled to express any opinion. It is not to be supposed that a legislative body will waste its time by discussing a Bill which, even if it receives the Governor-General's assent, would obviously be beyond the competence of the Legislature to enact; but if it chooses to do so, that is its own affair, and the only function of a Court is to pronounce upon the Bill after it has become an Act.

In the opinion of this Court therefore it is immaterial that the powers of the Legislature changed during the passage of the Bill from the Legislative Assembly to the Council of State. The only date with which the Court is concerned is April 14th, 1937, the date on which the Governor-General's assent was given; and the question whether the Act was or was not within the competence of the Legislature must be determined with reference to that date and to none other.

It is convenient to consider the second and third contentions together, *viz.*, that the Act was beyond the competence of the Indian Legislature, so far as its operation might affect agricultural land in the Governors' Provinces ; and that, if it were held to be in part beyond the competence of the Legislature, its provisions were not severable, so that it could not even affect property other than agricultural land. No doubt if the Act does affect agricultural land in the Governors' Provinces, it was beyond the competence of the Legislature to enact it ; and whether or not it does so must depend upon the meaning which is to be given to the word "property" in the Act. If that word necessarily and inevitably comprises all forms of property, including agricultural land, then clearly the Act went beyond the powers of the Legislature ; but when a Legislature with limited and restricted powers makes use of a word of such wide and general import, the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other. The question is thus one of construction, and unless the Act is to be regarded as wholly meaningless and ineffective, the Court is bound to construe the word "property" as referring only to those forms of property with respect to which the Legislature which enacted the Act was competent to legislate ; that is to say, property other than agricultural land. On this view of the matter, the so-called question of severability, on which a number of Dominion decisions, as well as decisions of the Judicial Committee, were cited in the course of the argument does not arise. The Court does not seek to divide the Act into two Parts, *viz.*, the part which the Legislature was competent, and the part which it was incompetent, to enact. It holds that, on the true construction of the Act and especially of the word "property" as used in it, no part of the Act was beyond the Legislature's powers.

There is a general presumption that a Legislature does not intend to exceed its jurisdiction : Maxwell on the Interpretation of Statutes (8th Ed.) 126 ; and there is ample authority for the proposition that general words in a statute are to be construed with reference to the powers of the Legislature which enacts it. "It seems to me" said Lord Esher M. R. in *Colquhoun v. Heddon*, 1890, 25 Q. B. D. 129. at p. 134, "that, unless Parliament expressly declares otherwise, in which case, even if it should go beyond its own rights as regards the comity of nations, the Courts of this country must obey the enactment, the proper construction to be put on general words used in an English Act of Parliament is, that Parliament was dealing only with such persons or things as are within the general words and also within its proper jurisdiction, and that we ought to assume that Parliament (unless it expressly declares otherwise), when it uses general words, is only dealing with persons or things over which it has proper jurisdiction". Where the expression "personal estate" occurred in a Victorian statute imposing duties on the estates of deceased persons, it was held by the Judicial Committee that it must be construed as referring only to such personal estate as the colonial grant of probate conferred jurisdiction on the personal representatives to administer, whatever the domicile of the testator might be, that is to say, personal estate situate within the Colony, in respect of which alone the Supreme Court of Victoria had power to grant probate : "Their Lordships thought that in imposing a duty of this nature the Victorian Legislature also was contemplating the property which was under its own hand, and did not intend to levy a tax in respect of property beyond its jurisdiction. And they held that the general expressions which import the contrary ought to receive the qualification for which the appellant contends, and that the statement of personal property to be made by the executor under s. 7 (2) of the Act should be confined to that property which the probate enables him to administer" ; *Blackwood* v. *The Queen*, 1882, 8 App. Cas. 82, at p. 98. In the well known case of *Macleod* v. *Attorney-General for New South Wales*, 1891, A. C. 455, the Legislature of New South Wales had enacted a law providing that "whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years". The appellant,

who had during the lifetime of his wife married another woman in the United States of America and had in a New South Wales Court been convicted of bigamy under the provisions of this law, contended that the Court had had no jurisdiction to try him for the alleged offence, since the Act under which he was tried, according to its true construction, was limited to offences committed within the jurisdiction of the local Legislature by persons subject at the time of the offence to its jurisdiction ; and that upon any other construction the Act would be *ultra vires*. Lord Halsbury, delivering the Judgment of the Judicial Committee, observed that if Their Lordships construed the statute as it stood and upon the bare words, any person, married to any other person, who married a second time anywhere in the habitable globe, was amenable to the criminal jurisdiction of New South Wales, if he could be caught in that Colony. "That seems to Their Lordships", he continued, "to be an impossible construction of the statutes ; the Colony can have no such jurisdiction, and Their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a Colony, and indeed inconsistent with the most familiar principles of international law. It, therefore, becomes necessary to search for limitations, to see what would be the reasonable limitation to apply to words so general ; and Their Lordships take it that the words "whosoever being married" mean "whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales". And again in a later passage : "It appears to Their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects ; more than any persons who may be within the jurisdiction of the Colony by any means whatsoever ; and that, therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was *ultra vires* of the Colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the Colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used, subject to the well-known and well-considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the Colony". The principle is the same for all law-making bodies with limited powers ; "Now it is true that a by-law must be, as a general rule, consistent with the principles of the common law : that if it violates those principles it is bad ; and it follows that if it is capable of two constructions, one of which would make it bad and the other good, we must adopt that construction which will make it consonant with the principles of the common law" : *Collman v. Mills*, 1897, 1 Q. B. 396, at p. 399. In *D'Emden v. Pedder*, 1904, 1 C. L. R. 91, the High Court of Australia held that they would not be justified in assuming that a State Parliament intended general words in an enactment to have an application which would conflict with the constitution of the Commonwea'th : "It is in our opinion a sound principle of construction that Acts of a sovereign legislature, and indeed of subordinate legislatures such as municipal authority, should, if possible, receive such an interpretation as will make them operative and not inoperative..... It is a settled rule in the interpretation of statutes that wider or more restricted sense according to the general scope and object of the enactment" (at pp. 119, 120).

