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PART VI.

BILLS OF THE GOVERNMENT OF INDIA.

LEGISLATIVE DEPARTMENT.

The following Bill was introduced into the Council of the Governor General of India for the purpose of making Laws and Regulations on the 9th July, 1884, and was referred to a Select Committee:—

Bill No. 8 of 1884.

THE KHOJA' SUCCESSION BILL, 1884.

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SCHEDULE.—PORTIONS OF THE INDIAN SUCCESSION ACT (X OF 1865) MODIFIED FOR APPLICATION TO WILLS MADE BY KHOJÁS.

Explanation of abbreviation used in the margin.

"Bo. Bill" refers to the draft Bill prepared by the Commission and received with the letter from the Government of Bombay, No. 216, dated 14th January, 1880.

A Bill to amend and define the law of Testamentary and Intestate Succession to Khojás.

WHEREAS it is expedient to amend and define the law applicable to testamentary and intestate succession to Khojás; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

1. This Act may be called the Khojá Succession Act, 1884; and it shall extend to the whole of British India.

Short title.
Local extent.

2. Except as provided by any other law for the time being in force, succession to the property, whether moveable or immovable, in British India of a Khojá dying on or after the first day of January eighteen hundred and eight-five shall be regulated by the rules contained in this Act, wherever he may have had his domicile at the time of his death.

[Act X of 1865, s. 5.]

Explanation.—Property in British India includes obligations enforceable there.

3. (1) In this Act, unless there is something repugnant in the subject or context,—

[Bo. Bill, s. 3.]

Definitions.

"son" means a legitimate son, and does not include an adopted son:

"grandson" means a son's son:

"great-grandson" means a grandson's son:

"daughter" means a legitimate daughter:

"father" and "mother" do not include step-father and step-mother:

"grandfather" and "grandmother" do not include a father's step-father or step-mother:

"brother" and "sister" do not include step-brother and step-sister, nor half-brother and half-sister:

"half-brother" means son of the same father but by another wife:

"lineal male descendant," used with reference to any person, means a male descended from that person through males only: [New.]

"degree" means a degree of kindred computed according to the rules laid down in sections 21, 22 and 24 of the Indian Succession Act, 1865, and the table of consanguinity thereto annexed: "undivided property" means a share in the property belonging to an undivided family:

X of 1865.
[Home Dept. Office Memo., dated 12th August, 1882, para. 7.]

"restricted owner," used with reference to any property, means a female acquiring that property in the manner specified in section 21, section 23, sub-section (2), section 24, sub-section (1), section 27 and section 39. [New.]

(2) When it is provided in this Act that the members of any class shall take property and the shares which they are respectively to take therein are not specified, they shall take equal shares therein.

4. For the purposes of this Act there shall be no distinction between [Bo. Bill, s. 7.]

ancestral and self-acquired, nor between moveable and immovable, property. Child in womb.

no distinction between ancestral and self-acquired property, nor between moveable and immovable property, nor between those born in the lifetime of a deceased owner of property and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive. [Act X of 1865, s. 23.]

The Khojá Succession Bill, 1884.

(Chapter II.—Of Succession to the Undivided Property of a Male Khojá dying intestate.—Sections 5-6.)

(Chapter III.—Of Succession to the Separate Property of a Male Khojá dying intestate.—Sections 7-20.)

CHAPTER II.

[Bo. Bill, ss. 8-12.] OF SUCCESSION TO THE UNDIVIDED PROPERTY OF A MALE KHOJÁ DYING INTESTATE.

5. (1) When a male Khojá owning undivided

Where there are lineal male descendants within fourth degree.

property dies intestate in respect of that property, leaving legitimate lineal male descendants not more remote than the fourth degree, every such descendant shall be entitled to a share in that property unless one of the persons through whom he is descended from the intestate is living.

(2) When the sharers under sub-section (1) all stand in the same degree of kindred to the intestate, their shares shall be equal.

(3) When the sharers under sub-section (1) do not all stand in the same degree of kindred to the intestate, the property shall be divided into such a number of equal shares as will correspond with the number of the sharers who stood in the nearest degree of kindred to him at his decease, and of his lineal male descendants of the like degree of kindred who died before him, and through whom the other sharers are descended from him; and one such share shall be allotted to each of the sharers who stood in the nearest degree of kindred to the intestate at his decease; and one such share shall be allotted in respect of each such deceased male descendant; and the share allotted in respect of each such deceased male descendant shall be divided among the sharers descended through him, in such manner that the sons of any person shall always take that which their father would have been entitled to if he had survived the intestate.

[Act X of 1865, s. 33.]

6. In default of legitimate lineal male descendants as aforesaid, the property of the intestate shall be divided equally among all the male members of his undivided family living at his death.

[Bo. Bill, s. 13.]

CHAPTER III.
OF SUCCESSION TO THE SEPARATE PROPERTY OF A MALE KHOJÁ DYING INTESTATE.

7. When a male Khojá owning property, not being undivided property, dies intestate in respect of that property, leaving legitimate lineal male descendants not more remote than the fourth degree, the property shall descend in the manner provided in section 5.

[Bo. Bill, s. 16.]

8. In default of legitimate lineal male descendants as aforesaid, the intestate's father shall succeed to the property.

[Bo. Bill, s. 17.]

9. In default of the father, the intestate's mother shall succeed to the property.

[Bo. Bill, s. 18.]

10. In default of the mother, the widow or widows of the intestate shall succeed to the property.

[Bo. Bill, s. 19, see *infra*, s. 34.]

11. In default of widows, the daughters of the intestate shall succeed to the property.

[Bo. Bill, s. 20.]

12. (1) In default of daughters, the sons of daughters shall succeed to the property, the sons of each daughter taking an equal share:

[Bo. Bill, s. 21.]

Provided that, if the intestate has left brothers surviving him, the daughters' sons shall succeed to a moiety of the property, the sons of each daughter taking an equal share, and the brothers shall take the other moiety.

(2) In default of daughters' sons, the brothers shall take the whole of the property.

13. In default of brothers, the daughters of the intestate's sons shall succeed to the property, the daughters of each son taking an equal share.

[Bo. Bill, s. 22.]

14. In default of sons' daughters, the sons of the intestate's brothers shall succeed to the property, the sons of each brother taking an equal share.

[Bo. Bill, s. 23.]

15. In default of brothers' sons, the half-brothers of the intestate shall succeed to the property.

[Bo. Bill, s. 24.]

16. In default of half-brothers, the sons of half-brothers shall succeed to the property, the sons of each half-brother taking an equal share.

[Bo. Bill, s. 25.]

17. In default of sons of half-brothers, the paternal grandfather shall succeed to the property; and in default of the paternal grandfather, the paternal grandmother shall succeed to it.

[Bo. Bill, s. 26.]

18. In default of the paternal grandmother, the paternal uncles shall succeed to the property.

[Bo. Bill, s. 27.]

19. In default of paternal uncles, the sisters of the intestate shall succeed to the property.

[Bo. Bill, s. 28.]

20. In default of sisters, the property shall belong to those of the intestate's relatives on the father's side who stand in the nearest degree of kindred to the intestate;

[Bo. Bill, s. 29.]

and, in default of relatives on the father's side, to those of the intestate's relatives on the mother's side who stand in the nearest degree of kindred to the intestate:

Provided that no female relative shall be entitled to share in the property if there is a male relative standing on the same side in the same degree of kindred to the intestate.

21. If, at the death of the intestate, any of the male heirs mentioned in sections 7 to 18 (both inclusive), or any male restricted owner under foregoing sections, shall succeed to the property, the male heirs mentioned in sections 7 to 18 (both inclusive), or any male relative of the intestate on the father's side

[Bo. Bill, s. 33. See *sec.* 46, *infra*.]

The Khojá Succession Bill, 1884.
 (Chapter IV.—Of Succession to the Absolute Property of a Female Khojá dying intestate.—Sections 23-27.)
 (Chapter V.—Of Property which a Female takes as Restricted Owner, and the further Succession to the same.—Section 28.)

not more remote than the seventh degree of kindred to the intestate, is living, a female succeeding under any of the foregoing sections shall take the property as restricted owner.

[Bo. Bill, s. 30.]

22. When a male Khojá dies intestate in respect of any ornaments belonging to him, and not being undivided property, which are in the possession of his wife with his consent, and the wife does not acquire the ownership, whether absolute or restricted, of the ornaments under this Act, she shall be entitled to retain possession of them until she dies or re-marries.

CHAPTER IV.
 OF SUCCESSION TO THE ABSOLUTE PROPERTY OF A FEMALE KHOJÁ DYING INTESTATE.

[Bo. Bill, s. 33.]

23. (1) When an unmarried female Khojá owning property otherwise than as a restricted owner dies intestate in respect of that property, it shall belong to her brothers; in default of brothers, to her father; in default of the father, to her mother; in default of the mother, to the relatives of the intestate on the father's side who stand in the nearest degree of kindred to the intestate; and, in default of such relatives, to the relatives on the mother's side who stand in the nearest degree of kindred to the intestate.

(2) If at the death of the intestate any male relative of the intestate on the father's side not more remote than the seventh degree of kindred to the intestate is living, a female succeeding under this section, whether in preference to or together with that male relative, shall take the property as restricted owner.

[Bo. Bill, ss. 32 & 33.]

24. (1) When a married female Khojá owning property otherwise than as restricted owner dies intestate in respect of that property, it shall belong to her sons and daughters; and the daughters shall take it as restricted owners.

(2) In default of sons and daughters, the property shall, except as provided in sub-section (3), belong to her husband.

(3) If the property has been given to the female on the occasion of her marriage separately from the "Dej" for her sole use and benefit by her parents or relatives, it shall, in default of sons and daughters, belong—

- (a) to her father; and
- (b) in default of the father, to the person to whom it would then have belonged if it had been the property of the father at his death and had descended without having been alienated.

(4) A female taking property under clause (b) of sub-section (3) shall not take it as restricted owner.

[Bo. Bill, s. 37.]

25. (1) When a female Khojá, being a widow or divorced and owning property otherwise than as restricted owner, dies

Descent of absolute property of widow or divorced female leaving lineal de-

scendants within the fourth degree. that property leaving legitimate lineal descendants not more remote than the fourth degree, every such descendant shall be entitled to a share of the property unless one of the persons through whom he is descended from the intestate is living.

(2) When the sharers under sub-section (1) all stand in the same degree of kindred to the intestate, their shares shall be equal.

(3) When the sharers under sub-section (1) do not all stand in the same degree of kindred to the intestate, the property shall be divided into such a number of equal shares as may correspond with the number of the sharers who stood in the nearest degree of kindred to her at her decease, and of lineal descendants of the like degree of kindred who died before her and through whom the other sharers are descended from her; and one such share shall be allotted to each of the sharers who stood in the nearest degree of kindred to the intestate at her decease; and one such share shall be allotted in respect of each such deceased descendant; and the share allotted in respect of each such deceased descendant shall be divided among the sharers descended through him, in such manner that the children of any person shall always take what that person would have been entitled to if he had survived the intestate.

[Act X of 1865, s. 33.]

26. (1) In default of the descendants mentioned in section 25, the property shall belong to the brothers of the intestate; in default of brothers, to her father; in default of the father, to her mother.

[Bo. Bill, s. 37.]

(2) In default of the mother, the property shall belong to the relatives of the intestate on the father's side who stand in the nearest degree of kindred, and, in default of such relatives, to the relatives of the intestate on the mother's side who stand in the nearest degree of kindred.

27. If, at the death of the intestate, any of the male heirs mentioned in section 25 and the first sub-section of section 26,

[Bo. Bill, s. 32.]

or any male relative of the intestate on the father's side not more remote than the seventh degree of kindred to the intestate, is living, a female succeeding under section 25 or section 26, whether in preference to or together with that heir or relative, shall take the property as restricted owner.

CHAPTER V.

OF PROPERTY WHICH A FEMALE TAKES AS RESTRICTED OWNER, AND THE FURTHER SUCCESSION TO THE SAME.

28. A female taking property as restricted owner shall be absolutely entitled to the use of, and the income accruing from, that property during her life, and, except as otherwise provided by this Act, shall have all the other rights and powers of an absolute owner in respect of that property.

[Bo. Bill, s. 3; "life-estate," "stridhan."]

The Khojā Succession Bill, 1884.

(Chapter V.—Of Property which a Female takes as Restricted Owner, and the further Succession to the same.—Sections 29-36).

[Bo. Bill, s. 3; "life-estate."] 29. Except as provided by section 31, no right to, over or in re-
 Powers of alienation limited. spect of property created by a restricted owner of that property shall have effect for any time beyond her life :

[New.] Provided that nothing in this section shall affect a lease granted at a fair rent for a term not exceeding twenty years, and without payment of any fine or premium, or a right created for consideration in favour of a person acting in good faith, and without notice of the ownership being restricted.

[Act II of 1882, s. 3.] *Explanation.*—A person has notice of the ownership being restricted when he actually knows that it is restricted, or when, but for wilful abstention from enquiry or gross negligence, he would have known it, or when information of it is given to, or obtained by, his agent under the circumstances mentioned in the Indian Contract Act, 1872, section 229.

IX of 1872. 30. A female taking property as restricted owner shall be bound, so far as it is possible for her to do so without applying her other property for that purpose,—

(a) to preserve the substance of the property without any material alteration, deterioration or diminution except such as may be essential to the realization of the full income of it in a reasonable manner, and to deal with it in all respects as carefully as a person of ordinary prudence would deal with property which he hoped to transmit in good condition to his heirs; and

[Act II of 1882, s. 13.] (b) to make such payments, institute, maintain and defend such suits and other proceedings, and take such other steps as, regard being had to the nature and amount or value of the property, may be reasonably requisite for the assertion and protection of the title thereto, for the protection of the interest of those who are to take it after her, or for the recovery of any portion of it which is not in her possession.

[Bo. Bill, s. 3; "life-estate."] 31. A female taking property as restricted owner shall have power to transfer the same, so that the transfer may have effect beyond her life when, the income being insufficient, such transfer is necessary in order to raise money for any of the following purposes, namely :—

- (a) to discharge any of the obligations imposed by section 30;
- (b) to discharge the debts of the absolute owner from whom the property descended;
- (c) to provide for the maintenance of any persons entitled under this Act to have their maintenance provided for out of the property, for the payment of any marriage expenses or funeral expenses payable under this Act out of the property, and for the performance of any ordinary family ceremonies; and
- (d) to support herself where she has no other sufficient means of support.

32. (1) A restricted owner of property may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction to sanction any transfer of that property which she proposes to make under section 31.

(2) The petition must state the names of all the persons interested in the application so far as they can be ascertained, and must be verified by the applicant or by some other competent person in the manner required by law for the verification of plaints; and, if it contains any averment which the person making the verification knows or believes to be false, or does not know or believe to be true, that person shall be deemed to have intentionally given false evidence within the meaning of the Indian Penal Code.

(3) A copy of the petition shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit.

(4) A transfer made with the sanction of a Court obtained under this section shall be deemed to be warranted by section 31.

33. A Court dealing with an application under section 32 may, if it thinks fit, sanction the transfer proposed subject

to the condition that the money raised by the transfer shall be paid into Court or to trustees appointed by the Court, and may give such further directions as it thinks fit with a view to ensuring that the money shall be applied to the purpose for which it is raised, or that any balance thereof which is not required for that purpose, shall be secured for the benefit of those who would take the property after the restricted owner.

34 When property belonging to a female as restricted owner is sold in execution of a decree passed against her, the interest taken by the purchaser shall cease on her death,—

except when, without any collusion between her and the plaintiff,—

- (a) the decree is passed against her as representative of the absolute owner from whom the property descended; or
- (b) the decree is one for sale passed on a mortgage made under section 31 so as to take effect beyond the life of the female.

35. A decision in any suit or other proceeding, or a compromise of any dispute, relating to the property to which the restricted owner is a party, shall, except where she acts in collusion with the party opposed to her, bind those who take the property after her under this Act in the same manner and to the same extent as if she were an absolute owner of the property.

36. In any case in which, under any enactment for the time being in force, an owner of property would by lapse of time lose any right to, over or in respect of

Effect of lapse of time during continuance of restricted ownership. property would by lapse of time lose any right to, over or in respect of

[New l. of Act II of 1882, s. 34.]

XLV of 1860.

The Khojá Succession Bill, 1884.
(Chapter VI.—Of Wills of Khojás.—Section 42).

that property, or any means of enforcing any such right, or another person would by lapse of time acquire any right to, over or in respect of that property, any period which elapses during the continuance of the restricted ownership shall be reckoned as against those taking the property after the termination of that ownership in the same manner and to the same extent as if the restricted owner had been an absolute owner of the property and it had been taken by them as her heirs.

[Bo. Bill, s. 39.] 37. (1) When property has descended to a female as restricted owner and she dies unmarried, it shall belong to the person to whom it would then have belonged if she had died before the absolute owner from whom it descended and it had descended under this Act without having been alienated.

Further descent of property held by unmarried female as restricted owner. Further descent of restricted property of married or divorced female or widow. (2) In default of such person, the property shall descend as if the female were not a restricted owner.

[Bo. Bill, s. 41.] 38. (1) When property has descended to a female as restricted owner and she dies, being at the time of her death married, a widow or divorced from her husband, the property shall be divided among her legitimate lineal male descendants, not being more remote than the fourth degree, those nearest in degree of kindred to her excluding the more remote, and, when those nearest in degree are not her sons, the property being so divided amongst them that the sons of any person shall take the share which he would have taken if the fathers of all had survived the restricted owner.

(2) In default of legitimate lineal male descendants as aforesaid, the property shall belong to the daughters of the deceased; in default of daughters, the property shall belong to the legitimate lineal male descendants of daughters, not being more remote from the deceased than the fourth degree, those nearest in degree excluding the more remote; the descendants of each daughter, when they take, taking an equal share, and when they are not sons of the daughters, that share being so divided among them that the sons of any person shall take what he would have taken if the fathers of all had survived the restricted owner.

(3) In default of legitimate lineal male descendants of daughters as aforesaid, the property shall belong to the person to whom it would then have belonged if the restricted owner had died before the absolute owner from whom it descended, and it had descended under this Act without having been alienated.

(4) In default of such person, the property shall descend as if the female were not a restricted owner.

[Bo. Bill, s. 32.] 39. When property, having descended to a female as restricted owner, subsequently descends to another female under section 37, sub-section (1), or section 38, sub-section (3), that female shall take it as restricted owner.

When female taking property under sections 37 and 38 takes as restricted owner. Further descent of restricted property of married or divorced female or widow.

40. Notwithstanding anything in the foregoing sections, when two or more widows of a deceased Khojá take his property under this Act as restricted owners,—

(1) there shall be as between them a right of survivorship in respect of that property;

(2) the proviso to section 29 shall not apply to any lease of or any right to, over or in respect of the property, or any part or share thereof, granted or created by one or more of them without the consent in writing of the other or others of them then surviving;

(3) section 31 and section 32 shall not apply to any transfer made by one or more of them without the consent in writing of the other or others of them then surviving;

(4) section 35 shall not apply to any decision in any suit or proceeding or to any compromise unless all of them then surviving are parties to that suit, proceeding or compromise.

41. Notwithstanding anything in the foregoing sections, a widow marrying again after her husband's death shall not be entitled to take as restricted owner his property or any property of any of his lineal descendants which has descended to them from him; and a widow taking any such property as restricted owner under the foregoing sections and subsequently marrying again shall, for the purpose of applying sections 28, 29, 34, 38 and 40, to that property, be deemed to have died.

Effect of re-marriage of widow claiming or holding as restricted owner. Effect of re-marriage of widow claiming or holding as restricted owner.

CHAPTER VI.

OF WILLS OF KHOJÁS.

42. Subject to the provisions of this Act, the portions of the Indian Succession Act, 1865, set forth in the schedule hereto annexed, with the modifications shown in that schedule, shall, notwithstanding anything contained in section 331 of that Act, apply to all wills made by a Khojá, whether male or female, dying on or after the first day of January eighteen hundred and eighty-five; and in the portions of the Act so applying all words defined in section 3 of the Act shall, unless there be something repugnant in the subject or context, be deemed to have the same meaning as that section has attached to them respectively;

Extension of portions of Act X of 1865 with certain modifications to wills of Khojás. Extension of portions of Indian Succession Act, 1865, set forth in the schedule hereto annexed, with the modifications shown in that schedule, shall, notwithstanding anything contained in section 331 of that Act, apply to all wills made by a Khojá, whether male or female, dying on or after the first day of January eighteen hundred and eighty-five; and in the portions of the Act so applying all words defined in section 3 of the Act shall, unless there be something repugnant in the subject or context, be deemed to have the same meaning as that section has attached to them respectively;

Provided that—

(a) For the purpose of the portions of the Act so applying, no person to whom the Indian Majority Act, 1875, applies shall be deemed to have attained his majority before the time specified in this behalf in that Act.

(b) A bequest by a Khojá in favour of any person who has not come into existence at the death of the testator, or in favour of a class of persons any one of whom has not come into existence at that time, shall be void.

(c) When a bequest is void under clause (b), any bequest contained in the same will and intended to take effect after or upon failure of such prior bequest shall also be void.

IX of 1875.

The Khojá Succession Bill, 1884.
 (Chapter VII.—Of Maintenance and Marriage and Funeral Expenses.—Secs. 44-47).
 (Chapter VIII.—Miscellaneous.—Sections 48-51).

[Act IV of 1882, s. 10.]

43. Notwithstanding anything contained in the foregoing sections, a Khojá may bequeath property to or for the benefit of a woman so that she shall not have power to transfer or charge the same or her beneficial interest therein.

CHAPTER VII.

OF MAINTENANCE AND MARRIAGE AND FUNERAL EXPENSES.

[Bo. Bill, ss. 34 & 43.]

44. (1) The amount requisite for the maintenance of the following persons and the amount of their necessary funeral expenses shall, if they do not possess or leave means sufficient for the purpose, be payable out of any property of a deceased male Khojá in respect of which he has died intestate.

- (2) The persons referred to are—
- (a) the widow or widows of the deceased Khojá and the widows of his legitimate lineal male descendants, provided they have not married again;
- (b) every daughter and sister (whether legitimate or not) of the deceased Khojá and every legitimate daughter of his son, grandson or great-grandson, except when she has been married and her husband is living;
- (c) the father, mother, grandfather and grandmother of the deceased Khojá; and
- (d) his illegitimate sons until they attain their majority.

[Bo. Bill, s. 44.]

45. The expenses of the first or only marriage of every daughter (whether legitimate or not) of a deceased male Khojá, and of every legitimate daughter of his deceased son, grandson or great-grandson, if not otherwise sufficiently provided for, shall be payable out of any of his property in respect of which he has died intestate.

[Bo. Bill, s. 45.]

46. If a male Khojá dies leaving a legitimate lineal male descendant who has not attained his majority, or a daughter who is unmarried or a widow, and having disposed of his property by will in such a manner as to leave that descendant, daughter or widow without sufficient means for the purpose, the amount requisite for the maintenance, of the descendant during his minority, or of the daughter while she remains unmarried or of the widow until her death or re-marriage (as the case may be) shall be payable out of the testator's property; and if the descendant dies before he attains his majority or the daughter dies unmarried or the widow dies without re-marrying, his or her necessary funeral expenses shall be payable out of that property.

[New.]

47. Any sum claimable for maintenance or marriage expenses or funeral expenses under section 44, section 45 or section 46 out of any

Recovery of sums claimable under sections 44, 45, and 46.

property of a deceased male Khojá shall be recoverable as if it was due under a contract made by the Khojá in his lifetime and he had died leaving only that property:

Provided that—

- first, the property shall be applied to the payment of debts due by the deceased before being applied to the payment of sums so claimable;
- secondly, no decree shall be passed for arrears of any allowance on account of maintenance unless the amount of the allowance has been fixed by agreement or by order of a Court; and
- thirdly, when a suit is instituted for the purpose of having any such allowance fixed against a person taking the property by intestate succession, and that person is able and willing to maintain or provide for the maintenance of the person by or on whose behalf the suit is instituted, and gives security to the satisfaction of the Court for his so doing, the Court may, if it thinks fit, dismiss the suit.

CHAPTER VIII.
 MISCELLANEOUS.

48. When a Khojá dies intestate in respect of any of his property, and there is no person entitled to take that property under the foregoing sections, it shall go to the Crown.

[Bo. Bill, s. 42. Act X of 1865, s. 28.]

49. Except as otherwise provided by this Act—

- (1) a female taking property by intestate succession under this Act shall have the same interest in it, and the same powers in respect of it, as if she were a male; and
- (2) a female taking property under any testamentary disposition under this Act shall have the same interest in it, and the same powers in respect of it, as a male taking under a like disposition.

50. If a widow of a deceased Khojá, not having been appointed by his will to be guardian for his children, marries again, she shall not be entitled as of right to be appointed guardian of the children by a Court under any law for the time being in force relating to the appointment of guardians, and, when she has before her re-marriage been so appointed, a Court having jurisdiction to appoint a guardian for the children may in its discretion remove her from the guardianship.

[Bo. Bill, s. 35, Act XV of 1856, s. 3.]

51. A Khojá may dispose, by gift made in contemplation of death, of any moveable property which he could dispose of by will.

A gift is said to be made in contemplation of death where a person who is ill and expects to die shortly of his illness delivers to another the possession of any moveable property to keep as a gift in case the donor shall die of that illness.

Property transferable by gift made in contemplation of death.

When gift said to be made in contemplation of death.

Guardianship of children where widow remarries.

Females succeeding under this Act to take as males, except in certain cases.

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Such gift resumable. Such a gift may be resumed by the giver.

It does not take effect if he recovers from the illness during which it was made, nor if he survives the person to whom it was made.

When it fails.

the illness during which it was made, nor if he survives the person to whom it was made.

Illustrations.

(a.) A being ill, and in expectation of death, delivers to B, to be retained by him in case of A's death—

- a watch :
- a bond granted by C to A :
- a bank-note :
- a promissory note of the Government of India endorsed in blank :
- a bill of exchange endorsed in blank :
- certain mortgage-deeds.

A dies of the illness during which he delivered these articles.

B is entitled to—

- the watch :
- the debt secured by C's bond :
- the bank-note :
- the promissory note of the Government of India :
- the bill of exchange :
- the money secured by the mortgage-deeds.

(b.) A being ill, and in expectation of death, delivers to B the key of a trunk, or the key of a warehouse in which goods of bulk belonging to A are deposited, with the intention of giving him the control over the contents of the trunk, or over the deposited goods, and desires him to keep them in case of A's death. A dies of the illness during which he delivered these articles. B is entitled to the trunk and its contents, or to A's goods of bulk in the warehouse.

(c.) A being ill, and in expectation of death, puts aside certain articles in separate parcels, and marks upon the parcels respectively the names of B and C. The parcels are not delivered during the life of A. A dies of the illness during which he set aside the parcels. B and C are not entitled to the contents of the parcels.

SCHEDULE.

(See Section 42.)

PORTIONS OF THE INDIAN SUCCESSION ACT (X OF 1865) MODIFIED FOR APPLICATION TO WILLS MADE BY KHOJÁS.

Note.—Modifications are shewn in italics; omissions by asterisks.

PART VII.

Of Wills and Codicils.

46. Every person of sound mind and not a ^{Persons} capable of minor mind dispose of his property by will.

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

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

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

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

Illustrations.

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

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

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

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

48. A will or any part of a will, the making of which has been caused Will obtained by fraud, by fraud or coercion, or coercion or importunity. by such importunity as takes away the free agency of the testator, is void.

Illustrations.

(a.) A falsely and knowingly represents to the testator that the testator's only child is dead, or that he has done some undutiful act, and thereby induces the testator to make a will in his, A's, favour; such will has been obtained by fraud and is invalid.

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

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

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

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

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

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

(h.) A, with a view to obtaining a legacy from B, pays him attention and flatters him, and thereby pro-

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duces in him a capricious partiality to A. B., in consequence of such attention and flattery, makes his will, by which he leaves a legacy to A. The bequest is not rendered invalid by the attention and flattery of A.

49. A will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will.

Will may be revoked or altered.

PART VIII.

Of the Execution of Unprivileged Wills.

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

Execution of unprivileged wills.

First.—The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

Second.—The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

Third.—The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must sign or affix his mark to the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

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

Incorporation of papers by reference.

PART IX.

Of Privileged Wills.

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

Illustrations.

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

(b.) A is at sea in a merchant-ship, of which he is the purser. He is a mariner, and being at sea can make a privileged will.

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

(d.) A, a mariner of a ship in the course of a voyage, is temporarily on shore, while she is lying in

harbour. He is, in the sense of the words used in this clause, a mariner at sea, and can make a privileged will.

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

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

53. Privileged wills may be in writing or Mode of making, and rules may be made by word of for executing, privileged mouth.

The execution of them shall be governed by the following rules:—

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

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

Third.—If the instrument purporting to be a will is written wholly or in part by another person, and is not signed by the testator, it shall be considered to be his will, if it be shown that it was written by the testator's directions, or that he recognized it as his will.

If it appear on the face of the instrument that the execution of it in the manner intended by him was not completed, the instrument shall not by reason of that circumstance be invalid, provided that his non-execution of it can be reasonably ascribed to some cause other than the abandonment of the testamentary intentions expressed in the instrument.

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

Fifth.—If the soldier or mariner shall, in the presence of two witnesses, have given verbal instructions for the preparation of his will, and they shall have been reduced into writing in his lifetime, but he shall have died before the instrument could be prepared and executed, such instructions shall be considered to constitute his will, although they may not have been reduced into writing in his presence, nor read over to him.

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

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

PART X.

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

* * * * *

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

Witness not disqualified by interest or by being executor.

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application to Wills made by Khojás.)

* * * * *

57. No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than * * *

Revocation of unprivileged will or codicil.

* * by another will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Illustrations.

(a.) A has made an unprivileged will. Afterwards A makes another unprivileged will which purports to revoke the first. This is a revocation.

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

58. No obliteration, interlineation or other

Effect of obliteration, interlineation or alteration in unprivileged will.

alteration made in any privileged will after the execution thereof shall have

any effect, except so far as the words or meaning of the will shall have been thereby rendered illegible or undiscernible, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; save that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

59. A privileged will or codicil may be revoked

Revocation of privileged will or codicil.

by the testator, by an unprivileged will or codicil, or by any act expressing an

intention to revoke it, and accompanied with such formalities as would be sufficient to give validity to a privileged will, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Explanation.—In order to the revocation of a privileged will or codicil by an act accompanied with such formalities as would be sufficient to give validity to a privileged will, it is not necessary that the testator should at the time of doing that act be in a situation which entitles him to make a privileged will.

