COMMENTARIES ON
THE
HINDU SUCCESSION ACT, 1956

(No. XXX OF 1956)

(With Appendix Containing
The Hindu Marriage Act, 1955 &
The Hindu Minority & Guardianship Act, 1956)

With a Foreword by
Hon'able Mr. Justice S. C. Mishra
HIGH COURT, PATNA

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Dedicated

To

The Sacred Memory of my Father

Late Shri Baneshwar Prasad Tewary,

Pleader.

FOREWORD

The author has rendered a great service to every student of Hindu Law by this timely publication. It is generally recognised that no other enactment has done more to change the entire outlook of a vast social group such as Hindu society as this measure. It is almost revolutionary in character. Concepts and ideas which have governed the Hindu mind for centuries have been given a new orientation. The stubborn opposition to the passing of this piece of legislation is thus readily understandable. The Parliament of India, however looked upon the changes incorporated in the Act as much needed reform and placed it on the Statute Book.

The Legislature having done its part, the lawyer and the Hindu citizen have now to understand its implications. The task one can well imagine, will not be very easy. Old prejudices which have struck firm root will take time to disappear leaving the field for new ideas to find abode. Hindu law as we know it today is a highly complex system covering numberless social relations. The original texts with the ancient and mediaeval commentaries supplemented by the labours of British Indian Judges and Jurists during the British rule in this country have left a highly scientific and carefully thought out organism known as Hindu Law which governs us today.

Law of inheritance and succession has been the major part of this system. The present Act consisting of 31 sections only aims at embodying the quintessence of this vast mass of legal learning. Codified law in one sense has an advantage over uncodified legal ideas in as much as it is concrete and positive at which one can put one's finger, but on the other hand, it suffers from a disadvantage as it puts legal ideas which have already occupied the field in a strait jacket which they seek to break through.

It is accordingly necessary that a commentator should bring out in so far as he can the prominent features of the changes introduced. The author has sought to do it with success. He is no doubt confronted with the fact that feud of the obscure and ambiguous provisions of the Act have not received so far any judicial scrutiny and authoritative pronouncements are few and far between. But the author has all the same turned to his own legal experience and acumen to point out the difficulties and suggest answers. I have no doubt that this pioneer work will supply an urgent demand for a commentary on the Hindu Succession Act.

Sd/—S. C. Mishra
Judge, Patna High Court.

PREFACE.

The Hindu Succession Act, 1956 is an enactment revolutionary in nature and has been passed by the Indian Parliament in the teeth of strong opposition. A number of Acts were passed beginning from the Hindu widow's Remarriage Act, 1856 to reform the Hindu Law and Hindu Society but no other Act has such a far reaching effect as this Act. The other Acts did not affect the Hindu Law or Hindu Society to such an extent as this Act. The Hindu widow's Remarriage Act, 1856, The Hindu inheritance (Removal of disabilities) Act, 1928; The Hindu Law of inheritance (Amendment) Act, 1929; The Child marriage Restraint Act, 1928; The Hindu Gains of Learning Act, 1930; The Hindu women's rights to Property Act, 1937; The Arya Marriage validation Act, 1937; The Hindu Married women's Right to Separate Residence and Maintenance, Act 1946; The Hindu Marriage Disability Act, 1946; The Hindu Marriages Validity Act, 1949; The Special Marriage Act, 1954 and The Hindu Marriage Act 1955 were enacted *to reform the Hindu Law and the Hindu Society but this Act will greatly* affect the Hindu Society and Hindu Law. By this Act almost all branches of Hindu Law have been affected. The other Acts have not been adopted by the general mass of the Hindu Society but this Act which regulates devolution of the property of a Hindu, will be given effect to by every person who is entitled under this Act to an interest or share in the property of an intestate. The Act overrides all previous laws statutary, textual or otherwise. One will have to forget the mass of decisions which had settled certain points of law.

The task of a commentator of such an statute is difficult in the absence of any judicial opinion on the controversial points that are likely to arise. I have tried to point out in a short compass the various difficulties and differences of opinion that are likely to arise while applying the Act.

I have tried to show briefly as far as possible the various topics of Hindu Law which have been affected by the provisions of this Act. The Act has to be interpreted with a background of so many decisions on particular points which have not been clarified by this Act.

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THE HINDU SUCCESSION ACT, 1956.

No. 30 of 1956.

An Act to amend and codify the law relating to intestate succession among Hindus.

Be it enacted by Parliament in the Seventh Year of the Republic of India as follows:—

Note:—This Act is one of the series of Acts which seek to amend and codify the Hindu Law. Originally it was proposed to have one Act namely the Hindu Code but that idea has been abandoned and it has been decided to enact laws by parts. The Hindu Marriage Act and The Hindu Minority and Guardianship Act were the two Acts which have been passed in two instalments.

"This the third instalment of the Hindu Code seeks to amend and codify the law relating to intestate succession. The original draft of the provisions relating to intestate succession contained in the Rau Committee's Bill underwent substantial changes in the hands of the Select Committee which considered the Rau Committee's Bill in 1948. This Bill follows to a large extent the scheme adopted by the Select Committee but takes into account the various suggestions made from time to time for the amendment of the Select Committee's version of the Bill. In particular, special provisions have been included for regulating succession to the property of intestate governed by the Marumakkathayam, Aliyasantana or Nambudri Laws of inheritance." (*Statement of objects and reasons in the Bill*)

CHAPTER I.

PRELIMINARY

1. Short title and extent :—(1), This Act may be called the Hindu Succession Act, 1956.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

1. Enforcement of the Act :—The Hindu Succession Act came in force from 17-6-56. It received the assent of the President on 17-6-56 and was published in the India Gazette Extraordinary, Part II, Section I, dated 18-6-56. Under Section 5, General Clauses Act (*X of 1897*) where any Act is not expressed to come into operation on a purticular day, then it shall come into operation on the day on which it receives the assent of the President.

2. Extent of Application :—This Act applies to the whole of India except Jammu and Kashmir. Jammu and Kashmir is not the integral part of India for all purposes Under Article 370 of the Constitution of India only such laws are to apply to that State which are made applicable by the President in exercise of his powers.

3. Application of the Act :—The Hindu Succession Act has been enacted in order to have one uniform law of Succession in the whole of India so far as Hindus are concerned. It aims at evolving a fairly uniform system of law for the entire country with respect to intestate succession, irrespective of the different schools of Hindu Law.

4. Prospective effect of the Act:—This Act being a substantive legislation is not retrospective in operation. No Statute, except when it is a Statute dealing with procedure only can be construed to have re-trospective effect unless it its made so expressly or by necessary implication. This Act deals with intestate Succession and the provisions of this Act regarding succession will apply only when the Succession opens after the passing of this Act. The numerous heirs who are to succeed after the death of the intestate do not acquire any right during the lifetime of the intestate. Section 14 of the Act gives re-trospective effect to the absolute right of Female heirs, who were in possession of the property as limited owners otherwise known as widow's estate. Widow's estate has been abolished and the Female heirs now acquire absolute right over the properties possessed by them.

2. Application of Act :—(1) This Act applies—

(*a*) to any person, who is a Hindu by religion in any of its forms or developments, including a Virshaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(*b*) to any person who is a Budhist, Jaina or Sikh by religion, and

(*c*) to any other person who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation :—The following persons are Hindus, Budhists, Jainas or Sikhs by religion, as the case may be :—

(*a*) any child, legitimate or illegitimate, both of whose parents are Hindus, Budhists, Jainas or Sikhs by religion;

(*b*) any child, legitimate or illegitimate, one of whose parents is a Hindu, Budhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;

(*c*) any person who is a convert to the Hindu, Budhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

1. Scope :—1. This Act applies to all Hindus, Budhists, Jainas or Sikhs by birth or religion.

S. 2 (c) makes it clear that every person other than a Muslim, Christian, Parsi or Jew by religion who were governed by the Hindu law, before the passing of this Act shall be governed by the Hindu Succession Act.

2. Explanation (*a*) :—Any child, legitimate or illegitimate whose parents are Hindus, Buddhists, Jainas or Sikhs are governed by the Hindu

Law of Succession. Where both the parents are Hindus, Buddhists, Jainas or Sikhs, the child shall be treated as Hindu, Buddhist, Jaina or Sikh as the case may be and shall be governed by the Hindu Law.

3. Explanation (*b*) **:**—Where only one of the parents is a Hindu, Buddhist, Jaina or Sikh, the child legitimate or illegitimate shall be treated as a Hindu, Buddhist, Jaina or Sikh if the child has been brought up as a Hindu, Buddhist, Jaina or Sikh as the case may be.

Illegitimate children where the father is a Christian and the mother a Hindu, and the children have been brought up as a Hindu, such children shall be governed by the Hindu Law (*Myna Bagee versus Octaram 8 M I. A. 400*). The religion of a child is the religion of its parent who has brought the child according to his or her religion.

4. Explanation (*c*) **:**—Any person who is a convert or re-convert to a Hindu, Buddhist, Jaina or Sikh religion will be governed by this Act. Not only a Hindu by birth but also a Hindu by religion i. e. converts to Hinduism are Hindus (2. Pat. 230 P. C.; 1922 P. C. 228; 1931 Pat. 305; 51 Mad. 1 (*F. B.*). It also applies to Hindus who having renounced Hinduism has reverted to it. A reconvert to Hinduism after performing the religious rites of expiation and repentance (*1944 B. 40*) or even without a formal ritual of reconversion when he was recognised as a Hindu by his community are Hindus (*Durga Prasad Rao* versus *Sudersan Swami* 1940 Mad. 518) and will be governed by this Act.

5. Sub-section (2)**:**—This Act shall not apply to the members of any scheduled tribe within the meaning of clause (25) of Article 366 of the Indian Constitution unless the Central Government by notification in the official Gazette, otherwise directs.

3. Definitions and interpretation :—(1) In this Act, unless the context otherwise requires, —

(*a*) "agnate"—one peron is said to be an "agnate" of another if the two are related by blood or adoption wholly through males;

(*b*) "aliyasantana law" means the system of law applicable to persons who, if this Act had not been passed, would have been

Madras ACT IX of 1949. governed by the Madras Aliyasantana Act, 1949, or by the customary *aliyasantana* law with respect to the matters for which provision is made in this Act;

(*c*) "cognate"—one person is said to be a "cognate" of another if the two are related by blood or adoption but not wholly through males;

(*d*) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family;

Provided that the rule is certain and not unreasonable or opposed to public policy : and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family;

(*e*) "full blood" "half blood" and "uterine blood"—

(i) two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife, and by half blood when they are descended from a common ancestor but by different wives;

(ii) two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands;

Explanation :—In this clause "ancestor" includes the father and "ancestress" the mother;

(*f*) "heir" means any person, male or female, who is entitled to succeed to the property of an intestate under this Act;

(*g*) "intestate"—a person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect;

(*h*) "marumakkattayam law" means the system of law applicable to persons—

(*a*) Who, if this Act had not been passed, would have been governed by the Madras Marumakkattayam Act, 1932; the Travancore Nayar Act, the Travancore Ezhava Act; the Nanjinad Vellala Act; the Travancore Kshatriya Act; the Travancore Krishananvaka Marumakkathayee Act: the Cochin Marumakkathayam Act, or the Cochin Nayar Act with respect to the matters of which provision is made in this Act; or

Madras Act XXII of 1933 II of 1100 III of 1100 VI of 1101. VII of 1108. VII of 1115. XXXIII of 1113 XXIX of 1113

(*b*) Who belong to any community, the members of which are largely domiciled in the State of Travancore-Cochin or Madras, and who, if this Act had not been passed, would have been governed with respect to the matters for which provision is made in this Act by any system of inheritance in which descent is traced through the female line;

but does not include the *aliyasantana* law;

(*i*) "nambudri law" means the system of law applicable to persons who, if this Act had not been passed, would have been governed by the Madras Nambudri Act, 1932, the Cochin Nambudri Act; or the Travancore Malayala Brahmin Act with respect to the matters for which provision is made in this Act;

MADRAS ACT XXI of 1933 XVII of 1113 III of 1106.

(*j*) "related" means related by legitimate kinship :—Provided that illegitimate children shall be deemed to be related to their mother and to one another, and their legitimate descendants shall be deemed to be related to them and to one another, and any word expressing relationship or denoting a relative shall be construed accordingly.

(2) In this Act, unless the context otherwise requires, words importing the masculine gender shall not be taken to include females.

Note—

1. Clause—(*a*) A person is said to be the agnate of another if the two persons are related by blood or adoption wholly throuth males. Mitakshra divides sapindas or blood relations into two classes namely (i) Gotraja sapindas i. e. sapindas belonging to the same gotra or family as the deceased and (ii) bhinna gotra sapindas i. e. sapindas belonging to a

different gotra or family from the deceased. Gotraja sapindas are all agnates i. e. person connected with the deceased by an unbroken line of male descent. "Agnate" as difined in this Act means persons who are related wholly through males.

2. Clause—(*b*) *Aliyasantana Law* :—Madras Aliyasantana Law (Act IX of 1949) apply mainly to the Bunts, the Billawas and the non priestly class among the jainas in Kanara.

3. Clause—(*c*) "*cognate*" :—Cognates are persons who are related to one another by blood or adoption but not wholly throgh males. Cognates are persons connected by the female line.

4. Clause—(*d*) "*Customs and usage*" :—Custom and usage is one of the sources of Hindu Law. Customs and Usages have overridden the ancient text of Hindu law. Their lordships of the Judicial committee in *Collector of Madura* vs. *Ramahinga,* 12 M. I. A. 397, observed "under the Hindu systom of law, clear proof of usage will outweigh the written text of law." There are three kinds of customs recognised by courts, namely (*a*) local (*b*) class and (*c*) family customs. Custom or usage in order to be law must be ancient, certain and reasonable. It must not be opposed to morality or public policy and it must not be expressly forbidden by legislature (1928 Mad. 299). The first proviso provides that the custom must be certain, not unreasonable or opposed to Public Policy.

The second proviso to clause (*d*) clearly lays down that in the case of family custom, it has the force of law if it has not been discontinued by the family. A family usage like local custom must be certain, invariable and continuous but it may be discontinued so as to let in the ordinary law. "Well established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes and the effect can not be less, when it has been intentionally brought about by the concurrent will of the family." (*Raj Kishun singh* versus *Ramjay Sarma Mozumdar* 1 Cal. 186 at 196 P. C) The definition of "Custom & usage" as given in this Act is the same as that in Sec. 3(*a*) Hindu Marriage Act 1955. The word "ancient" or "immemorial" has been substituted by "a long time". Therefore customs which are coming on for "a long time" will be considerd as a valid custom having the force of Law. Different courts are bound to differ on the point as to what is "a long time."

5. Clause—(*e*) :—Persons related by full blood are those who are descendants from a common ancestor by the same wife, while those who are descendants from a common ancestor but by different mothers are said to be related by half-blood. Persons are said to be related to each other by uterine blood when they are descended from a common ancestress by different husbands. Children of the same mother by different fathers are under the Act said to be related by uterine blood.

6. Clause—(*g*) :—A person who dies without making testamentary dispositions of his property is said to die intestate. Now under this Act every Hindu has got a right to dispose of his or her interest in the property by will (S. 30). A person who does not leave any will is said to die "intestate".

