CHAPTER – III
CHRISTIAN AND PARSİ LAW OF TESTAMENTARY SUCCESSION
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(A). CHRISTIAN

I. DEFINITION

The Indian Christian Marriage Act, 1872 defines the term ‘Christian’ as a person professing the Christian religion, he may profess Christianity in any of its forms. Under the act the term ‘Indian Christian’ includes Christian descedants of native Indians converted to Christianity, as well as such converts. Ordinarily a person who is baptized is Christian but a person does not become Christian just because at the time of his birth he is baptized particularly when he is not in a position to tell the world as to what is his faith. Thus, when at the time of marriage, one refuses to be married as a Christian and ultimately solemnizes his marriage by Hindu Ceremonies and rites, the facts that he attended a Christian School and dresses like a Christian are immaterial. He is not a Christian. A child born to Christian parents is a Christian. A person who professes to be a Christian is a Christian even though he has not been baptized. The words ‘persons who profess the Christian religion’ mean not only adults who profess Christianity but also their children.

II. ORIGIN AND GROWTH OF SUCCESSION ACT

The Law of Succession applicable to Indian Christians has not had a steady growth, but has developed by an oblique progression. There are certain milestones making marked diversions in the rules applicable to Christian succession in India. One was the Succession Act of 1865 and the other the Indian Succession Act of 1925. Therefore, in order to understand the law, the law has to be traced in three periods viz., (i) one before 1865 (ii) another between 1865 and 1925 and (iii) yet another subsequent to 1925.
The case that established the law relating to succession before 1865 is what is popularly known as Abraham V. Abraham\(^1\) relating to a case of 1863. The Privy Council observed therein that those Christians who were converted but are still following the Hindu customs and manners would be governed by the ancient Hindu Law of Succession. If a convert had become completely westernized, it is for him to establish that he had become a member of a community which has accepted the western way of living, manners, customs and the law. That was the law before 1865.\(^2\)

The British Indian Government enacted the Indian Succession Act of 1865 on the recommendations of the 3\(^{rd}\) Law Commission. This Act was intended to be applied to different communities in British India who did not have a law of their own in matters of succession. It is specifically provided that it would not apply in the case of Hindus, Mohammedans, Buddhists, Sikhs or Jainis. The interpretation of the 1865 Act by the competent Courts introduced a radical change in the matters related to succession. The question whether the ancient Hindu law would apply to those who were converted to Christianity notwithstanding the fact that such converts followed Hindu customs and manners arose for consideration before the Bombay High Court in Dagree v. Pacotti San Jao\(^3\) in 1895. In that case the parties were Christians and belonged to the Koli caste of fishermen in Bombay, who were all originally Hindus, but some of whom had become Christians.

The Bombay High Court interpreted the Indian Succession Act of 1865 in a different manner by reading the two provisions i.e. section 2 and section 331 of the Act together. The Court held that the Succession Act 1865 would apply, that section 2 of the Succession Act provided exemptions and that the exemptions were to be found only in section 331 of the Act. Therefore unless it could be proved that the deceased was a Hindu or Mohammedan or Buddhist, the Succession Act of 1865 would apply and the ancient Hindu law would not apply to the instant case.

\(^1\) 9, M. I. A. 105
\(^2\) Devadasan E. D., Christian Law in India, P. 296-300.
\(^3\) I. L. R. Bombay Vol. 19 Page 783.
Therefore, the *ratio decidendi* of the Bombay decision was that unless the Government by notification had exempted a particular class of Christians, the Indian Succession Act would apply. The Bombay High Court in interpreting the 1865 Act relied implicitly on the decision of the Madras High Court in the following cases- Ponnusami Nadan v. Dorasami Ayyan,4 Administrator General of Madras v. Anandachari and others6 and Tellis v. Saldanha.6 The same view was confirmed by the Privy Council in 1921 in the case of Kamawati v. Digbijai Singh.7 The Privy Council quoted sections 2 and 331 of the 1865 Act in the same order as the Bombay High Court Dagree v. Pacotti San Jao.

Therefore, obviously the above question of law as decided by the Privy Council (however erroneous the reasoning may seem now) has to be accepted as the law during the relevant period when the 1865 Act was in force, i.e. even if a Christian convert followed Hindu customs and usages after conversion to Christianity, the Hindu Law will not apply, but only the Indian Succession Act will apply in respect of his estate by virtue of section 2 read with section 331 of the 1865 Act. This was not to be law for ever, as the law took a different turn under subsequent legislation.

In 1925 the Indian Succession Act was passed which consolidated the law applicable to succession. This has introduced some dislocation of the principles followed until then by the Privy Council and other Courts. The relevant provisions for consideration under the 1925 Act are section 29(1):

"This part shall not apply to any intestacy occurring before the first day of January 1866, or to the property of any Hindu, Mohammedan, Buddhist, Sikh or Jain".

Sub section (2):

"Save as provided in sub-section (1) or by any other law for the time being in force, the provisions of this Part shall constitute the law of India in all cases of intestacy":

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4 I. L. R., 2 Mad., 209  
5 I. L. R., 9 Mad., 466  
6 I. L. R., 10 Mad., 69  
7 I. C. Vol. 64 Pg. 599
Section 29(1) is in replacement of section 331 of the 1865 Act; and sub-section (2) is in replacement of section 2 of the 1865 Act and the consequent changes brought about in the law of Christian Succession by this realignment has been indeed revolutionary. In one stroke the earlier decisions under section 2 read with section 331 of the 1865 Act were rendered obsolete.

It would follow that by making sub-section 2 follow sub-section 1, in which the Hindus are exempted from rules of succession it is made clear that in addition to the Hindus, Muslims and Buddhists, there are others who are also exempted from the operation of the rules of succession provided under the Indian Succession Act. Sub-section 2 clearly provides that if any other law is in force the rule of succession provided there under will not apply. Therefore, unlike the earlier cases under the 1865 Act, the main question for consideration now is, what is the significance of the expression “any other law for the time being in force”? The expression “law in force” in Article 13 of the Constitution of India has been defined in the Constitution to include any rule, regulation, notification, custom or usage having the force of law. Similarly Article 372 provides that subject to the provisions of the Constitution the law in force immediately before the commencement of the constitution shall continue in force until altered or repealed by a competent legislature.8

A similar provision was enacted under Section 3 of the Indian Succession Act, 1925. In exercise of this power, the Native Christians in the province of Coorg (Mysore State) were exempted from the application of the provisions of the Indian Succession Act. The Khasis and Jyentengs in the Khasi Hills and Jaintia Hills in North East India were also exempted. The Mundas and Oraons in the province of Bihar and Orissa are also exempted from the application of the provisions of the Indian Succession Act, 1925. By virtue of the provisions of the Goa, Daman and Diu (Administration) Act, 1962, it is the Portuguese Civil Code and not the Indian Succession Act that applies in Goa. In Pondicherry, the French Civil Code still survives as per the provisions of the Treaty of Cession.

8 V.N. Shulka’s Constitution of India, by M.P. Singh, 11th Edn., p. 35-36

274
And the Garos of Meghalaya are also not subject to the provisions of the Indian Succession Act and they follow their customary matrilineal system of inheritance.

III. TRAVANCORE AND COCHIN ACTS

The problem is not so simple and the complexity does not end there. One has to take into account the Travancore Christian Succession Act of 1916 (hereinafter referred to as the Travancore Act) and the Cochin Succession Act (hereinafter referred to as the Cochin Act). The question whether, after the extension of the Indian law to the Part ‘B’ States, the Indian Succession Act has superseded the State Christian Succession Acts came up for consideration before the Kerala High Court in Augusty v. Devasey Aley.9 A division bench of the Kerala High Court held:

"it is clear from section 29(2) of the Indian Succession Act that it was not intended to interfere with the Personal law of Communities which has settled laws of their own as regards intestate succession. Even if Travancore formed part of the former British India, Part 'B' of the Act would not apply to Christians in Travancore who were governed by the Travancore Christian Succession Act."