60. No unprivileged will or codicil, nor any

Revival of unprivileged will.

part thereof, which shall be in any manner revoked, shall be revived otherwise

than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same;

and when any will or codicil which shall be

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

partly revoked and afterwards wholly revoked shall be revived, such revival shall not extend to so much

thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown by the will or codicil.

PART XI.

Of the construction of Wills.

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

62. For the purpose of determining questions as to what person or what property is denoted by any words used in a will, a Court must inquire into every material fact relating to the persons who claim to be interested under such will, the property which is claimed as the subject of disposition, the circumstances of the testator and of his family, and into every fact a knowledge of which may conduce to the right application of the words which the testator has used.

Illustrations.

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

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

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

63. Where the words used in the will to designate or describe a legatee, or a class of legatees, sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect.

A mistake in the name of a legatee may be corrected by a description, of him, and a mistake in the description of a legatee may be corrected by the name.

Illustrations.

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

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

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

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

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

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

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

When words may be supplied.

Illustration.

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

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

Illustrations.

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

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

66. If the will mentions several circumstances as descriptive of the thing which the testator intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest shall be considered as limited to such property, and it shall not be lawful to reject any part of the description as erroneous because the testator had other property to which such part of the description does not apply.

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

Illustrations.

(a.) A bequeaths to B "his marsh-lands lying in L, and in the occupation of X." The testator had marsh-lands lying in L, some of which were in the occupation of X, and some not in the occupation of X. The bequest shall be considered as limited to such of the testator's marsh-lands lying in L as were in the occupation of X.

(b.) A bequeaths to B "his marsh-lands lying in L, and in the occupation of X, comprising 1,000

bighás of land." The testator had marsh-lands lying in L, some of which were in the occupation of X, and some not in the occupation of X. The measurement is wholly inapplicable to the marsh-lands of either class, or to the whole taken together. The measurement shall be considered as struck out of the will, and such of the testator's marsh-lands lying in L as were in the occupation of X shall alone pass by the bequest.

67. Where the words of the will are unambiguous, but it is found by extrinsic evidence admissible in case of latent ambiguity, they admit of applications one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended.

Illustrations.

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

(b) A, by his will, leaves to B "his estate called Sultánpur Khurd." It turns out that he had two estates called Sultánpur Khurd. Evidence is admissible to show which estate was intended.

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

Illustrations.

(a) A man has an aunt Caroline and a cousin Mary, and has no aunt of the name of Mary. By his will he bequeaths 1,000 rupees to "his aunt Caroline" and 1,000 rupees to "his cousin Mary," and afterwards bequeaths 2,000 rupees to "his before-mentioned aunt Mary." There is no person to whom the description given in the will can apply, and evidence is not admissible to show who was meant by "his before-mentioned aunt Mary." The bequest is therefore void for uncertainty under the seventy-sixth section.

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

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

69. The meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other; and for this purpose a codicil is to be considered as part of the will.

Illustrations.

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

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

70. General words may be understood in a restricted sense were it may be collected from the will that the testator meant to use them in a restricted sense; and words may be understood in a wider sense than that which they usually bear, where it may be collected from the other words of the will that the testator meant to use them in such wider sense.

When words may be understood in restricted sense and when in sense wider than usual.

Illustrations.

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

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

(c.) A, by his will, bequeathed to B all his household furniture, plate, linen, china, books, pictures and all other goods of whatever kind; and afterwards bequeathed to B a specified part of his property. Under the first bequest, B is entitled only to such articles of the testator's as are of the same nature with the articles therein enumerated.

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

Which of two possible constructions preferred.

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

No part rejected, if it can be reasonably construed.

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

Interpretation of words repeated in different parts of will.

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

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

* * * * *

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

The last of two inconsistent clauses prevails.

Illustrations.

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

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

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

Illustration.

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

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

Words describing subject refer to property answering description at testator's death.

* * * * *

82. Where property is bequeathed to any person he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him.

Bequest without words of limitation.

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

Bequest in alternative.

Illustrations.

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

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

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

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

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

* * * * *

84. Where property is bequeathed to a person and words are added which describe a class of persons, but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the will.

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

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Illustrations.

(a.) A bequest is made—
to A and his children,
to A and his children by his present wife,
to A and his heirs,
to A and the heirs of his body,
to A and the heirs male of his body,
to A and the heirs female of his body,
to A and his issue,
to A and his family,
to A and his descendants,
to A and his representatives,
to A and his personal representatives,
to A, his executors and administrators.

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

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

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S5. Where a bequest is made to a class of persons under a general description only, no one to whom the words of the description are not in their ordinary sense applicable shall take the legacy.

* * * * *

S8. Where a will purports to make two bequests to the same person, and a question arises whether the testator intended to make the second bequest instead of or in addition to the first, if there is nothing in the will to show what he intended, the following rules shall prevail in determining the construction to be put upon the will:—

First.—If the same specific thing is bequeathed twice to the same legatee in the same will, or in the will and again in a codicil, he is entitled to receive that specific thing only.

Second.—Where one and the same will or one and the same codicil purports to make, in two places, a bequest to the same person of the same quantity or amount of anything, he shall be entitled to one such legacy only.

Third.—Where two legacies of unequal amount are given to the same person in the same will, or in the same codicil, the legatee is entitled to both.

Fourth.—Where two legacies, whether equal or unequal in amount, are given to the same legatee, one by a will and the other by a codicil, or each by a different codicil, the legatee is entitled to both legacies.

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

Illustrations.

(a.) A having ten shares, and no more, in the Bank of Bengal, made his will, which contains near its commencement the words “I bequeath my ten shares in the Bank of Bengal to B.” After other bequests, the will concludes with the words “and I bequeath my ten shares in the Bank of Bengal to B.” B is entitled simply to receive A’s ten shares in the Bank of Bengal.

(b.) A having one diamond-ring, which was given him by B, bequeathed to C the diamond-ring which was given him by B. A afterwards made a codicil to his will, and thereby, after giving other legacies, he bequeathed to C the diamond-ring which was given him by B. C can claim nothing except the diamond-ring which was given to A by B.

(c.) A, by his will, bequeaths to B the sum of 5,000 rupees, and afterwards, in the same will, repeats the bequest in the same words. B is entitled to one legacy of 5,000 rupees only.

(d.) A, by his will, bequeaths to B the sum of 5,000 rupees, and afterwards, by the same will, bequeaths to B the sum of 6,000 rupees. B is entitled to 11,000 rupees.

(e.) A, by his will, bequeaths to B 5,000 rupees, and by a codicil to the will bequeaths to him 5,000 rupees. B is entitled to receive 10,000 rupees.

(f.) A, by one codicil to his will, bequeaths to B 5,000 rupees, and by another codicil, bequeaths to him 6,000 rupees. B is entitled to receive 11,000 rupees.

(g.) A, by his will, bequeaths “500 rupees to B because she was his nurse,” and in another part of the will bequeaths 500 rupees to B “because she went to England with his children.” B is entitled to receive 1,000 rupees.

(h.) A, by his will, bequeaths to B the sum of 5,000 rupees and also, in another part of the will, an annuity of 400 rupees. B is entitled to both legacies.

(i.) A, by his will, bequeaths to B the sum of 5,000 rupees and also bequeaths to him the sum of 5,000 rupees if he shall attain the age of 18. B is entitled absolutely to one sum of 5,000 rupees, and take a contingent interest in another sum of 5,000 rupees.

S9. A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.

Illustrations.

(a.) A makes her will, consisting of several testamentary papers, in one of which are contained the following words:—

“I think there will be something left, after all funeral expenses, &c., to give to B, now at school, towards equipping him to any profession he may hereafter be appointed to.” B is constituted residuary legatee.

(b.) A makes his will, with the following passage at the end of it:—“I believe there will be found sufficient in my banker’s hands to defray and discharge my debts, which I hereby desire B to do, and keep the residue for her own use and pleasure.” B is constituted the residuary legatee.

(c.) A bequeaths all his property to B, except certain stocks and funds, which he bequeaths to C. B is the residuary legatee.

S90. Under a residuary bequest, the legatee is entitled to all property belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect.

* * * * *

S91. If a legacy be given in general terms, without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and, if he dies without having received it, it shall pass to his representatives.

S92. If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the re-

In what case legacy lapses.

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sidue of the testator's property unless it appear by the will that the testator intended that it should go to some other person.

In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

Illustrations.

(a.) The testator bequeaths to B "500 rupees which B owes him." B dies before the testator; the legacy lapses.

(b.) A bequest is made to A and his children. A dies before the testator or happens to be dead when the will is made. The legacy to A and his children lapses.

(c.) A legacy is given A, and in case of his dying before the testator, to B. A dies before the testator. The legacy goes to B.

(d.) A sum of money is bequeathed to A for life, and after his death to B. A dies in the lifetime of the testator. B survives the testator. The bequest to B takes effect.

(e.) A sum of money is bequeathed to A on his completing his eighteenth year, and in case he should die before he completes his eighteenth year, to B. A completes his eighteenth year, and dies in the lifetime of the testator. The legacy to A lapses, and the bequest to B does not take effect.

(f.) The testator and the legatee perished in the same shipwreck. There is no evidence to show which died first. The legacy will lapse.

93. If a legacy be given to two persons jointly, and one of them die before the testator, the other legatee takes the whole.

Legacy does not lapse if one of two joint legatees die before testator.

Illustration.

The legacy is simply to A and B. A dies before the testator. B takes the legacy.

94. But where a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then if any legatee die before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.

Effect of words showing testator's intention to give distinct shares.

Illustration.

A sum of money is bequeathed to A, B and C, to be equally divided among them. A dies before the testator. B and C shall only take so much as they would have had if A had survived the testator.

95. Where the share that lapses is a part of the general residue bequeathed by the will, that share shall go as undisposed of.

When lapsed share goes as undisposed of.

Illustration.

The testator bequeaths the residue of his estate to A, B and C, to be equally divided between them. A dies before the testator. His one-third of the residue goes as undisposed of.

96. Where a bequest shall have been made to any son or other legitimate lineal male descendant of the testator, and the legatee shall die in the lifetime of the testator, but any legitimate lineal male descendant of his shall survive the testator, the bequest shall

When bequest to testator's lineal descendant does not lapse on his death in testator's lifetime.

not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Illustration.

A makes his will, by which he bequeaths a sum of money to his son B for his own absolute use and benefit. B dies before A, leaving a son C who survives A, and having made his will whereby he bequeaths all his property to his widow D. The money goes to D.

97. Where a bequest is made to one person, for the benefit of another, the legacy does not lapse by the death, in the testator's lifetime, of the person to whom the bequest is made.

98. Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as shall be alive at the testator's death.

* * * * *

Illustrations.

(a.) A bequeaths 1,000 rupees to "the children of B" without saying when it is to be distributed among them. B had died previous to the date of the will, leaving three children, C, D and E. E died after the date of the will, but for the death of A. C and D survive A. The legacy shall belong to C and D, to the exclusion of the representatives of E.

(b.) A bequeaths a legacy to the children of B. At the time of the testator's death, B has no children. The bequest is void.

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PART XII.

OF VOID BEQUESTS.

99. Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.

Bequest to person by particular description, who is not in existence at testator's death.

the bequest is void.

* * * * *

Illustrations.

(a.) A bequeaths 1,000 rupees to the eldest son of B. At the death of the testator B has no son. The bequest is void.

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101. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease.

* * * * *

102. If a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules contained in the last preceding section, such bequest shall be wholly void.

Request to a class, some of whom may come under rules in Section 101.

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103. Where a bequest is void by reason of any of the rules contained in the two last preceding sections, any bequest contained in the same will and intended to take effect after or upon failure of such prior bequest is also void.

* * * * *

104. A direction to accumulate the income arising from any property shall be void; and the property shall be disposed of as if no accumulation had been directed.

Exception.—Where the property is immovable, or where accumulation is directed to be made from the death of the testator the direction shall be valid in respect only of the income arising from the property within one year next following the testator's death;

and at the end of the year such property and income shall be disposed of respectively, as if the period during which the accumulation has been directed to be made had elapsed.

Illustrations.

(a.) The will directs that the sum of 10,000 rupees shall be invested in Government-securities, and the income accumulated for 20 years, and that the principal, together with the accumulations, shall then be divided between A, B and C. A, B and C are entitled to receive the sum of 10,000 rupees at the end of the year from the testator's death.

(b.) The will directs that 10,000 rupees shall be invested and the income accumulated until A shall marry, and shall then be paid to him. A is entitled to receive 10,000 rupees at the end of a year from the testator's death.

(c.) The will directs that the rents of the farm of Sultánpur shall be accumulated for ten years, and that the accumulation shall be then paid to the eldest son of A. At the death of the testator, A has an eldest son living, named B. B shall receive at the end of one year, from the testator's death the rents which have accrued during the year, together with any interest which may have been made by investing them.

* * * * *

(e.) A bequeaths a sum of money to B, to be paid to him when he shall attain the age of 18, and directs the interest to be accumulated till he shall arrive at that age. At A's death the legacy becomes vested in B; and so much of the interest as is not required for his maintenance and education is accumulated, not by reason of the direction contained in the will, but in consequence of B's minority.

PART XIII.

OF THE VESTING OF LEGACIES.

106. Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy.

And in such cases the legacy is from the testator's death said to be vested in interest.

Explanation.—An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person.

Illustrations.

(a.) A bequeaths to B 100 rupees, to be paid to him at the death of C. On A's death the legacy becomes vested in interest in B, and if he dies before C, his representatives are entitled to the legacy.

(b.) A bequeaths to B 100 rupees, to be paid to him upon his attaining the age of 18. On A's death the legacy becomes vested in interest in B.

(c.) A fund is bequeathed to A for life, and after his death to B. On the testator's death the legacy to B becomes vested in interest in B.

(d.) A fund is bequeathed to A until B attains the age of 18, and then to B. The legacy to B is vested in interest from the testator's death.

(e.) A bequeaths the whole of his property to B upon trust to pay certain debts out of the income, and then to make over the fund to C. At A's death the gift to C becomes vested in interest in him.

(f.) A fund is bequeathed to A, B and C in equal shares, to be paid to them on their attaining the age of 18 respectively, with a proviso that, if all of them die under the age of 18, the legacy shall devolve upon D. On the death of the testator, the shares vest in interest in A, B and C, subject to be divested in case A, B and C shall all die under 18, and upon the death of any of them (except the last survivor) under the age of 18, his vested interest passes, so subject to his representatives.

107. A legacy bequeathed in case a specified Date of vesting when legacy contingent upon specified uncertain event happen does not vest until that event happens.

A legacy bequeathed in case a specified uncertain event shall not happen does not vest until the happening of that event becomes impossible.

In either case, until the condition has been fulfilled, the interest of the legatee is called contingent.

Exception.—Where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for his benefit, the bequest of the fund is not contingent.

Illustrations.

(a.) A legacy is bequeathed to D in case A, B and C shall all die under the age of 18. D has a contingent interest in the legacy until A, B and C all die under 18, or one of them attains that age.

(b.) A sum of money is bequeathed to A "in case he shall attain the age of 18," or, "when he shall attain the age of 18." A's interest in the legacy is contingent until the condition shall be fulfilled by his attaining that age.

(c.) An estate is bequeathed to A for life, and after his death to B, if B shall then be living; but if B shall not be then living, to C, A, B and C survive the testator. B and C each take a contingent interest in the estate until the event which is to vest it in one or in the other shall have happened.

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(d.) An estate is bequeathed as in the case last supposed. B dies in the lifetime of A and C. Upon the death of B, C acquires a vested right to obtain possession of the estate upon A's death.

(e.) A legacy is bequeathed to A when she shall attain the age of 18, or shall marry under that age with the consent of B, with a proviso that, if she shall not attain 18, or marry under that age with B's consent, the legacy shall go to C. A and C each take a contingent interest in the legacy. A attains the age of 18. A becomes absolutely entitled to the legacy, although she may have married under 18 without the consent of B.

(f.) An estate is bequeathed to A until he shall marry, and after that event to B. B's interest in the bequest is contingent until the condition shall be fulfilled by A's marrying.

(g.) An estate is bequeathed to A until he shall take advantage of the Act for the Relief of Insolvent Debtors, and after that event to B. B's interest in the bequest is contingent until A takes advantage of the Act.

(h.) An estate is bequeathed to A if he shall pay 500 rupees to B. A's interest in the bequest is contingent until he has paid 500 rupees to B.

(i.) A leaves his farm of Sultánpur Khurd to B, if B shall convey his own farm of Sultánpur Buzurg to C. B's interest in the bequest is contingent until he has conveyed the latter farm to C.

(j.) A fund is bequeathed to A if B shall not marry C within five years after the testator's death. A's interest in the legacy is contingent, until the condition shall be fulfilled by the expiration of the five years without B's having married C, or by the occurrence, within that period, of an event which makes the fulfilment of the condition impossible.

(k.) A fund is bequeathed to A if B shall not make any provision for him by will. The legacy is contingent until B's death.

(l.) A bequeaths to B 500 rupees a year upon his attaining the age of 18, and directs that the interest, or a competent part thereof, shall be applied for his benefit until he reaches that age. The legacy is vested.

(m.) A bequeaths to B 500 rupees when he shall attain the age of 18, and directs that a certain sum, out of another fund, shall be applied for his maintenance until he arrives at that age. The legacy is contingent.

108. Where a bequest is made only to such members of a class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy.

Vesting of interest in bequest to such members of a class as shall have attained particular age.

members of a class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy.

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PART XIV.

OF ONEROUS BEQUESTS.

109. Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully.

Onerous bequest.

Illustration.

A having shares in (X), a prosperous joint stock company, and also shares in (Y), a joint stock company in difficulties, in respect of which shares heavy calls are expected to be made, bequeaths to B all his shares in joint stock companies. B refuses to accept the shares in (Y). He forfeits the shares in (X).

110. Where a will contains two separate and independent bequests to the same person, the legatee is at liberty to accept one of them and refuse the other, although the former may be beneficial and the latter onerous.

One of two separate and independent bequests to the same person may be accepted and other refused.

independent bequests to the same person, the legatee is at liberty to accept one of them and refuse the other, although the former may be beneficial and the latter onerous.

Illustration.

A having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is higher than the house can be let for, bequeaths to B the lease and a sum of money. B refuses to accept the lease. He shall not by this refusal forfeit the money.

PART XV.

OF CONTINGENT BEQUESTS.

111. Where a legacy is given if a specified uncertain event shall happen, and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable.

Bequest contingent upon specified uncertain event, no time being mentioned for its occurrence.

uncertain event shall happen, and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable.

Illustrations.

(a.) A legacy is bequeathed to A, and in case of his death, to B. If A survives the testator, the legacy to B does not take effect.

(b.) A legacy is bequeathed to A, and in case of his death without children, to B. If A survives the testator or dies in his lifetime leaving a child, the legacy to B does not take effect.

(c.) A legacy is bequeathed to A when and if he attains the age of 18, and in case of his death, to B. A attains the age of 18. The legacy to B does not take effect.

(d.) A legacy is bequeathed to A for life and after his death to B, and, "in case of B's death without children," to C. The words "in case of B's death without children" are to be understood as meaning in case B shall die without children during the lifetime of A.

(e.) A legacy is bequeathed to A for life, and after his death to B, and, "in case of B's death," to C. The words "in case of B's death" are to be considered as meaning "in case B shall die in the lifetime of A."

112. Where a bequest is made to such of certain persons as shall be surviving at some period not specified, but the exact period is not specified, the legacy shall go to such of them as shall be alive at the time of payment or distribution, unless a contrary intention appear by the will

Bequest to such of certain persons as shall be surviving at some period not specified.

certain persons as shall be surviving at some period but the exact period is not specified, the legacy shall go to such of them as shall be alive at the time of payment or distribution, unless a contrary intention appear by the will

Illustrations.

(a.) Property is bequeathed to A and B, to be equally divided between them, or to the survivor of them. If both A and B survive the testator, the legacy is equally divided between them. If A dies before the testator, and B survives the testator, it goes to B.

(b.) Property is bequeathed to A for life, and after his death to B and C, to be equally divided between them, or to the survivor of them. B dies during the life of A; C survives A. At A's death the legacy goes to C.

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(d.) Property is bequeathed to A for life, and after his death to B and C, with a direction that, in case either of them dies in the lifetime of A, the whole shall go to the survivor. B dies in the lifetime of A. Afterwards C dies in the lifetime of A. The legacy goes to the representative of C.

PART XVI.

OF CONDITIONAL BEQUESTS.

Bequest upon impossible condition. 113. A bequest upon an impossible condition is void.

Illustrations.

(a.) An estate is bequeathed to A on condition that he shall walk one hundred miles in an hour. The bequest is void.

(b.) A bequeaths 500 rupees to B on condition that he shall marry A's daughter. A's daughter was dead at the date of the will. The bequest is void.

114. A bequest upon a condition the fulfilment of which would be contrary to law or to morality is void.

Bequest upon illegal or immoral condition.

(a.) A bequeaths 500 rupees to B on condition that he shall murder C. The bequest is void.

(b.) A bequeaths 5,000 rupees to his niece if she will desert her husband. The bequest is void.

115. Where a will imposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed, the condition shall be considered to have been fulfilled if it has been substantially complied with.

Illustrations.

(a.) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C, D and E. A marries with the written consent of B. C is present at the marriage. D sends a present to A previous to the marriage. E has been personally informed by A of his intentions, and has made no objection. A has fulfilled the condition.

(b.) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. D dies. A marries with the consent of B and C. A has fulfilled the condition.

(c.) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries in the lifetime of B, C and D, with the consent of B and C only. A has not fulfilled the condition.

(d.) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A obtains the unconditional assent of B, C and D to his marriage with E. Afterwards B, C and D capriciously retract their consent. A marries E. A has fulfilled the condition.

(e.) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries without the consent of B, C and D, but obtains their consent after the marriage. A has not fulfilled the condition.

(f.) A makes his will, whereby he bequeaths a sum of money to B if B shall marry with the consent of A's executors. B marries during the lifetime of A, and A afterwards expresses his approbation of the marriage. A dies. The bequest to B takes effect.

(g.) A legacy is bequeathed to A if he executes a certain document within a time specified in the will. The document is executed by A within a reasonable time, but not within the time specified in the will.

A has not performed the condition, and is not entitled to receive the legacy.

116. Where there is a bequest to one person and a bequest of the same thing to another, if the failure of prior bequest, to B. the prior bequest shall fail, the second bequest shall take effect upon the failure of the prior bequest, although the failure may not have occurred in the manner contemplated by the testator.

Illustrations.

(a.) A bequeaths a sum of money to his own children surviving him, and if they all die under 18, to B. A dies without having ever had a child. The bequest to B takes effect.

(b.) A bequeaths a sum of money to B, on condition that he shall execute a certain document within three months after A's death, and if he should neglect to do so, to C. B dies in the testator's lifetime. The bequest to C takes effect.

117. Where the will shows an intention that the second bequest shall take effect only in the event of the first bequest failing in a particular manner, the second bequest shall not take effect unless the prior bequest fails in that particular manner.

When second bequest not to take effect on failure of first.

Illustration.

A makes a bequest to his wife, but in case she should die in his lifetime, bequeaths to B that which he had bequeathed to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The bequest to B does not take effect.

118. A bequest may be made to any person with the condition superadded that in case a specified uncertain event shall happen, the thing bequeathed shall go to another person; or, that in case a specified uncertain event shall not happen, the thing bequeathed shall go over to another person.

Bequest over, conditional upon happening or not happening of specified uncertain event.

In each case the ulterior bequest is subject to the rules contained in sections 107, 108, 109, 110, 111, 112, 113, 114, 116, 117.

Illustrations.

(a.) A sum of money is bequeathed to A, to be paid to him at the age of 18, and if he shall die before he attains that age, to B. A takes a vested interest in the legacy, subject to be divested and to go to B in case A shall die under 18.

(b.) An estate is bequeathed to A with a proviso that, if A shall dispute the competency of the testator to make a will, the estate shall go to B. A disputes the competency of the testator to make a will. The estate goes to B.

* * * * *

(d.) A sum of money is bequeathed to A and B, and if either should die during the life of C, then to the survivor living at the death of C. A and B die before C. The gift over cannot take effect, but the representative of A takes one-half of the money and the representative of B takes the other half.

(e.) A bequeaths to B the interest of a fund for life, and directs the fund to be divided, at her death, equally among her three children, or such of them as shall be living at her death. All the children of B die in B's lifetime. The bequest over cannot take effect, but the interests of the children pass to their representatives.

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119. An ulterior bequest of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Illustrations.

(a) A legacy is bequeathed to A, with a proviso that, if he marries without the consent of B, C and D, the legacy shall go to E. D dies. Even if A marries without the consent of B and C, the gift to E does not take effect.

(b.) A legacy is bequeathed to A, with a proviso that, if he marries without the consent of B, the legacy shall go to C. A marries with the consent of B. He afterwards becomes a widower and marries again without the consent of B. The bequest to C does not take effect.

(c.) A legacy is bequeathed to A, to be paid at 18, or marriage, with a proviso that, if A dies under 18, or marries without the consent of B, the legacy shall go to C. A marries under 18, without the consent of B. The bequest to C takes effect.

120. If the ulterior bequest be not valid, the original bequest not affected by its invalidity is not affected by its invalidity.

Illustrations.

(a.) An estate is bequeathed to A for his life, with a condition superadded that if he shall not on a given day walk 100 miles in an hour, the estate shall go to B. The condition being void, A retains his estate as if no condition had been inserted in the will.

(b.) An estate is bequeathed to A for her life, and if she do not desert her husband, to B. A is entitled to the estate during her life as if no condition had been inserted in the will.

(c.) An estate is bequeathed to A for life, and, if he marries, to the eldest son of B for life. B, at the date of the testator's death, had not had a son. The bequest over is void under section 92, and A is entitled to the estate during his life.

121. A bequest may be made with the condition superadded that it shall cease to have effect in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

(a.) An estate is bequeathed to A for his life, with a proviso that, in case he shall cut down a certain wood, the bequest shall cease to have any effect. A cuts down the wood; he loses his life-interest in the estate.

(b.) An estate is bequeathed to A, provided that, if he marries under the age of 25 without the consent of the executors named in the will, the estate shall cease to belong to him. A marries under 25 without the consent of the executors. The estate ceases to belong to him.

(c.) An estate is bequeathed to A, provided that, if he shall not go to England within three years after the testator's death, his interest in the estate shall cease. A does not go to England within the time prescribed. His interest in the estate ceases.

(d.) An estate is bequeathed to A, with a proviso that, if she becomes a nun, she shall cease to have any interest in the estate. A becomes a nun. She loses her interest under the will.

(e.) A fund is bequeathed to A for life, and after his death to B, if B shall be then living, with a proviso that, if B shall become a nun, the bequest to her

shall cease to have any effect. B becomes a nun in the lifetime of A. She thereby loses her contingent interest in the fund.

122. In order that a condition that a bequest shall cease to have effect may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of a bequest as contemplated by the one hundred and seventh section.

123. Where a bequest is made with a condition superadded that, unless the legatee shall perform a certain act, the subject-matter of the bequest shall go to another person, or the bequest shall cease to have effect, but no time is specified for the performance of the act, if the legatee takes any step which renders impossible or indefinitely postpones the performance of the act required, the legacy shall go as if the legatee had died without performing such act.

Illustrations.

(a.) A bequest is made to A with a proviso that, unless he enters the army, the legacy shall go over to B. A takes holy orders, and thereby renders it impossible that he should fulfil the condition. B is entitled to receive the legacy.

(b.) A bequest is made to A with a proviso that it shall cease to have any effect if he does not marry B's daughter. A marries a stranger, and thereby indefinitely postpones the fulfilment of the condition. The bequest ceases to have effect.

124. Where the will requires an act to be performed by the legatee within a specified time, either as a condition to be fulfilled before the legacy is enjoyed or as a condition upon the non-fulfilment of which the subject-matter of the bequest is to go over to another person, or the bequest is to cease to have effect, the act must be performed within the time specified, unless the performance of it be prevented by fraud, in which case such further time shall be allowed as shall be requisite to make up for the delay caused by such fraud.

Performance of condition, precedent or subsequent, within specified time.

Further time in case of fraud.

PART XVII.

Of Bequests with directions as to application or enjoyment.

125. Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction.

Illustration.

A sum of money is bequeathed towards purchasing a country-residence for A, or to purchase an annuity for A, or to purchase a commission in the army for A, or to place A in any business. A chooses to receive the legacy in money. He is entitled to do so.

The Khojá Succession Bill, 1884.
(Schedule.—Portions of the Indian Succession Act (X of 1865) modified for application to Wills made by Khojás.)

126. Where a testator absolutely bequeaths a fund, so as to sever it from his own estate, but directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified benefit for the legatee; if that benefit cannot be obtained for the legatee, the fund belongs to him as if the will had contained no such direction.

* * * * *

127. Where a testator does not absolutely bequeath a fund so as to sever it from his own estate, but gives it for certain purposes and part of those purposes cannot be fulfilled, the fund, or so much of it as has not been exhausted upon the objects contemplated by the will, remains a part of the estate of the testator.

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PART XVIII.

Of Bequests to an Executor.

128. If a legacy is bequeathed to a person who is named an executor of the will, he shall not take the legacy unless he proves the will or otherwise manifests an intention to act as executor.

Legatee named as executor cannot take unless he shews intention to act as executor.

Illustration.

A legacy is given to A, who is named an executor. A orders the funeral according to the directions contained in the will, and dies a few days after the testator, without having proved the will. A has manifested an intention to act as executor.

PART XIX.

Of Specific Legacies.

129. Where a testator bequeaths to any person a specified part of his property, which is distinguished from all other parts of his property, the legacy is said to be specific.

Illustrations.

- (a.) A bequeaths to B—
 "the diamond-ring presented to him by C:"
 "his gold chain:"
 "a certain bale of wool:"
 "a certain piece of cloth:"
 "all his household-goods, which shall be in or about his dwelling-house in M Street, in Calcutta, at the time of his death:"
 "the sum of 1,000 rupees in a certain chest:"
 "the debt which B owes him:"
 "all his bills, bonds and securities belonging to him lying in his lodgings in Calcutta:"
 "all his furniture in his house in Calcutta:"
 "all his goods on board a certain ship then lying in the river Hughly:"
 "2,000 rupees which he has in the hands of C:"
 "the money due to him on the bond of D:"
 "his mortgage on the Rámpur factory:"
 "one-half of the money owing to him on his mortgage of Rámpur factory:"
 "1,000 rupees being part of a debt due to him from C:"

"his capital stock of 1,000l. in East India stock:"

"his promissory notes of the Government of India for 10,000 rupees in their 4 per cent. loan."

