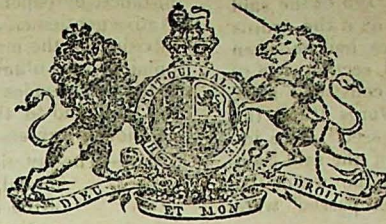


THE



Bombay Government Gazette.

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THURSDAY, 7TH OCTOBER 1869.

Separate paging is given to this Part in order that it may be filed as a separate compilation.

PART VI.

BILLS OF THE GOVERNMENT OF INDIA.

The following Bill and Statement of Objects and Reasons are published for general information, by order of His Excellency the Governor General, under the 19th of the Rules for the Conduct of Business at Meetings of the Council of the Governor General of India for the purpose of making Laws and Regulations:—

Bill No. 15 of 1869.

A Bill to Regulate the Wills of Hindús and Buddhists in the Presidency Towns.

WHEREAS it is expedient to provide rules for the execution, attestation, revocation, revival, interpretation, and probate of the wills of Hindús and Buddhists in the Presidency Towns; It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Hindú Wills Act, 1869."

2. The Indian Succession Act, 1865, sections 46, 48, 49, 50, 51, 54, 55,

Certain sections of Succession Act extended to wills of Hindús and Buddhists in the Presidency Towns.

and 57 to 77 (both inclusive), sections 82, 83, 85, 88 to 98 (both inclusive), sections 106 to 177 (both inclusive), sections 179 to 189 (both inclusive), sections 191 to 199 (both inclusive), so much of Parts XXX. and XXXI. as relates to grants of probate and letters of administration with the will annexed, Parts XXXIII. to XL. (both inclusive), so far as they relate to an executor and an administrator with the will annexed, and section 329 shall apply—

(a) to all wills and codicils made by any Hindú or Buddhist on or after the first day of January 1870, within the local limits of the ordinary original

civil jurisdiction of the High Courts of Judicature at Fort William, Madras, and Bombay; and

(b) to all such wills and codicils, wherever made relating to immoveable property situate within those limits:

Provided that marriage shall not revoke any such will or codicil:

And that nothing herein contained shall authorise a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right of maintenance which they would have possessed if he had died intestate:

And that nothing herein contained shall vest in the executor or administrator with the will annexed of a deceased person any property which he could not have alienated *inter vivos*.

3. Nothing contained in this Act shall affect the rights, duties and privileges of the Administrators General of Bengal, Madras, and Bombay respectively.

4. In this Act and in the said sections all words defined in section three of the said Succession Act, shall, unless there be something repugnant in the subject or context, be deemed to have the same meaning as the said section three has attached to such words respectively.

And in applying sections 62, 63, 92, 96, 98, and 182 of the said Succession Act, to wills and codicils made under this Act, the words "son," "child," and "children" shall be deemed to include an adopted child; and the word "grand-children" shall be deemed to include the children, whether adopted or natural-born, of a child whether adopted or natural-born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son.

And in making grants under this Act of letters of administration with the will annexed, or with a copy of the will annexed, section 195 of the said Succession Act shall be construed as if the words "and in case the Hindú Wills Act had not been passed" were added thereto; and section 198 of the said Succession Act shall be construed as if, after the word "intestate," the words "and the Hindú Wills Act had not been passed" were inserted; and sections 230 and 231 of the said Succession Act shall be construed as if the words "if the Hindú Wills Act had not been passed" were added thereto respectively.

STATEMENT OF OBJECTS AND REASONS.

When the Indian Succession Act, 1865, was under the consideration of the Legislature, it was proposed to extend to Natives the testamentary portion of that measure; but it was felt that, in three respects, sufficient information was not before the Council to justify an immediate extension in this direction. Doubts were entertained as to how far it would be politic to interfere with the power to make oral wills which Muhammadans have always possessed, and evidence was wanting as to the propriety of restricting Natives in creating perpetuities and in making bequests to religious and charitable uses. A clause was accordingly introduced as a temporary provision, excluding the Hindús, Muhammadans and Buddhists from the operation of any part of the Act.

Some months after the passing of the Act, a circular was issued from the Home Department to the several Local Governments respecting the extension to Natives of its testamentary clauses. Attention was called to the fact that, although liberty of testation was established throughout British India, and although the testamentary power of Hindús was derived from the English law, there were no securities for the due exercise of that power by Natives, such as the requirement of writing, signature and attestation, which were found indispensable in Europe.