There is a difference between Indian Succession Act, the Travancore Act and the Cochin Act. The Indian Succession Act being an All-India enactment has been extended to operate in Kerala also. Only by virtue of section 29(2) of the Indian Succession Act, the Travancore and Cochin Acts will apply and in their absence any customary law that may be applicable to any community may apply and only if the above become inapplicable, the Indian Succession Act will come into play in Kerala. On the other hand, the Travancore Act and Cochin Act have a territorial limitation.10

While so the Supreme Court of India in 1986 declared that with the coming into force of the Part B States (Laws) Act 1951, the Travancore Christian Succession Act of 1916 stood repealed with effect from 1st April 1951 and held

9 1956 K. L. T. 658
10 Devadasan E. D., Christian Law in India, P. 306-309.
that Christians in the Travancore area were and are governed by the Indian Succession Act, 1925. Following this decision, the High Court of Kerala declared that the Cochin Christian Succession Act of 1921 also stands repealed with effect from 1st April 1951. As the law declared by the Supreme Court and the High Court are binding, the Indian Succession Act of 1925 is the law relating to succession applicable to the great majority of Christians in India except the categories mentioned herein above.

(B). PARSI

I. DEFINITION

The Parsis came and settled down in India as a result of their persecution in their native land, Persia. They came largely from Persaon province ‘Pers’ or ‘Pars’ from which the word Parsi is derived. It seems that the word ‘Parsi’ has both a religious connotation and a racial significance. The Indian Parsis belong to the Zoroastrian faith, and in that sense, in India, the words ‘Parsis’ and ‘Zorastrian’ are synonyms. Zoroastrianism is founded on the belief in one God and on the basic tenets of good thoughts, good words and good deeds.

II. ORIGIN AND GROWTH OF SUCCESSION ACT

The 4th section of the Indian Succession Act 1925 which applies to Parsis has introduced a very important change in the law in the case of persons to whom hitherto the English law was applicable. It gets rid of the principle, so far as property is concerned that husband and wife are one person in Law, or it provides that after the 1st day of January 1866 no person shall, by marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried.
The Common Law of England, which hitherto applied to Parsis in the Presidency Towns, merged the wife in the husband and declared her absolutely incapable, during covertures, of contracting, holding and disposing of property.

By virtue of the English Common Law relating to husband and wife, the wife can exercise no independent disposing control, during her husband's lifetime, over any property whatever, not even over that which comes to her, or is given to her, from or by her own family.

During covertures a married woman could acquire no legal right to personal property. Immediately upon her marriage, the contracts between the husband and the wife came to an end, and goods, chattels and effects in possession belonging to the wife at the time of her marriage became the absolute property of the husband by virtue of the marriage.

The wife's personal articles in possession belonging to her at the time of her marriage and not settled to her separate use vested absolutely in the husband, except her paraphernalia.

The paraphernalia of the wife include such apparel and ornaments given to the wife as are suitable to her condition in life, and as are expressly given to be worn as ornaments of her person only, e.g., rings, watches and other jewels given to the wife by her husband to be worn merely as ornaments. The wife cannot dispose of her paraphernalia during her husband's life-time; but the husband can dispose of it by sale or gift inter vivos, though not by will, and on his death subject to payment of his debts, the wife is absolutely entitled to it. The fact of the husband's great control over, and interest in his wife's property at law, gave rise in Equity to the "doctrine of separate estate," that is ownership of property by a married woman apart from her husband for her exclusive use. Such property is free from the debts and control of her husband; and unless restrained by stipulation she may alone alienate it by deed or will, or charge it with her debts.11

11 Hubne v. Tenant, 1 W.&T. 586; Taylor v. Meads, ML. J. Cb. 203
Closely allied to separate property & pin-money, which may be defined as a yearly allowance settled upon the wife before marriage for the purchase of clothes and ornaments, or otherwise for her separate expenditure, and in order to decorate her person suitably to the rank and agreeably to the tastes of her husband. It is allowed to her in order to save the constant recurrence by the wife to the husband for trifling expenses.

As regards the wife chooses for an action (i. e., things which are enforceable by her only by suit) e. g., debts, legacies etc., they did not become the husband's unturned reduced them into possession; consequently if he failed so to reduce them, they survived to the wife, and if she died before and he had reduced them into possession they formed part of her estate and became his property subject to payment of her debts. Resting on the doctrine of unity of persons between husband and wife, the husband, as to her chattels real, became possessed of them by marriage in her right. Not only was he entitled to their rents and profits, but he might also dispose of them as he pleased during coverture. They were liable for his debts; and if he survived her, they were absolutely his. He could not, however, devise them by will and if he failed to dispose of them in his life-time, and in case he died before his wife, she became entitled to them absolutely.

By the 4th section of the Succession Act (which applies to Parsis) a woman married after the 1st day of January 1866 will hold all her property as fête covert in England holds property settled to her separate use.

Among Parsis a gift may be made to the separate use of a married woman, or of a woman about to be married.12

The 4th section of the Indian Succession Act sweeps away the husband's right to his wife's personality, his interest in her realty as tenant by the courtesy, and the wife's right to her husband's land as tenant by dower; and as to her property the section has the effect of a settlement of it to her own use without restraint on anticipation. This section abolishes the unity of persons between

12 {Merbed v, Perozbaiy 5 Bom, 268.}
husband and wife; consequently when an estate is conveyed or devised during covertures to husband and wife, they will take as joint-tenants with equal undivided shares, and each can alienate his or her own property in his or her lifetime. At Common Law in such a case they would take by entireties, and the husband may do what he likes with the rents and profits during coverture. Further, the husband is no longer able, by his endorsement alone, to pass his wife's negotiable instruments, nor can he release or assign her chooses-in-action.\textsuperscript{13} This section has altogether done away with the Common Law rule that where a man marries his creditor the debt is thereby released.

The 4th section does not affect the right to make a settlement nor the usual effect thereof. It does not apply to marriages contracted before the 1st day of January 1866. It is prospective, and does not affect rights which had already been acquired before the passing of the Act.\textsuperscript{14} Since the 4th section of the Succession Act (which applies to Parsis) is prospective and does not affect rights which had already been acquired before the 1st day of January 1866, it is evident that if a female Parsi who was married before 1st January 1866, dies leaving property, that property would not go to her heirs as on an intestacy, or to the persons named in her will, but will be governed by the English law. At Common Law a wife's will was void as to lands, and as to chattels she had no testamentary power, unless the husband was banished or transported, or unless the will was restricted to property of which she was executrix or administratrix, or unless it was made with her husband's special permission. But equity holds a wife's will valid as an execution of a power, or in pursuance of an agreement, or as disposition of her separate estate. In fact the will of such a Parsi female would be valid only so far as it relates to the disposition of her separate estate, or if her husband gave his consent to the will, or if she survived him.

In the absence of any rule applicable to Parsis other than the English law, following Graham v. Londonderry, a Parsi husband has no right to demand from the widow of his deceased father, in whose hands they are, delivery to himself of

\textsuperscript{13} Stokes Anglo Indian Codes. Vol. I. page 296.
\textsuperscript{14} Sarchies v. Prosono- moyee Dossee, 6 Cal. 794.
ornaments purchased for his wife by his deceased father, as they are the separate property of his wife.\textsuperscript{15}

In England the position as to wife's property at Common Law was to some extent altered by the Married Woman's Property Act 1870.\textsuperscript{16} In India the Married Woman's Property Act III of 1874 declares provisions similar to those declared by Statute 33 & 34, Vict. C. 93.