"all such sums of money as his executors may, after his death, receive in respect of the debt due to him from the insolvent firm of D. and Company:"

"all the wine which he may have in his cellar at the time of his death:"

"such of his horses as B may select:"

"all his shares in the Bank of Bengal:"

"all the shares in the Bank of Bengal which he may possess at the time of his death:"

"all the money which he has in the 5½ per cent. loan of the Government of India:"

"all the Government-securities he shall be entitled to at the time of his decease."

Each of these legacies is specific.

(b.) A having Government promissory notes for 10,000 rupees, bequeaths to his executors "Government promissory notes for 10,000 rupees in trust to sell" for the benefit of B.

The legacy is specific.

(c.) A having property at Benares, and also in other places, bequeaths to B all his property at Benares.

The legacy is specific.

(d.) A bequeaths to B—
 his house in Calcutta:
 his zamindári of Rámpur:
 his taluq of Rámnagar:
 his lease of the indigo-factory of Salkya:
 an annuity of 500 rupees out of the rents of his zamindári of W.

A directs his zamindári of X to be sold, and the proceeds to be invested, for the benefit of

Each of these bequests is specific.

(e.) A by his will charges his zamindári of Y with an annuity of 1,000 rupees to C during his life, and subject to this charge he bequeaths the zamindári to D. Each of these bequests is specific.

(f.) A bequeaths a sum of money—
 to buy a house in Calcutta for B:
 to buy an estate in zila Faridpur for B.
 to buy a diamond-ring for B:
 to buy a horse for B:
 to be invested in shares in the Bank of Bengal for B:
 to be invested in Government-securities for B:

A bequeaths to B—
 "a diamond-ring:"
 "a horse:"
 "10,000 rupees worth of Government securities:"
 "an annuity of 500 rupees:"
 "2,000 rupees, to be paid in cash:"
 "so much money as will produce 5,000 rupees 4 per cent. Government-securities."

These bequests are not specific.

(g.) A, having property in England and property in India, bequeaths a legacy to B, and directs that it shall be paid out of the property which he may leave in India. He also bequeaths a legacy to C, and directs that it shall be paid out of the property which he may leave in England.

No one of these legacies is specific.

130. Where a sum certain is bequeathed, the legacy is not specific where stocks, &c., in which merely because the invested are described. stocks, funds or securi-

The Khojá Succession Bill, 1884.
(Schedule.—Portions of the Indian Succession Act (X of 1865) modified for application to Wills made by Khojás.)

ties in which it is invested are described in the will.

Illustration.

A bequeaths to B—

- “10,000 rupees of his funded property.”
- “10,000 rupees of his property now invested in shares of the East Indian Railway Company.”
- “10,000 rupees at present secured by mortgage of Rámpur factory.”

No one of these legacies is specific.

131. Where a bequest is made in general terms of a certain amount

Request of stock where testator had, at date of will, equal or greater amount of stock of same kind.

of any kind of stock, the legacy is not specific merely because the testator was, at the date of his will,

possessed of stock of the specified kind, to an equal or greater amount than the amount bequeathed.

Illustration.

A bequeaths to B 5,000 rupees 5 per cent. Government-securities. A had at the date of the will five per cent. Government-securities for 5,000 rupees.

The legacy is not specific.

132. A money-legacy is not specific merely because the will directs

Request of money where not payable until part of testator's property disposed of in certain way.

its payment to be postponed until some part of the property of the testator shall have been re-

duced to a certain form, or remitted to a certain place.

Illustration.

A bequeaths to B 10,000 rupees, and directs that this legacy shall be paid as soon as A's property in India shall be realized in England.

The legacy is not specific.

133. Where a will contains a bequest of the

When enumerated articles not deemed specifically bequeathed.

residue of the testator's property along with an enumeration of some

items of property not previously bequeathed, the articles enumerated shall not be deemed to be specifically bequeathed.

* * * * *

136. If there be a deficiency of assets to

Where deficiency of assets to pay legacies, specific legacy not to abate with general legacies.

pay legacies, a specific legacy is not liable to abate with the general legacies.

PART XX.

Of Demonstrative Legacies.

137. Where a testator bequeaths a certain sum

Demonstrative legacy defined.

of money, or a certain quantity of any other commodity, and refers to

a particular fund or stock so as to constitute the same the primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative.

Explanation.—The distinction between a specific legacy and a demonstrative legacy consists in this, that—

where specified property is given to the legatee, the legacy is specific;

where the legacy is directed to be paid out of specified property, it is demonstrative.

Illustrations.

(a.) A bequeaths to B 1,000 rupees, being part of a debt due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. The legacy to B is specific; the legacy to C is demonstrative.

(b.) A bequeaths to B—

- “ten bushels of the corn which shall grow in his field of Greenacre.”
- “80 chests of the indigo which shall be made at his factory of Rámpur.”
- “10,000 rupees out of his five per cent. promissory notes of the Government of India.”
- an annuity of 500 rupees “from his funded property.”
- “1,000 rupees out of the sum of 2,000 rupees due to him by C.”

A bequeaths to B an annuity, and directs it to be paid out of the rents arising from his táluq of Rámnagar.

A bequeaths to B—

- “10,000 rupees out of his estate at Rámnagar,” or charges it on his estate at Rámnagar :
- “10,000 rupees, being his share of the capital embarked in a certain business.”

Each of these bequests is demonstrative.

138. Where a portion of a fund is specifically

Order of payment when legacy directed to be paid out of fund the subject of specific legacy.

bequeathed and a legacy is directed to be paid out of the same fund, the portion specifically bequeathed shall first be paid to the legatee, and the demonstrative legacy shall be paid out of the residue of the fund, and, so far as the residue shall be deficient, out of the general assets of the testator.

Illustration.

A bequeaths to B 1,000 rupees, being part of a debt due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. The debt due to A from W. is only 1,500 rupees; of these 1,500 rupees, 1,000 rupees belong to B, and 500 rupees are to be paid to C. C is also to receive 500 rupees out of the general assets of the testator.

PART XXI.

Of Ademption of Legacies.

139. If anything which has been specifically

Ademption explained. bequeathed does not belong to the testator at the time of his death or has been converted into property of a different kind, the legacy is adeemed; that is, it cannot take effect by reason of the subject-matter having been withdrawn from the operation of the will.

Illustrations.

(a.) A bequeaths to B—

- “the diamond-ring presented to him by C:”
- “his gold chain:”
- “a certain bale of wool:”
- “a certain piece of cloth:”
- “all his household-goods which shall be in or about his dwelling-house in M Street, in Calcutta, at the time of his death.”

A, in his lifetime,

- sells or gives away the ring:
- converts the chain into a cup:
- converts the wool into cloth:
- makes the cloth into a garment:
- takes another house into which he removes all his goods.

The Khojá Succession Bill, 1884.

(Schedule.—Portions of the Indian Succession Act (X of 1865) modified for application to Wills made by Khojás).

Each of these legacies is adeemed.

(b.) A bequeaths to B—
“the sum of 1,000 rupees in a certain chest :”
“all the horses in his stable.”

At the death of A, no money is found in the chest, and no horses in the stable.

The legacies are adeemed.

(c.) A bequeaths to B certain bales of goods. A takes the goods with him on a voyage. The ship and goods are lost at sea, and A is drowned.

The legacy is adeemed.

140. A demonstrative legacy is not adeemed

by reason that the promonstrative legacy. perty on which it is charged by the will does

not exist at the time of the death of the testator, or has been converted into property of a different kind ; but it shall in such case be paid out of the general assets of the testator.

141. Where the thing specifically bequeathed

is the right to receive something of value from a third party, and the testator himself receives

it, the bequest is adeemed.

Illustrations.

(a.) A bequeaths to B—

“the debt which C owes him :”
“2,000 rupees which he has in the hands of D :”

“the money due to him on the bond of E :”
“his mortgage on the Rámpur factory.”

All these debts are extinguished in A's lifetime, some with and some without his consent.

All the legacies are adeemed.

(b.) A bequeaths to B—

“his interest in certain policies of life-
assurance.”

A in his lifetime receives the amount of the policies. The legacy is adeemed.

142. The receipt by the testator of a part of

an entire thing specifically bequeathed shall operate as an ademption of the legacy to the extent of the sum received.

Ademption *pro tanto* by testator's receipt of part of entire thing specifically bequeathed.

Illustration.

A bequeaths to B “the debt due to him by C.” The debt amounts to 10,000 rupees. C pays to A 5,000 rupees, the one-half of the debt. The legacy is revoked by ademption, so far as regards the 5,000 rupees received by A.

143. If a portion of an entire fund or stock

is specifically bequeathed by the testator of a portion of the fund or stock shall operate as an ademption

only to the extent of the amount so received ; and the residue of the fund or stock shall be applicable to the discharge of the specific legacy.

Illustration.

A bequeaths to B one-half of the sum of 10,000 rupees due to him from W. A in his lifetime receives 6,000 rupees, part of the 10,000 rupees. The 4,000 rupees which are due from W to A at the time of his death belong to B under the specific bequest.

vi.—10

144. Where a portion of a fund is specifically

bequeathed to one legatee, and a legacy charged on the same fund is bequeathed to another legatee, if the testator receives a portion of that fund, and the remainder of the fund is insufficient to pay both the specific and the demonstrative legacy, the specific legacy shall be paid first, and the residue (if any) of the fund shall be applied so far as it will extend in payment of the demonstrative legacy, and the rest of the demonstrative legacy shall be paid out of the general assets of the testator.

Illustration.

A bequeaths to B 1,000 rupees, part of the debt of 2,000 rupees due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. A afterwards receives 500 rupees, part of that debt, and dies leaving only 1,500 rupees due to him from W. Of these 1,500 rupees, 1,000 rupees belong to B, and 500 rupees are to be paid to C. C is also to receive 500 rupees out of the general assets of the testator.

145. Where stock which has been specifically bequeathed does not exist at the testator's death, the legacy is adeemed.

Ademption where stock, specifically bequeathed, does not exist at testator's death.

Illustration.

A bequeaths to B—
“his capital stock of 1,000*l.* in East India Stock :”
“his promissory notes of the Government of India for 10,000 rupees in their 4 per cent. loan.”

A sells the stock and the notes. The legacies are adeemed.

146. Where stock which has been specifically

bequeathed does only in part exist at the testator's death, the legacy is adeemed so far as regards that part of the stock which has ceased to exist.

Ademption *pro tanto* where stock, specifically bequeathed, exists in part only at testator's death.

Illustration.

A bequeaths to B—
“his 10,000 rupees in the 5½ per cent. loan of the Government of India.”
A sells one-half of his 10,000 rupees in the loan in question.

One-half of the legacy is adeemed.

147. A specific bequest of goods under a

description connecting them with a certain place is not adeemed by reason that they have been removed from such place

from any temporary cause, or by fraud or without the knowledge or sanction of the testator.

Illustrations.

A bequeaths to B “all his household goods which shall be in or about his dwelling-house in Calcutta at the time of his death.” The goods are removed from the house to save them from fire. A dies before they are brought back.

The Khojā Succession Bill, 1884.

(Schedule.—Portions of the Indian Succession Act (X of 1865) modified for application to Wills made by Khojās.)

A bequeaths to B "all his household goods which shall be in or about his dwelling-house in Calcutta at the time of his death." During A's absence upon a journey, the whole of the goods are removed from the house. A dies without having sanctioned their removal.

Neither of these legacies is adeemed.

148. The removal of the thing bequeathed from the place in which it is stated in the will to be situated does not constitute an ademption where the place is only referred to in order to complete the description of what the testator meant to bequeath.

Illustrations.

A bequeaths to B all the bills, bonds and other securities for money belonging to him then lying in his lodgings in Calcutta. At the time of his death these effects had been removed from his lodgings in Calcutta.

A bequeaths to B all his furniture then in his house in Calcutta. The testator has a house at Calcutta and another at Chinsurah, in which he lives alternately, being possessed of one set of furniture only, which he removes with himself to each house. At the time of his death the furniture is in the house at Chinsurah.

A bequeaths to B all his goods on board a certain ship then lying in the river Hugli. The goods are removed by A's directions to a warehouse, in which they remain at the time of A's death.

No one of these legacies is revoked by ademption.

149. Where the thing bequeathed is not the right to receive something of value from a third person, but the money or other commodity which shall be received from the third person by the testator himself, or by his representatives, the receipt of such sum of money or other commodity by the testator shall not constitute an ademption;

but if he mixes it up with the general mass of his property, the legacy is adeemed.

Illustration.

A bequeaths to B whatever sum may be received from his claim on C. A receives the whole of his claim on C and sets it apart from the general mass of his property. The legacy is not adeemed.

150. Where a thing specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change takes place by operation of law or in the course of execution of the provisions of any legal instrument under which the thing bequeathed was held, the legacy is not adeemed by reason of such change.

Illustrations.

A bequeaths to B "all the money which he has in the 5½ per cent. loan of the Government of India."

The securities for the 5½ per cent. loan are converted during A's lifetime into 5 per cent. stock.

A bequeaths to B the sum of 2,000l., invested in consols in the names of trustees for A.

The sum of 2,000l. is transferred by the trustees into A's own name.

A bequeaths to B the sum of 10,000 rupees in promissory notes of the Government of India which he

has power under his marriage-settlement to dispose of by will. Afterwards in A's lifetime, the fund is converted into consols by virtue of an authority contained in the settlement.

No one of these legacies has been adeemed.

151. Where a thing specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change takes place without the knowledge or sanction of the testator, the legacy is not adeemed.

Illustration.

A bequeaths to B "all his 3 per cent. consols." The consols are, without A's knowledge, sold by his agent, and the proceeds converted into East India stock. This legacy is not adeemed.

152. Where stock which has been specifically bequeathed is lent to a third party on condition that it be replaced, and it is replaced accordingly, the legacy is not adeemed.

153. Where stock specifically bequeathed is sold, and an equal quantity of the same stock is afterwards purchased and belongs to the testator at his death, the legacy is not adeemed.

PART XXII.

Of the Payment of Liabilities in respect of the subject of a Bequest.

154. Where property specifically bequeathed is subject at the death of the testator to any pledge, lien or incumbrance, created by the testator himself or by any person under whom he claims, then, unless a contrary intention appears by the will, the legatee, if he accepts the bequest, shall accept it subject to such pledge or incumbrance, and shall (as between himself and the testator's estate) be liable to make good the amount of such pledge or incumbrance.

A contrary intention shall not be inferred from any direction which the will may contain for the payment of the testator's debts generally.

Explanation.—A periodical payment in the nature of land-revenue or in the nature of rent is not such an incumbrance as is contemplated by this section.

Illustrations.

(a.) A bequeaths to B the diamond-ring given him by C. At A's death the ring is held in pawn by D, to whom it has been pledged by A. It is the duty of A's executors, if the state of the testator's assets will allow them, to allow B to redeem the ring.

(b.) A bequeaths to B a zamindari which at A's death is subject to a mortgage for 10,000 rupees, and the whole of the principal sum, together with interest to the amount of 1,000 rupees, is due at A's death. B, if he accepts the bequest, accepts it subject to this charge, and is liable, as between himself and A's estate, to pay the sum of 11,000 rupees thus due.

The Khcjá Succession Bill, 1884.

(Schedule.—Portions of the Indian Succession Act (X of 1865) modified for application to Wills made by Khojás.)

155. Where anything is to be done to complete the testator's title to the thing bequeathed, it is to be done at the cost of the testator's estate.

Completion of testator's title to things bequeathed to be at cost of his estate.

Illustrations.

(a.) A, having contracted in general terms for the purchase of a piece of land at a certain price, bequeaths it to B, and dies before he has paid the purchase money. The purchase-money must be made good out of A's assets.

(b.) A having contracted for the purchase of a piece of land for a certain sum of money, one-half of which is to be paid down, and the other half secured by mortgage of the land, bequeaths it to B, and dies before he has paid or secured any part of the purchase-money. One-half of the purchase-money must be paid out of A's assets.

156. Where there is a bequest of any interest in immovable property, in respect of which payment in the nature of land-revenue or in the nature of rent has to be made periodically, the estate of the testator shall (as between such estate and the legatee) make good such payments or a proportion of them up to the day of his death.

Exoneration of legatee's immovable property for which land-revenue or rent payable periodically.

Illustration.

A bequeaths to B a house, in respect of which 365 rupees are payable annually by way of rent. A pays his rent at the usual time, and dies 25 days after. A's estate shall make good 25 rupees in respect of the rent.

157. In the absence of any direction in the will where there is a specific bequest of stock in a joint stock company, if any call or other payment is due from the testator at the time of his death in respect of such stock, such call or payment shall, as between the testator's estate and the legatee, be borne by such estate;

but if any call or other payment shall, after the testator's death, become due in respect of such stock, the same shall, as between the testator's estate and the legatee, be borne by the legatee if he accept the bequest.

Illustrations.

(a.) A bequeathed to B his shares in a certain railway. At A's death there was due from him the sum of 5*l.* in respect of each share, being the amount of a call which had been duly made, and the sum of 5*s.* in respect of each share, being the amount of interest which had accrued due in respect of the call. These payments must be borne by A's estate.

(b.) A has agreed to take 50 shares in an intended joint stock company, and has contracted to pay up 5*l.* in respect of each share, which sum must be paid before his title to the shares can be completed. A bequeaths these shares to B. The estate of A must make good the payments which were necessary to complete A's title.

(c.) A bequeaths to B his shares in a certain railway. B accepts the legacy. After A's death, a call is made in respect of the shares. B must pay the call.

(d.) A bequeaths to B his shares in a joint stock company. B accepts the bequest. Afterwards the

affairs of the company are wound up and each shareholder is called upon for contribution. The amount of the contribution must be borne by the legatee.

(e.) A is the owner of ten shares in a railway company. At a meeting held during his lifetime a call is made of 3*l.* per share payable by three instalments. A bequeaths his shares to B, and dies between the day fixed for the payment of the first and the day fixed for the payment of the second instalment and without having paid the first instalment. A's estate must pay the first instalment, and B, if he accepts the legacy, must pay the remaining instalments.

PART XXIII.

Of Bequests of Things described in general terms.

158. If there be a bequest of something described in general terms, the executor must purchase for the legatee what may reasonably be considered to answer the description.

Bequest of thing described in general terms.

Illustrations.

(a.) A bequeaths to B a pair of carriage-horses, or a diamond-ring. The executor must provide the legatee with such articles, if the state of the assets will allow it.

(b.) A bequeaths to B "his pair of carriage horses." A had no carriage-horses at the time of his death. The legacy fails.

PART XXIV.

Of Bequests of the Interest or Produce of a Fund.

159. Where the interest or produce of a fund is bequeathed to any person, and the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration, the principal as well as the interest shall belong to the legatee.

Bequest of interest or produce of fund.

Illustrations.

(a.) A bequeaths to B the interest of his five per cent. promissory notes of the Government of India. There is no other clause in the will affecting those securities. B is entitled to A's five per cent. promissory notes of the Government of India.

(b.) A bequeaths the interest of his 5½ per cent. promissory notes of the Government of India to B for his life, and after his death to C. B is entitled to the interest of the notes during his life and C is entitled to the notes upon B's death.

(c.) A bequeaths to B the rents of his lands at X. B is entitled to the lands.

PART XXV.

Of Bequests of Annuities.

160. Where an annuity is created by will, the legatee is entitled to receive it for his life only unless a contrary intention appears by will. And this rule shall not be varied by the circumstance that the annuity is directed to be paid out of the property generally, or that a sum of money is bequeathed to be invested in the purchase of it.

Annuity created by will payable for life only, unless contrary intention appears by will.

Illustrations.

(a.) A bequeaths to B 500 rupees a year. B is entitled during his life to receive the annual sum of 500 rupees.

The Khojá Succession Bill, 1884.

(Schedule.—Portions of the Indian Succession Act (X of 1865) modified for application to Wills made by Khojás.)

(b.) A bequeaths to B the sum of 500 rupees monthly. B is entitled during his life to receive the sum of 500 rupees every month.

(c.) A bequeaths an annuity of 500 rupees to B for life, and on B's death to C. B is entitled to an annuity of 500 rupees during his life. C, if he survives B, is entitled to an annuity of 500 rupees from B's death until his own death.

161. Where the will directs that an annuity shall be provided for any person out of the proceeds of property, or out of property generally, or where money bequeathed to be invested in the purchase of any annuity for any person, on the testator's death the legacy vests in interest in the legatee, and he is entitled at his option to have an annuity purchased for him or to receive the money appropriated for that purpose by the will.

Illustrations.

(a.) A by his will directs that his executors shall out of his property purchase an annuity of 1,000 rupees for B. B is entitled at his option to have an annuity of 1,000 rupees for his life purchased for him, or to receive such a sum as will be sufficient for the purchase of such an annuity.

(b.) A bequeaths a fund to B for his life, and directs that after B's death it shall be laid out in the purchase of an annuity for C. B and C survive the testators. C dies in B's lifetime. On B's death the fund belongs to the representative of C.

162. Where an annuity is bequeathed, but the assets of the testator are not sufficient to pay all the legacies given by the will, the annuity shall abate in the same proportion as the other pecuniary legacies given by the will.

163. Where there is a gift of an annuity and a residuary gift, the whole of the annuity is to be satisfied before any part of the residue is paid to the residuary legatee, and, if necessary, the capital of the testator's estate shall be applied for that purpose.

PART XXVI.

Of Legacies to Creditors and Portioners.

164. Where a debtor bequeaths a legacy to his creditor, and it does not appear from the will that the legacy is meant as a satisfaction of the debt, the creditor shall be entitled to the legacy as well as to the amount of the debt.

165. Where a parent, who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child, and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy as well as the portion.

Illustration.

A, by articles entered into in contemplation of his marriage with B, covenanted that he would pay to each of the daughters of the intended marriage a portion of 20,000 rupees on her marriage. This

covenant having been broken, A bequeaths 20,000 rupees to each of the married daughters of himself and B. The legatees are entitled to the benefit of this bequest in addition to their portions.

166. No bequest shall be wholly or partially adeemed by a subsequent provision made by settlement or otherwise for the legatee.

Illustrations.

(a.) A bequeaths 20,000 rupees to his son B. He afterwards gives to B the sum of 20,000 rupees. The legacy is not thereby adeemed.

(b.) A bequeaths 40,000 rupees to B, his orphan-niece, whom he had brought up from her infancy. Afterwards on the occasion of B's marriage, A settles upon her the sum of 30,000 rupees. The legacy is not thereby diminished.

PART XXVII.

Of Election.

167. Where a man, by his will, professes to dispose of something which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and in the latter case he shall give up any benefits which may have been provided for him by the will.

168. The interest so relinquished shall devolve as if it had not been disposed of by the will in favour of the legatee, subject, nevertheless, to the charge of making good to the disappointed legatee the amount or value of the gift attempted to be given to him by the will.

169. This rule will apply whether the testator does or does not believe that which he professes to dispose of by his will to be his own.

Illustrations.

(a.) The farm of Sultánpur was the property of C. A bequeathed it to B, giving a legacy of 1,000 rupees to C. C has elected to retain his farm of Sultánpur, which is worth 800 rupees. C forfeits his legacy of 1,000 rupees, of which 800 rupees goes to B, and the remaining 200 rupees falls into the residuary bequest, or devolves according to the rules of intestate succession, as the case may be.

(b.) A bequeaths an estate to B in case B's elder brother (who is married and has children) shall leave no issue living at his death. A also bequeaths to C a jewel, which belongs to B. B must elect to give up the jewel or to lose the estate.

(c.) A bequeaths to B 1,000 rupees, and to C an estate which will, under a settlement, belong to B if his elder brother (who is married and has children) shall leave no issue living at his death. B must elect to give up the estate, or to lose the legacy.

(d.) A, a person of the age of 18 domiciled in British India but owning real property in England, to which C is heir-at-law, bequeaths a legacy to C, and, subject thereto, devises and bequeaths to B "all his property, whatsoever and wheresoever," and dies under 21. The real property in England does not pass by the will. C may claim his legacy without giving up the real property in England.

The Khojá Succession Bill, 1884.
(Schedule.—Portions of the Indian Succession Act (X of 1865) modified for application to Wills made by Khojás.)

170. A bequest for a man's benefit is, for the purpose of election, the same thing as a bequest made to himself.

Illustration.

The farm of Sultánpur Khurd being the property of B, A bequeathed it to C, and bequeathed another farm called Sultánpur Buzurg to his own executors, with a direction that it should be sold, and the proceeds applied in payment of B's debts. B must elect whether he will abide by the will, or keep his farm of Sultánpur Khurd in opposition to it.

171. A person taking no benefit directly under the will, but deriving a benefit under it indirectly, is not put to his election.

Illustration.

The lands of Sultánpur are settled upon C for life, and after his death upon D, his only child. A bequeaths the lands of Sultánpur to B, and 1,000 rupees to C. C dies intestate, shortly after the testator, and without having made any election. D takes out administration to C, and as administrator elects on behalf of C's estate to take under the will. In that capacity he receives the legacy of 1,000 rupees, and accounts to B for the rents of the lands of Sultánpur which accrued after the death of the testator and before the death of C. In his individual character he retains the lands of Sultánpur in opposition to the will.

172. A person who in his individual capacity takes a benefit under the will may in another character elect to take in opposition.

Illustration.

The estate of Sultánpur is settled upon A for life, and after his death upon B. A leaves the estate of Sultánpur to D, and 2,000 rupees to B, and 1,000 rupees to C, who is B's only child. B dies intestate, shortly after the testator, without having made an election. C takes out administration to B, and as administrator elects to keep the estate of Sultánpur in opposition to the will, and to relinquish the legacy of 2,000 rupees. C may do this, and yet claim his legacy of 1,000 rupees under the will.

Exception to the six last Rules.—Where a particular gift is expressed in the will to be in lieu of something belonging to the legatee, which is also in terms disposed of by the will, if the legatee claims that thing, he must relinquish the particular gift, but he is not bound to relinquish any other benefit given to him by the will.

Illustration.

Under A's marriage-settlement his wife is entitled, if she survives him to the enjoyment of the estate of Sultánpur during her life.

A by his will bequeaths to his wife an annuity of 200*l.* during her life, in lieu of her interest in the estate of Sultánpur, which estate he bequeaths to his son. He also gives his wife a legacy of 1,000*l.* The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity, but not the legacy of 1,000*l.*

173. Acceptance of a benefit given by the will constitutes an election by the legatee to take under the will, if he has knowledge of his right to elect, and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

Illustrations.

(a.) A is owner of an estate called Sultánpur Khurd, and has a life-interest in another estate called Sultánpur Buzurg, to which, upon his death, his son B will be absolutely entitled. The will of A gives the estate of Sultánpur Khurd to B, and the estate of Sultánpur Buzurg to C. B, in ignorance of his own right to the estate of Sultánpur Buzurg allows C to take possession of it, and enters into possession of the estate of Sultánpur Khurd. B has not confirmed the bequest of Sultánpur Buzurg to C.

(b.) B, the eldest son of A, is the possessor of an estate called Sultánpur. A bequeaths Sultánpur to C, and to B the residue of A's property. B, having been informed by A's executors that the residue will amount to 5,000 rupees allows C to take possession of Sultánpur. He afterwards discovers that the residue does not amount to more than 500 rupees. B has not confirmed the bequest of the estate of Sultánpur to C.

174. Such knowledge or waiver of inquiry shall, in the absence of evidence to the contrary, be presumed if the legatee has enjoyed for two years the benefits provided for him by the will without doing any act to express dissent.

175. Such knowledge or waiver of inquiry may be inferred from any act of the legatee which renders it impossible to place the persons interested in the subject-matter of the bequest in the same condition as if such act had not been done.

Illustration.

A bequeaths to B an estate to which C is entitled and to C a coal-mine. C takes possession of the mine, and exhausts it. He has thereby confirmed the bequest of the estate to B.

176. If the legatee shall not, within one year after the death of the testator, signify to the testator's representatives his intention to confirm or to dissent from the will, the representatives shall, upon the expiration of that period, require him to make his election;

and if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the will.

177. In case of disability the election shall be postponed until the disability ceases, or until the election shall be made by some competent authority.

STATEMENT OF OBJECTS AND REASONS.

The Khojás are members of a sect which was originally Hindu but was converted to Muhammadanism about 400 years ago. They still, however, as has been more than once held by the highest Court in the Bombay Presidency, retain their former law to such an extent in matters connected with property and succession that it is to be presumed to apply to them until the contrary is shown. This state of things has at times given rise to great difficulties in litigation between Khojás.

2. In the case of *Hirbai v. Gorbai*, 12 Bombay High Court Report 294, which appears to have occupied the Lower Court for twenty-four sitting days and the Appellate Court for four days, Sir Michael Westropp, C. J., after describing the state of the law, observed as follows:—

“It is, however, evident that the Khojás are not as firmly bound in matters of succession and inheritance by the Hindu law as Muhammadans proper are by the Muhammadan law and the Hindus by the Hindu law, and hence it is that it would not be reasonable to require such stringent proof of a custom of inheritance amongst them differing from ordinary Hindu law as from a Hindu.

“Now, it is manifest that such a state of the law must greatly encourage litigation, and we cannot help thinking that it would be most desirable that the Government should take steps, as was done in the case of the Pársis, to ascertain the views of the majority of the community on the subject of succession, and should then pass an enactment giving effect to those views. Unanimity, of course, could not be expected, but the rules which were found generally to prevail might be made law; and though the religious differences existing among members of the Khojá caste might create some difficulty, it would not, we think, be insuperable.”

3. The Government of Bombay, acting upon this suggestion, appointed about the end of the year 1878 a Commission consisting of four gentlemen taken from the Shia division of the Khojás which acknowledged His Highness the late Aghá Khán as its spiritual superior, one taken from the Sunni division, and Mr. Spencer, Acting First Judge of the Court of Small Causes, with the Hon'ble Mr. Justice Melvill, of the Bombay High Court, as president.

The Commission took the greatest pains to inform themselves of the customs and views of both divisions of the Khojá sect in the Presidency of Bombay and elsewhere, and after much consideration and discussion agreed upon a draft Bill, subject to a dissent on a few specific points which was signed by His Highness Aghá Alí Sháh, son of his Highness the late Aghá Khán, and Mr. Dhurrumsey Poonjabhoy but not by Mr. Jairajbhoy Peerbhoy and Mr. Rahimtulá Syanee, the two other Shia members of the Commission. That draft, having been submitted to the Government of Bombay by the president on the 23rd of December, 1879, and approved of by that Government, was forwarded to the Government of India, and forms the basis of the present Bill.

4. It will be convenient to refer to the provisions of the present Bill as nearly as possible in their order, noticing in their proper place the few points in regard to which His Highness Aghá Alí Sháh and Mr. Dhurrumsey Poonjabhoy differed from the majority of the Commission, and the points of substantive importance in which the present Bill deviates from the draft framed by the Commission.