7. Clause—(*h*) :—Marumakkattayam law as administered by the courts is a body of customs and usages which have received judicial recognition. This law prevails among people inhabiting the west coast of South India i e, the State of Travancore-Cochin, South Kanara and Malabar. They are Hindus. The customary law has been considerably changed by the enactments of the Madras Legislature.

8. Clause—(*j*) :—Related as defined in the Act means related by legitimate kinship, but illegitimate children are said to be related to the mother and to one another.

Subsection (2) :—As a general rule of interpretation of Statute "he" includes "she" but this Act makes it clear that unless the context otherwise requires "he" shall not include "she".

4. Overriding effect of Act :—(1) Save as otherwise expressly provided in this Act :—

(*a*) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act ;

(*b*) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so for as it is inconsistent with any of the provisions contained in this Act.

(2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings.

Synopsis.

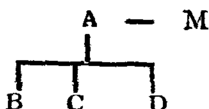
1. **Scope.**
2. **Over-riding effect of the Act.**
3. **Various changes introduced by the Act.**
4. **Repeal of previous Acts.**
6. **Law relating to Agricultural holdings.**
6. **"Devolution of tenancy right in such holdings."**

1. Scope :—Subsection (1) clearly lays down that after the passing of this Act, all texts, rules and interpretations of Hindu law, customs and usages having the force of Hindu law immediately before the commencement of this Act shall cease to have any effect with respect to the matters for which provision is made in the Hindu Succession Act and all laws which were applicable to the Hindus, Budhists, Sikhs and Jainas which are inconsistent with any of the provisions of this Act shall cease to apply to them. This Act therefore supercedes the Hindu law either statutory or otherwise to apply among the Hindus, Budhists, Sikhs and Jains which are inconsistent with or contrary to the provisions of this Act. Subsection (2) has been enacted as a proviso to subsection (1) as a saving clause. The provisions of this Act will not affect the provisions which were in force before the commencement of this Act providing for the prevention of fragmentation of agricultural holdings or for the devolution of tenancy rights in respect of such holdings.

2. Over-riding effect of the Act:—

Sub-section (1) of Section 4 clearly provides that in matters dealt with in this Act, all previous laws whether statutory, textual or customary, shall be overridden by the provisions of this Act. In matters of Succession, exclusion from inheritance and absolute interest acquired by female heirs, the Hindu Law so far applicable will cease to be the law of the land and

these matters shall now be governed by the provisions of this Act. In matters not dealt with in this Act, the Hindu Law which was applicable among Hindus will continue to operate. The question arises, according to Mitakshara Hindu Law when there is a partition among the sons, the mother gets a share equal to that of a son. No provision has been made in this Act about it. As under the old law when there is a partition among the sons or among the father and sons, mother will continue to get one share. This is neither inconsistent with nor contrary to the provisions of the Act. This fact becomes important when one has to find out the share of a co-parcener who dies leaving any of the female relatives mentioned in Class I of the Schedule. Proviso to Section 6 necessitates the ascertainment of the share of a deceased co.parcener for the purpose of notional partition. The share so found out will devolve on the heirs mentioned in Class I of the Schedule, and that share shall not pass by survivorship to the surviving co-parceners.



Let us take a case of a Mitakshara joint family consisting of A, the father, M, the mother, B & C, 2 sons of A and D, a daughter of A. Now if A dies, his interest will not pass by surviviership but will pass on to his heirs specified in Class I of the Schedule. In order to determine the share of A, one has to find out what his share would have been if there would have been partition immediately before his death. According to Hindu Law, A, the father, M, the mother and 2 sons will each get equal share. A would have got $\frac{1}{4}$th share in the joint family property and each of the 2 sons and mother will get 1/4th. 1/4th share of A will again be divided among the widow M, B & C, the 2 sons and D, the daughter, in equal shares as they are all Class I heirs. M, the mother, therefore, gets 1/4th as her own share and 1/4th of 1/4th ont of the share of A. The 2 sons will also each get 1/4th his co-parcenary share and 1/4th of 1/4th out of the share of their father, while the daughter will get only 1/4th of 1/4th, i. e., 1/16th of the joint family property.

This could never have been the intention of the Legislature but we are not to look to the intention of the Legislature. Plain meaning of the

Section as enacted has to be looked into. For further discussion on the subject see note 5 to Section 6.

3. Various changes introduced by the Act :—

1. It practically does away with the different schools of Hindu Law and provides for one uniform law of succession.

2. It applies to the properties of all Hindus dying intestate except to the property of a person who has married according to the Special Marriage Act and the Impartible estates of Indian Rulers, succession to which is governed by special covenants or agreements or enactments (Sec. 5).

3. The Act will not apply to Mitakshara coparcenary property if the coparcener dies without leaving any of the female relatives mentioned in Class I (Section 6).

4. It gives a death blow to the Mitakshara law of survivorship when a coparcener dies leaving any of the female relatives mentioned above (Proviso to S. 6.)

5. It makes new provisions for the the devoluation of property of a male Hindu (Section 8) and that of female Hindu (Section 15).

6. It introduced a number of new heirs hitherto unknown to Hindu Law who will succeed as co-heirs by right of inheritance (Section 8, 19 and Schedule).

7. It removes the distinction between different kinds of Stridhan property and abolishes the limited estates held as "widow's estate". The interest acquired by female heirs has been made absolute (Section 14),

8. Different modes of succession has been provided for the properties of a male intestate and that of a female intestate (Sec. 8 & 15).

9. Where a number of co-heirs inherit the property and if any one wants to transfer his or her share, the other heirs will have a preferential right to acquire the interest proposed to be transferred (Sec 22).

10. A female co-heir has no right to claim partition of the dwelling house untill the male members chose to divide their share. Daughter can

claim right of residence in the house only if she is unmarried or deserted by the husband or is a widow (Sec. 23).

11. Scope of exclusion from inheritance has been curtailed (Sec. 26 to 28).

13. Disease, deformity etc- is no longer a ground of exclusion from inheritance (Sec. 28),

13. A co-parcener has been given a right to dispose of his interest in the co-parcenary by will (Sec. 30).

4. Repeal of Previous Acts :—

According to Sec. 4 (1) all enactments which are inconsistent with the provisions of this Act will cease to apply. The Hindu Inreritance Act 1929 and Hindu Women's Right to Property Act 1937 have been expressly repealed by Section 31. The Hindu Inheritance (Removal of Disabilities Act) 1928 is contrary to and inconsistent with the provisions laid down in Section 28 of the Hindu Succession Act. The Act of 1928 ceases to be the law of the land. This Act also ought to have been repealed along with the 2 Acts mentioned above.

5. Law relating to Agricultural holdings :—

Section 5 (2) lays down as a matter of caution to the interpreters of the Act as a proviso to Sub-Section (1). Laws regarding the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy right in respect of such holdings which were in force at the time of the commencement of Hindu Succession Act shall continue to be in force though it may be contrary to or inconsistent with the provisions of this Act. It saves only the existing law and does not save any law which might come into force in future. The holdings contemplated by this sub-section must be agricultural holdings. Tenancy rights shall devolve according to the laws that are in force though the provisions of those Acts may be contrary to or inconsistant with this Act. In the absence of any such Act, the Hindu Succession Act shall apply to the devolution of interest in agricultural holdings also. After the Hindu Women's Right to Property Act 1937 was passed, the questions arose as

to whether the Act applied to agricultural lands in the Governor's Provinces. The matter was referred to the Federal Court by the Governor General under Section 213, Government of India Act, 1935 and the Federal Court, *In respect to Hindu Woman's Right to Property Act, 1937*, (A. I. R. 1941 F. C. 72) held that the Act did not apply to agricultural holdings in as much as "devolution of agricultural land" was in entry No. 21 of List II, the Provincial List of the Government of India Act 1935. After the passing of the Indian Constitution, there is no such entry in List II. The State List No 18 of List II is "Land, that is to say, rights in or over land tenures including the relation of landlord and tenant, the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization."Under the present constitution of India "devolution of agricultural land" has been omitted from List II, the State List. List III, the concurrent list, entry No. 5 includes "intestacy and succession". "Intestacy and Succession" now being in the concurrent list, law relating to intestacy and succession can be framed both by the Central and the State Legislatures. Under Govt. of India Act 1935, item No. 7 was "will, intestacy and succession, save as regards agricultural land." Succession to agricultural land was under the Act of 1935 solely within the provincial list and the Central Legislature could not enact any law providing for the succession of agricultural land. "Intestacy and Succession" under the Constitution of India being in concurrent list, Parliament has also power to make laws with respect to any of the matters enumerated in list III of the seventh Schedule (Art. 246 of the constitution of India). Under Art. 254, laws enacted by the Parliament shall prevail over the laws enacted by the State Legislature and the law made by the State Legislature shall, to the extent of the repugnancy, be void. The Provisions of the Hindu Succession Act, therefore, applies to the devolution of interest in agricultural lands.)

6. "Devolution of Tenancy Rights in respect of such holdings" :—In view of the discussions made above, the words "Devolution ot tenancy rights in respect of *such holdings*" clearly refer to holdings regarding which provision has been made for the prevention of fragmentation ot agricultural holdings or for the fixation of ceilings of holdings. The word "such" before the word "holding" also clearly shows that only such holding as provided for the prevention of fragmentation of agricultural

holdings or ceiling of holdings are exempted from the operation of the Hindu Succession Act.

5. Act not to apply to certain properties :—This Act shall not apply to—

(*i*) any property succession to which is regulated by the Indian Succession Act, 1925, by reason of the provisions contained in section 21 of the Special Marriage Act, 1954 ;

39 of 1925
43 of 1954.

(*ii*) any estate which descends to a single heir by the terms of any covenant or agreement entered into by the Ruler of any Indian State of the Government of India or by the terms of any enactment passed before the commencement of this Act ;

(*iii*) the Valiamma Thampuran Kovilagam Estate and the Palace Fund Administered by the Palace Administration Board by reason of the powers conferred by Proclamation (IX of 1124) dated 29th June, 1949 promulgated by the Maharaja of Cochin.

Synopsis.

1. **Scope**
   —Special marriage Act.
2. **Impartible estates.**
3. **Law of primogeniture by custom.**

Note—

1. Scope—This section lays down that in certain cases the Hindu Succession Act shall not apply. Clause (1) lays down that the Act will not apply to those who shall be governed by the Indian Succession Act 1925 in matters relating to Succession by reason of S. 21 of the Special Marriage Act (XLIII of 1954). The Special Marriage Act applies to all citizens of India. The marriage under the Act is effected by registration before an officer called "Marriage Officer". The marriage contemplated is manogamous i. e. neither party to the marriage should have a spouse living and the male must have completed the age of 21 years and the female the age of 18. No consent of the guardian is necessary. Only the

Special Marriage Act.

condition as to the age of the parties must be satisfied. The marriage solemnised under this Act of any member of an undivided family who professes the Hindu, Budhist, Sikh or Jain religion shall be deemed to effect his severance from such family. When a member of a joint Hindu family marries under the Act, he ceases to be an undivided member of that family and his share in the coparcenary property as on that date, gets seperated and vests in him absolutely, governed no longer by the rule of survivorship. The mode of devolution to such property is provided for in chapter II, Indian Succession Act, 1925.

2. Impartible estates :—Clause (II) refers to impartible estates of *Rulers of Indian States, Succession to which is regulated* by special covenants or agreements and to estates *succession to* which is regulated by any existing enactments.

3. Law of Primogeniture by custom :—The law of Primogeniture which applied in certain families by custom shall no more apply to them. Customs contrary to the provisions of this Act have been superceded by section 4. All those families where the property descended to only one heir by custom, there being no legislative enactment to that effect before the commencement of this Act, shall be governed by the provisions ot the Hindu Succession Act in matters of succession. It will no more descend to a single heir.

Generally the impartible estates and their succession by the rule of primogeniture are the creatures of customs such as in the families of Tripura Raj and Tirhoot Raj and there are numerous estates which are impartible and governed by the rule of primogeniture owing to the nature of such estates, such as Ghatwali Tenures in Bengal and Bihar. Besides there are some impartible estates which are the creatures of statutes such as Oudh Talukdari estates, Most of these estates have been affected by the abolition of Zamindaries and intermediaries. The legislature however keeps two kinds of such impartible estates alive by this piece of Legislation and they are (1) the estates of the rulers of *the Indian States where there is* a term in the agreement or treaty between them and the Government of India that their estates shall be impartible and (2) the others are those estates which have been made impartible by enactments passed before the commencement of this Act.

6. Devolution of interest in coparcenary property:—When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

"Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1.—For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2.—Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to there in.

Synopsis.

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—by an after-born son.
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—Wife.
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23. **Share of adopted son in cases of after-born son.**
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25. **Adoption by widow.**
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27. **Remarried woman can not adopt or give in adoption.**

1. In general :—This section makes it clear that when a male Hindu dies after the commencement of this Act as a member of a Mitakshara joint family with his coparceners, his interest in the coparcenary property shall devolve by the Mitakshara law of survivorship upon the surviving coparceners and not according to the rules of devolution according to this Act. The law of Mitakshara survivorship is not completely done away with but certain exceptions have been made.

The proviso clearly lays down that if any member of a Mitakshara coparcenary dies leaving a female relative specified in class I of the Schedule, namely daughter, widow, mother, daughter of a pre-predeceased son, daughter of a predeceased daughter, widow of a predeceased son, daughter of a predeceased son of a predeceased son, and widow of a predeceased son of a predeceased son or a male relative specified in that class who claims through such female relative, namely, son of a predeceased daughter, *such relatives shall* inherit the interest of the deceased coparcener. If a coparcener dies leaving daughter, widow, mother, daughter of a predeceased son, daughter of a predeceased daughter, widow of a predeceased son, daughter of a prede-

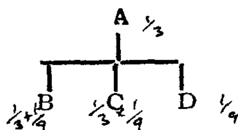
ceased son of a predeceased son and son of a predeceased daughter, or any of them, they shall inherit the interest of the deceased Mitakshara coparcener and in such cases, his interest will not pass by survivorship to the surviving coparcener, but to the heirs specified in class I of the schedule as per order of Succession specified in Sec, 8, 9 and 10.

2. Death blow to the law of survivorship :—The Mitakshara law of survivorship has therefore been retained in part and abolished in cases where the deceased coparcener dies leaving the aforesaid relatives. The law of survivorship has therefore been given a death blow by the Hindu Succession Act. In the majority of cases a member of a Mitakshara joint family will die leaving some of the aforesaid female relatives and in such cases the interest of the deceased coparcener shall not devolve by survivorship on the surviving coparceners but will devolve on the relatives specified in class I by succession and thus the law of survivorship has been given a complete go by. The Hindu Women's Rights to Property Act, 1937, by introducing widow as heir to her deceased husband who was a member of the coparcenary, had affected the law of survivorship to a considerable extent but this Act has introduced a number of new heirs as mentioned above who will succeed to the interest of the deceased coparcener along with son and other relatives specified in class I of the Schedule. The interest inherited by the widow of a coparcener under the Hindu Women's Rights to Property Act was a limited interest but the interest now acquired by the female heirs under this Act is absolute.

For all practical purposes the interest of a coparcener becomes defined and the Mitakshara joint family according to which the interest or share of a coparcener was said to be fluctuating and liable to increase and decrease due to the death or birth of a coparcener will now disappear. For all practical purposes therefore there becomes severance of the joint family status of the deceased coparcener just before his death. It may therefore be fairly said that on the death of a co-parcener leaving female heirs, there is a definition of the intestate's share by operation of Law.

