CHAPTER X
MAINTENANCE

"ভরণং পৌষ্যবর্গস্য প্রশস্তং স্বর্গসাধনং।
নরকং পীড়নে চাস্য তস্মাদ্ যত্নেন তং ভরেৎ।।"

— মনুঃ —

Meaning-``The support of the group of persons who should be maintained, is the approved means of attaining heaven, but hell is the man's portion if they suffer : therefore, he should carefully maintain them.''

— Manu —

"বৃদ্ধৌ চ মাতাপিতরৌ সাধ্বী ভার্য্যা সুতঃ শিশুঃ।
অপ্যকার্য্যশতং কৃত্বা ভর্ত্তব্যা মনুরব্রবীৎ।।"

— মনুঃ —

Meaning-``The aged parents, a virtuous wife, and an infant child must be maintained even by doing a hundred misdeeds.'

— Manu —

Liability for maintenance may be two-fold : —

(Two-fold liaility for maintenance.) **(i) Absolute :** A man is bound to maintain his aged parents, his virtuous wife and his minor children, whether he inherits any property or not. He is also bound to support his infant illegitimate children. (Sec. 488 of Cr. P.C.)[1]

(ii) Limited liability : — The ancestral immoveable property is the heriditary source of maintenance of the members of the family. The ancestral property can be alienated subject to the charge of maintenance of the members of the family who are entitled to it. *(Kamini V. Chandra* (1890) 17.Cal.373).[2]

1. (Sec. 488 of Cr. P.C.)
2. *(Kamini V. Chandra* (1890) 17.Cal.373).

The obligation to maintain extends even to the Crown or State when it takes the property by escheat, or by forfeiture. *(Mst. Golab V. Collector of Benares* (1847) 4.M.I.A.246).[3]

(Persons entitled to maintenance.) According to Hindu law the following persons are entitled to maintenance : —

1. Son : A father is personally liable to maintain his minor son. Under Mitakshara an adult son also is entitled to maintenance out of the joint family property. But under Dayabhaga law a father is not bound to maintain his adult son either out of his separate property or out of ancestral property. *(See Bhoopatinath V. Basanta Kumari* (1936) 63.Cal.1098).[4]

2. Daughter : A father is bound to maintain his unmarried daughters. After his death they are entitled to be maintained out of his estate. *(Bai Mangal V. Bai Rukhmini* (1899) 23.Bom.291).[5] The father is under a moral, though not legal obligation to maintain a married daughter if she is unable to obtain maintenance from her husband or after his death from his family.

``Under Hindu law, a daughter on her marriage ceases to be a member of her father's family and becomes a member of her husband's family and she is entitled to be maintained by her husband and after the husband's death out of the husband's estate, but if the husband leaves no estate, then, her father-in-law, if he has got sufficient property of his own, is morally, though not legally bound to maintain her, but after his death she acquires a legal right to be maintained out of his estate.

If she is unable to obtain maintenance from her husband or after his death, from his family, his father, if he has got separate property of his own, is under a moral, though not a legal obligation to maintain her. But it is not settled whether after the father's death, she acquires a legal right to be maintained by his heirs out of his estate.'' *(Matilal V. Brajabashi* (1960) 12.D.L.R.142).[6]

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3. *(Mst. Golab V. Collector of Benares* (1847) 4.M.I.A.246).
4. *(See Bhoopatinath V. Basanta Kumari* (1936) 63.Cal.1098).
5. *(Bai Mangal V. Bai Rukhmini* (1899) 23.Bom.291).
6. *(Matilal V. Brajabashi* (1960) 12.D.L.R.142).

3. Parents : A son is under a personal obligation to maintain his aged parents. He is bound to maintain them even if he inherits no ancestral property. *(Subbarayana V. Subbakka* (1885) 8.Mad. 236).[7]

4. Grand children : It is not the personal obligation of the grand-father to maintain his grandson or grand-daughter. But he is under a moral obligation to maintain them. *(Manmohini V. Balak Chandra* (1871) 8.Beng..L.R.22).[8]

5. Female members of the family : The *Karta* of a joint family is under a legal obligation to maintain all the male members of the family and their children. On the death of any one of the male members, he is bound to maintain his widow and his children. *(Bhagwan Singh V. Mst. Kewal* (1927) 8.Lah. 360 = 101. I.C.201).[9] The obligation to maintain these persons arises from the fact that the manager is in possession of the family property. The same principles apply *mutatis mutandis* to cases governed by Dayabhaga except where the female succeeds to the estate of the deceased owner.

6. Persons excluded from inheritance : Where a person is excluded from inheritance by reason of disability, he is entitled to maintenance for himself and his family out of the property which he would have inherited but for the disability. *(Ram Soonder V. Ram Sahye* (1882) 8Cal.919 ; Mit.II,10).[10]

7. Illegitimate sons and daughters : The illegitimate sons of a Hindu by a woman who is not a *dasi* is entitled to maintenance for life according to Mitakshara and upto minority according to Dayabhaga.

The illegitimate son of three higher classes by a *dasi* is entitled to maintenance whereas the illegitimate son of a Sudra by a *dasi* is entitled to a share of inheritance.

7. *(Subbarayana V. Subbakka* (1885) 8.Mad. 236).
8. *(Manmohini V. Balak Chandra* (1871) 8.Beng. L.R.22).
9. *(Bhagwan Singh V. Mst. Kewal* (1927) 8.Lah. 360 = 101. I.C.201).
10. *(Ram Soonder V. Ram Sahye* (1882) 8Cal.919 ; Mit.II,10).

The illegitimate son of a Hindu by a non-Hindu woman and illegitimate daughters are entitled to maintenance as per Sec.488 of Cr.P.C. (See ``SUCCESSION'', supra).

8. Concubine : *(Avaruddhastri)* A concubine, in the continuous and exclusive keeping of a Hindu *until his death,* is entitled to maintenance out of his estate. *(Rama Raja V. Papammal* (1925) 48.Mad.805=90.I.C.983).[11] But her right to maintenance is conditional upon her continued chastity. *(Yashvantrav V. Kashibai* (1888) 12.Bom.26).[12]

9. Wife and widow : A wife or a widow is entitled to maintenance out of the property of her husband or late husband as the case may be. This has already been discussed in the chapter ``MARRIAGE'', supra).

AMOUNT OF MAINTENANCE

In determining the amount of maintenance the following circumstances should be considered :

(i) The value of the estate. *(Shridhar V. Mst. Sitabai* (1938) Nag.289).[13]

(ii) The position and status of the deceased husband and of the widow.

(iii) The amount which may reasonably be necessary for ordinary expenses of living of the widow as well as what might reasonbly be spent for religious and allied purposes. *(Devi Persad V. Gunwanti* (1895) 22.Cal.410).[14]

(iv) The past relation between her and her husband. *(Purushothamdas V. Bai Rukmini* (1938) Bom. 1=170.I.C.897).[15]

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11. *(Rama Raja V. Papammal* (1925) 48.Mad.805=90.I.C.983).
12. *(Yashvantrav V. Kashibai* (1888) 12.Bom.26).
13. *(Shridhar V. Mst. Sitabai* (1938) Nag.289).
14. *(Devi Persad V. Gunwanti* (1895) 22.Cal.410).
15. *(Purushothamdas V. Bai Rukmini* (1938) Bom. 1=170.I.C.897).

There is a conflict of opinion whether a widow is entitled to maintenance out of the property of the joint family, when the income from her *stridhana* is sufficient for her maintenance. In such a case she is not entitled to maintenance according to Calcutta High Court but she is entitled according to Madras High Court. (See *Ramawati V. Manjhari* (1906) 4.Cal.L.J.74;[16] *Lingayya V Kanakamma* (1915) 38.Mad.153 = 28.I.C.200).[17]

The amount of maintenance payable to a widow is limited to the annual income of the share to which her husband would have been entitled on partition if living, *(Jayanti V. Alamelu* (1904) 27.Mad.45;[18] *Srimathi Sabitri V. Mrs. F.A. Savi* (1934) 13. Pat. 359 =145.I.C.1).[19]

A widow who has once received a sufficient allotment for her maintenance, but has dissipated it, is not entitled to further maintenance. *(Savitribai V. Laximibai* (1878) 2.Bom.573).[20]

(Maintenance to other females.) The principles of determining maintenance to a a widow apply *mutatis mutandis* in determing the amount of maintenance to other females.

The amount of maintenance is liable to be increased or diminished whenever there is such a change of circumstances as would justify a change in the rate. *(Rajender V. Putto* (1879) 5.Cal.L.R.18).[21] But an agreement by a widow not to claim any increase in future even in case of change of circumstances is binding upon her, *(Purushothamdas V. Bai Rukmini,* supra).[22]

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16. See *Ramawati V. Manjhari* (1906) 4.Cal.L.J.74;
17. *Lingayya V Kanakamma* (1915) 38.Mad.153 = 28.I.C.200).
18. *(Jayanti V. Alamelu* (1904) 27.Mad.45;
19. *Srimathi Sabitri V. Mrs. F.A. Savi* (1934) 13. Pat. 359 =145.I.C.1).
20. *(Savitribai V. Laximibai* (1878) 2.Bom.573).
21. *(Rajender V. Putto* (1879) 5.Cal.L.R.18).
22. *(Purushothamdas V. Bai Rukmini,* supra).

(Is maintenance a charge upon the estate?) The claim for maintenance is not a charge upon the estate until it is fixed or charged by a decree of a Court, or by an agreement between the person entitled to maintenance and the holder of the estate or by the will by which the property was bequeathed. So a *bona fide* purchaser for value without notice of such claim is not liable for the maintenance. The claim is also liable to be defeated by a transfer to a purchaser for value even with notice of the claim, unless the transfer was made with the intention of defeating the widow's rights and the purchaser had notice of such intention. *(Sarolah V. Bhoobun* 1888) 15.Cal.292).[23] But where maintenance has been made a charge upon the property, and the property is subsequently sold, the purchaser must hold it subject to the charge. *(Kuloda Prosad V. Jogeshar* (1900) 27.Cal.194).[24]

Where the property belonging to the husband or to the joint family is sold for payment of debts, the sale is binding on the widow and she has no right of maintenance against the purchaser or against the property sold even if the purchaser had notice of her claim for maintenance. *(Johurra V. Sreegopal* (1876) 1.Cal. 470).[25] But where the maintenance has been made a charge upon the property, it takes precedence over the right of a subsequent purchaser of the same property in execution of a money decree, though the decree was in respect of debts binding on the family. *(Somasundram V. Unnamalai* (1920) 43.Mad.800 = 59.I.C. 398).[26]

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23. *(Sarolah V. Bhoobun* 1888) 15.Cal.292).
24. *(Kuloda Prosad V. Jogeshar* (1900) 27.Cal.194).
25. *(Johurra V. Sreegopal* (1876) 1.Cal. 470).
26. *(Somasundram V. Unnamalai* (1920) 43.Mad.800 = 59.I.C. 398).

If a Hindu alienates entire property by gift or by will with the intention to defeat the right of his widow to maintenance, the donee or divisee takes the property subject to the widow's right of maintenance, and the widow may enforce her right against it. *(Becha V. Mothina* (1901) 23.All.86;[27] *Joytara V. Ramhari* (1884) 10.Cal.638).[28]

FAMILY DWELLING HOUSE AND RIGHT OF RESIDENCE

Where an undivided family consists of two or more males related as father and son or otherwise and :-

One of the coparceners or members dies leaving a widow she is entitled to reside in the family dwelling-house in which she lived with her husband. If the house is sold by surviving coparcener of coparceners *without necessity* the purchaser cannot evict her. *(Talemnad V. Rukmina* (1881) 3.All.353).[29] But if the sale is for family necessity or for a debt contracted by her husband, she is liable to be evicted even if the purchaser had notice at the time of purchase that she was in occupation of the house. *(Mt. Champa V. Official Receiver, Karachi* (1934) 15.Lah.9 =144.I.C.636).[30] The same rule applies *mutatis mutandis* in case of unmarried daughters of deceased coparceners. *(Suryanarayana V. Balasubramania* (1920) 43.Mad.635 = 56.I.C.524).

Where a family consists only of a husband and wife : —

The wife cannot assert her right of residence in the family dwelling-house against the purchaser even if the sale was without necessity and the purchaser had notice at the time of sale that she was residing in the house. *(Manilal V. Bai Tara* (1893) 17. Bom. 398).[31]

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27. *Becha V. Mothina* (1901) 23.All.86;
28. *Joytara V. Ramhari* (1884) 10.Cal.638).
29. *(Talemnad V. Rukmina* (1881) 3.All.353).
30. *(Mt. Champa V. Official Receiver, Karachi* (1934) 15.Lah.9 = 144.I.C.636).
31. *(Manilal V. Bai Tara* (1893) 17. Bom. 398).

The same rule applies *mutatis mutandis* to unmarried daughters. *(Suryanarayana V. Balasubramania,* supra).[32]

Where a Hindu disposes whole of his property by will, the right of the person entitled to maintenance under Hindu law is not affected. (Sch. III, 1, Succession Act, 1925).[33]

A Hindu female cannot transfer her right of future maintenance and such a right of future maintenance can not be attached. But the arrears of maintenance may be attached. (C.P.C. Sec. 60, cl. (n) ; *Haridas V. Baroda* (1900) 27.Cal.38).[34]

It should be noted that the husband's or father's obligation to maintain his wife or daughter is personal and quite independent of the possession by the husband or father of any property, ancestral or self acquired. It is different, however, in case of widows and daughters of the deceased coparceners, whose rights depend on the possession of joint property by the surviving coparceners.

SUITS

A widow, entitled to maintenance, may file a suit for all or any of the following reliefs :

(i) for a declaration of her right to maintenance.

(ii) for arrears of maintenance. *(Pirthee Singh V. Rajkooer* (1874) 12.Beng.L.R.238).[35]

(iii) for a charge on a specific portion of the property of her husband for her maintenance or residence, *(Mahalakshamamma V. Venkata* (1883) 6.Mad.83).[36]

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32. *(Suryanarayana V. Balasubramania,* supra).
33. (Sch. III, 1, Succession Act, 1925).
34. (C.P.C. Sec. 60, cl. (n) ; *Haridas V. Baroda* (1900) 27.Cal.38).
35. *(Pirthee Singh V. Rajkooer* (1874) 12.Beng.L.R.238).
36. *(Mahalakshamamma V. Venkata* (1883) 6.Mad.83).