The 4th section of the Indian Succession Act did not remove the disability of married women to contract; this was removed by the Married Woman's Property Act III of 1874.\textsuperscript{17} Section 4 of Act III of 1874 enacts that the wages and earnings of a married woman after the passing of the Act shall be deemed to be her separate property, and her receipts alone shall be good discharges.

I.S.A. provides that she may affect a policy of insurance on her own behalf and independently of her husband. It empowers her to sue in her own name for recovery of any property which by force of the Indian Succession Act or the Act itself was her separate property.

Another provision makes the wife (whether married before or after the 1st January 1866) liable to be sued to the extent of her separate property by any one contracting with her as to such property.

Both the provisions provide for the remedies of a married woman, who is within the 4th section, for injuries to her property.\textsuperscript{18}

The object of the Legislature in passing Act X of 1865 and Act III of 1874 was to assimilate the position of a married woman to that of an unmarried one, so far as regards her dealings with her own property.

Section 4 of the former Act combined with section 7 of the latter Act enables women, married since 1st of January 1866, to possess and sue and be sued in respect of such property as though they were unmarried. These sections

\textsuperscript{15} Dhanji' thai V. Navazhai 2 Bom. 75.
\textsuperscript{16} 33 k 34, Vict. C. 93.
\textsuperscript{17} Natall V, Natall, 9 Mad. 12.
\textsuperscript{18} Harris v. Harries\textsuperscript{v} lCal. 285.
do not, however, deal with their capacity to contract. Section 8 of the latter Act deals with that capacity, and applies to women married as well before as after the 1st of January, 1866, and provides that such women can contract as though they were unmarried at the date of the contract, but that on such contracts they will be liable only to the extent of their separate estate.\footnote{Oursetji v. Rustomji, 11 Bom. 352, 353.}

Under this provision a married woman has power to charge property settled upon herself, for her separate use without power of anticipation, with the payment of debts incurred by her subsequently to her marriage, and such a charge is valid and binding. The husband, however, stands responsible for debts contracted by his wife's agency.

Lastly, there is provision which relieves the husband married after 31st December 1865 from his wife's ante nuptial debts. At Common Law the husband stood liable jointly with his wife for her debts contracted before marriage. The wife's separate property is now held liable for her own contracts.

Thus the Indian Succession Act, 1925 regulates testamentary succession to Parsis domiciled in India.\footnote{Modee Kaikhoshru v. Cooverbai, 6 M. I. A. 449.}

III. DOMICILE

Part II of the Indian Succession Act which applies to Parsis treats of domicile. Succession to a deceased person's immovable property in British India was regulated by the law of British India wherever he may have had his domicile at the time of his death; and succession to his movable property is regulated by the law of the country in which he had his domicile at the time of his death.

"Immovable property" includes land, incorporeal tenements, and things attached to the earth, or permanently fastened to anything which is attached to the earth. "Movable property" means property of every description except immovable property.
A person can only have one domicile for the purpose of succession of his movable property. The domicile of origin of every person of legitimate birth is in the country in which, at the time of his birth, his father was domiciled: or if he is a posthumous child, in the country in which his father was domiciled at the time of the father's death. The domicile of origin of an illegitimate child is in the country in which, at the time of his birth, his mother was domiciled.

Domicile is the legal conception of residence of which there are three kinds:

(1) Domicile by birth, or of origin. As no man can be without a domicile the law attributes to every individual as soon as he is born, the domicile of his father, if the child is legitimate; and the domicile of his mother, if the child is illegitimate. This is called the domicile of origin and is involuntary.

(2) Domicile by operation of law. This sort of domicile attaches to those

(a) who are under the control of another, e.g., wife, minor and servant, and

(b) on whom the state affixes domicile, e.g., officer, prisoner.

(3) Domicile of choice. This is where one is abandoned and another is acquired.

The domicile of origin prevails until a new domicile has been acquired. A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin.

No man acquires a domicile in British India merely by residing in H. M.'s Civil or Military service, or in the exercise of any profession or calico, or in the discharge of the duties of any public office.

The special mode of acquiring a domicile in British India is treated of in the Succession Act, which provides that any person may acquire a domicile in British India by making and depositing in some office in British India (to be fixed by the Local Government) a declaration in writing under his hand of his desire to acquire
such domicile, provided that he shall have been resident in British India for one year immediately preceding the time of his making such declaration.

A new domicile continues until the former domicile has been resumed, or another has been acquired. The domicile of a minor follows the domicile of the parent from whom he derived his domicile of origin. During minority he cannot acquire a new domicile. His domicile however does not change with that of his parent, if the minor is married, or holds any office or employment in the service of Her Majesty, or has set up, with the consent of the parent, in any distinct business.

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

The age of majority of persons domiciled in British India is provided for as follows by the 3rd section of the Indian Majority Act, IX of 1875: "Every minor of whose person or property, or both, a guardian, other than a guardian for a suit within the meaning of Chapter XXXI of the Code of Civil Procedure, has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of eighteen years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age, shall, notwithstanding anything contained in the Indian Succession Act, X of 1865, or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years, and not before; and every other person domiciled in British India shall be deemed to have attained his majority while he shall have completed his age of eighteen years, and not before".

By marriage a woman acquires the domicile of her husband, if she had not the same domicile before. The wife's domicile during marriage follows her husband's, except when they are separated by sentence of a competent Court, or when the husband is undergoing a sentence of transportation. An insane person cannot acquire a new domicile in any other way than by his domicile following that of another person.
If a man dies leaving movable property in British India, in the absence of proof of any domicile elsewhere, succession to the property is regulated by the law of British India.

The Indian Succession Act provides that in the case of the marriage of a person not having a British Indian domicile to a person having such domicile, neither party acquires by the marriage any rights in respect of the other's property not comprised in an ante-nuptial settlement which he or she would not acquire thereby if both were domiciled in British India at the time of the marriage.

The meaning is this: where either of the parties has an Indian domicile, all his or her rights, as regards the other's property, whether movable or immovable, are regulated by the territorial law of India.21

In the above case it was held that section 4 of the Indian Succession Act does not apply in respect of the movable property of persons not having an Indian domicile and that while the 4th section lays down a general rule as to the effect of marriage in respect of movable property where both the married persons have an Indian domicile, the 44th section of the Indian Succession Act lays down a special rule to govern a particular case.

In a case22, however, Sale J. held that, since in the case of Miller v. Administrator General the applicability of the sections 4 and 44 was considered in connection with the question of domicile, but the particular question whether these sections in any way affect the rights of succession was not dealt with as necessarily arising in the case, these sections read together should be understood as laying down a general rule as to the immediate effect of marriage in respect of movable property belonging to each or either of the married persons not comprised in an ante-nuptial settlement, and not as laying down a rule intended to affect the law of succession.

21 Miller v. Administrator General, 1 Cal. 420.
22 Hill v. Administrator General of Bengal, 23 Oal. pp. 511, 512

284
WILL IN CHRISTIANS AND PARSIS

I. INTRODUCTION AND DEFINITION:

A Will is a document which ensures that one's wishes with respect to his/her assets and property are followed after his/her death. There often arise problems and complications when a person dies without a Will. Yet we put off making a Will, not realizing the predicament we put our family in, after our death. It's a little effort that goes a long way. You will find the answers to the questions you may have had on making your Will, registering it and other relevant information.

A Will is defined as "the legal declaration of the intention of the testator, with respect to his property, which he desires to be carried into effect after his death." In other words, a Will or a Testament means a document made by person whereby he disposes of his property, but such disposal comes into effect only after the death of the testator.

