CHAPTER - I

HINDU LAW OF
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I. SUCCESSION

1. What is Succession?

Succession is the transmission of property vested in a person at his death to some other person or persons. In all countries, Succession is regulated by law. However, legal historians have found that there is no universally common origin to such laws of succession in the various countries; they have not developed on uniform lines all over the world. There are systems in which religion has played a prominent part in the development of the law of succession. The Hindu community is a typical example of that kind. The ancient Hindu Law-giver, Manu stated: "To three libations of water must be given; to three must Pinda be offered the fourth is the giver. The property of a sapinda goes to the nearest sapinda," thereby demonstrating the intimate connection between the duty to offer spiritual benefit and the right to take the property of a deceased Hindu. The Hindu Law of Inheritance and Succession was believed by Hindus to be founded on divine ordinance.

Succession excludes survivorship. Inheritance means only the acquisition of property by succession and not by devise under a will.

There are again communities in which systems of family rights and communal ownership prevailed, which have been gradually superseded by forms of individual ownership. In regard to these communities, Professor Pluckett has referred to the Law of Succession as "an attempt to express family in terms of property".

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1 Sirkar, Hindu Law, 5th Edn., P.817.
2 Sankarbatv. Pila Devi, 76 CWN 400 (404) (Arun K. Mukherjea, J.)
4 See Concise History, 5th Edn., P. 711.
2. Kinds of Succession

The law relating to succession is only of gradual growth. A Law of Succession is not needed till disputes arise. But the law has developed and at the present day we mean by the Law of Succession as the law which regulates the transmission, after death, of the property of one individual to one or more individuals. The Law of Succession in modern times is divided into the Law of Testamentary Succession and the Law of Intestate succession. The law of Testamentary Succession regulates the devolution of the property of a person who dies having made a will disposing of it. The law of Instate succession, on the other hand, regulates the devolution and distribution of the undisposed property of a deceased person.5

In early communities a will was something very different from what it became in later law. It was generally in the form of a conveyance impending death. Accordingly it was generally resorted to when a testator desired to distribute the property after his death according to his wishes contrary to the normal mode in which the property would have passed on the basis of the prevailing customary law. This power to divert was not available as against the entirety of the estate owned by a person, but was generally confined to a fraction of the estate. A definite proportion of the inheritance shall always be allowed to devolve on the close relations like the widow and children, traces of which are still to be found in many of the modern laws relating to Wills. At the events, these dependents of the deceased could at least claim provisions for their maintenance from out of the estate devised to third parties.6

3. Need for Testamentary Succession

"The law of every civilized people concedes to the owner of property the right of determining by his last Will, either in whole or in part, to whom the effects which he leaves behind him shall pass. Yet it is clear that, though the law leaves to the owner of the property absolute freedom in this ultimate disposal that of

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5 Gopalakrishnan, Law of Will; 7th Edn.
which he is thus enabled to dispose, a moral responsibility of no ordinary
importance attaches to the exercise of the right thus given. The instincts and
affections of mankind in the vast majority of instances, will lead men to make
provisions for those who are the nearest to them in kindred and who in life have
been the objects of their affection. Independently of any law, a man on the point
of leaving the world would naturally distribute among the children or nearest
relatives the property which he possessed. The same motives will influence him
in the exercise of the right of disposal when secured to him by law. Hence arises
a reasonable and well warranted expectation on the part of man's kindred
surviving him that, on his death, his effects shall become theirs, instead of being
given to strangers. To disappoint the expectations thus created and to disregard
the claims of the kindred to the inheritance is to shock the common sentiments of
mankind, and to violate what all men concur in deeming an obligation of the
moral law. It cannot be supposed that in giving the power of testamentary
disposition the law has been framed in disregard of those considerations. On the
other hand, had they stood alone, it is probable that the power of testamentary
disposition would have been withheld and that the distribution of property after
the owner's death would have been uniformly regulated by the law itself. But
there are other considerations which turn the scale in favour of testamentary
power. Among those who as a man's nearest relatives would be enabled to
share the fortune he leaves behind him, some may be better provided for than
others; some may be more deserving than others: some from age, or sex, or
physical infirmity may stand in greater need of assistance. Friendship and tried
attachment of faithful service may have claims that ought not to be disregarded.
In the power of rewarding dutiful and meritorious conduct, paternal authority finds
a useful auxiliary. Age secures the respect and attentions which are one of its
chief consolations. As was truly said by Chancellor Kent in Van Alst v. Hunter7 'it
is one of the faithful consequences of extreme old age that it ceases to excite
interest, and is apt to be left solitary and neglected'. The control which the law
still gives a man over the disposal of his property is one of the efficient means

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7 Johnson N.Y. Ch. Rep. 159.
which he had on protracted life to commend the attentions due to his infirmities. For these reasons, the power of disposing of property in anticipation of death has ever been regarded as one of the most valuable of the rights incidental to property, while there can be no doubt that it operates as a useful incentive to industry in the acquisition of wealth and to thrift and frugality in the employment of it. The law of every country has, therefore, conceded to the owner of the property the right of disposing by Will either of the whole, or, at all events, of a portion of that which he possesses.

The need for the recognition of testamentary capacity may be stated as follows:

(1) The general law recognizes the possible inequities that in particular cases, the administration of general law results in.

(2) There may arise conditions and contingencies in the life of an individual, inducing him to depart from the normal channel of intestate succession under the general Law.

(3) It is to soften the rigour of hardships in possible cases that the law of every civilized country recognizes the testamentary capacity of everyone who is the owner of property.

(4) Legislature has stepped in again to correct any indiscreet exercise of testamentary power to provide maintenance for the dependants of the deceased owner.

Bentham in his Theory of Legislation, Part II, Chapter IV, states under the heading 'Testaments':

"The law not knowing individual cannot accommodate itself to the diversity of their wants. All that can be exacted from it is to offer the best possible chance of satisfying those wants. It is for each proprietor, who can and who ought to know the particular circumstances in which those who depend upon him will be placed at his death, to correct the imperfections of the law in those cases which it cannot furze. The power of making a Will is an instrument entrusted to the hands of individuals to prevent private calamities."
The same power may be considered as an instrument of authority entrusted to individuals, for the encouragement of virtue in their families and repression of voice.

The power of making a Will is advantageous, under another aspect, as a means of governing—not for the good of those who obey, as in the preceding article, but for the good of him who commands.

"It may be said that in default of kin, the services of strangers are necessary to a man, and his attachment to them is almost the same as to rewarding the care of a faithful servant, and of softening the regrets of a friend who has watched at his side, not to speak of the woman, who, but for the omission of a ceremony, would be called his widow, and the orphans whom all the world but the legislator would regard as his children."

II. WHO IS A HINDU AND HINDU PERSONAL LAW

1. Who is a Hindu?

Till today there is no precise definition of term 'Hindu' available either in any statute or in any judicial pronouncement; it has defied all efforts at definition. However, since Hindu law applies to all those persons who are Hindus it is necessary to know who are Hindus, whatever definitional difficulties there might be. If the question is posed in a different form, viz, to whom does Hindu law apply, it would be easier to state the various categories of persons to whom Hindu law applies. The persons to whom Hindu law applies may be put in the following three categories:

(a) Any person who is Hindu, Jain, Sikh or Buddhist by religion, i.e. Hindus by religion.

(b) Any person who is born of Hindu parents (viz, when both the parents or one of the parents is Hindu, Sikh, Jain or Buddhist by religion) i.e. Hindus by birth, and
(c) Any person who is not a Muslim, Christian, Parsi or Jew, and who is not governed by any other law.

Under this category two types of persons fall:

(i) Those who are originally Hindus, Jains, Sikhs or Buddhist by religion, and

(ii) Those who are converts or reconverts to Hindu, Jain, Sikh or Buddhist religion.8

2. Origin of Wills in Hindu Law

The idea of a Will is wholly unknown to Hindu Law of the Shastras.9

The origin and growth of the testamentary power among Hindus has always been a puzzle to Hindu lawyers. There was no name for them either in Sanskrit or in the vernacular languages, Kane says that owing to the joint family system and the custom of adoption, testamentary dispositions did not come into vogue in ancient India.10

Kane in History of Dharma Shastras, page 816, Vol.III, says: "But it need not be supposed that the idea had not at all dawned upon the minds of people before the advent of the British. Wills were known among the Muslims and contact with them would naturally suggest the idea of a Will."

He also refers to verses 341-359 of the Rajatarangini IV as appearing to embody the political testament of King Lalitaditya of Kashmir in the first half of the 8th century. He cites a text of Katyayana as making a very near approach to the modern conception of a Will. There is a reference to a letter, dated A.D.1775 by one Naro Babaji, who after referring to his illness, provides on a generous scale for his funeral and shradha expenses and makes dispositions in favour of his daughter-in-law, of another widow, and for the marriage of his Kinsman’s sons and the distribution of the balance of his assets.

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8 Hindu Law, Paras Diwan, 1st Edn. 1995, pp. 4-5.
9 Dr. Tahir Mahmood, Hindu Law, 2nd Edn., P. 768.
But subsequent to the commencement of the British rule, by a course of practice long enough to be recognized as approved usage, and by a series of judicial decisions gifts by Will have been held as binding as part and parcel of the general law of India.

One of the earliest Wills to come before the British Indian Courts was that of the notorious Umichand who died in A.D.1758.

In a Bombay case the Will of a Hindu, made in 1789 is referred to.11

Such gifts by will have followed in India the practice of gifts and conveyance inter vivos. In Roman Law also testamentary power appears to have been a development of the law gift inter vivos.

A gift by Will is intended to take effect upon the death of the donor and it is revocable in his lifetime. Until revoked it is a continuous act of gift up to the moment of death and does then operate to give the property disposed of to the persons designated as beneficiaries. They take the property upon the death of the testator, as they would if he had given it to them during his lifetime.

So the Law of Wills was grown up from the analogy furnished by the Law of Gifts: Even if Will cannot be regarded in all respects as gifts to take effect upon death, but the analogies are sound as regards the property to be transferred and the persons to whom it may be transferred.12

In Naga Lutchmee Ammal v. Gopoo Nadaraja Chettey,13 a Hindu governed by the Hindu Law as prevails in Madras and who had a wife and a daughter and male lineal descendants, made a Will. After the death of the testator, the wife impeached the validity of the Will. Their Lordships held that the Will was valid and made the following observations:

"It must be allowed that in ancient Hindu Law as it was understood through the whole of Hindustan, testamentary instruments, in the sense affixed by English lawyers to that expression, were unknown; and it is stated by a writer

12 Tagore V. Tagore, 1 IA Supp 47; 9 ben LR 377.
13 (1856) 6 MIA 309 (344).
of authority (Sir Thomas Strange) that the Hindu language has no terms to express what we mean by Will. But it does not necessarily follow, that what in effect though not in form are testamentary after the death of the maker of the instrument, were equally unknown. However this may be, the strictness of the ancient law has long since been relaxed, and throughout Bengal a man who is the absolute owner of property may now dispose of it as he pleases whether it be ancestral or not. This point was resolved several years ago, by the concurrence of all the judicial authorities in Calcutta, as well of the Supreme Court as of the Sadar Court. No doubt the law of Madras differs in some respects and among others, with respect to Wills, from that of Benagal. But even in Madras it is settled that a Will of property, not ancestral, may be good; a decision to this effect has been recognized and acted upon by the Judicial Committee and, indeed, the rule of law to that extent is not disputed in this case.”

In Vallinayagam Pillai v. Pachche,14 “now the power to make a Will is settled” co-extensively with the independent right of gift or other disposal by act inter vivos.

The Privy Council has observed in numerous cases that the nature and extent of the testamentary form of disposition by Hindu cannot be completely governed by any analogy to the law of England. 15

There are peculiarities of the English Law such as powers of appointment, real and personal property, legal and equitable interests, the law of estates which have been held as inapplicable to Hindu Wills.16

In Babbo Beer Pratab sahu v. Maharajah Rajender Pratab Sahu17, the Privy Council made the following observations as to the testamentary power of a Hindu governed by the Benares School:

“It is too late to contend that because the ancient Hindu treatises make no mention of Wills, a Hindu cannot make a testamentary disposition of his property.

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14 1 MHCR 326 (329).
15 Bhooban Moyee v. Ramkishore, 10 MIA 279(307, 308); Sonatun Bysac V. Juggutsondree, 8 MIA 66 (79).
16 Tagore case, 1 IA Supp 47 (64); Motivahu’s case, 21 Bom 709 (722).
17 (1867) 12 MIA 1.
Decided cases too numerous to be questioned now, have determined that the testamentary power exists, and may be exercised, at least within limits which the law prescribes to alienation, by gift inter vivos. Accordingly it has been settled that even in those parts of India which has been governed by the stricter law of Mitakshara, a Hindu without male descendants may dispose of, by Will, his separate and self-acquired property whether movable or immovable: that one having male descendants may so dispose of his self-acquired property, if movable, subject perhaps to the restriction that he cannot wholly disinherit any one of such descendants.

The Courts applied the Hindu Law of Gifts as far as possible to Hindu Wills also in so far as the transfer of property and the persons to whom it could be transferred. As stated in the Tagore's case18 "Even if wills are not to be regarded in all respects as gifts to take effect upon death, they are generally to be regarded as to the property which they can transfer and the person to whom it can be transferred."19 The analogy between Wills and gifts inter vivos stops with that.20

- **First Introduced in Bengal**

The testamentary power of a Hindu was first admitted in Bengal where the power of alienation was most exercised.21 In 1812, the Sudder pandits laid down the general principle that “the same rule applies to bequests as to gifts; every person who has authority, while in health, to transfer property to another, possesses the same authority of bequeathing it.”22 In Dayabhaga School it was settled by a long course of decisions even prior to the decision of the Privy Council in the Tagore case that a Dayabhaga father can Will, as well as alienate inter vivos, the entire property including ancestral, even to woman of ill-fame or to his illegitimate son, subject perhaps to their right of maintenance.

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18 IA 47 (69)
19 Pandarinath v. Govind, 23 Bom 59 (74); Venkatarama v. Venkata Surya, 2 Mad. 333.
21 Eshanchand v. Eshorechund (1792) 1 SD 2; Gopee v. Rajkrishna (1800) Montr 381.
22 Sreenaraian v. Bhya Jha (1812) 2 SD 23 (29, 37); Juggomohun v. Neemoo (1831) Morton 90.
The conveyance of property inter vivos was soon followed by the practice of making gifts by Wills.23

- **In Southern India**

In Southern India, the tendency of the Sudder Judges was at first to accept the opinions of Sir Thomas Strange, Mr. Colebrooke and the pandits, that the legality of a Will must be tried by the same tests as that of a gift; for instance, that it would be valid if made to the prejudice of a widow, but invalid if made to the prejudice of male issue. Then, Madras Reg. V of 1829 (Hindu Wills) was passed, which reciting that Wills were instruments unknown, enacted that for the future Hindu wills should have no legal force whatever, except so far as they were in conformity with Hindu law according to authorities prevalent in the Madras Presidency. Wills were not only set aside where they prejudiced the male issue, but the courts also laid down that where a man without male issue bequeathed his property away from his widow and daughters, such a Will would be absolutely illegal and void, unless they had assented to it.24

Finally, the Sudder Court by its decree in 1850 affirmed, in accordance with the opinion of pandits, the testamentary power of a Hindu to dispose of his property.25 This decision was on heal, affirmed in 1856 by the Judicial Committee. The Privy Council observed: “The strictness of the ancient law has long since been relaxed, and throughout Bengal, a man who is the absolute owner of property may now dispose of it by Will as he pleases; whether it be ancestral or not. Even in Madras it is settled that a Will of property, not ancestral, may be good”.26 After some conflicting decisions of the Sudder Court, the Madras High Court reviewed in 1862 all the previous decisions and reaffirmed the power of a testator, who has no male issue, to make a binding Will by which the bulk of his property is bequeathed to distant relation after providing sufficient

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23 Mayne’s Hindu law of Usage, 16th Edn., by Justice Ranganath Mishra., p. 1381.
24 Mootooengada v. Toombayasamy Mad Dec of 1849, 27.
25 Naglutchmee v. Nadaraja Mad Dec of 1851, 266.
26 Naglutchmee v. Gopoo (1856) 6 MIA 309, 344.
maintenance for his widow. This decision, of course put an end to all discussion as to the capacity of a testator in Madras to make a binding Will.

**In Bombay:**

In Bombay (now Mumbai), in a very early case, the pandits when consulted said: "There is no mention of Wills in our Shastras, and therefore they ought not to be made." In 1866, Westropp, J, said: "In the Supreme Court, the Wills of Hindus have been always recognized and also in the High Court, at the original side. Whatever questions there may formerly have been as to the right of a Hindu to make a Will relating to his property in the mofussil, or as to the recognition of Wills, by the Hindu law, there can be no doubt that testamentary writings are, as returns made within the last few years form the Zillahs show, made in all parts of the mofussil of this Presidency." The testamentary power of Hindus over their property must now be considered as completely established.

Under old Hindu law a testamentary disposition could be made either orally or in writing.

**History of legislation:**

Express legislation in the shape of the Hindu Wills Act (XXI of 1870) followed, as it was thought expedient to provide rules for the execution, revocation, interpretation and probate of Wills of Hindus, Jainas, Sikhs and Buddhists in the territories subject to the Lieutenant-Governor of Bengal and in towns of Madras and Bombay. By that Act, certain sections of the Indian Succession Act, 1865, which, of course, was not applicable to Hindus were made applicable to all Wills and codicils made by Hindus within the said territories and limits and to Wills and codicils made outside but relating to immovable property situate within those territories and limits. Section 3 of that

27 Villinayangam v. Pachche (1862) 1 Mad HC 326, 339.
28 2 Stra HL 449; Deo bae v. Wan Bae 1 Bor 27 (29); Goolab v. Phool, ib, 154 (173); Gungaram v. Tapee, ib., 372 (412); Icharam v. Purmanund 2 Bor 471 (515); all decisions ranged from 1806 to 1820.
29 Narrottam v. Narsandas (1866) 3 Bom HC (ACT) 8.
32 See Section 331 of Indian Succession Act (X of 1865).
Act provided that nothing contained in the Act shall authorize a testator to bequeath property which he could not have alienated inter vivos, or to deprive any person of any right of maintenance of which, but for the Act, he could not deprive them by Will. It also further provided that nothing contained in the Act shall authorize a testator to create an interest which he could not have created before the 1st September, 1870. Wills made by Hindus in other parts of the India continued to be governed entirely by Hindu law unaffected by any statutory provision. In 1881, the Probate and Administration Act provided for the grant of probate of Wills and letters of administration to the estates of Hindus, whether governed by the Hindu Wills Act or not. The Succession Certificate Act (VII of 1889) was passed to facilitate the collection of debts on successions and to afford protection to parties paying debts to the representatives of deceased persons. Finally, the Indian Succession Act, 1925 was passed, which consolidated the law applicable to intestate and testamentary succession in British India. It superseded inter alia the Indian Succession Act, 1865, the Hindu Wills Act, 1870, the Probate and Administration Act, 1881 and the Succession Certificate Act (VII of 1889). This Act, as amended by Acts XXXVII of 1926 and XVIII and XXI of 1929, now applies subject to certain exceptions mentioned therein, to all Wills and codicils made by Hindus, Buddhists, Sikhs and Jainas throughout India.33

3. Indian Succession Act, 1925-Statutory Law

- **Scope & Extent of Control over Indian Wills**

At present Hindus are governed by the provisions of the Indian Succession Act, 1925 as detailed in section 111 of that Act, with regard to testamentary disposition by them.

The provisions of the Indian Succession act are largely based upon the principle of the law of wills as laid down by English Courts, but adapted to suit the different social conditions of this country.

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33 Neither Parts II to V relating to intestate succession nor such provisions of Part VI as are specially excepted by sections 57 and 58 apply to Hindus, Buddhists, Sikhs and Jainas.
The provisions of consolidatory statutes as the Indian Succession Act are binding upon the Courts, as their object is to place the principles of law upon a footing more specific and more certain than the practice of English Courts in such matters. In interpreting those statutory provisions it is our duty specially to guard ourselves against being guided too much by the English cases and too little by the words of the statute. It must not be forgotten that in many matters the Indian statute has departed from the rules and principles adopted in England.34

Section 58(2) of the Indian Succession Act enacts that the provisions of Part V therein shall constitute the law of India applicable to all cases of Testamentary succession.

Sub-Section (1) of the said section saves from the operation of the said part-

(1) Testamentary Succession among Muslims.

(2) Wills made by Hindus, Buddhists, Sikhs or Jains, as well as others before the first day of January, 1866.

(3) Under Section 57, it may be noted that Testamentary Succession among Hindus, Buddhists, Sikhs and Jains was brought under statutory control in gradual stages;

(a) Wills and codicils made after 1st September 1879, within the territories then subject to the Lieutenant-Governor of Bengal and within the original civil jurisdiction of the High courts of Madras and Bombay;

(b) All Wills and codicils made outside those territories and limits but relating to immovable property situate within those territories and limits; and

(c) All Wills and codicils on or after the first day of January, 1927 and not included under the former classes.

The provisions of the statute made applicable to Wills are set out in Schedule III subject to the restrictions and modifications specified therein. It cannot, however, be assumed that the intention of the Legislature is that principles of those sections omitted ought not to have any application to the

34 Per Mahmood, J. in Bachman v. Bachman, ILR 6 All 583.
Hindus. It can only mean that the Legislature was doubtful about their applicability to Hindus. Where, therefore, on general principles, a rule was applicable to Hindus, a Court of law need not refrain from giving effect to it simply because it is subject of a provision excluded by Schedule III.\textsuperscript{35}

In regard to Wills by Hindus, as a result of Section 214, only probate is necessary where such Wills fall under clauses (a) and (b), no probate is necessary in regard to Hindu Wills falling under Section 57(c), i.e. Wills by Hindus after 1\textsuperscript{st} January, 1927.\textsuperscript{36}

4. Testament in Old Hindu Law

Under old Hindu Law the power of alienation inter vivos is different vis-à-vis classes such as families governed by Mitakshara law, Alisyasanthanam law, Dayabhaga law, etc. We may pin point the position thus:

(i) Under \textit{Mitakshara School} no bequest can be made by a member of an undivided family of the whole or part of his share in the ancestral property. Further he is not authorized to bequest property which he could not have alienated. Although a person can dispose of all his property through Will if the same is self aquired or private property and in no way belongs to the joint family property.

But can a coparcener bequeath with the consent of the other coparceners his coparcenary interest? There is conflict of opinion in this regard.

Madras High Court decisions are not uniform. In a case,\textsuperscript{37} father's Will in favour of his daughter of a reasonable portion of his undivided coparcenary property with the consent of his major sons and his minor son by guardian-mother was upheld. But A's bequest in favour of his wife for her maintenance was held not binding on the family in Subbarami Reddi v. Ramanna.\textsuperscript{38} Where a father made an unequal distribution of the coparcenary property among his major sons with their consent the court upheld it only as a family arrangement and not

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\item Amritlal Dutt v. Sornamayee Dasi, 24 Cal 589 (609).
\item Janki Bai v. Durga Prasad, AIR 1938 All 648; Rup Rao v. Ram Rao, AIR 1952 Nag 88.
\item Appan Patra charier vs. Srinivasa Chariar, 43 Mad 824; 12 LW 249.
\item Sadasivam v. Shanmugam, AIR 1927 Mad 126; 25 LW 119.
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as a Will. A, an undivided brother bequeathed a portion of his undivided property in favour of his daughter with the consent of his major brother B. this was also upheld only as a family settlement or arrangement.

(ii) In Aliyasanthana Law or Marumakkathayam, the Rules of Mitakshara law do apply. Consequently, a member of a tarwad cannot make a bequest of tarwad property. The last surviving member of a tarwad can execute a Will as to the tarwad property. Similarly a member of tavazhi (if he is the last member) can bequeath tavazhi property by Will. There is no doubt that a member of the aforesaid groups can dispose of by Will his self-acquired property.

(iii) The Dayabhaga School prevalent in Bengal gives absolute right to a member of Dayabhaga family. For, there is no right by birth so as to curb all alienations of ancestral property. The Dayabhaga Hindu can, therefore, make a devise of any property ancestral or self-acquired.

A Hindu's Will was held illegal when no provision was made therein for the maintenance of his wife and daughter. Later decision held the Will valid but is subject to maintenance claims. After the passing of the Hindu Women’s Right to Property Act XVIII of 1937, a widow's right to maintenance rarely arises as she is deemed a full-fledged heir.

Even before Part VI of the Indian Succession Act was made applicable to Hindus in 1926, by passing of the Madras Act I of 1914 and the Hindu Disposition of Property Act, 1916 and VII of 1921, gifts to unborn persons were declared valid even among Hindus provided they did not infringe the rule against perpetuity.

Now under section 57 of the Indian Succession Act, 1925, this provision (section 113) has been made applicable to Hindu Wills.

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41 Adam Haji v. Kunkan, AIR 1938 Mad 242. See also Achutan Nayar v. Cherlotti Nayar, 22 Mad. 9.
42 Dbendra Coomar v. Brojendra Coomar, 17 Cal. 886.
43 Mootoo Vengada v. Tobayaswamy, Madras, Decision of (1849) Mad 27.
44 Kamakshi Ammal v. Krishnammal, AIR 1938 Mad 340. See also sections 39 and 128, Transfer of Property Act, section 111, rule of Indian Succession Act, 1925.
The later decision of the Calcutta High Court in Anirudha Mitra v. Aralinda Mitra\(^{45}\) decided that as the Hindu Disposition of Property Act, XV of 1916, has not been repealed, the power to create an interest in property in favour of an unborn person given by that Act cannot be said to have been taken away by the Succession Act.

5. Hindu Succession Act, 1956 – Effect on Old Hindu Law

(i) Testamentary Disposition

Under the Hindu Succession Act, 1956 there has been a revolutionary change in the right of a Hindu to make a testamentary disposition. Section 30 of the Hindu Succession Act, 1956 deals with the testamentary succession among Hindus, which states that:

“Any Hindu may dispose of by Will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus.”

The Explanation further clarified that the interest of a male Hindu in Mitakshara coparcenary property or interest of a member of a Tarwad, “Tavazhi, Illom or Kutumba or Kavaru, shall be deemed to be property capable of being disposed of by him or by her within the meaning of this section.

Prior to this Act, a Hindu governed by Mitakshara could dispose of his property by a Will or other testamentary disposition if it was his separate property; and secondly if he was the sole surviving coparcener of the joint family property. Under Dayabhaga law as there was no right by birth in the other coparcenary members of the family till the father’s death, the father was in a position to dispose of by Will the whole of the joint family property. Now under the present section, according to the Explanation, a Hindu member of a coparcenary governed by the Mitakshara of a member of a Tawazhi, Tarwad, Illom, Kutumba or Kavaru is given for the first time a right enabling him to dispose of his undivided interest in the property by Will or other testamentary document under

\(^{45}\) AIR 1946 Cal 396.
the old Hindu law is removed by this section. According to section 4, any custom inconsistent with any provision of this enactment, is abrogated. It has been held however that a custom in Punjab prohibit bequest of an undivided interest is not inconsistent with this provision as this is only an enabling provision and this Act deals only with matters of succession and not matters of alienation.

The limitation on the right of the coparcener is found in the Explanation to section 30 of the Act which makes it clear that what is meant by the expression ‘property capable of being disposed of by him or by her’ is the interest of a male Hindu in the Mitakshara Coparcenary Property. The share of the deceased out of the joint family property of coparceners could at best have been lawfully disposed of by a Will but not the entire ancestral property inherited by him from his father.

In the expression "or any other law for the time being in force", the word "law" will include any statutory law or textual law or customary law. It would therefore follow that the customary law in Punjab where there was prohibition regarding the power of alienation which was the subject-matter of the above referred Punjab cases, would also be law in force within the meaning of this section and section 30 would prevail notwithstanding such law. Therefore, the decisions that this section did not abrogate the customary law of Punjab do not seem to be correct. The reasoning in the said decisions that this Act only deals with succession and not with alienation is faulty as this provision expressly deals with testamentary disposition.

The power under this section to make a testamentary disposition does not extend to the making of a gift, and so, a coparcener cannot make a gift inter vivos of his undivided share. This provision also does not apply to other modes of alienation inter vivos which will continue to be governed by the ordinary Hindu law. Where a coparcener made a bequest under a will executed prior to the Act,

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48 Rajamma (V.) v. Rami Reddy (A.) 1997 (2) HLR 548 (AP).
but died after the Act, this section operates as the will takes effect only from the death of the testator.\footnote{Veerabhadrappa v. Rabayawwa (1969) 2 Mys LJ 105.} In such a case, the property taken by the legatee is his absolute property and joint property.\footnote{Commissioner of Wealth Tax v. Sampatrai Bhutoria and Sons 1981 Tax LR 1550 (Calcutta).} However, dealing with a case where a deceased was allotted a share in his Kutumba property by a preliminary decree dated 26-8-1952 under Aliyasanthana law in a suit for partition and subsequently the deceased died on 25-7-1956 leaving a Will dated 19-6-1956 bequeathing his share allotted under the preliminary decree to his wife and children, it was held by the Mysore High Court that any kavaru taking a share under the Aliyasanthana Act, 1949, is a Nissanthathi Kavaru having life interest in the properties allotted to it, but if the Kutumba from which it separates has at least one female member who has not completed the age of 50 years or where the Kutumba breaks up into a number of Kavarus at the partition, if at least one of that Kavaru is a Santhathi Kavaru, the separating Kavaru shall have an absolute interest in the property allotted to it. Therefore, the explanation to section 30 has not the effect of enlarging the life interest of the deceased into an absolute estate.\footnote{Sundra Adapa v. Girija AIR 1962 Mysore 72 (FB).} It was further held that section 36, sub-sections (3), (4) and (5) of the Madras Aliyasanthana Act, 1949, were not inconsistent with section 7(2) or section 30 of Hindu Succession Act. But in another case,\footnote{Sundari v. Lakshmi, AIR 1980 SC 198.} it was observed that the provisions in the Aliyasanthana Act, 1949, should give way to section 8 of this Act as those provisions are inconsistent with those in this Act; that though during the lifetime of the deceased the interest does not get enlarged into an absolute interest, it shall be deemed to have been allotted on his death to his heirs with absolute interest as provided for under section 17 read with section 8 or section 15 of this Act as the case may be.

Section 30 of the Hindu Succession Act provides that any Hindu may dispose of by will or other testamentary disposition, any property, which is capable of being so disposed of by him, in accordance with provisions of the Indian Succession Act, 1925 or any other law applicable. These provisions deal
with the legal capacity to make a Will and who can and who cannot make a Will. Explanation (1) to section 59 of Indian Succession Act, 1925 clarifies what can be disposed of by Will by a married woman and states that any property which she could alienate by her own act during her life can be disposed of by Will. It follows that married woman who cannot alienate a property by her own act during her life, cannot dispose of the property by a Will.\(^{54}\) Section 30 of the Hindu Succession Act does not prohibit a gift by a coparcener of his undivided interest in the coparcenary to another coparcener or even to a stranger.\(^{55}\) Under Hindu law, a sole surviving coparcener can bequeath his joint family property as if it were his separate property. A Will executed by a coparcener can only challenged by another member of the coparcenary.\(^{56}\) Coparcenary property can be bequeathed by a surviving coparcener. The disability of a coparcener in disposing of his undivided interest in property by Will or other testamentary document under the old Hindu law is removed by section 30 of the Act.\(^{57}\) Properties acquired by the Karta of joint family with aid of joint family nucleus or from out of income derived from properties inherited from forefather are to be treated as joint family properties and not self-acquired properties. The burden to prove that such properties are self-acquired properties is on the coparcener making such assertion or claim. Divisions of properties under a Will appeared to be dividing family properties among his children and the properties being joint family properties, not right whatsoever vested in him to bequeath the said properties under a Will without the consent of other coparceners. Therefore, the will is not binding on them.\(^{58}\)

The mere fact that some first class heirs were ignored in the Will would not make the Will invalid. A validly executed Will which is proved by proper evidence before the court cannot be ignored merely in this basis. However, the court has to scrutinise the evidence in support of the execution of the Will with a greater

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\(^{54}\) Ramaiah v. Nagraj 2002 (1) HLR 67 (Kar).
\(^{55}\) Pariki Subbireddy v. Pariki Chinna Reddemma, 1996 (2) HLR 208 (AP).
\(^{56}\) Fateh Singh v. Lakhbir Singh, 2004 (1) HLR 426 (P&H).
\(^{57}\) Senthilkumar v. Dhandapani AIR 2004 Mad. 403.
\(^{58}\) Thimmmaiah (VK) v. Parvathi (VK) AIR 2003 Kant 245.
degree of care than usual. Where a Hindu testator bequeathed his entire property in favour of his ignoring his married daughters, the Court cannot sit in appeal over the decision of the testator. An owner of property has normally the right to deal with that property including the right to devise or bequeath the property. He could thus dispose it of by a testament. Section 30 of the Act, does not curtail or affect this right, it actually reaffirms it. Thus, a Hindu male could testamentarily dispose of his property. When he does that, a succession under the Act stands excluded and the property passes to the testamentary heirs. Hence, when a male Hindu executes a Will bequeathing the properties, the legatees take it subject to the terms of the Will unless of course, any stipulation therein is found invalid. Therefore, there is nothing in the Act which affects the right of a male Hindu to dispose of his property by providing only a life estate or limited estate for his widow. The Act does not stand in the way of his separate properties being dealt with by him as he deems fit.

No court has the power to make an order, that too an interim order restraining an individual from exercising his right to execute a Will and thereby regulate succession on his death. A direction to a party to maintain status quo in regard to a property does not bar him from making a testamentary disposition in regard to such property and consequently the testamentary disposition is neither void nor voidable. The bar contemplated in Explanation I to section 59 of the Indian Succession Act, 1925 is a bar or permanently inability under the personal law or a statute. It does not refer to temporary prohibition arising from an injunction issued by the court.

Under section 29 of the Hindu Adoptions and Maintenance Act, 1956, the Hindu Married Women's Right to Separate Residence and Maintenance Act 19 of 1946, and sub-section (2) of section 30 of the Hindu Succession Act, 1956 were

59 Mangat Ram v. Dina Nath 1997 (2) HLR 220 (P&H).
60 Gurdev Kaur v. Kaki 2006 (1) HLR 625 (SC).
repealed as the provisions therein are covered by section 18 and section 22 of the Hindu Adoptions and Maintenance Act, 1956.\textsuperscript{63}

\textbf{(ii) Hindu Female-Absolute Property (s.14)}

There is one important matter which will have considerable influence in construing the nature of the interest given to a Hindu female. The Hindu Succession Act, 1956 has been referred to as the Magna Carta of Hindu women. Section 14 of the said Act has abolished the limited estates of Hindu Law. Hereafter a gift to a Hindu female will have to be considered in the same way as a gift to a Hindu male. It says;

"Property of a female Hindu to be her absolute property- (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held as full owner thereof and not as a limited owner.\textsuperscript{64}"

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a Will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, Will or other instrument or the decree, order or award prescribed a restricted estate in such property."

V. Tulasmma v. Sesha Reddy,\textsuperscript{65} clearly lays down that clause (1) of the section 14 applies to properties granted to a Hindu female, in virtue of a pre-existing right of maintenance while clause (2) applies where property is granted to a female Hindu for the first time without any pre-existing right. Thus where property is acquired by the female at the time of partition or in lieu of maintenance clause (1) alone is attracted. The provision in clause (2) gets attracted in the case of instruments, decrees, awards etc., which create independent and new titles in favour of the female for the first time. Life estate of a widow under a Will which comes into operation after 1956 does not get enlarged into an absolute estate under section 14(1) of the Hindu Succession

\textsuperscript{63} Mayne’s Hindu Law & Usage, by Justice Ranganath Mishra, 16\textsuperscript{th} Edn. pp. 1274-77.
\textsuperscript{65} AIR 177 SC 1944
In the instant case, the respondent got the property under the Will of her father and as such the life estate given to her cannot be enlarged into an absolute estate.

Section 14 has introduced fundamental changes in the traditional Hindu law of property of women. The main object of the act has been to confer better rights on Hindu women such as:

(a) To remove all disability of a Hindu woman to acquire and deal with property, i.e., all the property that she acquires will be her absolute property.

(b) To convert existing woman’s estate into full estate.

For the applicability of sub-section (1) of section 14 two conditions must coexist, namely:

(i) The concerned female Hindu must be possessed of property; and

(ii) Such property must be possessed by her as a limited owner.

If these two conditions are fulfilled, the sub-section gives her the right to hold the property as a full owner irrespective of the fact whether she acquired it before or after the commencement of the Act.

(iii) Law of Domicile

Till 1956, the Hindus were governed by the particular school of Hindu law prevailing in the territory in which a Hindu was born. As a result of the differences that existed in the various schools of Hindu law that prevailed in various parts of the country, questions arose as to what would happen to a Hindu family migrating from one part of the country to another.

The law relating to migrating families has been laid down in numerous decisions of the Privy Council. The leading case on the subject is Balwant Rao v. Baji Rao.

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68 T.S. Rangachari v. V S Krishnaswamy, 1992 (2) HLR 119
69 Law of Wills, by Gopalakrishnan, 7th Edn.,
The law relating to migrating families has lost most of its importance subsequent to 1955-56, as a result of the various Acts, such as the Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Adoptions and Maintenance Act, 1956, have done away with the schools of Hindu law at all events in respect of matters dealt with by those Acts. Still the Hindu law of joint family remains as of old. The differences between the Mitakshara and Dayabhaga systems of joint family are still recognized. It is therefore essential to remember the important rules regulating the migrating families within India.

The following propositions have received recognition:

(1) Every Hindu is prima facie governed by the particular school of Hindu law prevailing in the Province where he is residing;

(2) Where he migrates from one Province or State to another, he carries with him the Hindu law of his origin as part and parcel of his personal status;

(3) Such law that a migrating Hindu carries with him would be the law of the place of origin at the time of migration;

(4) It is open to a Hindu who has migrated from one Province or State to another to give up the law of his origin and adopt the law of the new Province or state to which he has migrated;

(5) Such adoption is inferred from the giving up of peculiarities in the performance of religious ceremonies prevailing in the Province or origin and adopting the different modes prevailing in the new origin and adopting the different modes prevailing in the new Province;

(6) A Hindu who has adopted the new law of place to which he has migrated cannot give it up at his will and pleasure, and take back the old law of origin.

(iv) Present Status

Another revolutionary change has been made in the favour of Hindu females by way of amendment in section 30 of the Hindu Succession Act, 1956,
which is now known as Hindu Succession (Amendment) Act, 2005. Section 30 of the Hindu Succession (Amendment) Act, 2005 which deals with the testamentary succession among Hindus, now states that:

"Any Hindu may dispose of by Will or other testamentary disposition any property, which is capable of being so disposed of by him (or by her), in accordance with the provisions of the Indian Succession Act, 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus."

In view of the above said amendment now a female (daughter) by birth becomes a coparcener and inherits the same power and entitlements with regard to joint family property as like a male member (son) born in the same family.

III. WILLS

1. Definition & Essentials of a Will

Will means a continuous act of gift up to moment of the donor's death and though revocable in his lifetime, is, until revocation, a continuous act of gift up to the moment of death, and does then operate to give the property disposed of to the persons designed as beneficiaries. A testament is an institution or appointment of an heir or executor made according to formalities prescribed by law.

Will in Latin is called 'voluntas' which is used in the texts of Roman Law to express the intention of a testator. According to William's, Wills and Intestate Succession, Will which was originally an abstract obligation concretized into a document. The word 'testament' is derived from 'testatio menties' meaning thereby that it testifies the determination of mind ULPAIN has defined Will as, "Testamentum est mentis nostrae justa contestatio in id sollemniter facta to post martem nostrum valeat". Modastinus also defines it bases on the Latin word

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71 Inserted by the Hindu Succession (Amendment) Act, 2005, w.e.f. 9-9-2005.
74 Domat, Civil Law, 2987; see 50 Halsbury, para 201, 4th Edn., for the distinction between a Will and a testament.
'voluntas' as "Voluntatis nostre just sentential de co quod quis post mortem suam fieri velit".

According to Jarman, a Will is an instrument by which a person makes a disposition of his property to take effect after his decease and which is in its own nature ambulatory and revocable during his life. (Nam omne testamentum morte consummatum est; et voluntae testamentoric est ambulatoria usque od mortem).

Thus every testament is consumated by death, and until he dies the Will of a testator is ambulatory. Lord Penzance has said that "A Will is the aggregate of man's testamentary intentions so far as they are manifested in writing, duly executed according to the statute". In Tagore v. Tagore, their Lordships of the Judicial Committee said thus, it means a continuous act of gift up to the moment of death. Such a disposition of property, to take effect upon the death of donor, though revocable in his lifetime, is, until revocation, a continuous act of gift to the moment of death and does then operate to give properly disposed of the persons designated as beneficiaries."

Swin Burne explains that "a testament is the full and complete declaration of a man's mind or last Will of that which he would have thought to be done after his death, by way of disposition of his property (Chep. Touch 399). Will has also been documents, to mean, "every writing making a voluntary posthumous distribution of property".

In the absence of a statute, a Will may be in any form, oral or in writing. Before the Indian Succession Act became applicable to Hindus, oral Wills by Hindus were recognized as valid. An Oral Will could also be implied; if in writing it need not be signed or attested.

But to operate as Will, the writing must be complete and operative. A document can be said to be a Will only when it is executed with an intention to

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76 Leimage v. Goodhan, LR1 P&D 57
77 18 WR 359
78 (Registration Manual 1901,p.90)
79 Janki v. Kallu Mal, 31 All 236; Chintaman v. Lakshman, 11 Bom 89; in re: Bapuji, 20 Bom 674; Subayya v. Surayya, 10 Mad 251.
regulate succession after death "Varas Patra" or nomination cannot be construed as a Will.  