3. Explanation (1) :—The explanation clarifies the position that the interest of a deceased coparcener for the purpose of the devolution of that interest will be deemed to be the share which the deceased coparcener

would have been allotted by partition, if partition would have taken place between him and the other coparceners immediately before his death. No matter whether he was himself entitled to claim partition or not.



If A, a Hindu governed by the Mitakshara law, dies leaving two sons B & C and one daughter D, the interest of A in the coparcenary property would be 1/3 and B & C have each 1/3. After A's death his 1/3rd interest will devolve upon his sons B & C and his daughter D in equal shares. Thus, the daughter D will get 1/3rd of 1/3rd, i. e., 1/9th share and B & C will each get 4/9th share. Thus each of the sons will get 4 times more than the share which the daughter will get.

In the above instance if the family is governed by the Dayabhag School of Hindu law the sons and daughter will each get equal shares, i. e. 1/3rd each.

Let us take another instance :—Suppose A who is governed by the Mitakshara School of Hindu law dies leaving a widow, 2 sons and one daughter, the interest of A in the joint family property was to the extent of 1/4th immediately before his death in as much as if there would have been a partition among the coparceners before his death. A, the father, B, the mother and the 2 sons would have each got 1/4th share. The interest of A being 1/4th will after his death devolve upon the 2 sons, widow and daughter in equal shares, they all being in class I of the Schedule to the Act. The daughter in this case will get 1/4th of 1/4th, i. e., 1/16th share in the Joint family property. The widow mother will get her 1/4th share plus 1/16th share, i. e., 5/16 share and each of the 2 sons get 5/16th share in the joint family coparcenary property which existed at the time of A's death. The Hindu law according to which the mother gets a share equal to that of a son on partition has not been done away with by this Act. The daughter will get 1/16th share and each son will get five times more than the daughter.

4. Explanation (2) :—This says that a person who has separated himself from the coparcenary before the death of the deceased he or his heirs shall not claim on intestacy a share in the interest of the deceased coparcener referred to in the proviso to section 6. A separated member is debarred from claiming any share in the interest of the deceased if the deceased has left any female relative specified in class I of the Schedule or a male relative specified in class I who claim through such female relative.

5. Anomalies arising out of Section 6 :—As seen in note 2 to Section 4 above, serious anomalies are likely to arise in determining the share of a deceased coparcener as provided in explanation (1) to Section 6. In the case of a Mitakshara Hindu joint family serious complications are likely to arise. Where a joint family consists of the father, mother, a son and a daughter, after the death of the father, his share has to be determined under Explanation (1) to Section 6 for the purpose of the devolution of his share. One view will be that the share of the father is 1/3rd in the family property and the share of the son and mother is 1/3rd each in as much as when there is a partition between the father and son, mother also gets a share. Had there been a partition immediately before the death of the father, mother also would have got a share under the Hindu law. This share of the mother on partition though allotted to her in lieu of maintenance cannot be ignored. It has to be found out what his share would have been if there would actually have been partition during his life-time. This has been made clear by Explanation (1).

Another view will be that while ascertaining the share of the father, the mother will be ignored and there will be definition of share only between the father and son. The share of the mother will be ignored as the share given to the mother is only in lieu of maintenance and she does not get a share unless there is actual partition by metes and bounds.

The Act does not clarify the position and if we read the explanation (1) as it is, the share of the mother cannot be ignored. Their Lordships of the Bombay High Court in *S. G. Jadav* Vrs. *V. G. Jadav* (A. I. R. 1955 Bom. 410) at para 7 of their judgment observed "such anomalous position can be avoided only when and if the task of reforming the Hindu law is undertaken by codifying the whole of the Hindu law together. When

attempts are made to make reforms to personal law like the Hindu law by piecemeal legislation, such anomalies are sometimes inevitable, because in enacting a specific Act dealing with a specific part of Hindu law, it is not always easy to integrate the said provisions with the other provisions of the Hindu law and to anticipate what the effect of the new enactment would be on the remaining structure of the Hindu law." Their Lordships were dealing with a case under the Hindu Women's Rights to Property Act, 1937 where the question arose about the share of the mother under the Hindu law and as a widow after the death of her husband under the Act.

A joint Hindu Mitakshara family consisted of the father G, his two widows X and Y, two sons A & B by the first wife X, his third son C, by the second wife Y. A and B along with their mother X brought a suit for partition against G, C and Y impleading therein certain alienees of the joint property from G. During the pendency of the suit G died. Subsequently the widow X also died. The question was, what was the quantum of share taken by the parties, held that (i) in considering the claim made by a Hindu mother for a share at the time when partition takes place between her sons, she must be, and has been regarded as making a claim substantially for her maintenance and not a claim for inheritance properly so called; (ii) under the Mitakshara law when the family estate is divided, a wife or mother is entitled to a share, but is not recognised as the owner of such share until the division of the property is actually made, as she has no pre-existing right in the estate except a right of maintenance; (iii) that in the circumstances the two widows could not claim a share in their duel capacity as mothers under the Hindu law and as widows of G under the Hindu Women's Rights to Property Act. At the time when the matter was being decided, G was dead, and the only capacity in which they could claim a share would be that they were widows of G. Their rights as mothers notwithstanding, they would be given a share to which they would be entitled under Sec. 3, sub-section (2) of the Act; (iv) That the three sons of G were each entitled to one-fourth share in the property in suit and that Y was entitled to a one-fourth share because her one-eighth share was augmented by reason of the fact that X died pending the second appeal and the one eighth share which had devolved on X on G's death devolved upon Y on X's death (1955 Bom. 410). See also ***Pratap Mull*** Vrs. ***Dhanbati Bibi*** 1936 P. C. 20.

This case decided that so long as there is no actual partition, the mother is not entitled to a share which is given to her in lieu of maintenance. It may be said that the right of mother under the pre-existing Personal law of the Hindus, to a share in lieu of maintenance when a partition takes place between sons or between father and sons as the case may be, has gone out of the picture by necessary implication, because she is one of the heirs specified in class I of the Schedule and can succeed only under Section 8, read with the Schedule and has no right to any share when partition takes place between the co-parceners of the Joint family, although the co-parcener may happen to be father and the sons. But Sec. 6, Explanation (1) clearly lays down that the share of the deceased coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death. On partition, mother would have also got a share, therefore the share of the mother can not be ignored.

6. Co-parcenary :—A joint Hindu family consists of all persons linealy descended from a common ancestor and include their wives and unmarried daughters. The joint and undivided family is the normal condition of Hindu society. An undivided Hindu family is ordinarily joint not only in estate, but also in food and worship. Mere severance in food and worship does not operate as a separation. Severance of the joint family status occurs when there is an intention to separate and such intention is unequivocally communicated to the other members. A mere definition of share amounts to severance of the joint family status when it is done with such an intention. A mere filing of a plaint for partition amounts to the severance of the plaintiff's status in the joint family.

A Mitakshra Hindu co-parcenary is a much narrower body than the joint family. Co-parceners are only those persons who by birth acquire an interest in the joint co-parcenary property. These are the sons, grand-sons and great grand-sons of the respective members of the joint property. The conception of a joint Hindu family constituting a co-parcenary is that of a common male ancestor with his lineal male descendants within four degrees counting from and inclusive of such ancestor. Co-parcenary commences from a common male ancestor though after his death it may consist of collaterals, such as brothers, uncles, nephews, etc.

In a co-parcenary the person acquires an interest by birth. The property in which a person acquires an interest by birth is called unobstructed heritage or '*Apratibandh Daya*'. He acquires an interest in it from the moment of his birth. Property, the right to which arises not by birth but on the death of the last owner without leaving any male issue is called obstructed heritage or '*Sapradibandh Daya*'.

Interest of a co-parcener in the co-parcenary properties passes by survivorship to the surviving members of the co-parcenary. Unless the share is defined or there is severance of the joint family status, no one can predict as to what his share is.

Now under this Act, the co-parcenary interest of a co-parcener passes by survivorship only if he dies without leaving any of the female relatives mentioned in class I of the Schedule to the Act or any male relative claiming through such female relative. If he dies leaving any of these female relatives, his interest will pass to his heirs by inheritance as per rules provided in Section 8 & 9.

7. Females can not be co-parceners :—No female can be a co-parcener under the Mitakshara law. Even a wife, though she is entitled to maintenance out of her husband's property and has to that extent an interest in the property, is not her husband's co-parcener. A mother is not a co-parcener with her son nor a mother-in-law with her daughter-in-law. A widow succeeding to her husband's share in a joint family under the Hindu Women's Rights to Property Act can not be a co-parcener (*Sutha Bai* Vrs. *Narasimha* (1945) Mad. 568).

Under the Hindu Women's Rights to Property Act 1937, the interest which a widow takes upon the death of her husband in her husband's property is a fluctuating interest. It is liable to decrease by the number of co-parceners in the family increasing by a birth or adoption. On the other hand, it is capable of augmentation, in case one of the co-parceners, who was alive at the time when her husband died, dies subsequently. The interest which she takes is not a separated interest, separated that is, from the interest of the other members of the family, who may, of course, be co-parceners. Her interest is, like the interest of her husband, an undivided

interest in the joint family properties, even though she is entitled to file a suit for partition. The interest does not get separated, at any rate, until the suit for partition is filed by her. The family consequently continues to be a joint one till the widow files a suit for or a separation of interest is otherwise brought about. Therefore the Manager of a joint Hindu family can alienate for legal necessity joint family property, including the interest in the property of the widow of a pre-deceased co-parcener (*Mahadeo Kashiba Varnekar* Vrs. *Gajara Bai Shanker Varnekar* A. I. R. 1954 Bom. 442; *Gangadhar* Vrs. *Subhashini*, A. I. R. 1955 Orissa 135). This position cannot now be maintained under the Hindu Succession Act. Property is under the Act inherited by female heirs. A female heir now succeeding to the interest of a co-parcener becomes an absolute owner of it and she becomes a fresh stock of descent and on her death, her interest goes to her heirs and not to the heirs of the last full owner. The interest acquired by her as on the date of her inheritance becomes defined and separated by operation of law and no question of her interest fluctuating from time to time arises. The Karta or manager of the joint family will not be entitled to alienate her interest in the properties even for legal necessities.

8. Joint family :—The joint undivided family is the normal condition of Hindu Society. The presumption therefore is that the members of a Hindu family are living in a state of jointness, unless the contrary is proved. The strength of the presumption necessarily varies in every case. The presumption of jointness is stronger in the case of brothers than in the case of cousins, and the further you go from the common ancestor, the presumption becomes weaker and weaker (*Villappa* Vrs. *Tipanna* 56 I. A. 13; *Inder Juer* Vrs. *Pirthipal Singh*, 1945 P. C. 128; *Muna Mahto* Vrs. *Raghunath* 1933 Pat. 153).

A Hindu joint Mitakshara family constituting a co-parcenary include only those persons who have the right to enjoy and hold the joint property, to restrain the acts of each other in respect to it, to burden it with their debts, and at their pleasure to demand partition. They acquire an interest in the property by birth.

The manager or Karta of the joint family has got the right to incur debts or alienate the joint family property for justifying legal necessities which shall be binding on all the members of the family. The power of the Manager of a Mitakshara joint family is analogous to those of the guardian of a minor's estate, a limited owner such as the holder of a widow's estate, Shebait and Mahanths. The leading case on the point is the case of *Hanooman Prasad Pandey* Vrs. *Babuee Munraj Kumari*, 6 M. I. A., 393.

Hanuman Prasad Pandey's case.

In the case of Hanuman Prasad Pandey decided by the Privy Council in the year 1856, the following propositions of law were enunciated which are still regarded as the most authoritative statements of law :—

1. The power of a Manager for an infant heir to charge ancestral estate by loan or mortgage, is by the Hindu law, a limited and qualified power, which can only be exercised rightly by the Manager in a case of need, or for the benefit of the estate. But where the charge is one that a prudent owner would make in order to benefit the estate, a bonafide lender is not affected by the precedent mismanagement of the estate

2. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred, in the particular instance, are the criterion to be regarded.

3. A creditor is bound to enquire into the necessities of the loan and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate. If he does enquire and acts honestly, the real existence of an alleged and reasonably credited necessity is not a condition precedent to the validity of the charge, which renders him bound to see to the application of the money.

4. A bonafide creditor is not to suffer when he has acted honestly and with due caution.

5. The burden of proof is on the creditor to prove the actual existence of the necessity for the loan or that he made bonafide and reasonable enquiry about the necessity.

9. Benefit of estate and legal necessity :—Ever since the decision of Hanuman Prasad Pandey's case, "necessity" and "benefit to the estate" were the subject matter of decision in many cases. One view is that a transaction cannot be said to be for the benefit of the estate, unless it is of a defensive character meant for the protection of the estate, from some threatened danger or destruction. Another view is that it would be considered as being for the benefit of the estate if it is such as a prudent owner would have done with the knowledge available to him at the time of the transaction. Any act done by the Manager is or is not for the benefit of the estate is not to be judged by the result of such acts. What has to be seen is, as to whether the act done by him was done by him for the benefit of the estate as a prudent owner in the circumstances would have done. It should not be of a speculative nature (*Baijnath Prasad* Vrs. *Binda Prasad* 17 Pat. 549).

Necessity is not to be taken in the sense of what is absolutely indispensable but what according to the motives of a Hindu family would be regarded as reasonable and proper (*Kameshwar* Vrs. *Veeracharu* 34 Mad. 422). A Manager is perfectly entitled to do all acts which are reasonable and proper for the support and protection of the members of the family as well as those which are indispensable acts of duty.

Following are some of the instances which have been held to be legal necessities :

1. Payment of Government revenue and debts which are payable out of the family property (*Charib-ullah* Vrs. *Khellal Singh* 30 I. A. 165).

2. Payment of decretal dues & other debts binding on the family.

3. Rent due to the landlord (*Manrup mandal* Vrs. *Badri Sao* 1942 Pat. 383),

4. Maintenance of the co-parceners and their family members (*Makandi* Vrs. *Sarak sikh* 6 All. 417).

5. Expenses of necessary repairs of family dwelling and protection of family lands from flood, destruction etc, *Gobind Dani* Vrs. *Purusottam Mahapatra* 1943 P. 430,

6. Expenses of defending members of the family from criminal cases and of litigation in connection with recovery of family property (45 All 311).

7. First marriage of a co-parcener (*Debilal Sah* Vrs. *Nand Kishor Gor* 1 Pat, 266).

8 Marriage of daughters born in the family (*Sellapa* Vrs. *Suppan* 1937 Mad. 496). But the Calcutta High Court has held that the marriage held in contravention of the Child Marriage Restraint Act 1929, was not a necessity (*Ramjus Agrawal* Vrs. *Chand Mandal* I. L. R. (1937) 2 Cal. 764).

9. Carrying on the ancestral business (*Ram Krishna* Vrs. *Rattn Chand* 53 All. 190).

10. Daya-Bhag Law :—Under Daya-Bhag Law there is no jointness in property between father and son (31 Cal. 448) and as such no presumption of jointness arises inasmuch as, so long as the father is alive he is the sole owner. The sons may acquire separate properties of their own, but they have no concern with the joint family property during the life time of the father (1927 Cal. 776; 37 C. W. N. 1174).

11. Father Karta :—In the case of the manager or Karta of a joint Hindu Mitakshara family, he has got full power to incur debt and to alienate the joint family property for legal necessity and for the benefit of the estate. The father Karta has got all the powers of an ordinary Karta but he has got the additional power to alienate the co-parcenary property for payment of antecedent debt.