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

II. KINDS OF WILL

1. Privileged And Unprivileged Wills

Wills executed according to the provisions of section 63 of the Indian Succession Act are called Unprivileged Wills and Wills executed under section 66 of the Act, by a soldier employed in an expedition or engaged in actual warfare, or by an airman so employed or engaged, or by mariner being at sea, are called Privileged Wills. It is provided in the Act that such a Will may be written wholly by the testator with his own hands and, in such a case, it need not be signed or attested; or it may be written wholly or in part by another person, in which case, it may be signed by the testator but need not be attested. If, however, an 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 deemed to be his Will, if it is shown that it was written by the testator's directions or was recognised by him as his Will. If, on the face of it, the instrument appears to be incomplete, it shall nevertheless, be deemed to be the Will of the testator, provided the fact that it was not completed, can be attributed to some cause other than the abandonment of the testamentary intentions expressed in the instrument. Further, if such a soldier, airman or mariner has written instructions for the preparation of his Will, but has not died before it could be prepared and executed, the instructions shall be deemed to be his Will; and if such a person has, in the presence of two witnesses, given verbal instructions for the preparation of his Will, and such instructions have been reduced to writing in his lifetime, but he has died before the Will could be prepared and executed, then such instructions are to be considered to constitute his Will, although they may not have been reduced into writing in his presence, nor read over to him. It is also provided that such a soldier, airman or mariner may make a Will by word of mouth by declaring his intention before two witnesses present at the same time, but such a Will shall become null at the expiration of one month after the testator, being still alive, has ceased to be entitled to make a privileged Will.

An unprivileged Will or Codicil can be revoked by the testator only by another Will or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged Will can be executed under the Act or by burning, tearing or destroying of the same by the testator or by some other person in his presence and by his directions with the intention of revoking the same.

Mere loss of a Will does not operate as a revocation but where a Will is destroyed by the testator or with his privacy or approbation, it is to be deemed to have been revoked.

23 Thresia v. Lonan Mathew, AIR 1956 TC 186 (FB)
24 C.G. Tharakan v. Lily Jacob, AIR 1993 Ker 9.
No obliteration, interlineations or other alternation made in any unprivileged Will after the execution thereof, can have any effect except so far as the words or meaning of the Will have been thereby rendered illegible or indiscernible, unless such alteration has been executed in the same manner as is required for the execution of the Will; but a Will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or some other part of the Will opposite or near to such alteration, or at the foot or end or opposite to a memorandum referring to such alteration, and written at the end or some other part of the Will.

A privileged Will or Codicil may be revoked by the testator by an unprivileged Will or codicil, or by any act expressing an intention to revoke it and accompanied by 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. In such cases, it is not necessary that the testator should, at the time of doing the act which has the effect of revocation of the Will or Codicil, be in a situation which entitles him to make a privileged Will.

Every Will is revoked by the marriage of the maker, except a Will made in exercise of a power of appointment, when the property over which the power of appointment is exercised, would not, in default of such appointment, pass to his or her executor or administrator, or to the person entitled in case of intestacy. Even the subsequent marriage would revoke the Will. A void marriage does not revoke a Will.

This rule as to revocation of a Will by marriage, does not, however, apply to Wills and codicils executed by Hindus, Buddhists, Sikhs or Jains.

An unprivileged Will which has once been validly revoked cannot be revived otherwise than by the re-execution thereon with the prescribed

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27 Gabriel v. Mordakai, ILR 1 Cal 148.
28 Warter v. Warter, (1890) 15 PD 152.
29 Bell v. Fothergill, (1870) 2 Rob Eccl 318.
formalities, or by a codicil executed with such formalities and showing an
intention to revive the same. When a Will or a codicil, which has been partly
revoked and afterwards wholly revoked, such revival cannot extend to so much
thereof as has been revoked before the revocation of the whole thereof, unless
and intention to the contrary is shown by the Will or codicil.

It has already been stated that in the case of Hindus, Buddhists, Sikhs and
Jains a Will could validly be made orally and no formalities for the execution of a
Will are required. This rule, however, did not apply to Wills made by Hindu,
Buddhists, Sikhs or Jains, on or after the 1st of September, 1870, within the
territories which were subject to the Provincial Government of Bengal or in the
local limits of the ordinary civil jurisdiction of the High Courts of Judicature at
Madras and Bombay, and also, to all such Wills and codicils made outside those
territories or limits so far as they related to immovable property situated within
these territories or limits. The execution of such Wills was previously regulated by
the Hindu Wills Act (XXI of 1870). Except in the cases mentioned in that Act, oral
Wills could be made by person’s professing the Hindu, Buddhist, Sikh and Jain
religions. A question, however, arises whether the Indian Succession Act, 1925
has the effect of depriving such persons of the privilege of making oral Wills, or
whether the previsions of section 63 of the Act do not merely provide for the
formalities which must be observed, if any of such persons chooses to ‘execute’
a Will, i.e., chooses to reduce his testamentary dispositions to writing. It will be
observed that section 63 of the Act provides for the manner of ‘execution’ of
unprivileged Wills, it does not deal with the question of the ‘making’ of such Wills.

That the Act seems to make a distinction between the ‘execution’\(^{30}\) and
the ‘making’ of Wills, will appear from a comparison of the phraseology of
sections 63 and 66 of the Indian Succession Act, 1925. While section 63 refers to
the ‘execution’ of unprivileged Wills\(^ {31}\), section 66 prescribes the ‘mode of making’
and rules for executing Privileged Wills’. A distinction, therefore, seems to be
contemplate between the ‘execution’ and the ‘making’ of a Will. The former

\(^{30}\) Theresa v. Francis, 23 Bom LR 23
\(^{31}\) Ittop Vergheise v. Poulase, 1974 KLT 873

288
expression apparently applies to cases where the Will is to be reduced to writing, and the expression ‘making of a Will’ includes the execution of a Will and also an oral declaration by the testator of his testamentary disposition of his estate, if such declaration legally amounts to a Will. The matter is a debatable one, and no definite opinion, therefore, need be expressed on it at this stage.

2. **Conditional Or Contingent Wills**

A Will may be expressed to take effect only in the event of the happening of some contingency or condition, and if the contingency does not happen or the condition fails, the Will cannot be legally enforceable. Accordingly, where A executes a Will to be operative for a particular year, i.e. if he dies within that year, A lives for more years, after that year, since A does not express an intention that the Will be subsisting even intestate. A Conditional Will is invalid if the condition imposed is invalid or contrary to law.

3. **Joint Wills**

A Joint Will is a testamentary instrument whereby two or more persons agree to make a conjoint Will. Where a Will is joint and is intended to take effect after the death of both, it will not be enforceable during the lifetime of either. Joint Wills are revocable at anytime by either of the testators during their joint lives, or after the death of one, by the survivor.  

A Will executed by two or more testators as a single document duly executed by each testator disposing of his separate properties or his joint properties is not a single Will. It operates on the death of each and is in effect for two or more Wills. On the death of each testator, the legatee would become entitled to the properties of the testator who dies.

4. **Mutual Wills** A Will is mutual when two testators confer upon each other reciprocal benefits by either of them constituting the other his legatee. But when the legatees are distinct from the testators, there can be no position for Mutual Wills.

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32 Theobald, Wills, 28-29 (12th Edn.).
5. **Duplicate Wills**

A testator, for the sake of safety, may make a Will in duplicate, one to be kept by him and the other to be deposited in the safe custody with a bank or executor or trustee. If the testator mutilates or destroys the one which is in his custody it is revocation of both.

6. **Concurrent Wills**

Generally, a man should leave only one Will at the time of his death. However, for the sake of convenience a testator may dispose of some properties in one country by one Will and the other properties in another country by a separate will.

7. **Sham Wills**

If a document is deliberately executed with all due formalities purporting to be a Will, it will still be nullity if it can be shown that the testator did not intend it to have any testamentary operation, but was to have only some collaterally object. One thing must be borne in mind that the intention to make the Will is essential to the validity of a Will.