In the absence of statutory requirements, written instruments have been held to operate as Will, in whatever form or with whatever name they might have come into existence. The petitions addressed to officials, deeds or adoption, declarations in applications for deposit or the recitals in a letter have been held to operate as Will, provided they have the other characteristics of a Will. However, where a party is governed by a statute requiring due attestation for a Valid Will, a mere letter addressed to the authorities declaring an intention by a deceased that on his death without issue, his legally married wife shall be owner of the estate, would not be valid in the absence of attestation.

(i) Statutory Definition of Will

Section 2(h), Indian Succession Act, 1925, defines Will 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". The definition follows that of Blackstone and others.

A Will is the legal declaration of a man's intention, which he wills, to be performed after his death, or an instrument by which a person makes a disposition of his property to take effect after his death.

(ii) Essentials of Will

There are three essentials to a Will:-

(a) It must be a legal declaration of the intention of testator, i.e., the person who makes the Will.

Law prescribes form and formalities to be complied with. Unless those formalities are complied with, there cannot be a legal declaration. The document must be signed; it must be attested as required by law. An unprivileged Will must

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82 Definition of Wills in 94 corpus Juris Secundum, p. 676.
be in accordance with the provisions of section 63 of the Indian Succession Act, 1925.

(b) The declaration of intention must be with respect to the testator’s property. An authority to adopt given by a deceased to his wife to be exercised by her after her death is not a Will. So also a document appointing a guardian to the minor son after the death of the testator. 83

There must be a disposition of property under the document. Where a document called Will by a Hindu testator only gave his wife authority to adopt, without giving her anything else in his properties, the character of a Will is not established. There must be disposition of property.84 Where there is no disposition of the property but a mere appointment of a successor (as a mahant), it is not a Will.85

Under the Hindu Disposition of Property Act, 1916, the bar of transfer in favour of unborn person has been lifted subject, however, to the limitation that the disposition by transfer inter vivos shall be bound by the provisions of Chapter II of the Transfer of Property Act, 1882 and disposition by Will shall be subject to the provisions of sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.86

Sirkar Sastri is unable to justify the capacity of a person to deal with his property after his death. He criticizes the definition of Will under the Indian Succession Act as tainted with the logical defect of the “Fallacy of mutual dependence”.87-?

(c) The document should express a desire that his intention must be carried into effect after his death.88

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84 Jagannatha Bheema Deo v. Kunj Behari Deo, 44 Mad 733: AIR 1922 PC 162 (2); Vijaratnam v. Sudarsanan, 48 Mad 614 (PC); Krishna Rao v. Sundara Rao, 54 Mad 440 (PC).
87 See Hindu Law, 5th Edn., p.824.
88 2 BI Comm 499; Bhagyawati v. General Public, 1994(1) Hin LR 398 (399) (P&H).
The intention of the testator must be expressed in clear words in order that "the same might be given effect to.

There must be express words of bequest. However, it might be that a testator inadvertently omits, to express his intention to make a gift, but there may be recitals showing that the testator is under the impression that he has made a disposition in evidence of an intention. In such cases, if the Court is satisfied that there has been a mistake in carrying out the testator's intention, the Court may give effect to such intention if the other provisions of the Will will allow this to be done.89

In one case the deceased wrote, "On my demise my wife shall become the full (absolute) owner of my entire movable properties according to law, consequently there is no necessity for any Will in respect of the same also." Referring to the above recitals Horwill, J., observed,90 "It is difficult to conceive of a clearer indication that the deceased did not bequeath his movables under the document."91

It has been held that oral evidence may be let in to show that the dispositions were intended to operate only after the death of the maker of deed.92

2. Codicil

Section 2(b) of Indian succession Act defines 'codicil'. The word is derived from the roman codicillus, meaning an informal Will.

Section 2(b) states "codicil means an instrument made in relation to a Will and explaining, altering or adding to its dispositions and shall be deemed to form part of the Will.

So a codicil has to be executed and attested just as a Will (Vide section 64, Indian succession Act). The date of execution of the Will is irrelevant as the

89 Krishnamurthi v. Venkataramanappa, 60 LW 567: 39 (Halsbury) Article, 1503, (3rd Edn.); Jarman on Wills, Ch. IX.
90 60 L.W. 567
92 Sagar Chandra Mondal v. Digambar Mondal, 14 CWN 174.
law that will operate on the Will, will be as on the date of the death of the
testator.93

A codicil is similar to a Will and is governed by the same rules as a Will. A
document is called a codicil if it is supplementary to a will by adding, varying or
revoking provisions in the Will. If it is independent of any other deed and is
intended to be exhaustive in itself it is called a Will. "Its nature is not substantive
but adjective."

A codicil may be endorsed on the original Will itself, or it may be a
separate document. A codicil may stand, even though the Will to which it is
supplementary is revoked.94 It depends on the intention of the testator to be
gathered from circumstances. A codicil is not to disturb the provisions of the Will
any more than is absolutely necessary to give effect to the provisions of the
codicil.

Section 2(b) of Indian Succession Act defines the word 'codicil' in the
sense as understood in English Law.

The requirements are: (1) it must be an 'Instrument' it cannot be oral; (2) it
can only be in relation to an earlier Will or Wills in existence; it cannot be an
independent document; (3) it explains, alters or adds to the dispositions under
the earlier Will or Wills.

The word 'shall be deemed to form part of the Will' only emphasizes the
dependent character of the codicil. The codicil shall be deemed to be part of the
Will only in the matter of explaining, altering or adding to the Will. It must be
noted that the object of the codicil is to explain, alter and add effectively, and it
should not be construed as if by being deemed as to part of the Will, the desired
effect cannot arise.

The language of the codicil may be relied upon for interpreting the Will.95 A
codicil properly attested and executed is entitled to probate, though it refers to an

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94 Bonis Blackeley, 1 PD 169.
95 Rameshwar Baksh v. Balraj Kaur, AIR 1932 Oudh 327; Lindon v. Ingram, (1904) 2 Ch. 52.
Where a probate was obtained for a Will, and afterwards a codicil is discovered, the question arises whether probate could be granted to the codicil, or whether the original grant of probate for the Will should be revoked and a fresh grant must be for both the Will and codicil.

3. **Will or Deed- Test**

The Privy Council gave the following two reasons for considering a document to be a Will.

(i) **Disposition to take effect after death**

A Will takes effect only after the death of the testator. Normally no legal right can be founded or supported on the basis of a Will of living person.

A disposition of property during the life of the executant is not a Will. It will be a settlement. The difference between the two kinds of dispositions and whether a document is the one or the other must be determined by the nature of the disposition and not by the existence or non-existence of a revocation clause.

There is no objection to one part of an instrument operating in praesenti as a deed and another part in futuro as a Will.

As Jarman explains:

"The law has not made requisite, to the validity of a Will, that it should assume any particular form, or be couched in language technically appropriate to its technical character. It is enough if the instrument, however irregular in form or artificial in its expression, discloses the intention of the maker respecting the posthumous destination of his property; and if this appears to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded."

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96 Gardiner v. Courthope, 12 PD 14.
98 Chand Mal v. Lachmi Narain, 22 All 162 (164); Doe Elizabeth Cross v. Arthur Cross, (1846) 8 QB 714.
99 Volume 1, page 1, 8th Edition.
100 Whyte v. Pollock, 7 Ac 400 (409).
Instruments in the form of a deed or described as an indenture may be good Wills if there is a clear posthumous disposition of property. Name, not any indication - The fact that an instrument is described as a Will and is executed as such need not make it necessarily testamentary.\(^{101}\)

Thus where the instrument creates an immediate right to the property it is not a Will named as such.\(^{102}\)

An instrument described as a sale\(^{103}\), or as a gift\(^{104}\), or even as a trust\(^{105}\), will operate as Will, and may convey nothing till after the death of the author of the instrument. Where an instrument is a deed in form there must be something special in the case to justify its being treated as testamentary.

Though reservation of life interest in the property to the donor somewhat militates against the document being a Will, yet if the other characteristics of a Will are there, this reservation will not affect the document. For the primary things is that the Will is to take effect after the testator's death which implies that the testator does retain his interest during his lifetime.\(^{106}\)

There can be no Will if it does not deal with property. In Bhuban Moyee v. ram Kishore,\(^{107}\) a Hindu authorized his wife to adopt and to put the adopted son into possession of all the properties. The Privy Council held that the document was not a Will but only an authority to adopt. It cannot be construed a devise of property.

A will or codicil does not require stamp\(^{108}\), or Registration.\(^{109}\) A transaction affecting property in the life-time of its author cannot have a testamentary character.\(^{110}\)

\(^{101}\) Thomcroft v. Lakshman, 31 LJP 150.

\(^{102}\) Igvatia Barito v. Rego, 31 LW 716: AIR 1933 Mad 492: 64 MLJ 650; Abdul Ghani v. Fakhar, 44 All 301; Thirugnana v. Ponambala, 12 LW 660 (PC): AIR 1921 PC 89.

\(^{103}\) Govindasami v. Kannammal, 31 IC 77.

\(^{104}\) Venkatachelam v. Govindaswami, AIR 1924 Mad 605.

\(^{105}\) Garib v. Patia, AIR 1938 Cal 290.

\(^{106}\) Venkatachelam v. Govindaswami, AIR 1924 Mad 605; See also Ishri Singh v. Baldeo Singh, 10 Cal 792 (802) (PC).

\(^{107}\) 10 MIA 279 (305, 309)

The various circumstances attending this document viz., its being inscribed on stamp papers, its being registered, the intention to vest in preaesenti, the several terms therein are all pointers to show that the settlement was intended as a present one and it was a settlement deed and not a Will.\textsuperscript{111}

It must be remembered that Wills are comparatively new in India, and is not familiar instrument to the people who prepare it or who sign it.

(ii) Revocability

Revocability is the primary test. If a document is irrevocable then it cannot be termed as Will. This has been pointed out in Rajammal v. Authiyammal.\textsuperscript{112}

Section 62 - "A Will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by Will."

The essential character of a Will is its revocability. Any clause in a Will, that the testator cannot revoke the Will, makes it void.\textsuperscript{113} Lord Coke's dictum in Vymore's case\textsuperscript{114}, postulates:

"If I make testament and my last Will irrevocable, yet I may revoke it, for my act or my words cannot alter the judgment of the law to make that irrevocable which is of its own nature revocable."

There can be no suit for cancellation of a Will either by the testator or any objector since the Will is liable to be revoked by the unilateral act of the testator himself.\textsuperscript{115}

4. Instruments which are Testamentary

A person depositing money with a fund filled in a form provided by the fund, whereby he nominated another as his nominee, i.e., the person entitled to receive the money after his death. It was held that this amounted to a Will, but

\textsuperscript{109} Kodavanti v. Kodavani, 48 MLJ 425.
\textsuperscript{110} Ishri Singh v. Baldeo Singh, 10 Cal 792 (PC).
\textsuperscript{111} Duraisami v. Saroja Ammal, AIR 1981 Mad 351 (353, 354).
\textsuperscript{112} 33 Mad 304; Abdul Ghani v. Fakhar, 44 All 301 (PC).
\textsuperscript{113} Sagar Chandra Mondal v. Digambar Mondal, 14 CWN 174 (177).
\textsuperscript{114} (1610) 8 Coke 82 (a)
inoperative because it was not duly attested by two witnesses. Further, in order to enable the nominee to file a suit, a probate thereof must be obtained.\textsuperscript{116}

A nomination paper under the Industrial and Provident Societies Act, 1893, if duly executed may be admitted to probate.\textsuperscript{117}

An instrument to take effect two years after my wife's death, if she survives me,

Blank spaces- A Will does not become bad because of blank spaces or even blank pages.\textsuperscript{118}

It is permissible to ascertain the constituent parts of a Will by oral evidence of surrounding circumstances.\textsuperscript{119}

The form of document, provided that it is of a testamentary character, is immaterial.\textsuperscript{120}

When a document is duly executed and attested in accordance with the Statute, there is no reason why it could not be treated as a Will. It may be in the form of a deed of gift.\textsuperscript{121}

5. Instruments which are not Testamentary

A mere permission to adopt is not testamentary though it recites that the object of the adoption was for the performance of the pious duties and that the adopted son shall succeed to the property.\textsuperscript{122}

(i) Permission to adopt

A gift to take effect in praesenti even during the life of the donor is a deed or settlement and not a Will.\textsuperscript{123}

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\textsuperscript{116} Nana Tawker v. Bhawanee, 43 Mad 728; Venkatarama Iyer v. Sundarambal, AIR 1940 Bom 400; Towers v. Hogn, (1889) 23 Legal Representatives Ir 53; Williams (in re©, (1917) 1 Ch 1; Ma Nu v. Ma Gun, 2 R 388.

\textsuperscript{117} In the goods of Baxter, (1903) p. 12; se Jarman on Wills, 8th Edn., pp. 35-36.

\textsuperscript{118} Theobald on Wills, 11th Edn., p. 42

\textsuperscript{119} Gould v. Lakes, (1880) 6 PD 1.

\textsuperscript{120} Chaitanya Govinda Pujari v. Dayal Govind, 32 Cal 1082.

\textsuperscript{121} Udai Raj Singh v. Bhagwan baksh, 32 All 227 (PC); Ishri Singh v. Baldeo, 10 Cal 792 (PC).

\textsuperscript{122} Bhabun Moyee's case, 10 Mia 279 (281).

\textsuperscript{123} Rambha v. Lakshman, 5 Bom 630.
\end{flushright}
intent to Take effect in Praesenti

The intention must be that it shall not take effect till the settler’s death.\textsuperscript{124}

An appointment of a successor by a mahant or Shebait is not a Will.\textsuperscript{125}

A partition deed executed by a Hindu father to take effect in praesenti is not a Will.\textsuperscript{126}

A document may be testamentary only in part.\textsuperscript{127}

Though it is permissible to presume that where one part of an instrument is testamentary in character, the rest also is testamentary, yet there is no legal objection to one part of an instrument operating in praesenti, when the other party operates as a Will in futuro.\textsuperscript{128}

6. \textbf{No Delegation of Testamentary power}

It is a cardinal rule of most systems that a man may not delegate his testamentary power. The law gives the right only to the owner of an estate to dispose of the same by Will. He cannot in effect empower his executors to say what persons or objects are to be beneficiaries.\textsuperscript{129}

Animus Testandi

Again a person may produce an instrument in compliance with all the legal requirements of a valid Will, yet it may fail to take effect as a Will because of the absence of animus testandi, i.e., without any intention that it should affect the disposition of his property after his death. "If the fact is plainly and conclusively made out that the paper which appears to be the record of a testamentary act was in reality the offspring of a jest, or the result of a contrivance to effect some

\textsuperscript{124} Anzioni (in re), (1930) 1 Ch 407; see Theobald on Wills, 14th edn., p. 24.
\textsuperscript{125} Bhagaban Ramanuj Dass v. Ragunandha, 22 Cal 843 (PC); Chaitanya Gobinda Pujari v. Dayal Gobind, 32 Cal 1082.
\textsuperscript{126} Brijraj v. Sheodan, 35 All 337.
\textsuperscript{127} Baisnau v. Kishore Dass, 15 CWN 1014.
\textsuperscript{128} Chand Mal v. Lachmi Narain, 22 All 162; Anzioni (in re), (1930) 1 Ch. 407.
\textsuperscript{129} Chichester Diocesan Fund v. Simpson, (1944) AC 341 (371).
collateral object, and never seriously intended as disposition of property, it is not reasonable that the court should turn it into an effective instrument.\textsuperscript{130}

(ii) Burden of Proof

In order to dislodge the claim on the basis of intestacy, the propounder of a Will must prove the following:

1. Due and valid execution of the Will.
2. That the Will was signed by the testator at the relevant time while he was in a sound and disposing state of mind, after understanding the nature and effect of the disposition, and of his own freewill.
3. That any suspicious circumstances surrounding the Will could be satisfactorily explained away by cogent and satisfactory evidence on the side of the propounder.\textsuperscript{131}

In the matter of burden of proof Theobald on Wills,\textsuperscript{132} posits:

"The legal burden of proof of undue influence or fraud always lies on the person alleging it. That person must prove that the Will (or such part of it as he alleges to be invalid) was made as a result of the undue influence or fraud of another person. It is not sufficient merely to show that the circumstance attending the execution of the Will were consistent with its having been obtained by undue influence, or that another person had the power unduly to overbear the Will of the testator. No presumption of undue influence arises from the existence of a confidential relationship between a donee and a testator."

The law is settled in India that the onus probandi lies on the person who propounds the Will. This onus gets discharged once there is proof let in as to the mental capacity of the testator and as to due execution of the Will as required under law; once this is done, the court will assume that the testator had knowledge of the contents of the Will. If suspicious circumstances are there to throw a cloud on the due execution, it is then for the propounder to remove such

\textsuperscript{130} Lister v. Smith, (1865) 3 SW and Tr 282.
\textsuperscript{131} Behramji v. Rustomji, 1960 MPLJ 146.
\textsuperscript{132} 14th Edn., p. 40.
suspicion and to prove affirmatively that the testator knew and approved of the contents of the document.\textsuperscript{133}

Mere fiduciary relationship of the beneficiary to the testator is not enough to prove undue influence. There should be positive proof that he did exercise his power to overbear the will of the testator.\textsuperscript{134}

IV. KINDS OF WILLS

A brief description of various types of Wills is given but with a caution that its nature and characteristics remain intact that the will of the testator is in place of a law.

1. Conditional or Contingent wills

A Will may be so made as to take effect only on a contingency.\textsuperscript{135}

(i) Condition Different from Motive

The operation of the document may be postponed till after the death of the testator's wife.\textsuperscript{136} It may be conditioned on the testator not returning from a voyage or military expedition he might have undertaken.

The leading case on this subject is Spratt (in re:).\textsuperscript{137} In that case the testator wrote a Will as follows: "Being obliged to join my regiment in China, I leave this paper containing my wishes. Should anything unfortunate happen to me whilst abroad, I wish everything that I may be in possession of at that time, or anything appertaining hereafter, to be divided." The English Court of Probate held that the said Will was a conditional Will and would come into operation only on the testator dying while absent from England. Sir F.H. Jeune observed: "The difficulty which arises in determining the intention of the testator as expressed in his Will, is that an ambiguity is caused by the language which renders it doubtful whether the testator meant to refer to a possible event as his reason for making a

\textsuperscript{133} Gomti Bai (Mst.) v. Kanchchedilal, AIR 1949 PC 272.
\textsuperscript{134} Craig v. Lamoureux, LR 1920 AC 349.
\textsuperscript{135} Theobald on Wills, 14\textsuperscript{th} Edn., p. 26; Jarman on Wills, p. 39; Gavier (in re:), (1950), p. 137.
\textsuperscript{136} Rajeshwar v. Sukhdeo, AIR 1947 Pat 449.
\textsuperscript{137} (1897) p. 28: 66 LIP 25: 75 LT 518.
Will, or at limiting the operation of the Will made. If the Will is clearly expressed to take effect only on the happening or not happening of event, it is conditional. If the testator says in effect that he is led to make his Will by reason of the uncertainty of life in general or for some special reason, it is not conditional. But if it is not clear whether the words used import a reason for making Will or impresses a conditional character on it, the whole language of the document and also the surrounding circumstances must be considered. In such cases there are two criteria which are specially useful for determining the problem; first, whether the nature of the disposition made appears to have relation to the time or circumstances of the contingency; and secondly, whether the contingency is connected with a period of danger to the testator, whether it is coincident with that period; because if it is, there is ground to suppose that the danger was regarded by the testator only as a reason for making the Will, but if it is not, it is difficult to see the object of referring to a particular period unless it is to limit the operation of the Will.\footnote{See Jarman on Wills, 8th Edn., p. 40.}

The case whether the contingency was of the former kind, i.e., as reason for making the Will, is illustrated by Jagannatha v. Rambharosa.\footnote{Jagannatha Rao Dani v. Rambharosa, AIR 1933 PC 33: 64 MLJ 142 (PC).}

In that case, the opening words of the Will were as follows: "I am going to Delhi for Darbar, therefore, I am writing the following conditions about my property. I hope that by the Grace of God such an occasion will not arise, but strange is the course of time." The testator returned after visiting the Darbar. Their Lordships of the judicial Committee held that the Will was not a conditional Will and observed as follows:

"The testator's contemplated journey was, no doubt, the occasion, and was probably the reason of his making the Will, but there is, in their Lordships opinion, nothing in the words used by him to indicate that the Will was to cease automatically to be operative on his return. He may quite possibly have had it in his mind that the Will might require revision after his return, but that would not
make it contingent, the intention in such as case would almost certainly be that it was to remain operative until a new Will was made."

The above opinion of the Judicial Committee is quite in line with the conclusions arrived in the Spratt's case\textsuperscript{140} to which:

"The result of the cases appears to be that if the Will is made dependent on the contingency occurring, its validity Will depend on the happening of the contingent event, but if the contemplated possible event is merely the reason for the making of the Will it be valid and effectual in any event."

An example of a contingent Will is furnished in Parsons v. Lance\textsuperscript{141} where a person proceeding to Ireland made the following devise: "If I died before my return from my journey to Ireland then my house and land at F should be sold after my death...... The testator after his trip to Ireland did return to England, lived many years and died. It was held the Will was void as the contingent event of his return to England did happen."

Where the operation of a Will is made dependant on the testator's son predeceasing the testator, the Will would be contingent Will.\textsuperscript{142}

A testator may make a Will subject to a condition, that, if the condition does not happen it will be inoperative. Thus where a husband and wife jointly make a holograph to take effect in the event of both dying simultaneously by some war-time mischance, the wife died a natural death and the husband survived, it was held that the document was inoperative as a Will.\textsuperscript{143}

A Will may be conditional on the obtaining of the consent of another person.\textsuperscript{144}

\begin{itemize}
\item \textit{Conditional and contingent Wills: Distinguished}
\end{itemize}

It needs to be understood that all "conditions" and "contingents" convey almost the same sense with a distinction that the word "contingent" has reference

\begin{itemize}
\item \textsuperscript{140} (1897) p. 28, 35:75 LT 518: 66 LJP 25
\item \textsuperscript{141} 1 Ves Sen 190.
\item \textsuperscript{142} Abhoy Charan Das Mazumdar v. Raimya Devi, AIR 1982 Gau 94.
\item \textsuperscript{143} Govier (in re:), (1950), p. 237.
\item \textsuperscript{144} B. Smith (in re:), (1869) 1 P&D 717; Theobald on Wills, 14th Edn., p. 27.
\end{itemize}
to the happening of an event, whereas the word 'condition' refers to the doing or forbearance from the doing of an act. 145

2. Joint Wills

Two or more persons may make a joint Will. It will take effect as if each has properly executed a Will as regards his own property. If the Will is joint and is intended to take effect after the death of both, it will not be admitted to probate during the life-time of either. Joint Wills are revocable at any time by either during the joint lives, or after the death of one, by the survivor. 146

Lord Halsbury simply sums up the position as to joint Wills thus: 147

"A joint Will is a Will made by two or more testators contained in a single document, duly executed by two or more testators contained in a single document, duly executed by each or testator and disposing either of their separate properties, or of their joint property. It is not however recognized in English law as single Will. It is in effect two or more Wills; it operates on the death of each testator as his will disposing of his own separate property on the death of the survivor, if no fresh Will has been made, it is admitted to probate on the disposition of the property of the survivor."

Halsbury further contrasts a joint Will with what are known as Mutual Wills.

He states 148 "Wills are mutual when the testators confer upon each other reciprocal benefits and there may be absolute benefits in each other's property, or there may be life interest, with the same ultimate disposition of each estate on the death of the survivor."

Joint Wills are recognized in India also.

The validity of joint Wills has been recognized in Meenakshi Ammal v. Viswanatha Iyer. 149

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146 Jarman on Wills, 8th Edn., p 41; Theobald on Wills, 14th Edn., p. 27.
147 50 Halsbury, 4th Edn., para 207.
149 33 Mad 406, Jethabhai v. Parshotam, 45 Bom 987; Rajeshwar v. Sukhdeo, AIR 1947 Pat 449.
Where there are separate provisions in a joint Will regarding the devolution of the properties of each of the testator, the Will operates according to the intention expressed in the Will, not by attaching importance to isolated expressions but by reading the Will, as a whole with all its provisions and ignoring none of them as redundant or contradictory.\textsuperscript{150}

3. Mutual Wills

Two persons may agree to make mutual Wills, i.e., to confer upon each other reciprocal benefits.\textsuperscript{151} A Will is mutual when two testators confer upon each other reciprocal benefits as by either of them constituting the other his legatee; that is to say, when the executants fill the roles of both testator and legatee towards each other. But where the legatees are distinct from the testators, there can be no question of a mutual Will. They would remain revocable during the joint lives by either. However, previous notice to the other party must be given as to enable him also to alter the Will.\textsuperscript{152}

Revocation is possible even after the death of either.\textsuperscript{153} However, when the survivor had obtained a benefit, a claim against the estate Will lie.\textsuperscript{154}

Jarman points out that the "mutual Wills" recognized in England are those where two persons make a Will by which each leaves all his property to the other. Generally a husband and wife together make Wills each giving all his or her property to the other. In such cases the survivor can revoke or alter his or her Will. The circumstances that the surviving spouse has taken a benefit do not stand in the way of the exercise of the power to revoke.\textsuperscript{155}

Lord Halsbury points\textsuperscript{156} that in order to render mutual Wills irrevocable two conditions must be concurrently satisfied, i.e. (1) the surviving testator must have received under the mutual Will certain benefits from the deceased; (2) there

\textsuperscript{151} 50 Halsbury, 4th Edn., para 208.
\textsuperscript{153} In the estate of Heys, (1914), p. 192.
\textsuperscript{154} Green (in re:), (1951) Ch 148; see Theobald on Wills, 14th Edn., p.28; Jarman on Wills, 8th Edn., p. 41.
\textsuperscript{155} In the estate of Heys, (1914), p. 192.
\textsuperscript{156} 50 Halsbury, 4th Edn., para 221.
should be a prior agreement anterior to the execution of the mutual Wills that the testators will not revoke the mutual Wills. This prior agreement may be proved by specific mention of it in the mutual Will itself or by evidence outside the Wills.

4. **Oral Wills**

In view of section 57(c), Indian Succession Act, 1925, no oral Will can be legally made even by Hindus. At present, even Wills by Hindus must be in writing, signed and attested by two witnesses. Still among Muslims there is a provision of oral Will, which is recognized as per their personal law.

Again the privileged Will by soldiers, etc. may be oral a simple declaration before witnesses. An oral Will however, must be proved by very satisfactory evidence.

The burden of establishing an oral Will is a heavy one. Where witnesses give almost different versions of the words uttered by the lady testator, and facts of the case make out that there was no occasion for the lady to make an oral Will, it was held, oral Will was not proved.

Mere declaration of a desire to have a written “Will” made is not by itself enough to operate as oral Will. It must be proved with the utmost precision and with every circumstance of time and place.

The Privy Council made it clear that oral Will must be strictly proved. Thus in Beer Pertab V. Maharajah Rajendra Pratap it was postulated by that court “If any party is bound to strictness of pleading it is he who sets up a nuncupative Will. He, who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege as well as to prove, with the utmost precision the words on which he relies with every circumstances of time and place.

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159 Ganesh Prasad v. Hazari Lal, AIR 1942 All 201.
162 (1867) 12 MIA 1 (28); see also Kallu v. Ganesh, AIR 1929 All 348; Mahabir Prasad v. Mustafa Husain, AIR 1937 PC 174.
Strict proof is required to show that the testator really wanted to make a Will. A deaf or dumb person who cannot speak can make a will by signs.

5. **Sham Wills**

The general principle is that animus testandi is essential to the validity of a Will. It, therefore, follows that a document may be deliberately executed with all due formalities purporting to be a Will, still it will 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 collateral object, e.g. to be shown to another person to induce him to comply with the testator’s wish or the like.

6. **Holograph or Olograph Wills**

A holograph is a Will entirely in the handwriting of the testator. Naturally there is a greater guarantee of genuineness attached to such a Will. But in order to be valid it must also satisfy all the statutory requirements as per provision enumerated in Indian Succession Act, 1925.

7. **Concurrent and Duplicate Wills**

The general rule is that a man can leave only one Will at the time of his death. But for the sake of convenience a testator may dispose of some properties, e.g. those in one country, by one Will and those in another country by another Will. They may be treated as wholly independent of each other, unless there is any inter-connection or the incorporation of the one in the other.

Likewise, a testator, for the sake of safety, may make a Will in duplicate, the one to be kept by him and the other deposited in some safe custody with a bank or executor or trustee. Each copy must be duly signed and attested in order to be valid. A valid revocation of the original would affect a valid revocation of the duplicate also.

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164 Lister v. Smith, 33 LJ Pr. 29.
V. WHO CAN MAKE A WILL

It speaks of capacity and requirements of a person to make a Will. In this regard section 11 of the Indian Contract Act, 1872 says:—

"Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject", so section 11 of the Contract Act lays emphasis on four aspects:—

(i) Age of majority (minor).
(ii) According to law to which he is subject.
(iii) Sound mind.
(iv) Not disqualified from contracting by any law to which he is subject.

These four aspects also reflect in section 59 of the Succession Act, 1925. The age of majority is governed by the provisions of the section 3 of the Indian Majority Act, 1875, which deals with regard to age of majority of persons domiciled in India. As regards, "According to the law to which he is subject" means that for the purpose of determining majority of the person, if there is difference between the Indian Majority Act, 1875 and those of the law to which the person concerned is subject, the provisions of the latter law will prevail and override those of the Indian Majority Act as per section 2 of the Majority Act. "Sound mind" is governed by section 12 of the Contract Act, 1872 stating:

"At the time when he makes it, he is capable of understanding it, and of forming a rational judgment as to its effect upon his interests" and lastly, he should not be disqualified by any law to which he is subject.

The same analogy applies to the law of Wills as it is based on two principles:

(i) The person must be mature enough to know the consequences of the act he intends to do
(ii) He should be capable of distinguishing between right and wrong.
Section 7 of the English Wills Act, 1837 also of the same view which states that: "No Will of a person under age valid and no Will made by any person under the age of eighteen years shall be valid."\(^\text{166}\)

Section 59 of the Indian Succession Act, 1925, which stipulates the capabilities a person should possess for the purpose of making Will states that:

"Every person of sound mind not being a minor may dispose of his property by Will."

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

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

**Explanation 3.**—A person who is ordinarily insane may make a Will during an interval while he is of sound mind.

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

1. **Majority**

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,

\(^\text{166}\) See section 7 and 8, English Wills Act, 1837.
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). A Will executed by a minor is void and ineffective on that account. He is in law Incapable of knowing what he is doing.

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.]

No doubt, section 60 is not made applicable to Hindus. But a Hindu has got the power to appoint a testamentary guardian to his child under section 9 of the Hindu Minority and Guardianship Act, 1956. The qualification for a Hindu father to so appoint a testamentary guardian is that he, the father, must be entitled to act as the natural guardian of his minor child. Naturally, if the father himself is a minor he will not be competent to act as the natural guardian and so he cannot appoint a testamentary guardian.

- Testamentary Guardian and their powers

The right of a Hindu father to appoint a testamentary guardian of his minor children and the powers of such guardian under Hindu law as hitherto applied. The rights of such testamentary guardian under that law as interpreted by the courts, were comparatively very wide. The testamentary guardian could deal with the minor’s property, subject only to such restrictions as were imposed by the Will. In the absence of any such restrictions, the exercised powers are similar to those of a natural guardian. The testamentary guardian could, therefore, in the absence of any restrictions in the Will, mortgage, sell or otherwise dispose of the immovable property of the minor, even without the sanction of the court, provided the alienation or any other dealing with such property by the guardian was for the benefit of the minor’s estate. The powers of testamentary guardian under the Indian Guardians and Wards Act, 1890, are only subject to the restrictions

imposed by the Will, unless he is also declared to be a guardian by an order of the court (section 28).

In a case, the court examined the relative jurisdictions under the present section 9 of Hindu Minority and Guardianship Act, 1956, and section 7 of the Guardians and Wards Act, 1890, and expressed the view that they are not inconsistent and that they operated in different fields.

Section 9 of Hindu Minority and Guardianship Act, 1956, brings some important changes in the law relating to testamentary guardians of a Hindu minor. The right of a Hindu father to appoint, by Will, a guardian of the person as well as the property of his minor is reiterated in sub-section (1). The position affecting the undivided interest of the minor in joint family property is different and no testamentary guardian can be appointed by the father of any such interest of his minor children (s. 12). Sub-section (2), (3) and (4) of the present section, relate to the rights of the mother to appoint a testamentary guardian of a minor child, which states that a Hindu widow is entitled to act as natural guardian of her minor legitimate children and may, by Will, appoint a guardian in respect of minor’s person or in respect of the minor’s property (except undivided interest in the joint family property) and also empowers a Hindu mother to act as the natural guardian of her minor illegitimate children and may by Will appoint a guardian in respect of the minor’s person or minor’s property or for both. Sub-section (5) is the vital clause in this section and materially affects the rights of a testamentary guardian of a Hindu minor as previously recognized under Hindu law and s. 28 of the Guardians and Wards Act. Under the law as previously applied in case of testamentary guardians, the view was taken that the testamentary guardian derived his powers of management not only from the Will of the father but also from the principle of Hindu law enunciated by the Privy Council in case and several other later cases. It was held in cases under this head that where the Will did not impose further restrictions or limitations on the exercise of this power in the matter of the disposal of the immovable property

170 Re: Hanuman Prasad Pandey, 6 MIA 393, Ramanathan v. Palaniappa AIR 1939 Mad. 531.
belonging to the minor, the testamentary guardian could alienate such property in case of need or for the benefit of the minor's estate. However, the power of a testamentary guardian is now controlled by the restrictions imposed by sec. 8(2), which requires the previous permission of the court inter alia for sale of any immovable property of the minor.\footnote{171} As per sub-section (6), the rights of a testamentary guardian of a minor girl cease on her marriage. After marriage, her husband becomes her natural guardian.

- **Incapacity of a Minor to act as Guardian**

The section 10 of the Hindu Minority and Guardianship Act, 1956, lays down in express terms that a minor, that is a person who has not completed the age of 18 years, is incompetent to act as guardian of the property of any minor. It supersedes to a large extent the rule laid down in s. 21 of the Guardians and Wards Act, 1890, which recognizes the right of a minor to act as the guardian of the property of his minor is competent to be the 'managing member of an undivided Hindu family' and that he is, as such manager, competent to be the guardian of the minor wife or child of another minor member of that family. It was observed in a decision of the Madras High Court\footnote{172}:

"It does seem anomalous that a minor could be the guardian of the person of his wife and children, that is entitled to the custody of their persons and the management of their properties while his own person is subject to the custody of the legal guardian of his person and his properties are under the management of the legal guardian of his properties."

It was suggested in that case that the right of a minor to act as a guardian should be confined to his wife and child, to the control of their persons and he should have no power to interfere with the management of their properties. A Hindu minor, therefore, now has no capacity to act as the guardian of the property of any person. He can only act as the natural guardian of the person of his minor's wife and children.

\footnote{171}{Doraiswamy v. Balasubramaniam, AIR, 1977 Mad., 304.}
Hindu minor

It is not enough that a Hindu is a major according to Hindu law. The Indian Majority Act has repealed Hindu law except for marriage, adoption, dower or divorce. A Will executed by a Hindu who has not attained majority under the Indian Majority Act is not valid.¹⁷³

When a Will is attacked on the ground of majority of the testator, the burden lies on the propounder of the Will to prove that the testator was a major.¹⁷⁴

2. Unsoundness of Mind

The question of sanity is a question of fact. There is no presumption that a testator is sane till the contrary is shown.¹⁷⁵

The test of sanity and insanity was explained by Sir John Nichol in an early English case.¹⁷⁶ "Whenever a person conceives something extravagant to exist, and wherever having so conceived he is incapable of being or at least of becoming permanently reasoned out of that conception, such a person may be said to be under a delusion in a peculiar half technical sense; the presence or absence of such delusion is the true and only test or criterion of presence or absence of insanity."¹⁷⁷

The testator in this case was labouring under various forms of mental perversion. He exhibited unusually unnatural animosity to his child and totally executed it from his Will. The Court held it was a dear case of mental delusion having beliefs of fact which any ordinary person would not credit, or which one cannot understand how any person in his senses could hold.¹⁷⁸

¹⁷⁴ Rajendra v. Ramjowai Shah, AIR 1924 Lah 541.
¹⁷⁵ See, however, Ganpat Rao v. Vasant Rao, AIR 1932 Bom 588 (Law Presumes sanity).
¹⁷⁶ Dew v. Clark, (1923) 3 Add 79.
¹⁷⁷ See Jarman on Wills, 8th Edn., p. 53; Theobald on Wills, 14th Edn., p. 30.
¹⁷⁸ See Also Boughton v. Knight, LR 3 P&D 64.
If there has been an inquisition declaring a man a lunatic, *prima facie* he is disqualified during the whole period. However, proof that the execution of the Will occurred during lucid interval is not precluded.¹⁷⁹

There may be lucid intervals in an insane person at which time he can effect a Will. It must be proved that he was then in a sound disposing state of mind. A lucid interval connotes "not cooler moment, an abatement of pain or violence, or of a higher state of torture, but an interval in which the mind having thrown off the disease has recovered its general habits."¹⁸⁰ In this state of lucid interval there must be clear absence of delusions and the mind must be perfect and sound on all subjects.¹⁸¹ In the above case the executant of the Will had been once in a lunatic asylum but thirty years thereafter when he made the device there was no indication that he was at all insane. The Will was upheld as valid.

Lord Haldane stated the position thus in *Sivewright v. Sivewright's Trustee*:¹⁸²

"The question whether there is such unsoundness as renders it impossible to make a testamentary disposition is one of degree. A testator must be able to exercise a rational appreciation of what he is doing. He must understand the nature of his act... If his act is the outcome of a delusion so irrational that it is not to be taken as that of one having appreciated what he was doing sufficiently to make his action in the particular case, that of a mind sane on the question, the Will stands. But in that case, if the testator is not generally insane, the Will must be shown to be the outcome of the special delusion."

In *Battan Singh v. Amichand*,¹⁸³ the testator was in the last stage of consumption and was so weak as to be in a dazed sort of mind. So the statement in the Will that he had no relations anywhere, which is a palpably untrue statement, made the Privy Council conclude that the testator was clearly of

¹⁷⁹ In Re., Marshall, (1920) 1 Ch 284; Jarman on Wills 8th Edn., p. 52, see Explanation 3 to section 59.
¹⁸⁰ Attorney-General v. Pamther, (1792) 3 Bro GC 444.
¹⁸¹ A Smwar v. Secretary of State, ILR 31 Cal 885 (894).
¹⁸² (1920) HLC 63 (Lord Dunedin and Buckmaster concurring).
unsound mind at the time of the alleged execution of the Will. The Will was declared invalid.

The party who wants to take advantage of the fact of interval of reason must prove it.\textsuperscript{184} The question of soundness of mind is a dominant question in a Court of Probate. Numerous decisions of high authorities have laid down from time to time tests, by which to judge a sound disposing mind. It is not an absurd test. Nor is it the test of a perfectly healthy and perfect mind. Indeed most of the Wills are not made by persons young and vigorous and glowing health. In V. Sarda v. V.K. Narayana Menon,\textsuperscript{185} there was a joint Will comprising three Wills executed by the testators in a single document. It was held that the entire Will could not be declared invalid as properties of the insane testator could be separated without affecting the other part of the Will. The test of a sound disposing mind is in law a workable test. It means in plain language an appreciation of the contents of that Will and an appreciation of the nature of disposition that he is making having regard to the claims of affection and family relationship and the claims of the society or community to which he belongs. It is neither a hypothetical nor an impractical test. It is not the test of a psychologist or a psycho-analyst or a psychiatrist who in the modern age is prone to consider all human minds to be inherently unsound by nature and abnormal. Nor is it the too scientific test which would satisfy the highest technical medical examinations. Some idea of what this sound disposing mind in testamentary law is, can be gathered from section 59 of the Succession Act and the statutory \textit{Explanations} thereunder.

In \textit{Explanation} 2 to section 59 to the Succession-Act it is expressly stated that 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 about it.

However, cases on sound state of mind are not always helpful except for the general principles they laid down. A Will by a testatrix was held valid even though she was incapable of speaking or writing owing to an apoplectic stroke

\textsuperscript{184} Cartwright v. Cartwright, 1 Phillow 100; Jarman on Wills, 8 Edn., p. 53.
\textsuperscript{185} AIR 1989 Ker 155, Also refer Annual Survey of Indian Laws, 1989.
and assented only by nods of her head and pressures on the head and made a mark with a pen in lieu of signature. The medical evidence showed that she was unconscious, paralysed or her right side, devoid of power of speech.\textsuperscript{186}

It must be shown that the mind was then perfect and sound on all subjects with complete absence of delusion.\textsuperscript{187}

There can be other factors that can constitute unsoundness of mind like "imbecility of mind", "idiocy", "weakness of mind", 'delusion', "acute sickness" "serious infirmity of body" etc., which cast suspicion as to the capacity to make a Will. In such case the burden of proof lies on the propounder. He is to prove that these factors have not affected his mental faculties and that he was having a sound disposing state of mind. The Will shall be valid if suspicious circumstances surrounding the Will are not proved (AIR 1978 SC 1203).