12. Antecedent Debt :—Antecedent debt means an indebtedness of the father prior in time to and independent in origin of the particular dealing with the family property, whether by way of sale, mortgage or other dispositions in favour of the creditor which it is sought to enforce against the sons. To constitute a debt an antecedent debt, it is not necessary that the prior and subsequent creditor should be defferent persons. All that is necessary is that the two transactions must be dissociated in time as well as in fact. Thus if a previous mortgage bond is renewed in favour of the

same mortgagee in lieu of the previous mortgage dues, the subsequent bond is said to be for payment of an antecedent debt and will be binding on the sons. The question of existence of legal necessity for the prior item does not arise. The leading case on the point is the case of *Raja Brij Narayan* Vrs. *Mangla Prasad* 1924 P. C. 50, which laid down the following propositions of law :—

Raja Brij Narayan Vrs. Mangla Prasad

1. The managing member of a joint undivided estate cannot alienate or burden the estate except for purposes of necessity.

2. If he is the father and the other members are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

3. If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate.

4. Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

5. There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate is alive or dead.

13. Son's Pious Obligation :—These propositions of law are based upon the doctrine of pious obligation of the son to pay his father's debt. Son, grand-son and great grand-sons are liable to pay the debts contracted by the father, though for his personal benefit provided they were not incurred for an immoral or illegal purpose. It arises from the obligation of religion and piety which is placed upon the sons under the Mitakshara Law to discharge the father's debt not tainted with immorality. The father by alienating the co-parcenary property including the interest of the son for payment of a prior debt is discharging the son of his pious obligation to pay the father's debt, hence it is binding on the son.

14. Transfer of undivided Interest :—Under the Mitakshara law, no member of the co-parcenary has any defined share and after the death of one member, his interest passes to the surviving members. As the share of a co-parcener is not defined a co-parcener cannot transfer even his own interest in the undivided co-parcenary property except in Bombay and Madras. According to Mitakshara Law as administered in West Bengal, Bihar, Uttar Pradesh, Orissa, Punjab and in Oudh no co-parcener can alienate even for value his undivided interest without the consent of other co-parceners But the undivided interest of a co-parcener can be sold in execution of decree against him but even in such cases the purchaser is not entitled to joint possession with the other co-parceners. Such a purchaser acquires merely a right to compell a partition which the co-parcener whose interest he has purchased might have compelled, had he been so minded, before the sale of his interest took place. That right can only be enforced by a suit for a general partition to which all the co-parceners must be joined as parties. The purchaser may in such suit ask the court to allot to his vendor the specific property purchased by him and the court may allot that property to him if the interest of the other co-parceners will not be prejudiced thereby.

Purchaser not entitled to joint possession.

Where the purchaser has not obtained possession, but claims the whole property as his own, the non-alienating co-parcener may sue him for a declaration that he is entitled to no more than the undivided interest of the alienating co-parcener. The proper decree to pass in such a suit would be an order declaring that by virtue of the sale, the purchaser acquired only the undivided interest of the alienating co-parcener in the property with such power of ascertaining the extent of such share by means of a partition as the alienating co-parcener possessed and confirming the possession, of the other co-parceners subject to such proceedings as the purchaser may take to enforce his rights. If the purchaser has obtained possession, the non-alienating co-parceners are entitled to sue for and recover possession of the whole of the property for the benefit of the joint family including the vendor. The purchaser is not entitled in such suit to an order for partition either of the specific property sold to him or of the joint family properties in general; he must, if he wants to realise his vendor's interest, bring a suit of his own for a general partition. Where a suit therefore is

brought by the non-alienating co-parceners for possession, the proper decree to be passed would be an order directing the purchaser to deliver possession to the plaintiffs of the whole property (*Mulla Hindu Law, 11th Edition* Page 315).

In the case of execution of decree against a co-parcener, the undivided interest of the debtor co-parcener must be attached during his life time otherwise his interest passes to the other co-parcener by survivorship. It cannot be attached after his death unless where the co-parcener is the father, grand-father or great grand-father (*Suraj Bansi Kuer* Vrs. *Sheo Prasad* 5 Cal. 148). It is only when the attachment is effected during the life time of the debtor that prevents the accrual of his interest to the co-parceners by survivorship. An attachment before judgment of the undivided interest of a co-parcener not followed by a decree in his life time does not defeat the right of survivorship of the other co-parceners (*Kalianna* Vrs. *Masayappa* 1943 Mad. 149; 17 Mad. 144) A purchaser in a court sale of a specific property belonging to the Joint family held in execution of a decree obtained against one of the members of a joint family is entitled to ask for equitable relief in a suit for general partition that the property purchased by him should, if possible be allotted to the share of the Judgment debtor. But if it is not possible he can not compell the Judgment debtor to give other properties that fell to his share in substitution for the properties purchased by him (*B. Venkatta Subbaya* Vrs. *N. Struangam*, 19[illegible] Andhra 188 F. B.)

15. Changes effected by this Act :—Now, under the Hindu Succession Act if any co-parcener dies leaving any of the female relatives mentioned in class I of the schedule, his interest does not pass by survivorship to the other co-parceners. (*Proviso to Section 6*). When the devolution of interest is not by survivorship the question of attaching the undivided interest of a co-parcener during his life time will no more arise. His interest will now devolve to his heirs. The heirs will therefore be liable to pay the debt of the person whose interest they inherit. Even after the death of the debtor co-pacener, his interest can be made liable in the hands of his heirs.

Section 30 also empowers a co-parcener to transfer his interest in the co-parcenary property by will. But the restriction in the transfer of

the undivided interest of a co-parcener in other respect remains un-affected by this Act. Even after this Act a co-parcener cannot transfer his undivided interest except by testamentary disposition as provided for in Section 30.

As seen above, Section 6 deals only with the co-parcenary property, i. e., property *in which the other co-parceners acquire an interest in it* by birth. Such properties are the ancestral properties or self acquired property of a co-pacener thrown in the common hotch-pot and the separate property has lost its separate identity. It therefore becomes necessary to ascertain what are ancestral properties.

16. Ancestral properties :—

1. Property inherited from paternal ancestor (**पितामह**).

2. Accumulation of income of ancestral property or property purchased or acquired out of the income of the ancestral property.

3. Property acquired from maternal grand-father (**मातामह**) is not ancestral in the sense that his sons will get interest in it by birth. (***Md. Hussain Khan*** Vrs. ***Babu Kishwananda*** *Sahai* 64 I. A. 250 = 1937 P.C.) In ***Venkayyamma*** Vrs. ***Venkataramanuyyamma,*** 25 Mad. 678, the P. C. observed that the property inherited from a maternal grand-father was ancestral. But that was a case where 2 brothers inherited the property from their maternal grand-father and remained as members of a joint family and the question arose as to whether after the death of one brother his interest passed by survivorship to the other members and their lordships held that the law of survivorship applied. The word ancestral was used there in a loose sense and not in the technical sense as meant under the Hindu Law.

17. Separate property :—

1. Property acquired from collaterals (obstructed heritage).

2. Self acquisitions, separate earnings and properties acquired by gains of learning (*Hindu Gains of Learning Act*, 1930).

3. Property acquired by partition when he has no son, grand-son or great grand son. Such properties are technically ancestral in his hands but there being no co-parcener with him, they will be treated as his separate property.

4. Property of a sole surviving co-parcener. A person being a sole owner of the property, in his hands it will be treated as his separate property but it is also ancestral in his hands as his sons will acquire an interest in it by birth.

5. Property acquired without detriment to the father's estate.

Section 6 does not deal with the separate and self acquired property of a co-parcener. As before such property will devolve by inheritance.

18. Whether separated son can inherit as an heir :— Explanation (2) to section 6 deals only with regard to the devolution of interest in the co-parcenary property. It does not deal with the separate property of the deceased co-parcener. According to explanation (2) if a family consists of A, the father and B & C two sons of A and D, a daughter, B & C have separated from their father. Now if A dies, his 2 sons will be excluded from inheriting the property of A under explanation (2) and the daughter will inherit his entire property to the exclusion of the sons.

In the above instance if only one son has separated, the undivided son and the daughter will succed in equal shares.

According to the Bombay and the Madras High Court (*Ramappa* Vrs. *Sithaumal*, 2 Mad. 182; *Balkrishna* Vrs. *Savitri Bai*, 3 Bom. 54) on the death of a father leaving self acquired property, an undivided son takes such property to the exclusion of a divided son. If, however, there is no undivided son, the divided son is entitled to succeed to such property in preference to his father's widow. Now under this Act if there is no undivided son, the son as well as the other relatives specified in class I of the schedule who may be alive at the time the suecession opens shall inherit the property by virtue of section 8.

In *Bhairab Prasad* Singh Vrs. *Birendra Pratap* Singh & *others*, 1950 Pat. 1, it was held after reviewing the original texts and case laws on the point "The principle of Mitakshara is that the son and grand-son get "unobstructed" right (*Apratibandh Daya*) by mere birth to the separate property of the grand father. Partition does not annul the grandson's right or convert it into an obstructed right; and the existence of a son or united brothers would not defeat it, although both the son and the grand son are

separate from their ancestor and also from one another. Partition merely adjusts or resolves joint right into several rights, it frees the father's share from any present proprietary right, but it cannot annul the filial relation nor the right of succession incidental to that relation. Where, therefore, one partitioned his properties with his sons B and S and subsequently P, one of the sons of B, becomes separate from his father and brothers who continued to remain joint and then K died; held that P was entitled to a share of the inheritance left by K." (1950 Pat. 1).

19. Challenging of unauthorised alienation by the father:— Unauthorised alienations made by any coparcener can be challenged by a coparcener who was born or conceived at the time the alienation was made. It can be set aside at the instance of any coparcener who, though born subsequent to the date of alienation was in his mother's womb at the time of the alienation, the reason being that under the Hindu law a son conceived is, in many respects, equal to a son born.

An alienation made by the father while he has no other co-parcener, there being no son in existence at the time of the alienation, is valid though made without any legal necessity. Such alienations cannot be challenged by a son born after the date of the alienation on the ground that it was made without any justifying necessity (*Bhola Nath* Vrs. *Kartik*, 34 Cal. 372; *Surju Prasad* Vrs. *Makhar Lal* 1922 All. 51). If all the sons living at the time of the alienation predecease their father and no other son is born before the death of the last of them so that the father becomes the sole co-parcener for some time, then the alienation cannot be impeached by an after born son (*Hitendra* Vrs. *Sukhdeb*, 1929 Pat. 360). But if, before the sons alive at the time of the alienation are dead, another son is born, the alienation can be challenged by such after born son. This is based on the doctorine of overlapping. The Bombay High Court in *Shivaji Ganpati Muthal and others* Vrs. *Murlidhar Daji Muthal and others*, 1954 Bom. 386 F. B. overrulling 1943 Bom. 239 held., "An alienation of the Joint Family Property made by the father, when made not for any legal necessity or for an antecedent debt can be challenged by his son who was in existence at the date of the alienation. A son born after such alienation can also do so subject to the doctorine of overlapping. In order that an after born son should have a right to

By an after born son

challange an alienation he must be born at a time when there is some co-parcener in existence in the Joint Family who has a right to challenge the alienation. There must be no gap between the existence of a co-parcener who has a right to challenge and the birth of a son who enters the coparcenary subsequently. Therefore, the two lives, namely the life of the son who has a right to challenge and the subsequently born son must overlap".

20. Devolution of interest in Shebaiti interest of a Hindu— The interest of a shebait in the religious endowments devolve according to the ordinary law of Hindu Succession. After the death of a shebait, all his heirs become joint shebaits. The innumerable heirs who have now become heirs to a Hindu are entitled to become joint shebaits, The Supreme Court in the leading case of *Angurbala* Vrs. *Devabrat Mullick*, A. I. R. 1951 S. C. 293 held after distinguishing the decision of the Fedral Court in *Umayal Achi* Vrs. *Lachmi Achi*. 1945 F. C. 25 that a widow under the Hindu Women's Rights to Property Act, 1937 is entitled to succeed to the Shebaiti interest of her husband. Their Lordships observed. "There is nothing in any of the Provisions of the Hindu Women's Rights to Property Act which excludes from the scope and operation of the Act succession to shebaitships which is a recognised from of property in Hindu Law".

Angurbala vrs. Devabrat Mullick

While the general law of succession has been changed by the Hindu Succession Act, there is no reason why the law as it stands at present should not be made applicable in the case of Shebaitships. Therefore, all the heirs, who have been made heirs under the Hindu Succession Act will succeed to the shebaiti interest of an intestate Hindu. This will create anomalies and confusion. A family idol is managed by the shebait for the interest of the family because the idol is the family idol. Now under this Act a number of persons belonging to different families and even holding different religious views will become joint shebaits. The Legislature ought to have made exception with regard to the devolution of shebaiti interest.

21. Shebaiti interest inherited by Shebaits are limited interest :—Uuder Section 14, Hindu Succession Act an interest inherited by a female heir is an absolute interest, but the interest which is inherited

by either a male or a female heir in shebaiti interest is a limited interest and this has not been affected by this Act. The property of a diety or religious endowment vests in the diety and shebaits though not trustees in the technical sense are not owners of the property which belong to the diety. In *Angurbala* Vrs. *Devabrat Mullick* A. I. R. 1951 S. C. 293 at page 300-301, his Lordship Mr. Justice Chandrasekhar Aiyar observed. "So far as Shebaitship is concerned, the office does not enure beyond the life-time of the holder, whether male or female and is generally inalienable. It is *res extra commercium*. A male heir cannot alienate it any more than a female heir. What limitations exists or are imposed on alienability arises out of the nature of the property, not out of the nature of the estate taken by the heir. *In the very nature of things, there can be no alienation for necessity*, surrender, acceleration of the estate in favour of the next succession etc."

22. Hindu law of partition affected by this Act :—Under the Hindu law every co-parcener is entitled to a share upon partition. Son begotten at the time of partition but born after partition is entitlen to a share as if he was in existence at the time of partition. If no share is reserved for him, the partition is liable to be re-opened and a share alloted to him by repartition, he is not entitled to have the partitioned re-opened if the father has reserved a share for himself. The after born son will be entitled to inherit the share of father alloted to him on partition as well as to the seperate property of the father. Thus if A has 2 sons B and C and he seperates from them reserving 1/3rd share for himself. Some years after partition a son D is born to him. D will take on A's death the 1/3rd share alloted to him on partition and also the whole of the seperate property of his father to the entire exclusion of the seperated sons. But if A has not seperated from all his sons but is joint with his son, B, D the after born son will along with B be entitled to the joint property alloted to A aud B as well as the seperate property of A. They shall share equally all the properties left by A.

Where the father has not reserved any share to himself on partition with his sons, a son born as well as begotten after partition is entitled to get the partition re-opened and to have a share alloted to him in the pro-

perty as it stood at the time of partition but also to the accumulations and accretions made therein with the help of that property (20 Mad. 75). Such an after-born son is not bound by any agreement entered into by the father against re-opening of partition (I. L. R. 1945 Mad. 297).

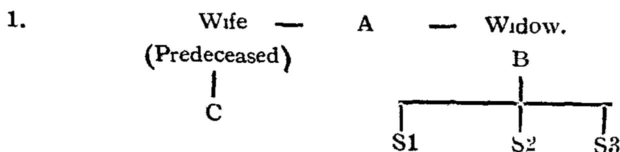
Section 20, of this Act also recognises the existence of an afterborn son who was in the mother's womb.