There is this also to be said. The underlying purpose of Act No. XVIII is plainly stated in its preamble : "Whereas it is expedient to amend the Hindu Law to give better rights to women in respect of property". It is therefore a remedial Act seeking to remove or to mitigate what the Legislature presumably regarded as a mischief ; and as such it ought to receive a beneficial interpretation : "If the enactment be manifestly intended to be remedial, it must be so construed as to give the most complete remedy which the phraseology will permit". *Gover's Case*, 1875, 1 Ch. D. 182 at p. 198. It may well be that the Indian Legislature, if it had been able to pass the Act while it still possessed plenary powers, would have desired that the "better rights" which it sought to give to Hindu

women should extend to agricultural land as well as to other property ; but it cannot be supposed that when, after restriction of its powers, it passed an Act with the above preamble, it did not intend to make the enactment as effective as it was within its power to make it. It was contended before the Court that the passing of the Act with a restricted effect might result in some cases in a widow being deprived of advantages which she possessed under the pre-existing law. The examples adduced by the Advocate-General of India were by no means conclusive, and it should not be assumed that the Court accepts the contention ; but even if it were true that an Act intended to be remedial, though possibly limited in scope, was found in a small minority of cases to prejudice rather than to benefit those whom it was intended to help, this would be no reason why the Court should not adopt the construction which is on the whole best calculated to give effect to the manifest intention of the Legislature.

The Court has already pointed out that the question is one of the construction of the Act, that is to say, of ascertaining its true meaning, and that the construction which has commended itself to the Court leaves no room for the application of the principle of non-severability of subject-matter. It should not, however, be thought that the Court has overlooked cases cited to it in which the same words have been applied in an Act to a number of purposes, some within and some without the power of the Legislature, and the whole Act has been held to be bad. If the restriction of the general words to purposes within the power of the Legislature would be to leave an Act with nothing or next to nothing in it, or an Act different in kind, and not merely in degree, from an Act in which the general words were given the wider meaning, then it is plain that the Act as a whole must be held invalid, because in such circumstances it is impossible to assert with any confidence that the Legislature intended the general words which it has used to be construed only in the narrower sense ; *Owners of SS. Kalibia v. Wilson*, 1910, 11 C. L. R. 689 ; *Vacuum Oil Company, Ltd. v. State of Queensland* (2) 1934, 51 C. L. R. 677 ; *R. v. Commonwealth Court of Conciliation and Arbitration*, 1910, 11 C. L. R. 1 ; *British Imperial Oil Co., Ltd. v. Federal Commissioner of Taxation*, 1925, 35 C. L. R. 422. If the Act is to be upheld, it must remain, even when a narrower meaning is given to the general words, "an Act which is complete, intelligible, and valid and which can be executed by itself" ; Wynes : Legislative and Executive Powers in Australia 51, citing *Presser v. Illinois*, (1886) 116 U. S. 252. These words appear to the Court apt to describe Act No. XVIII, if construed as the Court has thought right to construe it, that is to say, even when a narrower meaning is given to the general words which the Legislature has used.

It remains to deal with the fourth contention, that is, with regard to the import of the term "succession" in entry No. 7 of List III and of the word "devolution" in entry No. 21 of List II. The question raised is whether these words which *prima facie* imply the passing of an interest from one person to another can include the change which takes place under the Mitakshara law in the extent of the interest possessed by the male members of a joint Hindu family in the joint property when one of these members dies. Borrowing a term from the English law, this change has been described as the operation of the principle of survivorship. But the note of caution sounded by Lord Dunedin in *Baijnath Prasad Singh v. Tej Bali Singh* (1921) I. L. R. 48 All. 228 as to the use of the terms "coparcenery" and "coparceners" in relation to a Mitakshara joint family is equally applicable to the use of the terms "joint-tenancy" and survivorship" ; for the incidents associated with joint ownership under the Mitakshara law are not identical with those known to the English law of joint-tenancy. There is, however, this degree of resemblance between the *jus accrescendi* and the effect of the death of one of the owners of joint family property under the Mitakshara law, that in a sense there is only an extinction of the deceased person's interest, and the shares of the survivors,—whose pre-existing interest extended over the whole property,—are increased only because of the diminution in the number of sharers.

The argument therefore is that words like "devolution" and "succession" cannot be held to include cases where the deceased person's interest does not pass to another but is merely extinguished or lapses. There are at least two answers to this argument.

Whatever may be the position under the English law, the theory of extinction does not exactly describe the position which arises on the death of a member of a Mitakshara joint family. The result of a long course of decisions is that certain legal acts continue to operate on the interest of the deceased member even when what is ordinarily spoken of as the rule of survivorship is taking effect. Thus, if a creditor obtains a decree against a member of a joint family and during the latter's lifetime attaches his undivided interest in the family property, the creditor will be entitled to proceed against that interest to the extent necessary for the satisfaction of his claim even after the property has survived to the other members by reason of the death of the judgment-debtor. In some of the Provinces there have also been decisions recognizing a right of voluntary alienation in each joint owner, in respect of his undivided share, when the alienation is for value; and, if in this part of the country a member creates a mortgage over his undivided share, such mortgage has been held to be operative even after the death of the mortgagor. According to several decisions of the Madras High Court, the alienation by a member of his undivided share does not disrupt the joint status and yet the rights of the purchaser have been held not to be defeated by the death of the alienor, though no suit for partition be instituted during his lifetime. Results of this kind are wholly inconsistent with the theory of extinction or lapse, and even more so when the deceased happens to be the father of the survivors. It was recognized as early as *Nanomi Babuasin v. Modhun Mohun*, (1886), I. L. R. 13 Cal. 21 that the application of the theory of the son's "pious obligation" to pay the father's debts has practically resulted in the *pro tanto* extinction of the son's independent rights in the family property; and section 53 of the Civil Procedure Code provided that to the extent to which joint family property remained liable for the father's personal debts even after his death, it "shall be deemed to be property which has come to the hands of the son as his legal representative".

It is equally important to remember that neither in their ordinary grammatical significance nor by a long continued use in a technical sense have the words "devolution" and "succession" acquired a connotation that would preclude their application to describe the operation of the rule of survivorship as above explained. Eminent text-writers and Judges have used one or the other of these terms to include the accession of right which takes place on the death of one of the members of a Mitakshara joint family. Many enactments of Parliament and of the Indian Legislature have used the words "inheritance" and "succession" in juxtaposition, justifying the inference that succession is either another category from or a wider category than "inheritance" (see some of these enactments referred to in Ilbert's Government of India, Chapter IV, and in Mulla's Hindu Law, p. 4). If in these enactments "succession" should be held not to include the principle of survivorship, it would be difficult to say what else that word is meant to refer to and in any other view the continued administration of that part of the Hindu Law by the British Indian Courts could not have been provided for, because there are no other appropriate words in those provisions. Such being the position as to the meaning of the words, it is permissible to add that it is difficult to conceive of any reason why in framing Lists II and III Parliament should have thought fit to take away the law of survivorship from the jurisdiction of the Indian Legislatures, and there is no justification for attributing oversight either, when, as above explained, the language employed may properly be held to comprehend the law of survivorship as well.