8. **Holograph Wills**

Such Wills are written entirely in the handwriting of the testator.

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III. **THE CHIEF REQUISITES FOR A VALID WILL**

1. **Soundness Of Mind And Age Of Majority.**

Every person of sound mind and not a minor may dispose of his property by will. A married woman may dispose of by will any property which she could alienate by her own act during her life. Persons who are deaf, or dumb, or blind, are not thereby incapacitated for making a will if they are able to know what they do by it. One who is ordinarily insane may make a will during an interval in which he is of sound mind. 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.

Section 59 expressly states that only a person not being a minor may dispose of his property by Will. 'Minor' is defined in section 2(e) of the Indian Succession Act, 1925 as "minor means any person subject to the Indian Majority Act, 1875, who has not attained his majority within the meaning of that Act, and any other person who has not completed the age of eighteen years, and minority means the status of such person."

Section 3 of the Indian Majority Act declares that a person shall be deemed to have attained majority when he shall have completed the age eighteen years. In the case, however, of a minor of whose person or property a guardian has been appointed, or of whose property the superintendence has been assumed by a Court of Wards under the Indian Guardian and Wards Act, 1890, the Act provides that the age of majority shall be deemed to have been attained on the minor completing the age of twenty one years.

The Indian Majority Act, 1875 extends to whole of India (sec. 1), and applies to every person domiciled in India (sec. 3).34 A Will executed by a minor is void and ineffective on that account. He is in law Incapable of knowing what he is doing.35

An exception.— Though a minor cannot execute a Will disposing of his property (under section 59 of the Indian Succession Act) even a minor is enabled to appoint a testamentary guardian to his minor child [section 60.]

2. Freedom From Fraud, Coercion Or Importunity.

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

3. Proper Execution.

The Succession Act deals with the execution of unprivileged (ordinary) Wills that is Wills executed by persons, not being soldiers employed in expedition, or engaged in actual warfare, or mariners at sea. All three rules are to be observed in the execution of such wills.

First - The testator shall sign or shall affix his mark to the will, or it shall be signed (not marked) by some other person in his presence and by his direction.

Second. - The signature or mark of the testator, or the signature (not the mark) of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will. The form of a paper does not affect its title to probate as a Will, provided that it is the intention of the deceased that it should operate after his death. Thus, documents in the form of deeds, agreements, letters, bills of exchange, powers-of-attorney, or other instruments, may take effect as a Will, if duly executed, where a testamentary intention can be collected, and the dispositions are not to take effect until after the death of the persons making them.

It is immaterial in what language a Will may be written. A Will or Codicil, or any part thereof, may be written on paper, parchment or any other substance, in any character, at large, or abbreviations, or in cipher, and may be made or altered in pencil as well as in ink.\footnote{36 Stokes. 27.}

Third - The Will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix the mark to the Will, or have seen some other person (not an attesting witness) sign the Will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary. As regards attestation a Will shall not be considered as insufficiently attested by reason of any benefit thereby given, either by way of bequest or by way of
appointment, to any person attesting it, or to his or her wife or husband; but the bequest or appointment shall be void so far as concerns the person so attesting, or the wife or husband of such person, or any person claiming under either of them.

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

There are rules governing the execution of privileged wills which are less formal than ordinary Wills are dealt with in the Succession Act.

The chapter IV of ISA deals with privileged Wills. Section 65 relates to the persons who can make a privileged Will following two conditions for the execution of a privileged Will:

(a) Will must be executed by a soldier, airmān, mariner who has completed the age of 18 years, and

(b) Who is employed in an expedition or engaged in an actual warfare

When a member of military force is sent for training he cannot be regarded in actual military service. Thus, not every soldier in time of war though literally on active service has power to make a privileged Will, if he is not engaged in actual warfare or expedition.37 In the Estate of Anderson,38 a soldier went to his solicitor and instructed him to make a Will, but before the Will could be prepared he was shot dead. Such a soldier was not engaged in “actual warfare”. The words “in actual military service” are not to be construed liberally. However, during war a soldier who is ordered to proceed upon a campaign, whether he actually proceeds or not, is treated as a soldier in actual military service. But a soldier while in barracks or an airman on land is not entitled to execute a privileged Will. Mariner means a seaman and includes the entire personnel, from cook to captain. A seaman may be in naval forces or in merchant navy, he is included. But to acquire the privilege of executing a privileged Will, he must be “at sea”, i.e;

37 In re Wingham, (1948) 1 All ER 2081; Re Jones, (1981) 1 All ER 1.
38 (1944) PI.
the time he goes on board. It is immaterial whether he is at sea or on board a vessel in a river or at sea or in a port.

A privileged Will may be verbal or written.

A verbal Will must be declared before the witnesses present at the time or oral declaration of the Will. A verbal Will becomes null and void at the expiration of one month after the soldier, airman or mariner has ceased to be entitled to make it.

A privileged Will in writing may be wholly written by the testator (in such a case neither his signature nor attestation is necessary, or written by another (in such a case testator's signatures are necessary though attestation is not necessary). If the Will is not signed by the testator, it is necessary to establish that it was written under his directions or be recognized as Will.

An oral Will become null and void at the expiration of one month after the testator has ceased to be entitled to make a privileged Will. But, it seems, the written Will remains operative till it is revoked. A person propounding an oral Will has to prove it beyond any shadow of doubt by cogent and convincing evidence.

The formalities to be observed in the case of a bequest to religious or charitable uses by a testator having a nephew or niece or any nearer relative are that the will must be executed not less than 12 months before his death and within 6 months from its execution the same must be deposited in some place provided by law for safe custody of the wills of living persons.

IV. CONSTRUCTION OF WILLS

The fundamental principle in the construction of wills is to effectuate the testator's intention so far as it is consistent with the rules of law. It is sufficient if the wording of a will is such that the intentions of the testator can be known therefrom; no technical words or terms of art need necessarily be used. A will not expressive of any definite intention is void for uncertainty.
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. If in a Parsi will written in Gujarati the words used are such as to create a joint interest, it is impossible to escape the consequence that the beneficiaries take as joint tenants with the benefit of survivorship.\textsuperscript{39}

No part of a will is to be rejected as destitute of meaning if it is possible to put a reasonable construction upon it and testator’s intention is not to be set aside because it cannot take full effect, but is to be effectuated as far as possible. Where any word material to the full expression of the meaning has been omitted, it may be supplied by the context. Erroneous particulars in the description of the subject-matter of a bequest shall be rejected. A part of the description, however, shall not be rejected as erroneous, if any object answers, the whole description.

The characteristic of cases within the rules is that the description so far as it is false, applies to no subject at all, and so far as it is true, applies to one only.\textsuperscript{40} Extrinsic evidence of the testator’s intention is admissible in cases of latent ambiguity only. It is inadmissible in cases of patent ambiguity or deficiency. 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. And where two clauses in a will are inconsistent and not reconcilable, the last shall prevail.

A will speaks from the testator’s death. Where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless a restricted interest appears to have been intended for him. In the case of a bequest in the alternative, 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.

\textsuperscript{39} HJayroji v. Pirozhai, 23 Bom, at p. 99.

\textsuperscript{40} Stokes. 48.
The Succession Act lays down four rules of construction where a will purports to make two bequests to the same person, and nothing appears in the will to show the testator's intention whether the latter bequest was to be cumulative or to be substitutional only.

First - 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.

In the four last rules, the word "will" does not include a codicil.

There are certain rules laid down for construction of gifts to objects under particular designations descriptive of relationship or membership of a class.

V. REVOCATION OF WILLS.

A Will is said to be ambulatory until the testator's death because he may revoke or alter it at any time when he is competent to dispose of his property by will.