Wife. A wife cannot herself demand a partition but if partition takes palce between her husband and his sons, she is entitled to get a share equal to that of a son and to hold and enjoy the same seperate from her husband.

If there is a partition among her sons after the death of the father, she is entitled to a share equal to that of a son.

Mother. On partition between sons by different mothers when more than one mother is alive, the property will be divided into as many shares as there are sons and then to allot to each surviving mother a share equal to that of each of her sons in the aggregate portion allotted to them.

1.



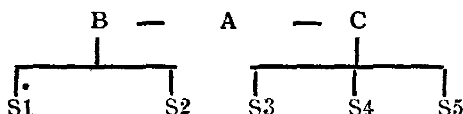
Thus if A dies leaving a widow B, 3 sons by B and a son C by a predeceased wife. C sues his step-mother B and his 3 three half brothers for a partition. The property will be devided into 5 parts, each of the 5 persons including B will get 1/5th share (*Damodar das* Vrs. *Uttam Ram*, 17 Bom. 271).

Now if A dies after the commencement of the Hindu Succession Act, the result will be different. As A dies leaving a widow that is, a female relative mentioned in class I of the schedule, the interest of A in co-parcenary property will devolve by succession under the Act. The share of A under the Hindu law if there would have been partition during his life time would have been 1/6th, the father, mother and sons each getting equal share. The 1/6th, share of A will again devolve on the 4 sons and widow in

equal shares (S. 8). The share of the sons and Mother will be 1/6th their own share plus 1/5th of 1/6th out of the share of A.

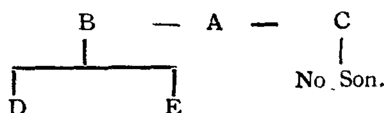
When by operation of law there is separation of A immediately before his death there is no reason why the mother will not get her own share. To say that the mother will not get any share would mean that the law of Hindu partition by which the mother gets a share is done away with but the Act does not say any such thing expressly or impliedly.

2.



A dies leaving two widows B and C, 2 sons by B and 3 sons by C. On partition between the sons of B and C, the mode of division is first to divide the property into 5 shares corresponding to the number of sons. The 2 sons of B will share 2/5 equally with their mother B, each taking 1/3rd of 2/5th that is 2/15th. The three sons of C each taking 1/4th of 3/5 that is 3/20. Thus B will take 2/15, and C will take 3/20.

3.



A dies leaving 2 widows B and C, and 2 sons D and E by B. C has no son. D sues E, B and C for partition. The property will be devided into 4 parts, there being two widows and 2 sons and each widow will take one-fourth and each son also will get one-fourth.

According to the leading authorities of the Mitakshara school, both mother and step-mother are equal sharers with the sons (*Damodar Misher* Vrs. *Sonabati Misrain,* 8 Cal. 537=10 C. L. R. 401).

Grandmother :—Grandmother which includes step-grandmother, (*Siri Ram* Vrs. *Hari Charan,* 1930 Pat 315) is under the Hindu law entitled to a share equal to that of a grandson when there is a partition among her grandsons, son having predeceased her. But when there is a partition

between her sons and his sons, grandmother is not entitled to a share according to the High Court of Allahabad (*Sheo Narayan* Vrs. *Janki Prasad*, 34 All. 505) and Bombay (*Joti Ram* Vrs. *Ram chandra* 1941 Bom. 382) but according to the Patna (*Krishan lal* Vrs. *Nandeshwar*, 1918 Pat. 91) and Calcutta (8 Cal. 649) High courts, she is entitled to a share.

Now the Hindu Succession Act will materially affect the shares of each of the aforesaid persons. If the father being in co-parcenary with his sons die leaving a widow or mother (as well as other female relatives in Class I of the Shedule) by operation of law there will be deemed to have been a partition immediately before his death. In such cases under Explanation (1) to section 6 of the Act, the share of the father will have to be determined for the purpose of the devolution of his interest by succession. His interest will not pass by survivorship as he leaves behind a widow or mother both being the female relatives mentioned in Class I of the Schedule.

Illegitimate son :—Under the Hindu law illegitimate son of a Hindu by a dasi, who is in his continuous and exclusive keeping has some right in the property of his father. Illegitimate sons of the three regenerate castes are not entitled to any share on partition or to inheritence. He is only entitled to maintenance.

The illegitimate son of a Sudra does not acquire by birth any interest in his father's estate but on the death of the father, he however succeeds to his estate as a co-parcener with the legitimate son of his father with a right of survivership and he is entitled to enforce a partition against the legitimate son (*Shamrao* Vrs. *Munna bai*, (1948) Nag. 678). On partition between the legitimate and the illegitimate son, the illegitimate son takes only half of what he would have got if he were legitimate. If there be one legitimate and one illegitimate son, the illegitimate son will get one-fourth and the legitimate son three-fourth.

Now under the Hindu Succession Act, an illegitimate son is not recognised as an heir at all. He is therefore not entitled to any share even if his father be a sudra. Under the Act, an illegitimate son is only an heir of his mother (Section 3 clause (f)).

23. Share of adopted son in cases of after-born natural son ;—The Hindu Succession Act does not anywhere speak about an adopted son. No distinction has been made in the Act between a natural born son and an adopted son. In section 3(a) agnate has been defined as persons related by blood or adoption wholly through males. Adopted son therefore has the same status as a natural born son for the purpose of inheritance and share in the property of his father. Schedule to the Act only mentions "son" which will include an "adopted son". Adopted son as well as the natural or aurasa son will have the same status. The sons share equally in the father's property (Section 8 to 10 and Schedule).

Before this Act, the law was that when a son is born after adoption to the adoptive father, the adopted son does not, on a partition between him and the after-born natural son, share equally with him as he would have done if he were a natural son, but he took :—

I. In Bengal, one third of the adoptive father's estate;

II. In Benaras, one fourth of the estate;

III. In Bombay and Madras States, one fifth of the estate; and if the estate is impartible, the aurasa son alone succeeded to it.

Among Sudras in Madras and Bengal, an adopted son shared equally with the after-born natural son (1922 P. C. 71); in Bombay, he took one fifth of the estate. The same rule applied on a partition in the lifetime of the father.

Now after the enforcement of this Act the natural born son and the adopted son will share equally.

24. Adoption by widow and its relation back from the date of the death of the adoptive father. :—In case of adoption by the widow, the adopted son acquires the status of a son. When an adoption is made to A, the adopted son is entitled to recover the estate of A not merely when it has vested in his widow who makes the adoption but also in any other heir of his (*Amrendra Man Singh* Vrs. *Sanatan Singh* 1933 P. C. 155). The coparcenary subsists so long as there is a widow of a co-parcener alive. The ground on which an adopted son is held entitled

to take in defeasance of the rights acquired prior to his adoption is that in the eye of law his adoption relates back, by a legal fiction, to the date of the death of his adoptive father, he being put in the position of a posthumous son. The scope of the principle of relation back is clear. It applies only when the claim made by an adopted son relates to the estate of his adoptive father. This estate may be definite and ascertained as when he is the sole and absolute owner of the properties, or it may be fluctuating as when he is a member of a joint Hindu Family, in which the interest of the co-parceners is liable to increase by death or decrease by birth. In either case, it is the interest of the adoptive father which the adopted son is declared entitled to take as on the date of his death. The theory on which this doctrine is based is that there should be no *hiatus* in the continuity of the line of the adoptive father. That, by its very nature, apply to him and not to his collaterals (*Srinivas* Vrs. *Narayan*, 1954 S. C. 379). Their Lordships of the S. C. did not follow the decision of the Privy Concil in A. I. R. 1943 P. C. 196. Their Lordships of the S. C. observed that the adopted son is bound by alienations made by the limited owner and co-parceners, prior to his adoption if they were for purposes binding on the estate. Thus, the transferees from limited owners, whether they be widows or co-parceners in a Joint Family, are amply protected.

Thier Lordships of the S. C. held that the decision in *Ananta Bhikappa* Vrs. *Shanker Ram Chandra* 1943 P. C. 196 in so far as it relates to properties inherited from collaterals is not sound, as "no such safeguard exists in respect of property inherited from a collateral because if the adopted son is entitled on the theory of relation back to divest that property, the position of the mesne holder would be that of an owner possessing a title defeasible on adoption, and the result of such adoption must be to extinguish that title and that of all persons claiming under him. The alienees from him would have no protection, as there could be no question of supporting the alienations on the ground of necessity or benefit. And if the adoption takes place long after the succession to the collateral had opened and the property might have mean-while changed hands several times, the title of the purchasers would be liable to be disturbed quite a long time after the alienations. The court must hesitate to subscribe to a view of the law which leads to consequences so inconvenient".

Now let us take the case of a Mitakshara Hindu, A who dies leaving a widow, a daugher and a predeceased son's daughter. The interest of A will now under this Act devolve on the three relations in equal share. All of them acquire absolute interest (Section 14). If the daughter or son's daughter transfer her interest without any necessity or benefit of the estate and sometimes after the transfer, the widow adopts a son to A. By adoption the adopted son also gets a share in the interest of A and his title relates back from the date of the death of A. The adopted son shall therefore be entitled to claim his share from the transferees and the transferee will have no defence opened to him, to defeat the title of the adopted son.

Serious complications will arise in matters like these and courts will have great difficulty in administering the law. Cases like these were not contemplated by the Legislature.

25. Adoption by widow :—In Mithila a widow cannot adopt at all, not even if she has express authority of her husband.

In Bengal, Benaras and Madras, a widow can adopt under an authority from her husband in that behalf.

In Madras State, a widow may also adopt without her husband's authority; if where the husband was separate at the time of his death, she obtains the consent of his sapindas and where he was joint, she obtains the consent of his undivided co-parceners.

In the Bombay State a widow may adopt even without any authority.

In all parts of India except Madras and Punjab, the Jainas observe the custom by which a widow is entitled to adopt to her husband without his authority. The rule is so well known and so well established by Judicial decisions that it is no longer necessary to plead and prove it in any part of India except Madras and Punjab (1948 P. C. 177). Such custom prevails amongst the Agarwals of Marwar who generally adhere to Jainism.

Among the Raghubansi Rajputs who immigrated from Ayodhya to Chindwara, a widow may adopt without authority of her husband (*Mulla —Hindu Law 11th edition* Page 558).

26. When does the widow's power to adopt come to an end :—A widow of a co-parcener can validly adopt a son to her husband notwithstanding the vesting of his interest in another co-parcener, even where the latter is the last surviving co-parcener (*Raghunandan* Vrs. *Brozo Kishore* 1 Mad. 69 P. C,). If the natural or adopted son dies unmarried leaving his mother as his heir, her power of adoption is still exercisable, (*Vellunki* Vrs. *Venkaturamu* 1 Mad. 174 P. C.) Where however, the husband dies leaving a son or son's son or their widows who may continue the line by means of adoption, the power of the widow is extinguished. In *Pratap singh* Vrs. *Agar singji*, 41 Mad. 855 P. C. their Lordships of the Judicial Committee of the Privy Council held that the right of the widow to make an adoption is not dependent on the inheriting as a Hindu female owner her husband's estate. She can exercise the power so long as it is not exhausted or extinguished even though the property has not vested in her. There was however distinction drawn by Indian High Courts between vesting of estate by inheritance and that by survivorship. Where last surviving member of a coparcenary died leaving an heir in whom the property vested by inheritance, it was held that a widow of a predeceased co-parcener could not validly make an adoption to her deceased husband which would have the effect of divesting an inheritance already vested in an heir (*Chandra* Vrs. *Gajarabai*, 14 Bom. 463; *Vasudeo* Vrs. *Ramchandra*, 22 Bom. 551 F. B.) It was also held that where the separate estate of the last male holder became vested by inheritance, not in the adopting widow, but in a collateral, her power came to an end (*Doobamoyee* Vrs. *Sham churan*, 12 Cal. 246; *Kesarbhai* Vrs. *Shiv Singji*, 56 Bom, 619). Distinction was therefore made between cases of vesting by inheritance and vesting by survivorship. The matter was set at rest by the decision of the Privy Council in the leading case of *Amrendra Man singh* Vrs. *Sanatan*, 12 Pat. 642=1933 P. C. 155, which overruled 37 Bom. 598 and reversed A. I. R. 1930 Pat. 417=10 Pat. 1. It swept away the distinction between cases of vesting by inheritance and vesting by survivorship. It laid down a simple and intelligible rule of limitation applicable to all cases alike. In that case a Hindu governed by the Benaras School was survived by an infant son and a widow, to whom he had given authority to adopt in the event of the son dying. The son succeeded to his father's impartible zamindari but died unmarried at the age of 20 years and 6 months.

By a custom of the family which excluded females from inheritance, the estate did not go to his mother but became vested in a distant kindred. A week after the death she made an adoption. It was held that the adoption was valid and it divested the estate vested by inheritance in the collateral. Their Lordships laid the following propositions of law.

1. That the foundation of the Brahmnical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnisation of the necessary rites.

2. That the interposition of a grandson, or the son's widow, brings the mother's power of adoption to an end.

3. That the power to adopt does not depend upon any question of vesting of property; and

4. That the mother's authority to adopt was not extinguished by the mere fact that her son had attained ceremonial competence.

The matter came up for decision by the Supreme Court in *Gurunath* Vrs.*Kamlabai*, 1955 S. C. 206=1955 S.C. A. 241. In that case one Gurunath, the plaintiff claimed that he was adopted in 1940 by Gangabai widow of Krishtarao, Krishtarao died in 1890 leaving him surviving two widows Radha Bai and Ganga Bai and a son Dattatraya. Dattatraya died in 1913 leaving him surviving a widow Sundara Bai and a son Jagannath. Sundara Bai died shortly after Dattatraya while Jagannath died in 1914. After an interval of about 30 years since his death, it was alleged that Gangabai who survived both her son, and grandson adopted the plaintiff, Gurunath, Their Lordships were therefore to decide "whether a widow can exercise a power of adoption conferred on her or possessed by her at any time during her life, irrespective of any devolution of property or changes in the family or other circumstances and even after a grandson has come on the scene but has subsequently died without leaving a widow or a son" Their Lordships after reviewing the cases on the point held—"For about three quarters of a century the rule that the power of a widow to adopt comes to an end by the interposition of a grandson or the son's widow competent to adopt has become part of Hindu law though the reasons for limiting the power may not be traceable to any Shastric text, and may have been differently stated in the several judgments". Their Lordships observed that the reason

for the rule in Amrendra's case (1933 P. C. 155) was "Where the duty of providing for the continuance of the line for spiritual purposes which was upon the father, and was laid by him conditionally upon the mother, has been assumed by the son and by him passed on to a grandson or to the son's widow, the mother's power is gone". Gurunath's adoption was held to be invalid as Gangabai's power to adopt had come to an end at the time when her son had died leaving a son and widow to continue the family line. Their Lordships observed that if that was the true reason, (the reason stated above of Amrendra's case) obviously the duty having come to an end can not be revived on logical grounds. The view taken by the Nagpur (*Bapuji* Vrs. *Ganga Ram,* A. I. R. 1941 Nag. 116) and Oudh Courts (*Prem Jagat Kuer* Vrs. *Harihar Bux Singh,* I. L. R. 21 Lucknow page 1 = A. I. R. 1946 Oudh 163) that a widow's power to adopt is only suspended during the life time of the son and son's widow and is revived on the death of the son and the death or remarriage of the son's widow was overruled.