A line of cases in the High Courts dispensing with the production of a succession certificate when title to a "debt" is claimed by survivorship may seem to support the restricted interpretation of the word "succession" (*cf.* I. L. R. 62

Cal, at p. 16). But taking this class of decisions as a whole they must be understood to rest not so much on the connotation of the word "succession" as on the meaning of the expression "effects of the deceased person" and on the reason of the rule relating to the production of a succession certificate in support of the claim to a "debt" *prima facie* due to a deceased person. (See I. L. R. 44 Mad. 499.) In any event, the two enactments not being *in pari materia*, such observations as may be found in these cases in support of the limited interpretation of the word "succession" cannot be held to be sufficient to override the cumulative effect of the considerations referred to above.

In one or two instances, eminent writers have employed language suggesting that "devolution" may comprehend cases of survivorship but not the word "succession" (see Mayne's Hindu Law, para. 270), but it is difficult to find any basis for this distinction. "Devolution" may be wider in scope than "succession" in the sense that the former is not restricted to the result of a "death" (see O. 22, r. 10, C. P. C.), but that is immaterial for the present purpose ; and, as already stated, eminent Judges have used both the terms in a sense that will include the operation of the principle of survivorship.

The Court is therefore of opinion that the answers to the questions comprised in the Special Reference are as follows :—

(1) The Hindu Women's Rights to Property Act, 1937, and the Hindu Women's Rights to Property (Amendment) Act, 1938,—

(a) do not operate to regulate succession to agricultural land in the Governors' Provinces ; and

(b) do operate to regulate devolution by survivorship of property other than agricultural land.

(2) The subject of devolution by survivorship of property other than agricultural land is included in entry No. 7 of List III, the Concurrent List.

The Court will report to His Excellency accordingly.

MAURICE GWYER, *C. J.*

S. VARADHACHARIAR, *J.*

JOHN BEAUMONT, *J.*

The 22*nd April* 1941.

APPENDIX II.

QUESTIONNAIRE ISSUED BY THE HINDU LAW COMMITTEE.

The plan of this questionnaire is first of all to explain how each question arises and then to state the question. It is hoped that this will facilitate the task of those who have to answer it. The questionnaire will be divided into parts, each part covering, as far as possible, separate groups of Acts or Bills. The first group which the Committee have to examine comprises the Hindu Women's Rights to Property Act, 1937 (Act XVIII of 1937), as amended by Act XI of 1938, and the following connected Bills—

(i) The Hindu Women's Rights to Property (Amendment) Bill promoted by Mr. Akhil Chandra Datta,

(ii) The Hindu Women's Rights to Property (Amendment) Bill promoted by Mr. A. N. Chattopadhyaya and others,

(iii) The Hindu Women's Rights to Property (Amendment) Bill promoted by Dr. G. V. Deshmukh and Mr. Kailash Biharilal,

(iv) The Hindu Women's Property Bill promoted by Mr. N. V. Gadgil, and

(v) The Hindu Women's Estate Bill promoted by Dr. G. V. Deshmukh.

The following questions, which arise out of the above Acts and Bills, accordingly form Part I of the questionnaire.

PART I.

Question 1.

A. This question relates to certain constitutional difficulties that stand in the way of immediate legislation. Under the present distribution of powers between the Central and the Provincial Legislatures the Centre can legislate with respect to succession to property other than agricultural land, but not with respect to succession to agricultural land. The result is that until Central legislation is supplemented by Provincial legislation there will be one law of succession in regard to agricultural land and another in regard to property other than agricultural land. Most of the Provinces are now without their normal Legislatures, so that Provincial legislation on the subject can hardly be expected under present conditions. In these circumstances, there appear to be two possible alternatives :—

(1) The Centre should legislate (with respect to property other than agricultural land) at once but the legislation should not come into force until some future date dependent, in each Province, on the date of the necessary supplementary Provincial legislation.

(2) The Centre should legislate (with respect to property other than agricultural land) at once and bring the law into force at once throughout British India, leaving it to the Provinces to do whatever they think fit with respect to agricultural land.

The advantage of the first alternative is that the law will not be effectively altered until the alteration can affect all forms of property, but there will be delay in making the alteration. Under the second plan there need be no delay, but the alteration will be partial and will result in different rules of succession in regard to agricultural land and property other than agricultural land. It has however been contended by some that Act XVIII of 1937, as amended by Act XI of 1938, has already disturbed the pre-existing uniformity and created different sets of rules for the two different kinds of property.

Q. 1.—*Which of these two alternatives would you prefer? Or would you prefer to have no Central legislation at all until there are normal legislatures in all the Provinces? Or have you any other suggestion to make?*

B. We now come to a group of questions arising out of the fact that the Acts of 1937 and 1938 have the effect of excluding from inheritance various blood-relations of the deceased owner, such as (to mention only some of the female relations) the daughter, the mother, the father's mother, and the sister, if there is a widowed daughter-in-law surviving. Each of these cases requires examination.

Question 2.

Case of the daughter.—A Hindu dies leaving only a widowed daughter-in-law and a daughter. On one interpretation of the Act of 1937, as amended by the Act of 1938 (leaving out for the moment the distinction between agricultural land and property other than agricultural land already mentioned), the daughter-in-law takes the estate during her life and the daughter gets no share. It was probably thought that a daughter, if unmarried, would be entitled to maintenance and marriage expenses out of the estate, and if married, she would be provided for in her husband's family ; and it was probably on these grounds that she was not given a share of her father's estate.

Q. 2.—*What would you desire to be the position as between the widowed daughter-in-law and the daughter in such a case ?*

As sub-questions under this question—

(a) *Should there be different rules according as the daughter is unmarried or married, rich or poor ? (At present Hindu Law makes these distinctions).*

(b) *Should a daughter who is a widow without male issue be excluded ? (She is at present excluded under the Bengal School).*

Question 3.

Under the Act of 1937, as amended by the Act of 1938, the widow of a Hindu owner and a widowed daughter-in-law each inherit his separate property to the same extent or in like manner as a son. If, therefore, a Hindu dies leaving a widow, a widowed daughter-in-law, and a daughter, the first two would each take half the estate and the daughter would get nothing during their life.

Q. 3.—*What should be the position as between these three in such a case ?*

As a sub-question,

Q. 3 (*a*).—*When a Hindu dies leaving only a widow and a daughter, should the daughter take equally with the widow, exactly as a widowed daughter-in-law would do under the above Acts ?*

Question 4.

If a Hindu dies leaving a widowed daughter-in-law, a son and a daughter, then according to one interpretation of the Act of 1937, as amended by the Act of 1938, the widowed daughter-in-law and the son each take half the estate and the daughter gets nothing.