- **Delusion**

Delusion is an erroneous belief in the existence of a state of mind which does not exist and with no foundation for the belief. Only an insane person would entertain it. Therefore in order to constitute an insane delusion affecting the question of testamentary capacity, it must be shown, not only that it was unfounded, but also that it was so destitute of foundation that no one, save an insane person, would have entertained it.\textsuperscript{188}

Mere eccentricity of conduct or capricious behaviour does not incapacitate a man to write a Will.\textsuperscript{189}

The court further refers to the suspicious circumstance of the propounders taking a prominent part in the execution of the Will which also confers on them substantial benefits so it becomes more necessary to satisfy the test of judicial conscience (a rather pedantic technical word) that the Will was validly executed sans all undue influence. So the propounder has to take all the care to prove the

\begin{table}[h]
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\textsuperscript{186} & In the Estate of, Holtam, Gillet v. Rogers, (1913) 108 LT 732. \\
\textsuperscript{188} & Sajid Ali v. Ibad Ali, 23 Cal 1 (PC)> \\
\textsuperscript{189} & Suradhani v. Rajah Jagat Kishore, AIR 1939 Cal 373. \\
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Will on the principles enunciated in sections 67 and 68 of the Evidence Act read with sections 59 and 63 of the Indian Succession Act.\textsuperscript{190}

Sometimes the Will may be unnatural and unreasonable e.g., no provision made for a child more so when the child is helpless or affected by disease. The suspicion aroused by this coupled with a provision in the Will for a remote relation or stranger has to be properly explained. The court will be alert in such circumstances in looking for the presence of some improper influence that wrapped the judgment of the testator. So the onus is more heavily on the propounder to satisfy the court in such regards.\textsuperscript{191}

- \textit{Imbecility of Mind}

The combination of circumstances such as age, disease, mental and physical weakness, and above all, an unnatural Will to the extent that minor childrens of tender years are left absolutely unprovided for, and comparatively remote relations, like a nephew and niece become recipients of the bounty, raise a presumption of undue influence.\textsuperscript{192} But mere old age of the testator, 90 years in instant case, does not lead to an inference that the testator had no capacity to execute the Will, in the absence of medical evidence to the effect.\textsuperscript{193}

Imbecility arising from advanced age or caused by illness may destroy testamentary capacity.\textsuperscript{194}

The burden of proving that the Will was executed when the testator was free and capable is initially on the propounder of the Will.\textsuperscript{195}

However, when the testator is shown to be in his normal state of mind and body and he duly executed the Will, it may be presumed that the Will was

\textsuperscript{190} Rajeshwari Rani Pathak v. Nirja Guleri, AIR 1977 P&H 123 (126).
\textsuperscript{191} Kamala Devi v. Kishori Lal Labhu Ram, AIR 1962 Punj 196 (199).
\textsuperscript{193} Ram Nath Das v. Ram Nagina Chaubey, AIR 1962 Pat 481 (483).
\textsuperscript{194} Abhay Charan Das Mazumdar v. Raimya Devi, AIR 1982 Gau 94.
executed when in his normal state of mind and body. The rule is the same whether the question arises in probate proceedings or in a regular suit.\textsuperscript{196}

A person who sets up a Will is under a duty to satisfy the court that it is the will of a competent testator.\textsuperscript{197}

A person may cease to be in his normal state of mind for various reasons. In \textit{Jodh Singh v. Union of India},\textsuperscript{198} the Supreme Court held:

"..........where a certain benefit is admissible on account of status and a status that is acquired on the happening of certain event, namely, on becoming a widow on the death of the husband, such pension by no stretch of imagination could form part of the estate of the deceased... it could never be the subject-matter of testamentary disposition.... special family pension is payable to the widow on the death of the officer.... Therefore, it is unquestionably established that special family pension sanctioned to the widow of an officer of the Indian Air Force by the President of India under Rule 74 (of the Pension Regulations for Indian Air Force) could not be subject-matter of testamentary disposition.

Further whether a gratuity specialty sanctioned in favour of the widow of the deceased by the President under the Rules could be the subject-matter of testamentary disposition has not been considered in this matter because that amount has been included in the Probate of the Will the deceased and the widow had not questioned that order before us."

- \textit{Moral Insanity}

Moral insanity or mere eccentricity of habits or perversion of feelings and conduct is not such as to constitute legal incapacity.

A distinction is made between general insanity and partial insanity. In the case of a generally insane person, he has capacity to execute a Will during lucid intervals.\textsuperscript{199}

\textsuperscript{196} Gnanaprakasam v. Parasakthi, AIR 1941 Mad 17: 52 LW 440; Kunam Krishnamachariar v. Veeravelli Krishnamama Chariar, 39 Mad 166; JARMAN ON Wills, 8th Edn., p 50.
\textsuperscript{197} Harmes v. Hinkson, (1946) 62 TLR 445.
As regards partial insanity, Lord Brougham in the above case said that it is incorrect to speak of partial insanity. A mind not sound on one subject could not be called sound on any other. So testamentary incapacity is the necessary consequence, however, unconnected may be the subject on which the unsoundness is manifested and the disposition is in question.200

- **Weakness of Mind**

Similarly, under *Explanation* 4 of section 59 to the Succession Act, no person can make a Will while he is in such a state of mind whether arising from intoxication or from illness or from any other cause that he does not know what he is doing.

The *Illustrations* to section 59, Indian Succession Act, 1925, make it clear that a mere perception of what is going on in the immediate neighbourhood and an ability to answer familiar questions but without competent understanding as to the nature of his property or the persons who are kindred to him or in whose favour it would be proper that he should make his Will, will not be sufficient proof of a sound mind within the meaning of the section. The statutory Explanations are not intended to be exhaustive but they give practice illustrations to explain a sound disposing mind.201

- **General Weakness of Mind**

Under *Explanation* 4 to section 59, a person rendered incapable of knowing what he is doing on account of his weak state of mind, whether arising from intoxication or from illness, or from any other cause, cannot make a Will.

When there is a general weakness of the mind, as a consequence, the person becomes incapable of knowing what he is doing.

The weakness of mind may result from sickness. A man may become very feeble and debilitated and may indeed be at the point of death. Still before his death, a man may continue to answer familiar and usual questions. That

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199 Waring v. Waring, 6 Moo PC 341.
200 Smith v. Tebbitt, LR 1 P and M 398.
condition of his mind would not justify the inference that he is capable of knowing what he is doing. He must be able to exercise a competent understanding as to the general nature of his property, the state of his family, the claims of the various relations to his bounty. Then only he can make a Will.202

Where a testator was in a state of health which had affected his memory and rendered him incapable of managing his estates, he cannot on that account alone be said to have become incapable of considering what dispositions of his property he should make in favour of members of his family or that he did not understand the disposition which in fact he made.203

The testator, however, might become so enfeebled by disease as to be without sound mind or memory and while under a delusion as to the existence of his nephews he disposes of his properties to strangers, the Will is invalid.204

3. **Deaf, Dumb and Blind Persons**

The incapacity to comprehend the nature of testamentary disposition may arise as a result of congenital deafness and dumbness. A person who has been from his nativity blind, deaf and dumb is intellectually incapable of making a Will, as he wants those senses, through which ideas are received into the mind.205

It may be that a blind or deaf man may be capable or shown to understand what is written especially when such weakness is the result of accidents.206

A person labouring under such natural defects, can make a Will provided he had the capacity to know what testament means and desires to make one. There is no legal bar to a deaf and dumb person making a Will. The only criteria is that the testator is capable of understanding the nature of his acts.207

The Will of a blind person was recognised in *Pinchen v. Edwards*.208

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202 Esuf Ahmad v. Ismail Ahmad, AIR 1938 Rang 322.
204 Battan Singh v. Amichand, AIR 1948 PC 200: 61 LW 428 (PC); see also Harward v. Baker, (1840) 3 Moo PC 282 (290).
205 Jarman on Wills, 8th Edn., p. 50.
206 Jarman on Wills, 8th Edn., p. 50.
208 4 Moo PC 198.
A deaf and dumb testator made his Will by communicating his testamentary instructions to his reliable acquaintance by signs and motions. The later prepared the Will as desired and the testator signed it. On the affidavit of the writer of the Will, stating the nature of the signs and motions as to the instructions given, the court declared the Will valid.209

4. **Married Women**

The English Law prior to 1883 which made a married woman in general incapable of making a valid Will has since been modified. The Law Reform (Married Women and Tortfeasors) Act, 1935, abolished those disabilities finally.

Under section 59, Indian Succession Act, 1925, a married woman has the power to dispose of by Will whatever property she could alienate during her life.

The same rule holds good as regards a Hindu woman, married and unmarried. Under the Hindu Law prior to the introduction of Hindu Succession Act, 1956, a Hindu woman had only a limited estate in all inherited properties, [which has been converted into absolute property by way of section 14(1) of the Hindu Succession Act, 1956], which she could not dispose of by Will.

5. **Burden of Proof of Testamentary Capacity**

The Privy Council has stated, while pointing out what is required for proof of a Will:

"A Will is one of the most solemn documents known to the law. By it a dead man entrusts to the living the carrying out of his wishes, and as it is impossible that he can be called either to deny his signature or to explain the circumstances in which it was attached, it is essential that trustworthy and effective evidence should be given to establish compliance with the necessary forms of law."

It is for the propounder of the Will to show that the testator executed the Will while in sound state of mind, when the testator’s sanity is disputed.210

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209 Owston, In the goods of, 2 SWK Tr 461. See also In the goods of, Geale, 3 SW & Tr 431. Ganapath Rao v. Vasant Rao, AIR 1932 Bom 588.
If it is shown that the testator was insane before the date of the Will, the propounder must establish that the testator has completely recovered or was at least in his lucid intervals.\textsuperscript{211}

In regard to a Will which is an 'ancient document' under section 90, Indian Evidence Act, there can be a presumption of due execution and attestation which involves a further conception that the testator had capacity to make the Will.\textsuperscript{212}

The ultimate burden of proving, that the testator had sound disposing state of mind and was capable, is on the person who propounds the Will.\textsuperscript{213}

The rule is the same whether the question arises in probate proceedings or in a regular Suit.\textsuperscript{214}

Especially, when it shown that the testator was given to delusions, the propounder of the Will should satisfy the conscience of the Court that the Will is the last Will of a free capable person in sound state of mind.\textsuperscript{215}

In \textit{Lacchhu Bibi v. Gopi Narain},\textsuperscript{216} the testator had suffered from diabetes of a serious type, his constitution has been undermined and his physical strength enfeebled. He sustained a sever shock on the death of his only son. Thereafter his habits and bearing became those of a person of unsound mind. In such circumstances Mr. Motilal Nehru appearing for the appellants contended that the initial onus of proof lay on the propounders of the Will.

Accepting the contention, the Court laid down:

"As regards the onus of the proof in cases of this kind the law is quite clear. The first rule is that the \textit{onus probandi} lies in every case upon the party propounding a Will, and he must satisfy the conscience of the Court that the

\textsuperscript{211} Ganapath Rao v. Vasant Rao, AIR 1932 Bom 588.
\textsuperscript{212} Sarat Chandra Mondal v. Panchman Mondal, AIR 1953 Cal 471: 58 CWN 271.
\textsuperscript{213} Barry v. Butlin, 2 Moo PC 480; Muniyallappa v. Venkatarama, 28 MLJ 124; Symes v. Green, 1 SW and Tr 401; Taylor on Evidence, 10th Edn., p. 107
\textsuperscript{214} Gnanapnakasam v. Parasakthi, 52 LW 440; Krishnamachariar v. Krishnamachariar, 38 Mad 166; Earnest Benito v. John Francis, AIR 1958 Cal 440: (1958) 1 CWN 46.
\textsuperscript{215} Guardhouse v. Blackburn, 1 P&D 109; Goodacre v. Smith, (1867) 1 P&D 359; Atter Atkinson, 1 P&D 665; Cleare v. Cleare, 1 P&D 657; Harter v. Harter, 3 P&D II.
\textsuperscript{216} 23 All 472: 1901 AWN 145 (147).
instrument so propounded is the last Will and testament of a five and capable testator."

The second rule is, if a party who writes or prepares a Will under which he takes a benefit, or if any other circumstances exist which excites the suspicion of the Court, and whatever their nature may be, it is for those who propound the Will to remove such suspicion, and to prove affirmatively, that the testator knew and approved the contents of the Will and only where this is done the onus is thrown on those who oppose the Will to prove fraud or undue influence or whatever they rely on to displace the case for proving the Will.217

The nature of the evidence required in such cases is to establish knowledge of, or assent to, the contents of the Will, "by proof of capacity, and the fact of execution from which knowledge of, and assent to, the contents are assumed."

It cannot be said that the precise species of evidence in all cases of the deceased’s knowledge of the Will is to be in the shape of instructions for reading the Will. They form no doubt the most satisfactory though not the only satisfactory proof by which the contents of the Will may be brought home to the deceased.218

There is no rigid rule either, that if the Court is satisfied that a testator of a competent mind has read his Will, or had it read to him and has therefore executed it, all further enquiry is shut out.219

A Will cannot be thrown away on mere suspicion. A Will otherwise shown to be validly executed cannot be rejected unless it is vitiated by fraud or other cause. Simply because the wife has been totally ignored is by itself not such as to raise any resumption against the Will.220

218 Barry v. Butlin, 2 Moo PC 480; Mitchel v. Thomas, 6 Moo PC 137.
219 Per Lord Hathereley in Pulton v. Andrew, (1875) 7 HL 448.
Where the lawyer who drafted the Will bias been examined, mere non-examination of the attesting witnesses doe not void the Will.221

The person who attacks a Will on the ground of undue influence must prove it.222

Where there is a well-grounded suspicion, that a Will does not express the mind of the testator, the Court will not pronounce in favour of the Will unless the suspicion is removed.223

6. Grounds Exciting Suspicion

(a) Benefit under the Will

The contents of a Will may be such as to demand greater degree of proof of proper execution. Thus, the writer of the Will may be a substantial beneficiary under the Will. A Will may be propounded by such a beneficiary. Again, among the beneficiaries there may be persons placed in a position of active confidence reposed by the testator, persons like his lawyer or spiritual adviser. In Punni v. Sumer Chand224 execution of Will was not proved because details of only one witness was handwritten and rest of the Will including name of a lawyer as scribe and attesting witness was typed, secondly the said witness was not aware of the revocation of earlier Will and thirdly statement of clerk scribing the Will about absence of the testator and it was scribed at the instance of the lawyer. Or, again, the testator may be an illiterate, uneducated person unable to read or understand the contents of the Will. These are circumstances likely to excite the Suspicions of a Court demanding from it greater degree of proof of valid execution of the Will with the knowledge of its contents.225

The weight of the burden will of course depend on the circumstances.226

223 Prasanna Mayi v. Bai Kanta, 49 Cal 132.
224 AIR 1995 HP 74, Also refer Annual Survey of Indian Laws.
226 Bai Ganga Bai v. Bhugwan Das Valji, 29 Bom 530.
Where, however, there are other circumstances against the due execution of the Will by a person capable of doing so, such unnatural dispositions would be additional grounds for insisting on strict proof of execution of the Will with the knowledge of its contents.227

(b) Unnatural Will—When a Factor in Considering the Validity of a Will?

It is true that the unnatural provision of a Will may be a relevant factor in considering the validity or execution of a Will, or in determining the testamentary capacity of the testator. But in the absence of any issue challenging the validity of the Will on the grounds of undue influence or due execution, such provision cannot be a determining factor.228

(c) Unnatural and Improbable Legacies

It is no doubt in the complete discretion of the testator to benefit whosoever he likes. He may beggar his own son and enrich a distant relation. However, he can do so only by executing a valid Will.

Where accordingly a Will has been shown to be perfectly valid, duly executed and properly attested and the testator is also shown to be sound in mind and capable of knowing the nature of the dispositions he makes, the Court must give effect to the Will. "Once the man’s mind is free and clear and is capable of disposing of his property, the way in which it is to be disposed of rests with him and it is not for any court to try and discover whether a Will could not have been made more consonant either with reason or with justice."229

VI. REQUISITES OF A VALID WILL

This phrase, "Requisites of valid Will" connotes two significant expressions i.e. (1) "Voluntary act", and (2) "free consent". "Voluntary act" is defined in

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228 Bratindra Nath Dey v. Sukumar Ch. Dey, AIR 1970 Cal 85.

relation to the causation of effects and not of the doing of acts from which those effects results. It constitutes 'doing act of one's own free Will." "Free Consent" has been defined under section 14 of the Contract Act, 1872 which says that "consent is said to be caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake". Thus "consent" is an act of reason, accompanied with deliberation, the mind weighing the good and the evil on each side. Every free consent presupposes three aspects,

(i) a moral power
(ii) a physical power, and
(iii) serious and free use of both.

So consent obtained by coercion, undue influence, mediated imposition, misrepresentation, circumvention, fraud etc., is a vitiated consent, tainted with blemished act and under this taint or blemish a deliberate and free act of mind cherishes and the persons entrapped in such a way that he does not remain of his own and acts on the dictates heaped on him. A Will so executed under such situation is never a valid Will. It is void.

1. Voluntary Act

In order that a Will may be valid, two essential conditions must be satisfied. They are:

(1) the testator must be fully aware of the contents of the Will and approve them;

(2) it must be his own voluntary act. A testator cannot delegate his testamentary power to another person.

A Will must express the mind of the testator. The court of probate will demand strict proof of due execution of the Will of his own free Will, from those who propound it even when circumstances raise a well-grounded suspicion.230

The fact that the Will has been prepared by a legatee under the Will is a suspicious circumstance.231

Where it is shown that the Will had been read over to the testator and its contents properly brought to his notice, before execution, it must be presumed that the Will was executed by the testator after approving its contents.232

- *Presumption of Knowledge of the Contents of the Will when Permissible*

In order that a Will would be recognised as valid, it is necessary that the testator was aware of its contents and approved of the same.233

Such knowledge and approval may be presumed on proof of signature of the executant to the Will.234

Stricter proof of knowledge and approval will be insisted, where the testator was an uneducated person and unable to read the Will,235 or where it was doubtful that he could have read or known about the contents; or where the person benefiting under the Will has been a party to bring about the execution of the Will and was also so related to the deceased as to be in a position to influence and dominate the testator236 or where the disposition under the Will were not consistent with the natural love and affection of the deceased to his relations.237

A Will that has been read over to the testator in a proper manner, and the contents of which have been brought to his notice before execution, must in the absence of fraud or coercion, be presumed to have been approved by him.238 Without adequate proof, a Will cannot be held valid merely because its contents are reasonable.239

233 Theobald on Wills, 11th Edn., p. 32.
234 Hastilow v. Stobie, LR 1 P&D 64.
235 Bitton v. Robcrus, 3 Phillem 455.
236 Mitchell v. Thomas, 6 Moo PC 137.
237 Prinsep v. Dyce Sombre, 10 Moo PC 285.
The person, who takes a leading part in the making of the Will and is a substantial beneficiary under it, must show that the testator was aware of the contents and approved of the same. When the testator had sound mental capacity, the Will is not rendered invalid merely because he was influenced to give a legacy to some individual. The law is that in order to be effective it should be the last Will of a free and capable testator. The mere reasonableness of its terms will not completely displace the proof of execution. There must be enough material to justify the inference that the document was executed by the testator. A Court of Appeal will not be justified in disregarding the view of the trial Court as to which set of witness is credible.

A Holograph Will i.e., written by the testator himself clearly indicates his mind is following what he is writing. When some one else is the writer, the writer has to testify to the fact that he was only writing out what the testator said to him, or copying out a prepared draft clearly effected by the testator through his vakil and now acknowledged by him to the writer and the two attesting witnesses. A Will can also be type-written based on the specific voluntary statement of the testator. All this, of course, need prima facie proof. Merely because the Will is type-written, it cannot be deemed as a suspicious circumstance. In cities where legal advice is easily available and most of the solemn documents are typed out, what is required is proof of the actual execution of the Will by the testator whose knowledge of the contents must be deemed as indicative of his sound disposing state of mind. Of course, that he was a free agent and no extraneous influences were pressed on him, is part of the necessary proof to indicate his voluntary disposition.

- Under Indian Statute.

Section 61 of the Indian Succession Act provides;

"61. Will obtained by 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.

This section lays down that under certain circumstances, a person of normal understanding and physical capacity may cease to be a free agent and his dispositions may not be characterised as voluntarily made. Such a state of affairs may be brought up by fraud, coercion or importunities. If it is proved that the entire dispositions under the Will have been made as a result of fraud, etc. practised on the testator, the entire Will may be declared void. It may also be that only some of the provisions have been so brought about fraudulently in which case only so much of the Will would be invalidated.

For validating only a portion of the Will in the probate proceedings the two portions must be severable.243 In this instant case only one para 12 was omitted from probate.

2. Fraud

One ground of avoidance is fraud. Fraud is defined by section 17 of the Indian Contract Act for purposes of the Law of Contracts. Fraud is infinite in its variety.

S-17. 'Fraud'. defined.— "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

(1) the suggestion as a fact, of that which is not true by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.— Mere silence as to facts likely to affect the Willingness of a person to enter into a contract is not fraud, unless the circumstances of the case

are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is in itself, equivalent to speech.

As to coercion there can be no doubt that a Will will be invalidated if actual physical force or extreme mental torture was inflicted on the testator. This is so even if all the formalities of a testament were duly observed and the testator also was perfectly in his senses. The Will will be invalid if the testator executes it out of fear. "A vain fear is not enough to make a testament void, but it must be such a fear as the law intends when it expresses it by a fear that may cadere in constantium virum: as the fear of death, or of bodily hurt, or of imprisonment or loss of all or most part of one's goods or the like; whereof no certain rule can be delivered, but it is left to the discretion of the Judge who ought not only to consider the quality of the threatenings but also the persons threatening as well as the threatened; in the person threatening, his power and disposition, in the person threatened sex, age, courage, pusillanimity and the like."

Where however a person who takes an active part in the preparation and registration of the Will is benefited under the Will to the disadvantage of other legatees, the circumstances excite the suspicion of the Probate Court demanding greater vigilance and security. The court must be satisfied that no undue advantage has been taken or any undue pressure has been exercised on the testator.

These rules no doubt enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the judge, even in circumstances of grave suspicion, resolute and impenetrable incredibility. "A judge is never required to close his mind to truth."

It may be that only particular words in a Will or particular parts of the Will have been introduced by fraud, accident or mistake without the consent and knowledge of the testator. In such cases the court has power to strike down

\[\text{References:}\]

- Mountain v. Bennet, 1 Cox 355; See Williams, p. 29 (12th Edn.).
- Swib, Pt. 7, Sect 2 PL 7; Williams, p. 30; See also Nelson v. Old field, 2 Vem 76.
those words or portions alone. The Court however will not substitute the right words in order to make sense of the other words of the Will.

The burden of proving that fraud was played upon the testator in obtaining execution of the Will is on the person alleging it.

3. Undue Influence

Although a man may have a mind of sufficient soundness and discretion to manage his affairs in general, yet if such a dominion or influence be obtained over him as to prevent his exercising that discretion in the making of his Will, he cannot be held as having a sound disposing mind as could give effect to the Will. It depends on the circumstances also as in S.P. Thiunavukkarasu v. S.P. Longanathan, the eldest son alleged that undue influence by the executors as the father was living with other brothers. On evidence it was found that the eldest son has been sufficiently compensated by subsequent settlement deed, so there is nothing unnatural about the Will.

It is not possible to give an exact definition of undue influence. Whenever any ground of suspicion exists, the Court casts the burden on the propounder to prove that the Will was the voluntary and conscious act of the testator.

The influence becomes undue in so far as it destroys the free agency of the testator.

In many of the cases of undue influence, there is also the presence of physical or mental weakness. As Lord Cranworth observed,

"It is sufficient to say that allowing a fair latitude of construction, they must arrange themselves under one or other of these heads, Coercion or Fraud."

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249 Horrocks (in re), (1939) P 198.
251 AIR 1992 Mad 328, Also refer Annual Survey of Indian Laws.
254 Boyse v. Rossbrough (1857) 6 HLC 2 (49).
The Indian definition of undue influence is found in section 16 of the Indian Contract Act. But in the Law of Wills, undue influence must involve an element of fraud or coercion to invalidate a Will.\textsuperscript{255}

Influence in order to be undue must be influence exercised by coercion or by fraud. It must be of the nature of fraud and duress.\textsuperscript{256} All influences are not unlawful. Undue influence in order to invalidate a Will must amount to coercion or fraud. Its existence must be established as a fact and it must also appear that it was actually exercised on the testator.

There must be circumstances attending, or at least relevant to the preparation and execution of the Will itself. There must be strong grounds for suspicion.\textsuperscript{257} The influence of a wife over the husband may not be undue.

The burden of proving that a Will was executed under undue influence rests upon the party who alleges this.\textsuperscript{258}

4. Importunity

The third ground referred to in section 61 of the Indian Succession Act, 1925, of avoiding a Will is importunity. The importunity must be such as takes away the free agency of the testator. For example:

"A, being in, so feeble a state of health, as to be unable to resist importunity, is pressed by B to make a Will of a certain property and does so merely to purchase peace and in submission to B. The Will is invalid."

Here A falls a victim to the importunities by B, and his testation is not that of a free mind. The testator has not the courage to resist; because the importunity exerted may be in the nature of a moral command yielded to for the

\textsuperscript{255} Sayad Mohammad v. Fatteh Muhammad, 22 Cal 324 (PC).
\textsuperscript{256} Gomtibai v. Kanchedilal, AIR 1949 PC 272: (1949) 2 MLJ 469: 62 LW 700 (PC); Naba Gopal v. Sarala, AIR 1933 Cal 574.
\textsuperscript{257} Cuteffs Estate (in re:), (1959) P 6.
sake of peace and quiet, of escaping from social discomfort or distress of mind.259

"Importunity in its correct legal acceptation must be in such a degree as to take away from the testator free agency: It must be such importunity as he is too weak to resist; such as Will render the act, no longer the act of the deceased, the free act of a capable testator, in order to vitiate the instrument."

Flattery, without fraud, does not void Will made by a free testator.260 Not all importunities are undue influence. A person may well plead his case before the testator and to persuade him to make a disposition in his favour. If the testator retains his mental capacity and there is no element of fraud or coercion, the Will cannot be attacked.261

5. Proof of Exercise of Undue Influence

In order that a Will may be rendered void, it is necessary to show that such influence was exercised at the time of execution of the Will.262 A general assertion of the wife's commanding character as against the husband's weakness and of their usual wrangling about family expenses will not invalidate a Will by the husband when there is no evidence to show coercion in the special matter of the Will.263

But it may be that a person has been generally under the dominating influence of another in regard to all his transactions and it is possible for the Court to infer undue influence in regard to the Will also.264

Again, it must also be shown that the person said to have exercised undue influence was in a position to exercise undue influence. The influence which an

262 Neha Gopal v. Sarala, AIR 1933 Cal 574.
263 Sala Mahomed v. Dama Janashi, 22 Bom 17 (PC).
264 Morison v. Administrator-General, Madras, ILR 7 Mad 515.
affectionate wife exerts on her loving husband who, in the free exercise of his volition executes a Will in her favour is not undue.\textsuperscript{265}  

The rule as to burden of proof as usually stated by the authorities is that where a Will appears to have been duly executed and attested according to the requirements of law, it is presumed to be valid, and the burden of proof rests upon the contestant who alleges fraud or undue influence.\textsuperscript{266}  

Where, however, there are circumstances to arouse the suspicion of the court as where the testator is an elderly person and the Will is prepared by a solicitor who takes a benefit under the Will, the court of probate will need to be satisfied that the testator knew and approved of the Will.\textsuperscript{267}  

- **Suspicious Circumstances**

Where natural heirs were excluded from inheritance but no reason was disclosed. The Will was not scribed by any deed writer and name of scribe was also not given. The 'Will' was executed on paper taken from exercise book. Thus execution of Will was highly suspicious and not free from suspicious circumstances.\textsuperscript{268}  

Where attesting witnesses were not close to testator to enjoy his trust and witnesses were not independent rather witnesses were interested in the beneficiary of the Will. Execution of Will was not proved. Burden to prove the Will lying on propounder was not discharged. The daughter the issue of testator was excluded from any benefits under the Will. Will purported to revoke earlier bequest in favour of the daughter. Reasons shown for the disfavour to daughter were found not convincing and non-existent. Reasons shown for the bequest in favour of the stranger were found to be untenable. Independent reasonable mind of testator was not reflected by the Will. All these circumstances made the Will suspicious.\textsuperscript{269}  

\textsuperscript{265} Morison v. Administrator-General, Madras, ILR 7 Mad 515.
\textsuperscript{266} Craig v. Lamoureux, LR 1920 AC 349.

The facts are that deceased propositer had two wives. Recitals of Will show that he bequeathed suit properties in favour of second wife on the ground that the first wife left his house. Witnesses revealed that both the wives of deceased were jointly living with him when Will was executed and both were equally loved. Son of the first wife of the deceased stated that the said Will was traced 8 days after the death of his father. During life-time of the deceased they were not aware of the said Will. Circumstances create suspicion regarding genuineness of Will. Held, that the said Will could not be said to be valid.

- **Burden of proof**

The onus probandi, in every case, lies upon the party propounding a Will, and he must satisfy the conscience of the Court that the instrument propounded is the last Will of a free and capable testator.270

Where also a person who takes a benefit under the Will is the writer of the Will, or where there are any other circumstances which excite the suspicion of the court, whatever their nature may be, the onus, is cast on the party propounding the Will to remove such suspicions and to affirmatively prove that the testator knew and approved the contents of the Will.271

Then only the burden will be shifted on those who oppose the Will to prove fraud or undue influence or whatever they rely on to displace the Will.272

Of course if there are suspicious circumstances, the propounder of the Will should dispel all those suspicions. The pronouncement of the Supreme Court in the oft quoted leading case Venkatachala Iyengar v. B.N. Thumma

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270 Barry v. Butlin, (1838) 2 Moo PC 480; Harmes v. Hinkson, AIR 1946 PC 156; (1946) 2 MLJ 156.


Jamma\textsuperscript{273} amply supports this view. Apart from the evidence tendered, the court has to take into consideration all the surrounding circumstances that will erase or enhance all suspicions, as the case may be.\textsuperscript{274} Mere non-mention of details of property cannot be deemed as suspicious nor the mere non-production of the draft Will. In the last case the testator was an I.A.S. officer, who drafted the Will himself. May be the draft is lost or thrown away as unnecessary. The testator's good health, position and sound disposing state of mind were enough to validate the Will.

Appointment of mother's sister as executor and also as a beneficiary do not justify invalidating a Will.\textsuperscript{275} In this case it was this lady who reared up the son from childhood, the testator's own brothers were living at far off places from the place where properties were situate and so the testator rightly appointed his mother's sister as the executor and rightly made her a beneficiary also.

But even grave suspicious circumstances should not induce a Court to disbelieve truth where it could be perceived.\textsuperscript{276}

\textbf{VII. EXECUTION}

It applies to Wills executed in India by any person including Hindus, but excluding Muslims, with effect from January 1, 1927. The Hindu Wills which could be executed otherwise than by the formalities laid down in this section after January 1, 1927 will not be valid. In other words, Wills made by Hindus anywhere in India (except the state of Jammu and Kashmir) must conform to formalities laid down in this section. So should be Wills of all other persons made in India, except the Muslims to whom the provisions of this Part are not applicable.\textsuperscript{277}


\textsuperscript{274} Guru Dutt Singh v. Durga Devi, AIR 1966 J&K 75 (80).

\textsuperscript{275} Harmes v. Hinkson, AIR 1946 PC 156: (1946) 2 MLJ 156; Suryanarayanamurthy v. Suramma, (1947) 2 MLJ 185 (PC).

\textsuperscript{276} Law of Intestate and Testamentary Succession; Dewan Paras.
This section lays down the following two formalities for the execution of the Will:

1. It must be signed by the testator or by some other person in his presence and by his direction. The testator may in the alternative affix his mark, such as a thumb impression.278

2. It must be attested by two or more witnesses.

Once both the conditions are satisfied, the Will be held to be validly executed.

1. **Formalities and proof of execution**

The matter relating to formalities of a Will and proof of a Will are different matters. The former is regulated by this section, while the latter by the Indian Evidence Act, 1872. Under this section will must be attested by two witnesses, but under section 68 of Indian Evidence Act, a Will can be proved only by one of attesting witnesses. If a Will has been thus proved it can be admitted to probate.279 Just as in other cases, the test of proof is the satisfaction of the prudent person and not of beyond all reasonable doubt or of mathematical certainty.280

(i) **Signatures or mark of the testator**

(a) the testator must sign the Will or affix his mark, or

(b) it may be signed by some other person in the presence of the testator and by his direction.

Ordinarily, Wills are signed by the testators themselves; sometimes testators may, instead of signing it, like to put his mark, either because they are illiterate, or incapable of affixing their signatures on account of weakness, or they may like to do it that way, may be by habit. Where testator put a thumb mark in inspite of being literate because he was diabetic and his hands shook, it was held to be proper.281 In either way, a Will, will be deemed to have been signed validly.

278 Kalyan Singh v. Chhori, AIR 1990 SC 396, Also refer Annual Survey of Indian Laws.
279 Manormama Srivastava v. Saroj Srivastava, AIR 1989 All 17
280 Rammol Das. Iakol, 22 CWN 315
When a testator is unable to sign his Will on account of weakness, he may affix a mark and in doing so his hand may be guided by some other person. Under the General Clauses Act, 1897 'sign' includes, in reference to a person who is unable to write his name, 'mark'. The thumb impression or a rubber stamp impression of his signature, or mark, to which the testator was in the habit of using, will do. The mark must be made by the testator and not by any other persons. Where a testator signs under an assumed name intentionally or unintentionally, the signatures are still his and can be proved as amin testandi. For signing the Will, pen and ink are not necessary. It may be signed with a pencil, or a name stamp may be put. Where on account of paralysis a person was in the habit of using a name stamp which used to be impressed by his servant, on his direction, on any document or paper he wanted to sign, this was held valid execution of the Will.

Initials of the testator also operate as his signatures.

It is not necessary that the testator himself shall put his signatures or affix his mark to the Will, some other person can do so in his presence and by his directions.

Where the testator attempts to sign but fails to complete the signatures and dies, these may still be treated as his signatures provided it is proved that the testator was capable of executing the Will and that he fully appreciated its contents and that what he wrote was intended to be his signatures.

The Will may be signed by some other person in the presence of the testator and by his direction. Thus, where the signature in a Will contained the words, "this scratch the mark of so and so," it was held that the Will was validly executed. Where an illiterate testator held the pen and the scribe wrote testator’s

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282 Gullan Devi v. Puna, AIR 1989 All 75, Also refer Annual Survey of Indian Laws.
283 Harihar Prasad Sao v. Bhagwan Das, AIR 1972 Pat 146
284 Teresa v. Francis, 23 Bom LR 23
285 Re Redding, (1852) 2 Rob 339
288 Sher Mahomed v. Dy. Commissioner, 58 IC 134.
290 In the Goods of Chalcraft, (1948) P 222
name at the foot of the document, it was held that the Will was properly executed.\textsuperscript{291}

Under this clause, the requirement is that "some other person" should "sign" on behalf of and by the direction of the testator, and, therefore, this some other person has no power to put the mark of the testator. When someone else is signing for the testator, then he should write the name or put it in such a manner as would lead anybody else to see at once who the person was who executed the Will.\textsuperscript{292}

Under Indian law "some other person" signing for the testator cannot be one of the attesting witnesses. It has to be other than the two attesting witnesses. In \textit{re Himlota Debee},\textsuperscript{293} some other person signed the Will in the presence of the testator and by his direction, the court observed that besides that person who had signed for the testator, there must be two more attesting witnesses.

- \textit{Place of Signature}.

What is needed is that the testator must sign the Will or affix his mark or get it signed by someone else on his behalf. It is not necessary that he must sign, etc., at the end of the will or at every page of the Will (where Will consists of several pages). Thus, a Will will not be invalid if the testator has placed his signatures amidst the words of the testimonial clause or of clauses of attestation, if the court is satisfied that the testator did intend to sign and execute the Will.\textsuperscript{294}

It does not matter as to at which place of a Will the testator signs. In some parts of the country it is customary to put signatures at the top of the document at the right hand side. This form of signing the Will has been held valid.\textsuperscript{295} In the Goods of Mann\textsuperscript{296} provides a very good illustration. The testatrix wrote out her Will on a sheet of paper and one of the attesting witnesses was present when the testatrix was writing the last part of the Will. She put the sheet of paper in an envelope

\textsuperscript{291} Kotni R N Subudhi v. V.R.L.Murthy Raju, AIR 1961 Ori 180
\textsuperscript{292} Nirmal Chandur v. Saratmoni, ILR 25 Cal 911
\textsuperscript{293} ILR 9 Cal 226
\textsuperscript{294} IN the Goods of Pern 1, PD 70.
\textsuperscript{295} Savitri v. F.A. Sain, 19 CWN 1297
\textsuperscript{296} 1942 P 146
and wrote on it: "The last Will and testament of Jane" and at her request the
witnesses wrote at the foot of the document the words "in the presence of
witnesses" and signed. The document then was placed in another envelope but
the testatrix did not sign it. After sometime, the testatrix fell suck and was taken
to the hospital where another envelope was brought and the whole packet was
put into it on which was superscribed "the last Will of Jane Catherine Mann" and
was signed by her. The Court held that the Will was properly executed though
the testatrix had not signed on the document but only on the envelope. But mere
writing his name on the document by the testator by his own hand at the very
beginning of the document without any intention of authenticating the document
does not amount to signing of the document; this does not amount to the
execution of the Will.297

Is writing of his name on the Will by testator in own hand at the very
beginning of the document without signing it at the bottom of Will sufficient
authentication of the Will? Whether writing of his name and address in a
holograph Will while describing his status and place of residence, is to be
construed as his signature? The requirement of signing the Will by the testator is
for the purpose of authenticating the contents of the writing containing his
declaration about the disposition of his property after his death. It is, therefore,
apparent that the testator has to put his signature or mark as contemplated, only
after the contents of the writing containing the declaration have been scribed, for
it is not possible to authenticate a declaration before such declaration has been
actually scribed and has thus come into existence. Something non-existent
cannot obviously be authenticated. When a person writes his name, parentage
and address in the opening part of a document to disclose his identity, it is a
stage or point of time when the contents of the document are yet to be written
and have not come into existence. Can such writing of name be treated as
authentication of the contents of the document?

We would proceed to review the case law.

297 Leela Karwal v. J.D.Karwal, AIR 1986 All 220
In *Sabitri v. F.A. Sain*, the testator had executed a holograph Will in four pages and all the four pages bore his signatures, though he had not signed at the bottom of the Will. On the first pages, his signature appeared at the top left hand corner and against or alongside the signature of the testator four persons were said to have attested the Will. The question which arose for consideration was as to which of these signatures was the operative signature of the deceased. It was held that the operative signature was on the first page. In this connection it was pointed out that amongst Indians the English system of executing the document at the foot did not obtain and that their custom was to execute the document at the top. *Mathura Das vs. Babu Lai*, was a case where a letter written by a duly authorised agent of Babu Lai, a banker, was headed as “written by Babu Lai to Shah Banarsi Das” and the concluding portion of the letter was written by Babu Lai in his own handwriting but it was not signed by him. It was treated to contain an acknowledgment as contemplated by the Limitation Act on the ground that it is not the practice of the Hindu bankers to sign their letter at the foot. In the case of *The Goods of R. Prothouse*, a testator died leaving as his Will a printed form of a will imperfectly filed in, and having omitted to insert his name and description at the head of document, and to append his signature thereto. He had, however, written his name in the attestation clause and completed the disposition clause bequeathing all his property to his wife and appointing her sole executrix. It was held that this was sufficient and the will should be admitted to probate. In this case it would appear that the name of the testator found place in the last sentence of the will after the entire contents containing the declaration of the intention of the testator with respect to his property which he desired to be carried into effect after his death had already been scribed in clause (2) which was the disposition clause and this disposition clause was completed by the aforesaid last sentence which reads “In witness whereof I the said Robert Porthouse have to (put) this my last will and testament set my hand the eleventh day of October in the year of our Lord one thousand eight hundred and eighty

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298 (1915) 29 IC 743
299 ILR (1878) 1 All 683.
300 ILR (1897) 24 Cal 784.
eight”. The place where and the point of time when the testator wrote his name clearly amounted to authentication of the declaration of the testator with respect to disposition of his property.

Amrendra Nath Chatterjee v. Kashi Nath Chatterjee,\(^{301}\) was a case where the Will did contain the signature of the testator on the right hand corner but the signature had not been made in the presence of the attesting witnesses. The testator, however, admitted before the attesting witnesses that the paper which they were required to attest was his last will. It was held that it constituted sufficient acknowledgement by the testator of his signature to his will. In Janki v. Kallu,\(^{302}\) the widow of a deceased Hindu applied for a certificate of succession. In opposition to this application a alleged will of the deceased was set up and it was proved that the deceased, being of sufficient testamentary capacity, had, shortly before his death, caused a draft will to be prepared, that he had the draft read to him twice and explained to him, that he made it over to person appointed as trustee under the will telling him, to have I fairied out and brought to him for signature, but that he died before this was done without having expressed any intention, except in one small particular, of wishing to alter the draft so made. Two witnesses Lachman Sarup and D. Ram Chander were produced to prove the will. Relying on the evidence of these witnesses and the circumstances that according to Hindu law it was not necessary that a will should be executed by the testator it was held that the testator had made the will. At that time a Hindu could make an oral will.