27. Remarried woman can not adopt or give in adoption:— A Hindu widow after remarriage loses her status as her husband's widow for all purposes and has no longer any spiritual or temporal ties with the family of her first husband. She can not therefore claim to have any right to give a son by her first husband in adoption (*Fakirappa* Vrs. *Savitrewa,* 1921 Bom. 1 F. B. which followed 24 Bom. 89 and overruled 33 Bom. 107). She can not therefore adopt a son to her first husband while she is the wife of another.

7. Devolution of interest in the property of a *Tarwad, Tavazhi, Kutumba, Kavaru or Illom*:—(1) When a Hindu to whom the *Marumakkattayam* or *Nambudri* law would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an interest in the property of a Tarwad, Tavazhi or Illom, as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to the Marumakkattayam or Nambudri law.

Explanation :—For the purposes of this sub-section, the interest of a Hindu in the property of a Tarwad, Tavazhi or Illom shall

be deemed to be the share in the property of the Tarwad, Tavazhi or Illom, as the case may be, that would have fallen to him or her if a partition of that property per capita had been made immediately before his or her death among all the members of the Tarwad, Tavazhi or Illom, as the case may be, then living, whether he or she was entitled to claim such partition or not under the Marumakkattayam or Nambudri law applicable to him or her, and such share shall be deemed to have been allotted to him or her absolutely.

(2) Whem a Hindu to whom the Aliyasantana Law would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an undivided interest in the property of a Kutumba or Kavaru as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to the Aliyasantana law.

Explanation:—For the proposes of this sub-section, the interest of a Hindu in the property of a Kutumba or Kavaru, shall be deemed to be the share in the property of the Kutumba or Kavaru, as the case may be, that would have fallen to him or her if a partition of that property per capita had been made immediately before his or her death among all the members of the Kutumba or Kavaru, as the case may be, then living, whether he or she was entitled to claim such partition or not under the Aliyasantana law, and such share shall be deemed to have been allotted to him or her absolutely.

(3) Notwithstanding anything contained in sub-section (1), when a Sthanamdar dies after the commencement of this Act, the Sthanam property held by him shall devolve upon the members of the family to which the Sthanamdar belonged and the heirs of the Sthanamdar as if the Sthanam property had been divided per capita immediately before the death of the Sthanamdar among himself and all the members of his family then living, and the shares falling to the members of his family and the heirs of the Sthanamdar shall be held by them as their separate property.

Explanation:—For the purposes of this subsection, the family of a Sthanamdar shall include every branch of that family, whether divided or undivided, the male members of which would have been entitled by any custom or usage to succeed to the position of Sthanamdar if this Act had not been passed.

Note—

This section regulates succession to the interest of an intestate in any property belonging to any of the various kinds of joint families specified therein which are peculiar to the South West Coast of India. In the case of Sthanam properties which are specially assigned to a senior member of the joint family for the purpose of preserving his dignity, sub-section (2) provides for notional partition immediately before the death of the Sthanamdar so that his interest will pass, not by any special rule of descent to a single heir, but in accordance with this law.

8. General rules of succession in the case of males:-

The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter :—

(*a*) Firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(*b*) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;

(*c*) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(*d*) lastly, if there is no agnate, then upon the cognates of the deceased.

9. Order of succession among heirs in the Schedule:-

Among the heirs specified in the Schedule, those in class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in class II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession.

Synopsis.

1. **Scope.**
2. **Clause (a)**
3. **Heirs in class I.**
4. **Heirs in class II.**

1. Scope :—Section 8 deals with the general rules of succession in the case of males. When a Hindu male dies intestate his property shall devolve in the manner provided therein. This section deals with the separate or self-acquired property of a person who is governed by the Mitakshara school of Hindu law and to the Dayabhag School of Hindu law. This will not apply where the deceased was a member of a Mitakshara Hindu Joint family. Rules regarding the devolution of interest in coparcenary property have been made in section 6. The property of the persons governed by any School of Hindu law other than Mitakshara and the separate property of a Hindu governed by the Mitakshara School will now devolve as provided for in Section 8. The same rule will apply for the devolution of the interest of a deceased co-parcener if he dies leaving any of the female relatives mentioned in class I of the Schedule.

2. Clause (*a*) :—It will first devolve on the heirs, being relatives specified in class I of the Schedule, i. e., son, daughter, widow, mother, son of a predeceased son, daughter of a predeceased son, son of a predeceased daughter, daughter of a predeceased daughter, widow of a predeceased son, son of a predeceased son of a predeceased son, daughter of a predeceased son of a predeceased son, widow of a predeceased son of a predeceased son, who will all succeed simultaneously as co-heirs.

The relatives specified in class I will succeed to the exclusion of the relatives specified in class II of the Schedule. A number of new relatives who were not recognised as heirs under the Hindu law have been introduced and they have been classified as heirs of class I.

The order of succession among heirs has been provided for in section 9.

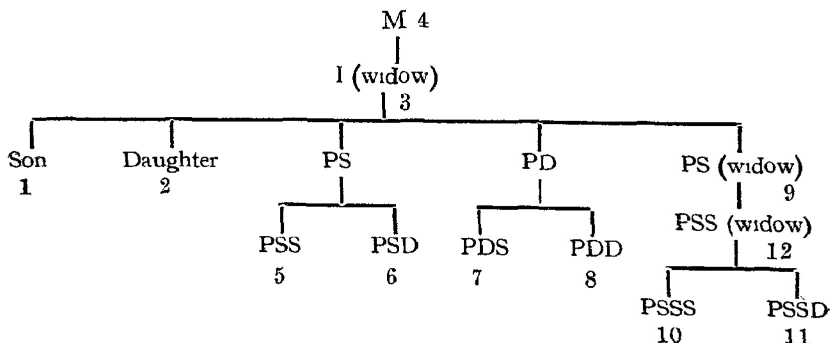
In the opinion of the Joint Committee there is no need to refer to any heir as 'Preferential' heir. It is sufficient if they are referred to as heirs in class I or class II.

"Mother" has been placed in class I while "Father" has been placed in class II.

In case of failure of the relatives specified in class I of the Schedule, the inheritance goes to the relatives specified in class II of the Schedule. Section 9 provides that the relatives mentioned in the first entry shall be preferred to those in the 2nd entry and those in the second entry shall be preferred to those in the 3rd entry and so on in succession.

3. Heirs in Class I :—12 relatives have been classified as Class I heirs. They have been shown in the table below.

In the table I stand for the intestate; M for his mother, PS for a predeceased son, PSS for the son of a predeceased son, PSD for the daughter of a predeceased son, PD for predeceased daughter, PDS for the son of a predeceased daughter, PDD for the daughter of a predeceased daughter, PSSS for the son of a predeceased son of a predeceased son and PSSD for the daughter of a predeceased son of a predeceased son.



These 12 relatives succeed to the property of the intestate as simultaneous heirs. They are son, daughter and widow of the intestate; son daughter and widow of a predeceased son, son and daughter of a predeceased daughter; son, daughter and widow of a predeceased son of a predeceased son and mother. Thus we find that the son's branch goes upto 3 degrees i. e. upto great grandson and great grand daughter while in the case of daughter it goes only upto 2 generations, i. e. upto daughter and daughter's son and daughter. In the case of widows it goes to the intestate's widow, the widow of the predeceased son and the widow of a predeceased grandson and to the mother of the intestate. Mother has been

classified in Class I while father's widow has been mentioned in class II entry No. VI along with brother's widow.

Father is not an heir of class I. He is enumerated in entry No I of class II.

4. Entries in class II of the Schedule are as follows :—

Entry No.	Name of the relatives.
I.	Father.
II.	(1) son's daughter's son; (2) son's daughter's daughter; (3) brother; (4) sister.
III.	(1) Daughter's son's son; (2) daughter's son's daughter, (3) daughter's daughter's son; (4) daughter's daughter's daughter.
IV.	(1) Brother's son; (2) sister's son; (3) brother's daughter; (4) sister's daughter.
V.	Father's father; father's mother.
VI.	Father's widow; brother's widow.
VII.	Father's brother; father's sister.
VIII.	Mother's father; Mother's mother.
IX.	Mother's brother; mother's sister.

Brother or sister do not include brother or sister by uterine blood.

"Mother" in class I does not include "Step mother". Mother has been enumerated in class I while father's widow has been included in entry No. VI of class II.

10. Distribution of property among heirs in class I of the Schedule :—

The property of an intestate shall be divided among the heirs in class I of the Schedule in accordance with the following rules :—

Rule 1.—**The intestate's widow, or if there are more widow's than one, all the widows together, shall take one share.**

Rule 2.—The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule 3.—The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the intestate shall take between them one share.

Rule 4.—The destribution of the share referred to in Rule 3—

(*i*) Among the heirs in the branch of the pre-deceased son shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions; and the branch of his pre-deceased sons gets the same portion;

(*ii*) Among the heirs in the branch of the predeceased daughter shall be so made that the surviving sons and daughters get equal portions.

Synopsis.

1. **Scope.**
2. **Co-widows.**
3. **Distribution of shares among the children of a pre-deceased son or daughter.**
4. **Simultaneous heirs.**

—Illustrations.

1. Scope —This section provides rules for the distribution of the property of the intestate among the heirs specified in class I as per rules below.

Rule 1—The widow of the intestate or if there are more than one, all the widows together, shall take one share.

Rule 2.—The surviving sons, daughters and mother of the intestate shall each take one share.

Rule 3.—The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the intestate shall take between them one share.

Rule 4.—The distribution of share among the branch of the pre-deceased son shall be made in such a way that the widow or widows together and the surviving sons and daughters get equal portions and the branch of his pre-deceased sons get the same portion.

Thus if A dies leaving 2 widows, 2 sons and one daughter of a pre-deceased son, the division will be in 4 shares. The 2 widows together will get 1 share and the 2 sons will each get 1 share and the daughter of the predeceased son will get 1 share.

2. Co-widows :—It has not been provided for in the Act that after the death of one widow, the entire will go to the surviving widow. Under the Hindu law the widows succeed as heirs to their husband as *joint tenants* with rights of survivorship. After the death of one widow, the entire property passes to the surviving widow by survivorship and it will not go to the heirs of the deceased widow as she was not a fresh stock of descent being a limited owner and not as full owner. Section 14 of the Hindu Succession Act provides that any property possessed by a female Hindu whether acquired before or after the commencement of this Act, shall be held by her as full owner and not as a limited owner. The question therefore will arise whether after the death of one widow, her half interest in the property will go to the surviving widow or to the heirs of the deceased widow. Her interest being like that of a full owner, she becomes a fresh stock of descent and after her death, her interest will devolve upon her heirs and not to the surviving widow.

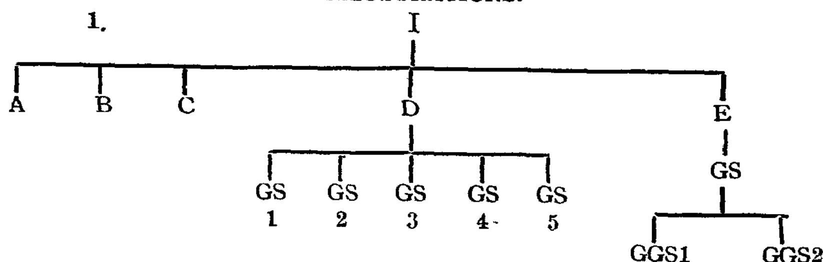
3. Distribution of shares among the children of a pre-deceased son or daughter :—While distributing the shares among the heirs of a pre-deceased son or daughter, the division will be among the descendants of the branches as per stirpes i. e. as per branch and not per capita. The shares of sons and daughters have been made equal. "The Joint Committee feel that there is no justification for treating the daughter differently from the son in the matter of shares allotted to them"—(Joint Committee report on the Bill).

The division among heirs in the branch of the pre-deceased daughter shall be such that the surviving sons and daughters get equally. The division will be according to the number of sons and daughters including pre-deceased daughter and pre-deceased son and after dividing equally between them, one share, representing the share of the pre-deceased daughter or pre-deceased son, will be divided among her or his children.

4. Simultaneous heirs :—Before 1937 the "simultaneous heirs" of a male Hindu dying intestate comprised only the son, son of a pre-deceased son and son of a pre-deceased son of a predeceased son. The Hindu Women's Rights to Property Act, 1937, added to the list, the widows of the first two as well as the intestate's own widow. Class I in the Schedule now adds to the existing list of simultaneous heirs, the daughter, and further seeks as far as possible to treat the other grand-children of an intestate whose parent has predeceased the intestate, on the same footing as the son of a pre-deceased son.

ILLUSTRATIONS.

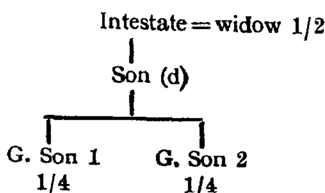
1.



The surviving heirs of an intestate are 3 sons, A, B & C, 5 grandsons by a pre-deceased son, D, and 2 great grandsons by a pre-deceased son of another pre-deceased son E. A, B & C take one share each under Rule 2, and the branches of D & E get one share each under Rule 3. The grandsons in D's branch and the great grandsons in E's branch divide the share allotted to their respective branches equally by virtue of Rule 4. Each son of the intestate, therefore, takes 1/5th of the heritable property, each grandson 1/25th and each great grandson 1/10th.

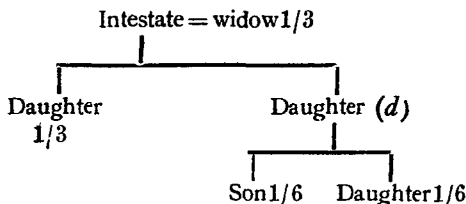
2. Only a widow or daughter or daughter's daughter or daughter's son or son's daughter survives an intestate. She or he takes the whole of the heritable property. All of them being heirs in class I.

3.



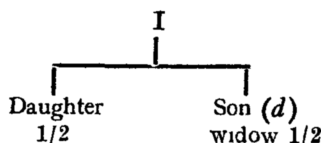
The surviving heirs are the widow and 2 grandsons by a pre-deceased son. The widow takes one share under Rule I and the grandsons together take one share under Rule III. The widow therefore takes one-half of the heritable property and each grandson one-fourth.

4.



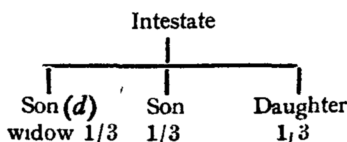
The surviving heirs are a widow, a daughter and two grand-children by a pre-deceased daughter. The widow takes one share under Rule 1; the daughter gets one share under Rule 2 and the grandchildren by the pre-deceased daughter divide the share allotted to their mother under Rule 3 & 4 (II). The widow therefore gets one-third of the heritable property, the daughter one-third and each grand children one-sixth.

5.



The surviving heirs are a daughter and a widow of a pre-deceased son. Both the relatives are heirs of class I. Daughter will get one share under Rule 2 and the widow of the pre-deceased son will get one share under Rule 3 and 4 (I). The heritable property is thus equally divided between the two.

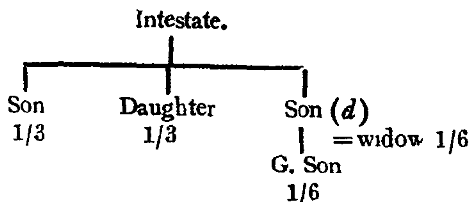
6.