An unprivileged Will or codicil shall be revoked (a) by marriage of the maker, except when made in exercise of a power of appointment, or (b) by another will or codicil, or (c) by some writing declaring an intention to revoke the same and executed as an unprivileged will, or (d) by 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.

The Succession Act provides that where an unprivileged Will or Codicil, or any part thereof shall be revoked, the same shall be revived only by its re-execution, or by a codicil executed as required, and showing an intention to revive the same; and when any Will or Codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown by the will or codicil.

Section 72 of the ISA deals with the revocation of privileged Will. A privileged Will may be revoked by anyone of the following modes:

- By the execution of an unprivileged Will or codicil.

- By any act expressing an intention to revoke the Will accompanied by such formalities as are prescribed for the execution of a privileged Will (See section 66).

- By burning, tearing or destroying the Will by testator or by some other person in the presence and under direction of the testator.

VI. LEGACIES

Legacies are either general, specific or demonstrative, A general legacy is one which does not relate to any individual thing, or sum of money, as distinguished from other things of the same kind, or other moneys.

Where a general legacy is given to be paid at a future time the executor must invest a sum sufficient to meet it in authorized securities. The intermediate interest in such a case forms part of the residue of the testator's estate.

Where the sum is fixed for the payment of a general legacy, interest begins to run from the expiration of one year from the testator's death, except where the legacy is bequeathed in satisfaction of a debt, or where the testator
was a parent or a more remote ancestor of the legatee, or has put himself in loco parentis to the legatee, or where a sum is bequeathed to a minor with a direction to pay for his maintenance out of it; in all these cases interest on the legacy runs from the testator's death. Where a time has been fixed for the payment of a general legacy interest begins to run from the time fixed (the interest up to such time forming part of the residue of the testator's estate), except where the testator was a parent or a more remote ancestor of the legatee or has put himself in loco parentis to the legatee or the legatee is a minor, in which cases the interest begins to run from the testator's death unless a specific sum for maintenance is given by the will.

Where a testator bequeathes 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. A specific legacy has two advantages over a general one. (1) It does not abate with the latter on a deficiency of assets. (2) When given to a person in being and producing interest, it carries with it that interest from the date of the testator's death. But if it should get adeemed or be inadequate to its object, the legatee is not entitled to recompense or satisfaction out of the testator's estate. When other assets are insufficient to pay debts it will have to abate in proportion.  

A bequest of a sum certain, merely because the stocks, funds, or securities in which it is invested are described in the will, or a bequest of any stock in general terms, merely because the testator had, at the date of his will, an equal or greater amount of the specified kind, or a bequest of money, merely because it is not payable until some part of the testator's property is disposed of in a certain way, is not specific. So 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.

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41 Griffith p. 85.
Where a specific legacy is subject at the testator's death to any clearage, the legatee, if he accepts the legacy, takes it subject to such charge, and is liable to make good the amount of the charge. The testator's estate is liable, however, (a) for anything to be done to complete the testator's title to the thing bequeathed; or (b) for payment of rent or land-revenue of immovable property any interest (which is given in a bequest) payable periodically, up to the testator's death; or (c) for call and other payment due from the testator at his death in respect of stock in a joint stock company, which is specifically bequeathed; the specific legatee bears the call or other payment becoming due in respect of such stock after the testator's death.

The legatee of a specific legacy is entitled to the produce thereof from the testator's death. Demonstrative legacy means a legacy directed to be paid out of specified property. It is in its nature a general legacy but there is a particular fund pointed out to satisfy it.

A demonstrative legacy is so far in general is that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the tendril assets: but it is so far specific that it will not be liable to abate with general legacies upon a deficiency of assets. It is however, liable to abate when it becomes a general legacy by reason of the failure of the fund out of which it is payable. And a demonstrative legacy of stock does not carry interest from the testator's death.42

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 in prima facie entitled to the legacy as well as to the amount of the debt. So 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 is entitled to receive the legacy as well as the portion.

42 Stokes. III.
The executor's assent is necessary to complete a legatee's title to his legacy and when given, it gives effect to a legacy from the testator's death, the executor, however, is not bound to pay or deliver any legacy until after one year from the testator's death.

VII. VESTING OF LEGACIES

If a legacy be driven 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. Whenever the enjoyment of the property is postponed to some date subsequent to the testator's decease, if the vesting of the property is not postponed, the representatives of the donee, surviving the testator but dying before the date of the will, take it.

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 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.

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.

A legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens. A legacy bequeathed in case a specified uncertain event shall not happen does not vest until the happening of that event.
becomes impossible. In either case, until the condition has been fulfilled, the interest of the legatee is called contingent.

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.43

The Act also deals with gifts to a contingent class and provides that 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.

Onerous bequests, provide that where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully but that 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.

Conditional bequests: Where a will imposes a condition precedent to the vesting of a legacy, the condition shall be considered to have been fulfilled if it has been substantially complied with. Where, however, there is a bequest with a condition subsequent as distinguished from a condition precedent, the bequest takes effect only when the condition is strictly fulfilled. In case of a condition precedent the legatee has no vested interest until the condition is performed and the condition is taken as performed if it has been substantially complied with; in case of a condition subsequent, the interest vests in the legatee in the first instance, subject to be divested by the non-performance of the condition.

The original bequest is not affected by the invalidity of the second (ulterior) bequest. Where there is a bequest to one person, and on its failure to another, of the same thing, the second bequest takes effect on the failure of the first, (though

43 Ibid.

301
the failure may not have occurred in the way contemplated by the testator), unless the will shows an intention on the testator's part that the first bequest shall fail in a particular way before the second can take effect, and then in such a case the second bequest takes effect only on failure of the first bequest in that particular way.

Bequests with directions as to application or enjoyment. It has been said that "equity like nature will do nothing in vain." Following this principle it is laid down that 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.

Where a testator absolutely bequeathes 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. 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.

VIII. ADEMPTION OF LEGACIES

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.

Where, however, the change between the date of the will and the testator's death, takes place by operation of law, or in execution of the provisions of any legal instrument in which the thing bequeathed was held, or without the
testator's knowledge or sanction, the specific legacy is not adeemed. A demonstrative legacy is not adeemed by reason that the property on which it is charged by the will does not exist at the testator's death or has been converted into property of a different kind; but is payable in such case from the general assets of the testator.

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 (a) for any temporary cause, or (b) by fraud, or (c) without the testator's knowledge or sanction. Nor does the removal of the thing bequeathed from the place in which it is stated in the will to be situated constitute an ademption, where the place is only referred to in order to complete the description of what the testator meant to bequeath.

So also stock specifically bequeathed does not adeem (a) if it is lent to a third party on condition that it be replaced, and it is replaced accordingly, or (b) if it is sold and an equal quantity of the same stock is afterwards purchased and belongs to the testator at his death.

A specific bequest of a right to receive something of value from a third party, gets adeemed by the testator himself receiving it; but where the bequest is of a valuable to be received by the testator from a third person, it does not get adeemed by the testator or his representative receiving the same, unless he mixes it up with his general property in which case the legacy gets adeemed. The receipt by the testator of a part of an entire thing specifically bequeathed operates as an ademption of the legacy to the extent of the sum so received. So the receipt by him of a portion of an entire fund or stock specifically bequeathed operates as an ademption only to the extent of the amount so received.