5. The first provision calling for notice is section 2, which defines the application of the Act—a matter which was not clearly provided for in the Bill prepared by the Commission. The main enactment of the section is that succession to the property, whether moveable or immoveable, in British India of a Khojá dying on or after the first day of January, 1885, shall be regulated by the rules contained in the Act wherever he may have had his domicile at the time of his death. So far as regards immoveable property, this provision coincides with section 5 of the Indian Succession Act, but, as regards moveable property, it involves an important deviation from that section, inasmuch as it applies the Act to all successions to such property though the deceased person may have been domiciled outside British India at the time of his death.

As the rule, which makes the law of the domicile of a deceased person regulate the succession to his moveable property, is not merely the rule of the Indian Succession Act but has obtained very general acceptance elsewhere, it seems desirable to state the reasons which have led the Government of India to think that it is not suitable to the Khojá community.

6. The choice as regards succession to moveable property appears to lie between the law of the domicile of the deceased and the law of the *situs* of the assets. The objections urged against the latter in Western countries are chiefly that a man's moveables are apt to be scattered over many jurisdictions each having a readily ascertainable law of its own, and that accordingly, if the law of the *situs* is made applicable to them, his estate will be broken up into many fragments, all governed by different laws; that a man's moveables may change their place; that the most important class of them, goods employed in commerce, are constantly changing their place; and that accordingly, if the law of the *situs* is applied, it will be impossible for him to foresee the particular law under which they will fall upon his death; and lastly, that the rule of the law of the *situs* does not clearly provide for that portion of the assets which consists of debts or other obligations existing in favour of the deceased. To avoid these difficulties it has been generally agreed to adopt the law of the domicile of the deceased for the whole of his moveable estate. Various attempts have been made to rest this rule on some *á priori* principle; but it would seem to have had its actual origin in mere considerations of convenience.

7. Looking to the arguments by which it is supported, and to the peculiar circumstances of the Khojá community, it is questionable, to say the least, whether such a rule would meet the requirements of their case. The places beyond the limits of British India, as, for example, Kutch, the Persian Gulf and Zanzibar, in which any considerable number of Khojás is to be found, have no law such as can properly be called a territorial law of succession. The tribunals in such places, in so far as they make any rational attempt to apply a law at all, would apply the personal law of the parties, and that

in the case of Khojás is *ex hypothesi* altogether unsettled and unascertainable. There is thus in the case of Khojás domiciled out of British India practically speaking no law of the *situs* of the foreign assets to conflict with the law which would apply to the British Indian assets, and no law of the domicile to which recourse could be had; and, therefore, to give the law of the domicile a preference over the Indian law would be simply to substitute a congeries of indefinite and half-established customs for a law, to the application of which there could be no reasonable objection.

It may be added that, in the absence of a law of the domicile, the case is very analogous to those cases in which it is impossible to fix the domicile of the deceased, and the solution which Lord Alvanley appears to have suggested in a case of this latter class was to fall back, as is proposed in this case, on the law of the *situs* of the property; in other words, to put moveables on the same footing as immoveables.

8. If this solution is adopted, and the Indian law is applied to all moveables left by a deceased Khojá in British India, without regard to his domicile, and if, moreover, the same rule is applied, as it naturally would be, in cases arising in Consular jurisdictions in the Persian Gulf, Zanzibar and elsewhere, this further advantage will probably in time be gained, that the law in British India will come to be adopted as a personal law applicable to Khojás in all foreign States in this part of the world.

9. The above remarks apply equally to intestate and to testamentary succession. A question might indeed be raised as to whether a testamentary disposition made beyond the limits of British India should as regards its form be made absolutely subject to British Indian law; but, seeing that the effect of taking any other course would certainly be to admit oral dispositions, it seems clear that the risk of failures of justice will be on the whole less by subjecting completely to our law all dispositions, wherever made, of moveable property in British India.

10. In connection with the definitions it is convenient to notice one of the few important questions on which any difference of opinion has arisen, namely, the question as to the status to be assigned to a woman who is not a Khojá but who is legally married to a Khojá according to the rules of the Muhammadan law; and to her children by him.

The Khojás of the Sunni Jamát though apparently unwilling to go so far as to recognize any other than a Khojá widow as entitled to inherit from her husband, proposed that the sons of a Khojá by a wife who is not a Khojá should have some share in the inheritance. To this the Khojás of the Shia Jamát would not agree, and the Commission ultimately adopted as a compromise the plan of assigning to the offspring of the marriages in question a status nominally intermediate between those of legitimacy and illegitimacy and giving them in the definition-clauses the designation of "alien sons", but allowing them nothing more than illegitimate sons in the later sections of their Bill. It is stated that the Khojás as a rule are very exclusive and rarely take wives from outside their own community, and so long as this state of things continues the mode in which this point is dealt with is not of great practical moment; but there is an important principle involved, against which even the compromise adopted by the Commission appears to the Government of India to offend. The exclusion of the non-Khojá wife from inheritance and the degradation of her sons to a position altogether lower than that of the legitimate son involves a view as to restrictions on marriage which, even though it may have obtained acceptance with a majority of the Khojá sect, and though the Government has no desire to interfere with it, it is manifestly undesirable to have affirmed by the legislature. The present Bill will accordingly be found to contain no reference either in its definition clauses or elsewhere to the so-called "alien son." It defines "son" to be a legitimate son and leaves "widow" undefined, and then proceeds to declare the rights of sons and widows, trusting to the Courts to decide, as they will on principles lying outside the law of succession, who are legally entitled to the status of sons and widows.

11. Chapter II of the Bill deals with "succession to the undivided property of a male Khojá dying intestate," and in the previous chapter "undivided property" has been defined as meaning "a share in property belonging to an undivided family." The Bill prepared by the Commission purported to define the phrase "undivided family," but the definition proposed has on inquiry been found to be unsafe. The undivided family among the Khojás appears to come into existence chiefly in connection with trade, and would seem to be an institution of a peculiar nature, somewhat resembling the undivided family among the Hindus; but, on the other hand, it is clear, from the rules laid down in certain sections of the Bill prepared by the Commission, and from the papers submitted with that Bill, that it differs in important respects from the Hindu undivided family. What exactly it is, and when property is to be regarded as its undivided property, it is difficult to ascertain from the papers before the Government of India; but, judging from the analogous case in Hindu law, it would seem that these are matters which it would be almost hopeless to attempt to define in an Act of the legislature; nor does it appear to be necessary to define them in a Succession Act. It may well be assumed that a fundamental distinction which goes to the root of the family constitution, and which is not confined in its operation to matters of succession, but applies also *inter vivos*, is established outside this Bill. For these reasons, it has been thought best to make no attempt to define "undivided family" or "undivided property" in the present Bill.

12. It will be observed, on comparing Chapters II and III, that the only peculiarity connected with the intestate succession to undivided property is (section 6) that, in default of legitimate lineal male descendants of the intestate within the fourth degree, the property is equally divided among all the male members of the undivided family living at his death.

13. Chapter III of the Bill treats of "succession to the separate property of a male Khojá dying intestate," and the order of succession marked out in sections 7 to 20 will be found to be based on that of the Hindu law.

The subjoined statement has been prepared by the Hon'ble Mr. Melvill, the President of the Commission, with a view to showing at a glance the extent to which the two differ—

Order of succession according to Hindu law.

1. Sons.
2. Grandsons.
3. Great-grandsons.
4. Widow.
5. Daughters.
6. Daughters' sons.
7. Mother.
8. Father.
9. Brothers.
10. Half-brothers.
11. Brothers' sons.
12. Half-brothers' sons.
13. Grandmother.
14. Sister (under the Mayukha)
15. Grandfather.
16. More distant relatives.

Order of succession for Khojás proposed by the Bill.

1. Sons.
2. Grandsons.
3. Great-grandsons.
4. Great-great-grandsons.
5. Father.
6. Mother.
7. Widow.
8. Daughters.
9. Daughters' sons. }
10. Brothers. }
11. Sons' daughters.
12. Brothers' sons.
13. Half-brothers.
14. Half-brothers' sons.
15. Grandfather.
16. Grandmother.
17. Paternal uncle.
18. Sister.
19. More distant relatives.

"It will be seen," Mr. Melvill observes, "that the only very noticeable point of difference is that among the Khojas the father and mother are elevated to a rank in the order of succession superior to that of the widow. This precedence of the mother has been judicially settled in the case of *Hirbai v. Gorbai**, already referred to; and although the Khojá members of the

*Reported 12 Bom. H. C. Rep., 294.

Commission were not unanimously in favour of the view taken in that case, they all agreed that, having once been judicially determined, the

rule should not be disturbed."

14. Section 20 of the present Bill differs in one important particular from the corresponding section (29) of the Bill prepared by the Commission.

The latter admitted to the succession only those of the "more distant relatives" of the intestate who were on the father's side, and confined it to such of them as are within the seventh degree of kindred. On failure of this limited class of distant kindred, section 42 gave the property "to the Jamát of that sect of the Khojás to which the intestate belonged at the time of his death, to be held and applied according to the customs of the said Jamát." Even this did not satisfy the two dissenting members of the Commission and some of the other adherents of His Highness the late Aghá Khán, who, as Imám, was the person chiefly interested in the succession of the Jamát. They contended that the Jamát should come in immediately after the nearer relations.

The Government of India, after fully considering this point in communication with the local authorities, have come to the conclusion that it is impossible to exclude the heirs of a deceased person in favour of any such institution as a "Jamát," or any person or authority representing such an institution. It is open to any Khojá who desires that his property should be devoted to any charitable or religious purpose, or should be enjoyed by any spiritual person for whom he entertains a special veneration, to dispose of his property by will or otherwise in accordance with law, but, if he dies intestate, it would be contrary to all established principles to enact that his property should devolve otherwise than upon his relatives.

15. Apart from this fundamental objection in point of principle, there appear to be practical objections to the proposal as formulated by the Commission. The Jamát is said to be an assembly in council of all the adult male members of the Khojá community of the place, and it is not unlikely that doubts would arise, in connection with matters of religious belief, residence, attendance at the Jamát, and so forth, as to the particular Jamát (if any) to which the deceased person belonged. Similar doubts might also arise as to who were the other persons actually belonging to the Jamát to which the deceased belonged, so as to take the property. There might further be doubts as to how the property of a deceased intestate Khojá is to be held, and the objects to which it is to be applied. It is true that the section proposed by the Commission says that the property is to be held and applied "according to the customs of the said Jamát."

Dayá Muhammad and others versus H. H. Aghá Khán and others (page 323 of the Bombay High Court Reports, Vol. XII.)

But from a judgment of Sir J. Arnould in the case marginally noted it would appear that there are no customs to look to. Though a Jamát collects a large sum of money through its officers, it only does so on behalf of the Imám; the money collected is passed on to him; and if the Jamát wants any portion of it, even for the expenses of its Jamát-kháná (the council-hall or guildhall of the community), it can procure it only as a grant from the Imám. It appears to be absolutely in the discretion of the Imám to spend the money as he pleases, and as a matter of fact he spends a large portion of it, or at least is said by Sir J. Arnould to have done so at the time the judgment was delivered, on his own private purposes. In deed, in a set of draft rules of succession for Shia Khojás submitted by His Highness Aghá Alí Sháh the succession of the Jamát is treated as the same thing with the succession of the Imám. The Jamát, therefore, does not seem to have any property or control over property, and it is not clear how there can be any custom governing the application of property by it. It has been argued that no such difficulties as those suggested ordinarily arise at present, but it would be clearly impossible to put the succession of the Jamát on a legislative basis without defining its conditions and incidents, and it would be equally impossible to place the property at the absolute disposal of any individual in whatever degree of veneration he might be held.

16. For these reasons section 20 of the present Bill extends the succession to relatives of the intestate both on the father's and on the mother's side without limit of degree, and it may be added that section 48 applies the ordinary rule, which makes the Crown the ultimate heir, in the rare case in which an owner of property may die intestate and leave no person entitled to succeed under the previous sections.

17. Section 21 is one of the leading sections of the Bill. It provides in effect that, when a female inherits under any of the foregoing sections, she shall, if certain near male relatives are living and are thus postponed to her, take the property only as "restricted owner"—a position to be presently explained at length. With this section should be read section 49, from which it will be seen that in other cases she takes the same interest in the property and has the same powers in respect of it as if she were a male.

18. Chapter IV treats of succession to the absolute property of a female Khojá dying intestate, that is to say, the succession to such of her property as belongs to her otherwise than as restricted owner. The provisions of this chapter call for no remark. Mr. Melvill states that they differ from the Hindu law but that they are approved by all classes of the Khojás, and are not, he thinks, open to any objection. The particulars in which they deviate from the Hindu law or the reasons for the deviations are not explained. They have been accepted by the Government of India as settled by the Commissioner, such details only being filled in after consultation with the local authorities as seemed necessary to give effect to what is understood to be the intention of those who framed them.

19. Chapter V, which treats of "property which a female takes as restricted owner and the further succession to the same," calls for more detailed notice.

It applies not only in the ordinary case of property taken by a female as restricted owner under Chapter III (*supra*, paragraph 17), but also in cases where she may take a similar interest in property under section 23 (2), section 24 (1), section 27 and section 39.

Its provisions are merely a development, with the requisite amplifications and with the addition of the necessary machinery, of the corresponding provisions of the Bill framed by the Commission. It has been settled in consultation with the local authorities and with a view to giving effect to what are understood to be the views of the Commission; but, having regard to the novelty and complication of the subject, it is not unlikely that when subjected to criticism it will be found susceptible of improvement in many particulars.

The limited estate taken by a Khojá female under this Bill resembles the estate taken by a Hindu widow, but there are many important differences between them. Mr. Melvill observes that the Khojá female estate is the more restricted of the two, but on this point he says the Khojás hold very strong views which he is of opinion must be respected.

20. In proceeding to notice the details of the chapter, the first point calling for attention is the phrase "restricted owner." It has been chosen merely on the ground that it is new and connotes nothing, and it is not unlikely that some more appropriate phrase may be suggested. The phrase "life-estate" and its correlative "reversion," used in the Bombay Bill, are not only open to the objection that ordinary lies against all terms imported from another legal system, but further, as has been constantly observed of them in the case of the Hindu widow's estate, they suggest an altogether false analogy. The position, if it is necessary to illustrate it by reference to English law, is rather like that of a fee-simple estate subject to an executory devise.

21. As regards the attempt made in the Bill to define the estate, it will be observed that section 28 enacts that the female shall be absolutely entitled to the use of, and the income accruing from, the property during her life, and, except as otherwise provided by the Act, shall have all the other rights and powers of an absolute owner.

An objection has been taken to this on the ground that money saved by a widow from the income of the property should not belong to her absolutely but should go to her husband's heirs.

This contention is not based on any alleged actual practice, but is put forward merely as a "necessary consequence of the invariable custom" which limits the widow's interest in the *corpus* of her husband's property to the time during which she remains unmarried.

Now, not only is it not a necessary consequence of the custom in question, but it is, as admitted by the objectors themselves, in a certain sense, illogical; for why should a person who has absolute power to dispose of the income as it comes in, in whatever way she pleases, be restricted from dealing with her savings from it?

Again, the only effect of adopting the proposed suggestion would, as the objectors themselves admit, generally be that the widow would squander the income as it came in; and, in the rare cases in which she allowed some of it to accumulate, the probability is that litigation would result from the difficulty of identifying the fund and separating it from the rest of her property. For these reasons the section has been allowed to stand.

22. Section 30 defines the obligations of the restricted owner as regards—

(a) the preservation of the substance of the property for those who are to come after her; and

(b) the protection of the title.

As regards "waste," it stands on a footing altogether peculiar in the case of the Hindu widow; and clause (a) of this section has been drawn with a view to placing it on a somewhat similar footing in the case of the restricted owner.

23. As regards the powers of alienation, in the limitations on which the restricted nature of the estate chiefly consists, the only powers of alienation for any time beyond the life of the restricted owner allowed to her by the Bill, besides a limited power of leasing conferred by section 29, are those specified in section 31, which runs as follows:—

"31. A female taking property as restricted owner shall have power to transfer the same, so that the transfer may have effect beyond her life, when, the income being insufficient, such transfer is necessary in order to raise money for any of the following purposes, namely:—

Restricted owner's power of transfer.
**Viz.*, obligations to preserve the substance of the property and protect the title.

- "(a) to discharge any of the obligations imposed by section 30;*
 "(b) to discharge the debts of the absolute owner from whom the property descended;
 "(c) to provide for the maintenance of any persons entitled under this Act to have their maintenance provided for out of the property, for the payment of any marriage expenses or funeral expenses payable under this Act out of the property, and for the performance of any ordinary family ceremonies; and
 "(d) to support herself where she has no other sufficient means of support."

24. It has been urged by the two dissenting members of the Commission and by some other adherents of His Highness the Imám that a mother taking a restricted estate should have larger powers of alienation and that she or a widow taking a like estate should be empowered to alienate for religious objects; that is, as explained in the set of draft rules submitted by His Highness Aghá Ali Sháh, to give the property to the Imám; but, upon considering the arguments adduced and consulting the local authorities, the Government of India have determined to uphold the decision of the majority of the Commission, which is against the concession of any such powers.

25. In order to avoid as far as possible the great difficulties which arise in the case of a Hindu widow exceeding her power of alienation, an alienation in excess of the power has (section 29 of the Bill) been made absolutely void for any period beyond the restricted owner's life, except where the purchaser takes for consideration and without notice of the ownership being restricted. This, no doubt, standing alone, would place too great difficulties in the way of alienation; but sufficient relief will probably be afforded by the power to apply to a Court for sanction, which is given by section 32. It may be objected that it is undesirable to force people to resort to a Court in such matters; but the case is one of a choice of evils, and it is probably better that they should resort to the Court in every case where there is any room for doubt than run the risk of being involved in troublesome and expensive litigation later on.

A Court dealing with an application under section 32 is empowered (section 33) to accord its sanction to the transfer subject to the condition that the money thereby raised shall be paid into Court or to trustees appointed by the Court, and to give such further directions as it may think fit with a view to ensuring that the money shall be applied to the purpose for which it is raised or that any balance that is not so applied shall be secured for the benefit of those entitled after the restricted owner.

26. It will be observed that no provision is made in the draft for alienation with the consent of the so-called "reversioners." This matter is one which gives rise to great difficulties in the case of the Hindu widow, and it seems impossible, having regard to the system of succession established by the Bill, to provide for it in any satisfactory manner. If provision had only to be made to meet the case of "reversioners" who claim under section 37 (1) and section 38 (3) by descent from the last absolute owner, the matter would be much simpler than in the case of the Hindu widow, inasmuch as these "reversioners" would always be known living persons or persons who would claim through them; but there are, besides these, the "reversioners" mentioned in section 38 (1) and (2), and it is thus impossible to fix upon any person whose consent would be sufficient.

27. Further, even if we were, as has been suggested, to waive this objection, and accept the consent of a merely presumptive "reversioner," there is another difficulty, namely, that the presumptive "reversioner" might (see section 39 of the Bill) be another restricted owner, possibly an old woman on the verge of the grave, whose prospect of succeeding would be extremely small. There might be several such persons intervening between the restricted owner and the first person who would take as absolute owner. We could hardly rest satisfied with anything short of the consent of this last person and all the intervening ones, and thus we should be landed in a considerable complication, leading in many cases to no very satisfactory result, inasmuch as the interest of the first person who would take as absolute owner, and to whose consent we would chiefly look, would often be of a remotely contingent nature. It is, of course, on economical grounds desirable to provide a means of freeing the property from the limited ownership, but the advantage would be dearly purchased if the basis of the purchaser's title were to be complicated in this way.

28. As regards the sale of property in execution of a decree against a restricted owner, it will be seen that the effect of section 34 of the Bill is that a person lending money for any of the purposes mentioned in section 31 can sell in execution nothing more than the so-called "life-interest" of the restricted owner, unless his loan is secured by a mortgage. The position of the restricted owner as regards anything beyond her so-called life-interest is, in fact, in this particular, somewhat similar to that of an English executor with power to charge the real estate. If it were otherwise, there might arise, in cases of execution for unsecured debts, the same difficult questions which the preceding sections are intended to shut out in cases of voluntary alienation.

29. It will be observed that, by sections 37 (2) and 38 (4) of the Bill the Crown is postponed to the general heirs of the restricted owner. This appears to be right, though it is gathered from the case of *The Collector of Masulipatam v. Cavalry Venkata Narrainapah* (8 Moo. I. A. 529),—this precise point was not there decided,—that it is otherwise in the case of a Hindu woman's estate.

30. Sections 35 and 36 in effect provide that the restricted owner shall represent the property in judicial proceedings and compromises of disputes and for the purposes of laws of limitation and prescription, so as to bind those who take after her.

31. Sections 37 to 39, which regulate the devolution of property after the death of the restricted owner, have been drawn with a view to carry out what is understood to be the intentions of the Commission.

Their main provisions are that—

(a) when the restricted owner dies unmarried, the property shall belong to the person to whom it would then have belonged if she had died before the absolute owner from whom it descended and it had descended under the Act without having been alienated, and in default of such person it shall descend as if the female were not a restricted owner; and

(b) when the restricted owner has been married, the property shall on her death go to certain of her descendants, and if there are no such descendants shall devolve as just stated.

32. From section 39 it will be seen, as already observed, that property may devolve upon two or more restricted owners in succession. This is to be regretted, but it seems to be an essential part of the scheme.

33. Section 40 regulates the legal relations arising where two or more widows of a deceased Khojâ take his property together as restricted owners, and provides that there shall be a right of survivorship between them.

34. Section 41 provides that a widow marrying again after her husband's death shall not be entitled to take as restricted owner his property or any property of any of his lineal descendants which has descended to them from him, and that, if a widow taking any such property as restricted owner subsequently marries again, she shall be deemed for the purposes of certain sections of the chapter to have died. One effect of this latter provision is that the restricted ownership of the widow ceases on her re-marriage.

35. Coming now to Chapter VI, relating to the wills of Khojâs, it will be observed that all matters connected with probate and letters of administration are in the case of Khojâs, as in the case of other persons not subject to the Indian Succession Act, left to be dealt with under the Probate and Administration Act, 1881. The result of this is that the matters remaining to be provided for under this chapter are in the main the same as those which are provided for by the Hindu Wills Act, 1870, as amended by the Act just mentioned; and, as a matter of fact, the specification of the sections of the Indian Succession Act made applicable to the wills of Khojâs by this chapter is based on the specification contained in the Hindu Wills Act as cut down by the Probate and Administration Act, 1881. There are, however, some important differences between the two which call for explanation here.

36. The most important of these differences is connected with the limitation on the powers of testamentary disposition. The specification of the sections of the Indian Succession Act applicable to Hindus, &c., contained in the Hindu Wills Act comprises several sections which either confer, or assume the existence of, a power of disposition in favour of unborn persons, but the Act contains a proviso to the effect that nothing therein contained shall authorize any Hindu, &c., to create in property any interest which he could not previously have created, and the Calcutta High Court have held in the recent case of *Alangamonjori Dabee v. Sonamoni Dabee* (I. L. R. 8 Cal. 637) that the effect of that proviso is to cut down the power of disposition, which the sections in question confer or assume to exist, to the limits imposed on a testator by the Hindu law, that is to say, as held in the well-known *Tagore* case, to a mere power of disposition in favour of persons who are either in fact or in contemplation of law in existence at the death of the testator.

37. It will be seen, on reference to the report of *Alangamonjori Dabee's* case, that, though there was no difference of opinion in the Appellate Court which finally heard it, much difficulty arose from the form in which the Hindu Wills Act had been drafted, and that the learned Judge in the Court below had been led by this to take the opposite view. This being so, it was obvious that the drafting of the Hindu Wills Act could not be followed in this particular. Moreover, it was seen that to adopt this form of drafting would in a considerable number of cases expose the testamentary dispositions of Khojâs to be called in question for reasons drawn or supposed to be drawn from the extremely vague and unsettled customary law now prevailing among them, and thus the object of the present measure, which is intended to supply a definite body of law, would be to a great extent defeated. It was accordingly resolved to enact directly either that a Khojâ's power of testamentary disposition should be co-extensive with that allowed by the Indian Succession Act, or should be limited somewhat in accordance with the ruling in the *Tagore* case.

38. It was clear that the question as to which of these courses should be adopted stood on grounds altogether independent of those on which the perpetuity question among Hindus had been discussed. The considerations with reference to which it should, in the opinion of the Government of India, be decided will be best seen from the remarks made on referring it to the local authorities for opinion. It was observed that the point was one in regard to which there was no recognized definite rule among the Khojâs, and that if, having regard to the family system of that sect and its requirements in this particular, it was considered that it would be desirable to confer upon Khojâs a power of disposition as large as that conferred by the Succession Act, the Governor General in Council would be prepared to confer that power; that the circumstance that, in the absence of any other rule, the Courts presume the Hindu law to be applicable to Khojâs, and so might possibly, if the question then arose, hold a Khojâ testator limited by the rule in the *Tagore* case, ought not, in the opinion of the Governor General, in Council, to be permitted to stand in the way of such legislation. "The Government of India," it was said, "has ever been reluctant to alter, by legislation, personal laws like those of the Hindus and Muhammadans, which are definitely ascertainable and are established on a religious or quasi-religious basis; but a rule of Hindu law, which is applied not as such, but merely by virtue of the presumption above referred to, in the absence of any other ascertainable rule, to persons who are by religion not

Hindus but Mussulmans, stands in its application to such persons on a totally different footing; and, if it appears expedient to set it aside as regards them, there need be no hesitation about doing so. The rule of the *Tagore* case, assuming that it would at this moment be applied by the Courts to Khojás, is as applied to them no more sacred or immutable than any of the other rules of Hindu law which at this moment may be applicable to Khojás, but which will be modified by the Bill if it becomes law. No difficulty will, therefore, be raised here on this score."

If, on the other hand, it was observed, it should appear that the rule prohibiting dispositions in favour of unborn persons had, as a matter of fact, been recognised and observed among the Khojás, or if, there being no recognized rule or established practice either way, it should be considered that the powers of disposition allowed by the Succession Act were larger than were needed for the requirements of Khojás, it would probably be desirable to limit the power of disposition in some such way as it is limited by the Hindu law as interpreted in the *Tagore* case. The system of intestate succession established by the Bill was in certain respects a complicated one; and if to this were to be added a power of making complicated dispositions by will, it was to be feared that we should bring about, in regard to the property of this wealthy and important sect, a state of things which it was desirable if possible to avoid.

39. The reply of the local authorities was to the effect that, as far as appeared, there was no recognized definite rule among the Khojás bearing on the point; that it was unlikely that any attempt had hitherto been made among them to create by will an interest in favour of an unborn person; that there was thus a *tabula rasa*; and that it was quite open to the legislature to legislate on the subject as it thought best without any fear of violating an existing custom or of running counter to any prejudice or desire of the Khojá community.

This being so, the Government of India have come to the conclusion that it is undesirable to confer on Khojás any power of testamentary disposition in favour of persons not in existence at the time of the testator's death; and accordingly all portions of the Indian Succession Act which confer, or assume the existence of, such a power have, as far as practicable, been omitted, a proviso at the same time being inserted to the effect that a bequest by a Khojá in favour of any person who has not come into existence at the death of the testator shall be void.

40. The remaining differences between this Bill and the Hindu Wills Act as regards the provisions of the Indian Succession Act applied by them are of less importance.

It may, however, be stated that the following additional provisions of the Succession Act have been made applicable, namely:—

- (a) section 47, giving a father power to appoint a guardian by will—a power the existence of which was assumed by the Commission;
- (b) sections 52 and 53, relating to privileged wills;
- (c) section 84, which provides that, when property is bequeathed to a person and words are added which describe a class of persons but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole of the interest of the testator therein unless a contrary intention appears by the will;
- (d) section 104, which limits directions for accumulation.

It should be added that section 137 of the Indian Succession Act, which provides that no right as executor or legatee can be established until a grant of probate or letters of administration is obtained, has been omitted for reasons similar to those which led to its being ultimately omitted from the Probate and Administration Act, 1881; and that sections 134 and 135, determining whether property bequeathed to two or more persons in succession should when its value is liable to decrease be retained in its original form, have been omitted, as it seems safer in this country to lay down no hard-and-fast rules on the subject.

41. The only other point calling for notice in connection with this chapter is that section 43, following the proviso to section 10 of the Transfer of Property Act, confers a power of bequeathing property to or for the benefit of a woman, so that she shall not have power to transfer or charge the same or her beneficial interest therein. The existence of such a power appears to have been assumed in the Bill prepared by the Commission.

42. Chapter VII, relating to maintenance and marriage and funeral expenses, calls for little notice. There was some obscurity about the corresponding provisions of the Bill prepared by the Commission, and this chapter has now been settled in accordance with what is understood from the local authorities to have been the original intention. It is believed that the only change of a substantive nature made here is in section 46, where provision has been made for the maintenance, &c., of a daughter while she remains unmarried. The chapter, however, will probably be found open to further amendment when it has been more fully considered.

43. Section 47, which provides for the recovery of sums due under this chapter, has been drawn with a view to precluding, as far as possible, the difficulties which have arisen under the Hindu law in regard to claims for maintenance, and in particular as to how far a person having a right to maintenance is entitled to follow the property of the deceased. As regards this last point, it has been thought best to place the claim for maintenance, &c., on the footing of a debt, postponing it, however, to debts proper. This will not absolutely remove all difficulty, but, by bringing the case within an existing class, it will avoid the creation of a new difficulty.

The 1st July, 1884.

(Signed) C. P. ILBERT.

D. FITZPATRICK,
Secretary to the Government of India.

[Published with the "Bombay Government Gazette" on the 24th July 1884.]

PART VI.

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When it fails.

SCHEDULE.—PORTIONS OF THE INDIAN SUCCESSION ACT (X OF 1865) MODIFIED FOR APPLICATION TO WILLS MADE BY KHOJÁS.

Explanation of abbreviation used in the margin.

"Bo. Bill" refers to the draft Bill prepared by the Commission and received with the letter from the Government of Bombay, No. 216, dated 14th January, 1880.

A Bill to amend and define the law of Testamentary and Intestate Succession to Khojás.

WHEREAS it is expedient to amend and define the law applicable to testamentary and intestate succession to Khojás; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

1. This Act may be called the Khojá Succession Act, 1884; and it shall extend to the whole of British India.
Short title.
Local extent.
2. Except as provided by any other law for the time being in force, succession to the property, whether moveable or immoveable, in British India of a Khojá dying on or after the first day of January eighteen hundred and eight-five shall be regulated by the rules contained in this Act, wherever he may have had his domicile at the time of his death.
Application.