Q. 4.—*What would you desire to be the position as between these three in such a case ?*

Question 5.

Under the Act of 1937, as amended by the Act of 1938, a widowed daughter-in-law is arguably on the same footing as a son in regard to the separate property of the deceased owner. Assuming that the daughter is to be put on the same footing as the widowed daughter-in-law,

Q. 5.—*Should this be done in all circumstances, e.g., even when there is a surviving son of the deceased, or only in certain defined circumstances, e.g., when there is no surviving son ?*

As a sub-question—

Q. 5 (*a*).—*When a Hindu dies leaving only a son and a daughter, should the daughter take equally with the son exactly as a widowed daughter-in-law would do under the above Acts ?*

Cases of the mother and other relations.—Please also answer Question 2 (without the sub-questions), Question 3, Question 4 and Question 5 (including the sub-question), when instead of the daughter there is respectively (a) a mother, (b) a father's mother, and (c) a sister besides a pre-deceased son's widow.

C. We next come to a group of questions arising out of the fact that Hindu Law recognises various sons whose position is not in all respects that of an ordinary son, *e.g.*, (a) an adopted son, (b) in the case of Sudras, a *dasiputra*, (c) in certain parts of India, the son of an *anuloma* marriage (that is, a marriage where the wife is of a caste inferior to that of the husband). The result is to make the law as expressed in the Acts in question ambiguous in certain cases.

Question 6.

A Hindu dies leaving a widow and an adopted son. Under the Acts mentioned she is entitled to the same share of the deceased's estate as a son.

Q. 6.—*Should she take the same share as a son born to her after the adoption or the same share as the adopted son ?*

The result would be different in the two cases, as the rights of the adopted son as against an after-born son are different in different schools of Hindu Law.

Question 7.

A Hindu dies leaving only a widow. She thus takes the estate and thereafter adopts a son. The Acts of 1937 and 1938 are silent as to the effect of the adoption.

Q. 7.—*Should the adoption divest the widow of the entire estate or only to the extent of one-half of the estate ?*

Question 8.

A Sudra dies leaving a widow and a *dasiputra*. Under the Acts of 1937 and 1938 the widow inherits "the same share as a son".

Q. 8.—*Should she inherit the same share as an ordinary son or as the dasiputra ?*

In the former case she would take three-fourths of the estate and the *dasiputra* would take one-fourth, and in the latter each would take one-half.

Question 9.

A Hindu dies leaving a widow and a son of an *anuloma* marriage (locally valid).

Q. 9.—*Should the widow inherit the same share as an ordinary son or as the son of the anuloma marriage ?*

In those parts of India where *anuloma* marriages are recognised, the son of the marriage takes a smaller share than an ordinary son.

As a sub-question—

Q. 9 (*a*).—*Should any provision be made to place the legality or otherwise of anuloma or other intercaste marriages beyond doubt ?*

D. We now come to various other ambiguities or possible defects in the Acts of 1937 and 1938.

Question 10.

A Hindu dies leaving two widows and a number of sons. Under the Acts in question the two widows *together* are entitled to the same share as a son, whereas under the law as it stood before the Acts *each* of the widows might, on a partition between the sons, have taken a son's share.

Q. 10.—*Should the position created by the Acts be maintained ?*

Question 11.

Under the Acts of 1937 and 1938, if a Hindu dies leaving two widows, they are both entitled to inherit ; but nothing is said as to their shares *inter se* : *e.g.*, where one of the widows is of the same caste and the other of an inferior caste (where *anuloma* marriages are permitted).

Q. 11.—*Should all the surviving widows take equally, irrespective of caste ? If not, what rule would you prescribe ?*

Question 12.

The Acts of 1937 and 1938 are silent as to what should happen if any of the widows provided for therein were unchaste, or if they remarried, or became converts to another religion, or incurred any other disqualification under Hindu Law.

Q. 12.—*What provision should be made for each of these contingencies ?*

Question 13.

The Acts in question are silent as to what should happen upon the death of any of the heirs provided for therein. Thus, suppose a Hindu, with separate property, dies leaving a widow X, a son Y, and a widowed daughter-in-law Z. Under the Acts, each would get one-third of the property. If thereafter Z dies, should her share go to X and Y equally or only to Y ? Or more generally,

Q. 13.—*What express provision, if any, should be made for the devolution of the estate upon the death of any of the heirs provided for in the Acts in question ?*

Question 14.

Under the Acts of 1937 and 1938, the interest which a widow inherits is "the limited interest known as a Hindu Woman's estate". Before the Acts came into force, a Jain widow sometimes took, not a limited estate, but an absolute estate in her husband's property and in Mithila (North Bihar) she took an absolute estate in her husband's movables. The Acts have thus restricted rather than enlarged the widow's interest in certain cases.

Q. 14.—*What remedy, if any, would you propose ? Would you provide for* (*a*) *a limited estate in every case as under the Acts in question, or* (*b*) *an absolute estate in every case, or* (*c*) *an absolute estate in a certain specified share of the inheritance, such as one-sixth, or* (*d*) *the same kind of estate, whether limited or absolute, as the widow would have taken under her own personal law but for the Acts ? If* (*b*) *or* (*c*), *what course of devolution would you propose for the estate or share thereof upon her death ?*

As a sub-question—

Q. 14 (*a*).—*Do you consider that any special provision should be made for women in families with Impartible Estates or would you extend the same rules to them as may be formulated in the case of ordinary estates ?*

Question 15.

A Hindu governed by the Mitakshara school* dies, leaving a widow, a mother, and a brother, all members of a joint family. By section 3 (2) of the Act of 1937 as amended by the Act of 1938, the widow will have the same interest in the joint family property as her husband had, except that hers will be a limited estate. If this means that she will be deemed to be a coparcener exactly as her husband was, the result will be that upon the brother's death, the entire property will pass to her to the exclusion of the mother. If on the other hand it means that the widow will have the same interest as her husband would have obtained, had he separated from the coparcenary immediately before his death, the position will be different. For, had there been a partition immediately before his death, his mother, his brother, and he himself would each have got a one-third share, so that this last-mentioned one-third share would pass to his widow. In other words, his death must be regarded as effecting the disruption of the joint family and the transfer of his share of the property to his widow.

Q. 15.—*Which of these two positions (or which other position) would you wish to see established ?*

Question 16.