Where stock specifically bequeathed does not exist in whole or in part at the testator's death the legacy is adeemed so far as regards the whole or the part as the case be. No bequest is wholly or partially adeemed by a subsequent provision made by settlement or otherwise for the legatee.
IX. ABATEMENT OF LEGACIES

If the assets, after payment of debts, necessary expenses, and specific legacies, are not sufficient to pay all the general legacies in full, the latter shall abate or be diminished in equal proportions. On a deficiency of assets to pay legacies, a specific legacy is not liable to abate with the general legacies. When the assets are not sufficient to pay debts and specific legacies, then only the specific legacies abate rateably. Where the assets are sufficient to pay debts and necessary expenses specific legacies do not abate. Demonstrative legacies under similar circumstances where the assets are sufficient to pay debts and necessary expenses do not also abate, if the funds from which they are directed to be paid exist. These, however, are liable to abate when they become general legacies by reason of the primary funds out of which they are payable ceasing to exist.

Where there is a deficiency of assets general legacies first abate, then demonstrative and then specific. If the fund out of which the demonstrative legacy is payable fails, the demonstrative legacy is payable out of the general assets, and then it abates with the general legacies. Where specific legacy fails it is not payable out of the general assets. Where the assets are not sufficient to pay all the legacies an opportunity abates in the same proportion as the other pecuniary legacies given by the will.

X. REFUNDING OF LEGACIES

In the event of the assets proving insufficient to pay all the legacies, an executor may call upon a legatee to refund, if he has paid the legacy under Judge's order, but not if he has paid it voluntarily, and in this case (when he has paid a legacy voluntarily) the executor if solvent must be first proceeded against by the unsatisfied legatee; but if the executor be insolvent, then such a legatee can oblige each satisfied legatee to refund in proportion. So each satisfied legatee is compellable to refund in proportion when the executor has paid away the assets in legacies and he is afterwards obliged to discharge a debt of which he had no previous notice. If assets were sufficient to satisfy all the legacies at
the time of the testator's death, an unpaid legatee or one who has been compelled to refund by creditor, cannot call upon the legatee who has received payment in full to refund. An unpaid creditor, however, may call upon a satisfied legatee to refund, whether the assets were, or were not sufficient at the time of the testator's death, to pay both debts and legacies, and whether the payment of the legacy by the executor was voluntary or not. A creditor may call upon a legatee to refund within 2 years. The refunding shall in all cases be without interest.

XI. ANNUITIES

An annuity created by will is payable to the legatee for; his life only, whether it is directed to be paid out of the property generally, or a sum of money is bequeathed to be invested in the purchase of it. Where no time is fixed for the commencement of an annuity given by a will it commences from the testator's death; but the first payment is made at the end of a year next after that event. Where, however, there is a direction that the annuity be paid quarterly or monthly, the first payment becomes due and may be paid out at the end of the first quarter or first month, as the case be, after the testator's death; but the executor is not bound to pay it till the end of the year. And where there is a direction that the first payment is to be made within a given time from the testator's death, or on a day certain, the successive payments are to be made on the anniversary of the earliest day on which the will authorizes the first payment to be made; and in the interval between the times of payment if the annuitant were to die, an apportioned share of the annuity is to be paid to his representative.

XII. DOCTRINE OF LAPSE

If the legatee does not survive the testator, the legacy cannot take effect but shall lapse and form part of the residue of the testator's property. In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator. A bequest, however, does not lapse when the dying legatee is the testator's child or other lineal descendant and leaves a lineal
descendant living at the testator’s death, nor when the legatee is a trustee for another. So also a legacy does not lapse if one of two joint legatees die before the testator, but the survivor takes the whole. Where, however, there are words showing the testator’s intention to give to legatees distinct shares, and if any legatee die before the testator, the legacy intended for him shall fall into residue of the testator’s property.

Residue means all of which no effectual disposition is made by the will other than the residuary clause; but when the disposition of the residue itself fails, to the extent to which it fails, the will is in-operative, and the testator will be taken to have died intestate in respect to it. A residuary legatee may be constituted by any words that show an intention on the testator’s part that the person designated shall take the surplus or residue of his property. 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. The residue after usual payments is to be paid to the residuary legatee (if any) appointed by the will.

XIII. POWER OF APPOINTMENT

Where a testator gives by his Will the income of certain property to a certain person for life with a power to give the property by Will to whomsoever that person pleases such person takes a life interest in the income of the property and anyone who takes under the latter’s Will, takes the property from the first testator. The only requisite condition for a legal and valid exercise of the power is that the appointee should be a person who was in existence actually or in contemplation of law at the time of the first testator’s death.

XIV. RESIDUARY LEGatee

A residuary legatee is one to whom the testator gives what remains of his property after he had made all the legacies and bequests that he desired to make. The residuary legatee should be distinguished from the universal legatee. The latter is the one whom the testator bequeaths whole of his properties which he leaves at his death. The residuary legatee should also be distinguished from
the next-of-kin. The latter is a claimant de hors the Will, while the former is claimant under the Will. Just as in cases of all other legacies and bequests, no specific words or formula is needed to constitute a person a residuary legatee. Wherever a testator lays down that the surplus or residue of his estate after payment of debt, legacies and cost of administration shall go to the person or persons specified by him, such a person is known as residuary legatee.44

XV. VOID BEQUESTS

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

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

Exception.—If property is bequeathed to person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise; and if a person answering the descriptions alive at the testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or, if he is dead, to his representatives.

This general rule is relaxed by Exception which admits a kindred born after the death of the testator and before the period of distribution.

Where a bequest is made to a person not in existence at the time of the testator’s death, subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

- Application.—Sec. 113 has nothing to do with postponement of possession; a failure to vest the whole remaining interest of the testator is repugnant to the section but, when that has been done, it has no

44 ILR 4 Cal 433

307
application. Postponement of possession is not a retention of part of the testator's interest and is to a fetter so as to prevent the whole of that interest being vested in the beneficiary. The vesting is not delayed or affected by postponement of possession.45

A child enventre sa mere is considered to be in existence.46

2. **Bequest to unborn persons**

- **Rule apart from statute**

  A bequest to a person not in existence at the testator's death is invalid. A child in the womb and a son adopted by a widow after the death of her husband is in contemplation of law in existence at the death of the testator. A bequest to the wife of the testator's son in case he should marry within 10 years from the testator's death is valid, provided, the son marries a girl who was in existence at the testator's death,47 as the rule in this section does not apply.

3. **Disposition in favour of unborn person subject to prior dispositions:**

Where a gift or bequest is made to a person not in existence at the death of the testator, subject to a prior gift or bequest, the later gift or bequest shall not take effect, unless it extends to the whole of the remaining interest of the donor or testator in the property.

**Illustrations**

(1) Gift – A transfers property of which he is the owner to B in trust of A and his intended wife successively for their lives, and, after the death of the survivor, for the eldest son of the intended marriage for life and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

(2) Bequest – Property is bequeathed by a father to his son for life, after his death, to his son's wife for life and after her death to certain other persons.

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45 Aniruddha v Arabinda AIR 1946 Cal 396.
46 In re Wilmer’s Trusts (1903)2 Ch 411.
The son's wife was not in existence at the date of the testator's death. The bequest to her, not being of the whole interest, is void.48

This section is a combination of s. 13, Transfer of Property Act, 1882, and s. 113, Indian Succession Act, 1925.

4. **Rule Against Perpetuity**

(1) Gift - No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date or such transfer, and the minority of some person who shall be in existence at the expiration of the period, and to whom, if he attains full age, the interest created is to belong.

(2) Bequest - 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 death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

For example if a fund is bequeathed to A for his life, and after his death to B for his life, and after B's death to such of the sons of B, who shall first attain the age of 25. A and B survives the testator. Here, the son of B who shall first attain the age of 25 may be a son born after the death of the testator; such son may not attain the age of 25 until more the 18 years have elapsed from the death of the survivor A and B, and the vesting of the fund may thus be delayed beyond the lifetime of A and B and the minority to the sons of B. The bequest after A's death is void.

This rule is one of public policy.49 The rule against perpetuity relates to any property, whatever be its nature, and whether is it movable or immovable.50

Sub-section (1) is s. 14 of the Transfer of Property Act 1882, and sub-section (2) is s. 114 of the Indian Succession Act 1925. Both these sections are the same in substance, though different in form.