[Act X of 1865, s. 5.]

Explanation.—Property in British India includes obligations enforceable there.

3. (1) In this Act, unless there is something repugnant in the subject or context,—
Definitions.

[Bo. Bill, s. 3.]

"son" means a legitimate son, and does not include an adopted son:

"grandson" means a son's son:

"great-grandson" means a grandson's son:

"daughter" means a legitimate daughter:

"father" and "mother" do not include step-father and step-mother:

"grandfather" and "grandmother" do not

include a father's step-father or step-mother:

"brother" and "sister" do not include step-brother and step-sister, nor half-brother and half-sister:

"half-brother" means son of the same father but by another wife:

"lineal male descendant," used with reference to any person, means a male descended from that person through males only: [New.]

"degree" means a degree of kindred computed according to the rules laid down in sections 21, 22 and 24 of the Indian Succession Act, 1865, and the table of consanguinity thereto annexed: [X of 1865.]

"undivided property" means a share in the property belonging to an undivided family: [Home Dept. Office Memo., dated 12th August, 1882, para. 7.]

"restricted owner," used with reference to any property, means a female acquiring that property in the manner specified in section 21, section 23, sub-section (2), section 24, sub-section (1), section 27 and section 39. [New.]

(2) When it is provided in this Act that the members of any class shall take property and the shares which they are respectively to take therein are not specified, they shall take equal shares therein.

4. For the purposes of this Act there shall be no distinction between ancestral and self-acquired property, nor between moveable and immoveable property, nor between those born in the lifetime of a deceased owner of property and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive. [Bo. Bill, s. 7.]

No distinction between ancestral and self-acquired, nor between moveable and immoveable property.
Child in womb.

no distinction between ancestral and self-acquired property, nor between moveable and immoveable property, nor between those born in the lifetime of a deceased owner of property and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive.

[Act X of 1865, s. 23.]

The Khojá Succession Bill, 1884.

(Chapter II.—Of Succession to the Undivided Property of a Male Khojá dying intestate.—Sections 5-6.)

(Chapter III.—Of Succession to the Separate Property of a Male Khojá dying intestate.—Sections 7-20.)

CHAPTER II.

OF SUCCESSION TO THE UNDIVIDED PROPERTY OF A MALE KHOJÁ DYING INTESTATE.

5. (1) When a male Khojá owning undivided property dies intestate in respect of that property, leaving legitimate lineal male descendants not more remote than the fourth degree, every such descendant shall be entitled to a share in that property unless one of the persons through whom he is descended from the intestate is living.

(2) When the sharers under sub-section (1) all stand in the same degree of kindred to the intestate, their shares shall be equal.

(3) When the sharers under sub-section (1) do not all stand in the same degree of kindred to the intestate, the property shall be divided into such a number of equal shares as will correspond with the number of the sharers who stood in the nearest degree of kindred to him at his decease, and of his lineal male descendants of the like degree of kindred who died before him, and through whom the other sharers are descended from him; and one such share shall be allotted to each of the sharers who stood in the nearest degree of kindred to the intestate at his decease; and one such share shall be allotted in respect of each such deceased male descendant; and the share allotted in respect of each such deceased male descendant shall be divided among the sharers descended through him, in such manner that the sons of any person shall always take that which their father would have been entitled to if he had survived the intestate.

6. In default of legitimate lineal male descendants as aforesaid, the property of the intestate shall be divided equally among all the male members of his undivided family living at his death.

CHAPTER III.

OF SUCCESSION TO THE SEPARATE PROPERTY OF A MALE KHOJÁ DYING INTESTATE.

7. When a male Khojá owning property, not being undivided property, dies intestate in respect of that property, leaving legitimate lineal male descendants not more remote than the fourth degree, the property shall descend in the manner provided in section 5.

8. In default of legitimate lineal male descendants as aforesaid, the intestate's father shall succeed to the property.

9. In default of the father, the intestate's mother shall succeed to the property.

10. In default of the mother, the widow or widows of the intestate shall succeed to the property.

11. In default of widows, the daughters of the intestate shall succeed to the property. [Bo. Bill, s. 20.]

12. (1) In default of daughters, the sons of daughters shall succeed to the property, the sons of each daughter taking an equal share: [Bo. Bill, s. 21.]

Provided that, if the intestate has left brothers surviving him, the daughters' sons shall succeed to a moiety of the property, the sons of each daughter taking an equal share, and the brothers shall take the other moiety.

(2) In default of daughters' sons, the brothers shall take the whole of the property.

13. In default of brothers, the daughters of the intestate's sons shall succeed to the property, the daughters of each son taking an equal share. [Bo. Bill, s. 22.]

14. In default of sons' daughters, the sons of the intestate's brothers shall succeed to the property, the sons of each brother taking an equal share. [Bo. Bill, s. 23.]

15. In default of brothers' sons, the half-brothers of the intestate shall succeed to the property. [Bo. Bill, s. 24.]

16. In default of half-brothers, the sons of half-brothers shall succeed to the property, the sons of each half-brother taking an equal share. [Bo. Bill, s. 25.]

17. In default of sons of half-brothers, the paternal grandfather shall succeed to the property; and in default of the paternal grandfather, the paternal grandmother shall succeed to it. [Bo. Bill, s. 26.]

18. In default of the paternal grandmother, the paternal uncles shall succeed to the property. [Bo. Bill, s. 27.]

19. In default of paternal uncles, the sisters of the intestate shall succeed to the property. [Bo. Bill, s. 28.]

20. In default of sisters, the property shall belong to those of the intestate's relatives on the father's side who stand in the nearest degree of kindred to the intestate; and, in default of relatives on the father's side, to those of the intestate's relatives on the mother's side who stand in the nearest degree of kindred to the intestate: [Bo. Bill, s. 29.]

Provided that no female relative shall be entitled to share in the property if there is a male relative standing on the same side in the same degree of kindred to the intestate.

21. If, at the death of the intestate, any of the male heirs mentioned in sections 7 to 18 (both inclusive), or any male relative of the intestate on the father's side

restricted owner under foregoing sections. [Bo. Bill, s. 33. See sec. 48, *infra*.]

[Bo. Bill, ss. 8-12.]

[Act X of 1865, s. 33.]

[Bo. Bill, s. 13.]

[Bo. Bill, s. 16.]

[Bo. Bill, s. 17.]

[Bo. Bill, s. 18.]

[Bo. Bill, s. 19, see *infra*, s. 34.]

[Bo. Bill, s. 20.]

[Bo. Bill, s. 21.]

[Bo. Bill, s. 22.]

[Bo. Bill, s. 23.]

[Bo. Bill, s. 24.]

[Bo. Bill, s. 25.]

[Bo. Bill, s. 26.]

[Bo. Bill, s. 27.]

[Bo. Bill, s. 28.]

[Bo. Bill, s. 29.]

[Bo. Bill, s. 33.]

[See sec. 48, *infra*.]

The Khojá Succession Bill, 1884.
 (Chapter IV.—Of Succession to the Absolute Property of a Female Khojá dying intestate.—Sections 23-27.)
 (Chapter V.—Of Property which a Female takes as Restricted Owner, and the further Succession to the same.—Section 28.)

not more remote than the seventh degree of kindred to the intestate, is living, a female succeeding under any of the foregoing sections shall take the property as restricted owner.

[Bo. Bill, s. 30.] 22. When a male Khojá dies intestate in respect of any ornaments belonging to him, and not being undivided property, which are in the possession of his wife with his consent, and the wife does not acquire the ownership, whether absolute or restricted, of the ornaments under this Act, she shall be entitled to retain possession of them until she dies or re-marries.

CHAPTER IV.
 OF SUCCESSION TO THE ABSOLUTE PROPERTY OF A FEMALE KHOJÁ DYING INTESTATE.

[Bo. Bill, s. 33.] 23. (1) When an unmarried female Khojá owning property otherwise than as a restricted owner dies intestate in respect of that property, it shall belong to her brothers; in default of brothers, to her father; in default of the father, to her mother; in default of the mother, to the relatives of the intestate on the father's side who stand in the nearest degree of kindred to the intestate; and, in default of such relatives, to the relatives on the mother's side who stand in the nearest degree of kindred to the intestate.

[Bo. Bill, ss. 32 & 33.] (2) If at the death of the intestate any male relative of the intestate on the father's side not more remote than the seventh degree of kindred to the intestate is living, a female succeeding under this section, whether in preference to or together with that male relative, shall take the property as restricted owner.

[Bo. Bill, s. 40.] 24. (1) When a married female Khojá owning property otherwise than as restricted owner dies intestate in respect of that property, it shall belong to her sons and daughters; and the daughters shall take it as restricted owners.

[Bo. Bill, s. 32.] (2) In default of sons and daughters, the property shall, except as provided in sub-section (3), belong to her husband.

(3) If the property has been given to the female on the occasion of her marriage separately from the "Dej" for her sole use and benefit by her parents or relatives, it shall, in default of sons and daughters, belong—

- (a) to her father; and
- (b) in default of the father, to the person to whom it would then have belonged if it had been the property of the father at his death and had descended without having been alienated.

(4) A female taking property under clause (b) of sub-section (3) shall not take it as restricted owner.

[Bo. Bill, s. 37.] 25. (1) When a female Khojá, being a widow or divorced and owning property otherwise than as restricted owner, dies

Descent of absolute property of widow or divorced female leaving lineal de-

scendants within the fourth degree. intestate in respect of that property leaving legitimate lineal descendants not more remote than the fourth degree, every such descendant shall be entitled to a share of the property unless one of the persons through whom he is descended from the intestate is living.

(2) When the sharers under sub-section (1) all stand in the same degree of kindred to the intestate, their shares shall be equal.

(3) When the sharers under sub-section (1) do not all stand in the same degree of kindred to the intestate, the property shall be divided into such a number of equal shares as may correspond with the number of the sharers who stood in the nearest degree of kindred to her at her decease, and of lineal descendants of the like degree of kindred who died before her and through whom the other sharers are descended from her; and one such share shall be allotted to each of the sharers who stood in the nearest degree of kindred to the intestate at her decease; and one such share shall be allotted in respect of each such deceased descendant; and the share allotted in respect of each such deceased descendant shall be divided among the sharers descended through him, in such manner that the children of any person shall always take what that person would have been entitled to if he had survived the intestate.

[Act X of 1865, s. 33.]

26. (1) In default of the descendants mentioned in section 25, the property shall belong to the brothers of the intestate; in default of brothers, to her father; in default of the father, to her mother.

[Bo. Bill, 37.]

(2) In default of the mother, the property shall belong to the relatives of the intestate on the father's side who stand in the nearest degree of kindred, and, in default of such relatives, to the relatives of the intestate on the mother's side who stand in the nearest degree of kindred.

27. If, at the death of the intestate, any of the male heirs mentioned in section 25 and the first sub-section of section 26, or any male relative of the intestate on the father's side not more remote than the seventh degree of kindred to the intestate, is living, a female succeeding under section 25 or section 26, whether in preference to or together with that heir or relative, shall take the property as restricted owner.

[Bo. Bill, s. 32.]

CHAPTER V.
 OF PROPERTY WHICH A FEMALE TAKES AS RESTRICTED OWNER, AND THE FURTHER SUCCESSION TO THE SAME.

28. A female taking property as restricted owner shall be absolutely entitled to the use of, and the income accruing from, that property during her life, and, except as otherwise provided by this Act, shall have all the other rights and powers of an absolute owner in respect of that property.

[Bo. Bill, s. 3; "life-estate," "stridhan."]

Nature of restricted ownership generally.

The Khojá Succession Bill, 1884.

(Chapter V.—Of Property which a Female takes as Restricted Owner, and the further Succession to the same.—Sections 29-36).

- [Bo. Bill, s. 3; "life-estate."] 29. Except as provided by section 31, no right to, over or in respect of property created by a restricted owner of that property shall have effect for any time beyond her life:
- [New.] Powers of alienation limited. Provided that nothing in this section shall affect a lease granted at a fair rent for a term not exceeding twenty years, and without payment of any fine or premium, or a right created for consideration in favour of a person acting in good faith, and without notice of the ownership being restricted.
- [Act II of 1882, s. 3.] *Explanation.*—A person has notice of the ownership being restricted when he actually knows that it is restricted, or when, but for wilful abstention from enquiry or gross negligence, he would have known it, or when information of it is given to, or obtained by, his agent under the circumstances mentioned in the Indian Contract Act, 1872, section 229.
- IX of 1872. 30. A female taking property as restricted owner shall be bound, so far as it is possible for her to do so without applying her other property for that purpose,—
- [Act II of 1882, s. 13.] (a) to preserve the substance of the property without any material alteration, deterioration or diminution except such as may be essential to the realization of the full income of it in a reasonable manner, and to deal with it in all respects as carefully as a person of ordinary prudence would deal with property which he hoped to transmit in good condition to his heirs; and
- (b) to make such payments, institute, maintain and defend such suits and other proceedings, and take such other steps as, regard being had to the nature and amount or value of the property, may be reasonably requisite for the assertion and protection of the title thereto, for the protection of the interest of those who are to take it after her, or for the recovery of any portion of it which is not in her possession.
- [Bo. Bill, s. 3; "life-estate."] 31. A female taking property as restricted owner shall have power to transfer the same, so that the transfer may have effect beyond her life when, the income being insufficient, such transfer is necessary in order to raise money for any of the following purposes, namely:—
- (a) to discharge any of the obligations imposed by section 30;
- (b) to discharge the debts of the absolute owner from whom the property descended;
- (c) to provide for the maintenance of any persons entitled under this Act to have their maintenance provided for out of the property, for the payment of any marriage expenses or funeral expenses payable under this Act out of the property, and for the performance of any ordinary family ceremonies; and
- (d) to support herself where she has no other sufficient means of support.
32. (1) A restricted owner of property may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction to sanction any transfer of that property which she proposes to make under section 31.
- [New.] [Act II of 1882, s. 34.] Power to apply to Court to sanction a transfer under section 31. (2) The petition must state the names of all the persons interested in the application so far as they can be ascertained, and must be verified by the applicant or by some other competent person in the manner required by law for the verification of plaints; and, if it contains any averment which the person making the verification knows or believes to be false, or does not know or believe to be true, that person shall be deemed to have intentionally given false evidence within the meaning of the Indian Penal Code. XLV of 1860.
- (3) A copy of the petition shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit.
- (4) A transfer made with the sanction of a Court obtained under this section shall be deemed to be warranted by section 31.
- [New.] 33. A Court dealing with an application under section 32 may, if it thinks fit, sanction the transfer proposed subject to the condition that the money raised by the transfer shall be paid into Court or to trustees appointed by the Court, and may give such further directions as it thinks fit with a view to ensuring that the money shall be applied to the purpose for which it is raised, or that any balance thereof which is not required for that purpose, shall be secured for the benefit of those who would take the property after the restricted owner.
- [New.] 34. When property belonging to a female as restricted owner is sold in execution of a decree passed against her, the interest taken by the purchaser shall cease on her death,—
- Effect of sale in execution against restricted owner. except when, without any collusion between her and the plaintiff,—
- (a) the decree is passed against her as representative of the absolute owner from whom the property descended; or
- (b) the decree is one for sale passed on a mortgage made under section 31 so as to take effect beyond the life of the female.
35. A decision in any suit or other proceeding, or a compromise of any dispute, relating to the property to which the restricted owner is a party, shall, except where she acts in collusion with the party opposed to her, bind those who take the property after her under this Act in the same manner and to the same extent as if she were an absolute owner of the property.
- [New.] 36. In any case in which, under any enactment for the time being in force, an owner of property would by lapse of time lose any right to, over or in respect of
- Effect of lapse of time during continuance of restricted ownership.

The Khojá Succession Bill, 1884.
(Chapter VI.—Of Wills of Khojás.—Section 42).

that property, or any means of enforcing any such right, or another person would by lapse of time acquire any right to, over or in respect of that property, any period which elapses during the continuance of the restricted ownership shall be reckoned as against those taking the property after the termination of that ownership in the same manner and to the same extent as if the restricted owner had been an absolute owner of the property and it had been taken by them as her heirs.

[Bo. Bill, s. 39.]

37. (1) When property has descended to a female as restricted owner and she dies unmarried, it shall belong to the person to whom it would then have belonged if she had died before the absolute owner from whom it descended and it had descended under this Act without having been alienated.

(2) In default of such person, the property shall descend as if the female were not a restricted owner.

[Bo. Bill, s. 41.]

38. (1) When property has descended to a female as restricted owner and she dies, being at the time of her death married, a widow or divorced from her husband, the property shall be divided among her legitimate lineal male descendants, not being more remote than the fourth degree, those nearest in degree of kindred to her excluding the more remote, and, when those nearest in degree are not her sons, the property being so divided amongst them that the sons of any person shall take the share which he would have taken if the fathers of all had survived the restricted owner.

(2) In default of legitimate lineal male descendants as aforesaid, the property shall belong to the daughters of the deceased; in default of daughters, the property shall belong to the legitimate lineal male descendants of daughters, not being more remote from the deceased than the fourth degree, those nearest in degree excluding the more remote; the descendants of each daughter, when they take, taking an equal share, and when they are not sons of the daughters, that share being so divided among them that the sons of any person shall take what he would have taken if the fathers of all had survived the restricted owner.

(3) In default of legitimate lineal male descendants of daughters as aforesaid, the property shall belong to the person to whom it would then have belonged if the restricted owner had died before the absolute owner from whom it descended, and it had descended under this Act without having been alienated.

(4) In default of such person, the property shall descend as if the female were not a restricted owner.

[Bo. Bill, s. 32.]

39. When property, having descended to a female as restricted owner, subsequently descends to another female under section 37, sub-section (1), or section 38, sub-section (3), that female shall take it as restricted owner.

40. Notwithstanding anything in the foregoing sections, when two or more widows of a deceased Khojá take his property under this Act as restricted owners,—

(1) there shall be as between them a right of survivorship in respect of that property;

(2) the proviso to section 29 shall not apply to any lease of or any right to, over or in respect of the property, or any part or share thereof, granted or created by one or more of them without the consent in writing of the other or others of them then surviving;

(3) section 31 and section 32 shall not apply to any transfer made by one or more of them without the consent in writing of the other or others of them then surviving;

(4) section 35 shall not apply to any decision in any suit or proceeding or to any compromise unless all of them then surviving are parties to that suit, proceeding or compromise.

41. Notwithstanding anything in the foregoing sections, a widow marrying again after her husband's death shall not be entitled to take as restricted owner his property or any property of any of his lineal descendants which has descended to them from him; and a widow taking any such property as restricted owner under the foregoing sections and subsequently marrying again shall, for the purpose of applying sections 28, 29, 34, 38 and 40, to that property, be deemed to have died.

Effect of re-marriage of widow claiming or holding as restricted owner.

[Bo. Bill, s. 34; Act XV of 1856, s. 2.]

CHAPTER VI.

OF WILLS OF KHOJÁS.

42. Subject to the provisions of this Act, the portions of the Indian Succession Act, 1865, set forth in the schedule hereto annexed, with the modifications shown in that schedule, shall, notwithstanding anything contained in section 331 of that Act, apply to all wills made by a Khojá, whether male or female, dying on or after the first day of January eighteen hundred and eighty-five; and

in the portions of the Act so applying all words defined in section 3 of the Act shall, unless there be something repugnant in the subject or context, be deemed to have the same meaning as that section has attached to them respectively;

Provided that—

(a) For the purpose of the portions of the Act so applying, no person to whom the Indian Majority Act, 1875, applies shall be deemed to have attained his majority before the time specified in this behalf in that Act.

(b) A bequest by a Khojá in favour of any person who has not come into existence at the death of the testator, or in favour of a class of persons any one of whom has not come into existence at that time, shall be void.

(c) When a bequest is void under clause (b), any bequest contained in the same will or upon failure of such prior bequest shall also be void.

[Bo. Bill, ss. 4, 5 & 6.]

X of 1865.

IX of 1875.

The Khojā Succession Bill, 1884.

(Chapter VII.—Of Maintenance and Marriage and Funeral Expenses.—Secs. 44-47).
(Chapter VIII.—Miscellaneous.—Sections 48-51).

[Act IV of 1882, s. 10.]

43. Notwithstanding anything contained in the foregoing sections, a Khojā may bequeath property to or for the benefit of a woman so that she shall not have power to transfer or charge the same or her beneficial interest therein.

CHAPTER VII.

OF MAINTENANCE AND MARRIAGE AND FUNERAL EXPENSES.

[Bo. Bill, ss. 34 & 43.]

44. (1) The amount requisite for the maintenance of the following persons and the amount of their necessary funeral expenses shall, if they do not possess or leave means sufficient for the purpose, be payable out of any property of a deceased male Khojā in respect of which he has died intestate.

(2) The persons referred to are—

- (a) the widow or widows of the deceased Khojā and the widows of his legitimate lineal male descendants, provided they have not married again;
- (b) every daughter and sister (whether legitimate or not) of the deceased Khojā and every legitimate daughter of his son, grandson or great-grandson, except when she has been married and her husband is living;
- (c) the father, mother, grandfather and grandmother of the deceased Khojā; and
- (d) his illegitimate sons until they attain their majority.

[Bo. Bill, s. 44.]

45. The expenses of the first or only marriage of every daughter (whether legitimate or not) of a deceased male Khojā, and of every legitimate daughter of his deceased son, grandson or great-grandson, if not otherwise sufficiently provided for, shall be payable out of any of his property in respect of which he has died intestate.

[Bo. Bill, s. 45.]

46. If a male Khojā dies leaving a legitimate lineal male descendant who has not attained his majority, or a daughter who is unmarried or a widow, and having disposed of his property by will in such a manner as to leave that descendant, daughter or widow without sufficient means for the purpose, the amount requisite for the maintenance of the descendant during his minority, or of the daughter while she remains unmarried or of the widow until her death or re-marriage (as the case may be) shall be payable out of the testator's property; and if the descendant dies before he attains his majority or the daughter dies unmarried or the widow dies without re-marrying, his or her necessary funeral expenses shall be payable out of that property.

[New.]

47. Any sum claimable for maintenance or marriage expenses or funeral expenses under section 44, section 45 or section 46 out of any

property of a deceased male Khojā shall be recoverable as if it was due under a contract made by the Khojā in his lifetime and he had died leaving only that property:

Provided that—

first, the property shall be applied to the payment of debts due by the deceased before being applied to the payment of sums so claimable; *secondly*, no decree shall be passed for arrears of any allowance on account of maintenance unless the amount of the allowance has been fixed by agreement or by order of a Court; and *thirdly*, when a suit is instituted for the purpose of having any such allowance fixed against a person taking the property by intestate succession, and that person is able and willing to maintain or provide for the maintenance of the person by or on whose behalf the suit is instituted, and gives security to the satisfaction of the Court for his so doing, the Court may, if it thinks fit, dismiss the suit.

CHAPTER VIII.

MISCELLANEOUS.

48. When a Khojā dies intestate in respect of any of his property, and there is no person entitled to take that property under the foregoing sections, it shall go to the Crown.

[Bo. Bill, s. 42, Act X of 1865, s. 28.]

49. Except as otherwise provided by this Act—

(1) a female taking property by intestate succession under this Act shall have the same interest in it, and the same powers in respect of it, as if she were a male; and

(2) a female taking property under any testamentary disposition under this Act shall have the same interest in it, and the same powers in respect of it, as a male taking under a like disposition.

50. If a widow of a deceased Khojā, not having been appointed by his will to be guardian for his children, marries again, she shall not be entitled as of right to be appointed guardian of the children by a Court under any law for the time being in force relating to the appointment of guardians, and, when she has before her re-marriage been so appointed, a Court having jurisdiction to appoint a guardian for the children may in its discretion remove her from the guardianship.

[Bo. Bill, s. 35, Act XV of 1856, s. 3.]

51. A Khojā may dispose, by gift made in contemplation of death, of any moveable property which he could dispose of by will.

A gift is said to be made in contemplation of death where a person who is ill and expects to die shortly of his illness delivers to another the possession of any moveable property to keep as a gift in case the donor shall die of that illness.

Property transferable by gift made in contemplation of death.

When gift said to be made in contemplation of death.

Property when to go to the Crown.

Females succeeding under this Act to take as males, except in certain cases.

The Khojá Succession Bill, 1884.
(Schedule.—Portions of the Indian Succession Act (X of 1865) modified for application to Wills made by Khojás.)

Such gift resumable. Such a gift may be resumed by the giver.

It does not take effect if he recovers from the illness during which it was made, nor if he survives the person to whom it was made.

When it fails,

was made, nor if he survives the person to whom it was made.

Illustrations.

(a.) A being ill, and in expectation of death, delivers to B, to be retained by him in case of A's death—

- a watch :
- a bond granted by C to A :
- a bank-note :
- a promissory note of the Government of India endorsed in blank :
- a bill of exchange endorsed in blank :
- certain mortgage-deeds.

A dies of the illness during which he delivered these articles.

B is entitled to—

- the watch :
- the debt secured by C's bond :
- the bank-note :
- the promissory note of the Government of India :
- the bill of exchange :
- the money secured by the mortgage-deeds.

(b.) A being ill, and in expectation of death, delivers to B the key of a trunk, or the key of a warehouse in which goods of bulk belonging to A are deposited, with the intention of giving him the control over the contents of the trunk, or over the deposited goods, and desires him to keep them in case of A's death. A dies of the illness during which he delivered these articles. B is entitled to the trunk and its contents, or to A's goods of bulk in the warehouse.

(c.) A being ill, and in expectation of death, puts aside certain articles in separate parcels, and marks upon the parcels respectively the names of B and C. The parcels are not delivered during the life of A. A dies of the illness during which he set aside the parcels. B and C are not entitled to the contents of the parcels.

SCHEDULE.

(See Section 42.)

PORTIONS OF THE INDIAN SUCCESSION ACT (X OF 1865) MODIFIED FOR APPLICATION TO WILLS MADE BY KHOJÁS.

Note.—Modifications are shown in italics; omissions by asterisks.

PART VII.

Of Wills and Codicils.

46. Every person of sound mind and not a ^{Persons} capable of minor may dispose of his property by will.

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

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

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

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

Illustrations.

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

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

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

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

48. A will or any part of a will, the making of which has been caused Will obtained by fraud, by fraud or coercion, or coercion or importunity. by such importunity as takes away the free agency of the testator, is void.

Illustrations.

(a.) A falsely and knowingly represents to the testator that the testator's only child is dead, or that he has done some undutiful act, and thereby induces the testator to make a will in his, A's, favour; such will has been obtained by fraud and is invalid.

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

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

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

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

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

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

(h.) A, with a view to obtaining a legacy from B, pays him attention and flatters him, and thereby pro-

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duces in him a capricious partiality to A. B., in consequence of such attention and flattery, makes his will, by which he leaves a legacy to A. The bequest is not rendered invalid by the attention and flattery of A.

49. A will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will.

Will may be revoked or altered.

PART VIII.

Of the Execution of Unprivileged Wills.

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

First.—The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

Second.—The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

Third.—The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must sign or affix his mark to the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

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

PART IX.

Of Privileged Wills.

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

Illustrations.

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

(b.) A is at sea in a merchant-ship, of which he is the purser. He is a mariner, and being at sea can make a privileged will.

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

(d.) A, a mariner of a ship in the course of a voyage, is temporarily on shore, while she is lying in

harbour. He is, in the sense of the words used in this clause, a mariner at sea, and can make a privileged will.

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

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

53. Privileged wills may be in writing or Mode of making, and rules may be made by word of for executing, privileged mouth.

The execution of them shall be governed by the following rules:—

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

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

Third.—If the instrument purporting to be a will is written wholly or in part by another person, and is not signed by the testator, it shall be considered to be his will, if it be shown that it was written by the testator's directions, or that he recognized it as his will.

If it appear on the face of the instrument that the execution of it in the manner intended by him was not completed, the instrument shall not by reason of that circumstance be invalid, provided that his non-execution of it can be reasonably ascribed to some cause other than the abandonment of the testamentary intentions expressed in the instrument.

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

Fifth.—If the soldier or mariner shall, in the presence of two witnesses, have given verbal instructions for the preparation of his will, and they shall have been reduced into writing in his lifetime, but he shall have died before the instrument could be prepared and executed, such instructions shall be considered to constitute his will, although they may not have been reduced into writing in his presence, nor read over to him.

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

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

PART X.

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

* * * * *

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

Witness not disqualified by interest or by being executor.

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* * * * *

57. No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than * * *

Revocation of unprivileged will or codicil.

* * * by another will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Illustrations.

(a.) A has made an unprivileged will. Afterwards A makes another unprivileged will which purports to revoke the first. This is a revocation.

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

58. No obliteration, interlineation or other

Effect of obliteration, interlineation or alteration in unprivileged will.

alteration made in any unprivileged will after the execution thereof shall have any effect, except so far as the words or meaning of the will shall have been thereby rendered illegible or undiscernible, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; save that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

59. A privileged will or codicil may be revoked

Revocation of privileged will or codicil.

by the testator, by an unprivileged will or codicil, or by any act expressing an intention to revoke it, and accompanied with such formalities as would be sufficient to give validity to a privileged will, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Explanation.—In order to the revocation of a privileged will or codicil by an act accompanied with such formalities as would be sufficient to give validity to a privileged will, it is not necessary that the testator should at the time of doing that act be in a situation which entitles him to make a privileged will.

60. No unprivileged will or codicil, nor any

Revival of unprivileged will.

part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same;

and when any will or codicil which shall be

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

partly revoked and afterwards wholly revoked shall be revived, such revival shall not extend to so much

thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown by the will or codicil.

PART XI.

Of the construction of Wills.

61. It is not necessary that any technical

Wording of will.

words or terms of art shall be used in a will, but only that the wording shall be such that the intentions of the testator can be known therefrom.

62. For the purpose of determining questions

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

as to what person or what property is denoted by any words used in a will, a Court must inquire into every material fact relating to the persons who claim to be interested under such will, the property which is claimed as the subject of disposition, the circumstances of the testator and of his family, and into every fact a knowledge of which may conduce to the right application of the words which the testator has used.

Illustrations.

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

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

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

63. Where the words used in the will to

Misnomer or misdescription of object.

designate or describe a legatee, or a class of legatees, sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect.

A mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name.

Illustrations.

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

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

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

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

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

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

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

When words may be supplied.

Illustration.

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

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

Illustrations.

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

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

66. If the will mentions several circumstances as descriptive of the thing which the testator intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest shall be considered as limited to such property, and it shall not be lawful to reject any part of the description as erroneous because the testator had other property to which such part of the description does not apply.

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

Illustrations.