The matter came for consideration before the Allahabad High Court in Leela Karwal v. J. D. Karwal, where the testator under his will bequeathed his house to his second wife. The testator died leaving behind two sons and three daughters from his first wife (who had died) and one daughter from his second wife. When letters of administration were sought by the second wife of the testator, the Will was challenged by the children from the first wife. It was admitted that the Will was in the handwriting of the testator but it bore no date. It

\(^{301}\) ILR (1900) 27 Cal 169.
\(^{302}\) ILR (1909) 31 All 236.
bore the signatures of two attesting witnesses. The opening sentence of the Will read thus: "I Guru Datt Karwal son of Devi Chand, retired professor, University of Allahabad (U.P.) declare this to be my Will". It was written on both sides of a half-sheet of ordinary paper and did not bear any signatures of the testator on any of its two sides. The propounder of the Will contended that his name written in the first sentence was in fact his signature.

After a review of authorities, the Court observed that the writing of his name by the testator in a holograph Will, while describing his identity, could not be construed as his signature. The requirement of signing the Will by the testator is for the purpose of authenticating the contents of the writing containing his declaration about the disposition of his property after his death. It is, therefore, apparent that the testator has to put his signature or mark only after the contents of the writing containing the declaration have been scribed, for it is not possible to authenticate a declaration before such declaration has been actually scribed and has come into existence. Something non-existent cannot obviously be authenticated. When a person writes his name, parentage and address in the opening part of a document to disclose his identity, it is a stage or point of time when the contents of the document are yet to be written and have not come into existence.

The Court further said that through writing of one's name, parentage and address in the opening part of documents such as, sale deed, gift deed, mortgage deed, lease deed, agreements, promissory notes and even Wills is customary in our country, invariably all these documents are signed by the executant. Describing his identity in the opening part of the document is not taken or treated as his signature in lieu of execution of that document. Even though it is true that signature includes writing one's full name, it cannot be said that when the executor write his name, in the opening sentence of the Will in question be signed the Will as contemplated by sections 63(a) and (b) of the Act. The mere fact that the Will in question was a holograph one is not sufficient to explain this unnatural conduct of the executor, in the result the Court held that
the Will being not properly executed in terms of section 63, the Will stood as not proved and letters of administration could not be granted.303

- **Evidence of Scribe**

A Will has to be proved by a person who could speak about the execution of the same. There is some misunderstanding that a Will can be proved only by attesting witnesses. This is an erroneous belief. It can be proved by any person who could speak of its execution. Thus a scribe of the Will can also prove it and mere fact that he scribed the Will is no disqualification. In *Ujagar Singh v. Charan Singh*,304 the Punjab and Haryana High Court said that in the matter of a Will the proof can be furnished by the scribe of the document who could speak to the execution of it and it is not essential that it should be proved only by at least one of the attesting witnesses. It will be a question of fact in each case to be determined as to under what circumstances and in what manner the scribe acted and attested the Will or not. The mere fact that the Will was scribed by a person does not mean that he cannot prove the Will as an attesting witness.

(ii) **Attestation of the Will**

Attestation of the Will is a mandatory formality of an unprivileged Will. The definition of attestation in this clause is the same as in Transfer of Property Act, 1882. The execution of a Will includes its attestation by witnesses and if there is no attestation the Will is not validly executed. For the purpose of valid attestation under section 63 of the Indian Succession Act it is absolutely necessary that the attesting witness should either sign or affix his thumb impression or mark himself as the section does not permit an attesting witness to delegate that function to another. In *Moonga Devi v. Radha Ballabh*,305 the Supreme Court observed that it must be proved that the Will was executed in accordance with rule, unless that is done probate cannot be granted. The following are requirements of a valid attestation.

- The will must be attested by at least two witnesses,306

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303 See also Dr. M. Ratna v. Kottyboyina Navaneelam, AIR 1994 AP 96
304 AIR 1986 P&H 230
305 AIR 1972 SC 1471.
- each witness must have seen the testator sign or affix his mark or that some other person has signed it in the presence of and by the direction of the testator, though they need not know the contents of the Will,\textsuperscript{307} or

- if the will has already been signed each witness must have received from the testator as personal acknowledgement of his signature or mark or of the signature of such other person signing it for him.

However, the attestator must sign it himself unlike testator, he cannot direct some other person to attest Will on his behalf.\textsuperscript{308}

Where attestation of the Will by only one witness is proved, the Will cannot be considered genuine and valid.\textsuperscript{309} A Will which is not attested is invalid. Where son claimed entire property on the basis of an attested Will, it was held will was not proved, especially when Testator had equal love for his wife and children.\textsuperscript{310} If attestation of a Will is not proved, then a registered Will is not admissible.\textsuperscript{311}

It is not necessary that all the witnesses should be present at one and the same time. The only requirement as to the attesting witnesses is that they should have necessary animus attestandi. If one of the attesting witnesses proves the signature of the testator that is enough. Production of all the attesting witnesses is not essential. Evidence of one attesting witness is enough to prove Will.\textsuperscript{312} The testator may sign in the presence of one witness and acknowledge his signatures before another. Where one of the attesting witnesses deposed that the other witness was present and had attested the same in presence of testator, it is sufficient for proving the Will.\textsuperscript{313} The acknowledgement by the testator of his signatures may be express or implied. It is not necessary that the testator must say to the witness that these are his signatures when he takes out his Will which he has already signed; When his signatures are visibly apparent on it, and he requests the witnesses to sign it, this is sufficient acknowledgement of the

\textsuperscript{307} V.K.Kamalam v. Pandhali Amma, AIR 1988 Ker 265, Also refer Annual Survey of Indian Laws.
\textsuperscript{308} N.Kamdam v. Ayyasamy, (2001) 7 SCC 503
\textsuperscript{309} Labh Singh v. Piara Singh, AIR 1984 P&H 270
\textsuperscript{310} Subbayajoga v. Narayanai AIR 2004 Kant. 430
\textsuperscript{311} Purnabai v. Ranchhoddas, AIR 1992 AP 270
\textsuperscript{312} Pradip Kumar Bhowmick v. Basunti Dutta, AIR 2004 Cal 238
\textsuperscript{313} Amalorpuva Marg v. Kulandai Amamal, AIR Mad 291

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signatures. In some cases conduct itself may amount to acknowledgement. A scribe can be an attesting witness provided he knows that he is putting his signatures as an attesting witness. If witnesses in better position were handy but were not called does not throw any suspicion on the genuineness of the Will. Where the court is satisfied that the attesting witnesses are falsely and deliberately denying their signatures, it is free to take into other circumstances and other evidence on the question of attestation.

In *Tilak Raj Kakkar v. Shambhu Nath Kakkar*, a Will was attested by six witnesses. The Will was executed by a woman in favour of her brother. Three of the attesting witnesses proved the Will (the other were not examined). One of the brothers of the testatrix supported the Will. The other brother opposed it. The Delhi High Court said that these two factors namely (1) the "no-objection" affidavit by the Respondent brother of the Petitioner, and (2) the attestation of the Will by as many as six witnesses must be held to be sufficiently outstanding to establish the genuineness of the Will so as to overshadow the other factors alleged to be suspicious circumstances surrounding the Will such as non-appearance of the Petitioner himself, omission to summon the lawyer who drafted the Will, ignorance of the attesting witnesses about the name of the said lawyer, the ailment of rheumatic pains suffered by the testatrix (which had not impaired the mental faculties), omission to examine the three remaining attesting witnesses when no attempt was made by the contesting Respondent to summon them, etc. the Petitioner was, therefore, held to be entitled to the grant of probate of the Will.

In *Girja Datt Singh v. Gangotri Datt Singh*, the Supreme Court observed that where the signatures of two persons were shown to be appended at the foot of the endorsement of registration of the Will to the effect that they signed as attesting witnesses, the Will could not be treated as duly executed unless the

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314 Ganshyam Doss Narayandoss v. Saraswati Bai AIR 1923 Mad 861
315 Chhanga Singh v. Dharam Singh AIR 1965 Punj 204
316 Nand Kumar Singh v. Chander Kishore Saran, AIR 1956 Pat 377
317 Ittop Varghese v. Poulouse, 1974 KLT 873
318 AIR 1987 Del 360
319 AIR 1955 SC 346
signatures of at least one witness were proved. In Janki Narayan Bhoir v. Narayan Mamdeo Kadam,\textsuperscript{320} if the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the Will by other witness also it falls short of attestation of Will at least by two witness for the simple reason that the execution of the Will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required. In \textit{Doraiswami v. Rathannmal},\textsuperscript{321} of the attesting witness only one was alive and he denied attestation and the Sub – Registrar deposed that one woman purporting to be testatrix admitted correctness of the contents of the Will, and another witness simply identified signature of the other attesting witness who was dead, and the rest of the witnesses could not depose that they had actually seen the testatrix signing the Will, it was held that due execution of the witness was not proved. On the other hand, where a testatrix admitted her signatures before the Registrar and one of the attesting witnesses identified her, the Registrar and the identifying witness signed their name as witnesses, it was held that the Will was validly executed.\textsuperscript{322} But no inference can be drawn of due execution of the will from the fact that the Registrar signed the Will as attesting witness unless there is evidence that the testator signed the Will in the presence of the Registrar and the Registrar signed it in the presence of the former.\textsuperscript{323} The statement of Sub-Registrar cannot be taken as that of attesting witness when neither testator nor attesting witnesses of Will signed it in presence of Sub-Registrar. Similarly statement of scribe would not also be sufficient to prove execution of Will.\textsuperscript{324} There is no bar in the Registrar signing a will as attesting witness provided it is proved, that he has received from the testator a personal acknowledgement of his signatures or marked and the Registrar has signed it in his presence. Similarly, in \textit{Asharfi Devi v. Tirlok Chand},\textsuperscript{325} where it was established that the testator signed the Will in the presence of the Registrar who also signed the endorsement contemporaneously, the Will was held to be validly executed. In

\textsuperscript{320} S.C. Appeal (civil) 11194 of 1995
\textsuperscript{321} AIR 1978 Mad 78
\textsuperscript{322} Amrendra Nath v. Kashi Nath, ILR 27 Cal 169
\textsuperscript{323} Satipada Chatterjee v. Annakali Doebya, AIR 1953 Cal 462
\textsuperscript{324} Balwinder Singh v. Mohinder Singh, AIR 2005 NOC 60 (P&H)
\textsuperscript{325} AIR 1965 Punj 140

96
this case the Punjab High Court has dissented from its decision in *Chhaju Ram v. Surindar Kumar*.\(^{326}\) In *Sarada Prasad Tej v. Triguna Charan Ray*,\(^{327}\) the previous day to the Registrar visiting the testatrix at her house, the testatrix had put her mark and the Will was signed by one attesting witness. She was identified to the Registrar by the scribe whereupon the Registrar put his signatures as the second attesting witness endorsing on the Will that the testatrix had admitted the execution of the Will. It was held that the Will was properly attested. *Umakanta Das Bairiganjan Bhuyan Mahapatra v. Bishwambhar Das Mahapatra*,\(^{328}\) a testator purporting to execute the Will got it signed by the scribe and deposited it with the Registrar under section 42 of the Indian Registration Act. The Will was not attested by any witness. On the cover there was an endorsement containing a description of the Will and signed by the testator and below it was an endorsement by the Sub-Registrar who did not sign it; there were also the signatures of the pleader who identified the testator. It was held that the Will was not validly executed. There is no bar on a scribe signing the Will as an attesting witness.\(^{329}\) There is no bar on an authenticating authority, to sign the Will as an attesting witness. In *State of Punjab v. Vishwajit Singh*,\(^{330}\) an SDM was authorized to authenticate Wills. At the time of the authentication of the Will, he read over the Will and explained its contents in Hindi to the testatrix. Thereafter she appended her signatures thereon and the SDM also signed the Will in her presence. The Court held that in these circumstances the authenticating officer can also be an attesting witness, as he complied with all the formalities of attestation of the Will.

2. **Genuineness of Will**

It is well-settled that one who propounds a Will must establish the competence of the testator to make the Will at the time when it was executed by adducing prima facie evidence proving the competent of the testator and

326 AIR 1951 (38) Punj 305
327 AIR 1922 Pat 402
328 AIR 1929 Pat 401
329 Sita Ram v. R D Gupta, AIR 1981 P&H 83
330 AIR 1987 P&H 126
execution of the Will in the manner contemplated by law. The factors, such as the Will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfied the requirement of proving a Will, the court would not return a finding of ‘not proved’ merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a Will as against the person disputing the Will and the pleadings of the parties would be relevant and of significance. Where, however, there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before it accepts the Will as genuine (Refer Annual Survey of Indian Law). Even where the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be regarding the genuineness of the signature of the testator, the condition of the testator’s mind, the disposition made in the Will being unnatural, improbable or unfair in the light of relevant circumstances, or there might be other indications in the Will to show that the testator’s mind was not free. All legitimate suspicions should be completely removed before the document is accepted as the last Will of the testator. In Krishan Kumar v. Daryao Singh, evidence of deed writer and attesting witness proved that the testator was not influenced by defendant. The fact that the testator was illiterate, blind and hard of hearing did not mean that his mental faculties were affected. The defendant, beneficiary looking after old testator had accompanied the testator for execution of Will. This did not show active participation of the defendant in execution of Will thereby creating no suspicious circumstances. Proof cannot be mathematically precise and certain.

332 Madhukar D. Shende v. Tarabai Aba Shedage, S.C. Appeal (civil) 110 of 2002 decided on 9-1-02
334 Meenakshiammal (Dead) through L.Rs v. Chandrasekaran, 2004 AIR SCW 6254
335 AIR 2005 P&H
and should be one satisfaction of a prudent mind in such matters.\textsuperscript{336} Where a testator made a bequest in favour of all his family members excluding the eldest son who was adequately compensated with more than what other could get through Will, the Court remarked; “Ungratefully the defendant questions the generosity of his father” and dismissed the appeal.\textsuperscript{337}

\textbf{VIII. PROOF OF A WILL}

1. \textbf{Important Elements to be Proved}

A person who propounds the Will or produces the Will before the Court and wants the Court to rely upon the same has to prove that:

(i) the Will in question is the legal declaration of the intention of the deceased;\textsuperscript{338}

(ii) the testator when executed the Will was in a sound and disposing state of mind, and\textsuperscript{339}

(iii) the testator had executed the Will of his own freewill, meaning thereby, he was a free agent when he executed the Will.\textsuperscript{340}

2. \textbf{Mode of Proof}

The onus of proof rests squarely on the person propounding a Will and in the absence of any suspicious circumstances surrounding its execution, the proof of testamentary capacity and testator’s signatures as required by law would normally suffice in discharging the onus. Where, however, suspicious circumstances are found to exists, the propounder of the Will must explain them and dispel all the suspicions to the satisfaction of the Court before it is accepted as genuine. This would be so even in those cases where such a plea has not

\textsuperscript{336} Sridevi v. Jayaraja Shetty, 2005 AIR SCW 605
\textsuperscript{337} Mathew v. Devassykutty, AIR 1988 Ker 315, Also refer Annual Survey of Indian Laws.
\textsuperscript{338} S. Kaliammal v K. Palaniamumal, AIR 1999 Mad 40, Amarjeet Singh v State, AIR 1999 Del 33, Also refer Annual Survey of Indian Laws.
\textsuperscript{339} Ramesh v A. Manohar Prashad, AIR 1999 Mad 149 & Beru Ram v Shankar Dass, J& K 55
Sumitra Devi Kochhar v State, AIR 1999 Del 226, Also refer Annual Survey of Indian Laws.
been raised and on proved circumstances had given rise to doubt. In such cases also, it is for the propounder to satisfy the conscience of the Court.341

It is well-established that in a case in which a Will is prepared under circumstances which raise the suspicion of the Court that it does not express the suspicion. What are suspicious circumstances must invariably be judged in the facts and circumstances of each particular case.

The mode of proving a Will does not ordinarily differ from that of proving any other document,342 except as to the special requirement of attestation prescribed in the case of a Will by section 63 of the Indian Succession Act 1925,343 of course, read with sections 67, 68 and 69 of the Evidence Act. Onus of proof of the Will is on the propounder or beneficiary of the Will.344 As in case of other documents so in the case of proof of Wills it would be ideal to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such cases.345 It stands settled that the Will is to be proved like any other document. The test to be applied is the usual test of the satisfaction of the prudent mind in such matters. Section 63 of the Indian Succession Act required a Will to be attested by atleast two witnesses. Where the execution of the Will is surrounded by suspicious circumstances the suspicion cannot be removed by the mere assertion of the propounder that the Will bears the signature of the testator or that the testator was in the sound disposing state of mind and memory at the time he made the Will.346 Will is a sacrosanct document which comes into force after the death of executants. This special document requires a special mode of proof, as required under section 63

341 Rani Devi v Ashok Kumar, AIR 1999 Del 109, Babu Ram v Parakutty, AIR 1999 Ker 274
Lacchman Singh v Raja Ram Singh, AIR 1999 SC 1756, Also refer Annual Survey of Indian Laws
343 Shashi Kumar Banerjee v. Subodh Kumar, AIR 1964 SC 529 (531) (Wanchoo, J.); H. Venkatchalal Iyengar v. B.N. Thimmajamma, 1959 (Supp) 1 SCR 426 (443) (Gajendragadkar, J.);
345 Venkatachala Iyengar v. Thimmajamma, 1959 (Supp) 1 SCR 426 (443), Sushila Devi v. Krishna Kumar, AIR 1971 SC 2236.
of the Indian Succession Act. The propounder of the Will is also expected to remove all suspicions attached to its execution.\footnote{347 Jagjit Singh v. Pritam Singh, 1994 (I) HLR 265 (272) (P&H).}

Section 68 of the Evidence Act which relates to those documents which are required to be proved at the trial stage, has to be read subject to section 58 of the Evidence Act and as obviating the necessity for calling an attesting witness to prove a registered will unless the execution of the Will or the attestation is in dispute. In the absence of any such plea in the written statement, it will be height of technicality and waste of judicial time to insist on examination of an attesting witness before a Will could be used in evidence.\footnote{348 Thayyullathil Kunhikannan v. Thayyullathil Kalliani, (1990) 1 Hin LR 235: (1990) 1 Kar LJ 114 (Ker).}

Where the plaintiff himself accept the execution of the Will, but chooses to contest only on legal aspects touching upon the validity of the bequeathment of certain properties. Section 68 of Indian Evidence Act does not come into play and is totally inapplicable. The words “it shall not be used as evidence” contained under section 68 of the said Act are very significant while considering this aspect. In the instant case section 58 of the Evidence Act would be applicable.\footnote{349 Valluri Jaganmohini eetharama Lakshmi v. K.R. Rao, (1994) 2 HLR 462.}

The scribe and the Sub-Registrar, can prove execution of the Will and its attestation, and their statements satisfy the requirements of the section. (Section 63 of Indian Succession Act).\footnote{350 Ajmer Singh v. Tirath Singh, (1983) 2 LLR 364; Sita Ram v. R.D. Gupta, AIR 1981 P&H 83; Villiammal v. R. Gounder, (1991) 2 MLJ 478.} Yet where an unregistered Will was written by manner to the testatrix, there being no material on record to show that the testatrix could read or write, and the Will for about 15 years, did not see light of the day after death of testatrix, the validity of the Will could not be upheld.\footnote{351 Sat Pal v. Sadhu Ram, 1989 Punj LJ 581: 1989 Sim LJ 754.}

3. **Execution and Attestation of the Will, how Proved**

If a testator is unable to write his name, he may put his mark on the testament.\footnote{352 See General Clauses Act, section 3(56). But the Court requires a stricter proof, when a mark is made. Unbounded confidence in the drawer of the Will and extreme debility of the testator may militate against the genuineness of the Will, Donnelly v. Broughton, 1891 App Cas 335 (442).} Testator can execute the Will by affixing his mark though he is
capable of writing but owing to weakness he is unable to put his signatures.\textsuperscript{353} The testator can sign or affix his mark. Even if the testator is capable of writing but, on account of weakness, he is unable to put his signature, he can execute the Will by affixing a mark or even thumb-impression is held to be good,\textsuperscript{354} or it has got to be signed by some other person in his presence and by his direction. The signature or mark of the testator, or the signature of the person signing for him, has to appear at a place on the testament from which it would appear that by that mark or signature the document was intended to have effect as a Will.\textsuperscript{355}

When the Court has to form an opinion as to the identity of handwriting or finger impression, the opinions upon that point of person specially skilled in questions as to the identity of handwriting or finger impressions are relevant.\textsuperscript{356}

The science of comparison of finger-prints has developed to a stage of exactitude. It is quite possible to compare the impressions, taken from finger prints of individuals with the disputed impression, provided there are sufficiently clear and enlarged photographs are available.\textsuperscript{357} It is a matter of common knowledge that science of fingerprints is more exact than that relating to handwriting.\textsuperscript{358}

In the microscopic sense, no two impressions of the same digit or thumb of the same individual are ever identically similar, even though they may have been obtained at the same time and under the same set of conditions. These differences may be due to variations in the pressure of the thumb, in the area or surface which contacts the paper, and in the position in which the contact is

\textsuperscript{353} S.D. Saha v. Saraswati Mondal, AIR 1991 Cal 166.
\textsuperscript{354} Sachin Dulal Saha v. Saraswati Mondal, (1990) 1 Cal LT 33 (Cal).
\textsuperscript{355} Section 63, Indian Succession Act, 1925; Harish Chandra v. Basant Kumar, (1973) 39 Cut LT 672 (675, 676) (B.K. Patra, J).
\textsuperscript{356} Section 45, Evidence Act.
\textsuperscript{357} Govinda Reddy (in re), ILR 1957 Mys 177: AIR 1958 Mys 150 (179) (H. HOMbe Gowda, J);
\textsuperscript{358} Hukum Singh v. Udham Kaur, (1969) 71 P.L.R. 908 (911) (Sodhi, J);
Bhagwan Kaur v. Shri Maharaj Krishna Sharma, (1973) 4 SCC 46 (53); AIR 1973 SC 1346 (Khanna, J);
Venkateswar Reddy v. Anjamma, AIR 1966 AP 354 (360) (Narasimhan, J); when the direct evidence offered of execution of the will is unreliable the situation may not be improved by a comparison of signatures.
made. No matter what may be the cause of superficial difference, the fact will always remain that the pattern and the sequence of the ridge characteristics will always be the same. To begin with the pattern should be examined first. If the patterns are different, it is a conclusive proof that the impressions are of different persons. If the patterns are the same, the core and the delta should be located. If the various ridge characteristics are all found in the same order in the impression under comparison, it can be safely stated that the impressions are from the same finger or thumb of the same individual. Likewise from the delta as a starting point and the ridge intervening between the core and the delta may also be counted.359

In order to hold a document to be a Will it has to be proved that the same is in conformity with the provisions as regards the execution and attestation as provided under section 63 of the Act and executed by a person competent to make it. The Will must relate to the property of the maker which he intends to dispose of and if no reference is made to the disposal of the property, the document cannot be termed to be a Will. The declaration intended to take effect after the death of the testator impliedly means that declaration should not be meant to take effect immediately and if it does so then it is not a Will. Section 63 of the Act regulates the execution of the Will providing that the testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his directions. Signature or mark of the testator, or the signature of the person signing for him shall be so placed that it shall appear that it was intended thereby to give affect to the writing as a Will. Such a Will is required to be attested by two or more witnesses, each of whom is required to see the testator signing or affixing his mark to the Will or see some other person signing the same, in the presence and by directions of the testator. It is, however, not necessary that more than one witness be present at the same time, and no particular form of attestation is necessary.360

Under section 63 of the Indian Succession Act it is provided that the Will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other person signing the Will in the presence and by the direction of the testator, or must 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 has to sign the Will in the presence of the testator. Section 68 of the Indian Evidence Act provides that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an atesting witness alive, and subject to the process of the court and capable of giving evidence. Thus, section 68 makes an important concession to those who wish to prove and establish a Will in a Court of law. Although the Indian Succession Act requires that a Will has to be attested by two witnesses, section 68 of the Evidence Act permits the execution of the Will to be proved by only one attesting witness being called. But that attesting witness must be in a position to prove the execution of the Will.

For compliance it is not necessary that the witnesses and the scribe of the Will must state that the testator had signed the Will in the presence of the witnesses who had attested it in his presence. An inference from the attending circumstances of this effect can be legitimately drawn by the Court, as held by the Supreme Court in Naresh Charan Des v. Paresh Charan Dass Gupta.

It is not necessary that attesting witness should be able to identify the signature of each other or even to know each other and as such there can be no basis for the requirement that the witnesses should identify each other’s signature. An attesting witness, supposing that he is unacquainted with the signature of the other attesting witnesses, cannot truly speaking identify the signature of such other witness, and if he states that he does. The only meaning attributable to such a statement is that as the document bears the signature of

two persons as attesting witnesses and one of the signatures is his, the other signature must necessarily be that of the other witness.\textsuperscript{364}

Where, however, execution of the Will has never denied as such and to prove the Will the scribe and one of marginal witnesses was produced who deposed to the relevant aspects and were not cross-examined the Will stood duly proved in accordance with section 63, Succession Act. Since the witnesses were not cross-examined on the question of attestation inference of attestation may be drawn.\textsuperscript{365}

The place at which the signature of thumb-mark of a witness is subscribed to the document is not a determinative factor for whether a witness or is not an attesting witness. It is the witness which has to be seen for the purpose\textsuperscript{366}

4. When Attesting Witnesses Need not be Called

In certain cases, a relaxation can be given for not calling the attesting witnesses:—

(i) When the document is thirty years old and the court, under section 90 of the Evidence Act, 1872, presumes it to have been duly executed and attested (Refer: AIR 1926 Cal 102).

(ii) When a party to the document against whom it is sought to be used, admits execution by himself (Refer: AIR 1990 Ker 226).

(iii) When the document is registered one and its execution is not specifically denied by the executant against whom it is to be used (Refer Proviso to section 68 of the Evidence Act, 1872).

(iv) When the document is not produced on notice and secondary evidence of its contents is given under section 65(a) of the Evidence Act, 1872 (Refer section 89 of the Evidence Act, 1872 and AIR 1925 All 56).

(v) When the document is a Will which has been admitted to probate and is proved by the probate, the production of the original having been

\begin{itemize}
\item \textsuperscript{364} Krishna Kumar Sinha v. Kayastha Pathshala, Allahabad, ILR (1965) I All 483: AIR 1966 All 570 (576) (Gangeshwar Prasad, J.).
\item \textsuperscript{365} Bhagwati v. Sita Devi, (1983) 85 Punj LR 490.
\item \textsuperscript{366} China Narasimhalu v. Kurubara Basappa, 1983 Hindu LR 426.
\end{itemize}
dispensed with under the second Exception to section 91 of the Evidence Act, 1872.

Refer to Proviso to section 68 of the Evidence Act, 1872 which indicates an uncompromising position in respect of Will which is kept in mind.

5. **Nature of Evidence**

A Will is one of the most solemn documents known to law. By it a dead man entrusts to the living, the carrying out of his wishes, and as it is impossible that he can be called either to deny his signature or to explain the circumstances in which it was executed it is essential that trustworthy and effective evidence should be given to establish compliance with the necessary forms of law. It seems impossible to enunciate any specific standard of proof which will be required to establish the authenticity of a Will in any given case. Everything depends upon the circumstances of the particular case under consideration. Section 3 of the Evidence Act shows the meaning of proof to be that the fact (in this case the Will) is proved when the court, after considering the matters before it, either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Each case must therefore be determined on its own facts. The party who applies for Probate or for Letters of Administration with a Will annexed is no doubt required to prove the Will. Such proof is usually furnished by the evidence of persons in whose presence the Will was actually executed or who subscribed their names to the document, that is to say, of persons who saw the testator executing it and who put their own names to the document as _attesting witnesses_. In a case where such attesting witnesses are produced and they give clear and cogent testimony regarding execution, one

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367 Ram Gopal Lal v. Aipna Kuniwar, 49 IA 413: 44 All 495: AIR 1922 PC 366 (369) (Lord Buckmaster, J.); Silva Bai v. Noronha Bai, AIR 1956 Mad 566 (Ramaswami, J.).


369 Shankaran Parida v. Laxmindhar Nayak, AIR 1991 Ori 23, Also refer Annual Survey of Indian Laws

should require very strong circumstances to repel the effect of such testimony. It will not do to talk airily about the circumstances of suspicion.\textsuperscript{371}

In the case of a Will reasonable, natural and proper in its terms, it is not in accordance, with sound rules of construction to apply to it canons, which demand a rigorous scrutiny of documents of the opposite party which can be said, namely, that they are unnatural, unreasonable or tinged with impropriety.\textsuperscript{372} It is not permissible for the Court to do, what Courts are often invited to do on behalf of objectors, namely, to make up the mind about the iniquitous character of the contents of the Will and then look at the positive or direct evidence in favour of the execution of the Will from that standpoint. Probability, however, is not the main thing to be considered in connection with the question as to whether probate should or should not be granted. The Court has to be satisfied as to whether the Will was, as a matter of fact, executed and if so executed, by a free, capable and willing testator.\textsuperscript{373}

What is the true legal position in the matter of proof of Wills? Mr. Justice Gajendragadkar, gives the following answer in \textit{H. Venkatachala lyengar v. Thimmajamma}:\textsuperscript{374}

"Section 67 and 68 of the Evidence Act are relevant for this purpose. Under section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under sections 45 and 47 of the Act, the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a

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  \item[372] Sarojini Dasi v. Hari Das Ghose, 49 Cal 235 (244) (Mokerji, J.).
  \item[373] Govil Shaw v. Patia, AIR 1938 Cal 290 (294).
\end{itemize}
\end{footnotesize}
document in a Court of law. Similarly, section 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by Will and the three illustrations to this section indicate what is meant by the expression ‘a person of sound mind’ in the context. Section 63 requires that the testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a Will. This section also requires that the Will shall be attested by two or more witnesses as prescribed...

Thus, the question as to whether the Will set up by the propounder is proved to be the last Will of the testator has to be decided in the light of these provisions. Has the testator signed the Will? Did he understand the nature and effect of the dispositions in the Will? Did he put his signature to the Will knowing what it contained? Stated broadly it is the decisions of these questions which determines the nature of the finding on the question of proof of Wills. It would prima facie be true to say that the Will has to be proved like any other document except as to special requirements of attestation prescribed by section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of Wills it would be ideal to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

There may, however, be cases in which the execution of the Will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder’s case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator’s, mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the Will may appeal to be unnatural, improbable or unfair in the light of relevant circumstances; or, the Will may otherwise indicate that the said dispositions may not be the result of the
testator's freewill and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the testator.”


"Will being a document has to be proved by primary evidence except where the court permits a document to be proved by leading secondary evidence. Since it is required to be attested, as provided in section 68 of the Indian Evidence Act, 1872, it cannot be used as evidence until one of the attesting witnesses at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of court and capable of giving the evidence. In addition, it has to satisfy the requirement of section 63 of the Indian Succession Act, 1925. In order to assess as to the whether the Will has been validly executed and is a genuine document, the propounder has to show that the Will was signed by the testator and that he had put his signatures to the testament of his own free Will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus is on the propounder to remove the suspicion by leading appropriate evidence. The burden of proof that the Will was forged, or that it was obtained under undue influence or coercion or by playing a fraud is on the person who alleges it to be so.

6. **Opinion of Handwriting Expert as to Signature**

It is necessary to observe that expert's evidence as to handwriting is opinion evidence and it can rarely, if, ever, take the place of substantive evidence. Before acting on such evidence it is usual to see if it is corroborated either by clear direct evidence or by circumstantial evidence. In a case where there are no suspicious circumstances, the mere opinion of the expert cannot
override the positive evidence of the attesting witnesses.\textsuperscript{375} In case of proof of execution of Will, opinion of handwriting expert is admissible, however, corroboration of opinion by other evidence is necessary.\textsuperscript{376} Because of circumstances of the instant case the opinion of expert as to identity of signature of testator in the Will is not relevant.\textsuperscript{377}

7. Burden of Proof

The question of burden of proof arises only when the execution of the Will is denied. Where it was specifically asked whether the execution of the Will was denied, and the answer was, "No" the question whether the burden of proof has been discharged becomes immaterial.\textsuperscript{378} The initial onus of proof of the Will is on the court that the instrument is the last Will of a free and capable testator.\textsuperscript{379} Admittedly there is no presumption that the Will in question is a legal and valid Will and its execution is to be proved in accordance with law i.e., section 63 of the Indian Succession Act, and also that it is the last and genuine testament explaining all suspicious circumstances alleged to be shrouding it.\textsuperscript{380}

The onus of proof that the testator was a major when he executed the Will is on the person who relies on the Will.\textsuperscript{381}

It is well-established that in a case in which a Will is prepared under circumstances which raise the suspicion of the court that it does not express the

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\item[375] Shashi Kumar Banerjee v. Subodh Kumar Banerjee, AIR 1964 SC 529 (537) (Wanchoo, J.); See also Moonga Devi v. Radha Ballah, AIR 1972 SC 1471: 1973 (2) SCC 112: 1973 UJ 123
\item[376] Joseph v. Aliyamma, AIR 1991 NOC 28 (Ker).
\item[378] Mahesh Chandra Gupta v. \textsuperscript{39} Addl. District Judge, 1985 All RC 318.
\item[380] Bishamber Lal Sud v. Ajay Kumar, 1995 AIHC 1417 (HP).
\end{enumerate}
\end{footnotesize}
mind of the testator, it is for those who propound the Will to remove that suspicion.\textsuperscript{382}

If the document is in a language not understood by the testator, who has put a mark thereon to signify his signature, the onus lies on the propounder to prove that the document was explained and interpreted to him and was executed with the knowledge of its contents.\textsuperscript{383} It is well-settled that the onus is on the propounder to satisfy the court that the Will was not only the physical but also the mental act of the testator.\textsuperscript{384} Where there exist reasonable grounds for disputing the sanity of the testator, the onus would lie on the person propounding the Will to prove affirmatively that the testator was of sound mind at the date of execution and knew and approved the contents thereof.\textsuperscript{385}

But however, in case the Will does not create any doubt as to soundness of the testator’s mind nor any vagueness in the contents of the Will,\textsuperscript{386} express statement of witnesses about the soundness of mind may not be required.\textsuperscript{387}

If once the execution and attestation is established by the propounder, the onus to prove that the Will was executed under undue influence shifts on the person who alleges undue influence, fraud or coercion.\textsuperscript{388}

The burden lies on propounder of Will to satisfy the conscious of Court that the Will was duly executed by testator.\textsuperscript{389}

It is now well-settled that initial onus to prove the Will is on the propounder.\textsuperscript{390}


Since the Will altering the normal rule of succession, burden lies upon person putting forward the Will, to establish the truth and validity of Will.391

8. Will 30 Years’ Old

Section 90 of the Evidence Act provides that where any document, purporting or proved to be thirty years' old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document; which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested. Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be: but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable. Section 90 of the Evidence Act does apply to Wills as such as to other documents.392 When the Court does presume under section 90 about the Will more than 30 years old, no further proof of the facts is necessary under section 69 of that Act,393 Which provides:

“If no such attesting witness can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.”

The reason for the rule embodied in section 90 of the Evidence Act, is based on the impossibility of obtaining living testimony to the signing or handwriting of a document. If this is a reason which underlies section 90 of the Evidence Act, it logically follows that time should run from the date which the document bears whether it is a Will or any other document. The outer limit of time

is not the date when it was filed in Court, but the material date in this behalf is the date when the document is tendered in evidence.\textsuperscript{394}

Production of a copy is, however, not sufficient to justify the presumption of due execution of the original under section 90 of the Evidence Act,\textsuperscript{395} even though it be obtained from the office of the Sub-Registrar, who registered the Will.\textsuperscript{396}

9. Delay

Delay, even undue delay, in producing the Will for probate does not by itself militate against its genuineness when execution and attestation are duly proved.\textsuperscript{397} The cause for the delay may be the procurement of a large amount of money for probate duty, or it may be due to death of parties and even of attestors. The presumption of due execution and attestation can rightly be invoked where the aforesaid deaths cause the delay.\textsuperscript{398} In \textit{Mst. Biro v. Atmaram},\textsuperscript{399} the Privy Council found it difficult to accept delay as justified when the Will was not acted upon for long nor was it produced at a critical time and there were suspicious circumstances against the genuineness of the testament. If the execution of the Will is true and valid on the evidence offered, even long delay will not at all matters,\textsuperscript{400} delayed production of Will is not a suspicious circumstance.\textsuperscript{401} The court will call for strict proof of execution when delay is clubbed with factors which throw doubts on due execution,\textsuperscript{402} or is inefficacious,\textsuperscript{403} or is unregistered,\textsuperscript{404} or bristles with suspicious circumstances,\textsuperscript{405}


\textsuperscript{396} Mehtab Singh v. Amrik Singh, ILR (1957) 1 Punj 418 (422) (Bishan Narain, J.).

\textsuperscript{397} Gayeshwar Prasad Prasad v. Mst. Bhagwati, AIR 1933 Pat 612 (613).

\textsuperscript{398} Gayeshwar Prasad Prasad v. Mst. Bhagwati, AIR 1933 Pat 612 (613).

\textsuperscript{399} Mst. Biro v. Atmaram, 45 LW 451 (PC).

\textsuperscript{400} Manindra Chandra v. Mahalakshmi Bank, (1945) 2 MLJ 46 (48) (PC).

\textsuperscript{401} Bijoybala Sadhu v. Sanat Kumar Sadhu, (1988) 1 CHN 165 (Cal) (DB).

\textsuperscript{402} Dullin Genda v. Harmandan, 30 MLJ 624 (PC).

\textsuperscript{403} Rosa Maria v. Jacob Souza, AIR 1924 Mad 151 (153).

\textsuperscript{404} Harimathi Devi v. Anath Nath Ray, AIR 1939 Cal 535 (539).

\textsuperscript{405} Baikuntha Nath v. Prasannamoyi, AIR 1922 PC 409 (411); See also Ram Gopal Lal v. Aipna Kunvar, AIR 1922 PC 366: 44 All 495; Ramanandi Kuer v. Kalwati Kuer, AIR 1928 PC 2 (6): 55 IA 18.
or the testator is illiterate.\textsuperscript{406} Two Wills within a short time spell suspicions particularly on the second will, demanding a very high degree of proof.\textsuperscript{407}

10. Effect of Registration

The registration of a document is a strong circumstances that proper parties had appeared before the registering officer and the latter had attested the same after ascertaining their identities.\textsuperscript{408} The Indian Registration Act provides that Wills may be registered. They are not compulsorily registrable. The mere fact that a Will is not registered is not such a circumstances as must \textit{ipso facto} tell against the genuineness of the Will.\textsuperscript{409} When the propounder of the Will has discharged the onus which rests upon him, the Will can be said to be true and a valid document.\textsuperscript{410} Registration of a Will itself is neither sufficient to prove the sound disposing mind of the testator nor is enough to hold that the Will was duly executed.\textsuperscript{411} Non-registration may be due to a dislike for publicity of the arrangements that one makes or to avoid expenses and trouble. If the testator does not expect anybody to dispute his Will, when he had made a proper disposition for his wife, son and daughter, he may not like to undergo the formality of registration. Non-registration assumes importance when it exists with one or more suspicious circumstances.\textsuperscript{412} Merely not keeping the unregistered Will with the District Registrar cannot lead to any suspicion. Normally, a Will is a secret document and is not disclosed even to the beneficiaries and especially in the case where there is litigation pending in the proceedings for divorce with the first wife.\textsuperscript{413} Indeed, the fact that the Will was duly registered after it had been

\textsuperscript{406} Baikuntha Nath v. Prasannamoy, AIR 1922 PC 409 (411).
\textsuperscript{407} Sadachi Ammal v. Rajathi Ammal, 1939 MWN 651 (664); See also China Basavayya v. Elamanchili Bapammal, 10 IC 420 (421).
\textsuperscript{409} Chinmoyee Shaha v. Debendralal Saha, AIR 1985 Cal 349; (1985) 89 CWN 832 (DB).
\textsuperscript{412} Silva Bai v. Noronha Bai, AIR 1956 Mad 566 (569, 570) (Ramaswami, J); see also Bachini Kaur v. Punjab Kaur, (1961) 63 PLR 193 (204) (Dua, J.).
\textsuperscript{413} Manorama Srivastava v. Saroj Srivastava, AIR 1989 All 17 (28).
executed ordinarily removes any ground for suspicion. \(^414\) Lord Sinha observed in *Ramnandi v. Kalawati*. \(^415\)

"It is a circumstance which cannot be ignored, that though care was taken to obtain as many as 14 witnesses to the Will, the simple precaution of getting the Will registered in the local Registration office was not adopted, even though registration of Wills is not compulsory. Nor can it be considered anything but unusual and suspicious that no doctor or lawyer attested this will, specially in view of its provisions practically disinheriting the widow and the only daughter and the serious nature of the illness of the testator."

Hence when a Will has been *registered* in the office of the Sub-Registrar, a presumption in favour of its validity arises in law. \(^416\)

If the evidence as to registration on a close examination reveals that the registration was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a Will disposing of his property and thereafter he admitted its execution and signed it in token thereof, the registration will dispel the doubt as to the genuineness of the Will. But if the evidence as to registration shows that it was done in a perfunctory manner, that the officer registering the Will did not read it over to the testator or did not bring home to him that he was admitting the execution of a Will or did not satisfy himself in some other way (as, for example, by seeing the testator read the Will) that the testator knew that it was a Will the execution of which he was admitting, the fact that the Will was registered would not be of much value. Registration may take place without the executant really knowing what he was registering. \(^417\)

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\(^{414}\) Mahindra Nath v. Netai Charan, ILR (1943) 1 Cal 392 (395) Rau, J.