48 Kappuswami Pillai v. Jayalakshmi Ammal, AIR 1934 Mad 705.
49 In re Oliver's Settlements (1905)1 Ch 191.
50 Cowasji v Rustomji 20 Bom 511 (561).
The rule against perpetuity does not apply to charitable or religious endowments.

5. Bequest or Gift to a Class:

It is a bequest made to a class of persons with regard to some of whom it is inoperative by reason of the provisions of section 113 or section 114, such bequest shall be void in regard to those persons only and not in regard to the whole class.

Illustration:

(1) A fund is bequeathed to A for life, and after his death to all his children who shall attain the age of 25. A survives the testator, and has some children living at the testator's death. Each surviving child of A at the time of testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest. But A may have children after the testator's death, some of whom may not attain the age of 25 until more than 18 years have elapsed after the death of A. The bequest to A's children, therefore, inoperative as to any child born after testator's death and in regard to those who do not attain the age of 25 within 18 years after A's death, but is operative in regard to the other children of A.

This is a combination of s.15, Transfer of Property Act, 1882, as amended by the Transfer of Property (Amendment) Act, 20 of 1929, ss. 9 and 115 of the Indian Succession Act, 1925, as amended by s.14, Transfer of Property (Amendment) Supplementary Act 21, of 1929. Before the amendment, if a gift or bequest to a class failed as to any member thereof, the gift or bequest was wholly void. Since the amendment, it is not wholly void. It is void only as to those in regard to whom it fails.

6. Effect of direction for Accumulation

(i) Where the terms of a Will direct that the income arising from any property shall be accumulated either wholly or in part during any period longer than a period of eighteen years from the death of the testator, such direction shall, save as hereinafter provided, be void to the extent to which the period during which
the accumulation is directed exceeds the aforesaid period and at the end of such period of eighteen years the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(ii) This section shall not effect any direction for accumulation for the purpose of:

1. The payment of the debt of the testator or any other person taking any interest under the Will or

2. The provision of portions for children or remoter issue of the testator or of any other person taking any interest under the Will or

3. The preservation or maintenance of any property bequeathed; and such direction may be made accordingly.

7. **Bequest to Religious or Charitable Purposes**

A person having nephews and nieces or nearer relations has no power to make a Will or make a provision in the Will for religious uses or for charitable purposes unless the Will has been made out not less than 12 months before the death of the testator and has been deposited within six months from its execution in the Registrar's office and should remain there until the death of the testator. If these conditions are not fulfilled the bequest for religious or charitable uses will not be valid. The purpose of this section is obviously to prohibit death bed bequest to religious and charitable uses so that a testator is not permitted to deprive his near relations from inheritance.

The procedure for deposit of Wills is laid down in Part IX of the Indian Registration Act. The fact that the Will has been registered does not amount to the fulfillment of the condition of the deposit of the Will.

It is essential that the Will must remain in the custody of the Registrar. If it is deposited and then withdrawn from the custody, the requirement of the section is not fulfilled. It is essential that the Will must remain in the custody of the registrar till the death of the testator.
Ban goes on disposal of property for religious purposes. Concerned over the contradictions in marriage laws of various religions, the Supreme Court, in a historic judgment, has emphasized the need for legislation by Parliament on a common civil code.

Holding that there was no "necessary connection" between religious and personal laws in a civilized society, a three-Judge Bench, headed by the Chief Justice, Mr V N Khare, said it was a matter of regret that Article 44 of the Constitution, which provided for the state to "endeavour" to secure a uniform civil code for its citizens throughout the country, had not been effected.

"Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of the national integration by removing the contradiction based on ideologies," the court said.

The judgment might be a major boost to the BJP which had been striving for a common civil code but had kept the issue out of its agenda under the pressure of the NDA alliance partners. The judgment came on a public interest litigation (PIL) by a Christian priest John Vallamattom and some other citizens of the community, challenging the validity of Section 118 of the Indian Succession Act (ISA), 1925, describing it as discriminatory to their community because it prevented a Christian from bequeathing his property for religious and charitable purposes.

Striking down Section 118 of the ISA by holding it as "violative" of the Article 14 (equality before law) of the Constitution, the other Judges of the Bench, Mr Justice S B Sinha and Mr Justice AR. Lakshmanan, in their separate but concurring judgments, said "Disposition of property for religious and charitable purpose is recommended in all religions but the same cannot be said to be an integral part of it."

Though Mr Justice Sinha and Mr Justice Lakshmanan, fully concurred with the main judgment, written by the Chief Justice, they did not discuss the need for a law on common civil code separately in their orders.
The court said, "Article 25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. According to Articles 25 and 44 while the former guaranteed religious freedom, the latter divested religion from social relations and personal law."

There was no doubt that marriage, succession and the like matters of a secular character could not be brought within the purview of Article 25 (freedom of propagation of religion) and 26 (freedom to manage religious affairs). "Any legislation, which brings succession and the like matters of secular character within the ambit of these Articles, is a suspect legislation," the court said, adding the provision of Section 118 also violated the UN Convention on Civil and Political Rights.

While Mr Justice Sinha said that the purpose of Section 118 had lost its significance with the passage of time, Mr Justice Lakshmanan said "the harsh and rigorous procedure envisaged under the Section in relation to testamentary disposition of property for religious and charitable use does not apply to members of Hindu, Mohammedan, Buddhist, Sikh or Jain communities by virtue of Section 58 of the ISA, making it discriminatory against Christians."

The petitioner had challenged the provisions of Section 118 of the Act on the ground that it discriminated against a Christian vis-a-vis a non-Christian in bequeathing their property for religious and charitable purposes, except by a will executed not less than 12 months before the death, and deposited within six months from its execution in some place provided by the law for the safe custody of it.

The Act said that such a provision was made to prevent a person from making ill-considered death-bed will under the religious influence.

But the court said, "There is no justification in restricting testamentary disposition of property for charitable purposes. Charitable purposes included relief to poor, education, medical and advancement of objects of public utility."

313
The charitable purposes were philanthropic and a person's freedom to dispose of his property for such a cause had nothing to do with the religious influence, and the provision under Section 118, treating bequests for both religious and charitable purposes "is discriminatory and violative of Article 14 of the Constitution," the court said, observing that the world had witnessed a sea change about the right of equality since the law was enacted.

"We, however, are not oblivious of the fact that restriction to make testamentary disposition of the property to some extent is prevalent under the Mohammedan law also but therein the purpose is to protect the near relation which cannot be said to be the sole purpose underlying Section 118 of the Act," the court said.

XVI. GIFTS IN CONTEMPLATION OF DEATH

Donatio Mortis Causa,

A gift is said to be made in contemplation of death where a man who is ill, and expects to die shortly of his illness, delivers to another the possession of any movable property to keep as a gift in case the donor shall die of that illness. Any movable property which the donor could dispose of by Will, may be the subject of such a gift. It may be resumed by the giver and 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. Thus, like a Will, it is ambulatory, incomplete and revocable during the donor's lifetime. On the other hand, a gift inter vivos once made is complete and irrevocable. This is not so about the death-bed gift. Just as a legacy so also the property, the subject-matter of the death-bed gift, remains the property only on the death of the donor, provided the donor has not rescinded it before he died. Probate is necessary of the Will giving legacies and bequest, but no probate is required of death-bed gifts. There is nothing like an executor of a death-bed gift. A donee of a gift is entitled to succession certificate in respect of it.\(^51\) The burden of proof that the property donated to him was a death-bed gift is on the donee; he must establish that gift was made to him by the donor in contemplation of death.

\(^51\) D'Silva v. Maclakin, ILR (1943) All 198