(a.) A bequeaths to B "his marsh-lands lying in L, and in the occupation of X." The testator had marsh-lands lying in L, some of which were in the occupation of X, and some not in the occupation of X. The bequest shall be considered as limited to such of the testator's marsh-lands lying in L as were in the occupation of X.

(b.) A bequeaths to B "his marsh-lands lying in L, and in the occupation of X, comprising 1,000

bighás of land." The testator had marsh-lands lying in L, some of which were in the occupation of X, and some not in the occupation of X. The measurement is wholly inapplicable to the marsh-lands of either class, or to the whole taken together. The measurement shall be considered as struck out of the will, and such of the testator's marsh-lands lying in L as were in the occupation of X shall alone pass by the bequest.

67. Where the words of the will are unambiguous, but it is found by extrinsic evidence admissible in case of latent ambiguity, they admit of applications one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended.

Illustrations.

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

(b.) A, by his will, leaves to B "his estate called Sultánpur Khurd." It turns out that he had two estates called Sultánpur Khurd. Evidence is admissible to show which estate was intended.

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

Illustrations.

(a.) A man has an aunt Caroline and a cousin Mary, and has no aunt of the name of Mary. By his will he bequeaths 1,000 rupees to "his aunt Caroline" and 1,000 rupees to "his cousin Mary," and afterwards bequeaths 2,000 rupees to "his before-mentioned aunt Mary." There is no person to whom the description given in the will can apply, and evidence is not admissible to show who was meant by "his before-mentioned aunt Mary." The bequest is therefore void for uncertainty under the seventy-sixth section.

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

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

69. The meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other; and for this purpose a codicil is to be considered as part of the will.

Illustrations.

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

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

70. General words may be understood in a restricted sense where it may be collected from the will that the testator meant to use them in a restricted sense; and

When words may be understood in restricted sense and when in sense wider than usual.

words may be understood in a wider sense than that which they usually bear, where it may be collected from the other words of the will that the testator meant to use them in such wider sense.

Illustrations.

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

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

(c.) A, by his will, bequeathed to B all his household furniture, plate, linen, china, books, pictures and all other goods of whatever kind; and afterwards bequeathed to B a specified part of his property. Under the first bequest, B is entitled only to such articles of the testator's as are of the same nature with the articles therein enumerated.

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

Which of two possible constructions preferred.

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

No part rejected, if it can be reasonably construed.

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

Interpretation of words repeated in different parts of will.

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

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

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

The last of two inconsistent clauses prevails.

Illustrations.

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

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

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

Will or bequest void for uncertainty.

Illustration.

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

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

* Words describing subject refer to property answering description at testator's death.

property the subject of gift, shall, unless a contrary intention appears by the will, be deemed to refer to and comprise the

82. Where property is bequeathed to any person he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him.

Bequest without words of limitation.

person he is entitled to the whole interest of the testator therein, unless it

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

Bequest in alternative.

with a bequest in the alternative to another person

Illustrations.

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

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

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

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

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

84. Where property is bequeathed to a person and words are added which describe a class of persons, but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the will.

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

and words are added which describe a class of persons, but do not denote

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Illustrations.

- (a.) A bequest is made—
 to A and his children,
 to A and his children by his present wife,
 to A and his heirs,
 to A and the heirs of his body,
 to A and the heirs male of his body,
 to A and the heirs female of his body,
 to A and his issue,
 to A and his family,
 to A and his descendants,
 to A and his representatives,
 to A and his personal representatives,
 to A, his executors and administrators.

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

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

* * * * *

85. Where a bequest is made to a class of persons under a general description only, no one to whom the words of the description are not in their ordinary sense applicable shall take the legacy.

* * * * *

88. Where a will purports to make two bequests to the same person, and a question arises whether the testator intended to make the second bequest instead of or in addition to the first, if there is nothing in the will to show what he intended, the following rules shall prevail in determining the construction to be put upon the will:—

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

First.—If the same specific thing is bequeathed twice to the same legatee in the same will, or in the will and again in a codicil, he is entitled to receive that specific thing only.

Second.—Where one and the same will or one and the same codicil purports to make, in two places, a bequest to the same person of the same quantity or amount of anything, he shall be entitled to one such legacy only.

Third.—Where two legacies of unequal amount are given to the same person in the same will, or in the same codicil, the legatee is entitled to both.

Fourth.—Where two legacies, whether equal or unequal in amount, are given to the same legatee, one by a will and the other by a codicil, or each by a different codicil, the legatee is entitled to both legacies.

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

Illustrations.

(a.) A having ten shares, and no more, in the Bank of Bengal, made his will, which contains near its commencement the words "I bequeath my ten shares in the Bank of Bengal to B." After other bequests, the will concludes with the words "and I bequeath my ten shares in the Bank of Bengal to B." B is entitled simply to receive A's ten shares in the Bank of Bengal.

(b.) A having one diamond-ring, which was given him by B, bequeathed to C the diamond-ring which was given him by B. A afterwards made a codicil to his will, and thereby, after giving other legacies, he bequeathed to C the diamond-ring which was given him by B. C can claim nothing except the diamond-ring which was given to A by B.

(c.) A, by his will, bequeaths to B the sum of 5,000 rupees, and afterwards, in the same will, repeats the bequest in the same words. B is entitled to one legacy of 5,000 rupees only.

(d.) A, by his will, bequeaths to B the sum of 5,000 rupees, and afterwards, by the same will, bequeaths to B the sum of 6,000 rupees. B is entitled to 11,000 rupees.

(e.) A, by his will, bequeaths to B 5,000 rupees, and by a codicil to the will he bequeaths to him 5,000 rupees. B is entitled to receive 10,000 rupees.

(f.) A, by one codicil to his will, bequeaths to B 5,000 rupees, and by another codicil, bequeaths to him 6,000 rupees. B is entitled to receive 11,000 rupees.

(g.) A, by his will, bequeaths "500 rupees to B because she was his nurse," and in another part of the will bequeaths 500 rupees to B "because she went to England with his children." B is entitled to receive 1,000 rupees.

(h.) A, by his will, bequeaths to B the sum of 5,000 rupees and also, in another part of the will, an annuity of 400 rupees. B is entitled to both legacies.

(i.) A, by his will, bequeaths to B the sum of 5,000 rupees and also bequeaths to him the sum of 5,000 rupees if he shall attain the age of 18. B is entitled absolutely to one sum of 5,000 rupees, and take a contingent interest in another sum of 5,000 rupees.

89. A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.

Constitution of residuary legatee.

Illustrations.

(a.) A makes her will, consisting of several testamentary papers, in one of which are contained the following words:—"I think there will be something left, after all funeral expenses, &c., to give to B, now at school, wards to equipping him to any profession he may hereafter be appointed to." B is constituted residuary legatee.

(b.) A makes his will, with the following passage at the end of it:—"I believe there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire B to do, and keep the residue for her own use and pleasure." B is constituted the residuary legatee.

(c.) A bequeaths all his property to B, except certain stocks and funds, which he bequeaths to C. B is the residuary legatee.

90. Under a residuary bequest, the legatee is entitled to all property belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect.

* * * * *

91. If a legacy be given in general terms, without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and, if he dies without having received it, it shall pass to his representatives.

92. If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the re-

In what case legacy lapses.

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sidue of the testator's property unless it appear by the will that the testator intended that it should go to some other person.

In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

Illustrations.

(a.) The testator bequeaths to B "500 rupees which B owes him." B dies before the testator; the legacy lapses.

(b.) A bequest is made to A and his children. A dies before the testator or happens to be dead when the will is made. The legacy to A and his children lapses.

(c.) A legacy is given to A, and in case of his dying before the testator, to B. A dies before the testator. The legacy goes to B.

(d.) A sum of money is bequeathed to A for life, and after his death to B. A dies in the lifetime of the testator. B survives the testator. The bequest to B takes effect.

(e.) A sum of money is bequeathed to A on his completing his eighteenth year, and in case he should die before he completes his eighteenth year, to B. A completes his eighteenth year, and dies in the lifetime of the testator. The legacy to A lapses, and the bequest to B does not take effect.

(f.) The testator and the legatee perished in the same shipwreck. There is no evidence to show which died first. The legacy will lapse.

93. If a legacy be given to two persons jointly, and one of them die before the testator, the other legatee takes the whole.

Legacy does not lapse if one of two joint legatees die before testator.

Illustration.

The legacy is simply to A and B. A dies before the testator. B takes the legacy.

94. But where a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then if any legatee die before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.

Effect of words showing testator's intention to give distinct shares.

Illustration.

A sum of money is bequeathed to A, B and C, to be equally divided among them. A dies before the testator. B and C shall only take so much as they would have had if A had survived the testator.

95. Where the share that lapses is a part of the general residue bequeathed by the will, that share shall go as undisposed of.

When lapsed share goes as undisposed of.

Illustration.

The testator bequeaths the residue of his estate to A, B and C, to be equally divided between them. A dies before the testator. His one-third of the residue goes as undisposed of.

96. Where a bequest shall have been made to any son or other legitimate lineal male descendant of the testator, and the legatee shall die in the lifetime of the testator, but any legitimate lineal male descendant of his shall survive the testator, the bequest shall

not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Illustration.

A makes his will, by which he bequeaths a sum of money to his son B for his own absolute use and benefit. B dies before A, leaving a son C who survives A, and having made his will whereby he bequeaths all his property to his widow D. The money goes to D.

97. Where a bequest is made to one person for the benefit of another, the legacy does not lapse by the death, in the testator's lifetime, of the person to whom the bequest is made.

98. Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as shall be alive at the testator's death.

* * * * *

Illustrations.

(a.) A bequeaths 1,000 rupees to "the children of B" without saying when it is to be distributed among them. B had died previous to the date of the will, leaving three children, C, D and E. E died after the date of the will, but for the death of A. C and D survive A. The legacy shall belong to C and D, to the exclusion of the representatives of E.

(b.) A bequeaths a legacy to the children of B. At the time of the testator's death, B has no children. The bequest is void.

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PART XII.

OF VOID BEQUESTS.

99. Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.

Bequest to person by particular description, who is not in existence at testator's death.

the bequest is void.

* * * * *

Illustrations.

(a.) A bequeaths 1,000 rupees to the eldest son of B. At the death of the testator B has no son. The bequest is void.

* * * * *

101. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease.

* * * * *

102. If a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules contained in the last preceding section, such bequest shall be wholly void.

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The Khojâ Succession Bill, 1884.
(Schedule.—Portions of the Indian Succession Act (X of 1865) modified for application to Wills made by Khojâs.)

103. Where a bequest is void by reason of any of the rules contained in the two last preceding sections, any bequest contained in the same will and intended to take effect after or upon failure of such prior bequest is also void.

* * * * *

104. A direction to accumulate the income arising from any property shall be void; and the property shall be disposed of as if no accumulation had been directed.

Exception.—Where the property is immoveable, or where accumulation is directed to be made from the death of the testator, the direction shall be valid in respect only of the income arising from the property within one year next following the testator's death; and at the end of the year such property and income shall be disposed of respectively, as if the period during which the accumulation has been directed to be made had elapsed.

Illustrations.

(a.) The will directs that the sum of 10,000 rupees shall be invested in Government-securities, and the income accumulated for 20 years, and that the principal, together with the accumulations, shall then be divided between A, B and C. A, B and C are entitled to receive the sum of 10,000 rupees at the end of the year from the testator's death.

(b.) The will directs that 10,000 rupees shall be invested and the income accumulated until A shall marry, and shall then be paid to him. A is entitled to receive 10,000 rupees at the end of a year from the testator's death.

(c.) The will directs that the rents of the farm of Sultânpur shall be accumulated for ten years, and that the accumulation shall be then paid to the eldest son of A. At the death of the testator, A has an eldest son living, named B. B shall receive at the end of one year from the testator's death the rents which have accrued during the year, together with any interest which may have been made by investing them.

* * * * *

(e.) A bequeaths a sum of money to B, to be paid to him when he shall attain the age of 18, and directs the interest to be accumulated till he shall arrive at that age. At A's death the legacy becomes vested in B; and so much of the interest as is not required for his maintenance and education is accumulated, not by reason of the direction contained in the will, but in consequence of B's minority.

PART XIII.

OF THE VESTING OF LEGACIES.

106. Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy.

And in such cases the legacy is from the testator's death said to be vested in interest.

Explanation.—An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person.

Illustrations.

(a.) A bequeaths to B 100 rupees, to be paid to him at the death of C. On A's death the legacy becomes vested in interest in B, and if he dies before C, his representatives are entitled to the legacy.

(b.) A bequeaths to B 100 rupees, to be paid to him upon his attaining the age of 18. On A's death the legacy becomes vested in interest in B.

(c.) A fund is bequeathed to A for life, and after his death to B. On the testator's death the legacy to B becomes vested in interest in B.

(d.) A fund is bequeathed to A until B attains the age of 18, and then to B. The legacy to B is vested in interest from the testator's death.

(e.) A bequeaths the whole of his property to B upon trust to pay certain debts out of the income, and then to make over the fund to C. At A's death the gift to C becomes vested in interest in him.

(f.) A fund is bequeathed to A, B and C in equal shares, to be paid to them on their attaining the age of 18 respectively, with a proviso that, if all of them die under the age of 18, the legacy shall devolve upon D. On the death of the testator, the shares vest in interest in A, B and C, subject to be divested in case A, B and C shall all die under 18, and upon the death of any of them (except the last survivor) under the age of 18, his vested interest passes, so subject to his representatives.

107. A legacy bequeathed in case a specified Date of vesting when uncertain event shall legacy contingent upon happen does not vest unspecified uncertain event. til that event happens.

A legacy bequeathed in case a specified uncertain event shall not happen does not vest until the happening of that event becomes impossible.

In either case, until the condition has been fulfilled, the interest of the legatee is called contingent.

Exception.—Where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for his benefit, the bequest of the fund is not contingent.

Illustrations.

(a.) A legacy is bequeathed to D in case A, B and C shall all die under the age of 18. D has a contingent interest in the legacy until A, B and C all die under 18, or one of them attains that age.

(b.) A sum of money is bequeathed to A "in case he shall attain the age of 18," or, "when he shall attain the age of 18." A's interest in the legacy is contingent until the condition shall be fulfilled by his attaining that age.

(c.) An estate is bequeathed to A for life, and after his death to B, if B shall then be living; but if B shall not be then living, to C. A, B and C survive the testator. B and C each take a contingent interest in the estate until the event which is to vest it in one or in the other shall have happened.

The Khojā Succession Bill, 1884.
(Schedule.—Portions of the Indian Succession Act (X of 1865) modified for application to Wills made by Khojās).

(d.) An estate is bequeathed as in the case last supposed. B dies in the lifetime of A and C. Upon the death of B, C acquires a vested right to obtain possession of the estate upon A's death.

(e.) A legacy is bequeathed to A when she shall attain the age of 18, or shall marry under that age with the consent of B, with a proviso that, if she shall not attain 18, or marry under that age with B's consent, the legacy shall go to C. A and C each take a contingent interest in the legacy. A attains the age of 18. A becomes absolutely entitled to the legacy, although she may have married under 18 without the consent of B.

(f.) An estate is bequeathed to A until he shall marry, and after that event to B. B's interest in the bequest is contingent until the condition shall be fulfilled by A's marrying.

(g.) An estate is bequeathed to A until he shall take advantage of the Act for the Relief of Insolvent Debtors, and after that event to B. B's interest in the bequest is contingent until A takes advantage of the Act.

(h.) An estate is bequeathed to A if he shall pay 500 rupees to B. A's interest in the bequest is contingent until he has paid 500 rupees to B.

(i.) A leaves his farm of Sultānpur Khurd to B, if B shall convey his own farm of Sultānpur Buzurg to C. B's interest in the bequest is contingent until he has conveyed the latter farm to C.

(j.) A fund is bequeathed to A if B shall not marry C within five years after the testator's death. A's interest in the legacy is contingent, until the condition shall be fulfilled by the expiration of the five years without B's having married C, or by the occurrence, within that period, of an event which makes the fulfilment of the condition impossible.

(k.) A fund is bequeathed to A if B shall not make any provision for him by will. The legacy is contingent until B's death.

(l.) A bequeaths to B 500 rupees a year upon his attaining the age of 18, and directs that the interest, or a competent part thereof, shall be applied for his benefit until he reaches that age. The legacy is vested.

(m.) A bequeaths to B 500 rupees when he shall attain the age of 18, and directs that a certain sum, out of another fund, shall be applied for his maintenance until he arrives at that age. The legacy is contingent.

108. Where a bequest is made only to such members of a class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy.

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PART XIV.

OF ONEROUS BEQUESTS.

109. Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully.

Onerous bequest.

Illustration.

A having shares in (X), a prosperous joint stock company, and also shares in (Y), a joint stock company in difficulties, in respect of which shares heavy calls are expected to be made, bequeaths to B all his shares in joint stock companies. B refuses to accept the shares in (Y). He forfeits the shares in (X).

110. Where a will contains two separate and independent bequests to the same person, the legatee is at liberty to accept one of them and refuse the other, although the former may be beneficial and the latter onerous.

Illustration.

A having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is higher than the house can be let for, bequeaths to B the lease and a sum of money. B refuses to accept the lease. He shall not by this refusal forfeit the money.

PART XV.

OF CONTINGENT BEQUESTS.

111. Where a legacy is given if a specified uncertain event shall happen, and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable.

Illustrations.

(a.) A legacy is bequeathed to A, and in case of his death, to B. If A survives the testator, the legacy to B does not take effect.

(b.) A legacy is bequeathed to A, and in case of his death without children, to B. If A survives the testator or dies in his lifetime leaving a child, the legacy to B does not take effect.

(c.) A legacy is bequeathed to A when and if he attains the age of 18, and in case of his death, to B. A attains the age of 18. The legacy to B does not take effect.

(d.) A legacy is bequeathed to A for life and after his death to B, and, "in case of B's death without children," to C. The words "in case of B's death without children" are to be understood as meaning in case B shall die without children during the lifetime of A.

(e.) A legacy is bequeathed to A for life, and after his death to B, and, "in case of B's death," to C. The words "in case of B's death" are to be considered as meaning "in case B shall die in the lifetime of A."

112. Where a bequest is made to such of certain persons as shall be surviving at some period but the exact period is not specified, the legacy shall go to such of them as shall be alive at the time of payment or distribution, unless a contrary intention appear by the will.

Illustrations.

(a.) Property is bequeathed to A and B, to be equally divided between them, or to the survivor of them. If both A and B survive the testator, the legacy is equally divided between them. If A dies before the testator, and B survives the testator, it goes to B.

(b.) Property is bequeathed to A for life, and after his death to B and C, to be equally divided between them, or to the survivor of them. B dies during the life of A; C survives A. At A's death the legacy goes to C.

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The Khojá Succession Bill, 1884.
(Schedule.—Portions of the Indian Succession Act (X of 1865) modified for application to Wills made by Khojás.)

(d.) Property is bequeathed to A for life, and after his death to B and C, with a direction that, in case either of them dies in the lifetime of A, the whole shall go to the survivor. B dies in the lifetime of A. Afterwards C dies in the lifetime of A. The legacy goes to the representative of C.

PART XVI.

OF CONDITIONAL BEQUESTS.

Bequest upon impossible condition. 113. A bequest upon an impossible condition is void.

Illustrations.

(a.) An estate is bequeathed to A on condition that he shall walk one hundred miles in an hour. The bequest is void.

(b.) A bequeaths 500 rupees to B on condition that he shall marry A's daughter. A's daughter was dead at the date of the will. The bequest is void.

114. A bequest upon a condition the fulfilment of which would be contrary to law or to morality is void.

Bequest upon illegal or immoral condition.

Illustrations.

(a.) A bequeaths 500 rupees to B on condition that he shall murder C. The bequest is void.

(b.) A bequeaths 5,000 rupees to his niece if she will desert her husband. The bequest is void.

115. Where a will imposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed, the condition shall be considered to have been fulfilled if it has been substantially complied with.

Illustrations.

(a.) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C, D and E. A marries with the written consent of B. C is present at the marriage. D sends a present to A previous to the marriage. E has been personally informed by A of his intentions, and has made no objection. A has fulfilled the condition.

(b.) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. D dies. A marries with the consent of B and C. A has fulfilled the condition.

(c.) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries in the lifetime of B, C and D, with the consent of B and C only. A has not fulfilled the condition.

(d.) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A obtains the unconditional assent of B, C and D to his marriage with E. Afterwards B, C and D capriciously retract their consent. A marries E. A has fulfilled the condition.

(e.) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries without the consent of B, C and D, but obtains their consent after the marriage. A has not fulfilled the condition.

(f.) A makes his will, whereby he bequeaths a sum of money to B if B shall marry with the consent of A's executors. B marries during the lifetime of A, and A afterwards expresses his approbation of the marriage. A dies. The bequest to B takes effect.

(g.) A legacy is bequeathed to A if he executes a certain document within a time specified in the will. The document is executed by A within a reasonable time, but not within the time specified in the will.

A has not performed the condition, and is not entitled to receive the legacy.

116. Where there is a bequest to one person and a bequest of the same thing to another, if the failure of prior bequest, to B, the prior bequest shall fail, the second bequest shall take effect upon the failure of the prior bequest, although the failure may not have occurred in the manner contemplated by the testator.

Illustrations.

(a.) A bequeaths a sum of money to his own children surviving him, and if they all die under 18, to B. A dies without having ever had a child. The bequest to B takes effect.

(b.) A bequeaths a sum of money to B, on condition that he shall execute a certain document within three months after A's death, and if he should neglect to do so, to C. B dies in the testator's lifetime. The bequest to C takes effect.

117. Where the will shows an intention that the second bequest shall take effect only in the event of the first bequest failing in a particular manner, the second bequest shall not take effect unless the prior bequest fails in that particular manner.

Illustration.

A makes a bequest to his wife, but in case she should die in his lifetime, bequeaths to B that which he had bequeathed to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The bequest to B does not take effect.

118. A bequest may be made to any person with the condition superadded that in case a specified uncertain event shall happen, the thing bequeathed shall go to another person; or, that in case a specified uncertain event shall not happen, the thing bequeathed shall go over to another person.

In each case the ulterior bequest is subject to the rules contained in sections 107, 108, 109, 110, 111, 112, 113, 114, 116, 117.

Illustrations.

(a.) A sum of money is bequeathed to A, to be paid to him at the age of 18, and if he shall die before he attains that age, to B. A takes a vested interest in the legacy, subject to be divested and to go to B in case A shall die under 18.

(b.) An estate is bequeathed to A with a proviso that, if A shall dispute the competency of the testator to make a will, the estate shall go to B. A disputes the competency of the testator to make a will. The estate goes to B.

* * * * *

(d.) A sum of money is bequeathed to A and B, and if either should die during the life of C, then to the survivor living at the death of C. A and B die before C. The gift over cannot take effect, but the representative of A takes one-half of the money and the representative of B takes the other half.

(e.) A bequeaths to B the interest of a fund for life, and directs the fund to be divided, at her death, equally among her three children, or such of them as shall be living at her death. All the children of B die in B's lifetime. The bequest over cannot take effect, but the interests of the children pass to their representatives.

The Khojá Succession Bill, 1884.
(Schedule.—Portions of the Indian Succession Act (X of 1865) modified for application to Wills made by Khojás.)

119. An ulterior bequest of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Illustrations.

(a) A legacy is bequeathed to A, with a proviso that, if he marries without the consent of B, C and D, the legacy shall go to E. D dies. Even if A marries without the consent of B and C, the gift to E does not take effect.

(b) A legacy is bequeathed to A, with a proviso that, if he marries without the consent of B, the legacy shall go to C. A marries with the consent of B. He afterwards becomes a widower and marries again without the consent of B. The bequest to C does not take effect.

(c) A legacy is bequeathed to A, to be paid at 18, or marriage, with a proviso that, if A dies under 18, or marries without the consent of B, the legacy shall go to C. A marries under 18, without the consent of B. The bequest to C takes effect.

120. If the ulterior bequest be not valid, the original bequest is not affected by its invalidity.

Illustrations.

(a.) An estate is bequeathed to A for his life, with a condition superadded that if he shall not on a given day walk 100 miles in an hour, the estate shall go to B. The condition being void, A retains his estate as if no condition had been inserted in the will.

(b.) An estate is bequeathed to A for her life, and if she do not desert her husband, to B. A is entitled to the estate during her life as if no condition had been inserted in the will.

(c.) An estate is bequeathed to A for life, and, if he marries, to the eldest son of B for life. B, at the date of the testator's death, had not had a son. The bequest over is void under section 92, and A is entitled to the estate during his life.

121. A bequest may be made with the condition superadded that it shall cease to have effect in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations.

(a.) An estate is bequeathed to A for his life, with a proviso that, in case he shall cut down a certain wood, the bequest shall cease to have any effect. A cuts down the wood; he loses his life-interest in the estate.

(b.) An estate is bequeathed to A, provided that, if he marries under the age of 25 without the consent of the executors named in the will, the estate shall cease to belong to him. A marries under 25 without the consent of the executors. The estate ceases to belong to him.

(c.) An estate is bequeathed to A, provided that, if he shall not go to England within three years after the testator's death, his interest in the estate shall cease. A does not go to England within the time prescribed. His interest in the estate ceases.

(d.) An estate is bequeathed to A, with a proviso that, if she becomes a nun, she shall cease to have any interest in the estate. A becomes a nun. She loses her interest under the will.

(e.) A fund is bequeathed to A for life, and after his death to B, if B shall be then living, with a proviso that, if B shall become a nun, the bequest to her

shall cease to have any effect. B becomes a nun in the lifetime of A. She thereby loses her contingent interest in the fund.

122. In order that a condition that a bequest shall cease to have effect may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of a bequest as contemplated by the one hundred and seventh section.

123. Where a bequest is made with a condition superadded that, unless the legatee shall perform a certain act, the subject-matter of the bequest shall go to another person, or the bequest shall cease to have effect, but no time is specified for the performance of the act, if the legatee takes any step which renders impossible or indefinitely postpones the performance of the act required, the legacy shall go as if the legatee had died without performing such act.

Illustrations.

(a.) A bequest is made to A with a proviso that, unless he enters the army, the legacy shall go over to B. A takes holy orders, and thereby renders it impossible that he should fulfil the condition. B is entitled to receive the legacy.

(b.) A bequest is made to A with a proviso that it shall cease to have any effect if he does not marry B's daughter. A marries a stranger, and thereby indefinitely postpones the fulfilment of the condition. The bequest ceases to have effect.

124. Where the will requires an act to be performed by the legatee precedent or subsequent, within a specified time, either as a condition to be fulfilled before the legacy is enjoyed or as a condition upon the non-fulfilment of which the subject-matter of the bequest is to go over to another person, or the bequest is to cease to have effect, the act must be performed within the time specified, unless the performance of it be prevented by fraud, in which case such further time shall be allowed as shall be requisite to make up for the delay caused by such fraud.

PART XVII.

Of Bequests with directions as to application or enjoyment.

125. Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction.

Illustration.

A sum of money is bequeathed towards purchasing a country-residence for A, or to purchase an annuity for A, or to purchase a commission in the army for A, or to place A in any business. A chooses to receive the legacy in money. He is entitled to do so.

The Khojá Succession Bill, 1884.
(Schedule.—Portions of the Indian Succession Act (X of 1865) modified for application to Wills made by Khojás.)

126. Where a testator absolutely bequeaths a fund, so as to sever it from his own estate, but directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified benefit for the legatee; if that benefit cannot be obtained for the legatee, the fund belongs to him as if the will had contained no such direction.

127. Where a testator does not absolutely bequeath a fund so as to sever it from his own estate, but gives it for certain purposes and part of those purposes cannot be fulfilled, the fund, or so much of it as has not been exhausted upon the objects contemplated by the will, remains a part of the estate of the testator.

PART XVIII.

Of Bequests to an Executor.

128. If a legatee is bequeathed to a person who is named an executor of the will, he shall not take the legacy unless he proves the will or otherwise manifests an intention to act as executor.

Illustration.

A legacy is given to A, who is named an executor. A orders the funeral according to the directions contained in the will, and dies a few days after the testator, without having proved the will. A has manifested an intention to act as executor.

PART XIX.

Of Specific Legacies.

129. Where a testator bequeaths to any person a specified part of his property, which is distinguished from all other parts of his property, the legacy is said to be specific.

Illustrations.

- (a.) A bequeaths to B—
- “the diamond-ring presented to him by C:”
 - “his gold chain:”
 - “a certain bale of wool:”
 - “a certain piece of cloth:”
 - “all his household-goods, which shall be in or about his dwelling-house in M Street, in Calcutta, at the time of his death:”
 - “the sum of 1,000 rupees in a certain chest:”
 - “the debt which B owes him:”
 - “all his bills, bonds and securities belonging to him lying in his lodgings in Calcutta:”
 - “all his furniture in his house in Calcutta:”
 - “all his goods on board a certain ship then lying in the river Hughly:”
 - “2,000 rupees which he has in the hands of C:”
 - “the money due to him on the bond of D:”
 - “his mortgage on the Rámpur factory:”
 - “one-half of the money owing to him on his mortgage of Rámpur factory:”
 - “1,000 rupees being part of a debt due to him from C:”

“his capital stock of 1,000l. in East India stock:”

“his promissory notes of the Government of India for 10,000 rupees in their 4 per cent. loan:”

“all such sums of money as his executors may, after his death, receive in respect of the debt due to him from the insolvent firm of D and Company:”

“all the wine which he may have in his cellar at the time of his death:”

“such of his horses as B may select:”

“all his shares in the Bank of Bengal:”

“all the shares in the Bank of Bengal which he may possess at the time of his death:”

“all the money which he has in the 5½ per cent. loan of the Government of India:”

“all the Government-securities he shall be entitled to at the time of his decease:”

Each of these legacies is specific.

(b.) A having Government promissory notes for 10,000 rupees, bequeaths to his executors “Government promissory notes for 10,000 rupees in trust to sell” for the benefit of B.

The legacy is specific.

(c.) A having property at Benares, and also in other places, bequeaths to B all his property at Benares.

The legacy is specific.

(d.) A bequeaths to B—

- his house in Calcutta:
- his zamindari of Rámpur:
- his taluq of Rámnagar:
- his lease of the indigo-factory of Salkya:
- an annuity of 500 rupees out of the rents of his zamindari of W.

A directs his zamindari of X to be sold, and the proceeds to be invested for the benefit of B.

Each of these bequests is specific.

(e.) A by his will charges his zamindari of Y with an annuity of 1,000 rupees to C during his life, and subject to this charge he bequeaths the zamindari to D. Each of these bequests is specific.