\(^{415}\) 55 IA 18 (28): AIR 1928 PC 2.


IX. REVOCATION

A Will being an ambulatory instrument, is of its own nature revocable. Even where a man should make his testament and last Will irrevocable in the strongest and emphatic express words, yet he can revoke it. That which is by law of its own nature revocable cannot be rendered irrevocable by a man's act or deed.

Section 62 of Indian Succession Act, 1925 says that "A Will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by Will. Since a testamentary intention is ambulatory till death even if it is stated it is irrevocable, it does not alter its quality. A testator who makes his testament and last Will irrevocable may yet revoke it. However, the question is as to how the Will is to be revoked if the testator so desires.

1. Statutory Provision

In Indian Law, as per section 69, Indian Succession Act, 1925, there is a provision for revocation of Will by subsequent marriage, which is not applicable in case of Hindus and Muslims, but applicable to Christains and Parsis and section 70 provides for other modes of revocation of unprivileged Wills or codicils. In view of section 70, oral revocation of a Will is not permissible.

There are three modes of revocation of a Will. They are:

(1) by another Will or codicil;
(2) by destruction; or
(3) by marriage.

The mode of revocation by marriage is not grounded on any presumed intention of the testator, but on grounds of policy. The other two modes are based on the express or implied intentions of the testator.

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418 Asa Nand v. Roshnibai, AIR 1921 Lah 353: 68 IC 42.
420 (1910) 33 Mad 304; (1905) 27 All 14; AIR 1947 Pat 449; Hubert P. James v. Gulam Hussein Pakseema, AIR 1949 PC 151; Ramautar Singh v. Sm. Ramsundari Kuer, AIR 1959 Pat 585.

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2. Revocation by another Will or Codicil

Revocation may be effected by a subsequent Will, codicil or mere obliteration of the whole Will by blackmarks, or by a letter addressed to a third party.\footnote{Spacklam's Estate (in re), (1938) All ER 345.}

But in all these cases, the writing must be signed and attested by two witnesses; then only there will be effective revocation.\footnote{In the Estate of, Gosling, 11 PD 79; In the Estate of, Durraee, LR 2 P&D 406.} When Will has been proved by producing registered copy the burden to prove revocation will be on those who are claiming that it has been revoked.\footnote{K. Nambiar v. T.T.P.V.I. Appissi's Children L. Appissi, AIR 1990 NOC 164 (Ker).} The law does not require the compulsory registration of a Will. There is, therefore, no bar to its terms being varied by an unregistered document.\footnote{Shambai v. Govardhan, AIR 1925 Sind 195 (199) (Rupchand Bila Ram, A.J.C.).}

The requirements prescribed by the statutory law must be complied with. The person must have also testamentary capacity at the time of revocation.

As a general rule, an express revocatory clause in a later Will operates to revoke all prior Wills and codicils.\footnote{Southern v. Dening, (1882) 20 Ch D 99; Lowthorpe v. Lowthorpe, 1935 P 151.}

But a later Will may or may not revoke an earlier Will. If portions are inconsistent and contradictory, to that extent there is implied revocation.\footnote{Murray (in re), (1956) 1 WLR 605; Wyatt (in re), (1952) 12 TLR 1294; Cadell v. Wilcocks, 1898 P 1.}

\textit{(i) Express Revocation}

Revocation may be either express or implied.

A Will or codicil may operate as a revocation of a prior testamentary instrument. No particular form of expression is necessary.\footnote{Berks v. Berks, 164 ER 1423.}

A revocation may be any non-testamentary writing even declaring unequivocally an intention to revoke.\footnote{Toomer v. Sobinska, 1907 P 106; Har Prasad v. Ram, AIR 1946 Oudh 223; see also Ramprasad Shaw v. Basantia, AIR 1925 Pat 729 (Adami, J.); e.g. by saying, "I do hereby cancel the said Will and make it Null and Void".}

\begin{footnotesize}
\footnote{Spacklam's Estate (in re), (1938) All ER 345.}
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\footnote{Murray (in re), (1956) 1 WLR 605; Wyatt (in re), (1952) 12 TLR 1294; Cadell v. Wilcocks, 1898 P 1.}
\footnote{Berks v. Berks, 164 ER 1423.}
\footnote{Toomer v. Sobinska, 1907 P 106; Har Prasad v. Ram, AIR 1946 Oudh 223; see also Ramprasad Shaw v. Basantia, AIR 1925 Pat 729 (Adami, J.); e.g. by saying, "I do hereby cancel the said Will and make it Null and Void".}
\end{footnotesize}
Even though the later Will is void, and as such could not be probated, it may operate so as to revoke an earlier Will.\textsuperscript{429}

But a later will without words of revocation will not operate as revocation of an earlier Will.\textsuperscript{430}

The effect of an express revocation may either be the avoidance of the entirety of the Will, or only a part of it. It is a matter of construction of the Will in each case.\textsuperscript{431}

A subsequent Will or codicil may expressly revoke a former Will. The subsequent Will must have been validly executed with all proper formalities. The effect is not taken away merely because the testator had been misled as to the effect of the clause, provided that the testator had knowledge of the presence of that clause.

Where a subsequent Will revoking the earlier one, is not produced in original and judgment of the proceeding where such Will was produced is not brought on record and the evidence of witnesses to the subsequent Will are not satisfactory, the subsequent will cannot be held to be established.\textsuperscript{432}

A recital in a later Will that it is the last Will and testament, or words to that effect, may not amount to revocation.

In Gosling, in the goods of,\textsuperscript{433} the whole of the codicil was struck off by obliterating the text, signature etc. At the foot was written "we are witnesses of the erasure of the above" duly signed by the testator and two attestors, it was held that the revocation was quite valid as a writing declaring an intention to revoke within the meaning of the section.

In the writing evidencing the revocation the executant must sign in the presence of attesting witnesses or acknowledge his signature before them. The two attestors however, need not be present at the same time.

\textsuperscript{429} Howard (in re:), 1944 P 39.
\textsuperscript{430} Kitcat v. King, 1930 P 206; ‘last’ or “last and only Will” no revocation of prior wills: Leslie Leslie, (1972) LR 6 Eq 332; Simpson v. Fox, 1907 P 54.
\textsuperscript{431} Cock (in re:), (1960) 1 WLR 941.
\textsuperscript{433} 11 PD 79 (80).
(ii) **Implied Revocation**

There may be revocation by implication.

A later Will may simply repeat the entire former Will, or it may be totally inconsistent with the earlier one and thereby revoke it.

The repetition or inconsistency may be only partial. Then portions of the former Will, not repeated or consistent with the later Will, remain effective, partially revoking the rest of it.

Where a testator leaves a number of Wills without expressly revoking any, then all the Wills, must be read together and the sum total must be treated as the testator's Will, effect being given to each of the Wills except to the extent the same is varied or revoked by the later Wills.

Where there are several Wills of the same date, not consistent with one another the Court may admit evidence to show which was executed last. In the absence of such evidence the Court may construe them if possible so as to sustain them all. If that is not possible, all the Wills fall and none can be admitted to probate. 434

A testator may die leaving several Wills. No doubt the maxim of the law is that no man can die with two testaments. However, where there are several Wills, it is possible that all together are admitted to probate as one single Will, provided all can stand. It is not the rule that a later Will works a total revocation of the earlier one, unless the later expressly or in effect revokes the earlier. 435

If the later Will is partially inconsistent with the earlier, there is revocation only to the extent of inconsistency. 436

To this extent, a Probate Court has to interpret and construe the Will and ascertain the intention of the testator. 437

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434 Howard (in re), Howard v. Treasury Solicitor, 1944 P 39.
435 Wyatt (Deceased) (in re), (1952) 1 All ER 1030.
436 Jarman on Wills, 8th Edn., p. 188, Williams on Executors, 7th Edn., Vol. 1, p. 162; Kitcat v. King, 1930 P 266.
437 In the Estate of Thomas, Public Trustee v. Davies, (1939) 2 All ER 567.
Unless the words in the later Will are clear and unequivocal, the Court will presume against revocation.\textsuperscript{438}

A Will which has been revoked by a subsequent Will is not revived by an erroneous reference to it in a codicil which said: "It is a codicil to my last Will" as the testator's last Will, while he was referring to the revoked Will. A codicil which referred only to a revoked Will, thereby confirming it (i.e., re-publishing it), revives the revoked Will and displaces a Will, intermediate in date between the first revoked Will and the codicil; and inconsistent with the first Will. In other words, it becomes both the first and last Will.\textsuperscript{439}

Where a Will is revoked by a codicil executed subsequent thereto, it is a question of construction whether intermediate codicils are also revoked. Thus where a testator begins by distinguishing between the last Will and a codicil to it, and purports to revoke the last Will only not referring to any previous codicil, the revocation is not to be carried further than the necessity of the terms which he has used may require. Hence all previous codicils are not revoked because he revokes the last Will.\textsuperscript{440}

Jarman points out that where a testator leaves several testamentary instruments, as an earlier Will and a later codicil, "it is the established rule not to disturb the dispositions of the Will further than is absolutely necessary for the purpose of giving effect to the codicil."\textsuperscript{441}

He has cited a number of adjudications selected from a large mass of cases. Another rule is stated thus:

"The principle is perfectly clear that where you have a distinct disposition made by a Will, that disposition cannot be revoked by a codicil except through the medium and use of words equally distinct."\textsuperscript{442}

\textsuperscript{438} Hellier v. Hellier, 9 PD 237.
\textsuperscript{440} Ferrer v. St. Catherine College (1873) 16 Eq 19 (Lord Selborne, L.C.).
\textsuperscript{441} Jarman on Wills, 8th Edn., p. 194.
\textsuperscript{442} Kellell v. Kellelt, LR 3 HL 167; Jarman on Wills at 203.
A court, before holding that a codicil has, by necessary implication revoked a clear devise in the Will must find definitely that the intention to revoke is clear.\textsuperscript{443}

A Will cannot be revoked by mere abandonment. There must be some unequivocal act.\textsuperscript{444}

3. **Revocation by Marriage - Indian Law**

The corresponding law is stated in section 69 of the Indian Succession Act, 1925:

"69. Revocation of Will by testator's marriage.—Every Will shall be revoked by the marriage of the maker, except a Will made in exercise of a power of appointment, when the property over which the power of appointment is exercised would not, in default of such appointment, pass to his or her executor or administrator, or the person entitled in case of intestacy.

Explanation.—Where a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property."\textsuperscript{445}

- The section does not apply to Hindus. It is omitted in Schedule III. Further, section 57 specifically states “Provided that marriage shall not revoke any such Will or codicil.”
- Refer section 30 of the Hindu Succession Act, 1956 as amended by Hindu Succession (Amendment) Act, 2005.
- Refer section 59 of Succession Act, 1925, *Explanation I*.

The effect of the provisions in the Indian Succession Act on Hindu Wills was considered in *Subba Reddi v. Doraisami Bathan*.\textsuperscript{446} The Legislature has recognised only certain modes of revocation of Hindu Wills. Beyond that the

\textsuperscript{443} Guari Parasad v. Raj Rani, AIR 1941 Lah 286 (290) (Tekchand, J.); Narinjan Das v. Devi Dass, 3j IC 899 (900).
\textsuperscript{444} Andrew v. Motley, 32 LJ Ch 128.
\textsuperscript{446} 30 Mad 369, section 6.
principle underlying the rule of revocation by change of circumstances is not applied to Wills of Hindus.

So where a Hindu made Will of his self-acquired properties, the same is not revoked by the birth of a posthumous son or by adoption of a son.

Section 70 of the Indian Succession Act now applies to all Hindu Wills as well.

4. Revocation by Destruction

- Revocation by Burning and Tearing

The English as well as the Indian Statutes expressly recognise burning and tearing as a mode of revoking a Will.

In order to amount to revocation the Will need not be totally burnt or torn to pieces.

The instrument must no longer exist as it was.\(^{447}\)

An attempted burning or tearing not accomplished on account of interruption does not amount to revocation.\(^ {448}\)

- Otherwise Destroying

The third method of revocation mentioned in the English Wills Act (section 20) is where a Will is “otherwise destroyed”.

Merely writing across a Will that it is revoked or throwing it into the waste paper basket will not revoke a Will, if it is in fact preserved, uninjured.\(^ {449}\)

The words ‘otherwise destroying’ are to be taken to mean destruction \textit{ejusdem generis} with the words before mentioned, that is, destruction in the proper sense of the word, of the substance or contents of the Will or at least a

\(^{447}\) Glenlivet (in re), 1893 P 171.

\(^{448}\) See Johur Lall v. Dhirendra, 20 CWN 304.

\(^{449}\) Theobald, p. 50; Cheese v. Lovejoy, (1877) 2 PD 251; Kharshetji Ratanji v. Kekobad Khambatta, 52 Bom 653: AIR 1928 Bom 194 (Davar, J.).

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complete effacement of the writing, as by pasting a black paper: and not a ‘destroying’ in a secondary sense as by ‘cancelling’ or incomplete obliteration.\textsuperscript{450}

Cutting, scratching with a penknife the signature of the testator or of the witnesses have been held as amounting to destruction.\textsuperscript{451}

- \textit{Destruction by a Stranger}

In order to effect revocation by destruction it must be an act of the testator. By his direction in his presence alone can a stranger destroy it to bring about revocation of the Will. A testator cannot authorize a stranger to revoke his Will after his death. Such a Will is a validsubsisting Will and its contents can be proved by oral evidence.

- \textit{Indian law}

Section 70, Indian Succession Act, 19,25 refers to destruction as a mode of revocation.

"70. Revocation of unprivileged Will or codicil—No unprivileged Will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another Will or codicil, or by same writing declaring an intention to revoke the same and executed in the manner in which an unprivileged Will is hereinafter required to be executed, or by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same.

The two elements required to constitute revocation are: (a) destruction, (b) intention to revoke (\textit{animus revocandi}). Tearing is not meant a literal tearing to pieces.\textsuperscript{452}

There can be no revocation by implication as revocation must comply with the provision in Section 70 as laid down by the Supreme Court in \textit{Jaswant Kaur v. Amrit Kaur}\textsuperscript{453} where Chandrachud, J. laid down;

\begin{footnotesize}
\textsuperscript{450} Jarman on Wills, 8\textsuperscript{th} Edn., p. 162; Kharshetji Ratanji v. Kekobad Khambutta, 52 Bom 653: AIR 1928 Bom 194 (Davar, J).
\textsuperscript{451} Hobbs v. Knight, 1 Curt 768; In the goods of, Morton, 1887) 12 PD 141; The operative signature may be on the first page of the Will if it consists of more folios, abitri v. Sain, 29 IC 743 (Fletcher, J).
\textsuperscript{452} Johur Lall v. Dhirendra Nath Dey, 20 CWN 304; Cheese v. Lovejoy, (1877) 2 PD 251.
\end{footnotesize}
“The revocation of an unprivileged Will is an act only a little less solemn than the making of the Will itself and has to comply with statutory requirements contained in section 70 of the Succession Act.”

(a) *Destruction may be Complete or Partial*

Even a partial destruction by burning, tearing of some essential part of the Will, such as the portion containing the signature of the testator or of the witnesses is treated as destruction amounting to complete revocation.\(^{454}\)

But merely drawing two lines across the first page of the Will and adding “this Will is destroyed” does not amount to such destruction as to justify the inference of revocation.\(^{455}\)

In one case, the testator drew a line across the middle of the Will, and endorsed on the portion above “all these are revoked” and left it in a cover. It was held that there was no destruction of the Will.

It would appear that in the case of *Cheese v. Lovejoy*\(^{456}\) the testator after writing “This is revoked” threw it among a heap of waste papers. His servant picked it up and kept it on the kitchen table. After 7 or 8 years it was found injured. The Court held that this did not comply with the statutory words ‘or otherwise destroying’ and that the Will was not actually injured.

It may be that destruction of a part of the Will may have the effect of complete or partial revocation according to circumstances. The part destroyed may be so important that the rest cannot be intended to stand alone. In such cases there will be complete revocation. Revocation may be partial if part of the Will alone is destroyed.

But it is essential that the manual operation of tearing the instrument or the act of throwing it into the fire or of destroying it by other means, must be accompanied by animus or the intention of revoking. It is the animus alone that

\(^{453}\) (1977) 1 SCC 369 (372); (1977) 1 SCR 925.
\(^{454}\) Jarman on Wills, 8th Edn., p. 161.
\(^{455}\) Kharshetji Rtanji v. Kekobad Khambatta, 52 Bom 653: AIR 1928 Bom 194.
\(^{456}\) Cheese v. Lovejoy, (1877) 2 PD 251.
governs the extent and measure of operation of revocation to be attributed to the act and whether there has been complete revocation or only partial revocation.

Where a Will had been destroyed by accident without any intention to revoke, secondary evidence may be let in to prove its contents.

(b) Intention to Revoke (Animus Revocandi)

The Will must have been destroyed with intent to revoke. The destruction may be intentional in the sense that the testator intentionally destroys it while he is drunk or believes that the Will is useless and inoperative. It is only with an intention to destroy the paper and is not the result of, or in manifestation of an intention to revoke the Will. As was stated in Cheese v. Lovejoy.457 “All the destroying in toe world without intention will not revoke a Will, nor till the intention in the world without destroying: there must be the two.”458

The mere physical act of destruction is itself equivocal, and may have no revoking efficacy. It may be accidental, or by mistake or while drunk or insane.

In order to infer revocation it is not easy to define the extent of destruction necessary. “There must be, at all events, a partial burning of the instrument itself: I do not say that a quantity of words must be burnt; but there must be a burning of the paper on which the Will is.”459

Where the act is done by a third person by testator's direction, it must be done in the presence of the testator.460

5. Revocation - Complete or Partial

It is a matter for construction to say whether there has been a complete revocation or revocation only in part; or where there are more than one Wills, or several Wills and codicils, whether all the prior Wills and codicils have been revoked or only some of the Wills are revoked.

457 (1877) 2 PD 251.
458 See Brown's Probate Practice.
459 Per Patterson, J., in Reed v. Harris, 6 AD&EU 209; but see Bibbd Mole v. Thomas, 2 WLB 1043. Theohald on Wills, 11th Edn., p. 76.
460
It may have to be inferred from the circumstances attending the act of the testator intending to revoke.\textsuperscript{461}

Thus, it is a matter of inference whether it is complete revocation or partial revocation, whether the revocation is by a subsequent Will or codicil or by destruction of the Will. Where only some of the clauses in the Will, such as the clauses granting some particular legacies, or a clause appointing a particular person as executor, it was held that there was only a partial revocation of the clauses so destroyed and the rest of the Will remained valid.\textsuperscript{462}

In \textit{Kedarnath v. Sarojini},\textsuperscript{463} a Will had been executed on the sheets of paper and only one sheet was available after death of the testator. The Court held that in the circumstances of that case the sheet was only lost and there was no destruction with intent to revoke. The testator who signed on 4 pages and got the same attested, substituted page 2 afterwards with no attestation. The Will cannot be admitted to probate as the portion destroyed may be most important or least important.\textsuperscript{464}

\textit{In Re, Woodward},\textsuperscript{465} the scoring out of a few lines in the first page of a Will covering several pages each of which had been signed and attested, would not by itself lead to the inference that the entire Will has been revoked.

In another case, the testator had appointed G as executor under the Will. On account of disagreement subsequent to the execution of the Will, the testator cut out the name of G wherever the same occurred in the Will. It was held that the Will was only partially revoked.\textsuperscript{466}

\textsuperscript{461} In the Estate of, Clemene, 1892 P 254.
\textsuperscript{462} In the Estate of, Maley, 12 PD 135.
\textsuperscript{463} ILR 26 Cal 634 (639); cutting of some lines at the beginning of the Will: Quoting, Clarke v. Scripps, 163 ER 1414.
\textsuperscript{464} Ser v. Meakvi, 20 Bom 370 (Starling, J); Leonard v. Leonard, 102 P 243, Treloar v. Lean, (1889) PD 19.
\textsuperscript{465} (1871) LR 2 P&D 206.
\textsuperscript{466} In the Goods of, Leach, (1890) 63 LT 111.
It will be entirely a question of construction whether a later Will revokes a former though no express revocation is incorporated in the later Will. In Halsbury’s Law of England⁴⁶⁷, it is stated:

“A later Will or codicil may revoke all earlier Wills even though it contains no clause of revocation. It is a question of intention in each case, where a later unambiguous Will deals with the testator’s entire property it revokes all earlier Wills, and, if the later Will practically covers the same ground as an earlier one, it must be taken as being in substitution for it, and probate of the later Will alone is granted.”

Similar view finds expression in Jarman on Wills.⁴⁶⁸ followed in R. Somi Rajalu Naidu v. Kothandurama Naidu.⁴⁶⁹

“And a Will may revoke an earlier testamentary document, disposing of the whole of the testator’s property even though the later Will does not contain an express clause of revocation, and does not dispose of all the testator’s property. It is the question of construction on the terms of the two documents.

- **Revocation of Will—Effect on Codicil**

The destruction or cancellation of a Will have the effect of revoking a codicil also where the codicil is so interconnected with the Will and has no independent existence.⁴⁷⁰ Where a codicil revoking a Will in part is itself revoked, the Will remains as altered by the codicil.⁴⁷¹

Where the testator had kept the Will in a box, the key of which was with his manager, and there has been no search for the Will immediately after his death, there can be no presumption of revocation simply from the non-production of the will.⁴⁷²

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⁴⁶⁸ ⁸th Edn., Vol. 1, p. 139.
⁴⁷⁰ Surendranath v. Sivadas, AIR 1922 Cal 182.
⁴⁷¹ In the Estate of, Debac, (1897) 77 LT 374.
Revocation may be by some writing e.g. a letter signed by the testator and attested by two witnesses and addressed to his brother desiring the destruction of his Will. The English doctrine of presumption in favour of destruction of the Will if it is not forthcoming once it is traced to the possession of the deceased has to be applied to India with great caution.

6. Conditional Revocation

Revocation may be absolute or conditional. In the latter case, the Will gets revoked only after the condition is fulfilled.

A man may effectually destroy his Will by tearing or cancelling it. He may intend to revoke the first on condition it is substituted by a later effective devise. Where the testator expressly states so, there is no difficulty and unless the later devise is valid and effective, the earlier Will will be treated as operative on his death. The rule applies to revocation by subsequent Will or by destruction.

It is a question of fact, whether a revocation is conditional or absolute.

- Doctrine of Dependent Relative Revocation

One particular kind of conditional revocation is known as dependent relative revocation. Where a testator executes one Will, and lateron executes another Will and intended that the earlier Will should get revoked in the event of the later one being valid, the revocation will not be valid unless the later Will takes effect.

Likewise, a testator destroys a Will with the intention of revoking it by executing another Will: but the new Will is never executed. In those circumstances, the old Will remains valid.

But the revocation validly effected does not cease to have operation only because the testator has the intention to make a new Will at some future time.

475 Jarman on Wills, 8th Edn., p. 165; In the goods of, Middleton, 10 Jur (NS) 1109; see 71 Law QR, pp. 374-387: Raikhushru v. Bai Bachubar, AIR 1951 Bom 339: (1950) 22 Bom LR 694.
476 In the Estate of, Bromham, (1952) 1 All ER 110; Hyde v. Hyde, 1 EQAB 409; Dixon v. Solicitor to the Treasury, 1905 P 42.
The doctrine of dependent relative revocation is at least as old as the 18th Century. It has been said that it was first recognised and christened by Powell in his book on Devises in 178 and that it blossomed into full flower after the establishment of the Probate Court in England in 1857. The doctrine came up for discussion before the Bombay High Court in *Kaikhushru v. Bai Bachubai*, and in Travancore-Cochin High Court in *Thresta v. Lonan Mathew*.

**Doctrine Applied to Obliteration of Part of Legacy**

A testator may alter the extent of legacy given under the original Will by writing over or interlineation. If the inference is permissible in the circumstances that the testator intended to revoke the earlier legacy, if the altered legacy could be effectively made, then when the alteration fails, the original legacy will stand.

The doctrine will not apply when there is only an erasure of part of the legacy, e.g., a legacy of one hundred and fifty altered by erasing ‘fifty’.

**Change of the Name of the Legatee:**

Generally, no case of dependent relative revocation will arise where the name of the legatee is altered. But a gift may be made to A on the supposition that B was incapable of taking; then the testator strikes out A and inserts the name of B; in such cases if B is incapable of taking the legacy in favour of A will stand.

Again, a testator may execute a Will first. Later on he executes a second Will revoking the first Will. Subsequently he may revoke the second Will. He may be in the mistaken belief that by revoking the second Will, the earlier Will is revived, while in law it is not enough to revive the earlier one. In those circumstances, the doctrine of dependent relative revocation is invoked to render

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477 AIR 1951 Bom 339; (1950) 52 Bom LR 694.
478 AIR 1956 TC 186 (FB).
479 Itter (in re:), 1950 P Ker 48.
480 Bonis McCabe, (1873( 3 P&D 94: see Williams on Wills, 1952 P 101.
the revocation of the second Will ineffective. No *animus revocandi* is considered to exist.481

The real question in such cases is whether the revocation is conditional or absolute. If it is absolute it takes effect, although founded on a mistake on the part of the testator.

The doctrine has been explained in numerous English cases.

Where a testator bequeaths a property in a Will and again disposes of it in a later Will without expressly revoking the earlier Will, if the later Will becomes ineffective, then there will be no revocation of the earlier disposition.482

The doctrine may simply be described as a conditional revocation.483

The condition for the revocation of the earlier Will is the operation of the later Will. When there is no revocation by the later Will, the earlier Will continues to be valid.484

This doctrine has been applied also to cases of revocation by destruction.485

Where the testator removed the original page No. 2 and substituted a fresh one under the impression that he was thereby making a substitution which was good in law, and but for the belief he would not have revoked what was in the original page, there is a case of dependent relative revocation.

If there was evidence as to the contents of the original page No. 2, probate of the original Will may be granted.486

Theobald summarises the rule thus:

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482 Southerdon (in re:), 1925 P 177; Davies (in re:), 1951 (1) All ER 920; Botting (in re:), (1951) 2 TLR 1089.

483 Southerdon (in re:), 1926 P 177; Murray (in re:), (1956) 1 WLR 605.

484 Hope Brown (in re:), 1942 P 136. See also Ram Charan v. Gobvinda, 56 Cal 894: LR 56 IA 104: AIR 1929 PC 65 (Lord Phillimore).

485 Itter (in re:), 1950 P 130; Cock (in re:), (1960) 1 WLR 491.

486 Ker v. Meaking, 20 Bom 370.
“To bring the case within this doctrine, it must appear that the testator considered the substitution of some valid disposition as part of the act of revocation at the time when the act was done. The mere revocation of a Will, followed by a subsequent ineffectual disposition, will not set up the original Will if the two acts are not so connected that it can be said that the substitution of an ineffectual disposition was the condition of the revocation of the original Will. The point in these cases is not that a revoked Will is set up again if a subsequent disposition is ineffectual, but that the original Will is not itself intended to be revoked unless and until an effectual disposition of the property is made.”

Thus in *Murray v. Murray*, it was held that revocation of an earlier Will by a later Will which when proved ineffective did not revive the earlier one.

7. **Burden of Proof**

There is a presumption that a Will continues to exist until testator's death and that the testator intended to dispose of his property as provided for in his Will. Unless it is mutilated, the proponent need not show lack revocation.

There may be a *prima facie* presumption of revocation, when the Will is found cancelled, defaced or obliterated and a burden may be cast on the proponent to overcome the presumption.

The onus to prove that the Will is revoked by the testator lies on the person alleging revocation. Each case will depend on its own facts and no general rule can be laid down as to when the loss of the original Will is tantamount to revocation.

Where a Will is not forthcoming after the death of testator, the burden is on one asserting revocation that the Will had been destroyed with the intent to revoke.
A presumption of revocation by the testator himself does arise where the facts are that the Will was made when the testator was a bachelor: that under the Will a son subsequently born to the testator by his lawful wife would be entirely disinherited and left to starve, unless the legatee out of compassion chose to allow him some maintenance; and that the Will is not found after the testator's death. Court is justified in assuming that after the birth of his own son, the testator by his own act, destroyed the Will which left everything to a comparative stranger to the detriment and prejudice of his son.492

8. Capacity of Testator to Revoke

In Jarman on Wills [8th Edition, pages 182-206], the topic of intentional revocation of a Will is discussed. One of the important characteristics of a Will is that it is always revocable until the death of the testator. Being an international and voluntary act of the testator, he must be of sound mind at the time of revocation. A revocation is not valid if the testator is insane at the time; subsequent attainment of sanity will not validate the revocation.493 Likewise, where the testator became insane after executing a Will and died without recovering sanity, the loss or destruction of the Will does not warrant an inference of revocation.494 Further, a mere expression of intention to revoke a Will at some future date cannot amount to revocation of the Will under any system of law.495

A mere promise not amounting to contract is not enforceable, even where, the other party had acted in a particular manner, on the faith of the promise.496

9. Who may apply for Revocation?

The creditors of the heir at law can also ask for revocation of the probate on the ground that the Will was forged. In principle it makes no difference whether they ask for revocation or they lodge caveat in response to a general

492 Uttam Das v. Charan Das, 20 IC 462.
493 Brunt v. Brunt, 3 P&D 37; In the Estate of, Hint, 1893 P 282; see also Sprigge v. Sprigge, 1868 LR 1 P&D 608: 19 LT 462: 17 WR 80.
495 Mahomed Yoonus v. Abdul Satar, AIR 1938 Mad 616: 47 LW 719: (1938) 1 MLJ 444.
496 Maddison v. Alderson, (1883) 8 AC 467.
citation. Similar is the case of a purchaser of part of the property covered by the Will of the testator. If a legatee from a second Will is entitled to enter a caveat, a purchaser from such legatee is similarly so entitled.  

Step-son of testator mother who left behind her sons has no right to apply for revocation of probate as the applicant cannot claim share in testator’s property simultaneously with her sons under section 15 of the Hindu Succession Act. 1956.  

- **Attesting Witness Whether can Seek Revocation**  
  Person having attested Will and having appeared as witness to prove attestation, cannot seek revocation of Will. When a party impliedly admit the revocation of Will in earlier suit, it can be used with subsequent suit against that party.  

  It is clear that there cannot be an entering of a caveat by any party against the revocation of a probate. Title dispute is not to be decided by the court while granting probate and probate can be revoked under section 263 if proved but the absence of caveatable interest recorded cannot come in the way of probate’s revocation.  

- **Court’s Discretion**  
  Jurisdiction under section 263 is a discretionary one and the trial court may refuse revocation if a just cause is not established. The Court has jurisdiction to set aside the ex parte, revocation order passed in proceedings relating to revocation of the probate (under Order 9, rule 13, Civil Procedure Code). The provisions regarding necessary parties as contained in the Civil Procedure Code will also apply to probate proceedings. Thus, the heirs of a testator who would have succeeded as natural heir in absence of the Will, are

necessary parties, and probate proceedings cannot be continued in their absence.\textsuperscript{505}

In revocation of probate granted by District Judge, if question of jurisdiction is not raised before Additional District Judge, which is the trial Court of revocation proceedings, the objection cannot be raised in appeal.\textsuperscript{506}

Additional District Judge being a probate court can revoke probate granted by District Judge.\textsuperscript{507}

\section*{X. REPUBLICATION}

Republication does not mean the revival of a revoked Will. It is generally used to denote the re-execution of a former valid Will or codicil, only confirming it. The entire Will takes effect as if it was executed on that date for certain purpose.\textsuperscript{508}

Where a testator makes a Will and a codicil and afterwards re-executes the Will without referring to the codicil, oral evidence can be let in to show that the testator did not intend to revoke the codicil, and that his object of re-execution is only to give effect to some alterations in it.\textsuperscript{509}

A republication cannot invalidate a bequest which was valid under the original Will.\textsuperscript{510}

Again any legal effect already brought about by what has already taken place in the meantime, will not be nullified by republication.\textsuperscript{511}

The Courts have always treated the principle that republication makes the Will speak as if it has been re-executed at the date of the codicil, not as a rigid formula or technical rule but as a useful and flexible instrument for effectuating a

\begin{footnotes}
\item [505] Ranibai v. Ramkumari Bai, 1989 MPLJ 789.
\item [508] Cf. Tredgold (in re:), 1964 Ch 69; Barkeley v. Barkeley, 1946 AC 555.
\item [509] Jarman on Wills, 8th Edn., p. 215.
\item [510] Heath’s Wills Trust (in re:), (1949) Ch 170 (180).
\item [511] Stilwell v. Melush, (1851) 20 LJ Ch 35.
\end{footnotes}
testator’s intentions by ascertaining them down to the latest date at which they have been expressed.\footnote{512}{Romer, J. in Hardyman (in n), 91925) Ch 287, see also Health’s Wills Trusts, (1949) Ch 170.}

1. Constructive Republication

Where a testator makes a codicil to his Will from which the inference can be drawn that he wishes to be read as part of his Will, in such a case constructive republication occurs.\footnote{513}{William on Wills, 1952, p. 109.}

Republication means the publication of an instrument a second time. Similar a word “revival” which is almost synonymous with republication means “to reanimate”. It necessitates when the earlier Will is either destroyed or revoked or the testator intends to bring some changes in the already constituted Will so that the intention of the testator is fully reflected.

2. Revival

As the revocation by destruction of a revoking Will fails to revive the first Will, there is \textit{prima facies} an intestacy, but evidence can be given that the second Will was revoked solely with the intention of validating the earlier Will; the revocation of the second Will is then treated as conditional, and the condition not having been fulfilled the doctrine of dependent relative revocation applies, and the second Will is not revoked. When an earlier Will, which has been revoked by a later Will, is revived by a codicil, the later Will stands unless expressly revoked or impliedly revoked by reason of dispositions inconsistent with it being contained in the codicil. Under the section, the mode of revival is the same, whether there has been an express revocation or an implied revocation.

The modes indicated in the section are: (1) re-execution of the prior Will, (2) a duly executed codicil, (3) the existence of intention to revive in the language of the Will itself.

A later codicil may ‘confirm’ an earlier Will and thereby revive it. The word ‘confirm’ is an apt word and has the same meaning as ‘revive’—the word in the Statute.\footnote{514}{William on Wills, 1952, p. 109.}
• **Complete or Partial**

The revival also, like revocation, may be of a prior revoked Will, in its entirety, or only a part of it. The extent of revival must be decided with due regard to the intention shown by the later document. The later document reviving the earlier revoked Will may be a codicil.\footnote{515}

The intention to revive must be contained in the document itself. Mere physical annexation with the Will is not sufficient.\footnote{516}

The only mode of reviving the earlier Will is by a re-execution or republication.\footnote{517}

Intestacy may be prevented by the doctrine of relative revocation. In such cases effect may be given to the second destroyed will provided the latter destruction was done with the sole purpose of reviving the first Will. This purpose can be brought out by oral evidence.\footnote{518} This rule will apply in cases of partial revocation of former Will or a codicil partly revoking a Will. The result will be there is no revival of the revoked portion of the first Will. Consequently there will be partial intestacy.\footnote{519}

Once the first Will is revoked by destruction there can be no revival.\footnote{520} The existence of the original Will, not a mere draft of it, is imperative for revival.\footnote{521} Jarman posits:\footnote{522} Where the first Will is revoked by the second and the testator subsequently executes a codicil naming it as a codicil of the first Will and no reference is made to the second Will in it, the result will be the revival of the first Will and revocation of the second Will. This will be so only if the first Will is in

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\footnote{514}{Dyke (in re:), (1881) 6 PD 201.}
\footnote{515}{In the Estate of, Mardon, 1944 P 109.}
\footnote{516}{Marsh v. Marsh, 164 ER 845.}
\footnote{517}{Major v. William, 163 ER 781.}
\footnote{518}{Powell v. Powell, LR 1 P & D 209.}
\footnote{519}{In bonis, Demac, 77 LT 374.}
\footnote{520}{Hale v. Tokeleve, 2 Rob 318.}
\footnote{521}{Jarman on Wills, 7th Edn., p. 180.}
\footnote{522}{Jarman on Wills, 7th Edn., p. 180.}
existence and an intention to revive it is clear from the codicil. What is paramount is the intention to revive. 523

The revival of an earlier Will may be by direct reference to it or by implication or inference. 524

The testator's intention to revive which of the Wills, may have to be decided by reference to the language of the later document.

Thus, a later codicil may simply 'confirm' an earlier of the two Wills. This is treated as sufficient evidence of an intention to revive that Will. 525

If it was clear from the evidence, that the person who prepared the codicil was not aware of the existence of a later Will, then the confirmation of the Will would be taken as indicating an intention only to revive that first Will only. 526

At times there may be mistaken or ambiguous references to the documents intended to be revived. Courts are free to ascertain the Will intended to be revived. 527

In the estate of Davis, 528 a testator bequeathed all his property to one Miss E whom he married later. After the marriage, the testator had written on the envelope: "The herein E is now my lawfully wedded wife," and signed it and attested by two witnesses. It was held that the testator had no other intention except to revive his Will.

**XI. ALTERATIONS**

As per section 71 of the Indian Succession Act, 1925:-

No obliteration; interlineation or other alteration made in any unprivileged Will after the execution thereof shall have any effect except so far as the words

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523 William on Wills, 12th Edn., p. 121.
524 161 ER 451.
525 Kakhushru v. Bachubai, AIR 1951 Bom 339; (1950) 52 Bom LR 694; McLeod v. Mcnab 1891 AC 471 (The earlier Will was referred to by date).
526 In the estate of, Stedham, 6 PD 205; See also In the estate of, Chiloit, 1897 P 223.
527 In the estate of, Wilson, LR 1 P & D 582; Baker v. Baker, (1929) 1 Ch 668; See In the estate of, May 1 P & D 581 (Held no revival).
528 1952 P 279.
or meaning of the Will have been thereby rendered illegible or undiscernible, unless such alteration has been executed in like manner as hereinbefore is required for the execution of the Will:

Provided that the Will, as so altered, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses is made in the margin or some other part of the Will opposite or near to such alteration at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the Will."

This section is based on section 21 of the English Wills Act, 1839 and is made applicable to Hindu Wills also. This section applies only to obliteration, etc., made in any unprivileged Will after the execution thereof, and not to alterations made before execution and also applies to codicils.

The proviso indicates that the signature must be referable to the alteration by their juxtaposition and proximity. The alterations will be valid only if the signature of the testator and also those of the witnesses are there as provided by the section.

1. Effect of Alterations

Where the alterations are properly executed, they form part of the Will and probated with the alterations.

Where a Will has been altered after the execution and without knowledge of the testator, it will not enable the party who made the alteration or in whose custody it was, to lay claim under the Will.

Mere marginal notes by the testator for his own guidance are not alterations and do not form part of the Will.

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529 In the goods of, Broughton, 29 Cal 311.
530 Rohutu Yellappa v. Setti, 1934 MWN 357.
531 Rohutu Yellappa v. Setti, 1934 MWN 357.
532 Suresh Chandra v. Ravi Dasi, 47 Cal 1043; Pandurang v. Vinayak, 16 Bom 652.
533 Paramma v. Ramachandra, 7Mad 203.
534 Sardar Nowroji v. Puthibai, 15 Bom LR 352.
It is a salutary practice to notice all alterations, interlineations, etc., in the attestation clause referring to the page and line in the Will where these occur and stating that such were made prior to execution. It becomes unnecessary then to place the signature or initials of the testator and attestors in the margin near to the alteration.\footnote{See Williams on Wills, 1952, p. 83.}

Williams on Wills postulates\footnote{On p. 145 (12th Edn.,) See also In bonis, Adams, LR 2 P&D 367.} that even if alterations are made prior to execution, they may be ignored provided they are prima facie only deliberative e.g.: Pencil writing in a Will written out in ink. Where the testator himself showed the alterations in red ink written before the codicil and confirming the testament, probate was granted.\footnote{In the goods of, Broughton, 29 Cal 311 (313).} The general presumption is that the alterations were made after the execution of the Will. So in the absence of rebuttal evidence, probate will be granted for the Will in its original state, omitting the alterations.\footnote{Suresh Chandra v. Ravi Dasi, 47 Cal 1043 (1065); see also Raghubar Dayal v. Ram Rakhan Lall (1897) 1 CWN 428: 4 Moo PC 419} Alterations and additions found in a Will without the testator’s signature and those of the attestors, are presumed to be made before execution.\footnote{In bonis, Cadge, 1 P&D 543; see also 7 Moo PC 320.}

Complete obliterations present difficulties. In \textit{bonis, Ibbesom, in the goods of},\footnote{2 Curt 337.} under Court’s orders the erasures in a Will were carefully examined with the aid of a magnifying glass. As they could not be made out, probate was granted with the erased words restored and where they could not be made out, probate was issued with those words in blank.

No extrinsic evidence is admissible when the original words are not discernible.\footnote{Townley v. Watson, 3 Curt 161.} An exception to this rule is where the alteration was only as to altering the amount of the gift and not revoking it.\footnote{Brooke v. Kent, 3 Moo PC 334. See Soar v. Doman, 3 Curt 121.} In such an event the doctrine of dependent relative revocation does apply. In \textit{bonis, Ibbesom}\footnote{2 Curt 337.} the testator erased in the words “one hundred and fifty pounds” the words ‘one hundred and.'
It was held the legacy for fifty pounds stands and the aforesaid doctrine does not apply.

Every alteration, interlineation or obliteration made after the execution of a Will, can be effectively made only in the same way as a Will, the formalities of signatures by the testators and the attestors are not complied with, the alteration will be ineffective. The signatures may be made in the margin opposite to the alteration. They may also be at the end or foot of a memorandum or note recording the alteration.