A widow is entitled to a decree against all the members of a joint family and not only against the branch to which her husband belonged and to which his share lapsed by survivorship. *(Subbarayalu V. Kamalavallitha* (1912) 35.Mad.147=10.I.C.347).[37]

A decree which directs the payment of future maintenance from time to time can be enforced by execution, but a decree which merely declares a right of maintenance cannot be so enforced. *(Ashutosh V. Lukhimoni* (1892) 19.Cal.139;[38] *Venkanna V. Aitamma* (1889) 12.Mad.183).[39]

The period of limitation for a suit : —

(Limitation) (i) for a declaration of a right to maintenance is 12 years from the time when the right is denied.

(ii) for arrears of maintenance is 12 years from the time when the arrears are payable. Therefore, past maintenance cannot be claimed for a period of more than 12 years.

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37. *(Subbarayalu V. Kamalavallitha* (1912) 35. Mad. 147 = 10. I.C. 347).[37]
38. *(Ashutosh V. Lukhimoni* (1892) 19.Cal.139;
39. *Venkanna V. Aitamma* (1889) 12.Mad.183).

CHAPTER XI

HOLY ORDERS AND ENDOWMENTS

(Moksha or communion with the Supreme soul.) The sages prescribed four stages of life for attaining *moksha* or communion with the *Supreme Soul.* These are *Brahmacharyya* or student life, *Garhastha* or life of a house holder, *Vanprastha* or retirement from the world, and *Sannyas* or total renouncement of the world. A Sudra cannot become a *Sannyasi* or ascetic.

The Hindus of the present day rarely adopt the third and fourth stages of life. A life long student is also rare now-a-days.

(Maths.) A *math* (or mutt) means a place for the residence of ascetics and their pupils and the like. The *maths* may be of three descriptions e.g. *Maurasi, Panchyeti* and *Hakimi.* In the *maurasi* maths the office of the chief *mohunt* (head of the math) devolves upon the disciple of the existing mohunt who moreover, usually nominates him as his successor. In *panchayati* mutts the office of the mohunt is elective whereas in *Hakimi* mutts the appointment of the presiding mohunt is vested in the ruling power or in the party who has endowed the temple.

(Maths and temples.) In case of a temple, the property is dedicated for the worship of a God primarily for spiritual purposes. ``The two classes of institutions viz., temples and mutts are thus supplementary in the Hindu Ecclesiastic system, both conducing to spiritual welfare, the one by offering opportunities for prayer and worship, the other by facilitating spiritual instruction and the acquisition of religious knowledge-the presiding element being the deity or idol in the one, the learned and pious ascetic in the other.'' *(Vidypurna V. Vidyanidhi* (1904) 27.Mad. 435).[1] G.C. Sarkar Sastri differs from the above view and maintains that, ``The Deity is the presiding element in both, there being no mutt without its Deity : the worship is prominent in both, but religious knowledge is added to it in one of them.''

1. *(Vidypurna V. Vidyanidhi* (1904) 27.Mad. 435).

The manager or the head of a temple is called *shebait* and the head of the *math* is called *mohunt*. Property dedicated to religious uses is called *debutter* property. *Debutter* means *belonging to a Deity*.

There can be no divesting of properties already vested in the Deity.*(Ram Dasi Paul V. Sura Bala Dasya* (1962) 14 D.L.R.810).[2]

Temples and maths are both religious foundations and a math like an idol is a *juridical person*. But a temple is not a *juridical person (Thakardwara V. Ishar Das* (1928) 9.Lah. 588 = 110. I. C. 384).[3] A shebait forfeits his position by reason of his lunacy but the head of a math does not. *(Vidyapurna V. Vidyanidhi,* supra).[4] It has been held in *Nirmal Kumar Banerjee V. Jyoti Prasad Banerjee* (1941) 2.Cal.128 = 197.I.C.763) that subsequent lunacy of a shebait is no ground for his removal from the office, as the guardian of the lunatic can discharge his duties on his behalf.

A female can become the manager of a religious foundation but she cannot perform any spiritual function. *(Janoki Devi V. Gopal* (1882) 9.Cal.766).[5] Though there are some points of similarity between a minor and a Hindu idol still the idol is not a perpetual minor. *(Tarit Bhusan V. Sree Ishwar* (1941) Cal.477).[6] Any next friend may sue on behalf of the idol for a declaration that certain property is a *debutter* property. It is not necessary to ask the shebait to institute the suit before the next friend files it. *(Thakur Sree Sree Annapurna V. Shiba Sundari* (1944) 2.Cal.144).[7]

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2. *(Ram Dasi Paul V. Sura Bala Dasya* (1962) 14 D.L.R.810).
3. *(Thakardwara V. Ishar Das* (1928) 9.Lah. 588 = 110. I. C. 384).
4. *(Vidyapurna V. Vidyanidhi,* supra).
5. *(Janoki Devi V. Gopal* (1882) 9.Cal.766).
6. *(Tarit Bhusan V. Sree Ishwar* (1941) Cal.477).
7. *(Thakur Sree Sree Annapurna V. Shiba Sundari* (1944) 2.Cal.144).

Religious endowment-Family deity (Private Deity)-Stranger can be appointed next friend or guardian *adlitem* of the deity for protecting *debutter* property-Rules of procedure relating to a minor should be followed in such cases. *(Pran Gopal Jiew V. Malika Begum and others.* (1973) 25.d.l.r.387;[8] *Sm. Susama V. Atul Krishna.* A.I.R. (1955) Cal.624).[9]

Property belonging to a religious institution may by the usage and custom of the institution vest in trustees other than the spiritual head, *(Arunachellam V. Venkata* (1919) 46.I.A.204).[10]

Shebaitship is a property and is heritable. *(Ram Dasi Pal V. Surabala Dasya* (1962) 14.D.L.R.810).[11] Mohunt occupies similar position like that of shebait under Hindu law and that of mutwalli under Muslim law. *(Mian Ahmed Ali V. Rehabilitation Authority* (1964) 16. D.L.R.(S.C.) 325).[12] But mohuntship is not heritable like ordinary property. *(Vikram Das V. Daulat Ram* (1956) S.C.382).[13]

Deity is a perpetual minor and cannot act without guardian, viz, shebait-Decree on behalf of a deity-Shebait alone is competent to execute it. *(Satya Ram Ghosal and others V. Province of E. Pakistan* (1973) 25. D.L.R.314).[14]

Property belonging to the deity-Once it is found that the property belongs to the deity and the said deity has not migrated to India, the property cannot be declared to be an enemy property only because some of the shebaits or all of the shebaits do not live in Pakistan. *(Shuk Dev. V. Province of E. Pakistan.* (1972) 24.D.L.R.55).[15]

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8. *(Pran Gopal Jiew V. Malika Begum and others.* (1973) 25.d.l.r.387;
9. *Sm. Susama V. Atul Krishna.* A.I.R. (1955) Cal.624).
10. *(Arunachellam V. Venkata* (1919) 46.I.A.204).
11. *(Ram Dasi Pal V. Surabala Dasya* (1962) 14.D.L.R.810).
12. *(Mian Ahmed Ali V. Rehabilitation Authority* (1964) 16. D.L.R.(S.C.) 325).
13. *(Vikram Das V. Daulat Ram* (1956) S.C.382).
14. *(Satya Ram Ghosal and others V. Province of E. Pakistan* (1973) 25. D.L.R.314).
15. *(Shuk Dev. V. Province of E. Pakistan.* (1972) 24.D.L.R.55).

ENDOWMENTS

(Who can create an endowment) Every adult Hindu of sound mind may dedicate his property for religious and charitable purposes. A Hindu may dedicate for religious and charitable objects all property which he can validly dispose of by gift or by will and there is nothing to prevent a Hindu from dedicating the whole of his property for such purposes. (See Macnaghten's Consideration on Hindu Law P.335).

Since the words *dharam, good work* etc., are vague and uncertain, a gift or bequests to *dharam* or *for good work* is void for vagueness and uncertainty. *(Gouri Shankar V. Mohanlal* (1940) 15.Luck 674=187.I.C.597).[16]

(Essentials of an endowment.) All that is necessary to create an endowment is that the religious or charitable purposes should be clearly specified and the property should be set apart or dedicated to those purposes. It is not necessary that there should be any express words of gift to the idol. *(Prafulla V. Jogendra Nath*(1905) 9.C.W.N.528).[17] Nor any religious ceremony is necessary. *(Prem Nath V. Hari Ram* (1935) 16.Lah.85 = 154 I.C.229).[18] Though desirable, it is not necessary to vest the land and properties in trustees. A clear and unequivocal manifestation of intention to create a trust and vesting of the same in the donor or another as a trustee is enough to constitute dedication. *(Prem Nath V. Hari Ram,* supra). No writing is necessary to create an endowment, except where the endowment is created by a will. *(Muddun V. Komul* (1867) 8.W.R.42).[19]

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16. *(Gouri Shankar V. Mohanlal* (1940) 15.Luck 674=187.I.C.597).
17. *(Prafulla V. Jogendra Nath*(1905) 9.C.W.N.528).
18. *(Prem Nath V. Hari Ram* (1935) 16.Lah.85 = 154 I.C.229).
19. *(Muddun V. Komul* (1867) 8.W.R.42).

"A Hindu may dedicate his property to charity without any document." *(Rangalal V. Satish Chandra* (1959) 11.D.L.R.377).[20]

(Kinds of endo-wments and dedictions.) Endowments may be absolute, partial or illusory. Where the main object of the donor is to defraud the creditors or to restrain alienation, the property cannot be treated as *debutter* property though it may purport on the face of the deed to dedicate the property to an idol. The executant should divest himself of the property and if his subsequent dealings with the property show that he did not intend to create an endowment, the dedication would be inoperative. *(Watson and Co. V. Ram Chund* (1891) 18.Cal.10).[21] The fact that the members of the settlor's family get some remuneration as *shebait* does not render the dedication void, provided the remuneration is reasonable. *(Ishwari Bhubaneshwari V. Projonath* (1937) 2. Cal.447).[22]

Where no beneficial interest is reserved for the settlor or for any other person and the property is absolutely dedicated to the worship of an idol, the dedication is said to be absolute or complete. *(See Jagadindra V. Hemanta* (1905) 32.Cal.129).[23]

On the other hand if any beneficial interest is reserved for the settlor or any other person and a mere charge or trust is created in favour of an idol, the dedication is said to be partial or qualified. *(Ishawari Bhuvaneshwari V. Projonath,* supra).[24]

Illustration.

A will provides that the property of the testator shall be considered to be the property of a certain idol and further provides that the residue after defraying the expenses of the temple "*Shall be used by our legal heirs to meet their own expenses.*" It is partial dedication.

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20. *(Rangalal V. Satish Chandra* (1959) 11.D.L.R.377).
21. *(Watson and Co. V. Ram Chund* (1891) 18.Cal.10).
22. *(Ishwari Bhubaneshwari V. Projonath* (1937) 2. Cal.447).
23. *(See Jagadindra V. Hemanta* (1905) 32.Cal.129).
24. *(Ishawari Bhuvaneshwari V. Projonath,* supra).

(Distinction between a public and a private endowment.)

In a public endowment the dedication is for the use or benefit of the public. When property is set apart for the worship of a *family* God in which the public are not interested, the endowment is a private one. *(Jugal Kishore V. Lakshmands* (1899) 23.Bom.659).[25] The distinction between public and private endowment is important, for it has been held by the Judicial Committee that where a temple is a public temple, the dedication may be such that the family itself could not put an end to it, but in the case of property dedicated to a family idol, the consensus of the whole family might give the property another direction. *(Konwar Doorganath V. Ram Chunder* (1876) 2. Cal. 341 = 4.I.A.52).[26] In the above case their Lordships observed, "Where the temple is a *public temple,* the dedication may be such that the family itself could not put an end to it but in case of a *family idol,* the consensus of the whole family might give estate another direction."

It has accordingly been held that where the heirs of the founder are unable to carry on the worship of the *family idol,* out of the income of the endowment, they may transfer the idol and its property to another family for the purpose of carrying on the worship. Such a transfer, if made *without consideration and for the benefit of the idol,* is valid and binding on the heirs of the transferor. *(Khetter Chunder V. Hari Das* (1890) 17. Cal.557).[27]

In a Calcutta case *(Gobinda Kumar V. Debendra* (1907) 12.C.W.N.98),[28] it was held that properties dedicated to a *family idol* may be converted into secular property by the consensus of the family. The correctness of this decision has been doubted in subsequent cases and it has been said that even if the consent of the family could effect such a diversion, it must be the consent of all

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25. *(Jugal Kishore V. Lakshmands* (1899) 23.Bom.659).
26. *(Konwar Doorganath V. Ram Chunder* (1876) 2. Cal. 341 = 4.I.A.52).
27. *(Khetter Chunder V. Hari Das* (1890) 17. Cal.557).
28. *(Gobinda Kumar V. Debendra* (1907) 12.C.W.N.98),

members of the family, both males and females, as they are all interested in the worship of the idol. *(Chandi Charan V. Dulal Chandra* (1927) 54.Cal.30;[29] *Gopal V. Radha* (1925) 41.Cal.L.J.396).[30]

(Bequest to a Deity not in existence.) Bequest to an idol not in existence at the time of testator's death is valid. *(Bhupati Nath V. Ramlal* (1910) 37.Cal.128).[31] Similarly a dedication to a number of deities some of which were installed after the death of the testator is valid. *(Bhupatinath V. Basanta Kumari* (1936) 63.Cal.1098).[32]

But the idol to which the property is to be dedicated must be specified, otherwise the dedication would be void. *(Chandi Charan V. Haribola* (1919) 46.Cal.951).[33] The rule against perpetuity applies to gifts and bequests to private persons. It does not apply to religious and charitable endowments. *(Prafulla V. Jogendranath* (1905) 9.C.W.N. 528 ; T.P.Act. Sec.18).[34]

POSITION OF SHEBAITS AND MOHUNTS

(Shebait.) A shebait is not the owner of the *debutter* property. He has only the title of manager of a religious endowment. *(Shibessouree V. Mothooranath* (1869) 13.M.I.A. 270).[35] The rent of the property dedicated to the services of an idol as well as the offerings made to the idol belong to the idol and not to the shebait. *(Shibessouree V. Mothooranath,* supra).[36] Hence it follows that a shebait :

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29. *(Chandi Charan V. Dulal Chandra* (1927) 54.Cal.30;
30. *Gopal V. Radha* (1925) 41.Cal.L.J.396).
31. *(Bhupati Nath V. Ramlal* (1910) 37.Cal.128).
32. *(Bhupatinath V. Basanta Kumari* (1936) 63.Cal.1098).
33. *(Chandi Charan V. Haribola* (1919) 46.Cal.951).
34. *(Prafulla V. Jogendranath* (1905) 9.C.W.N. 528 ; T.P.Act. Sec.18).
35. *(Shibessouree V. Mothooranath* (1869) 13.M.I.A. 270).
36. *(Shibessouree V. Mothooranath,* supra).