E. In order to promote the gradual growth of a uniform law of succession for Hindus throughout British India, while avoiding piecemeal legislation, the following suggestions have been made :—

(1) that every Hindu (whether male or female should be empowered to make a formal declaration before a prescribed authority that his or her property (whether separate or joint) shall devolve according to the rules of Hindu Law applicable to the case and that in default of such a declaration the property will devolve according to the rules laid down in the Indian Succession Act ;

(2) that every Hindu (whether male or female) should be empowered to make a formal declaration before a prescribed authority that his or her property (whether separate or joint) shall devolve according to the rules laid down in the Indian Succession Act and that in default of such a declaration the property will devolve according to the rules of Hindu Law applicable to the case. [It will be noticed that this is, so to speak, the converse of (1)] ; and

(3) that either (a) the rules in the Indian Succession Act, or (b) a set of rules representing the 'greatest common measure' of the rules of succession in the various schools of Hindu Law should be made applicable to the property of all Hindus throughout British India after a specified date which may be five or even ten years hence.

In order to give effect to (1) or (2) or (3) (a) it may be necessary slightly to adapt certain provisions of the Indian Succession Act, *e.g.*, where the declarant has two wives—a contingency which is not provided for in the Indian Succession Act. As to (3) it may be explained that the object of postponing the application of the new rules until a specified date is to give adequate notice of the change to all concerned.

Q. 16.—*Which, if any, of these alternatives would you prefer ? If you prefer* (3) (*b*) *can you suggest a suitable table of heirs or the principle (whether of "propinquity" or of "spiritual efficacy") upon which such a table should be prepared ?*

Would you suggest any other course, as for example, one set of rules for those territories where the Mitakshara is the leading authority and another set for those which are governed by the Dayabhaga ?

*Outside the Madras Presidency.

PART II.

Dr. Deshmukh's Hindu Married Women's Right to Separate Residence and Maintenance Bill.

In framing our questions on this Bill (as in other cases) we have had to take a liberal view of our terms of reference, so as to reduce the risks of piecemeal legislation.

The Bill provides :—

(1) that notwithstanding any custom or law to the contrary a married Hindu women shall be entitled to separate residence and maintenance from her husband on any of certain specified grounds ;

(2) that every suit for the purpose shall be instituted in the Civil Court within whose jurisdiction the husband and wife ordinarily reside ;

(3) that the amount of maintenance to be given to the wife shall not be less than one-fifth of the income of the husband ; and

(4) that the custody, maintenance and education of the children shall be in the Court's discretion.

The grounds upon which separate residence and maintenance may be claimed are described thus :—

(1) If the husband is suffering from leprosy, or any loathsome disease ;

(2) If the husband is suffering from venereal disease ;

(3) If the husband is an incurable lunatic ;

(4) If the husband is guilty of cruelty towards the wife ;

(5) If the husband deserts the wife ;

(6) If the husband marries again ; or

(7) If the husband turns a recluse or changes his religion.

Some of these grounds are already recognised by the Courts as sufficient to found such a claim, *e.g.*, where the husband suffers from leprosy or similar disease (45 Mad. 812) or is guilty of cruelty (19 Cal. 84) or changes his religion (6 All. 617). The case of venereal disease would probably be covered by cruelty, as in England [(1921) P. 438]. Lunacy also may be held to be covered by certain other words of the same text (Manu IX 79) that has been relied upon for admitting leprosy as a ground, although there have been differences of opinion on this point.

There are, however, certain circumstances which even under the existing law are sufficient to sustain a claim for separate maintenance and which are not mentioned in the Bill, *e.g.*, where the husband keeps a concubine in the house (32 Cal. 234). It may therefore be necessary to add to the grounds mentioned in the Bill if the enumeration is to be as complete as possible. Certain other changes may also be necessary, *e.g.*, "desertion" might require to be qualified by some such phrase as "without just cause". It may also be necessary to add detailed provisions regarding procedure, the effect of an order for separate residence on the property or other rights of the wife, etc., *e.g.*, whether property acquired by her after the order by her own exertions is to be her absolute property or not.

Two of the grounds mentioned in the Bill, however, call for particular notice :

(1) *Incurable lunacy.*—This raises the question how far a marriage is valid in Hindu law if one of the parties is insane at the time of the marriage. The law on the subject is not very precise. In the Privy Council case Moujilal *vs.*

Chandrabati (38 I. A. 122) the validity of the marriage was impugned on the ground that the husband was completely insane. Their Lordships observed that "to put it at the highest the objection to a marriage on the ground of mental incapacity depends on a question of degree" and that in that case the requisite degree of incapacity had not been established. In an earlier case (1891) the Madras High Court held that the person married may be a minor or even of unsound mind and yet if the marriage rite is duly solemnised, there is a valid marriage (13 Mad. 316, 318). According to West and Bühler (4th edition, p. 817) "the marriage of Hindu children is a contract made by their parents; the children themselves exercise no volition, so that insanity does not necessarily prevent marriage." According to Sir Gurudas Banerjee "Persons of unsound mind—that is, idiots and lunatics—though disqualified for civil purposes generally, have not been declared incompetent to marry. * * * But, on the other hand, it should be noticed that the idiot and the lunatic being, where the loss of reason is complete, incompetent to accept the gift of the bride, which is a necessary part of the ceremony of marriage, it is not easy to understand how their marriage in such cases can be regarded as marriage at all". (Hindu Law of Marriage and Stridhan, 1923 Edition, pp. 40, 41). According to Trevelyan (1929 edition, p. 37) "unsoundness of mind does not invalidate a marriage". It would seem to follow from these authorities that in Hindu Law unsoundness of mind at the time of marriage does not in general make the marriage invalid, although, possibly, where the degree of mental incapacity is extreme, the marriage may be held to be void. In the latest edition of Mayne's Hindu Law (1938), it is said that the marriage of a lunatic or idiot is invalid, although it is added later that the degree of the incapacity is an important consideration for determining whether the disqualification has been clearly made out (pp. 150, 153). The first question, therefore, which arises upon this Bill, is :

Q. 1.—*Should the law be made more precise,* e.g., *by enacting that the marriage of a person who, from unsoundness of mind, is unable to understand its nature or meaning is null and void ?*

If insanity of this degree at the time of marriage is made a ground for nullifying it, the question of giving the wife a right to separate residence and maintenance on the ground of the husband's insanity can only arise in other cases, *e.g.*, where the insanity starts after the marriage.