This rule does not apply to alterations before execution.**544** Initials are treated as signature.**545** The signature of the testator and the attestors must be in juxtaposition or proximity to the alteration and in some part of the Will itself. They cannot be put in a separate sheet of paper detached from and unconnected with the Will.**546** Provision applies to codicils also.

An alteration or erasure of any portion of a Will, not attested, will have the effect of revocation of that part, as amounting to destruction of that part. Likewise, where paper is pasted over part of a Will, and the words are not decipherable by any natural means, such as by means of a magnifying glass or by holding up the Will up to light, it would amount to revocation.**547**

Any physical interference with the Will, by using chemicals or by the removal of the paper is not permitted.**548** The alteration must be apparent on an inspection of the instrument, however elaborate may be the devises used to assist the eye, and, however skilled the eye which is being used. If the words can be read only by producing an *infra-red-ray* photograph, then a new document is created and it is not apparent.**549** There is no presumption as to when the alteration was made, whether before or after the execution of the Will.**550**

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**544** In the goods of, Broughton, 29 Cal 311.

**545** In the estate of, Blewitt, (1880) 5 PD 166.

**546** Ruhutu Yellappa v. Setti, 1934 MWN 357.

**547** In the estate of, Gilbert, 1893 P 183; in the estate of Itter, 1950 P 130.

**548** Finch v. Comb, 1894 P 191.

**549** In the estate of, Itter, 1950 P 130: (1950) 1 All ER 68.

**550** William v. Ashton, (1859) 1 J&H 115; but see Cooper v. Bockey, 4, Moo (PC) 419
In *Greville v. Tylu*,\(^\text{551}\) where mere blanks were filled up, it was presumed that it they were done before execution.

2. **Presumption, when Alteration is Made**

In the absence of any evidence to show when they were made, alterations appearing on the face of a Will are presumed to have been after the execution of the Will.\(^\text{552}\) Generally declarations by the testator are admissible for this purpose, whether before or at the time of the execution of the Will.\(^\text{553}\) When the evidence is acceptable, such alterations get incorporated in the Will even though unattested.

Likewise, when there are unattested alterations in a Will, and the codicil refers to them, the alterations get incorporated in the Will. If they are not referred to in the Will, then the presumption is that they have been made only after the codicil. If the alterations in a Will, which are such that, without them, the Will would be incomplete, then there is a presumption that they were made before execution.\(^\text{554}\)

Alterations in ink may be presumed to have been made before execution. Alterations in pencils are presumed to have been only deliberative but not operative.\(^\text{555}\)

**XII. WHO CAN TAKE UNDER WILL**

‘Testator’ and ‘donor’ may be one person but the concept of such status is quite different, so is the case with “legatee” and “donee”. So ‘legatee’ is one to whom a legacy is bequeathed. The right to take property under a Will is not a natural right, it is a creature of the law, a privilege accorded by the State.

The right of persons to take under a Will is subject to State regulation and control. In general, a person who has testamentary capacity may dispose of his

\(^{551}\) 7 Moo (PC) 320.
\(^{553}\) Jarman on Wills, 8th Edn., p. 174.
\(^{554}\) In the estate of, Binis, Cadge, 1 P&D 543.
\(^{555}\) Batman v. Pennington, 3 Moo (PC) 223.
property to any person and for any object that is not prohibited by Statute, or is not otherwise illegal, or against public policy.

The capacity of the legatee is to be decided as on the date of the death of the testator. The legatee must be in existence at the time of the death of the testator. A purported gift to a specified person at the death of such person is void.

A child *en ventre sa mere* is capable of taking a devise. When the child is able to stir in the mother's womb it can have a legacy. There can be a legacy in favour of husband or wife. Beneficiary can enjoy and possess property as per Will of executor till their death and gets absolute rights after the death of executor of Will. 556

- **Infants, Idiots, etc.**

  A bequest in favour of any disqualified persons, such as a minor, idiot, lunatic, etc., will be valid. Delivery of possession is not necessary to its validity. Generally the legatee need not give his assent in order that it may take effect. 557

  But in the case of an onerous gift, it may be different.

1. **Witness can be a Legatee**

   This subject is covered by various sections of Indian Succession Act, 1925 such as sections 67, 68, 109, 113 and 141.

   "A Will shall not be deemed to be insufficiently attested by reason of any benefit thereby given either by way to 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 attesting, or the wife or husband of such person, or any person, claiming under either of them.

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

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The concept of section 67 of the Succession Act, 1925 has been referred to in *Jose v. Ouseph*, AIR 2007 Ker 77: 2006 (4) KLT 991.

The issue was that since propounder is also one of the legatees under the Will and an attesting witness, the legacy is void as against the attesting witness. It was held that section 67 of the Indian Succession Act, 1925 deals with the effect of gift to attesting witness. This section is not applicable to Wills of Hindus by virtue of section 57 read with Schedule III of the Indian Succession Act and as such legatees under the Will of such persons do not forfeit their legacy on becoming attesting witnesses but, it being a case of Christians, section 67 would apply (Refer Explanation to section 67 of the Act 1925).

Section 68 may be referred to:

"68. Witness not disqualified, by interest or by being executor. No person, by reason of interest in, or of his being an executor of, a Will, shall be disqualified as a witness to prove the execution of the Will or to prove the validity or invalidity thereof."

This section applies to Hindus, Buddhists etc. In the *Administrator-General, Madras v. Lazar*, it was held that a legacy to the attesting witness of a Will is void, whether or not the attestation of that witness is indispensable to the validity of the Will.

Where the testator directed that a debt due to him from an attesting witness should not be claimed, but expressed a wish that the sum should be specially devoted to the education of the children of the testator, there was no release of the debt. There was a valid trust in favour of the children.

In a Gujarat case the testator had disregarded the claim of his widow and to that extent in the first blush it can be contended that it is not consistent with the testator's natural affection and moral duties. But that is only a suspicion which get erased in view of the circumstance that the testator was not on good terms with his wife who hence lived separately from him for 25 years. She

558 4 Mad 244.

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returned to his house only a days before his demise. The Court, therefore, held that the Will was not unnatural.

A person who signs a Will in token of his assent to the dispositions under the Will not for the purpose of attesting it does not forfeit the legacy. Section 68 only amplifies what is stated in section 67. It only says that person deriving a benefit under the Will either as legatee or executor, shall not be disqualified to speak to the validity or otherwise of the Will as a witness.

2. Can there be a Devise to Testator’s Heir?

In *Basti Rain v. Ved Prakash*, a bequest in favour of a person or persons in succession, who may be in existence at the date of testator’s demise was held valid under the Hindu Law, (as it existed before 1870) on the score that such a bequest did not create a new form of estate, or after the line of succession. It is not disputed by the appellant that House No. 1185, situated in Sector 8 at Chandigarh is at least of the value of about fifteen lacs of Rupees which is in the sole name of the deceased. Therefore, even if the Will does not exist, then too, the beneficiaries to whom the cash amount is to be distributed do have, a valuable share in the immovable property mentioned above and as such the value of their shares is much larger than the amount which is to be distributed to them No prejudice is, therefore, going to be caused to the appellant in case the amount is distributed to the heirs as per the terms of the Will.

The decision of the Supreme Court in *Ram Gopal v. Nand Lal* is of considerable importance and the extracts from the judgment states: “The position is that to convey an absolute estate to a Hindu female, no express power of alienation need be given; it is enough if the words used are of such amplitude as would convey full rights of ownership where, therefore, a Hindu widow relinquished by a written deed all her rights in certain properties and received

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561 Thankam alias Karthiyani v. C. Madhavan, 1999 Mah U 634.
562 NIR 1974 Punj 152 (155).
under a *Tamliknama* two items of property, house and shops as *malik*, the deed containing no express words showing that she was to enjoy the property only during her lifetime—Held, on consideration of all the circumstances, that an absolute estate was conveyed to her by the *Tamliknama*, though the gift was expressed to be for her maintenance and residence."

The word *'Malik'* connotes full ownership. So where a Hindu woman gets vested with a specific property as above indicated, she takes it absolutely with full powers of alienation, with no forfeiture of same threatening her on remarriage or subsequent unchastity. The matter is different when she receives maintenance from the deceased husband's estate as per decree of Court or under Hindu Law, as there is no vesting in such a case, the right being subject to her continued chaste life and not marrying again.565

3. **Murderer as Legatee**

An exception to the general right of person to take property by Will is made in the case of a beneficiary who murders the testator. It was a principle of the Civil Law evolved by many generations of Juris consult, philosophers and statesmen that one could not take property by Will from a testator whom he had murdered. This principle is also a part of the common law and is incorporated held in the statutes of some jurisdictions. It is based on public policy and has been held equally to apply to cases of manslaughter and murder.566

A rule of public policy precludes any person who is guilty of feloniously killing another from taking any benefit under that other person's Will or on his intestacy.567 Almost all systems of law have recognised that a person guilty of homicide cannot succeed to the property of his victim. There is distinction between inheritance and succession to the property of the person murdered.


567 Hall (in re):, 1914 P 1; Pittis (inre), (1931) 1 Ch 546: Sigsuorth (in re) , 1935 Ch. 80; Pollock (in re;) 1941 Ch. 219.
Person who has murdered the testator will not be entitled to the property bequeathed to him under the Will.568

“A man is not to be allowed to have recourse to a Court of Justice to claim a benefit from his crime whether under a contract or gift.569 There is no disability in the case of non-felonious killing.570

The rule propounded in Haisbury's Laws of England,571 relevant to the context is:

“It is contrary to public policy that a man should be allowed to claim a benefit resulting from his own crime. Accordingly a donee who is proved to be guilty of the murder or manslaughter of the testator cannot take any benefit under his Will where the above rule operates to preclude a person from acquiring benefit under the Will, the property goes to other persons entitled under his Will, if it is a gift to a class, or, if the exclusion of the donee effects an intestacy as to the property in question to the property in question, to the persons other than the donee, entitled on intestacy, and not to the Crown as bona vacantia save in so far as the Crown may be entitled under the intestacy provisions in the ordinary way.”

Where a testator bequeathed equally to two daughters after and of life-estate of wife on her death the share of daughter dying without male issue, would go to other daughter having male issue.572

A testatrix by her Will appointed her daughter as her sole executrix and legatee. The testatrix had only a son besides the legatee-daughter. The daughter murdered the mother and herself committed suicide. The son of the legatee laid claim to the whole estate, while the Crown claimed the estate as bona vacantia.

It was held that son is beneficially entitled to the entire estate of the deceased. Vaisey, J. stated:

568 Sasraanbhava v. Sellammal, (1972) 2 MLJ 49 (50) Raghavan, J.
569 Per Lord Atkin in Beresfonds royal Insurance Co. 1938 AC 586 (598).
570 Houghton (in re) (1915) 2 Ch. 173; Pitts (in re) (1931) 1 Ch. 546.
571 Vol. 50, 4th Edn, Paar241.
"Now this rule based on public policy is that no person is allowed to take any benefit arising out of a death brought about by the agency of that person acting feloniously, whether it be a case of murder or manslaughter."

The principle that a person who is guilty of felonious killing another cannot take any benefit in that other person's estate applies to murder as well as manslaughter. A person who, though not convicted of murder of his father, but who will convicted under section 324, Indian Penal Code (causing hurt by dangerous weapon) in the case where his co-accused were held guilty to murder cannot succeed to the property of his father.

4. Gift in Favour of Unincorporated Association

If in a gift to unincorporated Association, the beneficial use of the property goes to the present members who if they please can alienate and pocket the proceeds thereof to themselves, in such an event the present gift is to the individuals and so is good in law. But if the gift is for the benefit of the present and future members or for the purposes of the Institution as such, then the present members become trustees and so cannot appropriate the property or its proceeds for their own benefit. Such a gift is invalid. If nothing more is given to the society than annual rents, dividends and profits for the aforesaid reasons the gift will be invalid.

5. Legacy to Executor

Where a testator by his Will appoints an executor and bequeathes to him a legacy in such a way that it is annexed to the office, and by a codicil revokes the appointment of the executor, the legacy is revoked.

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573 Hall (m re), 1914 P.1.
575 Neeille Estates Ltd. V. Madden, 1962 Ch. 832, See also (1969) 1 WLR 229.
576 See Section 408 of Indian Succession Act.
577 Learly v. Attorney General for N.S. Wales. 1959 AC 457, See also, Macaulay’s Estate, 1943 Ch. 435 n.
578 Macatuday’s Estate (in re© (1943) Ch. 135n. See Wills by Stephen Gretney and Gerald Dworkin, 13th Edn. pp. 391-92,
But if the testator shows that the bequest of the legacy is independent of the office, the legacy is not revoked by the revocation of the office.\textsuperscript{579}

Since 1925, the executor's right is taken away by section 46 of the Administration of Estates Act, 1925.\textsuperscript{580}

- **Combined Operation of Sec. 109 and 141, I. S. A., 1925**

Where a testator appoints his own child as executor, but that legatee died before the testator, it was held that there was no lapse, but the lineal descendant was entitled to the legacy as if the legatee under the Will died soon after the testator.\textsuperscript{581}

However, section 109 is subject to any contrary intention as indicated in the Will. It is open to content that the appointment of the child as executor is indicative of an intention that the child could take the legacy only if he could act as executor.

141. *Legatee named as executor cannot take unless he shows intention to act as executor.*—If a legacy is bequeathed to a person who is named an executor of the Will, he shall not take the legacy unless he proves the Will or otherwise manifests an intention to act as executor.

This section is applicable to Hindus also.

The scope of section 141 was also considered in a Madras case of *Rajan v. Pankajam Ammal.*\textsuperscript{582} In that case, the testator had made a substantial legacy to his nephew very much loved by the deceased, and had appointed him as an executor. When after the death of the testator, the nephew proceeded to do his duties as an executor, the testator's widow remonstrated and with a view to avoid misunderstanding and trouble be renounced his executorship. Later on, the question arose if he could claim the legacy though he had renounced the office of executor. It was then contended that the Indian section also must be read as containing a proviso of indication of contrary intention by the testator, who, it was

\textsuperscript{579} Jarman on Wills, 8\textsuperscript{th} Edn., p. 199.
\textsuperscript{580} Skeats (in re:), 1936 Ch 783; Jarman on Wills, 8\textsuperscript{th} Edn., p. 724.
\textsuperscript{581} Ramasamy Iyar v. Kuppusamy Iyar, 13 MLJ 351.
\textsuperscript{582} ILR 1944 Mad 821: AIR 1944 Mad 335.
contended, desired to benefit his dearly loved nephew whether he acted as executor or not. The Court, however, rejected that contention saying: "It says, 'bequeathed to a person named as executor', not bequeathed to an executor'. It is, therefore, impossible to contend that the prohibition applies only to an executor as such. It clearly extends to any bequest whatever be the reason for which it is made, provided that the legatee is named as executor."

**Minor as legatee.** A minor can be a legatee under a Will.\(^{583}\)

The guardian can accept a legacy on behalf of the minor.\(^{584}\)

In case of contest in guardianship proceedings on the basis of two different Wills executed by the father and the children, one appointing wife as guardian and the other appointing mother and sister as guardian, it will be appropriate for the court to stay the proceedings and call upon the parties to produce probate of Will.\(^{585}\)

A person may be barred from inheritance by a physical defect or disqualification. Such defect or disqualification does not debar him from taking the legacy.\(^{586}\)

This case is under sections 141, 216 and 263 of the Succession Act, 1925. It was a suit by the legatee claiming allotment of property during pendency of administration of estate as per probated Will. Claiming allotment of property inspite of pendency of the administration of the estate, by executors in impliedly barred by the provisions of section 141 of the Succession Act, 1925 and as such plaint is liable to be rejected under Order VII, rule 11.

### 6. For Non-Charitable Purposes

A gift to a non-charitable purpose is valid, provided the purpose is specific, though there is no person or persons named as legatees or though there is a

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583 Trevelyan, Wills, 2nd Edn., p. 29.
person named as legatee, but he must by terms of the Will hold the gift for the specific purpose.  

A testator cannot leave the purpose vague and leave to another to make a Will for him. It is void for uncertainty.  

The legacy has been held valid in the following cases:

a. to maintain the horses and hounds of the testator, together with their stables and kennels and buildings for 50 years;

b. for the promotion and furthering of fox hunting;

c. for the erection of tombs and monuments — if not uncertain or void for perpetuity;

d. for the erection of Masonic temple.

XIII. RULES OF CONSTRUCTION UNDER THE INDIAN SUCCESSION ACT

The Indian Succession Act, 1925, is the statutory Law of Wills in force in India and since 1926 governs the Wills of all persons in India including Hindus and excluding Mohammedans.

Part VI of the said Act (sections 57 to 191) provides rules of law and rules of construction regulating Wills. Section 58(2) says that 'save as otherwise provided in sub-section (1) or by any other law for the time being in force, the provision of this part shall constitute the Law of India, applicable to all cases of testamentary succession.'

So far as Hindus are concerned, the provisions of Part VI which are set out in Schedule III shall, subject to the restrictions and modifications as set out

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587 Dean (in re.), 41 Ch D 552; Thompson (in re.), 1934 Ch 342; Wood (in re.), 1949 Ch 498; Astor Settlement (in re.), 1952 Ch 534.
589 Thompson (in re.), 1934 Ch 342.
590 Turkington (in re.), (1937) 4 All ER 501.
therein, apply also to all Wills and codicils made by Hindus, Buddhists, Sikhs and Jainas on or after the 1st day of January, 1927.

Among the provisions of Part VI are to be found several rules of statutory construction. Most of them are based upon rules as laid down in English Law by the decisions of the English Courts before 1925. Care has been taken to adapt those rules to suit the social conditions prevailing in India. Further, certain sections have not been made applicable to Hindus.

Even in regard to those exempted provisions. Courts of this country have taken the view that in numerous cases there in nothing inconsistent in Hindu Law with the statutory rules and so on grounds of convenience these exempted provisions have been applied to Hindus also.

The rules of interpretation of Wills are not similar to rules of interpretation of statutes which contain the words of trained and expert body of law-makers. A Will on the other hand contains the words of a layman; so 'No technical words or terms of art' be used in a Will, but only that the wording be such that the intention of the testator can be known therefrom.

1. No formality required in Wording

Having regard to the nature and object of the Will, section 71 lays down a rule of universal application. At times a man may have to draw up his Will without sufficient time to consult expert lawyers. He may be in extremis. He may suddenly start on a voyage to a distant place with attendant uncertainties of his return; and before leaving his native land he may desire to make his Will. To insist on particular formalities and the use of technical expressions is to deprive many of the opportunity of making a Will or to render most of the Will inoperative. On that account the Legislature has in its wisdom conferred on the people the privilege of using ordinary lay language, bringing out the intentions of the testator clearly and unmistakeably to be carried into effect after his death.

593 Din Tarini v. Krishna Gopal, 36 Cal 149.
The duty of the Court is only to ascertain the intentions of the testator. The guide to interpret the Will is the Will itself and his intentions have to be gathered from the language of the Will. 594

Oral evidence may be let in to understand the language used in the Will in order to ascertain the intentions of the testator. 595

But no oral evidence can be admitted to show the intentions of the testator.

2. Clear and Unambiguous Words

Where the language of the Will is clear and unambiguous, the ordinary meanings will prevail: Rules of construction have no place in such a case and the plain meaning of the words cannot be controlled by any general expression of intention. 596

The literal meaning of the words must not be disregarded. 597

In the case of a Will, the words must be understood as the testator understood them, without laying undue stress on the words or expressions. 598

Where a Court is once satisfied that the particular words express a particular meaning, although inaccurately, it is just as much bound to adhere to that meaning, as if the most precise and technical expressions had been used. In authorize a departure from the words of a Will, it is not enough to doubt whether they were used in the sense which they properly bear. The Court ought to be satisfied that they were used in a different sense, and ought to be able distinctly to say what the sense is in which they were used.

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594 Bowen v. Louis, (1884) 9 AC 890.
595 See Davidson (in re:), (1949) 2 All ER 551 (where the testator had bequeathed in favour of grandchildren, oral evidence can be let in to show that she had grandchildren of her own; but that she regarded her sister’s grandchildren as her own).
597 Rajeswari v. Khuklina, AIR 1943 PC 121.

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“To understand the language employed the Court is entitled to use a familiar expression, to sit in the ‘testator’s armchair’. When seated there, however the Court is not entitled to make a fresh Will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said—that he was in fact one of those persons of whom Knight Bruce, L.J. said that they spoke as if the language were to conceal their thought.”

It is, of course, true that the intention of the testator must be gathered from the language used in the Will. But where there is ambiguity in that language extrinsic evidence can be admitted to clear up that ambiguity.\(^599\)

3. **Dictionary Principle and Technical Words**

If a particular nomenclature is to be found used by the testator in the Will, then that will be taken as the dictionary from which the meaning of the word used must be ascertained.\(^600\)

If it is clear that the testator has used any word not in its ordinary sense but in a different sense, the word must be construed accordingly.\(^601\)

While the words used in the Will should normally receive their natural meaning, still if it is clear from the Will and the surrounding circumstances, that the testator has used the words in a special sense, it is permissible to construe the Will in the special sense. Thus, normally ‘children’ means legitimate children; still where a testator has only illegitimate children a clause in the Will providing for his children may be construed in the wider sense of including illegitimate children also.

This is known as the ‘dictionary principle’. A testator may make his own dictionary for purposes of his Will and show that he has used words conveying a particular or special sense departing from their normal meaning. It is not that an express definition clause should be provided in the Will.


\(^{600}\) Hill v. Crook, 1873 LR 6 HL 265.

\(^{601}\) Poole v. Poole, 127 ER 334.
When a testator has used words which have acquired a definite meaning, in conveyancing and have for a long time been used in the drafting of Wills and settlement and other like documents with that meaning, it requires a very strong case to justify their interpretation in a different sense.602

4. Same Word Occurring more than Once

The section 86, Indian Succession Act, 1925 runs thus:

"If the same words occur in different parts of the same Will, they shall be taken to have been used everywhere in the same sense, unless a contrary intention appears."

The section applies to Hindus also.

Where a word is used in a document in one sense, the same meaning must be given to it where it appears elsewhere in the document unless it is evident from the context that a different meaning should be put upon it.603

The same words in different parts of a Will should be given the same meaning unless there is some clear indication that the testator intended to use the word a second time in a restricted sense.604

Thus in D'Cruz V. Nagiah Naidu,605 a Will in Tamil gave the devise to testator's "Santhathi" This word was used twice meaning issue but in the later part of the Will was the phrase "aan Santhathi", meaning male issue. So the court accepted the later restricted meaning. Where in the earlier part of the Will full description or the legatee is given and the same name is repeated in another part without the description, the presumption is that it refers to the same person.606

This presumption is very strong disallowing any evidence to indicate that it was a

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602 Harvert (in re:), (1921) 2 Ch 491; (1922) 2 AC 473.
603 Maharajas of Venkatagiri v. Rajeshwar Rao, 49 LW 717; ILR 1939 Mad 622; (1939) 1 MLJ 831.
604 Aghore Nath v. Kamini, 11 CLJ 461; Edyon v. Archeah, 1903 AC 379 (384); D'Cruz v. Nagiah Naidu, AIR 1929 Mad 64; Guran Ditta v. Ram, AIR 1941 Lah 218; Kulsambai v. Khensa Bai, 13 LW 657 (PC); Bishan Singh v. Thakurji, 58 LW 47 (50); Salig Ram v. Charnajit, 11 Lah 647 (PC); AIR 1930 PC 239.
605 AIR 1929 Mad 64.
606 Webber v. Rorbett, LR 16 Eq 515.
different person. Where power of transfer is also conferred it clearly indicates conferral of absolute estate. In a Will "gifts to son and daughter" using the word ‘Arpan’ (I give fully) indicates absolute estates to the devisee. The use of ‘heir’ in gifts to widow and daughter-in-law is to be taken as full estate. So also, is the word ‘owner’ vis-à-vis gift to son and widow.

5. Contrary Intention

This rule does not apply where there is a clear intention to use the same word in a different sense. By force of context the word ‘Malik’ or ‘Owner’ mean a limited estate in one place and absolute estate in another place.

Thus in Punchoo Money Dossee v. Traoylucko, the Will stated “after my death my wife will be the owner (Malik) of my estate and after the death of my wife my daughters shall be the owners (Malik) and they shall have the power of all transfers gifts, etc.” It was held that the Malik wife had a life estate while the Malik daughters took full estate.

This rule in Ridgeway v. Munkittrick, was explained by Lord St. Leonards thus:

“It is well-settled rule of construction and one to which from its soundness, I shall always strictly adhere, never to put a different construction and on the same word, where it occurs twice or often in the same instrument, unless there appear a clear intention to the contrary.”

Within proper limits this is good sense and good law.

608 Bishan Singh v. Thakurji Mangala Nam, (1945) 58 LW 47 (50).
610 Jairam v. Keessewjee, 4 Bom LR 555.
611 Suhashini Dasi v. Ali Bhusan De, AIR 1963 Cal 520 (523); See also Pearey Lal v. Rameshwar Das, AIR 1963 SC 1703 (1705); (1963) Supp 2 SCR 834; (1964) 1 SCJ 85.
613 10 Cal 342.
614 1 Dr & W 84.
615 See Birks (ini re:), (1900) 1 Ch 417.
Jarman, however, has pointed out that there is not much difficulty in following the rule, but to find out where is 'a clear intention to the contrary' is still the vexed question. If we find that the testator's dispositive scheme would be violated by not giving a uniform construction throughout the Will, the argument for its adoption is very strong, where the dispositions of the Will are of a nature not to afford any light, the task of its expounder becomes very embarrassing.

There is another exception to the aforesaid rule. This is posited in Sheffield v. Lord Orrey to the effect that where the same words are used in a Will with reference to different subjects, it is permissible to put a different construction. An additional word or phrase may give a different additional meaning unless the variation is slight. In an Oudh case in one place the word used was 'aulad' while in another 'aulad narina' was used. Consequently different meanings should be drawn for each of them.

A word like Santhathi (issue) embraces also an adopted son.

Generally, however, the Will is to be the dictionary from which you have to find the meaning of the words and expressions used by the testator in the Will.

This rule is applicable to Hindu Wills also.

This section (section 86) has been held to embody a rule of common sense and common knowledge and experience. Whatever may be the position when a man uses the same word in several documents executed on different occasions it is fair presumption to make that a man may not be varying the meaning of a word, when he used it more than once in the same document, that is at the same time, when other contexts and circumstances cannot be expected to intrude on his cognition.

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616 Jarman on Wills, p. 1595.
617 3 Atk 288; See also Fourth V. Chapman I.P. Williams.
618 Jarman on Wills, p. 2146 (7th Edn., Rule XVIII); Cambell v. Cambell, 13 Ves 39.
619 Bhaiya v. Muna Kuar, AIR 1926 Oudh 260.
621 Hill v. Crook, 1873 LR 6 HL 265.
622 Ramanuj v. Manraj, AIR 1935 Oudh 198.
Where the same word 'owner' is used both with reference to the bequest to the son and also to the wife, it means absolute estate in both cases.623

6. Inquires to Determine as to Object or Subject of Will

This section 75 of the Indian Succession Act, 1925 is a rule of construction that a court has a right to ascertain all facts which were known to testator at the time he made the Will and thus to place itself in a testator's position. Evidence to the effect is admissible which shows that person or property actually exist as described in the Will.

So in all cases it is the primary duty of courts to ascertain from the language of the testator what were his intentions and in so doing they are entitled and bound to consider surrounding circumstances, the testator's position, his family relationships etc. As soon as it is settled, the duty of the court to carry out the intentions as expressed and none other.

Generally, legal conscience and judicial determination gets a rude shock when the Will of a native testator comes before the court who is ignorant of proper legal phrases to express his intentions, then the court has to adopt the armchair doctrine to reach at the truth and to carry out his intentions into effect. Sometimes it so happens the phrase used creates a confusion as to whether it is an adoption deed or a Will. In that situation the Court has to labour hard to find out the real intention of the testator from the surrounding circumstances and not from extrinsic circumstances.

7. Interpretation of Words Repeated in Different Parts of Will

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

"Law strictly believe in "construction" of Will rather than its "destruction" unless it is opposed to law, custom or practice. If there are conflicting clauses, effort should be made for reconciliation. If there is repugnancy, the first intention

623 Jairam v. Kessovjee, 4 Bom LR 555; But see Punchoo Money Dossee v. Troylucko Mohiney Dossee, 10 Cal 342.
is to be accepted. Rejection of Will is the last resort when the judicial conscience is pricked."

8. Courts on Construction of Wills

The interpretation or construction of a Will and the ascertainment of the intention of the testator are within the province of the appropriate Court.

The Court of construction exercises a 'judicial function' and not a legislative or creative one.

The function of construing a Will is limited to the interpretation of the language of the testator. It may not re-write or make a Will for the testator, with a view to effect a more equitable and liberal distribution of the estate and even though interested parties are agreeable to it.

The Court must examine the Will and, if possible, ascertain its plain meaning from the language used.

If the meaning is not clear or if there is uncertainty or ambiguity, it is then proper for the Court to resort to established rules for the construction of Wills.

The plain provisions of the Will must be given effect to if they do not violate any rule of law. The Court cannot pass judgment on the wisdom or propriety of provisions of a Will.624

In construing a Will, the skill of the draftsman must be considered.

The following are the guiding principles for ascertainment of such intention:

1. In construing a Will, the intention of the maker of Will must be ascertained, if possible. The guiding star in the construction of a Will is his intention as expressed in the Will.

2. The intention which controls in the construction of a Will, is that which is manifest, either expressly or by necessary implication from the language

624 95 CIS section 586.
of the Will. It cannot be inferred by a mere surmise, conjecture, or supposition as to the intent of the testator.

3. The intentions of a testator are merged in a Will as written.

4. In ascertaining the intention of the testator, the Court should place itself as nearly as possible in his position and his language may be construed in the light of the facts and circumstances surrounding the testator.

5. Consideration may be given to the testator's relation to, or associations with his family, beneficiaries and natural objects of his bounty, their age, condition, dependence or necessities, the mode of life in which his family has been reared and the means provided by him in his lifetime for their culture and happiness, the testator's character and environment, his mode of thought and living and his business operations and methods.

6. A testator may have a general intent and a particular intent and if they conflict the former must prevail.

7. When the Will does not satisfactorily disclose the real intention of the testator, technical rules of construction are to be followed so far as they are aid in determining that intention.625

While interpreting a Will, the court has to endeavour to ascertain the intentions of the testator. This intention has to be gathered primarily from the language of the document which is to be read as a whole. The Court also must consider the surrounding circumstances, the position of the testator, his family relationship the probability that he would use words in a particular sense and many other things which are often summed up in the somewhat picturesque figure. The Court is entitled to put itself into the testator's armchair. But all this is solely as an aid to arriving at a right construction of the Will. The duty of the court is to carry out the intention as expressed and none other.626

625 85 CJS section 591-96.
Where the propounder proved due execution and attestation of the Will, the Court need not decide whether the testator was justified in disinheriting his eldest son and his family. It is not permissible to a Court of probate to consider *aliunde* the terms of the Will to consider whether the relation who had natural and legitimate claim on the testator's bounty have been cut off altogether or not.627

9. **Value of Precedents**

The true way to construe a Will is to form an opinion as to its meaning, apart from decided cases, and then see whether the cases require a modification of this opinion.

Previous decisions are of little weight except in so far as they lay down some rules of construction. Each case has its own facts and no two Wills agree on facts. A different conclusion may be rendered necessary by surrounding circumstances.

When the decision is upon the meaning of words which differ so much from each other, it seldom happens that the words of one Will are a sure guide for the construction of words resembling them of another.628

In applying prior decisions of Courts, the Court has first to examine the Will in question and then put its own interpretation on it, and then decide whether there is any principle derived from decided cases which helps it in verifying and checking up its interpretation. It will be a fallacious and incorrect course for the Courts to, look first at the decided cases on other different Wills and then see how time Will under consideration, resembles or differs from any of them.629

10. **Judicial Decisions—Interpreting other Wills—Utility Interpretation**

In interpreting a Will the Court has to ascertain the intentions of the testator as declared by him and apparent in the words of the Will. The testator conveyed the expression of his wishes in the words employed by him in the document and all the parts of the Will should be construed and read together with

627 Alok Kumar Atch v. Asoke Kumar Atch, AIR 1982 Cal 599.
628 Grey v. Pearson, (1857) 6 HLC 61; Booth (in re:), (1894) 2 Ch 282 (285).
629 Williams (in re:), Metcalfe v. Williams, (1914) 1 Ch 219.
reference to each other, while effectuating the intentions of the testator. As often said, on a question of true interpretation of a Will, decisions on the construction of other Wills are useful only for the limited purposes, in so far as they lay down the principles of law which have to be observed in the construction of Wills. Court should not form any preconceived notions about the intention of the testator, based upon some decision apparently containing similar language, and then enquire, how far the Will in question resembles the Will or Wills referred to in judicial decisions in *M.V. Savitri Ammal v. Secretary, Revenue Department, Government of Madras*. Decisions with regard to other Wills can only give guidance in the application of general principles by reference to instances. The best way of construing a Will is to read the Will as a whole and form an opinion as to its import and then see whether the intention could be sustained in the light of the general principles found in decided cases. It has to be seen whether the estate inferred on the reading of the Will as a whole is legal and whether the opinion formed as to its import require modification in the light of decisions.

11. **Construction against Inconsistency**

The Court will construe a Will so as to reconcile repugnancies, incongruities or inconsistencies. This may be done by the process of *reduction ad absurdum*.

The Court, no doubt, cannot make a Will for the testators. But it must ascertain his expressed intention. If the grammatical meaning produces clear inconsistency in the Will, the Court is at liberty to depart from the natural grammatical meaning, strike out words or supply them.

12. **Presumptions in Construction**

In the construction of Wills the Court must keep in view four cardinal presumptions:

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632 Hicks v. Salitt, 43 ER 307.
633 Evans (in re), Public Trustees v. Evans, (1920) 2 Ch 304.
There is always a presumption against intestacy. Whenever possible, Courts will prevent intestacy.634

There is a presumption of legality of a Will. The Court should be inclined to believe that the testator had no intention to transgress any law.635

Where a Will has been shown to be duly executed and attested, there is a presumption that the testator had knowledge of the contents and approved of the same.636

There is a presumption that the testator intended to benefit the members of his family rather than strangers.637

13. Interpretation of Will and Judicial Conscience

Though Part VI of Indian Succession Act, 1925 provides rules of law and rules of construction regulating Wills, sections 74, 75 and 86 are the nerve centre of the interpretation of Wills. Interpretation of Will, in legal parlance, is the preservation of the solemnity of the Will without ignoring the suspicious circumstances weighing it in the balance of testator's intention as to in what manner he wanted his property to devolve after his mortal frame decays and the court is bound to look to every molecule of the Will under "Arm chair" doctrine leading to the satisfaction of judicial conscience. Judicial pronouncements as precedents do play a big role in addition to the Court's own assessments as the court does act as a truth seeker.

It is held that the onus of proof rests squarely on the person propounding Will in the light of section 63 of the Succession Act and that wherever suspicious circumstances exist, they must be dispelled to the satisfaction of the court as to the genuineness of the Will executed. These rules are based on sound judicial principles and on ground of public policy, as the Will often, if not always, comes under chatting only when, the testator has already departed from this word and cannot, therefore, assist the court enquiring into its genuineness in any manner.

634 Ashrafali v. Mahomedalli, AIR 1947 Bom 122.
635 Leach v. Leach, 63 ER222.
636 Fulton v. Andrew, (1875) 7 HL 448.
637 Farrant v. Nichols, 50 ER 370.
If the propounder takes a prominent part in the execution of the Will which confers substantial benefits on him, it is in itself a suspicious circumstance attending the execution of Will and court should proceed in a vigilant and cautious manner. So the Will has to be read in the light of sections 63 and 74 of the Indian Succession Act. 1925.638

It is a case under section 74 of the Succession Act, 1925 wherein Order 6, rule 1 was discussed. There was a challenge to the genuineness of the Will. There was no plea as to identity of land which was subject-matter of Will. No issue was framed as to whether suit land was covered under Will. Held, that, the order of the lower Court is not proper as Court is not to go beyond pleadings.

In the Will, the words used are, “occupy the..... premises absolutely”. It implies that the brother would have right to occupy said premises in its entirely had sister pre-deceased him. A right to occupy is not right to own property. The words, “give”, “bequeath” and “devise” indicate vesting of title in property absolutely in favour of persons mentioned in aforesaid clause. Property had been given to brother and sister in equal share.

XIV. WHAT MAY BE DISPOSED OF BY WILL

The property passing under the Will is as it is at the time of the death of the testator. [Section 90, Indian Succession Act.]

Mere possessory title can be devised under the Will.639

A power of disposition over property given to a person may be exercised by the donee of the power, by deed or Will.640

A purchaser who has made, but not signed, a contract for the purchaser of real estate, the terms of which are proved, and which is signed by the vendor,


639  Asher v. Whitlock, (1865) 1 QB I; Clarke v. Clarke, (1868) IR 2 C.L. 395; Caldet v. Alexander, (1900) 16 TLR 394; Re., Cresswell, (1883) 24 Ch D 102.

640  Re., Lawry, 91938) Ch 318.

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has a devisable interest. A seller who has an equity to have the sale set aside has a devisable interest. 641

If a power is exercised by a Will, it must be executed in accordance with the requirements of the law for a valid Will. 642

Any Hindu may dispose by Will any property in accordance with the provisions of Act, and the share of deceased out of joint Hindu family of these coparceners could be disposed off by a Will. 643

1. Shebaitship—If can be Disposed of by Will

The word Will is defined in section 2(h) of the Indian Succession Act to mean the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. It is, therefore, indisputable that the instrument which is sought to be propounded as a Will must contain the legal declaration of the intention of the testator with respect to his property. If what is sought to be disposed of by the deceased in question is not property the instrument cannot be regarded as a Will. The shebaitship of the temple, where it is not merely a religious office which could not be regarded as property for the purpose of civil law, but carries as an inalienable incident the right to appropriate the income of the temple, it is a religious office which brings income to the holder as a necessary concomitant of the office, it will be as much property as any other property known to law. If a shebaitship were merely a religious office without any beneficial interest in the endowed property and not producing any income, it might not have been possible to regard shebaitship as property, but when it entitled the holder of the office to the income of the endowed property, as also to the offerings which might be made to the deity, the shebaitship must be regarded as property. 644

Where two beneficiaries of the Will of a deceased Mahant, the shebait, applied jointly as chelas of the said testator for probate, and one of them died

641 Shimp v. Goby, 22 LJ Ch 352.
642 Re., Barnett, (1908) 1 Ch 402.
during the proceedings, his personal heirs cannot be substituted as his legal representatives, as they cannot be said to be the chelas of the deceased shebait.\footnote{Mahant Murlidhar Das v. Ram Charan Das, 1987 MPLJ 734.}

A shebaiti right can be transferred by Will according to the facts and circumstances of a case. The distinctive feature of a shebaiti right is that it cannot be absolutely alienable like any other property inasmuch as it is an office enjoining certain religious and spiritual duties to perform. Similarly as there is an element of property also in the concept of shebaiti right the view that it cannot be transferred at all can no longer be accepted. Thus, unless there is an absolute bar under Hindu Law or an express prohibition in the deed of religious endowment, there should not be any limitation on the power of a shebait to transfer his shebaiti right by gift or by Will. The general limitations under which such transfer is permissible may be set out as follows:

(a) The transfer of a shebaiti right is permissible if such transfer is not contrary to the intentions of the founder as expressed in the deed of endowment unless an ancient or reasonable custom or usage has been followed to the contrary.

(b) Where there is a perpetual or hereditary line of succession of shebaitship prescribed by the founder in the deed of endowment a particular shebait cannot change the line of succession by any deed of transfer unless the shebait transfers the totality of his rights in favour of the succeeding shebait or shebaits during his lifetime.

(c) A transfer of shebaiti rights is also permissible for the benefit of the idol or the deity or for imperious necessity under special circumstance.\footnote{Sonabati v. Kashi Nath Drey, AIR 1972 Cal 95 (102) (Masud, J.), Shambhu Charan Shukia v. Thakur Ladli Radha Chandra Maadan Gopaiji Maharaj, AIR 1985 SC 905: 1985 (3) SCR 372: 1985 (2) SCC 524.}

2. Property in Dead Body

A person has no property in the body after death and direction as to its disposition after death is not valid.\footnote{165}
A testator has power to devise a house to one legatee with a right of easement of light and air over another house which he bequeathed to another. The devise of a house also operates as an implied grant of the house and the law imputes an intention that this easement of light should pass with the house by virtue of the grant or devise.648

‘Interest’ of whatever kind may be bequeathed under a Will.649 It may be a life interest, or650 even contingent interest.651

Where there is a bequest under a Will, the bequest takes effect only after the death of the testator. In the nature of things there cannot be a personal covenant under a Will which is entirely a matter of mutual agreement and totally inconsistent with the scope of a Will.652

3. What Passes under a Will? English Rule—Under Section 8, Transfer of Property Act

Before 1926, English law required, as a general rule, the use of technical words to pass a fee simple by deed, though after the passing of the English Wills Act, 1837, a devise of property to A without words of limitation sufficed to pass the fee simple or the whole estate which the testator had power to dispose, unless a contrary intention was indicated under the Will.653

The Law of Property Act, 1925, section 130(2) has now dispensed with the technical requirements of the previous law.

In regard to a transfer of property, inter vivos, section 8 of the Transfer of Property Act provides that "unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee, all the interest which the transferor is then capable of passing in the property." It is a rule of universal application in India and is applicable to transfers by Hindus also.