(i) is the administrator of the property attached to the temple ;

(ii) is the trustee of the property of the temple ;

(iii) is the holder of an office of dignity as regards the services of the temple and he can perform all duties appertaining to it, including proper *sheba-puja* of the Deity. *(Ramanathan V. Murugappa* (1906) 29. Mad. 283 = 33. I.A.139).[37]

"A shebait can maintain a writ application even in his own name, as his shebaitship itself would give him a legal right which he could seek to preserve." *(Province of East Pakistan V. Kshiti Dhar Roy* (1964) 16.D.L.R. (S.C.) 457).[38]

"According to the Hindu law where property is devoted absolutely to religious purposes, the possession and management of the property belongs, in the case of *devasthanam* or temple (i.e. idol or deity) to the manager of the temple called shebait, and a shebait by virtue of his office is the administrator of the property attached to the temple of which he is the shebait, and also entrusted with services of the temple or idol and the duties that appertain to it." *(Sri Sri Siddheswari Devi Thakurani V. Maniruddin Biswas.* (1965) 17.D.L.R.629).[39]

(Mohunt.) As a general rule, the title to the property of the Math is in the Mohunt but the property is solely held by him in trust. *(Govinda V. Mohanta Ramcharan* (1936) 63.Cal.326).[40] And the surplus income must be added to the endowment. *(Arunachellam V. Venkata,* supra). He has a wider discretion as to the application of the income, but he is under fiduciary obligation to manage the property so as to serve effectively the objects for which the Math exists. *(Mahant Kesho Dạs V. Amar Dasji* (1935) 14.Pat.379 = 156.I.C.1099).[41] The *de facto* mohunt of a Math can maintain a suit to recover the property for its benefit from trespassers. *(Sr. Radhakrishna V. Mst. Maharaj* (1937) 12.Luck.331 = 164 I.C.919).[42]

37. *(Ramanathan V. Murugappa* (1906) 29.Mad.283 = 33. I.A.139).
38. *(Province of East Pakistan V. Kshiti Dhar Roy* (1964) 16.D.L.R. (S.C.) 457).
39. *(Sri Sri Siddheswari Devi Thakurani V. Maniruddin Biswas.* (1965) 17.D.L.R.629).
40. *(Govinda V. Mohanta Ramcharan* (1936) 63.Cal.326).
41. *(Mahant Kesho Das V. Amar Dasji* (1935) 14.Pat.379 = 156.I.C.1099).
42. *(Sr. Radhakrishna V. Mst. Maharaj* (1937) 12.Luck.331 = 164 I.C.919).

"The rights of a Mohunt are that so long as he retains office, he is presumed to have the sole management of the endowment or institution over which he presides. He is in no sense the owner of the property. His position is that of a *mutwalli* under Muslim law or a *shebait* under Hindu law." (*Mian Ahmed Ali V. Rehabilitation Authority* (1964) 16.D.L.R. (S.C.) 325).[43]

A *shebait* as well as a *mohunt* occupies a fiduciary position with respect to debutter property ; a purchase of such property by him *benami* and without disclosing that he is the purchaser is invalid even if bought at an execution sale or at a full market value. *(Peary Mohan V. Monohar* (1921) 48.Cal. 1019).[44]

(Alienation of debutter property.) A Shebait or a mohunt can borrow money, on a mortgage of the dubutter property for the purpose of proper worship and for the benefit and preservation of the property.

The power of a shebait or a mohunt is analogous to that of a manager of an infant heir as defined in *Hunooman Persaud V. Babooee,* and he has no power to alienate debutter property except *in case of need or for the benefit of the estate.*

"The power, however, [of a shebait] to incur debts must be measured by the existing necessity for incurring them." *(Prasunna Kumari V. Golab Chand* (1875) 2.I.A.145 = 14.BengL.R.450).[45]

The head of a math cannot create any interest in the math property to ensure beyond life, except for unavoidable necessity. *(Vidya Varuthi V. Balusami* (1921) 48.I.A.302).[46]

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43. (*Mian Ahmed Ali V. Rehabilitation Authority* (1964) 16.D.L.R. (S.C.) 325).
44. *(Peary Mohan V. Monohar* (1921) 48.Cal. 1019).
45. *(Prasunna Kumari V. Golab Chand* (1875) 2.I.A.145 = 14.BengL.R.450).
46. *(Vidya Varuthi V. Balusami* (1921) 48.I.A.302).

Funds required for the protection of the Deity and the *sheba puja* thereof in a place away from the place where the founder installed it, is a transfer for legal necessity and the *shebait* is entitled to transfer *debutter* property for such purposes. *(Dr. Habibur Rahman V. Md. Mansur* (1973) 25.D.L.R.211).[47]

In case of alienation of debutter property the alienee is bound to enquire *bona fide*, as to the existence of legal necessity. The onus is on him to prove that there was either a legal necessity in fact or he made proper and reasonable enquiries to satisfy himself as to the existence of such necessity. *(Konwar Doorganath V. Ram Chunder* (1876) 2.Cal. 341).[48]

(Creditor's position.) If a debt is contracted by the shebait for legal necessity the creditor is entitled to a decree for the amount even if no charge is created on the property to secure the loan. *(Lakshmindra V. Raghuvendra* (1920) 43.Mad. 795 = 59. I. C. 287).[49] But at the time of realisation of the amount provision should be made for resonable expenses connected with the institution and for proper *sheba-puja* of the deity. Such a decree is also binding on the successors. *(Vibhudapriya V. Lakshmindra* (1927) 50.Mad. 497 = 101. I.C.545).[50]

(Devolution of the officeof shebait and mohunt.) Neither the headship nor the property of the math is a matter or partition. *(Seth V. Meruswamiar* (1918) 45.I.A.1;[51] *Govinda V. Ram* (1925) 52.Cal.748).[52] (Devolution of the office of mohunt has already been

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47. *(Dr. Habibur Rahman V. Md. Mansur* (1973) 25.D.L.R.211).
48. *(Konwar Doorganath V. Ram Chunder* (1876) 2.Cal. 341).
49. *(Lakshmindra V. Raghuvendra* (1920) 43.Mad. 795 = 59. I. C. 287).
50. *(Vibhudapriya V. Lakshmindra* (1927) 50.Mad. 497 = 101. I.C.545).
51. *(Seth V. Meruswamiar* (1918) 45.I.A.1;
52. *Govinda V. Ram* (1925) 52.Cal.748).

discussed.) The devolution of the office of the shebait depends on the terms of the deed or will. In the absence of such provisions in the deed or will it passes to the heirs of the founder. *(Ganesh V. Lal Behari* (1936) 63.I.A.448;[53] *Turini V. Asha Lata* (1943) 2.Cal.137).[54]

The founder himself may appoint joint shebaits. The joint owners are also entitled to perform the worship in turn but the debutter property must be managed by them jointly. In cases where the interest of the shebaits are adverse to those of the deities, it will have to be represented by a disinterested next friend to be appointed by the Court. *(Pramatha V. Pradyumna* (1925) 52.I.A 245 = 52.Cal.809.[55] See *also Bimal V. Jnanendra* (1937) 2.Cal.105).[56]

Where the shebait has power of appointing his successor, he may nominate his successor by an act *inter vivos* or by a will. *(Radhanath V. Saktipada* (1936) 58.All.1053 = 164.1.C.595).[57] A shebait by his own act cannot alter the line of succession to the office of the shebait. *(Nirmal Kumar V. Jyoti Prasad* (1941) 2.Cal. 128).[58]

As to devolution of the office of shebait, the provision is that it depends on the terms of the deed or will by which it is created. Where there is no provision in the deed or will as to the succession, the title to the property or to the management and control of the poperty, as the case may be, follows the line of inheritance from the founder, in other words it passes to his heirs. *(Sri Sri Siddheswari Devi Thakurani V. Moniruddin Biswas*(1965) 17.D.L.R.629).[59]

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53. *(Ganesh V. Lal Behari* (1936) 63.I.A.448;
54. *Turini V. Asha Lata* (1943) 2.Cal.137).
55. *(Pramatha V. Pradyumna* (1925) 52.I.A 245 = 52.Cal.809.
56. See *also Bimal V. Jnanendra* (1937) 2.Cal.105).
57. *(Radhanath V. Saktipada* (1936) 58.All.1053 = 164.1.C.595).
58. *(Nirmal Kumar V. Jyoti Prasad* (1941) 2.Cal. 128).
59. *(Sri Sri Siddheswari Devi Thakurani V. Moniruddin Biswas*(1965) 17.D.L.R.629).

The founder may be a non-Brahman and the very fact that he or his heirs may hold the said office is sufficient to indicate in a conclusive manner that there is no bar to a non-Brahman being the shebait.

— Ibid —

(Transfer of right of management.) A sale by a shebait or a mohunt of his right to manage debutter property is void. *(Govinda V. Mohanta Ram Charan,* supra).[60]

Similarly a gift of the right of management of debutter property to a stranger is not valid unless sanctioned by custom. *(Rajaram V. Ganesh* (1899) 23.Bom.131;[61] *Ukoor Doss V. Chunder* (1865) 3.W.R.152).[62]

If objected to by the majority of the worshippers the manager of a public temple has no right to remove the idol from one temple to another. *(Hari V. Antaji* (1920) 56.I.C.459 = 44.Bom.466).[63]

RIGHTS OF THE FOUNDER

In the absence of any custom or express provision in the deed or will creating the endowment, the shebaitship vests in the founder and his heirs. This principle applies to public as well private trusts. *(Prakkash V. Subodh* (1937) 1.Cal.575).[64] The founder cannot alter the line of succession or interfere with the management unless he reserves such right by the deed of endowment. *(Gouri V. Ramanimoyi* (1923) 50.Cal.197).[65] Religious

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60. *(Govinda V. Mohanta Ram Charan,* supra).
61. *(Rajaram V. Ganesh* (1899) 23.Bom.131;
62. *Ukoor Doss V. Chunder* (1865) 3.W.R.152).
63. *(Hari V. Antaji* (1920) 56.I.C.459 = 44.Bom.466).
64. *(Prakkash V. Subodh* (1937) 1.Cal.575).
65. *(Gouri V. Ramanimoyi* (1923) 50.Cal.197).

(iii) The Court can remove the shebait if in the opinion of the Court, he is no longer in a position to discharge the duties of his office faithfully. *(Peary Mohan V. Monohar,* supra).[73]

(iv) A member of the interested community may sue a shebait for rendering accounts of the institution. But mere mistake on the part of a shebait or mohunt is no ground for his removal unless accompained by fraud or dishonest misappropriation. *(Phuttibai V. Shri Deo Mandir* (1942) nag.555 = 202.I.C.185.[74] *See Pran Gopal Jiew V. Malika Begum,* (1973) 25.D.L.R.387).[75]

(Right of worship.) Where a temple is founded for the worship of members of a particular sect, persons belonging to other sects are not entitled to worship in the temple. *(Sankaralinga V. Rajeswara* (1908) 14.Mad.1).[76] Collection of fees, except upon payment of fixed fees, for admission into the inner sanctuary of the temple is illegal. *(Sathappayyar V. Periasami* (1891) 14.Mad.1).[77]

(Limitation) Period of limitation for suit to set aside a transfer of immoveable property by a shebait or mohunt is 12 years from the date when the transfer becomes known to the plaintiff. In case of moveable property the period is 3years from the date when the sale becomes known to the plaintiff.

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73. *(Peary Mohan V. Monohar,* supra).
74. *(Phuttibai V. Shri Deo Mandir* (1942) nag.555 = 202.I.C.185.
75. *See Pran Gopal Jiew V. Malika Begum,* (1973) 25.D.L.R.387).
76. *(Sankaralinga V. Rajeswara* (1908) 14.Mad.1).
77. *(Sathappayyar V. Periasami* (1891) 14.Mad.1).

endowment, once made, becomes irrevocable. *(Juggut Mohini V. Sokheemoney* (1871) 14.M.I.A.289).[66] But if the trust fails for want of object the Court may apply the funds *cy-pres* i.e. to other similar objects or purposes. *(Mayor Lyons V. Adv. Gen. of Bengal* (1876) 26.W.R.1).[67]

If the terms of the deed or will regarding shebaitship become inconsistent with the general principles of Hindu law, it will be void. A Hindu, therefore, cannot by gift or will provide that the office of shebaitship shall be held by his sons, grandsons and their male descendants in perpetuity. *(Chandra V. Vibhuti* (1944) 23.Pat.763 ;[68] *Gopal V. Kartick* (1902) 29.Cal. 716 [P.C.]).[69]

(Offering) In the absence of any custom the offering to the idol belongs to the idol and not to the priest or shebait. Such offerings are intended for proper *sheba-puja,* maintenance of the shrine and for charity. *(Shibessouree V. Mothooranath,* supra).[70]

REMOVAL OF SHEBAITS AND MOHUNTS

A shebait or mohunt can be removed from his office on the following grounds : —

(i) The Court may remove the shebait of a public temple for the good of the religious endowment. *(Ram Parkash V. Anand Das* (1916) 43.Cal.707).[71]

(ii) The Court may also remove the shebait of a private endowment for misconduct. The Court has the power to call upon the shebait to render accounts of the institution. *(See Nirmal Kumar V. Jyoti Prasad,* supra).[72]

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66. *(Juggut Mohini v Sokheemoney* (1871) 14.M.I.A.289).
67. *(Mayor Lyons V. Adv. Gen. of Bengal* (1876) 26.W.R.1).
68. *(Chandra V. Vibhuti* (1944) 23.Pat.763 ;
69. *Gopal V. Kartick* (1902) 29.Cal. 716 [P.C.]).
70. *(Shibessouree V. Mothooranath,* supra).
71. *(Ram Parkash V. Anand Das* (1916) 43.Cal.707).
72. *(See Nirmal Kumar V. Jyoti Prasad,* supra).