(2) *Bigamy.*—The other ground mentioned in the Bill, which requires to be noticed, is where the husband marries a second wife. This is a departure from the existing law. But there are some who are of opinion that it does not go far enough and that the only effective remedy would be to make bigamous marriages altogether invalid. The question therefore arises :—

Q. 2.—*Has the time arrived for making a law that in future a subsisting marriage shall nullify any subsequent marriage of a Hindu ? If not, do you favour the provisions in the Bill ?*

Upon the answers to the two questions set out above, the further question may arise whether the Bill should be split up into two parts, one dealing with all cases where a marriage may be pronounced null and void (on the ground of one of the parties being insane at the time of the marriage or the marriage being bigamous, etc.) and the other dealing with all cases where, though the marriage is good, the wife will be entitled to separate residence and maintenance (on the ground of the husband's subsequent insanity, cruelty, desertion, etc.). Hence :

Q. 3.—*Do you consider that the Bill should provide separately for decrees of nullity and decrees for separate residence and maintenance ? If so, what should be the grounds for each ?*

A sub-question arising out of this question is whether the time has now arrived for relaxing some of the rules of Hindu Law, in particular (1) the rule that unless sanctioned by custom, a marriage is null and void if the parties belong to different castes, and (2) the rule that except among Sudras, a marriage is null

and void if the parties belong to the same *gotra*. It has been suggested that the reasons for these rules have no longer much force and that accordingly the rules should now be relaxed.

Q. 3 (*a*).—*Has the time arrived for declaring by law that no Hindu marriage shall be deemed to be, or ever to have been, invalid merely on the ground that the parties belonged to different castes or to the same* gotra ?

The effect of such a declaration would be that the directions on the subject contained in the ancient texts would remain only as moral precepts.

Question 4.

The Bill contemplates suits in the ordinary Civil Courts. In England there is now provision for separation and maintenance orders, within certain limits, by special Courts of summary jurisdiction dealing with "domestic proceedings": these consist of not more than three justices of the peace including, if possible, one woman. The proceedings are semi-private; newspaper reports are controlled; the Court may attempt to effect a conciliation between the parties through a probation officer or other person, instead of proceeding at once to make an order. The Courts have jurisdiction where the husband has been guilty of aggravated assault, or desertion, or persistent cruelty to the wife or her children and in certain other cases. The advantages of this plan (particularly of the efforts to effect a reconciliation) are obvious; but we do not know how it has been working in England or whether it would be practicable in India.

Q. 4.—*Do you consider it necessary or desirable to have any provision on these lines in India at the present stage in addition to, or in lieu of, the provisions of the Bill ?*

Question 5.

It has been pointed out that where there are several children and other dependants, a provision that the amount to be given as maintenance to a wife upon separation shall not be less than one-fifth (or any other specified proportion) of the husband's income may work hardship.

Q. 5.—*Should any such minimum proportion be fixed or would it be better to leave the matter in the discretion of the Court ?*

Question 6.

It has been suggested that, on the basis of the decision in the case of Gantapalli *vs.* Gantapalli [(1897) 20 Mad. 470], the wife should be given the right to separate maintenance if the husband is living in adultery (with any woman not his wife). That decision was under a provision of the Criminal Procedure Code which has since been amended, and there may, therefore, be some doubt as to the position now.

Q. 6.—*Do you consider that the suggestion should be adopted ?*

PART III.

Mr. Santanam's Hindu Law of Inheritance (Amendment) Bill.

This Bill purports to rectify an alleged oversight in the Hindu Law of Inheritance (Amendment) Act, 1929. Under the Act the son's daughter, the daughter's daughter, the sister and the sister's son were given rank in the Mitakshara order of succession immediately after the father's father and before the father's brother. Under the Bill five new heirs, namely, the son's daughter's son, the son's son's daughter, the daughter's son's son, the son's daughter's daughter and the daughter's daughter's son are interposed between the daughter's daughter and the sister; and a new heir, namely, the sister's son's son is added after the sister's son.

Question 1.

Before dealing with the new heirs, we may mention an ambiguity as to the existing heirs which has already led to a conflict of opinion. Does the term "sister" in the Act of 1929 include a half-sister ? On this point different High Courts have held different views. The Allahabad High Court has held that it does not [(1933) 55 All. 725], and the Madras High Court has also taken the same view (1938 M. W. N. 44) ; on the other hand, the Nagpur High Court has taken the view that "sister" includes a half-sister (A. I. R. 1938 Nagpur 134).

Q. 1.—*Which interpretation would you desire to be established ?*

As sub-questions—

Q. 1 (*a*).—*If you consider that the term "sister" should include a half-sister, what would you desire to be the position in a case where there are both sister and a half-sister ? Should the half-sister take after the full-sister, or should they take equally ? If they take equally, should they take as joint tenants with rights of survivorship, or as tenants-in-common ?*

Q. 1 (*b*).—*If the only surviving heirs are a half-sister and a full-sister's son, should the full-sister's son take before, or after, or with, the half-sister ?*

Question 2.

The effect of the Bill, as already indicated, is to interprose five new heirs between the daughter's daughter and the sister. It is said that they are direct descendants of the last owner and therefore nearer *bandhus* than the sister or her son.

Q. 2.—*Do you consider that the sister should be postponed to these five new heirs ? And what should be their order* inter se *? Do you consider it necessary to add the sister's son's son after the sister's son and before the father's brother ?*

APPENDIX III-A.

Table of Symbols.

Part I.

1 (A)	The Centre should legislate at once with respect to property other than agricultural land but the legislation should not come into force until some future date, dependent, in each Province, on the date of the necessary supplemental Provincial legislation with respect to agricultural land.
1 (B)	The Centre should legislate at once with respect to property other than agricultural land and bring the law into force at once throughout British India, leaving it to the Provinces to do whatever they think fit with respect to agricultural land.
1 (C)	There should be no Central legislation at all until there are normal Legislatures in all the Provinces.
1 (D)	The Acts of 1937 and 1938 should be repealed or kept in abeyance until the Provinces are prepared to enact supplementary legislation.
2 (A)	The shares of the widowed daughter-in-law and the daughter should be equal.
2 (B)	The daughter's share should be less than that of the widowed daughter-in-law.
2 (BB)	The daughter need not get any share along with the widowed daughter-in-law.
2 (C)	No distinction should be made between daughters whether married or unmarried, rich or poor, with or without the possibility of male issue.
2 (D)	Such a distinction should be made.
3 (A)	The shares of the widow, the widowed daughter-in-law, and the daughter should be equal.
3 (AA)	Their shares should be in descending order of magnitude.
3 (B)	The shares of the widowed daughter-in-law and the daughter should each be one-half or other fraction of the share of the widow.
3 (BB)	The widowed daughter-in-law and the daughter should take equally, but only after the death of the widow.
3 (C)	The widow and the widowed daughter-in-law should each get the same share as a son, and the daughter need not get any share.
3 (D)	The widow and the widowed daughter-in-law should each get the same share as a son, and the daughter less, *e.g.* half or one-fourth of a share.
4 (A)	Th son, the widowed daughter-in-law and the daughter should have equal shares.
4 (B)	The shares of the widowed daughter-in-law and the daughter should each be one-half of that of the son.