(f.) A bequeaths a sum of money—

- to buy a house in Calcutta for B:
- to buy an estate in zila Faridpur for B:
- to buy a diamond-ring for B:
- to buy a horse for B:
- to be invested in shares in the Bank of Bengal for B:
- to be invested in Government-securities for B.

A bequeaths to B—

- “a diamond-ring:”
- “a horse:”
- “10,000 rupees worth of Government securities:”
- “an annuity of 500 rupees:”
- “2,000 rupees, to be paid in cash:”
- “so much money as will produce 5,000 rupees 4 per cent. Government-securities:”

These bequests are not specific.

(g.) A, having property in England and property in India, bequeaths a legacy to B, and directs that it shall be paid out of the property which he may leave in India. He also bequeaths a legacy to C, and directs that it shall be paid out of the property which he may leave in England.

No one of these legacies is specific.

130. Where a sum certain is bequeathed, the legacy is not specific where stocks, &c., in which merely because the invested are described. stocks, funds or securi-

The Khojá Succession Bill, 1884.
(Schedule.—Portions of the Indian Succession Act (X of 1865) modified for application to Wills made by Khojás.)

ties in which it is invested are described in the will.

Illustration.

A bequeaths to B—

“10,000 rupees of his funded property :”

“10,000 rupees of his property now invested in shares of the East Indian Railway Company :”

“10,000 rupees at present secured by mortgage of Rámpur factory.”

No one of these legacies is specific.

131. Where a bequest is made in general terms of a certain amount of any kind of stock, the legacy is not specific merely because the testator was, at the date of his will,

Bequest of stock where testator had, at date of will, equal or greater amount of stock of same kind.

possessed of stock of the specified kind, to an equal or greater amount than the amount bequeathed.

Illustrations.

A bequeaths to B 5,000 rupees 5 per cent. Government-securities. A had at the date of the will five per cent. Government-securities for 5,000 rupees.

The legacy is not specific.

132. A money-legacy is not specific merely because the will directs

Bequest of money where not payable until part of testator's property disposed of in certain way.

its payment to be postponed until some part of the property of the testator shall have been reduced

to a certain form, or remitted to a certain place.

Illustrations.

A bequeaths to B 10,000 rupees, and directs that this legacy shall be paid as soon as A's property in India shall be realized in England.

The legacy is not specific.

133. Where a will contains a bequest of the residue of the testator's property along with an enumeration of some items of property not previously bequeathed, the articles enumerated shall not be deemed to be specifically bequeathed.

* * * * *

136. If there be a deficiency of assets to pay legacies, a specific legacy is not liable to abate with the general legacies.

When enumerated articles not deemed specifically bequeathed.

PART XX.

Of Demonstrative Legacies.

137. Where a testator bequeaths a certain sum of money, or a certain quantity of any other commodity, and refers to a particular fund or stock so as to constitute the same the primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative.

Explanation.—The distinction between a specific legacy and a demonstrative legacy consists in this, that—

where specified property is given to the legatee, the legacy is specific ;

where the legacy is directed to be paid out of specified property, it is demonstrative.

Illustrations.

(a.) A bequeaths to B 1,000 rupees, being part of a debt due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. The legacy to B is specific ; the legacy to C is demonstrative.

(b.) A bequeaths to B—

“ten bushels of the corn which shall grow in his field of Greenacre :”

“80 chests of the indigo which shall be made at his factory of Rámpur :”

“10,000 rupees out of his five per cent. promissory notes of the Government of India :”

“an annuity of 500 rupees “from his funded property :”

“1,000 rupees out of the sum of 2,000 rupees due to him by C.”

A bequeaths to B an annuity, and directs it to be paid out of the rents arising from his taluq of Rámnagar.

A bequeaths to B—

“10,000 rupees out of his estate at Rámnagar,”

or charges it on his estate at Rámnagar :

“10,000 rupees, being his share of the capital embarked in a certain business.”

Each of these bequests is demonstrative.

138. Where a portion of a fund is specifically

bequeathed and a legacy directed to be paid out of fund the subject of specific legacy.

is directed to be paid out of the same fund, the portion specifically bequeathed shall first be paid to the legatee, and the demonstrative legacy shall be paid out of the residue of the fund, and, so far as the residue shall be deficient, out of the general assets of the testator.

Illustration.

A bequeaths to B 1,000 rupees, being part of a debt due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. The debt due to A from W. is only 1,500 rupees ; of these 1,500 rupees, 1,000 rupees belong to B, and 500 rupees are to be paid to C. C is also to receive 500 rupees out of the general assets of the testator.

PART XXI.

Of Ademption of Legacies.

139. If anything which has been specifically bequeathed does not belong to the testator at the time of his death or has been converted into property of a different kind, the legacy is adeemed ; that is, it cannot take effect by reason of the subject-matter having been withdrawn from the operation of the will.

Illustrations.

(a.) A bequeaths to B—

“the diamond-ring presented to him by C :”

“his gold chain :”

“a certain bale of wool :”

“a certain piece of cloth :”

“all his household-goods which shall be in or about his dwelling-house in M Street, in Calcutta, at the time of his death.”

A, in his lifetime,

sells or gives away the ring :

converts the chain into a cup :

converts the wool into cloth :

makes the cloth into a garment :

takes another house into which he removes all his goods.

The Khojá Succession Bill, 1884.

(Schedule.—Portions of the Indian Succession Act (X of 1865) modified for application to Wills made by Khojás).

Each of these legacies is adeemed.

(b.) A bequeaths to B—
“the sum of 1,000 rupees in a certain chest :”
“all the horses in his stable.”

At the death of A, no money is found in the chest, and no horses in the stable.

The legacies are adeemed.

(c.) A bequeaths to B certain bales of goods. A takes the goods with him on a voyage. The ship and goods are lost at sea, and A is drowned.

The legacy is adeemed.

140. A demonstrative legacy is not adeemed

Non-ademption of demonstrative legacy. by reason that the property on which it is charged by the will does not exist at the time of the death of the testator, or has been converted into property of a different kind; but it shall in such case be paid out of the general assets of the testator.

141. Where the thing specifically bequeathed

Ademption of specific bequest of right to receive something from third party. is the right to receive something of value from a third party, and the testator himself receives it, the bequest is adeemed.

Illustrations.

(a.) A bequeaths to B—
“the debt which C owes him :”
“2,000 rupees which he has in the hands of D :”
“the money due to him on the bond of E :”
“his mortgage on the Rámpur factory.”

All these debts are extinguished in A's lifetime, some with and some without his consent, All the legacies are adeemed.

(b.) A bequeaths to B—
“his interest in certain policies of life-
assurance.”

A in his lifetime receives the amount of the policies. The legacy is adeemed.

142. The receipt by the testator of a part of

Ademption *pro tanto* by testator's receipt of part of entire thing specifically bequeathed. an entire thing specifically bequeathed shall operate as an ademption of the legacy to the extent of the sum received.

Illustration.

A bequeaths to B “the debt due to him by C.” The debt amounts to 10,000 rupees. C pays to A 5,000 rupees, the one-half of the debt. The legacy is revoked by ademption, so far as regards the 5,000 rupees received by A.

143. If a portion of an entire fund or stock

Ademption *pro tanto* by testator's receipt of portion of entire fund of which portion has been specifically bequeathed. be specifically bequeathed, the receipt by the testator of a portion of the fund or stock shall operate as an ademption only to the extent of the amount so received; and the residue of the fund or stock shall be applicable to the discharge of the specific legacy.

Illustration.

A bequeaths to B one-half of the sum of 10,000 rupees due to him from W. A in his lifetime receives 6,000 rupees, part of the 10,000 rupees. The 4,000 rupees which are due from W to A at the time of his death belong to B under the specific bequest.

VI.—12-6

144. Where a portion of a fund is specifically

Order of payment where portion of fund specifically bequeathed to one legatee, and legacy charged on same fund to another, and testator having received portion of that fund, remainder insufficient to pay both legacies. bequeathed to one legatee, and a legacy charged on the same fund is bequeathed to another legatee, if the testator receives a portion of that fund, and the remainder of the fund is insufficient to pay both the specific and the demonstrative legacy, the specific legacy shall be paid first, and the residue (if any) of the fund shall be applied so far as it will extend in payment of the demonstrative legacy, and the rest of the demonstrative legacy shall be paid out of the general assets of the testator.

Illustration.

A bequeaths to B 1,000 rupees, part of the debt of 2,000 rupees due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. A afterwards receives 500 rupees, part of that debt, and dies leaving only 1,500 rupees due to him from W. Of these 1,500 rupees, 1,000 rupees belong to B, and 500 rupees are to be paid to C. C is also to receive 500 rupees out of the general assets of the testator.

145. Where stock which has been specifically

Ademption where stock specifically bequeathed, does not exist at testator's death. bequeathed does not exist at the testator's death, the legacy is adeemed.

Illustration.

A bequeaths to B—
“his capital stock of 1,000l. in East India Stock :”
“his promissory notes of the Government of India for 10,000 rupees in their 4 per cent. loan.”

A sells the stock and the notes. The legacies are adeemed.

146. Where stock which has been specifically

Ademption *pro tanto* where stock, specifically bequeathed, exists in part only at testator's death. bequeathed does only in part exist at the testator's death, the legacy is adeemed so far as regards that part of the stock which has ceased to exist.

Illustration.

A bequeaths to B—
“his 10,000 rupees in the 5½ per cent. loan of the Government of India.”
A sells one-half of his 10,000 rupees in the loan in question.

One-half of the legacy is adeemed.

147. A specific bequest of goods under a

Non-ademption of specific bequest of goods described as connected with certain place, by reason of removal. description connecting them with a certain place is not adeemed by reason that they have been removed from such place from any temporary cause, or by fraud or without the knowledge or sanction of the testator.

Illustrations.

A bequeaths to B “all his household goods which shall be in or about his dwelling-house in Calcutta at the time of his death.” The goods are removed from the house to save them from fire. A dies before they are brought back.

The Khojá Succession Bill, 1884.

(Schedule.—Portions of the Indian Succession Act (X of 1865) modified for application to Wills made by Khojás.)

A bequeaths to B "all his household goods which shall be in or about his dwelling-house in Calcutta at the time of his death." During A's absence upon a journey, the whole of the goods are removed from the house. A dies without having sanctioned their removal.

Neither of these legacies is adeemed.

148. The removal of the thing bequeathed from the place in which it is stated in the will to be situated does not constitute an ademption where the place is only referred to in order to complete the description of what the testator meant to bequeath.

Illustrations.

A bequeaths to B all the bills, bonds and other securities for money belonging to him then lying in his lodgings in Calcutta. At the time of his death these effects had been removed from his lodgings in Calcutta.

A bequeaths to B all his furniture then in his house in Calcutta. The testator has a house at Calcutta and another at Chinsurah, in which he lives alternately, being possessed of one set of furniture only, which he removes with himself to each house. At the time of his death the furniture is in the house at Chinsurah.

A bequeaths to B all his goods on board a certain ship then lying in the river Hugli. The goods are removed by A's directions to a warehouse, in which they remain at the time of A's death.

No one of these legacies is revoked by ademption.

149. Where the thing bequeathed is not the right to receive something of value from a third person, but the money or other commodity which shall be received from the third person by the testator himself, or by his representatives, the receipt of such sum of money or other commodity by the testator shall not constitute an ademption;

but if he mixes it up with the general mass of his property, the legacy is adeemed.

Illustration.

A bequeaths to B whatever sum may be received from his claim on C. A receives the whole of his claim on C and sets it apart from the general mass of his property. The legacy is not adeemed.

150. Where a thing specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change takes place by operation of law or in the course of execution of the provisions of any legal instrument under which the thing bequeathed was held, the legacy is not adeemed by reason of such change.

Illustrations.

A bequeaths to B "all the money which he has in the 5½ per cent. loan of the Government of India."

The securities for the 5½ per cent. loan are converted during A's lifetime into 5 per cent. stock.

A bequeaths to B the sum of 2,000*l.*, invested in consols in the names of trustees for A.

The sum of 2,000*l.* is transferred by the trustees into A's own name.

A bequeaths to B the sum of 10,000 rupees in promissory notes of the Government of India which he

has power under his marriage-settlement to dispose of by will. Afterwards in A's lifetime, the fund is converted into consols by virtue of an authority contained in the settlement.

No one of these legacies has been adeemed.

151. Where a thing specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change takes place without the knowledge or sanction of the testator, the legacy is not adeemed.

Change of subject without testator's knowledge.

Illustration.

A bequeaths to B "all his 3 per cent. consols." The consols are, without A's knowledge, sold by his agent, and the proceeds converted into East India stock. This legacy is not adeemed.

152. Where stock specifically bequeathed is lent to a third party on condition that it be replaced, and it is replaced accordingly, the legacy is not adeemed.

Stock specifically bequeathed lent to third party on condition that it be replaced.

153. Where stock specifically bequeathed is sold, and an equal quantity of the same stock is afterwards purchased and belongs to the testator at his death, the legacy is not adeemed.

Stock specifically bequeathed, sold but replaced and belonging to testator at his death.

PART XXII.

Of the Payment of Liabilities in respect of the subject of a Bequest.

154. Where property specifically bequeathed is subject at the death of the testator to any pledge, lien or incumbrance, created by the testator himself or by any person under whom he claims, then, unless a contrary intention appears by the will, the legatee, if he accepts the bequest, shall accept it subject to such pledge or incumbrance, and shall (as between himself and the testator's estate) be liable to make good the amount of such pledge or incumbrance.

Non-liability of executor to exonerate specific legatees.

A contrary intention shall not be inferred from any direction which the will may contain for the payment of the testator's debts generally.

Explanation.—A periodical payment in the nature of land-revenue or in the nature of rent is not such an incumbrance as is contemplated by this section.

Illustrations.

(a.) A bequeaths to B the diamond-ring given him by C. At A's death the ring is held in pawn by D, to whom it has been pledged by A. It is the duty of A's executors, if the state of the testator's assets will allow them, to allow B to redeem the ring.

(b.) A bequeaths to B a zamindári which at A's death is subject to a mortgage for 10,000 rupees, and the whole of the principal sum, together with interest to the amount of 1,000 rupees, is due at A's death. B, if he accepts the bequest, accepts it subject to this charge, and is liable, as between himself and A's estate, to pay the sum of 11,000 rupees thus due.

The Khejā Succession Bill, 1884.

(Schedule.—Portions of the Indian Succession Act (X of 1865) modified for application to Wills made by Khejās.)

155. Where anything is to be done to complete the testator's title to the thing bequeathed, it is to be done at the cost of the testator's estate.

Completion of testator's title to things bequeathed to be at cost of his estate.

Illustrations.

(a.) A, having contracted in general terms for the purchase of a piece of land at a certain price, bequeaths it to B, and dies before he has paid the purchase money. The purchase-money must be made good out of A's assets.

(b.) A having contracted for the purchase of a piece of land for a certain sum of money, one-half of which is to be paid down, and the other half secured by mortgage of the land, bequeaths it to B, and dies before he has paid or secured any part of the purchase-money. One-half of the purchase-money must be paid out of A's assets.

156. Where there is a bequest of any interest in immoveable property, in respect of which payment in the nature of land-revenue or in the nature of rent has to be made periodically, the estate of the testator shall (as between such estate and the legatee) make good such payments or a proportion of them up to the day of his death.

Exoneration of legatee's immoveable property for which land-revenue or rent payable periodically.

in immoveable property, in respect of which payment in the nature of land-revenue or in the nature of rent has to be

Illustration.

A bequeaths to B a house, in respect of which 365 rupees are payable annually by way of rent. A pays his rent at the usual time, and dies 25 days after. A's estate shall make good 25 rupees in respect of the rent.

157. In the absence of any direction in the will where there is a specific bequest of stock in a joint stock company, if any call or other payment is due from the testator at the time of his death in respect of such stock, such call or payment shall, as between the testator's estate and the legatee, be borne by such estate;

but if any call or other payment shall, after the testator's death, become due in respect of such stock, the same shall, as between the testator's estate and the legatee, be borne by the legatee if he accept the bequest.

Illustrations.

(a.) A bequeathed to B his shares in a certain railway. At A's death there was due from him the sum of 5*l.* in respect of each share, being the amount of a call which had been duly made, and the sum of 5*s.* in respect of each share, being the amount of interest which had accrued due in respect of the call. These payments must be borne by A's estate.

(b.) A has agreed to take 50 shares in an intended joint stock company, and has contracted to pay up 5*l.* in respect of each share, which sum must be paid before his title to the shares can be completed. A bequeaths these shares to B. The estate of A must make good the payments which were necessary to complete A's title.

(c.) A bequeaths to B his shares in a certain railway. B accepts the legacy. After A's death, a call is made in respect of the shares. B must pay the call.

(d.) A bequeaths to B his shares in a joint stock company. B accepts the bequest. Afterwards the

affairs of the company are wound up and each shareholder is called upon for contribution. The amount of the contribution must be borne by the legatee.

(e.) A is the owner of ten shares in a railway company. At a meeting held during his lifetime a call is made of 3*l.* per share payable by three instalments. A bequeaths his shares to B, and dies between the day fixed for the payment of the first and the day fixed for the payment of the second instalment and without having paid the first instalment. A's estate must pay the first instalment, and B, if he accepts the legacy, must pay the remaining instalments.

PART XXIII.

Of Bequests of Things described in general terms.

158. If there be a bequest of something described in general terms, the executor must purchase for the legatee what may reasonably be considered to answer the description.

Bequest of thing described in general terms.

the executor must purchase for the legatee

Illustrations.

(a.) A bequeaths to B "a pair of carriage-horses, or a diamond-ring. The executor must provide the legatee with such articles, if the state of the assets will allow it.

(b.) A bequeaths to B "his pair of carriage-horses." A had no carriage-horses at the time of his death. The legacy fails.

PART XXIV.

Of Bequests of the Interest or Produce of a Fund.

159. Where the interest or produce of a fund is bequeathed to any person, and the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration, the principal as well as the interest shall belong to the legatee.

Bequest of interest or produce of fund.

son, and the will affords no indication of an intention

Illustrations.

(a.) A bequeaths to B the interest of his five per cent. promissory notes of the Government of India. There is no other clause in the will affecting those securities. B is entitled to A's five per cent. promissory notes of the Government of India.

(b.) A bequeaths the interest of his 5½ per cent. promissory notes of the Government of India to B for his life, and after his death to C. B is entitled to the interest of the notes during his life and C is entitled to the notes upon B's death.

(c.) A bequeaths to B the rents of his lands at X. B is entitled to the lands.

PART XXV.

Of Bequests of Annuities.

160. Where an annuity is created by will, the legatee is entitled to receive it for his life only unless a contrary intention appears by the will. And this rule shall not be varied by the circumstance that the annuity is directed to be paid out of the property generally, or that a sum of money is bequeathed to be invested in the purchase of it.

Annuity created by will payable for life only, unless contrary intention appears by will.

the legatee is entitled to receive it for his life only unless a contrary intention appears by the

Illustrations.

(a.) A bequeaths to B 500 rupees a year. B is entitled during his life to receive the annual sum of 500 rupees.

The Khojá Succession Bill, 1884.

(Schedule.—Portions of the Indian Succession Act (X of 1865) modified for application to Wills made by Khojás.)

(b.) A bequeaths to B the sum of 500 rupees monthly. B is entitled during his life to receive the sum of 500 rupees every month.

(c.) A bequeaths an annuity of 500 rupees to B for life, and on B's death to C. B is entitled to an annuity of 500 rupees during his life. C, if he survives B, is entitled to an annuity of 500 rupees from B's death until his own death.

161. Where the will directs that an annuity shall be provided for any person out of the proceeds of property, or out of property generally, or where money bequeathed to be invested in purchase of annuity. Period of vesting where will directs that annuity be provided out of proceeds of property, or out of property generally, or where money bequeathed to be invested in purchase of annuity. shall be provided for any person out of the proceeds of property, or out of property generally, or where money is bequeathed to be invested in the purchase of any annuity for any person, on the testator's death the legacy vests in interest in the legatee, and he is entitled at his option to have an annuity purchased for him or to receive the money appropriated for that purpose by the will.

Illustrations.

(a.) A by his will directs that his executors shall out of his property purchase an annuity of 1,000 rupees for B. B is entitled at his option to have an annuity of 1,000 rupees for his life purchased for him, or to receive such a sum as will be sufficient for the purchase of such an annuity.

(b.) A bequeaths a fund to B for his life, and directs that after B's death it shall be laid out in the purchase of an annuity for C. B and C survive the testators. C dies in B's lifetime. On B's death the fund belongs to the representative of C.

162. Where an annuity is bequeathed, but the assets of the testator are not sufficient to pay all the legacies given by the will, the annuity shall abate in the same proportion as the other pecuniary legacies given by the will. Abatement of annuity.

163. Where there is a gift of an annuity and residuary gift, the whole of the annuity is to be satisfied before any part of the residue is paid to the residuary legatee, and, if necessary, the capital of the testator's estate shall be applied for that purpose. Where gift of annuity and residuary gift, whole annuity to be first satisfied.

PART XXVI.

Of Legacies to Creditors and Portioners.

164. Where a debtor bequeaths a legacy to his creditor, and it does not appear from the will that the legacy is meant as a satisfaction of the debt, the creditor shall be entitled to the legacy as well as to the amount of the debt. Creditor *primâ facie* entitled to legacy as well as debt.

165. Where a parent, who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child, and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy as well as the portion. Child *primâ facie* entitled to legacy as well as portion.

Illustration.

A, by articles entered into in contemplation of his marriage with B, covenanted that he would pay to each of the daughters of the intended marriage a portion of 20,000 rupees on her marriage. This

covenant having been broken, A bequeaths 20,000 rupees to each of the married daughters of himself and B. The legatees are entitled to the benefit of this bequest in addition to their portions.

166. No bequest shall be wholly or partially adeemed by a subsequent provision made by settlement or otherwise for the legatee. No ademption by subsequent provision for legatee.

Illustrations.

(a.) A bequeaths 20,000 rupees to his son B. He afterwards gives to B the sum of 20,000 rupees. The legacy is not thereby adeemed.

(b.) A bequeaths 40,000 rupees to B, his orphan-niece, whom he had brought up from her infancy. Afterwards on the occasion of B's marriage, A settles upon her the sum of 30,000 rupees. The legacy is not thereby diminished.

PART XXVII.

Of Election.

167. Where a man, by his will, professes to dispose of something which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and in the latter case he shall give up any benefits which may have been provided for him by the will. Circumstances in which election takes place.

168. The interest so relinquished shall devolve as if it had not been disposed of by the will in favour of the legatee, subject, nevertheless, to the charge of making good to the disappointed legatee the amount or value of the gift attempted to be given to him by the will. Devolution of interest relinquished by owner.

169. This rule will apply whether the testator does or does not believe that which he professes to dispose of by his will to be his own. Testator's belief as to his ownership immaterial.

Illustrations.

(a.) The farm of Sultánpur was the property of C. A bequeathed it to B, giving a legacy of 1,000 rupees to C. C has elected to retain his farm of Sultánpur, which is worth 800 rupees. C forfeits his legacy of 1,000 rupees, of which 800 rupees goes to B, and the remaining 200 rupees falls into the residuary bequest, or devolves according to the rules of intestate succession, as the case may be.

(b.) A bequeaths an estate to B in case B's elder brother (who is married and has children) shall leave no issue living at his death. A also bequeaths to C a jewel, which belongs to B. B must elect to give up the jewel or to lose the estate.

(c.) A bequeaths to B 1,000 rupees, and to C an estate which will, under a settlement, belong to B if his elder brother (who is married and has children) shall leave no issue living at his death. B must elect to give up the estate, or to lose the legacy.

(d.) A, a person of the age of 18 domiciled in British India, but owning real property in England, to which C is heir-at-law, bequeaths a legacy to C, and, subject thereto, devises and bequeaths to B "all his property, whatsoever and wheresoever," and dies under 21. The real property in England does not pass by the will. C may claim his legacy without giving up the real property in England.

The Khojá Succession Bill, 1884.
(Schedule.—Portions of the Indian Succession Act (X of 1865) modified for application to Wills made by Khojás.)

170. A bequest for a man's benefit is, for the purpose of election, the same thing as a bequest made to himself.

Bequest for man's benefit how regarded for purpose of election.

Illustration.

The farm of Sultánpur Khurd being the property of B, A bequeathed it to C, and bequeathed another farm called Sultánpur Buzurg to his own executors, with a direction that it should be sold, and the proceeds applied in payment of B's debts. B must elect whether he will abide by the will, or keep his farm of Sultánpur Khurd in opposition to it.

171. A person taking no benefit directly under the will, but deriving a benefit indirectly not put to election.

Person deriving benefit indirectly not put to election.

Illustration.

The lands of Sultánpur are settled upon C for life, and after his death upon D, his only child. A bequeaths the lands of Sultánpur to B, and 1,000 rupees to C. C dies intestate, shortly after the testator, and without having made any election. D takes out administration to C, and as administrator elects on behalf of C's estate to take under the will. In that capacity he receives the legacy of 1,000 rupees, and accounts to B for the rents of the lands of Sultánpur which accrued after the death of the testator and before the death of C. In his individual character he retains the lands of Sultánpur in opposition to the will.

172. A person who in his individual capacity takes a benefit under the will may in another character elect to take in opposition to the will.

Person taking in individual capacity under will may in other character elect to take in opposition.

Illustration.

The estate of Sultánpur is settled upon A for life, and after his death upon B. A leaves the estate of Sultánpur to D, and 2,000 rupees to B, and 1,000 rupees to C, who is B's only child. B dies intestate, shortly after the testator, without having made an election. C takes out administration to B, and as administrator elects to keep the estate of Sultánpur in opposition to the will, and to relinquish the legacy of 2,000 rupees. C may do this, and yet claim his legacy of 1,000 rupees under the will.

Exception to the six last Rules.—Where a particular gift is expressed in the will to be in lieu of something belonging to the legatee, which is also in terms disposed of by the will, if the legatee claims that thing, he must relinquish the particular gift, but he is not bound to relinquish any other benefit given to him by the will.

Illustration.

Under A's marriage-settlement his wife is entitled, if she survives him, to the enjoyment of the estate of Sultánpur during her life.

A by his will bequeaths to his wife an annuity of 200*l.* during her life, in lieu of her interest in the estate of Sultánpur, which estate he bequeaths to his son. He also gives his wife a legacy of 1,000*l.* The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity, but not the legacy of 1,000*l.*

173. Acceptance of a benefit given by the will constitutes an election by the legatee to take under the will, if he has knowledge of his right to elect, and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

When acceptance of benefit given by will constitutes election to take under will.

constitutes an election by the legatee to take under the will, if he has knowledge of his right to elect, and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

Illustrations.

(a.) A is owner of an estate called Sultánpur Khurd, and has a life-interest in another estate called Sultánpur Buzurg, to which, upon his death, his son B will be absolutely entitled. The will of A gives the estate of Sultánpur Khurd to B, and the estate of Sultánpur Buzurg to C. B, in ignorance of his own right to the estate of Sultánpur Buzurg allows C to take possession of it, and enters into possession of the estate of Sultánpur Khurd. B has not confirmed the bequest of Sultánpur Buzurg to C.

(b.) B, the eldest son of A, is the possessor of an estate called Sultánpur. A bequeaths Sultánpur to C, and to B the residue of A's property. B, having been informed by A's executors that the residue will amount to 5,000 rupees allows C to take possession of Sultánpur. He afterwards discovers that the residue does not amount to more than 500 rupees. B has not confirmed the bequest of the estate of Sultánpur to C.

174. Such knowledge or waiver of inquiry shall, in the absence of evidence to the contrary, be presumed if the legatee has enjoyed for two years the benefits provided for him by the will without doing any act to express dissent.

Presumption arising from enjoyment by legatee for two years.

shall, in the absence of evidence to the contrary, be presumed if the legatee has enjoyed for two years the benefits provided for him by the will without doing any act to express dissent.

175. Such knowledge or waiver of inquiry may be inferred from any act of the legatee which renders it impossible to place the persons interested in the subject-matter of the bequest in the same condition as if such act had not been done.

Confirmation of bequest by act of legatee.

may be inferred from any act of the legatee which renders it impossible to place the persons interested in the subject-matter of the bequest in the same condition as if such act had not been done.

Illustration.

A bequeaths to B an estate to which C is entitled and to C a coal-mine. C takes possession of the mine, and exhausts it. He has thereby confirmed the bequest of the estate to B.

176. If the legatee shall not, within one year after the death of the testator, signify to the testator's representatives his intention to confirm or to dissent from the will, the representatives shall, upon the expiration of that period, require him to make his election;

When testator's representatives may call upon legatee to elect.

after the death of the testator, signify to the testator's representatives his intention to confirm or to dissent from the will, the representatives shall, upon the expiration of that period, require him to make his election;

and if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the will.

Effect of non-compliance.

and if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the will.

177. In case of disability the election shall be postponed until the disability ceases, or until the election shall be made by some competent authority.

Postponement of election in case of disability.

the election shall be postponed until the disability ceases, or until the election shall be made by some competent authority.

STATEMENT OF OBJECTS AND REASONS.

The Khojás are members of a sect which was originally Hindu but was converted to Muhammadanism about 400 years ago. They still, however, as has been more than once held by the highest Court in the Bombay Presidency, retain their former law to such an extent in matters connected with property and succession that it is to be presumed to apply to them until the contrary is shown. This state of things has at times given rise to great difficulties in litigation between Khojás.

2. In the case of *Hirbai v. Gorbai*, 12 Bombay High Court Report 294, which appears to have occupied the Lower Court for twenty-four sitting days and the Appellate Court for four days, Sir Michael Westropp, C. J., after describing the state of the law, observed as follows:—

“It is, however, evident that the Khojás are not as firmly bound in matters of succession and inheritance by the Hindu law as Muhammadans proper are by the Muhammadan law and the Hindus by the Hindu law, and hence it is that it would not be reasonable to require such stringent proof of a custom of inheritance amongst them differing from ordinary Hindu law as from a Hindu.

“Now, it is manifest that such a state of the law must greatly encourage litigation, and we cannot help thinking that it would be most desirable that the Government should take steps, as was done in the case of the Pársis, to ascertain the views of the majority of the community on the subject of succession, and should then pass an enactment giving effect to those views. Unanimity, of course, could not be expected, but the rules which were found generally to prevail might be made law; and though the religious differences existing among members of the Khojá caste might create some difficulty, it would not, we think, be insuperable.”

3. The Government of Bombay, acting upon this suggestion, appointed about the end of the year 1878 a Commission consisting of four gentlemen taken from the Shia division of the Khojás which acknowledged His Highness the late Ághá Khán as its spiritual superior, one taken from the Sunni division, and Mr. Spencer, Acting First Judge of the Court of Small Causes, with the Hon'ble Mr. Justice Melvill, of the Bombay High Court, as president.