In case of suit by a shebait or mohunt to recover possession of a property, moveable or immoveable, transferred or sold by a previous shebait or mohunt, the period of limitation is 12 years from the date of death, resignation or removal of the transferor or seller.

A minor can sue for possession of debutter property within 12 years from the date of dispossession or within three years from the date on which he attains majority. *(Jagadindra V. Hemanta* (1905) 32.Cal.129).[78]

A suit for possession of hereditary office (like *yajman vritti)* must be brought within 12 years from the date on which the plaintiff becomes dispossessed. *(Dharam Narain V. Suraj Narain* (1940) All.815 = 193.I.C.697).[79]

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78. *(Jagadindra V. Hemanta* (1905) 32.Cal.129).
79. *(Dharam Narain V. Suraj Narain* (1940) All.815 = 193.I.C.697).

CHAPTER XII
GIFTS

(Definition of gift.) Hindu law defines gift as "the creation of another person's proprietary right after the extinction of one's own proprietary right in the subject matter of the gift." (Hindu law : G.C.Sarkar Sastri).[1]

According to Mitakshara "gift consists of the extinction of one's own property, and the generation of another property ; and if that another accepts, then *and not otherwise* the generation of another's property becomes complete." *(Yajnavalkya,* Solka ii, 27).

Hindu law divides gifts into four kinds :

(i) Proper (দেয়)

(ii) Improper (অদেয়)

(iii) Valid (দত্ত)

(iv) Invalid (অদত্ত)

(Kinds of properties that may be dispesed of by gift.) (i) A Hindu governed by Mitakshara law may dispose of his separate or self acquired property by gift. But he cannot dispose of his coparcenary interest by way of gift unless he is the sole surviving coparcener.

(ii) A Hindu governed by Dayabhaga law can dispose of his separate and self acquired property and his coparcenary interest by gift. But his gift of coparcenary interest is subject to the claims of those who are entitled to be maintained by him. *(Nagalutchmee V. Gopoo* (1856) 6.M.I.A.309, 344).[2]

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1. (Hindu law : G.C.Sarkar Sastri).
2. *(Nagalutchmee V. Gopoo* (1856) 6.M.I.A.309, 344).

(iii) A father under Mitakshara law may dispose of a small portion of joint family property by gift. A Dayabhaga father can dispose of the whole of his property, whether ancestral or self acquired, by gift subject to the claims of those who are entitled to be maintained by him.

(iv) A female may dispose of a small portion of her *stridhana* by gift or will.

(v) A widow may dispose of a small portion of property inherited by her from her husband by gift for pious purposes but she cannot do so by will. *(Sardar Singh V. Kunja* (1922) 44.All.503 = 69.I.C.36).[3]

(vi) Unless prohibited by custom, the owner of an impartible estate may dispose it of by gift or will. *(Sri Raja Venkata Surya V. Court of wards* (1899) 22.Mad. 383 = 26.I.A.83).[4]

The performance of *sheba-puja* of an ancestral deity confers spiritual benefit on the soul of the deceased owner and is as such a pious act. A dedication of the property for the performance of an act which confers spiritual benefit on the soul of the deceased owner is a dedication for such benefit even though no express mention is made of it. *(Kasiruddin V. Madan Gopal Jiu* (1954) 6.D.L.R.329).[5]

(Delivery of possession.) Under Hindu law a gift need not be in writing but it is not valid unless accompanied by delivery of possession of the subject of the gift from the donor to the donee. *(Gordhandas V. Bai Ramcoover* (1902) 26.Bom.449).[6] If the donee is already in possession, the gift may be completed by a declaration of gift on the part of the donor and by acceptance on the part of the donee. *(Bai Kushal V. Lakhma* (1883) 7. Bom. 452).[7]

3. *(Sardar Singh V. Kunja* (1922) 44.All.503 = 69.I.C.36).
4. *(Sri Raja Venkata Surya V. Court of wards* (1899) 22.Mad. 383 = 26.I.A.83).
5. *(Kasiruddin V. Madan Gopal Jiu* (1954) 6.D.L.R.329).
6. *(Gordhandas V. Bai Ramcoover* (1902) 26.Bom.449).
7. *(Bai Kushal V. Lakhma* (1883) 7. Bom. 452).

As per Sec.123 of the T.P. Act a transfer of an immoveable property by gift must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. Under that Act delivery of possession is no longer necessary to complete a gift, nor is mere delivery sufficient to constitute a gift except in the case of moveable property. *(Dharmodas V. Nistarini* (1887) 14.Cal. 446).[8] But where from the nature of the case physical possession cannot be delivered, it is enough to validate a gift if the donor has done all that he could do to complete it, so as to entitle the donee to obtain possession. *(Kalidas V. Kanhayalal* (1884) 11.Cal.121).[9]

For the purpose of making a gift of moveable property, the transfer may be effected by a registered instrument signed as aforesaid or by delivery. (T.P.Act. Sec.123).[10]

But the Act does not dispense with the necessity of acceptance as is clear from sec 122. Acceptance must be proved as an independent fact.

``Aceptance of a gift under Hindu law may be either express or implied inasmuch as there is nothing in Sec.122 of the T.P.Act to say that it must be express.'' *(Hari Kison V. Nageswari* (1956) 8.D.L.R.65).[11]

``As regards Hindu gifts to which the T.P.Act applies the rule of pure Hindu law that delivery of possession is essential to the validity of a gift is abrogated by Section 123 of that Act. A gift under that Act can only be effected in the manner provided by Section 123.

— Ibid —

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8. *(Dharmodas V. Nistarini* (1887) 14.Cal. 446).
9. *(Kalidas V. Kanhayalal* (1884) 11.Cal.121).
10. (T.P.Act. Sec.123).
11. *(Hari Kison V. Nageswari* (1956) 8.D.L.R.65).

Gifts to unborn persons :

(See ``Rules common to gifts and wills'', infra).

(Revocation of gift.) A gift once completed is binding upon the donor, and it cannot be revoked by him *(Raja Ram V. gonesh* (1899) 23.Bom.131),[12] unless it was obtained by fraud or undue influence. *(Manigavri V. Narandas* (1891) 15.Bom.549).[13]

The rules of Hindu law as to revocation of gifts are substantially the same as that contained in the second para of Sec. 126 of the T.P.Act. which runs as follows : A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.'' This means that a gift may generally be rescinded on the same grounds *mutatis mutandis* as a contract, and the circumstances under which a contract may be rescinded are laid down in Sec 19 of the Contract Act : ``When consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so obtained.''

The words in the brackets ``save want or failure of consideration'' are used because a gift is itself a transfer without consideration. Thus the grounds on which a gift may ordinarily be set aside are coercion, undue influence, fraud, mistake or misrepresentation. *(Behari Lal V. Sindhubala.* 45.Cal.434 = 22.C.W.N.210).[14]

A gift made with the intention of defrauding the creditors is voidable at the option of the creditors. *(Nasir V.Mota* (1880) 2.All.891).[15]

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12. *(Raja Ram V. gonesh* (1899) 23.Bom.131),
13. *(Manigavri V. Narandas* (1891) 15.Bom.549).
14. *(Behari Lal V. Sindhubala.* 45.Cal.434 = 22.C.W.N.210).
15. *(Nasir V.Mota* (1880) 2.All.891).

(Reservation of life interest.) A gift made in contemplation of death *(Donatio mortis causa)* is recognised by the Hindu law. *(Bhaskar V. Saraswatibai* (1893) 17.Bom.486).[16]

A gift of property does not become invalid only for the reason that the donor has reserved for himself the usufruct of the property. *(Lallu Singh V. Gur Narain* (1923) 45.All.115 = 68.I.C.798).[17]

Where a gift is made with the condition that the donee shall not alienate it under any circumstances or that the property shall never be partitioned, the condition is void but the gift itself remains good. *(Muthukumara V. Anthony* (1915) 38.Mad.867 = 24.I.C.120. See T.P.Act Sec.10).[18]

(Miscellaneous.) Gift by one widow to *ghar-jamai* is not binding on the other widow in the absence of any consent. *(Sultanullah V. Al-Haj Yusuf Ali* (1954) 6.D.L.R.165).[19]

Dayabhaga school-Absolute gift in favour of wife—Valid.

``Though the Hindu texts do not approve of absolute gift by a husband governed by Dayabhaga school the net result of the judicial prononuncements is that there can be an absolute gift in favour of wife. *(Srimati Bidhumukhi V. Srimati Sarala* (1954) 6.D.L.R.97).[20]

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16. *(Bhaskar V. Saraswatibai* (1893) 17.Bom.486).
17. *(Lallu Singh V. Gur Narain* (1923) 45.All.115 = 68.I.C.798).
18. *(Muthukumara V. Anthony* (1915) 38.Mad.867 = 24.I.C.120. See T.P.Act Sec.10).
19. *(Sultanullah V. Al-Haj Yusuf Ali* (1954) 6.D.L.R.165).
20. *(Srimati Bidhumukhi V. Srimati Sarala* (1954) 6.D.L.R.97).

TRUSTS

Practically speaking, trusts are to be regarded as gifts alike as to the property which can be transferred, as to the person to whom it can be transferred. *(Tagore V. Tagore,* supra).[21]

A trust of immoveable property must be declared by a non-testamentary instrument in writing, signed by the author of the trust or the trustee and registered ; or by the will of the author of the trust or of the trustee. (Trust Act. Sec.5).[22]

A trust of moveable property must be declared as aforesaid or the ownership of the property must be transferred to the trustee.

A trust is valid for valid purposes only. That which cannot be done directly by gift, cannot be done indirectly by the intervention of a trustee. *(Ranganadha V. Bhagirathi* (1906) 29.Mad.412, 415).[23]

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21. *(Tagore V. Tagore,* supra).
22. (Trust Act. Sec.5).
23. *(Ranganadha V. Bhagirathi* (1906) 29.Mad.412, 415).

CHAPTER XIII
WILLS

(Definition and Scope.) The Succession Act, 1925 defines *will* as 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.

As per Sec. 63 of the above Act every Hindu will must be in writing, signed by the testator and attested by at least two witnesses. No particular form for a will is necessary. It is sufficient if it contains the testamentary wishes of the deceased. *(Mohamed Shamsool V. Shewukram* (1874) 14.Beng.L.R.226).[1] The will is a legal declaration. Since any declaration made by a minor with respect to his property cannot be said to be legal, the document containing such a declaration, though described as will is not a will at all. *(Kondapalli Vijayaratnam V. Mandapaka Sudarsana Rao* (1925) 52.I.A.305).[2] The will is desired to be carried into effect after the death of the testator. So the testator is free to alter or cancell the will during his lifetime.

Any adult Hindu of sound mind may dispose of his property by will, *(Hardwari V. Gomi* (1911) 33.All. 525),[3] provided it does not defeat the legal right, to maintence of his wife or of any other person. *(Pramatha V. Nagendrobala* (1908) 12.C.W.N.808).[4]

(Property that can by bequeathed by will.) A property which cannot be disposed of by gift *inter vivos* cannot be bequeathed by will.

1. *(Mohamed Shamsool V. Shewukram* (1874) 14.Beng.L.R.226).
2. *(Kondapalli Vijayaratnam V. Mandapaka Sudarsana Rao* (1925) 52.I.A.305).
3. *(Hardwari V. Gomi* (1911) 33.All. 525),
4. *(Pramatha V. Nagendrobala* (1908) 12.C.W.N.808).

The following kinds of property can be disposed of by will.

(i) According to all the schools, a Hindu can dispose of his separate or self acquired property by will. *(Beer Pertab V. Rajender Pertab* (1867) 12.M.I.A.1,38).[5]

(ii) According to Dayabhaga school a father can dispose of all his property, whether ancestral or self acquired, by will, A coparcener may dispose of his interest in the joint family property by will. *(Nagalutchmee V. Gopoo* (1856) 6.M.I.A.309).[6]

(iii) According to Mitakshara law a sole surviving coparcener may bequeath the joint family property, by will. *(Nagalutchmee V. Gopoo,* supra).[7] A Mitakshara father may dispose of a small portion of moveable property by way of gift but he cannot do so by will. *(Parvatibai V. Bhagwant* (1915) 39.Bom.593=31.I.C.280).[8]

(iv) A Hindu female may dispose of her *stridhana* by will, subject, in certain cases, to the consent of her husband.

(v) In the absence of any special custom, the owner of an impartible estate may dispose it of by will. *(Sri Raja Venkata Surya V. Court of wards* (1899) 22.Mad.383 = 26.I.A.83).[9]

The property which can be disposed of by gift may be disposed of (except in certain special cases) by will. (Such as a father under Mitakshara may dispose of a small portion of the property by gift but he cannot do so by will).

Bequests to unborn persons :

(See "**Rules common to gifts and wills,**" infra).

Election : Under Mitakshara law a Hindu cannot dispose of his undivided interest in the coparcenary property by will.

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5. *(Beer Pertab V. Rajender Pertab* (1867) 12.M.I.A.1,38).
6. *(Nagalutchmee V. Gopoo* (1856) 6.M.I.A.309).
7. *(Nagalutchmee V. Gopoo,* supra).
8. *(Parvatibai V. Bhagwant* (1915) 39.Bom.593=31.I.C.280).
9. *(Sri Raja Venkata Surya V. Court of wards* (1899) 22.Mad.383 = 26.I.A.83).

He may bequeath his self acquired property to his coparcener and his undivided interest in the coparcenary property to a third person. Such a disposition is valid, and the coparcener to whom the self acquired property is bequeathed will have to elect, after the testator's death, as to which of the two properties he would take. He cannot have both. *(Kishan Chand V. Narinjan* (1929) 10.Lah.389 = 113.I.C.298).[10]

(Probate, letters of administration.) In cases of Hindu wills no right as executor or legatee can be established until the probate of the will is granted by a competent Court.