648 Phillips v. Law, (1882) 1 Ch 47.
650 Rockford v. Hackman, 68 ER 597.
651 Egerton v. Brownlow, 10 ER 359; Re., Cresswell, (1883) 24 Ch D 102.
653 See section 28, Wills, Act, 1837; Re, Arden, 1935 Ch 326.
The corresponding provision regarding bequests under Wills is contained in section 95, Indian Succession Act, 1925. It runs thus:

"95. Bequest without words of limitation—Where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the Will that only a restricted interest was intended for him."

This section is included in Schedule III to the Indian Succession Act, as applicable to Hindus. The rule is a rule of good sense; it applies to Hindus in regard to transfers, *inter vivos*, and there is nothing to prevent a Court from following this rule and giving effect to Hindu Wills.654

Extraordinary circumstances are not relevant except where there is any ambiguity and it becomes necessary to explain the Will.655

It should be noted that what passed to this transferee is only the entirety of whatever interest that the transferor or testator has. A legatee or a transferee cannot claim an interest higher or larger than the transferor or the testator had.656

Where the testator had only the interest of a lessee or mortgagee, the legatee can have only the same interest.657

Nor can the rights and titles of third parties in property bequeathed be in any manner affected by what is conveyed to the legatee under the Will.658

A grant or devise of limited interest (i.e., less than what the transferor has) is different from grant of an absolute interest subject to conditions. Such conditions may be—

1. either repugnant to the nature of the interest granted; or
2. restricting the enjoyment of interest by the grantee; or
3. conditions precedent; or
4. conditions.

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655 Suresh Chandra v. Surendra Chandra, AIR 1917 Cal 663.
656 Muthukrishna v. Sankara Narayana, AIR 1915 Mad 447.
657 Asghar v. Mahomed, 50 Cal 556.
658 Ramraonarayan v. Rustum Khan, 26 Bom 198.
They may be void for various reasons, as being illegal, immoral or as opposed to policy of the law. They may either themselves be void, without affecting the validity of the grant or devise, or render the grant or devise also void.

If property is bequeathed absolutely under a Will, but conditions are supreadded absolutely restraining the transferee, or restricting the enjoyment of it, such conditions are void.\(^{659}\)

Where there is a gift of property absolutely with a proviso for forfeiture and a gift over if the legatee attempts to alienate the property or becomes an insolvent, or dies without alienating it, the condition and gift over will be void.\(^{660}\)

A condition restraining alienation though for a limited time is void.\(^{661}\)

But a condition restraining alienation to a particular person or not to sell out of the family is not void.\(^{662}\)

A testator bequeathed an absolute interest in favour of his son, and added that in case the son or the son of that son has no child, the property shall go to a temple. The Privy Council held that the absolute estate granted to the son cannot be subject to a condition that it shall be divested at his death without issue.\(^{663}\)

4. **There are, However, Exceptions to the Rule**

There are following exceptions to the rule:

1. Where the restriction is only against disposing of the legacy to a particular person and not to all generally.

2. Where the restriction is so expressed as to be a limitation, in other words, where property is granted absolutely, there cannot be a restriction in its enjoyment. Where, however, what is granted is only a restricted interest, this rule has no application. A disposition to a man, until he shall become

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660 Re., Ashton, (1920) 2 Ch 481.
661 Re., Rosher, (1884) 26 Ch D 801.
662 Re., Macleay, 1865 LR 20 Eg 622.
663 Sri Subramaniaswami Temple v. Ramasami, AIR 1950 PC 32.
bankrupt, and after bankruptcy is over, is quite different from an attempt to
give it to him for life, with a proviso that he shall not alienate it.664

(3) A forfeiture clause will be valid, if it is to take effect before the beneficiary
becomes entitled to the possession of the interest, as where the
beneficiary becomes a bankrupt within the year of testator's death.665

(4) When it was possible for a Hindu to authorise his widow to adopt a son
who would become absolute owner, an earlier gift to the widow with
authority to her to adopt would confer on the widow only a limited estate.

(5) Where under the same Will, property is given to A, and by a later clause a
gift in remainder is made to B, A takes only a life estate.

(6) Where the legacy is by way of provision for maintenance of the grantee it
may be only a restricted interest.666

The latest case law analyse the position as covered by section 95 of the
Indian Succession Act, 1925.

It is a case where the testator having wife, five sons and one daughter,
made a bequest of all movable and immovable assets in favour of his wife and
also expressed concern in Will about his two sons. Bequest of assets made in
favour of those of two Sons in case wife dying intestate and without disposing of
those assets. Bequest made in favour of wife cannot be said to be absolute only
life estate is created in her favour.

5. **No Express Words of Inheritance Necessary**

Where an estate is given to a person simply, without express words of
inheritance, it would, in the absence of conflicting context, carry by Hindu Law,
an estate of inheritance. Even an imperfect description as an estate of inheritance will suffice to pass an estate of inheritance.\textsuperscript{667}

Words 'becomes owner (malik)' would pass a heritable estate unless curtailed by context, without further usual customary words like "from generation to generation", etc.\textsuperscript{668}

The word 'malik' certainly connotes full ownership if there is nothing in the context to indicate a contrary intention.\textsuperscript{669}

As regards gift to a Hindu female the trouble regarding this question arose out of a decision of the Privy Council in Mohamed Shumsool Hooda v. Shewakram.\textsuperscript{670} In that case, dealing with a bequest of property by a Hindu in favour of his daughter-in-laws the Privy Council made the following observations:

"In construing the Will of a Hindu, it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family, and it may be assumed that a Hindu knows that as a general rule, at all events women do not take absolute estate of inheritance which they are enabled to alienate. Having, reference to these considerations together with the whole of the Will, all the expressions of which must be taken together without any one being insisted upon to the exclusion of others, their Lordships are of opinion that the two Courts in India, who both substantially agree on the point, are right in construing the intention of the testator to have been that the widow of his son should not take an absolute estate which she should have power to dispose of absolutely, but that she took an estate subject to her daughter's succeeding to that estate."

\textsuperscript{667} Rameshwar v. Lachmim, 31 Cal 111; Vallabdas v. Gordhan Das, 14 Bom 360.
\textsuperscript{668} Jotiram v. Bai Diwali, AIR 1939 Bom 154; Ram narayan v. Ram Saran Lal, 46 Cal 683 (PC); Pratap Singh v. Agar Singh, 43 Bom 778 (PC).
\textsuperscript{670} 2 IA 7: 22 WR 409.
The case of *Bishun Singh v. Thakurji* is a novel one. The testator left some properties to be inherited by his widow as his heir on his death. But by the Will he also bestowed on her a fuller power of transfer. As such, the widow had only a limited estate which devolved on her husband's heirs on her death; at the same time she was unable to exercise full powers of alienations conferred under the Will. Their Lordships said that such power did not conflict with the principles of Hindu law and the intentions of the testator should be given effect to.

The High Court of Andhra Pradesh in *Raja Malraju v. Rani Rajya Lakshmi*, summarised the rules of construction of bequests to a Hindu female as follows:

1. *Prima facie,* a gift or bequest to a female may be construed in the same way as a gift to a male; the rules are the same for gift to males as to females.

2. All the parts of the Will must be construed in relation to each other so as to form one consistent whole.

3. A gift over on a future contingency in defeasance of an earlier bequest or gift, renders the earlier bequest limited, but the gift over must be valid, without being repugnant to the earlier clause or without being void or unequivocal.

4. The prior gift liable to be defeated by a contingency which never happens, will become absolute.

A bequest by a Hindu father to be enjoyed by the daughters from generation to generations from son to grandson, confers an absolute estate on the daughters.
6. **Will Executed Prior to Hindu Succession Act—Testator Dying After it—Disposition of Coparcenary Interest—Validity**

The Privy Council in *Rani Krishna Kumari Devi v. Bhaiya Rajendra Sinha*,\(^{675}\) expressed the view that by a reference merely to the well-known rule that the Will of the testator without any intention thereto be found of any contrary intention must in relation to the property comprised in it be regarded as speaking from his death, and its validity with reference to the devise of any particular property thereby made must depend upon the testator’s statutory or other lawful disposing power over that property at that time. As the Hindu Law stood prior to the 17th June, 1956, no member of a Hindu joint family could dispose of his share in the ancestral or family property by Will. The reason for this was that at the moment of death the right of survivorship would be at conflict with the right by devise and title by survivorship being prior to death takes precedence to the exclusion of that devise. If a coparcener makes a Will of his share of the coparcenary property and subsequent to the execution of the Will, a son is born or adopted by him, the Will becomes invalid. But where a son born or adopted, predeceases the testator, the Will speaks as from the date of the death of the testator and its disposition if then it is not contrary to law will be enforced. This position is made clear in a decision in *Bodi alias Laksmakka v. Venkataswami Naidu*.\(^{676}\) The said decision lays down that a Will executed by a Hindu testator disposing of his ancestral property is not revoked in law by reason of the birth subsequent to the execution of the Will of a son who died before the testator. Thus the validity of the dispositions made under the Will is to be decided with reference to the date of the death of the testator.\(^{677}\)

The Supreme Court also observed in *Raghawamma v. Chenchamma*,\(^{678}\) as follows:

"A Will speaks only from the date of death of the testator. A member of an undivided coparcenary has the legal capacity to execute a Will, but he cannot

\(^{675}\) 56 IA 156.
\(^{676}\) 58 Mad 369.
\(^{678}\) AIR 1964 SC 130.
validly bequeath his undivided interest in the joint family property. If he died as an undivided member of the family, his interest survives to the other members of the family, and therefore, the Will cannot operate on the interest of the joint family property. But if he was separated from the family before his death the bequest would take effect.

7. **Oral Will by a Hindu after the Indian Succession Act—Validity**

Section 57(c) of the Indian Succession Act has made the Act applicable to all Wills executed by a Hindu after 1st January, 1927. Section 63 of the Act makes it obligatory in the case of unprivileged Will that the Will should be in writing and that it should be signed by the testator or his mark affixed or it should be signed by some other person in the testator's presence and by his direction and, further, that it should be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark into the Will, or has seen some other person sign the Will in the presence or by the direction of the testator, or has received from the testator a personal acknowledgment of his signature, or mark or of the signature of such other person. It is clear from this that after 1st January, 1927 there cannot be oral Will by a Hindu.

8. **Bequest by a Hindu Ancestor to his Descendants**

The question whether property bequeathed by a Hindu ancestor to his descendant is self-acquired property in the hands of the legatee or ancestral has been a vexed one. The law relating to the same is now authoritatively laid down by a Supreme Court of India.

A Hindu father governed by *Mitakshara* law has full and uncontrolled powers of disposition over his self-acquired property. His male heir cannot interfere with these rights. The father is not only competent to sell his self-acquired property to a stranger without the consent of his sons, but he can also make a gift to one of his sons to the detriment of another. He can even make an unequal partition among his sons.

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The interest which the son takes in the self-acquired property of his father received by way of bequest from him, in so far as his own son is concerned, cannot be said to be always of the nature of ancestral property so as to confer a right by birth on the sons of the donee also. To find out whether such property is or is not ancestral property, the relationship as well as the mode of transmission must be looked into. It will be ancestral if the donee got it only by virtue of his being a son or the ancestor. It is competent for the father to expressly provide that he makes the gift for the exclusive benefit of the donee or for the benefit of the branch of the family. If there are no clear words, the question would be one of construction and the Court must have to collect the intention of the donor from the language of the donee in the document taken along with surrounding circumstances.

If it is clear that the testator certainly wanted to make a disposition of his properties in a different way from what would take place in case of intestacy, and vests the sons to take as absolute self-acquired properties, prior decisions of the High Courts laying down varying views do not require our attention subsequent to the decision of the Supreme Court.

In Sevugapandia v. Thyagasundaradas Thevar, a zamindar executed a Will; in 1895 and gave his properties to his son who “should hold and enjoy the same with absolute rights and from generation to generation.” It was held that the son took the property as separate property and not as joint family property.

**XV. WILL MUST BE CONSTRUED AS A WHOLE**

The Court is under a duty to find out the intention of the testator by construing the Will.

The intention of the testator has to be ascertained and gathered from the language used by the testator who has conveyed his wishes by the words used in the Will.

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The meaning attached to the words by the testator has to be ascertained by reference to the surrounding circumstances which must, therefore, be taken into consideration by the Court interpreting the Will.

But the meaning of any particular clause must be ascertained by considering the language of the particular clause alone.683

The meaning of the particular clause has got to be gathered from a conspectus of the entire instrument so that parts of the Will may be construed with reference to each other and it is only after reconciling and harmonising the different parts that a consistent and coherent intention can be inferred.684

The construction must be consistent with the general tenor of the Will.685

The whole scheme of the Will must be kept in mind in construing words and phrases, and general words or expressions in one part of the Will may be controlled or limited in their application by language in another part. However, a clearly expressed intention in one part of the Will should not be curtailed or controlled by a doubtful expression in another part of Will.686

It may also be that the various clause in a Will are entirely independent of each other, each dealing with a particular subject with an apparent design to connect them all. In such cases the various parts must be considered and construed separately and with reference to each other.

1. Primary Rule

Anyhow the primary rule of construing a Will is that the meaning of any clause in it is to be collected from the entire instrument and all its parts are to be construed with reference to each other.

The Will must be read as a whole.687
The maxim of the law is that a man can leave only one Will. It may be that a man leaves more than one Will or more than one Will and one codicil. In all these cases the Wills and codicils ought to be construed as a single document.688

This rule is stated as Rule VII by Jarman in Chapter on General Rules of Construction:689

"VII. That all the parts of a Will are to be construed in relation to each other, and so as, if possible, to form one consistent whole but, where several parts are absolutely irreconcilable, the latter must prevail."

The former portion of the rule is incorporated in section 82, Indian Succession Act, 1925, which runs as under:

"82. Meaning of clause to be collected from entire Will.—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.

The section applies to Hindus etc. Langham v. Sanford,690 posits ‘But the rule which sacrifices the former of several contradictory classes is never applied but on the failure of every attempt to give to the whole such a construction as will render every part of it effective.’ To attain this object the local order of limitation is disregarded, if it be possible, by the transposition of them in order to deduce a consistent disposition from the entire Will.

Where parts of a Will contradict each other, a genuine attempt should be made to reconcile apparent inconsistencies. If they are irreconcilable the last clause of the Will dealing with the particular disposition of the properties should be deemed to reveal the real intention of the testator.691

It is proper to accept that construction which would give a consistent interpretation on all clauses in preference to that which leads to inconsistent results

689 Jarman on Wills, 8th Edn., p. 2069.
690 19 Ves 641. See Jarman on Wills, 7th Edn., p. 546, citing Blamire v. Geldart, 16 Ves 314. See illustration (i) to section 82.
691 Sansar Chand v. Durga Dasi, AIR 1934 All 93 (94) (where Cls. 14 and 15 were read together). Also Kanhaiya Lal v. Hira Bibi, 15 Pat 151.
The Tagore v. Tagore case posits that the true mode of construing a Will is to consider it as expressing in all its parts, whether consistent with law or not, the intention of the testator and to determine upon the reading of the whole Will whether, assuming the limitation therein mentioned to take effect, an interest claimed under it, was intended under the circumstances to be conferred.

The Privy Council pointed out that the plain language of a covenant cannot be destroyed by the use of different expressions in other portions of the document.

The words in a Will ‘Santan Santathi’ mean only children and not heirs. May be words like ‘Putra Poutradicromay’ and ‘Warihoncromay’ indicate a devise to heirs but since at the end of the Will a clause limits the earlier dispositions and gives a limited bequest to children and not to heirs.

The rule contained in section 82, Indian Succession Act has to be studied keeping the provisions in sections 78, 83 to 87 and 95 constantly in view.

The Supreme Court laid down the rule in Ramachandra Shenoy v. Hilda Brite thus: “It is one of the cardinal principles of construction of Wills that to the extent legally possible effect should be given to every ‘disposition contained in the Will unless the law prevents effect being given to it. Of course, if there are two repugnant provisions conferring successive interests, if the first interest created is valid, the subsequent interest cannot take effect but a court of construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the Will. It is for this reason that where there is a bequest to A even though it be in terms apparently absolute followed by a gift of the estate to B absolutely ‘on’ or ‘after’ or ‘at’ A’s death, A is prima facie held to take a life interest and B, an interest in remainder, the apparently absolute interest of A being cut down to accommodate the interest created in favour of B.

Panchu Gopal Sadhu Khan v. Kunja Behari Goswami, AIR 1957 Cal 150.
Panchu Gopal Sadhu Khan v. Kunja Behari Goswami, AIR 1957 Cal 150.
“Quite a number of authorities were cited by learned Counsel on either side but in each one of these we find it stated that in the matter of construction of a Will authorities or precedents were of no help as each Will has to be construed on its own terms and in the setting in which the clause occur. We have therefore not thought it necessary to refer to these decisions.”

The Will has to be read as a whole. If the dominant intention is to restrict an absolute grant, the duty of the court is to see if the restriction is good and valid. To enable this, the whole Will as also the codicil has to be considered. If the restriction is good, the estate is not absolute. 697 A restriction that will allow alienations except by a mortgage is void as that is repugnant to the power of alienation. An absolute estate cannot be denuded by a clause that directs enjoyment in a particular way. The direction is void for repugnancy. 698 If in the prior clause the testator gave his wife an absolute estate and in a later clause she is restrained from alienating the property the restraint is void. 699 In this case the effect of sections 87 and 95 of the Indian Succession Act were also considered. Even where a life interest is granted, if there is a restrictive clause preventing alienating his life interest, the repugnant clause will be void. 700

The latter part of Rule VII of Jarman is contained in section 88 of the Indian Succession Act:

“88. The last of two inconsistent clause prevails.—Where two clauses or gifts in a Will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

2. Indian Decisions

It is common in Hindu Wills to find that a testator conveys property to A absolutely, and by the same Will in a later clause, he gives it to B. The question has come up before the Court as to how to give effect to the Will. It may be that the subsequent devise to B is totally repugnant to the earlier devise; or it may be

697 Administrator-General of Madras v. White, 13 Mad 379 (381).
699 Jagat Singh v. Sangat Singh, AIR 1940 PC 70.
that subject to rights given to B, A takes the absolute interest, or subject to certain rights of A, B takes absolutely.

Bequest of the same property as an absolute grant to another, when the testator has intended to confer an absolute estate on the first taker, is void of repugnancy.701 Likewise, restrictions by way of alienations or enjoyment on what has been clearly given absolutely are void.702

It is, however, possible for the Court to infer on a proper construction of the Will, that the dominant intention of the testator was to pass to a number of persons as life estates.703

Again on a proper construction of the Will, the first absolute estate may have been lawfully terminated and an absolute estate may be granted in favour of the second grantee.704

But a gift over on the death of the first grantee is absolutely void.706

When there are two Wills, they ought to be construed together unless the latter one revokes the former expressly or impliedly.706 In Papammal v. K. Kuppuswamy707 there were two dispositions, the first conferring an absolute estate and the second a gift over after the life-time of the donee of the estate. It was held that in such cases the language of the Will has to he studied to find out the testator’s intention. As the latter devise in favour of grandchildren was absolute, the interest which the first defendant took under the Will was construed as a limited interest.

706 Ram Charan v. govinda, AIR 1929 PC 65 (68). See also Chinmappa Pillai v. Kailasam Pillai, 41 MLJ 661; Ahronee Shemail v. Ahmed Omer, AIR 1931 Bom 533 (536).
707 AIR 1973 Mad 21 (23, 24).
3. **Absolute Interest Cut Down to Limited Interest**

A testator may give property to A absolutely. A gift over following an earlier gift is taken as presumptive evidence of grant of only a limited interest previously. The later recitals may clearly show that the testator’s real intention was to grant a limited interest to the first taker.708

When the testator took care to indicate that the properties without any diminution even after his wife’s lifetime should go to each of the daughters, it should be presumed that it was clearly in his mind that the wife’s estate was only to be a limited estate or life estate and not an absolute one.709

Again clear dispositive words of bequest conferring an absolute estate are often controlled and restricted by other clauses in the Will cutting down the absolute character of the bequest. Such restrictive clauses cannot be construed to be a mere repugnancy and therefore, treated as void.710

When the intention of the donor or testator is to maintain an absolute estate conferred on the donee but he adds some restriction in derogation of the incidents of such absolute ownership, the clause is a repugnant one and is, therefore, void. If, however, the intention expressed, or to be necessarily implied, is to extinguish the absolute estate on the happening of a contingency and where the effect of the termination of the said absolute estate would not be in violation of any rule of law, the clause is a defeasance clause and would operate according to its tenor.

One circumstance that generally cuts down an absolute estate to a life interest is the presence of a gift over in unmistakable terms, which is not a mere gift by way of defeasance.

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709 Lakshmio Ammal v. Allauddin Sahib, AIR 1962 Mad 247 (249); (1962) 1 MLJ 187.

In certain circumstances the absolute estate is cut down to a life-estate with power of alienation. 711

4. **Entire Will must be Construed**

Section 85, Indian Succession Act, 1925, says:

“No part rejected if it can be reasonably construed.—No part of a Will shall be rejected as destitute of meaning if it is possible to put a reasonable construction upon it.”

It is applicable to Hindu Wills also.

It is a well-recognised rule of construction that it should not be imputed to the testator that he had used words in a Will unnecessarily and as far as possible, a meaning must be accorded to every word in a Will. 712

This rule applies to parts of the same Will or a Will and codicil. 713

The Court ought to ascertain the intention of the testator from the entire Will. 714

Where a testator bequeaths all his properties to his son, but later on there were provisions for the worship of certain deities, it was held that the two clauses must be read together. 715

Words having clear and definite operation in the testator’s property cannot be struck out of the Will. 716

Every word in the Will must be given effect to provided effect can be given to it consistent with the general intent of the entire Will. 717

No clause in a Will must be ignored as redundant or contradictory. 718

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713 Belyea v. McBride, AIR 1943 PC 43.
714 Nowroji v. Putlibai, 37 Bom 644.
716 Hall v. Warren, (1861) 9 HL Cas 420.
717 Nusserwanji v. Gulcher, AIR 1946 Bom 134.
A testator bequeathed his properties to his daughter absolutely with full powers of alienation. In a later clause he recited, "if she had no issue, she shall enjoy the same till her lifetime and after her death, the same shall pass on to my other daughters having heirs".

It was held that on a reading together of all the clauses in the Will, there was an absolute estate to the daughter subject to defeasance in the event of her dying without issue.\(^{719}\)

It must be noted that the presumption of law is against intestacy.\(^{720}\) So it is against partial intestacy.\(^{721}\) So a testator is presumed to have disposed of all his property through the Will at the time of his death, rather than at the time of the Will. The courts should avoid construing a prohibition of adoption even though the Will purports to dispose of entire estate.\(^{722}\) The test is "was the adoption so contrary to directions of the testator as to have been prohibited by him."\(^{723}\)

Sometimes the intention of the testator in writing satisfies the legal requirements but the facts stated therein create circumstances or situation which needs interpretation so that the testacy is established and in order to establish the real intention, inspite of some vagueness or ambiguity, the Will as a whole has to be read so that a harmonious balance is created among all the averments made in the Will.\(^{724}\)

Sections 82, 85 and 88 cover the primary rule that Will as a whole is to be read to construe the meaning of the clause and its relation to other averments.

It is a case under section 82 of the Succession Act as the issue involved is the construction of Will, the trial court held that the Will was genuine and on appeal the High Court reversed the order—The Apex Court held that the High


\(^{720}\) Bharadwaja v. Kolundavelu, 29 MLJ 717 (720).

\(^{721}\) Abdul Sakur v. Abu Bakkar, AIR 1930 Bom 190 (197): 54 Bom 358.


\(^{723}\) Shivaappa Gurappa v. Virabhadra Shivarudrappa, AIR 1943 Bom 423.

Court held the view without adverting to all the various aspects considered by the trial court, and that the view taken by the trial Court appears to be reasonable.

It is case covered by section 74 and 88 of the Succession Act, 1925. In this case the wife was given a limited estate and the son absolutely so the wife cannot be competent to execute partition deed as later part of the Will confers limited estate and the later part shall prevail.

XVI. LEGACIES

A gift of property under a Will is generally referred to either as a bequest or a devise or a legacy. In English law, the word “devise” was used to convey a gift of real property, while a gift of personal property is referred to generally as a legacy or a “bequest”. These words are often interchangeable and are used indiscriminately to refer to any gift under a Will.

In its legal sense, a “legacy” is a disposition of property by Will, and is not infrequently used in a Will to use gifts of both movable and immovable property under a Will as distinguished from gift *inter vivos* in which actual complete delivery during the donor’s lifetime is essential.

A gift *mortis causa* resembles a legacy in some respect in that it is made in contemplation of death, is ambulatory, incomplete and revocable at the option of the donor at any time during his life. It differs from a legacy; in gift *mortis causa* possession must be delivered to the donee and retained by him during the life of donor, whereas in the case of a legacy, the possession remains with the testator until his death.

Depending on their nature, legacies are classified and the rights of the legatees are determined by the character of the legacy. The fundamental and controlling factor in determining the nature and character of a legacy is the intent of the testator.

There are three kinds of legacies.
1. General Legacy

General legacy is a bequest of something or money not necessarily part of the testator's personal estate, and not distinguished from all others of the same kind.

"I give my diamond ring", is a general legacy which may be fulfilled by the handing over of any ring of that kind.

Normally, the effect of a general legacy of any quantity of a particular stock is a direction to the executors to buy that amount of stock for the legatee or pay him the value thereof.725

A general bequest may or may not be part of the testator's property. A general legacy has no reference to the actual state of the testator's property. If the testator leaves sufficient property, the legatee shall have that which is given to him.726

Though a general legacy of a horse or a watch is valid, yet there must be indication of its kind of value. Otherwise, the legacy will fail for uncertainly.727

The Courts, however, Will do its utmost to maintain the legacy.728

A general legacy is one which may be satisfied out of the general assets of the testator's estate without regard to any particular fund, thing or things and does not amount to a gift of a thing or part of the estate distinguished and set apart from the testator's property and capable of precise identification of a gift.

Section 171, Indian Succession Act, 1925, declares as follows:

"171. Bequest of things described in general terms—If there is a bequest of something described in general terms, the executor must purchase for the legatee what may reasonably be considered to answer the description.

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725 Williams on Executors, p. 748 (12th Edn).
726 Re., Borne, 1944 Ch 190.
727 Bothamley v. Sherson, 1875 LR 20 Eq 304 (308).
728 See Jarman on Wills, 8th Edn., p. 1039 (f.n.).
Illustrations

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

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

This section is applicable to Hindus as well.

This rule does not apply to a specific legacy.729

Williams adverts730 to the instance of a gift of ‘my grey horse’ which can pass as a black horse if only the testator intended to pass the same by that description but if the testator had no horse at all, the executor is not bound to buy a "grey horse".

2. Specific Legacy

A legacy is specific when it is a bequest of a specified part of the testator’s personal estate which is so distinguished.

"I give the diamond ring presented to me by A’ is a specific legacy. It can only be fulfilled by giving the specific thing. The specific legacy may fluctuate between the date of the Will and the death of the testator.731

A testator may give a specific legacy of “my brown horse”. It may be the testator sells it before his death and then buys another brown horse. The words of the Will are of sufficient amplitude as to include the later brown horse in the legacy .The testator had a brown horse when he died and it will form the subject of the legacy.

A specific legacy is something which a testator identifying it by something of sufficient description and manifesting an intention that it should be enjoyed in

729 Evans v. Tripp, (1821) 6 Mad 91.
730 Williams, 12 Edn., p. 747; Evans v. Tripp, (1821) 6 Mad 91 (92).
731 Castle v. Fox, 1871 LR 11 Eq 542.
the state and condition indicated by the description, separates it in favour of the particular legatees, from the general mass of his estate.\footnote{732}

In the case of a specific bequest it must be part of the testator's property itself. That is the first thing. In the next place, it must be a part emphatically as distinguished from the whole. If it satisfied both the conditions then, it appears to satisfy everything that is required to treat it as a specific legacy.

Section 142 of the Indian Succession Act, 1925, defines a specific legacy thus:

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

(i) A having Government promissory notes for 10,000 rupees, bequeaths to his executors Government promissory notes for 10,000 rupees in trust to sell for the benefit of B The legacy is specific.

(ii) A having property at Banaras, and also in other places, bequeaths to B all the property at Banaras. The legacy is specific.

3. Demonstrative Legacies

A demonstrative legacy is a legacy of quantity, out of a large source such as a certain sum of money out of a particular fund.

If the source is not adequate, the gift is intended to take effect out of other properties of the testator. In this respect, it is of the nature of a general legacy. Jarman\footnote{733} says, it is more proper to treat demonstrative legacy as a sub-division of general legacy.

At the same time, it will not be allowed to abate, if there is a deficiency of the assets, provided the source is not exhausted. To that extent it partakes of the character of a specific legacy.

\footnote{732} Robertson v. Broadbent, (1883) 8 App Cas 812.
\footnote{733} Jarman on Will, 8th Edn., p. 1043.
An independent gift of money, with a direction to pay it out of certain specific moneys, is only a demonstrative legacy.\textsuperscript{734}

According to Jarman, "the more logical classification is to divide legacies in to specific and general, and then sub-divide the general legacies into two subclasses of demonstrative and non-demonstrative".\textsuperscript{735}

A demonstrative legacy is a bequest of a certain sum of money, stock, or the like, payable out of a particular fund or security in such a way as not to amount to a gift of the corpus or evince an intent to relieve the general estate from liability if the particular fund or security fails and the two necessary elements are—

(1) It must be unconditional gift in the nature of a general legacy.

(2) The legacy must indicate the fund out of which it is payable.\textsuperscript{736}

Section 150 of the Indian Succession Act, 1925 runs as follows:

"150. Demonstrative legacy defined—Where a testator bequeaths a certain sum of money, or a certain quantity of any other commodity, and refers to a particular fund or stock out of which payment is to be made, the legacy is said to be demonstrative.

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

Where specified property is given to the legatee, the legacy is specific; where the legacy is directed to be paid out of specified property, it is demonstrative.

If a specific property is bequeathed there is a specific legacy.

If something bequeathed is to come out of specific property it is demonstrative.

\textsuperscript{734} Roberts v. Pocock, (1798) 4 Ves 150.
\textsuperscript{735} Jarman on Wills, 8th Edn., p. 1043.
\textsuperscript{736} See 96 Corpus Juris Secundum, 1125 (f).
A demonstrative legacy is, therefore, midway between a general legacy and a specific legacy.

It partakes of the character of a general legacy in some respects and of a specific legacy in certain respects.

It resembles a general legacy in that if the particular fund out of which it is directed to be paid, fails, the legatee will not be deprived of the legacy, but will receive the deficiency from out of the general assets, which will not be the position in the case of a specific legacy.

4. Distinction between General and Specific Legacy

The distinction between specific and general bequest is important: the specific gifts are secured to the specific legatee, while the general estate of the testator is, unless a contrary intention appears, the 'fund out of which the funeral and testamentary expenses, debts and pecuniary legacies are disposed of specifically out of all his estate; if, there is no fund out of which the legacies can be paid, they consequently fail.\(^{737}\)

The distinction between general and specific legacy may sometime be subtle. But it is a distinction not without a difference and such confusions as are lurking in The case-law are due to the ignoring of the essential test of distinction depending on the intention of the testator whether the legacy is of a particular thing only, or whether the amount should be paid at any cost forming source, though a particular source of payment may have been indicated.\(^{738}\)

It is important to distinguish a specific legacy from a general legacy, because a specific legacy must be paid or retained by the executor in priority to general legacies.

The specific legacy should not be sold to satisfy the testator's debts until all property undisposed of by the testator in his Will and all the property comprised in his residuary estate have been exhausted.

\(^{737}\) Roffey v. Early, (1873) 42 LJ Ch 472.
\(^{738}\) Mullins v. Smit, (1860) 1 D and Sin 204; Chnnam Rajamannar v. Tadikonda Ramachandra, 29 Mad 155.
Further, if given to a person it carries income from the testator's death.\textsuperscript{739}

A specific legacy is liable to be a deemed while a general legacy is not, in consequence of any act done by the testator during his lifetime.\textsuperscript{740}

5. **Indian Law Regarding “A Specific Legacy does not Abate”**

Section 149 of the Indian Succession Act lays down that: “If there is a deficiency of assets to pay legacies, a specific legacy is not liable to abate with the general legacies”.

This section applies to Hindus also.

Where there are assets enough to pay off all legacies and meet the debts and funeral expenses of the testator, there is no difficulty.

Where there are assets, not specifically bequeathed, sufficient to pay off the debts and legacies, the debts must be paid from out of the assets not specifically bequeathed, if they are sufficient, though the general legatees are thereby disappointed.

Where, however, the assets, not specifically bequeathed, are not sufficient to pay off the debts, then, the specific as well as demonstrative legacies must abate in proportion to their value.\textsuperscript{741}

There is a general presumption that the testator has intended to favour the specific legatees in preference to other legatees.

6. **Abatement**

Where the assets are not sufficient to pay off all the debts and legacies, the debts have priority; then specific legacies must be paid and the general legacies abate in equal proportions.

A residuary legacy can be paid only after all the prior claims have been met in full. The general legatees cannot be obliged to abate until all properties not specifically bequeathed are exhausted.\textsuperscript{742}

\textsuperscript{739} Re., Compton, (1914) w Ch 119 (122); see D.H. Parry on Succession, 4\textsuperscript{th} Edn., p. 77.

\textsuperscript{740} In re., Borne, 1944 Ch 190; In re., Gage, (1934) 1 Ch 536.

\textsuperscript{741} Roberts v. Pocock, (1798) 4 Ves 150.
Where a testator distributes his estate by granting two or more specific legacies, then there is a *pro rata* abatement, if the 'assets are insufficient.

An annuity has priority over residuary legacy.\(^743\)

An annuity is treated differently from the bequest of an income of a particular fund and the consequences also will differ according to the difference. Even in regard to damage by devatesavit of the executor it is now settled law that the residuary legatee has no claim till all the general legacies are satisfied.

There are exceptions to this rule.\(^744\)

Where all legacies are general, and there is deficiency in the assets, they abate proportionately. All general legatees rate equally and no preference is made among them with regard to the purpose or object of the legacy.\(^745\)

An annuity charged on the personal estate is a general legacy.

It is open to the testator to clearly manifest his intention to give priority to certain general legacies over others.

Specific legacies abate when the assets are insufficient to pay all the debts. A demonstrative legacy is treated as a specific legacy for purpose of abatement.

But when assets not specifically bequeathed are also insufficient to pay off debts then specific legacies also will abate [section 328].

Demonstrative legacies must be paid from out of the funds earmarked, if the assets are sufficient for payment of debts. If the funds earmarked are not sufficient, then they rank with the general legacies for the unpaid reminder [section 329] in the absence of a contrary direction in the Will.\(^746\)

Where assets are not sufficient to pay off the debts and the specific legacies, then there will be abatement of specific legacies as well [section 330].

742 Law of Succession; Basu N.D.
743 Re., Hill, 1944 Ch 270.
744 Williams on executors, section 1172.
745 Re., White, (1898) 2 Ch 217.
746 Chinnam Rajamannar v. Tadikonda Ramachandra, 29 Mad 155.

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Section 331 provides that a legacy for life, a fund for annuity and the value of any annuity shall be treated as general legacies.

XVII. RESIDUARY LEGATEE

The expression ‘residuary legatee’ has not been defined in the Act but such a legatee can be constituted by the testator using such words in the will which would indicate his intention that the legatee designated shall take the residue or surplus of his estate. No particular mode of expression is necessary to constitute a residuary legatee. It is sufficient if the intention of the testator be plainly expressed in the Will that, the surplus of his estate, after payment of debts and legacies, shall be taken by a person therein designated.

Thus, the following terms of bequests have been held sufficient to constitute a residuary legatee: "After these legacies and my doctor’s bills and funeral expenses are paid, I leave to my sister without any power or control of her husband". "Should there be any surplus after the above expenditure”. “After all these acts have been observed from the proceeds of the said property, if there be a surplus, then the family will be supported therefrom”.

The Illustrations appended to s. 102 of the Succession Act make it perfectly clear that in order to constitute a person a residuary legatee, it is not necessary that there should be other legatees besides him.

1. Property to Which Residuary Legatee is Entitled

A residuary legatee is entitled to the legacy which lapses by reason of the death of the legatee before the testator.
A residuary bequest of personal estate carries not disposed of, but everything that in the event turns out not to be disposed of.\textsuperscript{754} Where a testatrix, by mistake, recited in a Will, that, she had settled upon a particular property which, in fact, was still at her disposition, and the will contained other recitals and bequests of other properties, and also a residuary bequest in favour of X, it was held that the property mentioned in the recital passed under residuary gift to X.\textsuperscript{755}

Where the gift is a gift of the residue subject to particular gifts which fail, they will fall into the residue, even though the failure does not arise from the contingency mentioned in the will.\textsuperscript{756} A testator directed that his property should be divided among three children J, C and F, or the survivors or survivor of them, and made a residuary bequest in favour of his wife. The bequest of J could not take effect by reason of his having attested the will (s.67). It was held that J's share would to pass to C and F, according to the terms of the will, because the words "or the survivors or survivor of them" would not apply to this case, as J's incapacity to take was not due to his death but to some other cause (attestation of the will) which was not contemplated by the testator. Consequently, J's share would fall into the residue, under the section.\textsuperscript{757}

Where a testator devised a specific immovable property to B for life only, and later, directed his executors to sell the residue of this immovable property and make over the proceeds thereof to a university, held that the reversion in the property devised to B for life passed on his death, under the specific residuary devise, to the university.\textsuperscript{758} A residuary bequest carries every lapsed legacy and every legacy which on any ground fails to take effect in the absence of an express intention to the contrary.\textsuperscript{759}

The word 'property' in this section embraces both movable and immovable property.\textsuperscript{760}

A property which is the subject-matter of a trust which is incapable of taking effect, prima facie falls into the residue, unless the testator had sufficiently

\textsuperscript{754} Cambridge v rous 8 Ves 12 (25).
\textsuperscript{755} Re Bagot (1893)3 Ch 348.
\textsuperscript{756} Re Meredith's trusts 3 Ch D 757.
\textsuperscript{757} Camani v Barefoot 26 Mad 433 (435, 436).
\textsuperscript{758} Manorama v Kalichurn 31 Cal 166: 8 CWN 273.
\textsuperscript{759} Amitabha Ray v Jyotsna AIR 1975 Cal 323.
\textsuperscript{760} Mun Mohan v Puresh Nath 22 WR 174.
expressed an intention that the property was not to fall into the residue.\textsuperscript{761} Personal property does not fall into the general residue, where the testator clearly indicates his intention that personal property shall not fall into the general residue, where the testator clearly indicates his intention that personal property shall not fall into the general residue, no matter whether the recipient of the residue can take the personal property or not.\textsuperscript{762} The residuary gift carries every lapsed legacy and every legacy which on any ground fails to take effect; but if a testator has shown some intention with regard to the excepted property inconsistent with its ever falling again into the residue, effect must be given to that intention.\textsuperscript{763}

Where funds send in Court to the credit of a separate account, they become separated from the general estate. The interest accruing on such funds does not form the general estate. The interest accruing on such funds does not form part of the residue but goes so as to increase the funds in Court.\textsuperscript{764} Where a testator made certain disposition in a will and gave directions as to residue of the properties, and at the time of the will there was a fund in Court to the credit of the testator but unknown to him, held that the amount was not to be included in the residuary clause, but it went to the heirs as on an intestacy.\textsuperscript{765}

2. \textbf{Undisposed of residue}

"If a will fails to make an effectual and complete disposition of the whole of the testator's real and personal estate, of course, the undisposed of interest, whether legal or equitable, devolves to the person or persons on whom the law, in the absence of disposition, casts that species of property".\textsuperscript{766} In the absence of any residuary bequest, the heir of the testator is entitled to all property belonging to him at the time of his death, of which he has not made any testamentary

\begin{itemize}
\item \textsuperscript{761} Fanindra v Administration-general 6 CWN 321.
\item \textsuperscript{762} Re Bagot (1893)3 Ch 348 (per smith, LJ).
\item \textsuperscript{763} Blight v Hartnoll 23 Ch D 218.
\item \textsuperscript{764} Administrator-General v Belchambers 36 Cal 261 (265): 1 IC 944.
\item \textsuperscript{765} Kumthaklammal v suryaaprakasaroya 38 Mad 1096; 29 MLJ 682; 31 IC 494.
\item \textsuperscript{766} Jaraman on Wills, 6\textsuperscript{th} Ed., p.714.
\end{itemize}
disposition capable of taking effect.\textsuperscript{767} Even the bequest of a portion of the estate to the heir does not exclude him from the undisposed of residue.\textsuperscript{768} After making certain bequests in respect of specific property the testator as an absolute owner is competent to bequeath to a legatee all the remaining items of property, both movables as mentioned in the will to a different person.\textsuperscript{769}

3. Share of Residue and Specific Bequest

A share of residue does not stand on the same footing as a specific bequest. The legatee of a share in the residue has no interest in any of the property of the testator until the residue has been ascertained. Until the claims against the testator's estate have been settled, the residue does not come into actual existence. It is a non-existent thing until that event has occurred. The probability that there will be a residue is not enough. It must be actually ascertained.\textsuperscript{770}

XVIII. LAPSE OF LEGACIES

It has been established from the earliest periods, that unless the legatee survives the testator, the legacy is extinguished; neither can the executors nor administrators of the legatee demand the same.\textsuperscript{771} The liability of a testamentary gift to lapse or failure by reason of the decease of its object in the testator's lifetime is a necessary consequence of the ambulatory nature of will, which not taking effect until the death of the testator, can communicate no benefit to persons who previously die.\textsuperscript{772} Thus, where a testator bequeathed his whole property to his brother; and expressly directed that neither his daughter nor his widow should take any share of his property, and the brother predeceased the

\textsuperscript{767} Vundrawandas v Cursondas 21 Bom 388 (406); Damodardas v Dayabhai 21 Bom 1 (15); Kedar Nath v Atul Krishna 12 CWN 1083; Kunjamoni v Nikunjii 20 CWN 314; 32 IC 823; Motilat v Gourshankar 12 Bom LR 917.
\textsuperscript{768} Toolseyda v Premji 13 Bom 16 (69); Lallubhai v Mankuvarbai 2 Bom 388 (410, 412).
\textsuperscript{769} Mariammal v Govindammal AIR 1985 Mad 5.
\textsuperscript{770} Lord Sunderbey's case (1897) AC 11; Barnado's Homes v Special Income-Tax Commissioner (1921)2 AC 1; Trethiwy v Helyar (1876) 4 Ch D 53.
\textsuperscript{771} Williams on Executors, 13\textsuperscript{th} Ed. p.644
\textsuperscript{772} Jarmen on wills, 5\textsuperscript{th} Ed. Vol. I, p.307
testator, held that the testator had died intestate, not having made any disposition capable of taking effect, the sole devisee having predeceased him.\textsuperscript{773}

A testator bequeathed life estate in respect of a property to his wife, some properties to his daughter and another property to a different person X on condition of his maintaining the wife who was mentally deranged. The will further provided that if X did not maintain the widow the property bequeathed to X would devolve on the daughter. The wife died during the life-time of the testator. Bequest in favour of X failed as maintaining the wife was the sole condition of the gift.\textsuperscript{774}

A devise or bequest will lapse if the legatee be dead before the making of the will. In such a case, parol evidence is not admissible to show that the testator knew at the time of the making of the will, that the legatee was dead, so as to raise the presumption that he intended that there should be no lapse.\textsuperscript{775} Where by the terms of a will an annuity is payable to a certain person putra pautradi krame, but is not charged on any specific property, and the legatee predeceases the testator, it must be held that the will confers an estate of inheritance, but the legacy lapses because the legatee has predeceased the testator.\textsuperscript{776}

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

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

The Illustration seems to lays down that a bequest simpliciter to two persons creates a joint tenancy between them. But this rule is quite foreign to Hindu law, under which, in case of a joint gift, the Courts lean strongly in favour of a tenancy in common.