The surviving heirs are a son, a daughter and the widow of a pre-deceased son. Under Rule 2, the son and daughter each get one share and the widow of the pre-deceased son being the only heir in the branch

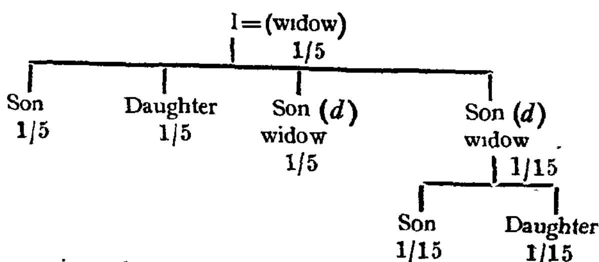
of the pre-deceased son, she gets one share under Rule 3. All of them therefore will get one third each.

7.



The surviving heirs are a son, a daughter and the widow and the son of a pre-deceased son. Under Rule 2 the son and daughter each get one share. Under Rule 4(1) the widow and the son of the pre-deceased son together get one share. In the result, the son and daughter each get one-third of the heritable property and the widow and the son of a pre-deceased son each get one-sixth.

8.



The surviving heirs are :—

(a) a widow;

(b) a son,

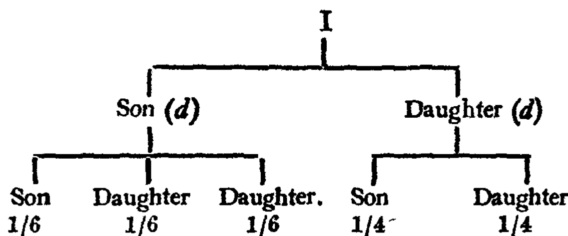
(c) a daughter;

(d) the widow of a pre-deceased son ; and

(e) the widow and a son and daughter of another pre-deceased son.

Under Rule 1 the widow gets one share, under rule 2 the son and daughter each get one share, under Rule 3 the widow of the pre-deceased son gets one share and the widow, son and daughter of another predeceased son together get one share under Rule 4(1). In the result, the widow, son and daughter each get one-fifth share and the widow of the pre-deceased son will get 1/5 share and the widow, son and daughter of another pre-deceased son shall each get one fifteenth share in the heritable property.

9..



The surviving heirs are :—

(*a*) a son by a pre-deceased son;

(*b*) a son and daughter by a pre-deceased daughter;

(*c*) two daughters by a pre-deceased son.

Here the heirs mentioned in (*a*) and (*c*) are heirs in the branch of a pre-deceased son and the heirs mentioned in (*b*) are heirs in the branch of a pre-deceased daughter. The relatives mentioned in (*a*) and (*c*) will share equally one share and those mentioned in (*b*) shall share equally the other half share.

11. Distribution of property among heirs in class II of the Schedule :—The property of an intestate shall be divided between the heirs specified in any one entry in class II of the Schedule so that they share equally.

Note—

1. Scope ;—Section 11 is meant for the distribution of the property of the intestate among the co-heirs specified in any one entry in class II. Relations mentioned in any one entry shall be simultaneous heirs and such of them as are alive when succession opens, shall share equally.

ILLUSTRATIONS.

1. A dies leaving B, a son's daughter's son, C, a son's daughter's daughter, D, a brother and E, a sister. B, C, D & E shall all share equally being in entry No. 2 of Schedule II.

2. The surviving heirs are father, brother and sister's daughter. Father will get the whole property as heir in entry I of class II to the exclusion of the other two who fall under entries II and IV.

3. The surviving heirs are brothers, sister and father's brother. The first two will get the estate simultaneously in equal shares. Father's brother will get nothing as he is in entry No. VII while the other two are in entry No. II.

12. Order of succession among agnates and cognates

The order of succession among agnates or cognates, as the case may be, shall be determined in accordance with the rules of preference laid down hereunder :—

Rule 1.—Of two heirs, the one who has fewer or no degrees of ascent is preferred.

Rule 2.—Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent.

Rule 3.—Where neither heir is entitled to be preferred to the other under Rule 1 or Rule 2 they take simultaneously.

Note—

This section deals with the order of succession among agnates or cognates as the case may be. Section 8 (*c*) and (*d*) lay down that in case of failure of the relatives specified in class I and II the property shall devolve on the agnates and in the absence of the agnates, on the cognates. Section 12 mentions the rules according to which the order of succession has to be found out.

Rule I lays down that of the two heirs, the one who has fewer or no degrees of ascent will be preferred and Rule 2 lays down that where the number of degrees of ascent is the same or none, that heir will be preferred who has fewer or no degrees of descent. This is based on the theory that the nearer will exclude the remote. If the heirs are related in the same degree with the intestate and one can not be preferred to the other under Rules 1 or 2, all such heirs shall inherit simultaneuosly.

13. Computation of degrees :—(1) For the purposes of determining the order of succession among agnates or cognates,

relationship shall be reckoned from the intestate to the heir in terms of degrees of ascent or degrees of descent or both, as the case may be.

(2) Degrees of ascent and degrees of descent shall be computed inclusive of the intestate.

(3) Every generation constitutes a degree either ascending or descending.

Note—

Scope :—This section deals with the mode of computing degrees while determining the order of succession among agnates or cognates. The degrees of ascent and descent shall be computed inclusive of the intestate and every generation constitutes a degree either of ascent or descent. The word "inclusive" represents more correctly the existing relationship than "exclusive" as per report of joint committee.

ILLUSTRATIONS.

1. Father's mother's father of the intestate has no degrees of descent, but has four degrees of ascent represented in order by (1) the intestate (2) father of the intestate (3) that father's mother and (4) her father.

2. Father's mother's father's mother of the intestate has no degrees of descent but has five degrees of ascent represented in order by (1) the intestate; (2) the intestate's father, (3) that father's mother, (4) her father and (5) his mother.

3. Son's daughter's son's daughter of the intestate has no degrees of ascent, but has five degrees of descent represented in order by (1) the intestate, (2) the intestate's son, (3) that son's daughter, (4) her son, and (5) his daughter.

4. Mother's father's father's daughter's son of the intestate has four degrees of ascent represented in order by (1) the intestate; (2) the intestate's mother, (3) her father, and (4) that father's father, and two degrees of descent represented in order by (1) the daughter of the common ancestor, namely, the mother's father's father, and (2) her son.

A person may have both degrees of ascent and descent. Degrees of ascent mean the generation from the intestate to the common ancestor and the degrees of descent mean the generations from the common ancestor to the heir inclusive of him.

When more than one person have the same degree of ascent or descent, one can not be preferred to the other and all of them will inherit as simultaneous heirs sharing equally. This applies to the order of succession amongst agnates as well as cognates. Agnates are preferential heirs to cognates (Section 8).

14. Property of female Hindu to be her absolute property :—(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation :—In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or demise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *Stridhana* immediately before the commencement of this Act.

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

Synopsis.

1. **In general.**
   - **—Limited interest out of picture.**
   - **—absolute right of disposal.**
2. **Property**
   - **—However acquired, absolute.**
   - **—Exceptions.**
3. **Widow's estate**
   - **—Reversioners out of Picture.**
   - **—No forfeiture on remarriage.**

4. Co-widows
—Survivorship of co-widows ends.
5. Reversioners
6. Surrender and its effect.
—Reversioner's right to claim possession from alienee or from adverse possessor.
—From donee.
7. Adverse possession against widow is not adverse against reversioners.
8 Incidents of widow's estate.
9. Surrender by widow with a provision for her maintenance.
10. Surrender to a female reversioner.
11. "Property possessed by a female Hindu."

Note—

1. In general :—This section deals with the interest acquired by female heirs. Sub-section (1) lays down that any property possessed by a female Hindu whether aquired before or after the commencement of this Act shall be held by her as full owner thereof and not as a limited owner.

Limited interest out of picture. Under the Hindu law the property acquired by a female owner either as heir or as share on partition, or property given for her maintenance is a widow's estate in which she has got life interest and she can not transfer the same unless it is for justifying legal necessities or for the benefit of the estate. But now the Act lays down that the property both movable and immovable which are possessed by a female shall be absolute in her hands. She can convey it to others without any necessity whatsoever and after her death it will go to her heirs and she will be treated as a fresh stock of descent.

Absolute right of disposal.

This section has been given retrospective effect. Therefore the property possessed by a female Hindu whether acquired prior to the commencement of this Act or after the commencement of this Act except those mentioned in sub-section (2) shall be her absolute property. This section does away with the "limited estate" which was hitherto possessed by a female Hindu. "In the opinion of Joint Committee there is no reason why the Hindu women's limited estate should not be abolished even with respect to existing properties".

2. "Property" :—The word "property" has been described in the explanation to section 14. The explanation clearly lays down that the word "property in sub-section (1) of section 14 includes both movable and immovable property acquired by a Hindu female by inheritance, or by demise, or at partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not before, at or after marriage, or by her own skill or exertion or by purchase or by prescription or in any other manner whatsoever and also any such property held by her as her ***Stridhan*** immediately before the commencement of this Act. All kinds of properties possessed by a female before the commencement of this Act as well as those acquired by her subsequently became her absolute property.

However acquired absolute.

Exception to this has been provided in sub-section (2) which lays down that sub-section (1) shall not apply to any property acquired by way of gift or under a will or under any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument, or the decree, order or award prescribe a restricted estate in such property. If the property in the hands of Hindu females have not been specifically made limited under the terms of the deed or decree or order or award by virtue of which the property is acquired by her, the interest acquired by her will be an absolute interest no matter whether the property was acquired by her before or after the commencement of this Act.

Exceptions.

3. Widow's estate :—The distinction between the widow's estate and Stridhan properties have been done away with.

Females therefore being absolute owners, they become fresh stock of descent and after their death the property will devolve on their heirs by succession as per rules provided for in sections 15 and 16.

The property acquired by a Hindu widow being her absolute property will not revert to the heirs of her husband even after she remarries. The provision according to which the rights of widow in her husband's property ceased after remarriage is contained in section 2, Hindu Widow's Remarriage Act (XV of 1856) which runs thus—

Reversioners out of picture.

"All rights and interests, which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property with no power of alienating the same, shall upon her remarriage cease and determine as if she had then died; and the next heir of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same".

Apart from the Hindu Widow's Remarriage Act, under the Hindu law a widow's right to succession is based on the ground that she is half of the body of her deceased husband and that she is capable of conferring spiritual benefits to him. When she remarries, she ceases to be half of the body of her late husband or to be able to confer spiritual benefits on him and she becomes the wife and half of the body of her new husband. (*Suraj Jote* Vrs. *Attar Kumri*, A. I. R. 1922 Pat. 378 = 3 P. L. T. 551)

No forfeiture on remarriage

Now under the Hindu Succession Act, the interest acquired by the widow is not a limited interest. Therefore section 2 of the Hindu Widow's Remarriage Act does not apply and the widow will not forfeit her right in her late husband's property.

"A provision for a widowed daughter-in-law was made in the Hindu law because widowed daughter-in-law was a part of the family. But now with the "progressive elements" in the society, widowed daughters-in-law are likely to remarry and by making the women's estate absolute, the widowed daughter-in-law will be able to take the estate of her father-in-law to her new husband's house. In the case of a widowed daughter-in-law, the estate should have been kept limited and this assault on our Hindu law should not have been made." V. G. Deshpande's note in the Joint Committee.

Survivorship of co-widows ends.

4. Co-widows :—In the case of 2 widows jointly succeeding to the property of her husband, who will succeed to the half interest of one widow after her death ? Will it go to the surviving widow by survivorship ? Under the Hindu law the estate acquired by the widows when they were more than one was like that of joint tenants with rights

of survivorship. The property of a female having been made absolute by section 14 of the Act, the question of their being joint tenants does not arise and the interest acquired by the deceased widow will now go to her heir and not to the surviving widow.

Suppose A dies leaving 2 widows. Both of them acquire absolute interest. If one of the widows remarries, she will carry half interest in her deceased husband's estate to her new husband's house and the surviving widow cannot claim any right in the half interest belonging to her co-widow. A co-widow being an absolute owner can even transfer her half share without any justifying legal necessity.

Section 19 (2) lays down that the interest acquired by co-heirs is like that of a tenant incommon and not like that of joint tenants. Thus the question of survivorship among widows does not arise.

5. Reversioners :—When the widow's estate is a limited estate and not absolute as it was before this Act, a limited owner was not a fresh stock of descent. After her death, the estate used to vest in the next heir of the last male owner. Now under the Act only such properties as are made specifically limited by the terms of the disposition to her or under a decree or order of a civil court or under an award, will be a widow's estate in her hands and in such properties only, she will have limited interest. Such properties will not go on her death to her heirs, but will pass on to the next heirs of the last absolute male owner. The heirs of the last male owner, who would be entitled to succeed to the estate of such owner on the death of a widow or other limited owner if they be then living, are called reversioners, who may be either male or female.

The interest of a reversioner is merely a possibility of succeeding, a *spes successionis*. He has no right *in presenti* in the property. Until the limited owner dies or she surrenders the estate in favour of the next reversioner, he has no right in the property and on his death, the property can not go to his heirs.

It is only after her actual death or civil death (*in the case of surrender*) that the reversioner acquires interest in the property. Under the Hindu law, the widow so long as she is alive fully represents her hus-

band's estate, though her powers of alienation are curtailed and the property after her death goes not to her but to her husband's heirs. The presumptive reversioner has got no interest in the property during the life time of the widow. He has a chance of succession which may not materialise at all. He can succeed to the property at any particular time only if the widow dies at that very moment. The whole doctrine of surrender is based upon this analogy or legal fiction of the widow's death. The widow's estate is an interposed limitation or obstruction which prevents or impedes the course of succession in favour of the heirs of her husband. It is opened to the widow by voluntary act of her own to remove this obstruction and efface herself from the husband's estate altogether. If she does that, the consequence is the same as if she died a natural death and the next heirs of her husband then living step in at once under the ordinary law of inheritance. This is the fundamental basis of the doctrine of surrender which can be said to be established beyond doubt." (*Natvar lal* Vrs. *Dadubhai* 1954 S. C. 61).

6. Surrender and its effect :—Surrender amounts to the self-effacement of the limited owner. It should not be a mere device to share the estate with the reversioners. It is the self-effacement by the widow that forms the basis of surrender. "As surrender conveys nothing in law and merely causes extinction of the widow's right, in her husband's estate, there is no reason why it should be necessary that the estate must remain with the widow before she could exercise her power of surrender. The widow might have alienated the property to a stranger or some one might have been in adverse possession of the same for more than the statutory period. If the alienation is for legal necessity, it would certainly be binding upon the estate and it could not be impeached by any person under any circumstances. But if the alienation is not for legal necessity, or if a squatter has acquired title by adverse possession against the widow, neither the alienation nor the rights of the adverse possessor could affect the reversioner's estate at all. These rights have their origin in acts or omissions of the widow which are not binding on the husband's estate. They are in reality dependant upon the widow's estate and if the widow's estate is extinguished by any means known to law, for example, by her adopting a son or marrying again, these rights must also cease to exist. The same consequences should

follow when the widow withdraws herself from her husband's estate by an act of renunciation on her part. As the rights acquired by adverse possession are available only against the widow and not against the husband's heirs, the husband's estate still remains undestroyed and the widow may withdraw herself from the estate leaving it open to the reversioners to take possession of it atonce as heirs of the last male holder (1954 S. C. 61).