If a Hindu dies intestate it is not necessary to obtain letters of administration to establish a right to any part of the property of the deceased.

In case of a suit to recover a debt due to the estate of the deceased, no decree can be passed against the debtor except on the production of a probate or letters of administration or a succession certificate.

For all purposes, the executor or administrator of a deceased Hindu is his legal representative and all the property vests in him. The estate of the deceased vests in the executor, whether he has obtained probate or not. *(Mahomed Yusuf V. Hargovindas* (1923) 47.Bom. 231 = 70.I.C.268).[11] A coparcenary property cannot be disposed of by will. Hence it cannot vest in the executor. *(Ujambai V. Harak Chand* (1935) 59.Bom.644 = 156.I.C.621).[12]

``Probate Court has the right to go into the question of the validity of a will when a bequest made by the will is void. *(Srimati Brajabala V. Tarapada* (1959) 11.D.L.R.40).[13]

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10. *(Kishan Chand V. Narinjan* (1929) 10.Lah.389 = 113.I.C.298).
11. *(Mahomed Yusuf V. Hargovindas* (1923) 47.Bom. 231 = 70.I.C.268).
12. *(Ujambai V. Harak Chand* (1935) 59.Bom.644 = 156.I.C.621).
13. *(Srimati Brajabala V. Tarapada* (1959) 11.D.L.R.40).

"Where bequest provided by a will is a void one by reason of its being contrary to law or morality or opposed to public policy the probate Court can pronounce such a bequest void or otherwise in accordance with the provisions of the succession."

— Ibid —

(Powers of executor, administrator.) An executor can dispose of the property vested in him. But such power regarding immoveable property is subject to the restrictions contained in the will, unless he obtains probate of the will and permission from the Court which granted the probate to dispose of such property. Similarly an administrator cannot alienate the immoveable property without the leave of the Court which granted the letters of administration. (Sec Succession Act. 1925, Sec.307 and Sec.90 of the Probate and Administration Act, 1881).

(Intention of the testator.) The primary duty of the Court is to ascertain the intention of the testator. *(Sasanka Bhusan V. Gopi Ballav* (1936) 63.Cal.385 = 159.I.C.437).[14] Those intentions must be ascertained by the proper construction of the words he uses and once ascertained they must not be departed from. *(Sasanka Bhusan V. Gopi Ballav,* supra).[15] If the testator uses the words *putra poutradi krame* it means an estate of inheritance. *(Lalit V. chukkum Lal* (1897) 24.Cal.834).[16] 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. *(Mahomed Shumsool V. Shewakran* (1874) 14. Beng. L.R. 226 = 2.I.A.7).[17]

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14. *(Sasanka Bhusan V. Gopi Ballav* (1936) 63.Cal.385 = 159.I.C.437).
15. *(Sasanka Bhusan V. Gopi Ballav,* supra).
16. *(Lalit V. chukkum Lal* (1897) 24.Cal.834).
17. *(Mahomed Shumsool V. Shewakran* (1874) 14. Beng. L.R. 226 = 2.I.A.7).

"One of the recognised rules of construction of will is that the intention of the testator shall not be set aside for the reason only that it cannot take effect to the full extent, but effect is to be given to it so far as possible."

"Another rule of construction of a will is that the Court will not in the act of construing it invest a new will for the testator, and one which instead of carrying the intention of the testator into effect would be in direct opposition of his intentions."

"Will conferring property in opposition to the recognised law of inheritance is void and cannot be given effect to."

"Persons taking under a will must in fact or in contemplation of law be in existence at the time of the death of the testator". *(Srimati Brajabala V. Tarapada* (1959) 11.D.L.R.40).[18]

RULES COMMON TO GIFTS AND WILLS

The rules laid down by the Judicial Committee in *Tagore V. Tagore* (1872) 9.Beng.L.R.377;[19] I.A.Sup.Vol.47) may be stated as follows : (The case has been given in the appendix for ready reference).

(i) A Hindu may give or bequeath his property to any one he likes but the person who is to take must be in existence on the date when the gift or bequest is to take effect.

(ii) The estate given to him must be one recognised by Hindu law. The Hindu law does not allow any one to confer upon any legatee an estate which would exclude the legal course of inheritance. Suppose, X gives an estate to A (his nephew) and the heirs male of his body ; it tantamounts to exclude female heirs, in other words it is an attempt to alter the succession allowed by law. The bequeath is void.

18. *(Srimati Brajabala V. Tarapada* (1959) 11.D.L.R.40).
19. *Tagore V. Tagore* (1872) 9.Beng.L.R.377;

``A private individual attempting by a gift or will to make property inheritable otherwise than the law directs is assuming to legislate ; such a gift or will must fail and inheritance would take place as the law directs and all estates of inheritance created by gift or will so far as they are inconsistent with the general law of inheritance are void.'' *(Srimati Brajabala V. Tarapada* (1959) 11.D.L.R.40).[20]

A Hindu may create a life estate or successive life estates for a limited term, provided the donee is a person capable of taking under the deed or will. *(Tagore V. Tagore,* supra). ``Under Hindu law creation of successive life estates is valid.'' *(Ram Dasi Paul V. Surabala Dasya* (1962) 14.D.L.R.810).[21]

(Accumulation) Direction for accumulation of income of the property bequeathed for a period longer than : —

(i) the life of the transferor, or

(ii) a period of eighteen years from the date of transfer, shall be void to the extent to which the period during which the accumulation is directed exceeds the afroesaid period with the following exceptions : —

(i) If it is applied for payment of debts of the testator or transferor or any other person taking any interest under transfer or will. (Sec. 17. of the T.P.Act).[22]

(ii) If it makes provision for children or remoter issue of the transferor or the testator or of any other person taking any interest under the transfer or will. (Sec. 17. of the T.P.Act).[23]

(iii) If it is used for the preservation or maintenance of the property transferred. (Sec.17 of the T.P.Act).

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20. *(Srimati Brajabala V. Tarapada* (1959) 11.D.L.R.40).
21. *(Ram Dasi Paul V. Surabala Dasya* (1962) 14.D.L.R.810).
22. (Sec. 17. of the T.P.Act).
23. (Sec. 17. of the T.P.Act).

(Gifts to two or more persons.) Where a gift or bequest is made in favour of two or more persons who are members of a coparcenary, they nevertheless take as tenants-in-common and not as joint tenants unless a contrary intention appears from the grant. *(Jogeswar Narain V. Ram Chandra* (1896) 23.Cal.670;[24] See also *Yethirajulu V. Mukunthu* (1905) 28.Mad.363).[25]

(Gifts to unborn persons.) Under pure Hindu law a gift cannot be made in favour of a person who was not in existence at the date of the gift. *(Tagore V. Tagore,* supra).[26]

But Sections 13, 14, 15 and 16 of the Transfer of Property (Amendment) Act of 1929, which correspond to Sections 113, 114, 115 and 116 of the Succession Act, 1925, assume that a gift or bequest can be made in favour of an unborn person. The first time all the eight Sections were applied to Hindu gifts and Wills was by the T.P. (Amendment) Supplementary Act 21 of 1929. See Secs. 11, 12 and 13 of Act 21 of 1929.

This, however, can only be done subject to the following limitations and provisions :

1. In case of a gift or bequest made to a person not in existence at the death of the testator, subject to a prior gift or bequest, the latter 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.

Illustration.

Gift : A transfers property of which he is the owner, to ***B*** in trust for ***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. (T.P.Act.Sec.13).[27]

24. *(Jogeswar Narain V. Ram Chandra* (1896) 23.Cal.670;
25. See also *Yethirajulu V. Mukunthu* (1905) 28.Mad.363).
26. *(Tagore V. Tagore,* supra).
27. (T.P.Act.Sec.13).

Bequest : A father bequeathed his property 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. *(Bibabathi V. Mahendra* (1937) 1.Cal.403).[28]

2. Rule against perpetuity :

(a) ***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 that period, and to whom, if he attains full age, the interest created is to belong.

(b) Bequest : No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong. (See. Sec. 14 of T.P.Act and Sec. 114 of the Succession act. Both these Sections are same in substance, though different in from).

Illustrations

(a) 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 survive 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 25 until more than 18years have elapsed from the death of the survivor of ***A*** and ***B*** ; and the vesting of the fund may thus be delayed beyond lifetime of ***A*** and ***B*** and the minority of the sons of ***B.*** The bequest after ***B's*** Death is void.

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28. *(Bibabathi V. Mahendra* (1937) 1.Cal.403).

(b) 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 sons of ***B*** as shall first attain the age of 25. ***B*** dies in the lifetime of the testator, leaving one or more sons. In this case the sons of ***B*** are persons living at the time of testator's death, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid. (T.P.Act.Sec.14).

(c) A fund is bequeathed to ***A*** for his life, and after his death to ***B*** for his life, with a direction that after ***B's*** death it shall be divided amongst such of ***B's*** children as shall attain the age of 18, but that if no child of ***B*** shall attain that age, the fund shall go to ***C.*** Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of ***B,*** a person living at the testator's decease. All the bequests are valid.

The rule applies to private trusts also. *(Ajit Kumar Mitra V. Tarubala* (1936) 63. Cal.209).[29]

The rule against perpetuity does not apply to charitable or religious endowments. (T.P.ct.Sec.18 ; (*Prafulla V. Jogendra Nath* (1905) 9.C.W.N.528).[30]

The rule against perpetuity as contained in Sec. 14. of the T.P.Act applies to Hindus *(Sreemuti Surjeemonee V. Denobundhu* (1862) 9.M.I.A.123) as well as Muslims.[31] *(Yusuf V. Misal Khan.* 73.I.C.99).[32]

3. Gift or bequest to a class :

If a gift or bequest is made to a class of persons with regard to some of whom it fails by reason of the rules contained in (1) and (2) above, such gift or bequest fails in regard to those persons only and not in regard to the whole class. (See T.P.Act. See 15 ; Succession Act Sec.115;[33] ***Rani Moni V. Radha Prasad*** (1914) 41.Cal. 1007).

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29. *(Ajit Kumar Mitra V. Tarubala* (1936) 63. Cal.209).
30. (T.P.ct.Sec.18 ; (*Prafulla V. Jogendra Nath* (1905) 9.C.W.N.528).
31. *(Sreemuti Surjeemonee V. Denobundhu* (1862) 9.M.I.A.123) as well as Muslims.
32. *(Yusuf V. Misal Khan.* 73.I.C.99).
33. (See T.P.Act. See 15 ; Succession Act Sec.115;

4. Failure of prior disposition :

Where a gift or bequest fails by reason of any of the rules contained in (1) and (2) above, only gift intended to take effect after or upon failure of such prior gift or bequest also fails. (See Sec. 16 of the T.P.Act and Sec. 116 of the Succession Act ; *Tagore V. Tagore,* supra).[34]

"By Hindu law, as a general principle, a person capable of taking under gift or will must either in fact or in contemplation of law be in existence at the time when the gift takes effect, i.e. in the case of a will at the time of death of the testator". *(Srimati Brajabala V. Tarapada* (1959) 11.D.L.R.40).[35]

A child in the womb and a son adopted by a widow after the death of husband are in contemplation of law in existence at the death of the testator. A gift to son's wife in case he should marry within 10 years from testator's death is valid provided the son marries a girl who was in existence at testator's death. *(Tagore V. Tagore,* supra).[36]

(Summary of the rules.) Rules regarding gift to unborn persons may be summarised as follows : —

1. If the gift to an unborn person is preceded by a prior disposition, the gift shall be of whole residue. *(Bibabathi V. Mahendra* (1937) 1.Cal. 403).[37]

2. The gift shall not offend the rule against perpetuities. *(Tagore V. Tagore,* supra).[38]

3. If a gift is made to a class of persons with regard to some of whom it is void under (1) or (2) above, the gift fails in regard to those persons only and not in regard to the whole class. *(Rani Moni V. Radhaprasad,* supra).[39]

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34. (See Sec. 16 of the T.P.Act and Sec. 116 of the Succession Act ; *Tagore V. Tagore,* supra).
35. *(Srimati Brajabala V. Tarapada* (1959) 11.D.L.R.40).
36. *(Tagore V. Tagore,* supra).
37. *(Bibabathi V. Mahendra* (1937) 1.Cal. 403).
38. *(Tagore V. Tagore,* supra).
39 *(Rani Moni V. Radhaprasad,* supra).

4. If a gift to an unborn person is void under (1) or (2) above, any gift intended to take effect after such gift is also void. *(Tagore V. Tagore,* supra).

(Alternative bequests.) If there are independent and alternative bequests or gifts of which one is good at the time the document takes effect, and the other is void, the former will take effect and the latter will be invalid. *(Raikishori V. Debendra Nath* (1887) 15.Cal.409).[40] In similar cases if some properties are bequeathed to relations and the others for charitable purposes and some of the former bequests were invalid, the latter were held to be valid as they were separable from and independent of each other. *(Kayastha Pathsala V. Mt. Bhagwati Devi* (1937) 64.I.A.5 = (1937) All.3).[41]

(Exectutory bequests.) A grant of an absolute estate *defeasible* on the happening of a subsequent event, by a Hindu is valid provided the event must happen, if at all, immediately on the close of the life in being, and the gift over must be in favour of *some person in existence* at the date of the gift or at death of the testator, as the case may be ; otherwise the gift over is void and the absolute estate granted to the first donee remains unaffected.

In cases, however, governed by the Hindu Transfers and Bequests Act, 1914, the Hindu Disposition of Property Act, 1916, the gift over may be made in favour even of a person not in existence at the death of the testator. (See the Acts in the appendix).

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40. *(Raikishori V. Debendra Nath* (1887) 15.Cal.409).
41. *(Kayastha Pathsala V. Mt. Bhagwati Devi* (1937) 64.I.A.5 = (1937) All.3).