Secs. 106 and 107 deal with cases where the legatees are not children while s. 109 deals with cases where the legatees are children, it being a specific

\textsuperscript{773} Erasha v Jerbai 4 Bom 537.
\textsuperscript{774} Sajanbai v Surajmal AIR 1985 MP 93.
\textsuperscript{775} Maybank v Brooks 1 Bro CC 84.
\textsuperscript{776} Jagadish v Rau Pade. 22 Pat LT 396: AIR 1941 Pat 458.
provision for the purpose. Where, therefore, a testator bequeathed his property to his two daughters one of whom predecease him leaving her legal heirs in view of s. 109 of the Act and it can be said that the other legatee would take the whole property by virtue of operation of s.106. When joint tenancy cannot be spelled out of the recitals in the will s. 106 is not applicable.777

But in case of a Christian, a joint-tenancy is presumed rather than a tenancy-in-common.778 Difference in the date of handing over the management of the property by the donor to the several donees creates no presumption in favour of a tenancy-in-common, as the vesting of the property takes place on the same date and the beneficial enjoyment of all commences at the same time.779

The concept of joint tenancy as understood in English law is foreign to Hindu law. Such a construction, however does so violate the principles of Hindu law. It cannot be postulated that whenever a gift is made to two or more persons jointly, they take it only as tenants-in-common. It all depends on the intention of the testator, Sec. 106 does not embody any principle of law or introduce any new concept but contains only a rule of construction of statutes. So even when s. 106 is in terms inapplicable, e.g., where one of the joint donees dies after the testator, the rule underlying it could be made use of in construing will in proper cases.780

Unless there is an intention expressed to the contrary, the sons, taking the self acquired property of their Hindu father under a will or gift by him, take it as tenants-in-common and not as joint tenants.781

No joint tenancy is created where the will provides as follows: "I give these properties to my wife for her maintenance and to my minor daughter for her stridhana, 'seer' and other expenses. After my life-time they shall take items 1 and 2 hereunder absolutely.......Neither of them shall have power to alienate the third item." Hence if the daughter predeceases the testator her half share shall
lapse and shall be treated as undisposed. Where a legacy is given to two persons by some such expression that the property should be divided half and half between them the legatees are tenants-in-common and not joint tenants.

**XIX. VOID BEQUESTS**

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

The leading case of Hindu Wills and gifts is the Tagore case, decided by the Judicial Committee in 1872. The rules laid down in that case and the decisions founded thereon, are set out in the following sections. The fundamental principle underlying those rules may be stated as follows;

A Hindu may give or bequeath his property to any one he likes. He may not only direct who shall take the estate, but may also direct what quality of estate they shall take. However, the person who is to take must be in existence at the date when the gift or bequest is to take effect, and the estate given to such person must be an estate recognized by the Hindu law. The rules laid down in the Tagore case as applicable to Hindu Wills, are applicable to hereditary offices and endowments as well as to immovable property.

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.

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782 Sinnaraj v ramayee Amal AIR 1969 Mad 96.
783 Jankibai v sarha AIR 1961 MP 139.
784 Ganesh Chunder v. Lal Behary (1936) 63 IA 448; AIR 1936 PC 318.
This general rule is relaxed by Exception which admits a kindred born after the death of the testator and before the period of distribution. But the Exception ought not to be applied to the wills of Hindus, because the result of it would be to subvert the fundamental principle of Hindu law that a Hindu cannot make a bequest to a person not in existence at his death.\footnote{785} The Exception must be read subject to the rule of Hindu law (as laid down in the Tagore case) that a bequest to a person not born at the time of the testator's death is void. Therefore, a person not born at the date of the testator's death, but born between that date and the date of distribution, cannot take under the will.\footnote{786}

Thus, where a Hindu testator gave his property to his grandsons subject to certain trusts, held that grandsons born after the death of the testator, though during the continuance of the trusts, were not entitled to anything under the will.\footnote{787}

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 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.\footnote{788}

The law of gifts and of wills is the same under the Hindu law, and in order that there may be a valid gift, the donor must immediately divest himself of the property in favour of some existing beneficiary; and in the same way with regard

\footnote{785} Cally Nath v Chnder Nath 8 Cal 378 (388); Nafar Chandra v Ratnamala 15 CWN 66 (70); 7 IC 921: 13 CJ 85.
\footnote{786} Alangamonjori v sonamoni 8 Cal 637 (639, 640) Tevg. Alangamonjori v Sonmoni 8 Cal 157.
\footnote{787} Cally Nath v Chunder Nath 8 Cal 378 (388).
\footnote{788} Aniruddha v Arabinda AIR 1946 Cal 396.
to wills, there cannot be a gift to a person to come into operation at a future date, unless these be a gift to a beneficiary in the interim.\textsuperscript{789} Where under a deed of settlement an interest is created in favour of the children of the life estate holder and the interest would take effect on the death of the life estate holder, then till the death of the life estate holder the construed as a transfer in favour of unborn person yet it settles property on trust and the unborn children under trust, may be beneficiaries but they can claim interest only after the death of the life estate holder.\textsuperscript{790} But the creation of successive life estates and that too in favour of persons in existence and those, not in existence would take effect with reference to those in existence at the time of the death of the testator and invalid as to the rest.\textsuperscript{791}

A child enventre sa mere is considered to be in existence.\textsuperscript{792}

2. Bequest to unborn persons

- Rule apart from statute

A person capable of taking under a Will must, either in fact or in contemplation of law, be in existence at the death of the testator.\textsuperscript{793} This rule still applies to cases to which the provisions of the three Acts namely, the Hindu Transfers and Bequests Act 1914, the Hindu Disposition of Property Act 1916 and the Hindu Transfers and Bequests (city of Madras) Act 1921, do not apply. This rule was discussed by the Supreme Court in Raman v. Rasalamma.\textsuperscript{794}

A bequest to a person not inexistence 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

\textsuperscript{789} Amrital Lal v Suranomoyi 25 Cl 662 (691).
\textsuperscript{790} Rukhamanbai v Shivram AIR 1981 SC 1881.
\textsuperscript{792} In re Wilmer’s Trusts (1903)2 Ch 411.
\textsuperscript{793} Venkata v. Suraneni, (1908), 31 Mad 310.
\textsuperscript{794} AIR 1970 SC 1759.
testator’s death is valid, provided, the son marries a girl who was in existence at
the testator’s death, as the rule in this section does not apply.

Exception to the rule:

In laying down the above rule in the Tagore case, the Judicial Committee
desired ‘not to express any opinion as to certain exceptional cases of provisions
by means of contract or of conditional gift on marriage or other family provision
for which authority may be found in Hindu law or usage.’ For instance, see the
under mentioned cases.796 The rule in this section applies to the office of a
Shebait and a direction in the Will that the office should be held by an unborn
person was held to be invalid.797

The rule laid down in this section is applicable to all Wills, whether they
are governed by Dayabhaga law or Mitakshara law, and whether they are not
subject to the provisions of the Indian Succession Act, 1925, relating to Hindu
Wills.799 It may be observed that the testator in the Tagore case was governed by
Dayabhaga law, and the Will was made long before the Hindu Wills Act, 1870,
came into force.

• Rule as altered by the Statute:

The rule of Hindu law that a bequest cannot be made in favour of a person
who was not born at the date of the testator’s death has been altered by three
Acts, namely, the Hindu Transfers and Bequests Act 1914, the Hindu Disposition
of Property Act 1916 and the Hindu Transfers and Bequests (city of Madras) Act
1921, and are stated as follows:

Subject to the limitations and provisions contained in ss. 113, 114, 115
and 116 of the Indian Succession Act, 1925, no bequest shall be invalid by
reason only that any person for whose benefit it may have been made was not
born at the date of the testator’s death.

This rule, however is not of universal application, but is confined to the
following cases, namely to:

796 Raja of Ramnad v. Sundara AIR 1918 PC 156; Khajeh Soleman Quadir v. Nawab Sir Salimullah,
    AIR 1922 PC 107; Jatindra v. Ghanshyam, AIR 1923 Cal 27.
797 Manohar Mukherji v. Bhipendernath Mukherji, AIR 1932 Cal 791.
799 Alangamonjori v. Sonamoni 1882 8 Cal 637; Radha Prasad v. Ramimon dasi, AIR 1914 PC 149.
(i) Wills executed on or after 14th February 1914, by Hindus domiciled in the State of Madras except the city of Madras, and in the case of Wills executed before that date, to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to that date (Hindu Transfers and Bequests Act 1914);

(ii) Wills executed on or after 20th September 1916, by Hindus in any part of India except the State of Madras (Hindu Disposition of Property Act 1916);

(iii) Wills executed on or after 27th March 1916, by Hindus domiciled within the limits of the territory of original civil jurisdiction of the High Court of Madras, and, in the case of Wills executed before that date, to such of the dispositions thereby made as are to come into operation at a time subsequent to the 14th February 1914 [Hindu Transfers and Bequests (City of Madras) Act 1921].

It may be noted that with effect from 1st February 1960, the Hindu Disposition of Property Act 1916 has been extended to the whole of India including the State of Madras and the City of Madras, and the Hindu Transfer and Bequests Act 1914, and the Hindu Transfers and Bequests (city of Madras) Act 1921 stands repealed.

3. Limitations Subject to which a Gift or Bequest can be made to an unborn person:

In cases governed by Hindu Disposition of Property Act, 1916, a grant may be made to an unborn person, however, can only be done subject to certain limitations and provisions as follows:

(a) transfers inter vivos, those contained in Chapter II of the Transfer of Property Act, 1882; and

(b) will, those contained in ss. 113, 114, 115 and 116, Indian Succession Act, 1925.

Chapter II of the Transfer of Property Act, 1882, did not originally apply to Hindus. It has now been extended to Hindus by the Transfer of Property Act (Amendment) Act, 20 of 1929, (s 3). The sections of the chapter material or the present purposes are ss 13, 14, 15 and 16, which correspond to ss 113, 114, 115.
and 116 of the Indian Succession Act, 1925. Both these sets of sections are similar in substance.

All the eight sections assume that a gift or bequest can be made in favour of an unborn person. They did not apply to Hindus at first. They were gradually made applicable to Hindus. The Hindu Transfers and Bequests Act 1914 and the Hindu Transfers and Bequests (city of Madras) Act 1921, incorporated only sec. 14 of the Transfer of Property Act and the corresponding s. 114 of the Indian Succession Act, being the sections which relate to the rule against perpetuity. The Hindu Disposition of Property Act, 1916, incorporated two more sections, namely, sec. 13 of Transfer of Property Act and the corresponding sec. 113 of Indian Succession Act. The first time all the eight sections were applied to Hindu gifts and wills was by the Transfer of Property (Amendment) Supplementary Act, 21 of 1929, by which all the three Acts mentioned above were amended and they were all made uniform.

4. **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. 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.800

800 Kappuswami Pillai v. Jayalakshmi Ammal, AIR 1934 Mad 705.
This section is a combination of s. 13, Transfer of Property Act, 1882, and s. 113, Indian Succession Act, 1925.

5. **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 of 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 life-time 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. The rule against perpetuity relates to any property, whatever be its nature, and whether is it movable or immovable.

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.

The rule against perpetuity does not apply to charitable or religious endowments.

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801 In re Oliver's Settlements (1905) 1 Ch 191.
802 Cowasji v Rustomji 20 Bom 511 (561).
Rule of Hindu law before Legislation:

The above rules apply only to gifts and bequests which are within the Hindu Transfers and Bequests Act 1914, the Hindu Disposition of Property Act 1916 and the Hindu Transfers and Bequests (city of Madras) Act 1921. As to gifts and bequests which do not come within those Acts, the old rule still applies. That rule may be stated as follows:

Where it appears from the Will that the intention of the testator was not to pass the estate at all, but to create perpetuity, as where the will contains a direction, as regards the corpus, that it should be kept intact for ever, and, as regards the income of the property, that portion thereof should be enjoyed by the testator’s sons, grandsons and their descendants for ever and that the rest should be accumulated, the direction is invalid, and the estate will pass as an estate intestate. The Hindu law does not allow property to be tied up in perpetuity except in the case of religious and charitable endowments.803 The same principle applies to transfers inter vivos (gifts). This rule may be explained by the following illustration.

A Will contains as to the property purported to be bequeathed thereby the following directions that:

1. the property shall not be alienated at all;
2. six-sixteenths of the net income of the property shall be applied towards the maintenance of the members of the testator’s family and the families of his sons, grandsons and their descendants in perpetuity;
3. the remaining ten-sixteenths should be accumulated and carried to the credit of the estate.

The Will is valid, and the property will descend to the testator’s heirs as on intestacy, The Will starts with a provisions against alienation, an this provision is confirmatory of the other parts of the Will, which clearly show an intention to create a perpetuity.

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803 Shookmoy Chandra v. Monoharri Dassi (1885) 11 Cal. 684
6. **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.

- *Rule of Hindu law as to Gift to a Class and Subsequent Legislation:*

Before the Acts of 1914, 1916 and 1921, relating to gifts and bequests to unborn persons, a bequest to a person who was not in existence at the date of the gift was void; and so was a bequest to a person who was not in existence at the date of the testator's death. This proceeded on the principle that a person who was not in existence at the material date was incapacitated from taking. Thus, if a gift was made by a Hindu to his grandson S, who was in existence at the date of the gift, and to other grandsons (brothers of S), who might be born
after the date of the gift, it is obvious that the grandsons who were born after the
date of the gift could not take, but could S take? In some of the earlier cases, it
was held that the gift having failed as to the other grandsons, it was wholly void,
and that S too could not take. However, it was held in later cases and by the
Judicial Committee that the incapacity of the other grandsons to take, did not
incapacitate s from taking, with the result that S took the whole of the property
which was he subject matter of the gift.804

If we go by the course of legislation, first introduced was the Madras Act
of 1914. It validated gifts and bequests in favour of unborn persons, and thus
removed the bar of incapacity. It also applied for the first time, the rule against
perpetuity to cases governed by that Act. Similar provisions were introduced by
the Hindu Disposition of Property Act, 1916, and the Hindu Transfers and
Bequests (City of Madras) Act, 1921. The result of all these were that, in the case
mentioned above, grandsons other than S, though not in existence at the date of
the gift, could also take under the deed.

At the time when these three Acts were passed, The Indian Succession
Act, 1865, was in force. Section 101 related to the rule against perpetuity and
section 102 related to bequests to a class are now corresponds to the sections
114 & 115 of the Indian Succession Act, 1925, before it was amended in 1929.
Another Act in force when the said three Acts were passed was the Hindu Wills
Act, 1870. Certain sections of the Indian Succession Act, 1865, were made
applicable to cases governed by the Hindu Wills Act, one of them being s. 102,
which says:

"If a bequest is made to a class of persons with regard to some of whom it
is inoperative by reasons of the provisions of s.100 or s. 101, such bequest is
wholly void."

Though s.101 was incorporated in all the three Acts, s.102 was not, the
intention being to keep alive the rule of Hindu law that if a bequests or gift was
made to a class of persons with regard to some of whom it was inoperative by
reason of the fact that they were not in existence at the material date, the gift or

bequest failed in regard to those persons only and not in regard to the whole class. However, the legislature seemed to have overlooked the Hindu Wills Act, 1870, and particularly the inclusion in that Act of s. 102. This was not noticed until the decision of the Judicial Committee in a case,\textsuperscript{805} where it was held that the bequest being void as to some members of the class under s.101, it was wholly void under s.102. This led to the amendment of s. 15 of the Transfer of Property Act, 1882, and s. 115 of the Indian Succession Act, 1925.

7. \textbf{Effect of direction for accumulation}

(1) 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.

(2) This section shall not affect any direction for accumulation, for the purpose of:—

(i) The payment of the debts of the testator or any other person taking any interest under the will, or

(ii) The provision of portions for children or remoter issue of the testator or of any other person taking any interest under the will, or

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

The old section of under which a direction of accumulation was pronounced be invalid did not apply to Hindus, because Hindu law favours the doctrine of accumulation of income. The new section which allows such accumulation has been made applicable to Hindus, Buddhists etc.

\textsuperscript{805} Soundara Rajan v. Natarajan, AIR 1925, PC 244.
Under the Hindu law, a direction in a will to accumulate the income arising from any property was not necessarily void. Such a direction was quite in accordance with the mode of Hindu life thought, and was not against the policy of Hindu law.\textsuperscript{806} The following cases indicate to what extent accumulation was permissible under Hindu law as it stood prior to the amendment of sec. 118;\textsuperscript{807}

But a direction for accumulation for all time, or until the rents and profits aggregate to three lacs of rupees or any other certain amount is void, as being a trust for an illegal purpose, namely, of creating a perpetuity.\textsuperscript{808}

The present section allows the accumulation to be made only for a period not exceeding 18 years.

If there is a present gift of property (i.e. gift to take place immediately on the testator's death), a direction in the will for accumulation the profits of the estate must be rejected as inconsistent or repugnant.\textsuperscript{809}

XX. VESTING OF LEGACIES

Legatees who are not entitled to the immediate possession of the thing or fund bequeathed, and has no application to a bequest of absolute interest which gives the legatee a right to possession immediately.\textsuperscript{810}

1. Vested Interest and Contingent Interest

An interest is said to be vested, when it is not subject to any condition precedent, when it is to take effect on the happening of an event which is certain; whereas an estate is contingent when the right to enjoyment depends upon the happening of an uncertain event which may or may not happen. A person takes a vested interest in property at the testator's death when he acquires a proprietary

\textsuperscript{806} Amrito Lall v Surnomoyi 24 Cal 589; Rajendra Lall v Rajcoomari 34 Cal 5; Krishnarao v Benabai 20 Bom 571 (588)

\textsuperscript{807} Rajendra v Rajcoomari 34 Cal 5 (10); Seerangathanni v Bava Vaithilanga AIR 1921 Mad 528; Amrito Lall v Surnomoyi 24 Cal 589; Nafar Chandra v Ratnamala 15 CWN 66 (70); 7 IC 921; Shookmoy v Monohari 11 Cal 684 (693) PC.

\textsuperscript{808} Krishnaramnai v Ananda 4 BLR OC 231.

\textsuperscript{809} Cally Nath v Chunder Nath 8 Cal 378 (387).

\textsuperscript{810} Asit Kumar v Provash Chandra ILR (1949)1 Cal 298.
right in it at that time but the right of enjoyment is only deferred till a future event happens which is certain to happen; but a contingent interest is one in which neither any proprietary interest nor a right of enjoyment is given at the testator’s death, but both depend upon future uncertain events.

Thus, a bequest to a person payable or to be paid at or when he shall attain twenty one years of age or at the end of any other certain determinable term, confers on him a vested interest immediately on the testator’s death, as debitum in praesenti solvendum in futuro, and transmissible to his executors or administrators for the words ‘payable’ or ‘to be paid’ are supposed to dis-aannex the time from the gift of the legacy so as to leave the gift immediate, in the same manner in respect of its vesting as if the bequest stood, singly and contained no mention of time. Where an estate is bequeathed to A until he: shall marry and after that event to B, B’s interest in the bequest is contingent, because it depends upon a condition precedent, viz., the marriage of A, an event which may or may not happen. B has at present no proprietary interest in the estate, and he cannot alienate it. But as soon as A marries, the contingent interest of B becomes a vested interest because of the happening of tile event (A’s marriage) on which it was so long contingent. In a contingent bequest, the interest is not complete until the specified event happens or does not happen. In case of a vested interest, the interest is complete, but on the happening of a specified event it may be divested.

The true criterion is the certainty or uncertainty of the event on the happening of which the gift is to take effect. Thus, if a bequest is made in favour of one person, and after his death the property is directed to go to another, the second legatee takes a vested interest in the estate ‘use death of the prior legatee is not an uncertain contingency. Where the event is certain though future, and the payment or enjoyment is postponed by reason of prior estates or interests, the ulterior interest to take effect after them will be vested. Thus, under

812 In re Eddel’s Trusts, LR11 Eq 559.
813 Darshan v Wali Khan AIR 1929 All 102 (104).
A gift by a testator to A at the decease of the testator's Wife, A's interest Vests at the testator's death.814

A vested interest is not defeated by the death of the devisee before he obtains possession, and his representative will be entitled to its benefit. Thus, a person gave a bequest to his nephew to take after the death of himself and his wife. The nephew survived the testator, but predeceased the transmissible wife held that the nephew took a vested interest which was transmissible to his heirs815 (This is another point of distinction between a vested interest and a contingent interest). Therefore, where out of two persons in whom an estate Vests, one person dies, the whole property does not pass to the other by survivorship but is divisible between the living person and the heir of the deceased.816

2. Devise without any intimation of desire to postpone operation, it confers immediate vested interest

Where by his will Hindu testator gave a life- Interest in his estate to his wife and proceeded to provide that after the death of his wife, his son would be entitled to the ownership and possession in absolute interest and there were further provisions as to where the estate would go in case the son died before the testator or his wife, it was held that under the will estate vested in the son after the death of the testator. Such vesting was not postponed by the words "after the death of my wife" which merely indicated the termination of the prior life interest, nor by the words "would become absolutely entitled" which merely meant that what would be a remainder during the life-time of the widow, would become absolute and entire on her death.817

814 Subramaniam v Subramaniam 4 Mad 124 (126); following Balmire v Geldart 16 Ves 314; Jairam v Kuverbahi 9 Bom 491 (510).
815 Bilaso v Muni Lal 33 All 558 (559); 8 ALJ 577.
816 Krishna Aiyar v Swaminath 47 IC 723 (724); Mathuranath v Monmochini 57 IC 747 (Cal); Moti Lal v Sardar Mal AIR 1976 Raj 40.
817 Sisir Chandra v Ajit Kishore 42 CWN 605; China Pulappa v Chinna Bayanna AIR 1962 AP 54; P. Someasundaram v K. Rajammal AIR 1976 Mad 295.
3. Vesting not Postponed

The fact that the estate granted is subject to partial trusts or charges for partial purposes does not postpone the vesting of the interest. Thus, where a testator after directing the payment of some annuities to some persons for their lives, gave the whole of his property to his grandsons to be divided among them only after the annuities have ceased on the cloth of the annuitants, held that the fact that the estate was subject to partial trusts did not postpone the vesting in interest of the gift to the grandson. If a bequest is to a person for life and after his death to his children, the bequest becomes vested in each child as and when it is born, and the vesting is not postponed till the death of the life tenant. The expression after his death' is taken to indicate merely the time when the gift becomes reduced to possession and not the time where the right to such possession vests.

4. Construction: Intention of Testator

The determination of the question whether an interest granted under a settlement or a will is vested or contingent is “one of intention to be gathered from a comprehensive view of all the terms of the document” and “a Court has to approach the task of construction in such cases with a bias in favour of a vested interest, unless the intention to the contrary is definite and clear”. The question whether particular words create a vested or a contingent interest is one of construction No particular words are necessary to the vesting of an interest, and the words of time granter must be construed in their plain and ordinary meaning, Words which have become by accepted usage terms of art in England do not exist in the vernaculars of India where the English mode of creating interests is but of recent origin. Where the ultimate object of the testator was clearly to make a gift of the property to the donees, who were also executors, but he

818 Cally Nath v Chunder Nath 8 Cal 378 (399). See also Rajes Kanta v Shanti Debi AIR 1957 SC 225 (263).
819 Adams v Mrs. Gray 48 MLJ 707: 90 IC 5: AIR 1925 Mad 599 (602); Halifax v Wilson (1809) 16 Ves 168; Bhagirathibai Gangraam v Rabchand Balaram AIR 1975 Bom 301.
820 The question whether particular words create a vested or a contingent interest is one of construction No particular words are necessary to the vesting of an interest, and the words of time granter must be construed in their plain and ordinary meaning, Words which have become by accepted usage terms of art in England do not exist in the vernaculars of India where the English mode of creating interests is but of recent origin. Where the ultimate object of the testator was clearly to make a gift of the property to the donees, who were also executors, but he
821 Harris v Brown 28 Cal 621 (635) (PC).
directed that sufficient fund from it should be provided during the lifetime of his wife to pay her a certain sum monthly, and charged the property with payment of another sum to his other, wife. It was held that as the estate was devised to the executors not for but subject to a particular purpose, they were not trustees but devises of an estate subject to a charge. The testator vested, the property in the executors; but postponed their interest in it until his younger wife's death.822

Explanation.- (a) postponement of enjoyment.- interest may be a vested one, though its enjoyment may be postponed. Thus, a testator executed his will whereby he gave his property, after the death of himself and his wife, to his nephew D. D survived the testators. If as held that D took a vested interest in the property although his enjoyment and possession were postponed till the death of the testator's wife.823 Where a will provided that the testator's mother and his wife were to succeed to his property for life, and on their death his sister's Sons should hold the properties in possession and enjoyment by right of inheritance, it was held that time nephews were intended to take vested interests on the death of the testator, though their possession and enjoyment were postponed.824 Where a testator bequeathed his property to two persons for life and the remainder absolutely in favour of a specified class of persons on the termination of the life-estates, the property became vested in that class on the death of the testator, and the mere fact that they were not entitled to immediate possession did not make it a contingent bequest.825

(b) Prior interest given to some other person.—An interest may be vested though the prior interest may be given to some other person, Where the enjoyment is postponed by reason of circumstances connected with the estate or for the convenience of the estate, as it has been termed, for instance, where there, are prior life-estates or other interests, the ulterior interest to take effect after them will be vested.

822 Subramaniam v subramaniam 4 Mad 124 (125, 126) following King v Denison 1 Ves & B 272.
823 Bilaso v Munni Lal 33 Al 558 (559): 8 ALJ 577. See also Greenwood v Green wood AIR 1838 PC 78; Hazari Singh v Banta Singh AIR 1970 Punj 257.
824 Bhagabati v Kali Charan 38 cal 468 (PC).
825 Sree Chand v Kasi Chetty AIR 1933 Mad 785 (786); Maturanath v MONMOHINI 27 IC 747 (Cal); Chinna Pullapa v Chinna Bayana AIR 1972 AP 54.
Where a will provides that after the life-time of the testator and his widow, the remaining property should go to P, and the will does not give any power of alienation 'to the widow, the bequest to P is a vested remainder and the bequest to the widow is a life interest and not a Hindu widow's estate. In such a case, s. 14(2) of the Hindu Succession Act will apply and the widow's interest will not be enlarged under s. 14(1) of the said Act.\textsuperscript{826}

(c) Direction for accumulation, of income.—A gift in terms which import, a present vested interest, with a postponed time of payment is not made contingent by a direction to accumulate till' the time of payment arrives.\textsuperscript{827} After the interest has vested, the donee is entitled to the income arising there from during the period of suspension, provided there is no prior interest, notwithstanding any- direction for postponement of enjoyment.\textsuperscript{828}

5. Legacy passing to another person on the happening of a particular event

Where there is a gift to an infant with remainder over in the event of his dying under 21, the infant has a vested interest subject to be divested on his death under that age.\textsuperscript{829}

6. Contingent Interest

Contingent and executory interests, whether in real or personal estate, devolve on the representative of a party dying before the contingency, upon which they depend, takes effect. Although, contingent and executory interests do not vest in possession, they may nevertheless vest in right so as to be transmissible to executors or administrators. But it is obvious that 'where the contingency upon which the interest depends is the endurance of the life of the party 'entitled to it till a particular period, the interest itself will be extinguished by the death of the party before the period arrives, and will not be transmissible to his executors, or administrators. The only case in which a contingent future...

\textsuperscript{826} Ramaswami Poundar v ramaswami Goundar (1972) 1 MLJ 417.
\textsuperscript{827} Blease v Buergah (1840) 2 Beav 221.
\textsuperscript{828} Goswami v Rivett-Carnac 13 Bom 463 (468) (cited above).
\textsuperscript{829} See Illustration (vi); O'Mahoney v Burdett LR 7 HL 388; Maseyk v Ferguson 54r Cal 304; Merry v. Hill LR. Eq 619.
interest is not transmissible would seem to be Where the being in existence when the contingency happens is an essential part of the description of the person who is to take if a bequest is made to a person for life, or then to such of his children as may survive him, then clearly the condition of being alive at his death would be a condition precedent to the vesting itself, and in such a case no child that does not so survive will acquire a vested interest in the bequest, The obvious principle Underlying this rule' of construction is that though the death of the life-tenant is certain, still it is by no means certain that the donee will survive the life tenant, And if from the words of the gift, the intention of the testator is clear that the persons' taking should be only such persons as are alive at the death of the life tenant, then it follows necessarily that it is a contingent gift, contingent upon the surviving the life tenant. Till such contingency is fulfilled there can be no vesting.

It does not apply if the legacy is given subject to a double contingency that the legatee must survive named person and must also attain a particular age.

To bring a case within the Exception, there must be a direct gift of a particular fund to 'the' legatee.' Where there is no direct gift to the legatee (son) but only a direction to the executor to hand over not any particular fund but the "whole 'of the 'remaining properties" of the testator (which are unascertainable) when the son comes of age, and the' income of the properties is not directed to be employed absolutely for the son, but the executor is directed to maintain the whole family of the testator out of that income and is authorised even to spend the corpus of the properties for that purpose, the 'case does not fall within the Exception, and the bequest of the residue to the son is not vested but contingent on his attaining the age of majority

830 Swinhuren, Part 7, s. 32, P1 10; Williams & Mortimer on Executors, Administrators and Probate, 16th Ed., p.518.
832 Sopher v Administrator-General of Bengal 71 LA 93; AIR 1944 PC 67.
833 Cowasji v ratanbai AIR 1925 PC 27 (29).
XXI. **ELECTION**

The English law of election is the same as that provided for in s. 180 of the Indian Succession Act. In *Douglas Mertzies v Uniphelby*, Lord Robert son refers to the principle of election as being the same as the doctrine of approbate and reprobate and observes as follows at page 232: "In considering the merits of the decision appealed against, it is well to remember what is the doctrine of approbate and reprobate invoked by the appellant. Although the name is different, the principle as was laid down by Lord Eldon in *Ker v. Wauchope*, is the same as that of the English law of election. It is against equity that anyone should take against a man’s will and also under it. This rests on no artificial rule, but on plain fair dealing. If anyone has the right by law to take a share of a testator’s estate, which the testator has not given but has otherwise disposed of, that person takes it against the will and cannot go on to found on the will and claim its benefits.” In *Pitman v. Grunt Ewing*, Lord Atkinson quotes with approval the passage cited above.

"The principle is that if a testator gives property, by design or by mistake, which is not in his power to give, and gives at the same time to the real owner of it other property, such real owner cannot take both."  

It is a principle of equity that a person who accepts a benefit under an instrument must adopt the whole, giving full effect to its provisions, and renouncing every right inconsistent with it. It follows that if a testator gives property by design or by mistake which is not his to give, and gives at the same time to the real owner of it other property such real owner cannot take both. In such a case the real owner is put to his election.

If, therefore, a testator has elected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the

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834 (1908) AC 224.
835 (1819) 1 Bligh 1.
836 (1911) AC 217.
837 Wollaston v King (1869) 8 Eq 165 (173) Per James, V.C.
testator's attempted disposition; but if, on the contrary, he chooses to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights.\(^{839}\)

The doctrine is really a branch of the elementary rule of Logic "Allegans contraria non est audiendus. He ought not to be heard who alleges things contradictory to One another", or as it is expressed in Scotch law, no one may approbate and reprobate.\(^{840}\)

The language of s. 180 and the illustration shows that a person whose property has been disposed of by the testator by bequeathing it to another, the will providing for a benefit to that person, who was the owner of the property, should elect to conform such disposition of his property, in which case he would be entitled to the benefit.\(^{841}\) But although a man is not at liberty to take under a will and at the same time to dispute the operation of the will in other respects, still there is no authority for saying that a person who accepts the benefit under a will is precluded from disputing some transaction in which the testator was engaged long before his death and which, is not the subject of the will at all.\(^{842}\)

1. Application of the doctrine

The doctrine of election is a rule of practice in equity\(^{843}\) and being founded the highest principle of equity, it applies equally to Hindus and to persons governed by other personal laws. The principle is not peculiar to English law alone but is common to all laws and based on the rules of justice, and was therefore applied by Their Lordships of the Privy Council to the consideration of Indian cases\(^{844}\) in which the rule had been applied to Hindus.

840 Codrington v Codrington LR 7 HL 861.
841 Pdu Kutty v Lakshmi AIR 1954 Mad 556.
842 Ramayya v Mahalkshmi AIR 1922 Mad 357 (358).
843 Spread v Morgan 11 HLC 588.
844 Forbes v Ameeroonissa 10 MIA 340; Shah Makhan Lal v Baboo Kishan Singh 12 MIA 186; see also Mangalda v ranchodadas 14 Bom 438 (440); tribhuvandas v Yorke Smith 20 Bom 316 (335); Venkataramyya v Pitchumma 78 IC 274; AIR 1925 Mad 164 (165); and Rajamannar v Vekata 25 Mad 361 (365).
Thus, D a Hindu widow died making a will in respect of property which she had inherited from her husband she bequeathed Rs. 2,000 as legacy to the plaintiff and the immovable property to K. Both the plaintiff it and K were the heirs of her husband. The plaintiff sued for the legacy under the will as well as for half the immovable property as heir, find that as the widow had not the power to devise the immovable property (to which she was not entitled absolutely), it must be considered that she had devised a property which did not belong to her; consequently the plaintiff must be put to his election either to take the legacy under the will or half the property as heir.  

Where a testator made specific bequests from joint property claiming it as his own, when he had only one-third interest therein, the legatees who note owners of the two-third interest in the joint property were not put to election if the bequests did not exhaust the testator’s share in the property.  

The doctrine of election applies to all kinds of property and persons. There is no distinction for the purpose of election, between personal estate and real estate, between specific and residuary legates, or between legatees and the next-of-kin of an estate. It is applicable to movable and immovable properties alike.

2. Testator’s intention to give property not his own

The doctrine of election ‘does not apply where the testator has some present interest in the estate disposed of by him, though it is not entirely his own. In such a case, unless there is an intention clearly manifested in the Will or a necessary implication on his part to dispose of the whole of the estate including the interest of third persons, he will be presumed to dispose of that which he might lawfully dispose of and no more.

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845 Mangaldas v Ranchoddas 14 Bom 438 (441).
846 Subbaraya v Vahesan AIR 1963 Mad 405.
847 Cooper v Cooper (1870) L4 6 Ch 15. Per Jones, LJ.
848 Grissell v Swinhoe (1869) L4 7 Eq 291; Wilkinson v Dent (1871)6 Ch 339.
The application of the doctrine depends on the true construction of the will and not on any supposed intention of the testator.\textsuperscript{849}

If the legatee does not take according to the instrument, he must relinquish the benefit conferred upon him, and the benefit so relinquished shall revert to the testator’s estate, on the principle that it is impossible to ascertain what the testator would have done, if he were aware of the defect in his instrument. And the Court cannot speculate what would have been his intention under the circumstance.\textsuperscript{850} But the disappointed legatee is attempted to take out of the benefit the value of the property attempted to be transferred to him.

There is a distinction between the English and the Indian law as to the disposal of the balance left after satisfying the disappointed legatee. Under the English law, the balance goes to the refractory legatee; whereas under the Indian law the balance goes to the testator’s residuary estate.

3. Testator’s belief immaterial

The testator’s belief as to his ownership is immaterial. It is not necessary to prove that he was aware that the subject of disposition was not his own.\textsuperscript{851} “A case of election arises although the testator proceeded on an erroneous supposition that both the subjects of bequests were absolutely at his own disposal, but not if it appears that the testator meant only to dispose of the property provided he had power to do so.”\textsuperscript{852} A case of election would arise where the testator has bequeathed somebody else’s property through mistake or by design.

4. Person talking benefit indirectly need not elect

"Election means free choice, and where the circumstance do not give to the legatee a choice whether he will take under the instrument of against it, he is not put to this election. Thus, whom a will purported to bequeath for the benefit of the testator’s younger Sons chattels which were in fact already settled as

\textsuperscript{849} Subbaraya Pillai v Vaheesan AIR 1963 Mad 405; Veerappa v Venugopala AIR 1967 Mad 404.
\textsuperscript{850} In re Brooksbank (1886)34 Ch D 163.
\textsuperscript{851} Coutts v Acworth 9 Eq 519.
\textsuperscript{852} Williams and Mortimer on Executors, Administrators and Probate, 16\textsuperscript{th} Ed, p. 879; Re Brooksbank 34 Ch D 160.

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heirlooms so that the eldest son had a life interest in them, and then bequeathed; the residue to the eldest son, it was held that no question of election arose; for the eldest son, having no power to alienate the chattels, could not have chosen to take under the will.\textsuperscript{853}

5. **Person acting in different capacities**

The rule of election is that a person who has accepted the will in its entirety, has acquiesced in all its entirety, has acquiesced in all its provisions and has elected to take under it, and has even executed a release in respect of a property to which he would have been entitled otherwise than under the will, cannot afterwards maintain a suit for an account of the rents and profits of the same property.\textsuperscript{854} But where a person takes a benefit under the will in a capacity different from that in which he asserts his rights, no question of election can arise merely, because owing to certain circumstances the two capacities have temporarily merged in him.\textsuperscript{855}

No person is bound by the principle of election unless he has knowledge of his right to elect and of the circumstance which would influence his judgment of a reasonable man making the election.\textsuperscript{856} The inquiry as to what act or acquiescence constitutes an actual or implied election, must be decided rather by the circumstances of each case than by any general principle.

6. **Two year's Enjoyment**

Acceptance of a benefit may be presumed from two years' enjoyment of the benefit. But if a person acts in of his right, no presumption will be made in favour of acceptance even though the possession be for 2 years or more.\textsuperscript{857} So also where the legatee is *Pardanshin* lady of slight education, and there is no evidence that she knew anything about the contents of the will nor that the Will was ever explained to her, and it further appears that the executors never called upon her (as they are required to do - under s. 189) to snake her election, the mere fact that she took the benefits for 2 years will not lead the Court to under s.

\textsuperscript{853} William and Mortimer on Executors, Administrator and Probate, 16th Ed p.879.
\textsuperscript{854} Tribhovanda v Yorke Smith 20 Bom 316 (337).
\textsuperscript{855} Deputy Commissioner v Ram Sarup 20 OC 243; 42 IC 18 (20).
\textsuperscript{856} Lalit Mohan v Nirodamoyi 101 IC 339; AIR 1927 Cal 494 (495).
\textsuperscript{857} Lalit Mohan v Nirodamoy AIR 1927 Cal 494 (495).
188(l) that she had impliedly made her election; especially when the receipt of money by her did not render it impossible to place the parties in the same position as if the money had not been taken, so as to make cl. (2) applicable.858

7. Postponement of Election in case of Disability – Minor

In the case of a minor the period of election will be postponed during the minority, unless the minor is represented by a qualified guardian, in which case he can elect. The usual practice is for the Court to elect for the infant if it is for its benefit859 and for that purpose the Court directs an inquiry whether it is to the advantage of the infant to elect or disclaim.860

858 Indubala v Manmatha AIR 1925 Cal 724 (727, 729).
859 Morrison v Bell 5 Ir Eq R 354; Re Chesham (1886)31 Ch 466 (472).
860 Browns v Brown (1866) LR 2 Eq 481 (486).