4 (BB) The widowed daughter-in-law and the daughter should take equally, but only after the death of the son.

4 (C) The son and the widowed daughter-in-law should each get a share and the daughter need not get any share.

4 (D) The son and the widowed daughter-in-law should each get one share and the daughter less, *e.g.* half or one-fourth of a share.

5 (A) The son and the daughter should have equal shares.

5 (B) The daughter should get half the share of a son.

5 (BB) The daughter should get less than a son, *e.g.*, one-fourth of his share.

5 (C) The son should exclude the daughter.

6 (A) The widow should take the same share as a son born to her (that is, in the case put, after the adoption).

6 (B) She should take the same share as the adopted son.

7 (A) The adoption should divest the widow of the entire estate.

7 (B) It should divest the widow of only one-half of the estate.

8 (A) The widow should inherit the same share as a son born to her.

8 (B) The widow should inherit the same share as the *dasi-putra.*

9 (A) The widow should inherit the same share as a son born to her.

9 (B) She should inherit the same share as the son of the *anuloma* marriage.

9 (C) All inter-caste marriages should be legalized.

9 (D) All *anuloma* marriages should be legalized.

9 (E) The position of inter-caste marriages should remain the same as at present.

9 (F) The position should be placed beyond doubt, one way or the other.

10 (A) Both widows together should take a son's share.

10 (B) Each widow should take a son's share.

11 (A) The widows should inherit *inter se* irrespective of caste.

11 (B) Their shares *inter se* should vary with their caste.

12 (A) Unchastity (during husband's lifetime) should disqualify.

12 (B) Unchastity should not disqualify.

12 (C) Re-marriage should work forfeiture.

12 (D) Re-marriage should not work forfeiture.

12 (E) Conversion should work forfeiture.

12 (F) Conversion should not work forfeiture.

13 (A) The estate should revert to their who would have taken it before the Act of 1937.

13 (B) The estate should revert to the heirs under the Acts of 1937 and 1938.

14 (A) The estate should be a limited estate in every case.

14 (B) It should be an absolute estate in every case.

14 (BB) It should be an absolute estate in every case save that in the event of intestacy it should devolve on the heirs of the last male holder.

14 (C) It should be an absolute estate in a certain specified share or a specified category (*e.g.* movables) of the inheritance.

14 (CC) It should be an absolute estate in the case of female heirs born in the family (*e.g.* the daughter or the sister) but a limited estate in the case of those brought into the family by marriage (*e.g.* the widow or the daughter-in-law).

14 (D) It should be the same kind of estate, whether limited or absolute, as the widow would have taken under her own personal law but for the Acts.

14 (E) There should be a special rule for Impartible Estates.

14 (F) There need not be a special rule for Impartible Estates.

15 (A) The widow should be treated as a joint tenant exactly like her husband.

15 (B) The husband's death should be regarded as splitting off his share of the joint family property at the moment of death, and the widow treated as a tenant-in-common in respect of that share.

15 (C) The position should be different from either of the two stated above.

16 (A) Every Hindu may make a declaration that his property shall devolve according to Hindu Law ; in default of such a declaration, the property will devolve according to the Indian Succession Act.

16 (B) Every Hindu may make a declaration that his property shall devolve according to the Indian Succession Act ; in default of such a declaration, his property will devolve according to Hindu Law.

16 (C) The succession to the property of all Hindus throughout British India should, after a certain number of years, be governed by a uniform set of rules.

16 (CC) The succession to the property of all Hindus throughout British India should, after a certain number of years, be governed by a uniform set of rules, preferably a set of rules representing the greatest common measure of the various Schools of Hindu Law.

16 (D) There should be one set of rules for those territories where the Mitakshara is the leading authority, and another set for those which are governed by the Dayabhaga.

16 (E) There should be no attempt to standardize the law or reduce the number of Schools.

Part II.

1 (A) The law regarding the validity of a marriage where one of the parties is of unsound mind, should be made more precise in the way indicated in the question.

1 (B) The law should be left as it is.

2 (A) Bigamous marriages should be declared null and void.

2 (B) Bigamous marriages should not be made null and void, but the former wife should be granted separate maintenance.

2 (C) A second marriage should not be prohibited, nor should the former wife be granted separate maintenance.

3 (A) The Bill should be split up so as to provide separately for decrees of nullity and decrees for separate maintenance.

3 (B) The Bill need not be so split up.

3 (C) There is no necessity for the Bill at all.

3 (D) The time has arrived for such a declaration in respect of inter-caste marriages as well as of *sagotra* marriages.

3 (E) The time has arrived for such a declaration in respect of inter-caste marriages, but not in respect of *sagotra* marriages.

3 (F) The time has arrived for such a declaration in respect of *sagotra* marriages, but not in respect of inter-caste marriages.

3 (G) The time has not arrived for any such declaration.

4 (A) A provision on these lines is necessary or desirable in addition to, or in lieu of, the provisions of the Bill.

4 (B) No such provision is necessary or desirable.

5 (A) A minimum proportion should be fixed as the maintnance to be given to a wife upon separation.

5 (B) It is better to leave the matter in the discretion of the Court.

6 (A) Habitual adultery of the husband should be a ground for separate maintenance to the wife.

6 (B) It should not be a ground.

Part III.

1 (A) Sister should include half-sister.

1 (B) Sister should not include half-sister.

1 (C) Half-sister should take after sister.

1 (D) They should take equally as joint tenants.

1 (E) They should take equally as tenants-in-common.

1 (F) The sister's son should take before the half-sister.

1 (G) The sister's son should take after the half-sister.

1 (H) The sister's son should take along with the half-sister.

2 (A) The sister should not be postponed to the new heirs.

2 (B) The sister should be postponed to the new heirs.

2 (C) The order of the new heirs *inter se* should be as in the Bill.

2 (D) The order of the new heirs *inter se* should be different from that in the Bill.

2 (E) The sister's son's son should be added.

2 (F) The sister's son's son need not be added.

APPENDIX III-B.

(Specimen Page from the Register of Opinions.)