Illustration

A executes a deed of settlement whereby he gives certain property to his daughter *B* absolutely with the condition that it should revert to *A's* heirs on failure of male descendants of *A*. Here the event on the happening of which the defeasance clause is to operate, namely the indefinite failure of male issue, may not take place at *B's* death. The gift over to *A's* heirs is, therefore, void and the absolute estate granted to *B* remains unaffected. *(Saraju Bala V. Joytir Moyee* (1931) 59.Cal.142).[42]

Where by the terms of a deed or will an absolute estate of inheritance is created in favour of a person, any subsequent clause restricting that interest is invalid, and the donee will take an absolute estate as if the document contained no such clause. *(Saraju Bala V. Joytir Moyee,* supra),[43]

(Direction postponing payment) If a transfer or will confers an absolute estate with the direction that the property shall not be made over to the donee or legatee until he attains a certain age beyond majority, such direction is inoperative and he is entitled to the property on attaining majority. But the direction will be valid and it will take effect if during the interval the income of the property is disposed of in favour of some other person. *(See Cally Nath V. Chunder Nath* (1882) 8.Cal.378).[44]

Illustration.

A property is bequeathed to A, a minor, with a direction that it shall not be handed over to him till he attains the age of 20. the direction in inoperative and A is entitled to receive the property on his attaining majority. But if the will contains a direction that until A attains the age of 20, the income of the property shall be given to B, then A is not entitled to receive the property until he attains the age of 20.

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42. *(Saraju Bala V. Joytir Moyee* (1931) 59.Cal.142).
43. *(Saraju Bala V. Joytir Moyee,* supra).
44. *(See Cally Nath V. Chunder Nath* (1882) 8.Cal.378).

Condition restraining alienation, partition or free enjoyment of a property given to a person by transfer or will is inoperative, and the donee takes the property as if the document contained no such direction. *(Tagore V. Tagore,* supra ; *Cally Nath V. Chunder Nath,* supra).[45]

A grant by way of remainder is valid provided :-

(i) the grant is to take effect immediately on the close of a life in being, and

(ii) it is made to a person in existence at the date of the gift or at the death of the testator.

In cases governed by the Hindu Transfers and Bequests Act, 1914 and the Hindu Disposition of Property Act, 1916, a gift by way of remainder may be made in favour of an unborn person.

Illustration.

Property is bequeathed to **A** for life, and after his death to **B.** Both **A** and **B** are in existence at the death of the testator. A takes an estate for life. **B** takes the remainder after **A's** death. The bequest to **B** by way of remainder is valid. *(Ranganadha V. Bhagirathi* (1906) 29. Mad. 412;[46] *Sreemutty Soorjeemoney Dossey V. Deenobundoo* (1862) 9.M.I.A. 123).[47]

(Gifts and bequests to females) In case of a deed of gift or will made by a Hindu *in favour of female relations,* the Court is entitled to assume that the donor intended the donee to take a *limited estate* only, unless the contrary appears from the deed or will. *(Mahomed Shumsool V. Shewukram* (1874) 14.Beng.L.R.226 = 2.I.A.7).[48]

Where the terms of the grant is unknown, the grant cannot be taken as absolute one unless absolute title is established. *(Braja Kisora V. Kundana* (1899) 22.Mad.431 = 26.I.A.66).[49]

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45. *(Tagore V. Tagore,* supra ; *Cally Nath V. Chunder Nath,* supra).
46. *(Ranganadha V. Bhagirathi* (1906) 29. Mad. 412;
47. *Sreemutty Soorjeemoney Dossey V. Deenobundoo* (1862) 9.M.I.A. 123).
48. *(Mahomed Shumsool V. Shewukram* (1874) 14.Beng.L.R.226 = 2.I.A.7).
49. *(Braja Kisora V. Kundana* (1899) 22.Mad.431 = 26.I.A.66).

CHAPTER XIV
GUARDIANS AND WARDS

(Age of majority.) According to Dayabhaga minority terminates at the completion of the 15th year. *(Cally Churn V. Bhugobutty* (1873) 10. Beng. L. R. 231.[F.B.]). And according to Mitakshara it terminates at the completion of the 16th year. *(Shivji V. Datu* (1875) 12.Bom.H.C.281). This principle applies to Hindus in matters of marriage, dower, divorce and adoption only and in all other matters they are governed by the Majority Act-1875.

According to the Majority Act every minor for whom a guardian had been appointed by any Court or whose property is under management of a Court of Wards is deemed to have attained majority at the completion of the 21st year ; and in all other cases at the completion of the 18th year.

(Guardians.) Guardians may be of the following kinds : —

(i) Natural guardians.

(ii) Guardians appointed by the father.

(iii) Guardians appointed by a District Court or by a Chartered High Court.

NATURAL GUARDIANS

(Father.) The father is the natural guardian of the person and separate property of his minor children. The Court has no power to appoint a guardian of the person, (all schools) separate property (Mitakshara School) separate property (Mitakshara School) and separate as well as undivided interest in the coparcenary property (Dayabhaga school) of a minor whose father is living and is not, in the opinion of the Court, unfit to be the guardian of the minor.

(Guardians and Wards Act. Sec.19 (b):[1] *Mst. Hurbai V. Usman* (1964) 16.D.L.R. (W.P.) 207).[2]

In case of a Mitakshara joint family where all the sons are minors the Court may appoint a guardian of the whole of the joint family property until one of the sons attains majority especially when the widows of the father are quarrelling among themselves. *(Seethabai V. Narasimha* (1945) Mad. 568).[3] On any one of the sons attaining majority the Court is bound to hand over the joint family property to the adult son notwithstanding the fact that other sons are minors. *(Chandra Pal Singh V. Sarabjit Singh* (1936) 11.Luck.67 = 154.I.C.855).[4]

In the absence of the father, the mother becomes the guardian unless the father has, by his will, appointed another person as the guardian of his children. *(Debanand V. Anandmani* (1921) 43 All.213 = 59.I.C.909).[5]

Except the parents no relation is entitled as of right to the guardianship of the minor. In the absence of the father and mother the Court may appoint the nearest male paternal kinsman or the nearest male maternal kinsman or even a stranger as guardian if the welfare of the minor requires it. *(Kristo Kissor V. Kadermoye* (1878) 2.Cal. L.R.583;[6] *Rahimunessa V. Ashraf Mia* (1973) 25.D.L.R.167).[7]

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1. (Guardians and Wards Act, Sec.19 (b);
2. *Mst. Hurbai V. Usman* (1964) 16.D.L.R. (W.P.) 207).
3. *(Seethabai V. Narasimha* (1945) Mad. 568).
4. *(Chandra Pal Singh V. Sarabjit Singh* (1936) 11.Luck.67 = 154.I.C.855).
5. *(Debanand V. Anandmani* (1921) 43 All.213 = 59.I.C.909).
6. *(Kristo Kissor V. Kadermoye* (1878) 2.Cal. L.R.583;
7. *Rahimunessa V. Ashraf Mia* (1973) 25.D.L.R.167).

(Married females.) Husband is the lawful guardian of his minor wife. After the husband's death, the guardianship of the minor wife devolves on the husband's relations in preference to her paternal relations. *(Khudiram V. Bonvarilal* (1889) 16.Cal.584).[8]

(Adopted son.) The adoptive father or mother and not his natural father or mother is the lawful guardian of the adopted minor son. *(Sreenarain V. Kishen* (1873) 11.Beng. L.R. 171 = 19.I.A.Sup. Vol.149).[9]

(Illegitimate childern.) The mother is the lawful guardian of her illegitimate childern. Where the father is known he has the preferential right. *(Prem Kuer V. Banarsi Das* (1934) 15.Lah.630 =156.I.C.87).[10]

(Re-marriage of mother.) A Hindu widow does not by the mere fact of her re-marriage lose her right of guardianship, in any case where re-marriage is recognised by custom. *(Ganga V. Jhalo* (1911) 38.Cal. 862).[11]

(Loss of caste.) The mere fact of loss of caste is no ground for loss of her right of guardianship of the person and property of minors since the passing of the Caste Disabilities Removal Act, 1850. *(Kaulesra V. Jorai* (1906) 28.All.233).[12]

(Change of religion by (a) the father.) The father is not deprived of the custody of his children by mere fact that he has changed his religion. (Freedom of Religion Act, 1850 ; *Shamsing V. Santabai* (1901) 25.Bom.551).[13] But if the father voluntarily abandons his paternal rights at the time of conversion, and entrusts the custody of the children to another person, the Court will not restore back the custody of the children to the father if such a course is detrimental to the interest of the children. *(Mokoond V. Nobodip* (1898) 25.Cal.881).[14]

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8. *(Khudiram V. Bonvarilal* (1889) 16.Cal.584).
9. *(Sreenarain V. Kishen* (1873) 11.Beng. L.R. 171 = 19.I.A.Sup. Vol.149).
10. *(Prem Kuer V. Banarsi Das* (1934) 15.Lah.630 =156.I.C.87).
11. *(Ganga V. Jhalo* (1911) 38.Cal. 862).
12. *(Kaulesra V. Jorai* (1906) 28.All.233).
13. *Shamsing V. Santabai* (1901) 25.Bom.551).
14. *(Mokoond V. Nobodip* (1898) 25.Cal.881).

(b) (The mother.) In ordinary circumstances the child must be presumed to have his father's religion and his corresponding civil and social status. Therefore, where a Hindu mother changes her religion, theCourt may, for the benefit of the minor, remove the child from the custody of the mother and place the child under a Hindu guardian. *(Skinner V. Orde* (1871) 14.M.I.A.309).[15]

(Change of religion by the minor.) Where a Hindu child, who has become a convert to any other religion, leaves his parents and proceedings are instituted by the parents for the custody of the child : according to High Courts of Bombay *(Saithri* in the matter of (1892) 16.Bom.307),[16] Calcutta *(Mokoond V. Nobodip,* supra)[17] and Allahabad *(Sarat Chandra V. Forman* (1890) 12.All.213)[18] the Court should in each case do, what it deems proper for the benefit of the minor.

(Powers of natural guardian.) The natural guardian of a Hindu minor is entitled to manage the estate, but he can alienate it only in case of necessity or for the benefit of the estate. The alienee is bound to prove that there was either a necessity in fact or he made reasonable enquiries as to the existence of such necessity at the time of sale otherwise the alienation is invalid. *(Mallappa V. Anant* (1937) Bom. 59 = 166. I. C.154).[19]

The natural guardian has power to enter into contracts and to do all other acts which are reasonable and proper for the protection or benefit of the minor's property and for the advantage of the minor. *(Krishna V. Nagamani* (1916) 39. Mad. 915 = 30. I.C. 574).[20] The touchstone of autority is necessity or the benefit of the minor.

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15. *(Skinner V. Orde* (1871) 14.M.I.A.309).
16. *(Saithri* in the matter of (1892) 16.Bom.307),
17. *(Mokoond V. Nobodip,* supra)
18. *(Sarat Chandra V. Forman* (1890) 12.All.213)
19. *(Mallappa V. Anant* (1937) Bom. 59 = 166. I. C.154).
20. *(Krishna V. Nagamani* (1916) 39. Mad. 915 = 30. I.C. 574).

A lawful guardian of a minor can enter into a compromise or acknowledge a debt on behalf of his ward. *(Nirvanaya V. Nirvanaya* (1885) 9.Bom.365).[21]

The Guardians and Wards Act does not alter or effect the rights of natural guardians under Hindu law and the powers of the natural guardians of a Hindu minor are larger than those of a guardian appointed under that Act. A natural guardian may alienate the minor's property even without the saction of the Court, provided the alienation is one for *necessity* or for the *benefit of the estate.*

Mother, being the next natural guardian, in the absence of the father under the Hindu law, possesses the power to transfer the properties of minors for *legal necessity* and for the *benefit of the minors. (Jalaluddin V. Kshirode* (1960) 12.D.L.R.433).[22]

TESTAMENTARY GUARDIANS

A father may nominate a guardian orally or in writing for his children, so as to exclude even the mother from the guardianship. *(Debanand V. Anandmani* supra).[23] The mother has no power to appoint a guardian by will but the Court may have regard to her wishes, if any, expressed in her will.

The power of a testamentary guardian is subject to the restrictions imposed by the will.

The father has no power to appoint a guardian of joint family property by his will. *(Venkayya V. Venkata* (1898) 21.Mad.401).[24]

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21. *(Nirvanaya V. Nirvanaya* (1885) 9.Bom.365).
22. *(Jalaluddin V. Kshirode* (1960) 12.D.L.R.433).
23. *(Debanand V. Anandmani,* supra).
24. *(Venkayya V. Venkata* (1898) 21.Mad.401).

GUARDIANS APPOINTED BY THE COURT

The Court may appoint a guardian for the person or property or both of the minor under the Guardians and Wards Act, 1890, if the Court thinks that it is necessary for the benefit and welfare of the minor. Where the father has appointed a testamentary guardian, the Court has no power to appoint a guardian under Sec. 7 of the Act. *(Amritha V. Siromani* (1938) Mad.757).[25]

Father is the natural guardian of minors-Order appointing father as guardian is erroneous in law. According to clause (b) of Section 19 of the Guardians and Wards Act. no Court is authorised to appoint or declare a guardian of the person of a minor whose father is alive and is not unfit to be the guardian.*(Mst. Hurbai V. Usman* (1964) 16.D.L.R.(W.P.) 207).[26]

Nothing in the Guardians and Wards Act, 1890 shall affect, or in any way derogate from, or take away any power possessed by a Chartered High Court.

(Alienation) A guardian appointed by the Court may alienate the minor's property with the previous permission of the Court and such alienation cannot be impeached by the minor or any other person except in a case of fraud or underhand dealing. *(Mansha V. Ahmad* (1916) 21.C.W.N.63).[27]

(De facto guardian & ad hoc guardian.) A *de facto* guardian is one who manages the minor's estate, such person being neither a natural guardian nor a guardian appointed by the Court.

An *ad hoc* guardian is one (like a separated uncle) who has never intermeddled or acted as guardian but performs an isolated transaction as a guardian of the minor.

A *de facto* guardian has the same power of alienating the property of his ward as a natural guardian. *(Hunooman Persaud V. Mst. Babooee,* supra).

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25. *(Amritha V. Siromani* (1938) Mad.757).
26. *(Mst. Hurbai V. Usman* (1964) 16.D.L.R.(W.P.) 207).
27. *(Mansha V. Ahmad* (1916) 21.C.W.N.63).