It was also pointed out that, although in England nuncupative wills have long been placed under considerable restrictions as to the persons by whom they can be made, as to the witnesses required to be present, and as to the time within which testimony is admissible to prove the speaking, in India, our Courts were compelled to recognize such wills when made by Hindús of any age or calling and under any circumstances whatever. It was observed that the favourite fraud of bringing forward false wills was encouraged by the non-requirement of writing; that the evidence setting up a false nuncupative will might revoke a true written one, and that, even in the case of a genuine testamentary disposition, the certainty of writing was replaced by the frailty of memory. Further remarks, which will now be merely referred to, were made as to the absence, in the case of Native testators, of any restraints on the creation of perpetuities and on devises to religious or charitable uses, as to the non-requirement of probate of their wills, whether written or oral, and as to the difficulty of ascertaining the character and powers of a Native executor.

The circular concluded by pointing out the provisions of the Indian Succession Act on the subjects thus treated of, and by requesting an opinion as to the advisability of extending those provisions to Natives.

To this circular replies were received from all the local authorities, accompanied, in almost every instance, by papers written by such European and Native gentlemen as were deemed best capable of advising on the matter. The general result of the opinions thus obtained may, so far as they relate to the Presidencies of Bengal, Madras, and Bombay, to Oudh, and to the Central Provinces, be comprehensively expressed as follows:—

- 1st.—The practice of making nuncupative wills should be abolished, and the provisions of the Indian Succession Act as to execution of wills and codicils should be adopted in the case not only of Hindús but Muhammadans.
- 2nd.—Marriage should not, in the case of a Native testator, revoke his will. In other respects the provisions of the Succession Act as to revocation should be followed.
- 3rd.—It is inexpedient to impose, in the case of Natives, any restrictions on the exercise of the testamentary power in favour of religious or charitable uses, or for the creation of perpetuities.
- 4th.—The provisions of the Succession Act as to the interpretation of wills should, with some few exceptions, be adopted.
- 5th.—Probate should be made compulsory, and the provisions of the Succession Act as to administration with will annexed and as to the powers and duties of an executor, should be extended with some slight modifications.

The primary object of the present Bill is to preclude the fraud and perjury which are notoriously encouraged by the absence of restriction on the making of nuncupative testaments. Its secondary objects are to prevent the evils arising from the non-requirement of probate of Native wills, and from the prevailing uncertainty as to the character and powers of Native executors.

As a Native's written will need not now be proved, it need not, of course, be deposited for safe custody. The resulting opportunities for forgery and fraudulent alteration are obvious, and have, it is believed, been often taken advantage of. Moreover, in England the granting of probate is conclusive as to the testamentary character of the instrument as regards all claimants of the personality. The result of this rule is most satisfactory in precluding litigation. But in India, a far more litigious country, even when a Native's will is proved, or when letters of administration are granted *cum testamento annexo*, the probate or grant is binding only as against those who obtain or who oppose it. As against persons who have no means of appearing, or right to dispute the probate or grant, it has no greater effect than the ordinary decree in a civil suit.

Then the Native executor takes nothing from any grant of the Court. His title is founded solely on the will considered as an instrument of gift. His acts between the testator's death and the grant of probate are not (as in England) rendered valid by the grant. It seems doubtful whether, as against creditors who have not appeared or been cited, he can retain any part of his own debt. In the interest of the honest executor, therefore, legislation seems needed in this direction. Moreover, a Native executor has, according to the High Court at Fort William, no greater power

over immoveable property than a manager. His powers are, therefore, at least in the Lower Provinces of Bengal, limited and qualified, and if he makes a mortgage or sale, the lender or purchaser, as the case may be, is bound to inquire into the necessity of the transaction. What the law on the subject is in Madras and Bombay does not appear to have hitherto been decided. It is hard to conceive a state of things more calculated to interfere with that free circulation of property so desirable in a country like India.

A Native executor, moreover, cannot be compelled, except by a law-suit, to exhibit an inventory or account of his testator's estate. In many cases, therefore, there is no adequate check upon him; and at any distance of time it is difficult to fix him with the possession of property comprised in the will.

The Bill only applies to Hindús and Buddhists. Muhammadans have an elaborate system of testamentary law, which, like the rest of their code, they regard as of divine origin. To impose on Muhammadans a body of rules which would have the effect of superseding any part of their existing law, might create alarm and discontent, and would therefore be impolitic. The case of Hindús is clearly distinguishable. Hindú wills being unknown to Hindú law, being in fact the creature of English Courts, the legislature is entitled to subject them to all expedient restrictions. Similar remarks apply to the wills of Buddhists.