Serial No.	Names of Correspondents.	Part I. Question 1.				Question 2.					Question 3.						Question 4.					Question 5.			
		A	B	C	D	A	B	BB	C	D	A	AA	B	BB	C	D	A	B	BB	C	D	A	B	BB	C
1			X			X			X				X					X					X		
2			X			X			X		X							X					X		
3			X			X			X		X						X					X			
4			X			X			X		X						X					X			
5			X			X					X						X					X			
6			X			X			X													X			
7			X			X					X							X					X		
8		X				X			X		X						X					X			
9			X			X				X	X							X				X			
10					X	X			X		X						X					X			
11			X				X		X							X					X			X	

Serial No.	Part I. Question 6.		Question 7.		Question 8.		Question 9.					Question 10.		Question 11.	
	A	B	A	B	A	B	A	B	C	D	E	A	B	A	B
1	X			X	X				X			X		X	
2		X		X	X		X				X	X		X	
3		X		X	X			X			X		X	X	
4															
5	X			X	X		X				X		X		X
6	X			X		X	X				X X	X		X	
7	X			X	X		X						X	X	
8	X			X	X		X				X	X			X
9	X			X	X		X			X		X		X	
10		X		X	X			X		X		X		X	
11		X		X	X		X		X			X		X	

Serial No.	Part I. Question 12.						Question 13.		Question 14.							
	A	B	C	D	E	F	A	B	A	B	BB	C	CC	D	E	F
1	X		X		X					X					X	
2		X	X			X	X						X	X		X
3		X		X		X		X			X				X	
4																
5	X		X		X				X							
6	X		X		X			X				X			X	
7		X		X	X			X			X					X
8								X	X						X	
9	X		X		X			X	X						X	
10	X		X			X		X	X							
11	X			X	X			X		X	X					X

Serial No.	Part I. Question 15.			Question 16.						Part II. Question 1.		Question 2.		
	A	B	C	A	B	C	CC	D	E	A	B	A	B	C
1		X					X			X			X	
2		X					X			X		X		
3		X				X				X			X	
4														
5														
6		X				X	X			X			X	
7		X				X				X				X
8						X				X			X	
9		X		X										
10							X							
11		X			X					X		†X		

Serial No.	Part II. Question 3.							Question 4.		Question 5.		Question 6.	
	A	B	C	D	E	F	G	A	B	A	B	A	B
1	X			X					X		X	X	
2	X								X		X	X	
3	X			X					*X		X	X	
4													
5													
6	X			X				X		X		X	
7	X			X				X			X	X	
8	X			X				X		X		X	
9													
10													
11	X			X				X			X	X	

Serial No.	Part III. Question 1.								Question 2.						Remarks.
	A	B	C	D	E	F	G	H	A	B	C	D	E	F	
1		X				X						X			
2	X		X				X			X		X			
3	X		X			X				X			X		*But on the pattern of Parsi matrimonial courts.
4															
5															
6	X				X			X							
7	X				X			X		X	X			X	
8	X			X				X		X	X		X		
9															
10															
11	X				X			X	X		X			X	†Subject to exceptions.

APPENDIX VI.

No. 28|18|38-Judicial.

GOVERNMENT OF INDIA.

HOME DEPARTMENT.

New Delhi, the 25th January 1941.

RESOLUTION.

On the 18th February 1939, Mr. Akhil Chandra Datta, a non-official member of the Legislative Assembly, introduced a Bill to amend the Hindu Women's Rights to Property Act, 1937 (XVIII of 1937), as amended by Act XI of 1938, so as to give rights of inheritance to daughters. On a motion adopted by the Legislative Assembly on the 15th September 1939, the Bill was circulated for the purpose of eliciting opinion thereon. The opinions received indicated that very few of the Provincial Governments were in favour of the Bill, and that even where there was a certain amount of sympathy for the principle underlying the Bill, a strong feeling was manifest that piecemeal legislation of this kind was undesirable, and that constant tinkering with the law could only lead to confusion unless undertaken in a systematic manner under the supervision of an expert committee. In the opinion of the Government of India, however, there was some reason to suppose that the Act of 1937 had effects on the position of daughters which were not intended by the Legislature and it was apparent that the principal Act as now amended leaves room for much uncertainty. When Mr. Datta moved on the 22nd November 1940 that the Bill be referred to a Select Committee, the Hon'ble the Home Member explained that while recognising that there was a clear need for the clarification of the existing legislation, Government felt doubtful whether a Select Committee would be in a position to evolve a measure which could be recommended to the House for acceptance. Thus, while opposing the motion for reference to a Select Committee, he gave an undertaking that Government would appoint a small committee of eminent Hindu lawyers to advise them as to how the existing legislation should be clarified, and the object desired by Mr. Datta should be secured. The motion for reference to a Select Committee was negatived by the Legislative Assembly.

2. In pursuance of the undertaking given the Central Government have decided to appoint a committee—

(a) to examine the Hindu Women's Rights to Property Act, 1937, with particular reference to the following non-official Bills :—

(i) The Hindu Women's Rights to Property (Amendment) Bill promoted by Mr. Akhil Chandra Datta ;

(ii) The Hindu Women's Rights to Property (Amendment) Bill promoted by Mr. A. N. Chattopadhayaya and others ;

(iii) The Hindu Women's Rights to Property (Amendment) Bill promoted by Dr. G. V. Deshmukh and Mr. Kailash Bihari Lal ;

(iv) The Hindu Women's Property Bill promoted by Mr. N. V. Gadgil ; and

(v) The Hindu Women's Estate Bill promoted by Dr. G. V. Deshmukh ;

and to suggest such amendments to the Act as would—

(1) resolve the doubts felt as to the construction of that Act,

(2) clarify the nature of the right conferred by the Act upon the widow, and

(3) remove any injustice that may have been done by the Act to the daughter ; and

(b) to examine and advise on two other non-official Bills mentioned below :—

(I) The Hindu Law of Inheritance (Amendment) Bill promoted by Mr. K. Santhanam, and

(II) The Hindu Married Women's Right to Separate Residence and Maintenance Bill promoted by Dr. G. V. Deshmukh.

3. The Committee will be composed as follows :—

Chairman.

The Hon'ble Mr. Justice B. N. Rau, Kt., C.I.E., I.C.S., Judge, Calcutta High Court.

Members.

1. Dr. Dwarka Nath Mitter, M.A., D.L., Ex-Judge, Calcutta High Court.
2. Mr. J. R. Gharpure, B.A., LL.B., Principal, Law College, Poona.
3. Rajratna Vasudeo Vinayak Joshi, B.A., LL.B., High Court Pleader, Baroda.

The headquarters of the Committee will be at New Delhi, and it will meet at the end of January 1941.

ORDER.—Ordered that the above resolution be published in the Gazette of India.

E. CONRAN-SMITH,

Secretary to the Government of India.

No. 28|18|38-Judicial.

A copy is forwarded to the Secretary to the Governor General (Public), for information in continuation of the Home Department endorsement No. 28|18|38-Judicial, dated the 24th January 1941.

By order,

N. BANERJEE,

for *Deputy Secretary to the Government of India.*

L127HD—1,000—12-7-41—GIPS