An alienation by a *de facto* guardian without necessity or benefit of the estate of the minor is not void but voidable and it may be ratified by the minor on attaining majority. *(Seetharamana V. Appiah* (1926) 49.Mad.768 = 92.I.C.827).[28]

An alienation by an *ad hoc* guardian is void. *(Harilal V. Gordhan* (1927) 51.Bom.1040 = 105.I.C.722).[29]

The *de facto* manager of the estate of a lunatic has no power to alienate his property even for necessity. *(Nagindas V. Bhimrao* (1943) Bom.117 = 205.I.C.44).[30]

REMEDIES

(Procedure for recovering cus-tody of minors.) A guardian, deprived of the custody of his ward has the following remedies :-

(i) He may proceed by suit against the person alleged to be in wrongful possession of the ward.

"A suit *inter partes* is not the form of procedure prescribed by the Act for proceedings in A District Court touching the guardianship of infants." *(Besant V. Narayaniah* (1914) 41. I.A. 314, 322 = 38.Mad.807).[31]

(ii) He may proceed by a writ of *habeas corpus* in cases where the ward is within the limits of the original civil jurisdiction of the High Court and has been unlawfully restrained. (Cr.P.C.Sec.491).[32]

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28. *(Seetharamana V. Appiah* (1926) 49.Mad.768 = 92.I.C.827).
29. *(Harilal V. Gordhan* (1927) 51.Bom.1040 = 105.I.C.722).
30. *(Nagindas V. Bhimrao* (1943) Bom.117 = 205.I.C.44).
31. *(Besant V. Narayaniah* (1914) 41. I.A. 314, 322 = 38.Mad.807).
32. (Cr.P.C.Sec.491).

Forum—Court at the place wherefrom the minor is removed has jurisdiction to entertain the case. (1952) P.L.R. (Kar) 68.[33]

In dealing with the application under Section 25 of the Act for the return of the minor to the custody of its guardian, all that the Court has to consider is whether it will be for welfare of the ward to return to the custody of his guardian. *(Amar Ilahi V. Rashida Akhter* (1955) 7.D.L.R.[W.P.]95).[34]

Question of title to a property cannot be decided in proceedings under the Guardians and Wards Act. The proper course would have been to direct the petitioner to get his title established in the Civil Court and to keep the property under restraint in the meanwhile. *(Aftab Nasir V. Fazal Bibi* (1965) 17.D.L.R.(W.P) 113).[35]

Appointment of guardians under Section 17 has to be made in the interest of the minor's welfare and *consistently* with the law to which minor is subject-Sec.25 is concerned with the right of a guardian to the custody of a minor and the matter which falls under Sec.17 need not be considered in a case under Sec.25. Paramount consideration in returning the minor to the custody of the guardian is the welfare of the minor-No order will be passed to that effect unless the Court is satisfied that the welfare of the minor demands such order. *(Rahimullah V. Mrs. Sayeda* (1968) 20.D.L.R.(S.C.) 1).[36]

Poverty of mother is no cause to deprive her of right to custody of minor. *(Mst. Hurbai V. Usman,* supra).

In appointing the guardian of a minor, dominant consideration is minor's welfare. Even a stranger may be appointed guardian in preference to relations. *(Rahimunnessa V. Ashraf Mia* (1973) 25.D.L.R.167).[37]

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33. (1952) P.L.R. (Kar) 68.
34. *(Amar Ilahi V. Rashida Akhter* (1955) 7.D.L.R.[W.P.]95).
35. *(Aftab Nasir V. Fazal Bibi* (1965) 17.D.L.R.(W.P) 113).
36. *(Rahimullah V. Mrs. Sayeda* (1968) 20.D.L.R.(S.C.) 1).
37. *(Rahimunnessa V. Ashraf Mia* (1973) 25.D.L.R.167).

CHAPTER XV

MISCELLANEOUS

BENAMI TRANSACTIONS

If a person buys property with his own money, in the name of another person or purchases it in his own name but subsequently transfers it into the name of another person, *without any intention in either case to benefit such other person,* the transaction is called *benami* and the person in whose name the transaction is effected is called *benamidar.*

In case of a benami transaction effect will be given to the real and not to the nominal title unless it is : —

(i) a device to violate the provisions of law ;

(ii) to defeat the rights of transferees for value, without notice ;

(iii) to defraud the creditors ;

(iv) a transaction against public policy.

Exceptions :

1. In case of a purchase under a decree of Court or for arrears of revenue, where the *benamidar* is certified to be the purchaser, the real purchaser cannot maintain a suit against the *benamidar.*

2. If a *benamidar* transfers a property for value without the knowledge of the real owner, the real owner is not entitled to have the transfer set aside unless the transferee had notice that the seller was really a *benamidar.* (*Mir Mahomed V. Kishori Mohun* (1895) 22. Cal.909).[1]

3. The real owner is not entitled to recover the property from *benamidar* where *benami* transaction was made for defrauding the creditors and he purpose was actually effected. *(Nawab Singh V. Daljit Singh* (1936) 58.All.842 = 162.I.C.958).[2]

4. Where the property is purchased *benami* to defeat some provisions of law, the purchaser is not entitled to recover the property from the *benamidar. (Sheo Narain V. Mata Prasad* (1905) 27.All.73).[3]

A *benamidar* fully represents the true owner and he can maintain all suits. *(Gur Narayan V. Sheo Lal.* (1919) 46.Cal.556).[4]

1. (*Mir Mahomed V. Kishori Mohun* (1895) 22. Cal.909).
2. *(Nawab Singh V. Daljit Singh* (1936) 58.All.842 = 162.I.C.958).
3. *(Sheo Narain V. Mata Prasad* (1905) 27.All.73).
4. *(Gur Narayan V. Sheo Lal.* (1919) 46.Cal.556).

(Presumptions.) In the absence of any evidence to the contrary it will be presumed that a suit instituted by a *benamidar* has been instituted by him with the full authority of the real owner. *(Gopinath V. Bhugwat* (1884) 10.Cal.697).[5]

He who alleges that the apparent title is not the real title must prove it. *(Sudhansu v. Baroda* (1952) 3.D.L.R.475).[6]

When both parties adduce evidence, question of onus looses importance. *(Kumbahan V. Tangibala* (1950) 2.D.L.R.83. [P.C.];[7] *Ng. See Hem V. The official Assignee, Fedaration of Malaya* (1953) 5.D.L.R.214 [P.C.]).

SUDRA

1. *Kayasthas* of Bangladesh and West Bengal of India are Sudras. *(Bhola Nath V. Emperor* (1924) 51. Cal.488)[8] But the *Kayasthas* of Bihar belong to the twice born class. *(Ishwari Prasad V. Rai Hari* (1926) 6. Pat. 506).[9]

2. The *Lingayats* of Madras are not Sudras but the *Lingayats* of Bombay are Sudras. *(Gopal V. Hanmant* (1879) 3.Bom.273).[10]

3. The Rajas of Tanjore are Sudras. *(Maharaja of Kolhapur V. Sundaram* (1925) 48.Mad.1 =93.I.C.705).[11]

4. Marhattas of Bombay excepting those belonging to *five families,* and *ninety-six families,* are Sudras. *(Subrao V. Radha* (1928) 52.Bom.497 = 113.I.C.497).[12]

5. Converts to Hinduism are Sudras. *(Muthusami V. Masila-mani* (1910) 33.Mad.342).[13]

A Sudra cannot enter the order of *Yati* or *Sanyasi. (Harish Chandra V. Atir Mahomed* (1913) 40.Cal.545).[14]

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5. *(Gopinath V. Bhugwat* (1884) 10.Cal.697).
6. *(Sudhansu v. Baroda* (1952) 3.D.L.R.475).
7. *(Kumbahan V. Tangibala* (1950) 2.D.L.R.83. [P.C.];
8. *(Bhola Nath V. Emperor* (1924) 51. Cal.488)
9. *(Ishwari Prasad V. Rai Hari* (1926) 6. Pat. 506).
10. *(Gopal V. Hanmant* (1879) 3.Bom.273).
11. *(Maharaja of Kolhapur V. Sundaram* (1925) 48.Mad.1 =93.I.C.705).
12. *(Subrao V. Radha* (1928) 52.Bom.497 = 113.I.C.497).
13. *(Muthusami V. Masila-mani* (1910) 33.Mad.342).
14. *(Harish Chandra V. Atir Mahomed* (1913) 40.Cal.545).

APPENDIX-A

ACTS

I

The Hindu Transfers and Bequests Act, 1914.

Being Madras Act No. 1 of 1914

[Came into force on the 14th February, 1914]

An Act to declare the rights of Hindus to make transfers and bequests in favour of unborn persons [in the Mufassal of Madras].

(Preamble.) Whereas it is expendient to declare the rights of persons governed by the Hindu law to make transfers and bequests in favour of unborn persons ; It is hereby enacted as follows :-

(Short title.) 1. This Act may be called "The Hindu Transfers and Bequests Act. 1914."

(Application and extent.) 2. *(1)* This Act shall apply to all transfers *inter vivos* and wills made by persons governed by the Hindu law who are domiciled within the limits of the Presidency of Madras.

(2) In the case of transfers *inter vivos* or wills executed before the date of this Act the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to such date : Provided that nothing contained in this section shall affect *bona fide* transferees for valuable consideration in whom the right to any property has vested prior to the date of the Act.

Explanation: Hindus governed by the Marumakkattayam or the Aliyasantana law shall be deemed to be persons governed by the Hindu law for the purposes of this Act.

3. Subject to the limitation and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for

whose benefit it may have been made was not born at the date of such disposition.

4. The limitations and provisions referred to in section 3 shall be the following, namely : —

(a) in respect of dispositions by transfers *intervivos,* those contained in Chapter II of the Transfer of Property Act, 1882, and

(b) in respect of disposition by will, those contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.

[Note :- See Sections 13, 14, 15 and 16 of Transfer of Property Act, 1882/1929 which correspond to secs. 113, 114, 115, and 116 of the Succession Act, 1925.]

II

The Hindu Disposion of Property Act, 1916.

Being Act No. XV of 1916.

[Received the assent of the Governor-General on the 28th September 1916].

An Act to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition.

Whereas it is expedient to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition ; It is hereby enacted as follows :

(Short title and extent.) 1. *(1)* This Act may be called the Hindu Disposition of Property Act, 1916.

(2) It extends, in the first instance to the whole of British India, *except the province of Madra* : Provided that the Governor-General in Council may, by notification in the Gazette of India, extend this Act to the province of Madras.

(Dispositions for the benefit of person not in existence.)

2. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not in existence at the date of such disposition.

(Limitations and conditions.)

3. The limitations and provisions referred to in section 2 shall be the following, namely : —

(a) in respect of dispositions by transfer *inter vivos* those contained in Chapter II of the Transfer of Property Act, 1882, and

(b) in respect of dispositions by will, those contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.

4. *[Omitted by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, Sec. 12.]*

(Application of this Act to the khoja community.)

5. Where the Governor-General in Council is of opinion that the Khoja community in British India or any part thereof desire that the provisions of this Act should be extended to such community, he may, by notification in the Gazette of India, declare that the provisions of this Act, with the substitution of the word 'Hindus' or 'Hindu' wherever those words occur, shall apply to that community in such area as may be specified in the notification and this Act shall thereupon have effect accordingly.

[Note :- See Sections 13, 14, 15 and 16 of Transfer of Proerty Act, 1882/1929 which correspond to secs. 113, 114, 115, and 116 of the Succession Act, 1925.]

III

The Hindu Transfers and Bequests (City of Madras) Act.

Being Act VIII of 1921

[Received the assent of the Governor-General on the 27th March 1921.]

An Act to declare the rights of Hindus to make transfers and bequests in favour of unborn persons in the City of Madras.

Whereas it is expendient to declare the rights of Hindus to make transfers and bequests in favour of unborn persons in the City of Madras ; It is hereby enacted as follows :-

(Short title.) 1. This Act may be called the Hindu Transfers and Bequests (City of Madras) Act. 1921."

(Application and extent.) 2. *(1)* This Act shall apply to all transfers *inter vivos* and wills made by persons governed by the Hindu law who are domiciled within the limits of the Ordinary Original Civil Jurisdiction of the High Court of Madras.

2. In the case of transfers *inter vivos* or wills executed before the date of this Act, the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to come into operation at a time which is subsequent to the 14th February, 1914.

Provided that nothing contained in this section shall affect *bona fide* transferees for valuable consideration in whom the right to any property has vested prior to the date of his Act.

Explanation: Hindus governed by the Marumakka-ttayam or the Aliyasantana law shall be deemed to be persons governed by the Hindu law for the purposes of this Act.

3. Subject to the limitation and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition.

4. The limitations and provisions referred to in section 3 shall be the following, namely : —

(a) in respect of dispositions by transfers *inter vivos,* those contained in Chapter II of the Transfer of Property Act, 1882, and

(b) in respect of disposition by will, those contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.

[Note :- See Sections 13, 14, 15 and 16 of Transfer of Property Act, 1882/1929 which correspond to secs. 113, 114, 115, and 116 of the Succession Act, 1925.]

IV

The Indian Limitation (Amendment) Act I of 1927.

[Received the assent of the Governor-General on the 18th February, 1927.]

An Act further to amend the Indian Limitation Act, 1908, for certain purposes.

Section 3. To section 21 of the said Act the following sub-section shall be added, namely : —

``(3) for the purposes of the said sections [that is, sections 19 and 20] —

(a) an acknowledgement signed, or a payment (of interest or part payment) made in respect of any liability, by, or by the duly authorised agent of *any widow or other limited owner of property* who is governed by the Hindu law, shall be a valid acknowledgement or payment, as the case may be as against a reversioner, succeeding to such liability ; and

(b) Where a liability has been incurred by, or on behalf of, a Hindu undivided family as such, an acknowledgement or payment (of interest, or part payment) made by, or by the duly authorised agent of, the *manager of the family* for the time being shall be deemed to have been made on behalf of the whole family.''

V

Hindu Inheritance (Removal of Disabilities) Act, 1928.

Act No. XII of 1928.

[Received the assent of the Governor-General on the 20th September, 1928]

An Act to amend the Hindu law relating to exclusion from inheritance of certain classes of heirs, and to remove certain doubts.

Whereas it is expendient to amend the Hindu law relating to exclusion from inheritance of certain classes of heirs, and to remove certain doubts; It is hereby enacted as follows : —

(Short title, extent and application.) 1. *(1)* This Act may be called ``The Hindu Inheritance (Removal of Disabilities) Act, 1928.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall not apply to any person governed by the Dayabhaga School of Hindu Law.