The Bill, too, is confined in its operation to the Presidency Towns. Hereafter it may be desirable to extend its provisions to Hindús and Buddhists in the Mofussil and Burma. But as yet the practice of testation does not prevail amongst Natives to any great extent outside those towns; and for the present, therefore, it seems advisable to limit the incidence of the proposed legislation.

The power of alienation *inter vivos* which a Hindú possesses is everywhere subject to restrictions, and varies from the nearly absolute freedom enjoyed, even as to ancestral property, by a Native of Bengal, to the comparatively limited authority of a Native of Madras or other territory subject to the law of the *Mitákshará*. The High Courts at Calcutta and Madras have held that a Hindú's testamentary power is only co-extensive with his independent power of alienation during life. The Bill adopts this ruling, and provides that nothing therein contained shall authorize a testator to bequeath property which he could not have alienated *inter vivos*. Connected with this provision is a clause expressly negating the power of a Native testator to deprive his relatives of any right of maintenance which they would have possessed if he had died intestate.

The rest of the Bill extends to the wills of Hindús and Buddhists certain sections of the Succession Act.

Of these, section 46 declares the testamentary power, and will be read in connection with the limitation above-mentioned.

Sections 48, 49, 50, 51, 54, 55, 57 to 60 relate (*inter alia*) to the execution, revocation, and rival of wills and codicils. It will be seen that the Bill expressly provides that marriage shall not operate as a revocation. It is the opinion of competent authorities that in the case of a polygamist, marriage does not create such a change in the testator's condition as to raise a presumption that he would not adhere to a will made previously.

The principle, therefore, on which marriage revokes a will in England, does not apply.

Part XI. of the Succession Act contains rules as to the construction of wills. Of these the Bill proposes to extend sections 61 to 77, and sections 82, 83, 85, and 88 to 98 (both inclusive). It omits sections 80 and 81, which provide rules for the cases of bequests to 'heirs,' 'next-of-kin,' 'nearest relation,' &c., or the 'representatives' of a particular person. These rules have been framed with reference to the English law of succession *ab intestato*, and are therefore inapplicable to Natives.

By section 84, a bequest to A and his children gives the whole interest to A. But the intentions of a Hindú testator, to whom the idea of a father and his sons being in a state of natural coparcenary is familiar, would probably be frustrated by the application of such a rule, which, therefore, has been omitted.

Section 86 ties down the construction of terms of relationship. Natives are generally so vague and inaccurate in using these terms that the section cannot safely be applied to their wills.

The general rule laid down by section 87, that words expressing relationship shall denote only legitimate relations, has also been omitted as being scarcely applicable to the wills of Hindús and Buddhists, whose notions as to legitimacy and illegitimacy are so different from those of Europeans.

Sections 179 to 264 relate to grants of probate and letters of administration. The Bill extends so much of them as relates to probate and grants *cum testamento annexo*, subject, however, to two modifications. Section 179 declares that all the property of the deceased person vests in the executor as such. This might give rise to a misconception, and the Bill expressly provides that nothing in the proposed Act shall vest in the executor or administrator with will annexed any property which the deceased could not have alienated during his life. And the Bill modifies sections 195, 198, 230, and 231 of the Succession Act so as to make it clear that the rules laid down in the 201st and the following sections, as to the order in which surviving relatives are entitled to administration in case of intestacy, do not apply to grants to Natives of letters of administration with will annexed. In such cases the practice will continue to be as at present, *viz.*, to let the grant follow the interest.

As adoption is practised not only by Hindús, but by Buddhists, it has been necessary to provide that the words 'son,' 'child,' 'children,' when they occur in the sections extended, shall include an adopted son.

It may, in conclusion, be remarked that the testamentary clauses of the Succession Act apply to the Parsis: that most of these clauses were extended to the Oudh Taluqdárs by Act I. of 1869, and that the similar provisions contained in the Indian Wills Act (XXV. of 1838) have for the last twenty years applied to all classes in the Straits Settlement—Muhammadans, Hindús, and Chinese, as well as Englishmen.

(Signed) H. S. MAINE.

WHITLEY STOKES,

Secretary to the Council of the Governor General
for making Laws and Regulations.

SIMLA,
The 20th September 1869. }

Forwarded for the perusal of

Recd 19/10/69
For 23/10/69

The 1st Assistant Collector Poona

The 2nd Assist. Collector Poona

The Assistant Collector Mr. Crouse

The Civil Surgeon Poona

18/11/69 The Muztadar Parandhar

The Muztadar Secroo

18/11/69 The Muztadar Sudapoor

18/11/69 The Muztadar Bhuthure

who will be good enough to return
it for record.

Poona Collector's office

16th October 1869

W. H. Crouse
Deputy Collector

W. H. Crouse
18/11/69