The Commission took the greatest pains to inform themselves of the customs and views of both divisions of the Khojá sect in the Presidency of Bombay and elsewhere, and after much consideration and discussion agreed upon a draft Bill, subject to a dissent on a few specific points which was signed by His Highness Ághá Áli Sháh, son of his Highness the late Ághá Khán, and Mr. Dhurrumsey Poonjabhoy but not by Mr. Jairajbhoy Peerbhoy and Mr. Rahimtula Syanee, the two other Shia members of the Commission. That draft, having been submitted to the Government of Bombay by the president on the 23rd of December, 1879, and approved of by that Government, was forwarded to the Government of India, and forms the basis of the present Bill.

4. It will be convenient to refer to the provisions of the present Bill as nearly as possible in their order, noticing in their proper place the few points in regard to which His Highness Ághá Áli Sháh and Mr. Dhurrumsey Poonjabhoy differed from the majority of the Commission, and the points of substantive importance in which the present Bill deviates from the draft framed by the Commission.

5. The first provision calling for notice is section 2, which defines the application of the Act—a matter which was not clearly provided for in the Bill prepared by the Commission. The main enactment of the section is that succession to the property, whether moveable or immoveable, in British India of a Khojá dying on or after the first day of January, 1885, shall be regulated by the rules contained in the Act wherever he may have had his domicile at the time of his death. So far as regards immoveable property, this provision coincides with section 5 of the Indian Succession Act, but, as regards moveable property, it involves an important deviation from that section, inasmuch as it applies the Act to all successions to such property though the deceased person may have been domiciled outside British India at the time of his death.

As the rule, which makes the law of the domicile of a deceased person regulate the succession to his moveable property, is not merely the rule of the Indian Succession Act but has obtained very general acceptance elsewhere, it seems desirable to state the reasons which have led the Government of India to think that it is not suitable to the Khojá community.

6. The choice as regards succession to moveable property appears to lie between the law of the domicile of the deceased and the law of the *situs* of the assets. The objections urged against the latter in Western countries are chiefly that a man's moveables are apt to be scattered over many jurisdictions each having a readily ascertainable law of its own, and that accordingly, if the law of the *situs* is made applicable to them, his estate will be broken up into many fragments, all governed by different laws; that a man's moveables may change their place; that the most important class of them, goods employed in commerce, are constantly changing their place; and that accordingly, if the law of the *situs* is applied, it will be impossible for him to foresee the particular law under which they will fall upon his death; and lastly, that the rule of the law of the *situs* does not clearly provide for that portion of the assets which consists of debts or other obligations existing in favour of the deceased. To avoid these difficulties it has been generally agreed to adopt the law of the domicile of the deceased for the whole of his moveable estate. Various attempts have been made to rest this rule on some *á priori* principle; but it would seem to have had its actual origin in mere considerations of convenience.

7. Looking to the arguments by which it is supported, and to the peculiar circumstances of the Khojá community, it is questionable, to say the least, whether such a rule would meet the requirements of their case. The places beyond the limits of British India, as, for example, Kutch, the Persian Gulf and Zanzibar, in which any considerable number of Khojás is to be found, have no law such as can properly be called a territorial law of succession. The tribunals in such places, in so far as they make any rational attempt to apply a law at all, would apply the personal law of the parties, and that

in the case of Khojás is *ex hypothesi* altogether unsettled and unascertainable. There is thus in the case of Khojás domiciled out of British India practically speaking no law of the *situs* of the foreign assets to conflict with the law which would apply to the British Indian assets, and no law of the domicile to which recourse could be had; and, therefore, to give the law of the domicile a preference over the Indian law would be simply to substitute a congeries of indefinite and half-established customs for a law, to the application of which there could be no reasonable objection.

It may be added that, in the absence of a law of the domicile, the case is very analogous to those cases in which it is impossible to fix the domicile of the deceased, and the solution which Lord Alvanley appears to have suggested in a case of this latter class was to fall back, as is proposed in this case, on the law of the *situs* of the property; in other words, to put moveables on the same footing as immoveables.

8. If this solution is adopted, and the Indian law is applied to all moveables left by a deceased Khojá in British India, without regard to his domicile, and if, moreover, the same rule is applied, as it naturally would be, in cases arising in Consular jurisdictions in the Persian Gulf, Zanzibar and elsewhere, this further advantage will probably in time be gained, that the law in British India will come to be adopted as a personal law applicable to Khojás in all foreign States in this part of the world.

9. The above remarks apply equally to intestate and to testamentary succession. A question might indeed be raised as to whether a testamentary disposition made beyond the limits of British India should as regards its form be made absolutely subject to British Indian law; but, seeing that the effect of taking any other course would certainly be to admit oral dispositions, it seems clear that the risk of failures of justice will be on the whole less by subjecting completely to our law all dispositions, wherever made, of moveable property in British India.

10. In connection with the definitions it is convenient to notice one of the few important questions on which any difference of opinion has arisen, namely, the question as to the status to be assigned to a woman who is not a Khojá but who is legally married to a Khojá according to the rules of the Muhammadan law, and to her children by him.

The Khojás of the Sunni Jamát though apparently unwilling to go so far as to recognize any other than a Khojá widow as entitled to inherit from her husband, proposed that the sons of a Khojá by a wife who is not a Khojá should have some share in the inheritance. To this the Khojás of the Shia Jamát would not agree, and the Commission ultimately adopted as a compromise the plan of assigning to the offspring of the marriages in question a status nominally intermediate between those of legitimacy and illegitimacy and giving them in the definition-clauses the designation of "alien sons", but allowing them nothing more than illegitimate sons in the later sections of their Bill. It is stated that the Khojás as a rule are very exclusive and rarely take wives from outside their own community, and so long as this state of things continues the mode in which this point is dealt with is not of great practical moment; but there is an important principle involved, against which even the compromise adopted by the Commission appears to the Government of India to offend. The exclusion of the non-Khojá wife from inheritance and the degradation of her sons to a position altogether lower than that of the legitimate son involves a view as to restrictions on marriage which, even though it may have obtained acceptance with a majority of the Khojá sect, and though the Government has no desire to interfere with it, it is manifestly undesirable to have affirmed by the legislature. The present Bill will accordingly be found to contain no reference either in its definition clauses or elsewhere to the so-called "alien son." It defines "son" to be a legitimate son and leaves "widow" undefined, and then proceeds to declare the rights of sons and widows, trusting to the Courts to decide, as they will on principles lying outside the law of succession, who are legally entitled to the status of sons and widows.

11. Chapter II of the Bill deals with "succession to the undivided property of a male Khojá dying intestate," and in the previous chapter "undivided property" has been defined as meaning "a share in property belonging to an undivided family." The Bill prepared by the Commission purported to define the phrase "undivided family," but the definition proposed has on inquiry been found to be unsafe. The undivided family among the Khojás appears to come into existence chiefly in connection with trade, and would seem to be an institution of a peculiar nature, somewhat resembling the undivided family among the Hindus; but, on the other hand, it is clear, from the rules laid down in certain sections of the Bill prepared by the Commission, and from the papers submitted with that Bill, that it differs in important respects from the Hindu undivided family. What exactly it is, and when property is to be regarded as its undivided property, it is difficult to ascertain from the papers before the Government of India; but, judging from the analogous case in Hindu law, it would seem that these are matters which it would be almost hopeless to attempt to define in an Act of the legislature; nor does it appear to be necessary to define them in a Succession Act. It may well be assumed that a fundamental distinction which goes to the root of the family constitution, and which is not confined in its operation to matters of succession, but applies also *inter vivos*, is established outside this Bill. For these reasons, it has been thought best to make no attempt to define "undivided family" or "undivided property" in the present Bill.

12. It will be observed, on comparing Chapters II and III, that the only peculiarity connected with the intestate succession to undivided property is (section 6) that, in default of legitimate lineal male descendants of the intestate within the fourth degree, the property is equally divided among all the male members of the undivided family living at his death.

13. Chapter III of the Bill treats of "succession to the separate property of a male Khojá dying intestate," and the order of succession marked out in sections 7 to 20 will be found to be based on that of the Hindu law.

The subjoined statement has been prepared by the Hon'ble Mr. Melvill, the President of the Commission, with a view to showing at a glance the extent to which the two differ—

Order of succession according to Hindu law.

1. Sons.
2. Grandsons.
3. Great-grandsons.
4. Widow.
5. Daughters.
6. Daughters' sons.
7. Mother.
8. Father.
9. Brothers.
10. Half-brothers.
11. Brothers' sons.
12. Half-brothers' sons.
13. Grandmother.
14. Sister (under the Mayukha)
15. Grandfather.
16. More distant relatives.

Order of succession for Khojás proposed by the Bill.

1. Sons.
2. Grandsons.
3. Great-grandsons.
4. Great-great-grandsons.
5. Father.
6. Mother.
7. Widow.
8. Daughters.
9. Daughters' sons. }
10. Brothers. }
11. Sons' daughters.
12. Brothers' sons.
13. Half-brothers.
14. Half-brothers' sons.
15. Grandfather.
16. Grandmother.
17. Paternal uncle.
18. Sister.
19. More distant relatives.

"It will be seen," Mr. Melvill observes, "that the only very noticeable point of difference is that among the Khojás the father and mother are elevated to a rank in the order of succession superior to that of the widow. This precedence of the mother has been judicially settled in the case of *Hirbai v. Gorbai**, already referred to; and although the Khojá members of the

*Reported 12 Bom. H. C. Rep., 294.

Commission were not unanimously in favour of the view taken in that case, they all agreed that, having once been judicially determined, the

rule should not be disturbed."

14. Section 20 of the present Bill differs in one important particular from the corresponding section (29) of the Bill prepared by the Commission.

The latter admitted to the succession only those of the "more distant relatives" of the intestate who were on the father's side, and confined it to such of them as are within the seventh degree of kindred. On failure of this limited class of distant kindred, section 42 gave the property "to the Jamát of that sect of the Khojás to which the intestate belonged at the time of his death, to be held and applied according to the customs of the said Jamát." Even this did not satisfy the two dissenting members of the Commission and some of the other adherents of His Highness the late Aghá Khán, who, as Imám, was the person chiefly interested in the succession of the Jamát. They contended that the Jamát should come in immediately after the nearer relations.

The Government of India, after fully considering this point in communication with the local authorities, have come to the conclusion that it is impossible to exclude the heirs of a deceased person in favour of any such institution as a "Jamát," or any person or authority representing such an institution. It is open to any Khojá who desires that his property should be devoted to any charitable or religious purpose, or should be enjoyed by any spiritual person for whom he entertains a special veneration, to dispose of his property by will or otherwise in accordance with law, but, if he dies intestate, it would be contrary to all established principles to enact that his property should devolve otherwise than upon his relatives.

15. Apart from this fundamental objection in point of principle, there appear to be practical objections to the proposal as formulated by the Commission. The Jamát is said to be an assembly in council of all the adult male members of the Khojá community of the place, and it is not unlikely that doubts would arise, in connection with matters of religious belief, residence, attendance at the Jamát, and so forth, as to the particular Jamát (if any) to which the deceased person belonged. Similar doubts might also arise as to who were the other persons actually belonging to the Jamát to which the deceased belonged, so as to take the property. There might further be doubts as to how the property of a deceased intestate Khojá is to be held, and the objects to which it is to be applied. It is true that the section proposed by the Commission says that the property is to be held and applied "according to the customs of the said Jamát."

Dayá Muhammad and others versus H. H. Aghá Khán and others (page 323 of the Bombay High Court Reports, Vol. XII.)

But from a judgment of Sir J. Arnould in the case marginally noted it would appear that there are no customs to look to. Though a Jamát collects large sums of money through its officers, it only does so on behalf of the Imám; the money collected is passed on to him; and if the Jamát wants any portion of it, even for the expenses of its Jamát-kháná (the council-hall or guildhall of the community), it can procure it only as a grant from the Imám. It appears to be absolutely in the discretion of the Imám to spend the money as he pleases, and as a matter of fact he spends a large portion of it, or at least is said by Sir J. Arnould to have done so at the time the judgment was delivered, on his own private purposes. Indeed, in a set of draft rules of succession for Shia Khojás submitted by His Highness Aghá Alí Sháh the succession of the Jamát is treated as the same thing with the succession of the Imám. The Jamát, therefore, does not seem to have any property or control over property, and it is not clear how there can be any custom governing the application of property by it. It has been argued that no such difficulties as those suggested ordinarily arise at present, but it would be clearly impossible to put the succession of the Jamát on a legislative basis without defining its conditions and incidents, and it would be equally impossible to place the property at the absolute disposal of any individual in whatever degree of veneration he might be held.

16. For these reasons section 20 of the present Bill extends the succession to relatives of the intestate both on the father's and on the mother's side without limit of degree, and it may be added that section 48 applies the ordinary rule, which makes the Crown the ultimate heir, in the rare case in which an owner of property may die intestate and leave no person entitled to succeed under the previous sections.

17. Section 21 is one of the leading sections of the Bill. It provides in effect that, when a female inherits under any of the foregoing sections, she shall, if certain near male relatives are living and are thus postponed to her, take the property only as "restricted owner"—a position to be presently explained at length. With this section should be read section 49, from which it will be seen that in other cases she takes the same interest in the property and has the same powers in respect of it as if she were a male.

18. Chapter IV treats of succession to the absolute property of a female Khojá dying intestate, that is to say, the succession to such of her property as belongs to her otherwise than as restricted owner. The provisions of this chapter call for no remark. Mr. Melvill states that they differ from the Hindu law but that they are approved by all classes of the Khojás, and are not, he thinks, open to any objection. The particulars in which they deviate from the Hindu law or the reasons for the deviations are not explained. They have been accepted by the Government of India as settled by the Commission, such details only being filled in after consultation with the local authorities as seemed necessary to give effect to what is understood to be the intention of those who framed them.

19. Chapter V, which treats of "property which a female takes as restricted owner and the further succession to the same," calls for more detailed notice.

It applies not only in the ordinary case of property taken by a female as restricted owner under Chapter III (*supra*, paragraph 17), but also in cases where she may take a similar interest in property under section 23 (2), section 24 (1), section 27 and section 39.

Its provisions are merely a development, with the requisite amplifications and with the addition of the necessary machinery, of the corresponding provisions of the Bill framed by the Commission. It has been settled in consultation with the local authorities and with a view to giving effect to what are understood to be the views of the Commission; but, having regard to the novelty and complication of the subject, it is not unlikely that when subjected to criticism it will be found susceptible of improvement in many particulars.

The limited estate taken by a Khojá female under this Bill resembles the estate taken by a Hindu widow, but there are many important differences between them. Mr. Melvill observes that the Khojá female estate is the more restricted of the two, but on this point he says the Khojás hold very strong views which he is of opinion must be respected.

20. In proceeding to notice the details of the chapter, the first point calling for attention is the phrase "restricted owner." It has been chosen merely on the ground that it is new and connotes nothing, and it is not unlikely that some more appropriate phrase may be suggested. The phrase "life-estate" and its correlative "reversion," used in the Bombay Bill, are not only open to the objection that ordinarily lies against all terms imported from another legal system, but further, as has been constantly observed of them in the case of the Hindu widow's estate, they suggest an altogether false analogy. The position, if it is necessary to illustrate it by reference to English law, is rather like that of a fee-simple estate subject to an executory devise.

21. As regards the attempt made in the Bill to define the estate, it will be observed that section 28 enacts that the female shall be absolutely entitled to the use of, and the income accruing from, the property during her life, and, except as otherwise provided by the Act, shall have all the other rights and powers of an absolute owner.

An objection has been taken to this on the ground that money saved by a widow from the income of the property should not belong to her absolutely but should go to her husband's heirs.

This contention is not based on any alleged actual practice, but is put forward merely as a "necessary consequence of the invariable custom" which limits the widow's interest in the *corpus* of her husband's property to the time during which she remains unmarried.

Now, not only is it not a necessary consequence of the custom in question, but it is, as admitted by the objectors themselves, in a certain sense, illogical; for why should a person who has absolute power to dispose of the income as it comes in, in whatever way she pleases, be restricted from dealing with her savings from it?

Again, the only effect of adopting the proposed suggestion would, as the objectors themselves admit, generally be that the widow would squander the income as it came in; and, in the rare cases in which she allowed some of it to accumulate, the probability is that litigation would result from the difficulty of identifying the fund and separating it from the rest of her property. For these reasons the section has been allowed to stand.

22. Section 30 defines the obligations of the restricted owner as regards—

(a) the preservation of the substance of the property for those who are to come after her; and

(b) the protection of the title.

As regards "waste," it stands on a footing altogether peculiar in the case of the Hindu widow; and clause (a) of this section has been drawn with a view to placing it on a somewhat similar footing in the case of the restricted owner.

23. As regards the powers of alienation, in the limitations on which the restricted nature of the estate chiefly consists, the only powers of alienation for any time beyond the life of the restricted owner allowed to her by the Bill, besides a limited power of leasing conferred by section 29, are those specified in section 31, which runs as follows:—

"31. A female taking property as restricted owner shall have power to transfer the same, so that the transfer may have effect beyond her life, when, the income being insufficient, such transfer is necessary in order to raise money for any of the following purposes, namely:—

Restricted owner's power of transfer.

* Viz., obligations to preserve the substance of the property and protect the title.

"(a) to discharge any of the obligations imposed by section 30;*"

"(b) to discharge the debts of the absolute owner from whom the property descended ;

"(c) to provide for the maintenance of any persons entitled under this Act to have their maintenance provided for out of the property, for the payment of any marriage expenses or funeral expenses payable under this Act out of the property, and for the performance of any ordinary family ceremonies ; and

"(d) to support herself where she has no other sufficient means of support."

24. It has been urged by the two dissenting members of the Commission and by some other adherents of His Highness the Imám that a mother taking a restricted estate should have larger powers of alienation and that she or a widow taking a like estate should be empowered to alienate for religious objects ; that is, as explained in the set of draft rules submitted by His Highness Aghá Alf Sháh, to give the property to the Imám ; but, upon considering the arguments adduced and consulting the local authorities, the Government of India have determined to uphold the decision of the majority of the Commission, which is against the concession of any such powers.

25. In order to avoid as far as possible the great difficulties which arise in the case of a Hindu widow exceeding her power of alienation, an alienation in excess of the power has (section 29 of the Bill) been made absolutely void for any period beyond the restricted owner's life, except where the purchaser takes for consideration and without notice of the ownership being restricted. This, no doubt, standing alone, would place too great difficulties in the way of alienation ; but sufficient relief will probably be afforded by the power to apply to a Court for sanction, which is given by section 32. It may be objected that it is undesirable to force people to resort to a Court in such matters ; but the case is one of a choice of evils, and it is probably better that they should resort to the Court in every case where there is any room for doubt than run the risk of being involved in troublesome and expensive litigation later on.

A Court dealing with a application under section 32 is empowered (section 33) to accord its sanction to the transfer subject to the condition that the money thereby raised shall be paid into Court or to trustees appointed by the Court, and to give such further directions as it may think fit with a view to ensuring that the money shall be applied to the purpose for which it is raised, or that any balance that is not so applied shall be secured for the benefit of those entitled after the restricted owner.

26. It will be observed that no provision is made in the draft for alienation with the consent of the so-called "reversioners." This matter is one which gives rise to great difficulties in the case of the Hindu widow, and it seems impossible, having regard to the system of succession established by the Bill, to provide for it in any satisfactory manner. If provision had only to be made to meet the case of "reversioners" who claim under section 37 (1) and section 38 (3) by descent from the last absolute owner, the matter would be much simpler than in the case of the Hindu widow, inasmuch as these "reversioners" would always be known living persons or persons who would claim through them ; but there are, besides these, the "reversioners" mentioned in section 38 (1) and (2), and it is thus impossible to fix upon any person whose consent would be sufficient.

27. Further, even if we were, as has been suggested, to waive this objection, and accept the consent of a merely presumptive "reversioner," there is another difficulty, namely, that the presumptive "reversioner" might (see section 39 of the Bill) be another restricted owner, possibly an old woman on the verge of the grave, whose prospect of succeeding would be extremely small. There might be several such persons intervening between the restricted owner and the first person who would take as absolute owner. We could hardly rest satisfied with anything short of the consent of this last person and all the intervening ones, and thus we should be landed in a considerable complication, leading in many cases to no very satisfactory result, inasmuch as the interest of the first person who would take as absolute owner, and to whose consent we would chiefly look, would often be of a remotely contingent nature. It is, of course, on economical grounds desirable to provide a means of freeing the property from the limited ownership, but the advantage would be dearly purchased if the basis of the purchaser's title were to be complicated in this way.

28. As regards the sale of property in execution of a decree against a restricted owner, it will be seen that the effect of section 34 of the Bill is that a person lending money for any of the purposes mentioned in section 31 can sell in execution nothing more than the so-called "life-interest" of the restricted owner, unless his loan is secured by a mortgage. The position of the restricted owner as regards anything beyond her so-called life-interest is, in fact, in this particular, somewhat similar to that of an English executor with power to charge the real estate. If it were otherwise, there might arise, in cases of execution for unsecured debts, the same difficult questions which the preceding sections are intended to shut out in cases of voluntary alienation.

29. It will be observed that, by sections 37 (2) and 38 (4) of the Bill the Crown is postponed to the general heirs of the restricted owner. This appears to be right, though it is gathered from the case of *The Collector of Masulipatam v. Oavaly Vencata Narrainapah* (8 Moo. I. A. 529),—this precise point was not there decided,—that it is otherwise in the case of a Hindu woman's estate.

30. Sections 35 and 36 in effect provide that the restricted owner shall represent the property in judicial proceedings and compromises of disputes and for the purposes of laws of limitation and prescription, so as to bind those who take after her.

31. Sections 37 to 39, which regulate the devolution of property after the death of the restricted owner, have been drawn with a view to carry out what is understood to be the intentions of the Commission.

Their main provisions are that—

(a) when the restricted owner dies unmarried, the property shall belong to the person to whom it would then have belonged if she had died before the absolute owner from whom it descended and it had descended under the Act without having been alienated, and in default of such person it shall descend as if the female were not a restricted owner; and

(b) when the restricted owner has been married, the property shall on her death go to certain of her descendants, and if there are no such descendants shall devolve as just stated.

32. From section 39 it will be seen, as already observed, that property may devolve upon two or more restricted owners in succession. This is to be regretted, but it seems to be an essential part of the scheme.

33. Section 40 regulates the legal relations arising where two or more widows of a deceased Khojâ take his property together as restricted owners, and provides that there shall be a right of survivorship between them.

34. Section 41 provides that a widow marrying again after her husband's death shall not be entitled to take as restricted owner his property or any property of any of his lineal descendants which has descended to them from him, and that, if a widow taking any such property as restricted owner subsequently marries again, she shall be deemed for the purposes of certain sections of the chapter to have died. One effect of this latter provision is that the restricted ownership of the widow ceases on her re-marriage.

35. Coming now to Chapter VI, relating to the wills of Khojâs, it will be observed that all matters connected with probate and letters of administration are in the case of Khojâs, as in the case of other persons not subject to the Indian Succession Act, left to be dealt with under the Probate and Administration Act, 1881. The result of this is that the matters remaining to be provided for under this chapter are in the main the same as those which are provided for by the Hindu Wills Act, 1870, as amended by the Act just mentioned; and, as a matter of fact, the specification of the sections of the Indian Succession Act made applicable to the wills of Khojâs by this chapter is based on the specification contained in the Hindu Wills Act as cut down by the Probate and Administration Act, 1881. There are, however, some important differences between the two which call for explanation here.

36. The most important of these differences is connected with the limitation on the powers of testamentary disposition. The specification of the sections of the Indian Succession Act applicable to Hindus, &c., contained in the Hindu Wills Act comprises several sections which either confer, or assume the existence of, a power of disposition in favour of unborn persons, but the Act contains a proviso to the effect that nothing therein contained shall authorize any Hindu, &c., to create in property any interest which he could not previously have created, and the Calcutta High Court have held in the recent case of *Alangamonjori Dabee v. Sonamoni Dabee* (I. L. R. 8 Cal. 637) that the effect of that proviso is to cut down the power of disposition, which the sections in question confer or assume to exist, to the limits imposed on a testator by the Hindu law, that is to say, as held in the well-known *Tagore* case, to a mere power of disposition in favour of persons who are either in fact or in contemplation of law in existence at the death of the testator.

37. It will be seen, on reference to the report of *Alangamonjori Dabee's* case, that, though there was no difference of opinion in the Appellate Court which finally heard it, much difficulty arose from the form in which the Hindu Wills Act had been drafted, and that the learned Judge in the Court below had been led by this to take the opposite view. This being so, it was obvious that the drafting of the Hindu Wills Act could not be followed in this particular. Moreover, it was seen that to adopt this form of drafting would in a considerable number of cases expose the testamentary dispositions of Khojâs to be called in question for reasons drawn or supposed to be drawn from the extremely vague and unsettled customary law now prevailing among them, and thus the object of the present measure, which is intended to supply a definite body of law, would be to a great extent defeated. It was accordingly resolved to enact directly either that a Khojâ's power of testamentary disposition should be co-extensive with that allowed by the Indian Succession Act, or should be limited somewhat in accordance with the ruling in the *Tagore* case.

38. It was clear that the question as to which of these courses should be adopted stood on grounds altogether independent of those on which the perpetuity question among Hindus had been discussed. The considerations with reference to which it should, in the opinion of the Government of India, be decided will be best seen from the remarks made on referring it to the local authorities for opinion. It was observed that the point was one in regard to which there was no recognized definite rule among the Khojâs, and that if, having regard to the family system of that sect and its requirements in this particular, it was considered that it would be desirable to confer upon Khojâs a power of disposition as large as that conferred by the Succession Act, the Governor General in Council would be prepared to confer that power; that the circumstance that, in the absence of any other rule, the Courts presume the Hindu law to be applicable to Khojâs, and so might possibly, if the question then arose, hold a Khojâ testator limited by the rule in the *Tagore* case, ought not, in the opinion of the Governor General, in Council, to be permitted to stand in the way of such legislation. "The Government of India," it was said, "has ever been reluctant to alter, by legislation, personal laws like those of the Hindus and Muhammadans, which are definitely ascertainable and are established on a religious or quasi-religious basis; but a rule of Hindu law, which is applied not as such, but merely by virtue of the presumption above referred to, in the absence of any other ascertainable rule, to persons who are by religion not

Hindus but Mussulmans, stands in its application to such persons on a totally different footing; and, if it appears expedient to set it aside as regards them, there need be no hesitation about doing so. The rule of the *Tagore* case, assuming that it would at this moment be applied by the Courts to Khojás, is as applied to them no more sacred or immutable than any of the other rules of Hindu law which at this moment may be applicable to Khojás, but which will be modified by the Bill if it becomes law. No difficulty will, therefore, be raised here on this score.'

If, on the other hand, it was observed, it should appear that the rule prohibiting dispositions in favour of unborn persons had, as a matter of fact, been recognised and observed among the Khojás, or if, there being no recognised rule or established practice either way, it should be considered that the powers of disposition allowed by the Succession Act were larger than were needed for the requirements of Khojás, it would probably be desirable to limit the power of disposition in some such way as it is limited by the Hindu law as interpreted in the *Tagore* case. The system of intestate succession established by the Bill was in certain respects a complicated one; and if to this were to be added a power of making complicated dispositions by will, it was to be feared that we should bring about, in regard to the property of this wealthy and important sect, a state of things which it was desirable if possible to avoid.

39. The reply of the local authorities was to the effect that, as far as appeared, there was no recognised definite rule among the Khojás bearing on the point; that it was unlikely that any attempt had hitherto been made among them to create by will an interest in favour of an unborn person; that there was thus a *tabula rasa*; and that it was quite open to the legislature to legislate on the subject as it thought best without any fear of violating an existing custom or of running counter to any prejudice or desire of the Khojá community.

This being so, the Government of India have come to the conclusion that it is undesirable to confer on Khojás any power of testamentary disposition in favour of persons not in existence at the time of the testator's death; and accordingly all portions of the Indian Succession Act which confer, or assume the existence of, such a power have, as far as practicable, been omitted, a proviso at the same time being inserted to the effect that a bequest by a Khojá in favour of any person who has not come into existence at the death of the testator shall be void.

40. The remaining differences between this Bill and the Hindu Wills Act as regards the provisions of the Indian Succession Act applied by them are of less importance.

It may, however, be stated that the following additional provisions of the Succession Act have been made applicable, namely:—

- (a) section 47, giving a father power to appoint a guardian by will—a power the existence of which was assumed by the Commission;
- (b) sections 52 and 53, relating to privileged wills;
- (c) section 84, which provides that, when property is bequeathed to a person and words are added which describe a class of persons but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole of the interest of the testator therein unless a contrary intention appears by the will;
- (d) section 104, which limits directions for accumulation.

It should be added that section 137 of the Indian Succession Act, which provides that no right as executor or legatee can be established until a grant of probate or letters of administration is obtained, has been omitted for reasons similar to those which led to its being ultimately omitted from the Probate and Administration Act, 1881; and that sections 134 and 135, determining whether property bequeathed to two or more persons in succession should when its value is liable to decrease be retained in its original form, have been omitted, as it seems safer in this country to lay down no hard-and-fast rules on the subject.

41. The only other point calling for notice in connection with this chapter is that section 43, following the proviso to section 10 of the Transfer of Property Act, confers a power of bequeathing property to or for the benefit of a woman, so that she shall not have power to transfer or charge the same or her beneficial interest therein. The existence of such a power appears to have been assumed in the Bill prepared by the Commission.

42. Chapter VII, relating to maintenance and marriage and funeral expenses, calls for little notice. There was some obscurity about the corresponding provisions of the Bill prepared by the Commission, and this chapter has now been settled in accordance with what is understood from the local authorities to have been the original intention. It is believed that the only change of a substantive nature made here is in section 46, where provision has been made for the maintenance, &c., of a daughter while she remains unmarried. The chapter, however, will probably be found open to further amendment when it has been more fully considered.

43. Section 47, which provides for the recovery of sums due under this chapter, has been drawn with a view to precluding, as far as possible, the difficulties which have arisen under the Hindu law in regard to claims for maintenance, and in particular as to how far a person having a right to maintenance is entitled to follow the property of the deceased. As regards this last point, it has been thought best to place the claim for maintenance, &c., on the footing of a debt, postponing it, however, to debts proper. This will not absolutely remove all difficulty, but, by bringing the case within an existing class, it will avoid the creation of a new difficulty.

The 1st July, 1884.

(Signed) C. P. ILBERT.

D. FITZPATRICK,
Secretary to the Government of India.