(Persons not to be excluded from inheritance or rights in joint family property.)

2. Notwithstanding any rule of Hindu law or custom to the contrary, no person governed by the Hindu law, other than a person who is and has been *from birth a lunatic or idiot,* shall be excluded from inheritance or from any right or share in joint family property by reason only of any disease, deformity or physical or mental defect.

(Saving and exception) 3. Nothing contained in this Act shall affect any *right* which has accrued or any *liability* which has been incurred before the commencement thereof, or shall be deemed to confer upon any person any right in respect of *any religious office or service or of the management of any religious or charitable trust* which he would not have had if this Act had not been passed.

Section not retropective : If any person suffering from any *physical* defect has before passing of the Act (20th September, 1928) been already excluded from inheritance or from a share on partition, the Act does not entitle him to claim the inheritance or the share on partition.

VI

The Indian Succession (Amendment) Act XIV of 1928.

[Received the assent of the Governor-General on the 22nd September, 1928.]

An Act further to amend the Indian Succession Act, 1925.

S.2. After sub-section (2) of section 372 of the Indian Succession Act, 1925, the following sub-section shall be added, namely :-

``(3) Application for such a certificate may be made in respect of any debt or debts due to the deceased creditor *or in respect of portions thereof.''*

VII

ACT NO. II OF 1929.

Hindu Law of Inheritance (Amendment) Act, 1929.

[Received the assent of the Governor-General on the 21st February, 1929.]

An Act to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate.

Whereas it is expedient to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate : It is hereby enacted as follows : —

(Short title, extent and application.) 1. *(1)* This Act may be called the Hindu Law of Inheritance (Amendment) Act, 1929.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas, but it applies only to persons who, but for the passing of this Act, would have been subject to the law of *Mitakshara* in respect of the provisions herein enacted, *and* it applies to such persons in respect only of the property of males *not held in coparcenary and not disposed of by will.*

(Order of succession of certain heirs.) 2. A son's daughter, daughter's daughter, sister and sister's son shall, in the order so specified, be entitled to rank in the order of succession next *after a father's father* and before a father's brother : Provided that *a sister's son shall not include a son adopted after the sister's death.*

(Savings.) 3. Nothing in this Act shall —

(a) affect any special family or local custom having the force of law, or

(b) vest in a son's daughter, daughter's daughter or sister an *estate* larger than, or different in kind from, that possessed by a female in property inherited by her from a male according to the school of Mitakshara law by which the male was governed, or

(c) enable more than one person to succeed by inheritance to the estate of a deceased Hindu male which by a customary or other rule of succession descends to a *single heir.*

[It is observed by the Madras High Court that this legislation is defective. See *Kalimuthu V. Ammamuthu* (1935) 58.Mad.238 = 153.I.C.107. In the actual case, no injustice resulted because the case arose before the Act.]

VIII

ACT NO. XVIII OF 1929.

Indian Succession (Amendment) Act, 1929.

[Received the assent of the Governor-General on the 1st October, 1929.]

An Act further to amend the Indian Succession Act, 1925, for certain purposes.

Whereas it is expedient further to amend the Indian Succession Act, 1925, for the purposes hereinafter appearing : It is hereby enacted as follows :-

(Short title.) 1. This Act may be called the Indian Succession (Amendment) Act, 1929.

(Amendment of section 2, Act XXXIX of 1925.)

2. After clause (b) of section 2 of the Indian Succession Act, 1925 (hereinafter referred to as the said Act), the following clause shall be inserted, namely : —

``*(bb)* `District Judge' means the Judge of a principal Civil Court of original jurisdiction.''

(Amendment of section 57, Act XXXIX of 1925.)

3. *(1)* Sub-section (1) of section 57 of the said Act shall be renumbered as section 57, and after cluse (b) and before the proviso the word ``and'' and the following clause shall be added, namely :-

``*(c)* to all wills and codicils made by any Hindu, Buddhist, Sikh, or Jaina on or after the 1st day of January, 1927, to which those provisions are not applied by clauses *(a)* and *(b)*.''

(2) Sub-section *(2)* of section 57 of the said Act shall be omitted.

(Amendment of section 213, Act XXXIX of 1925.)

4. In sub-section *(2)* of section 213 of the said Act, for the word `class' the word `classes' and for the words and figures ``sub-section *(1)* of section 57'' the words, letters and figures ``clauses *(a)* and *(b)* of section 57'' shall be substituted.

(Repeals.) 5. The enactments specified in the schedule are hereby repealed.

THE SCHEDULE

Enactments repealed.

(See Section 5.)

Year.	No.	Short title.
1926	XXXVII	The Indian Succession (Amendment) Act, 1926
1928	XXI	The Indian Succession (Second Amendment) Act, 1928

IX

ACT NO. XIX OF 1929.

As amended by Acts VII and XIX of 1938.

Child Marriage Restraint Act, 1928, amended by VII and XIX of 1938.

[Received the assent of the Governor-General on the 1st October 1929.]

An Act to Restrain the Solemnisation of Child Marriages.

Whereas it is expedient to restrain the solemnisation of child marriages ; It is hereby enacted as follows : —

(Short title, extent and commencement.) 1. *(1)* This Act may be called the Child Marriage Restraint Act, 1928.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas and applies also to

(a) all British subjects and servants of the Crown in any part of India ; and

(b) all British subjects who are domiciled in any part of India wherever they may be.

(3) It shall come into force on the *1st day of April, 1930.*

(Definition.) 2. In this Act unless there is anything repugnant in the subject or context, —

(a) 'child' means a person who, if a male, is under eighteen years of age, and if a female, is under fourteen years of age ;

(b) 'child marriage' means a marriage to which either of the contracting parties is a child ;

(c) 'contracting party' to a marriage means either of the parties whose marriage is or is about to be thereby solemnised ; and

(Punishment for male adult below twenty one years of age marrying a child.)

(d) 'minor' means a person of either sex who is under eighteen years of age.

3. Whoever, being a *male* above *eighteen* years of age and below twenty one, contracts a *child marriage* shall be punishable with fine which may extend to one thousand rupees.

(Punishment for male adult above twenty one years of age marrying a child.)

4. Whover, being a male above *twenty one* years of age, contracts a *child marriage* shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

(Punishment for solemnising a child marriage.)

5. Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both, unless he proves that he has reason to believe that the marriage was not a child marriage.

(Punishment for parent or guardian concerned in a child marriage.)

6. *(1)* Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful, or unlawful, who does any act to promote the marriage or permits it to be solemnised, or negligently

fails to prevent it from being solemnised, shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both :

Provided that no woman shall be punishable with imprisonment.

[For further references in this regard see *Ram Josh V. Chand Mandal* (1937) 2.Cal.764 ; *Emperor V. Munchi Ram* (1936) 58.All.402=159.I.C.1007.]

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnised.

(Imprisonment not to be a warded for offences under section 3.

7. Notwithstanding anything contained in section 25 of the General Clauses Act, 1897, or section 64 of the Indian Penal Code, a Court sentencing an offender under section 3 shall not be competent to direct that, in default of payment of the fine imposed, he shall undergo any term of imprisonment.

IXA

Amendment of Child Marriage Restraint Act, 1929 (XIX of 1929). —

[See The Muslim Family Laws Ordinance, 1961 (Ordinance No. VIII of 1961)]

In the Child Marriage Restraint Act, 1929 (XIX of 1929) —

(1) in section 2, —

(a) in clause (a), for the word ``fourteen'' the word ``sixteen'' shall be substituted ;

(b) in clause (c), the word ``and'' shall be omitted ; and

(c) in clause (d), for the full stop at the end a comma shall be substituted, and thereafter the following new clause (e) shall be added, namely —

"*(e)* 'Union Council' means the Union Council or the Town or Union Committee constituted under the Basic Democracies Order, 1959 (P.O.No.18 of 1959), within whose jurisdiction a child marriage is or about to be solemnized" ;

(2) section 3 shall be omitted ;

(3) in section 4, for the words "twenty-one" the word "eighteen" shall be substituted ;

(4) in section 9, after the words "under this Act," the words "except on a complaint made by the Union Council or if there is no Union Council in the area, by such authority as the Provincial Government may in this behalf prescribe, and such cognizance shall in no case be taken" shall be inserted ; and

(5) section 7 shall be omitted.

X

ACT NO XXX OF 1930.

Hindu Gains of Learning Act, 1930.

[Received the assent of the Governor General on the 25th July, 1930]

An Act to remove doubt as to the rights of a member of a Hindu undivided family in property acquired by him by means of his learning.

Whereas it is expedient to remove doubt, and to provide an uniform rule, as to the rights of a member of a Hindu undivided family in property acquired by him by means of his learning ; It is hereby enacted as follows : —

(Short title and extent.) 1. *(1)* This Act may be called the Hindu Gains of Learning Act, 1930.

2. It extends to the whole of British India.

(Definitions) 2. In this Act, unless there is anything repugnant in the subject or context, —

(a) 'acquirer' means a member of a Hindu undivided family, who acquires *gains of learning ;*

(b) 'gains of learning' means all acquisitions of property made substantially by means of learning, whether such acquisitions be made before or after the commencement of this Act and whether such acquisitions be the ordinary or the extraordinary result of such learning ; and

(c) 'learning' means education, whether elementary, technical, scientific, special or general, and training of every kind which is usually intended to enable a person to pursue any trade, industry, profession or a vocation in life.

(Gains of learning not to be held not to be the separate property of acquirer merely for certain reasons.)

3. Notwithstanding any custom, rule or interpretation of the Hindu law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely by reason of—

(a) his learning having been, in whole or in part, imparted to him by any member living or deceased, of his family, or with the aid of the joint funds of his family or with the aid of the funds of any member there of, or

(b) himself or his family having, while he was acquiring his learning, been maintained or supported, wholly or in part, by the joint funds of his family, or by the funds of any member thereof.

(Savings.) 4. This Act *shall not be deemeed in any way to affect—*

(a) the terms or incidents of any transfer of property *made or effected before the commencement of this Act,*

(b) the ualidity, invalidity, effect or consequences of anything already suffered or done *before the commencement of this Act,*

(c) any right or liability created under a partition or an agreement for a partition, of joint family property made before the *commencement of this Act, or*

(d) any remedy or proceeding in respect of such right or liability ;

or to render invalid or in any way affect anything done before the commencement of this Act in any proceeding pending in a Court at such commencement ; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued ; as the case may be, as if this Act had not been passed.

XI

India Act No, XVIII of 1937 as amended by Act XI of 1938.

The Hindu Women's Rights to Property Act, 1937.

Whereas it is expedient to amend the Hindu law to give better rights to women in respect of property : It is hereby enacted as follows : —

(Short title and extent.) (1) This Act may be called The Hindu Women's Rights to Property Act, 1937.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas but excluding Burma.

(Application.) 2. Notwithstanding any rule of Hindu law or custom to the contrary, the provisions of section 3 shall apply where a Hindu dies intestate.

(Devolution of property.) 3. (1) When a Hindu governed by the Dayabhaga school of Hindu law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu law or by customary law dies intestate leaving separate

property, his widow, or if there is more than one widow all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son ;

Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son ;

Provided further that the same provision shall apply *mutatis mutandis* to the widow of a predeceased son of a predeceased son.

(2) When a Hindu governed by any school of Hindu law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu Woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends on a single heir or to any property to which the Indian Succession Act, 1925, applies.

(Savings.) 4. Nothing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act.

(Meaning of the expression "die intestate.")

5. For the purpose of this Act, a person shall be deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

XII

Act No. XIX OF 1937.

Arya Marriage Validation act.

An Act to recognise and remove doubts as to the validity of inter-marriages current among Arya Samajists.

Whereas it is expedient to recognise and place beyond doubt the validity of inter-marriages of a class of Hindus known as Arya Samajists ; It is hereby enacted as follows : —

(Short title and extent.) 1. (1) This Act may be called the Arya Marriage Validation Act, 1937.

(2) it extends to the whole of British India including British Baluchistan and the Sonthal Parganas, and applies also to all subjects of His Majesty within other parts of India, and to all Indian subjects of His Majesty without and beyond British India.

(Marriage between Arya Samajists not to be invalid.)

2. Notwithstanding any provision of Hindu law, usage or custom to the contrary no marriage contracted whether before or after the commencement of this Act between two persons being at the time of the marriage Arya Samajists shall be invalid or shall be deemed ever to have been invalid by reason only of the fact that the parties at any time belonged to different castes or different sub-castes of Hindus or that either or both of the parties at any time before the marriage belonged to a religion other than Hinduism.

XIII

GOVERNMENT OF INDIA

Legislative Department.

New Delhi, the 4th May, 1946.

The following Act of the Indian Legislature received the assent of the Governor Gene[illegible]e 23rd April, 1946.

ACT XIX Of 1946.

An Act to give Hindu married women a right to separate residence and maintenance under certain circumstances.

Whereas it is expedient to provide for the right to separate residence and maintenance under certain circumstances in the case of Hindu married women ; It is hereby enacted as follows : —

(Short title and extent.) 1. *(1)* This Act may be called the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946.

(2) It applies to the whole of British India.

2. *Grounds for claiming separate residence and maintenance :-* Notwithstanding any custom or law to the contrary a Hindu married woman shall be entitled to separate residence and maintenance from her husband on one or more of the following grounds, namely,-

(1) if he is suffering from any loathsome disease not contracted from her ;

(2) if he is guilty of such cruelty towards her as renders it unsafe or undesirable for her to live with him ;

(3) if he is guilty of desertion, that it is to say, of abandoning her without her consent or against her wish ;

(4) if he marries again ;

(5) if he ceases to be a Hindu by conversion to another religion ;

(6) if he keeps a concubine in the house or habitually resides with a concubine ;

(7) for any other justifiable cause :

Provided that a Hindu married woman shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by change to another religion or fails without sufficient cause to comply with a decree of a competent Court for the restitution of conjugal rights.

3. *Amount of maintenance,-* When allowing a claim for separate residence and maintenance under section 2, the Court shall determine the amount to be paid by the husband to the wife therefor, and in so doing shall have regard to the social standing of the parties and the extent of the husband's means.