Reversioner's right to claim possession from alienee or from adverse possessor.

In the leading case of *Natvar lal* Vrs. *Dadubhai* (1954 S. C. 61) the question arose as to whether during the life time of the widow, the reversioner in whose favour the widow had executed a deed of surrender could recover possession of the properties belonging to the last male holder from persons who had acquired title to the same by adverse possession. Their Lordships of the Supreme Court after discussing the law relating to surrender by a limited owner held that the effect of surrender is to destroy the widow's estate in the same way as if she suffered physical or civil death and there was no conceivable reason why the reversioner should not, subject to any question of fraud or collusion, that might arise, be in a position to recover possession of the properties from an alienee from the widow or from one who has obtained title by adverse possession against her, as none of them could acquire rights except against the widow herself. There is no equity in favour of a tresspasser who came upon the land without any right. The reversioners, therefore in whose favour a deed of surrender was executed by a Hindu widow, have a right to recover possession of the properties belonging to the last male owner, during the life time of the widow from persons who acquired title to the same by adverse possession against the widow (The Patna view in *Basudeo* Vrs. *Baidyanath*, A. I. R. 1935 Pat. 175 was over ruled).

Gift by the limited owner.

A gift made by a widow prior to her surrendering the widow's estate can be challenged by the reversioner during the life time of the widow. Their Lordships of the Calcutta High Court in *Ramkrishna* Vrs. *Kousilya* A. I. R. 1935 Cal. 689 followed the decision of Mr. Justice Page in *Profullo Kamini* Vrs. *Bhabani Nath Roy* (A.I.R. 1926 Cal. 121) and held that on a surrender by the Hindu widow of her husband's estate and the consequent extinguishment of her interest therein,

all prior alienations in excess of her power were liable to be challenged by the reversioner immediately on the surrender taking effect just as they could be impeached if the widow died a natural death.

7. Adverse possession against widow is not adverse against revesioners :—A person who has acquired right by being in adverse possession against the widow for the statutory period can be evicted by the reversioner after the widow's death provided the suit is brought by the reversioner within twelve years from the date of the death of the widow if the property is immovable under Art. 141 Limitation Act or within 6 years if it is movable under Art. 120 Limitation Act.

8. Incidents of widow's estate :—A widow or other limited heir is not a tenant for life, but is the owner of the property inherited by her, subject to certain restrictions on alienation, and subject to its devolving upon the next heir of the last owner upon her death (*Bijoy Gopal* Vrs. *Krishna*, 34 Cal. 329 P. C.). She never becomes a fresh stock of descent. It is not a life estate. Hindu law knows nothing of estates for life, or in tail or in fee. It measured estate not by duration but by use. The whole estate is for the time vested in her, and she completely represents the estate. So long as she is alive no one has got any vested right in the succession. In the leading case of *Natvarlal* Vrs. *Dadubhai* (A. I. R. 1954 S. C. 61) their Lordships observed, "Though loosely described as a 'life estate' the Hindu widow's interest in her husband's property bears no analogy to that of a 'life tenant' under the English Law. The estate which the widow takes is a qualified proprietorship, with powers of alienation for purely worldly or secular purposes only when there is a justifying necessity and the restrictions on the powers of alienation are in-separable from her estate. The restrictions which are imposed on the widow's powers of alienation are not merely for the protection of the material interest of her husband's relations but by reason of the opinion expressed by all the Smriti writers that the Hindu widow should live a life of moderation and can not have any power of gift, sale or mortgage except for religious or spiritual purposes. The Hindu law certainly does not countenance the idea of widow alienating her property without any necessity, merely as a mode of enjoyment. If such a transfer is made by a Hindu widow, it is not correct to say that the

transferee acquires necessarily and in law an interest commensurate with the period of the natural life of the widow or at any rate with the period of her widowhood. Such a transfer is invalid in Hindu law, but the widow being the grantor herself, can not derogate from the grant and the transfer can not also be impeached so long as a person does not come into existence who can claim a present right to possession of the property. On the one hand, a Hindu widow has larger rights than those of a life estate holder, in as much as, in case of justifying necessity she can convey to another an absolute title to the properties vested in her. On the other hand, where there is no necessity for alienation, the interest which she herself holds and which she can convey to others, is not an indefeasible life estate, but an estate liable to be defeated on the happening of certain events which in Hindu law cause extinction of the widow's estate".

9. Surrender by widow with a provision for her maintenance :—A surrender by a limited owner in favour of the next reversioner must be a bonafide surrender and not a mere device to divide the estate with the reversioners. A surrender may be a total surrender inspite of a provision for the maintenance of the widow surrendering the estate (*Rama Nana* Vrs. *Dhondi Murari*, A. I. R. 1923 Bom. 432). But a widow who surrenders her whole estate and is treated quoad the estate as though she is civilly dead, is nevertheless in fact physically alive, and she must have something to live upon. Therefore the widow after surrender remains entitled to maintenance, and if the deed of surrender merely provides that she is to be entitled to maintenance, it is valid. But where a widow voluntarily surrenders her whole estate with a stipulation that she and her daughter-in-law should have a life interest for maintenance in and enjoy the usufruct of certain portion of the property it can not be said to be a surrender of the total interest of the widow in the whole estate and as the provision for the maintenance of a third person savours a device to divide the estate the surrender is not valid (*Gangadhar* Vrs. *Prabudha*, 1932 Bom. 625). The Supreme Court in *Natvarlal* Vrs. *Dadubhai*, 1954 S.C. 61 observed, "It is true that the widow at the time of surrendering her husband's estate can, if she so likes, stipulate for a right to be maintained out of the properties for her life time; but reservation of such a small benefit absolutely necessary for her maintenance does not invalidate a surrender".

10. Surrender to a female reversioner :—The basis of the doctrine of surrender is the effacement of the widow's interest, and not the exfacie transfer by which such effacement is brought about. There is therefore no difference between surrender to a daughter and surrender to the nearest male reversioner (*Sitanna* Vrs. *Viranna*, A. I. R. 1934 P. C. 105). Now under the Hindu Succession Act, only such properties as are made specifically limited will not be an absolute property of a female heir (Section 14). A limited owner therefore can surrender her life interest in favour of the entire body of the next heir of the last full owner who would be entitled to succeed under the Act, no matter whether the next heir is a male or female or both males and females, as the case may be.

11. "Property possessed by a female Hindu" :—The whole intention of the Legislature is to confer absolute right on females. This section clearly lays down that any property "possessed" by a female Hindu, whether acquired before or after the commencement of this Act,shall be held by the females as full owner. The word *"possessed"* in section 14 does not mean actual physical possession.

The section does not mean that only such properties as have been actually possessed by the female shall be her absolute property and those properties or interest in properties which did not come actualy in her possession will be treated as a widow's estate in her hands so as to devolve on her death on the next heir of the last male holder. It would have been better if sub-section (1) of Section 14 would have been worded as, "The interest acquired by a female Hindu in any property, whether before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner".

Before the codefication of the Hindu law, courts used to administer the Law on the basis of ancient texts and their interpretations by the courts supplemented by justice, equity and good conscience. After codification they will have to confine themselves within the four-corners of a particular provision laid down in the Act.

However, when lands etc. have descended to a man and he has not actually entered into them, he is said to be in possession in law (*Law*

Lexicon by whartan). "*Possessed*" is a variable term in the law and has different meanings, as it is used in different circumstances. It sometimes implies the temporary interest in lands as we say, a man is possessed in contradistinction to being seized. It sometimes implies no more than that one has a property in a thing; that he has it as owner; that it is his. In this sense it may be used even though an intruder may have excluded the owner for the time being, and there is never any improperiety in making use of the term when the only possession the intruder has is apparently subordinate to that of the general owner (*Law Lexicon—P. Ramnath Aiyar*).

The word "entitled" in Article 141 Limitation Act is to be understood as meaning "entitled independently of the right of the Hindu female" (*Biseshwer Bux* Vrs. *Rameshwar Bux*, 1918 Outh 32(2) at 53; *Ghisa singh* Vrs. *Gajraj singh* 1916 Oudh 50 at 53-54). A Hindu reversioner, becomes entitled to the property as succeeding to the last male owner and not to the widow and is therefore a person "entitled to the possession of the property on the death of a female Hindu" within the meaning of Art. 141. But the heir of a female Hindu who is a full owner of the property is not a person entitled to the property independently of the right of the female, but merely derives his right through the female full owner. Therefore a suit by an heir of the full owner for possession of the property inherited by him from a female, is not governed by Art. 141. (*Malkarjun Mahadeb* Vrs. *Amrita Tukaram*, 1918 Bom. 142 at 143; *Biseshwer Bux Singh* Vrs. *Rameshwar Bux*, 1918 Oudh 32 at page 53) and a suit for possession by such heirs will have to be filed within 12 years of the date when the adverse possession begins and not within 12 years of the widow's death. In such cases Art. 144 Limitation Act applies.

In *Thakur Lalta Bux* Vrs. *Lala Phool chand* (1945 P. C. 113). it was held that where no express provision has been made by the testator, a Hindu widow takes an interest for her life whether by implication under the will or under the Hindu Law. Now, under S. 14 (2) in the absence of any express provision prescribing a limited estate in any deed, decree or award, the Hindu widow takes absolute interest in the property acquired by her in any manner whatsoever either before or after the commencement of this Act.

A widow who was in possession of any property as a limited owner having inherited the same under *The Hindu women's Rights to Property Act*, 1937, has now after the commencement of this Act become absolute owner of the same. A widow whose husband being a member of a Mitakshara joint family died before the commencement of the Hindu women's Rights to Property Act, 1937 is only entitled to maintenance. The Hindu women's Rights to Property Act, 1937 is not retrospective in effect (*Moni Dei* Vrs. *Hadibandhu*, A. I. R. 1955 Orissa 73 F. B. which overrulled *Radhi Bewa* Vrs. *Bhagwan Sahu*, A. I. R, 1951 Orrissa 351).

The provision of Section 14 (1) being retrospective in effect, it shall apply to all pending suits and appeals. A reversioner can not question the validity of the transfers made by a limited owner. He can not now maintain any suit for injunction to restrain waste by limited owners. When the interest of a limited owner has become absolute, no suit of a reversioner will now be maintainable for a declaration that the alienation made by the limited owner is not binding on him. The Hindu Succession Act does not make any saving clause modifying the effect of Section 14 to pending litigations. Unless there is an implied or express provision making the provisions of S. 14 not applicable to pending litigations, it shall apply to pending suits and litigations. Section 14 has been made expressly retrospective in effect. The principle of law has been discussed in *K. C. Mukherji* Vrs. *Ram Ratan Kuer*, A. I. R. 1936 P. C. 49=17 P. L. T. 25=15 Pat. 268 which was a case undar S. 26 (N) and 26 (O) of the Bihar Tenancy Act, as it then stood. Sections 26 N. and 26 O. were added to the B. T. Act while the Appeal was pending before the Privy Council. Their Lordships on the basis of the amended B. T. Act dismissed the Appeal, holding that in as much as there is no saving clause, it applied to pending litigations.

15. General Rules of succession in the case of Female Hindus :—(1) The Property of a Female Hindu dying intestate shall devolve according to the rules set out in section 16—

(*a*) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;

(b) secondly, upon the heirs of the husband;

(c) thirdly, upon the mother and father;

(d) fourthly, upon the heirs of the father; and

(e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1)—

(a) any property inherited by a female Hindu from her father or mother shall dovolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon tho heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in the sub-section (1) in the order specified therein, but upon the heirs of the husband.

16. Order of succession and manner of distribution among heirs of a female Hindu :—The order of succession among the heirs referred to in section 15 shall be, and the distribution of the intestate's property among those heirs shall take place according to the following rules, namely :—

Rule 1.—Among the heirs specified in sub-section (1) of section 15, those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.

Rule 2.—If any son or daughter of the intestate had pre-deceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

Rule 3.—The devolution of the property of the intestate on the heirs referred to in clauses (*b*), (*d*) and (*e*) of Sub-section (1) and in sub-section (2) of section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or the husband's as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death.

Synopsis.

1. In general.

2. Self acquisition of the female intestate.

3. "Upon the heirs of the father".

—Illustrations.

Note—

1. In general :—These sections provide general rules of succession in the case of female Hindus. Under the existing law, succession to *Stridhan* properties varies according as a woman is married or unmarried and according as she is married in an approved form or in an unapproved form. It also varies according to the source from which Stridhan came. The rules of descent again vary from school to school. Section 15, however, evolves a new and uniform scheme of succession to a woman's property and section 16 regulates the manner of distribution thereof. The property of a female shall devolve firstly upon the sons, daughter (including the children of any pre-deceased son or daughter) and the husband who shall succeed simultaneously. On failure of the sons, daughters (including the children of any pre-deceased son or daughter) it shall devolve upon the heirs of the husband. In the absence of the heirs of the husband it shall devolve upon the mother and father of the female intestate. In the absence of the father and mother it shall devolve upon the heirs of the father and lastly upon the heirs of the mother. Under Rule 1 of section 16 those in one entry shall be preferred to those in succeeding entry and so on.

Chilren represent their parents.

Rule (2) of Section 16 provides that if any son or daughter of the intestate had pre-deceased the intestate leaving his or her own children alive at the time of intestate's death, the children of such son or daughter shall take between them as per stirpes. The children shall represent their parents.

Sub-section (2) of section 15 operates as a sort of proviso to sub-section (1) and provides that if the property was inherited by the female from her father or mother, it shall in the absence of any son or daughter of the deceased including the children of any pre-deceased son or daughter, devolve not upon the heirs referred to sub-section (1) in the order specified therein but upon the heirs of the father and in respect of the property inherited by her from her husband or father-in-law, it shall in the absence of any son or daughter including their children devolve on the heirs of the husband and not in the order specified in sub-section (1).

Acquisition from father or mother

Acquisition from husband or father-in-law

Thus, different modes of succession have been provided for the devolution of the property inherited by the deceased Hindu female from the husband's family and that of her parent's family. In the absence of her son or daughter or children of her predeceased son or daughter it shall devolve upon the heirs of her husband or father as the case may be.

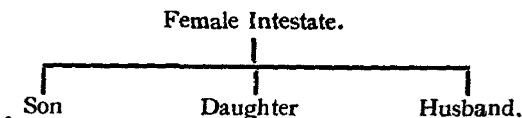
Rule 3 of section 16 provides that the devolution of property of the intestate Hindu female on the heirs referred to clauses (*b*), (*d*) and (*e*) of sub-section (1) and sub-section (2) of section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or husband's as the case may be as if those persons had died intestate immediately after the death of the intestate female.

2. Self acquisition of the female intestate :—Self acquired properties of the female intestate shall on her death devolve as per order mentioned in section 15 (1) whether she leaves her son or daughter, or not. In the absence of any son or daughter or children of any pre-deceased son or daughter her self-acquisition will devolve upon her husband but if the property was derived by her from her father or mother, it will devolve upon the heirs of her father and the husband will be excluded. Section 15 (1) deals generally with regard to the order of succession of the estate of a female Hindu but sub-section (2) acts as a proviso and makes distinction between the properties acquired by her from her father, mother, husband and father-in-law for the purpose of devolution after her death.

3. Upon the heirs of the father :—Section 15 (2) (*a*) provides that if the female dies without leaving any son or daughter or children of a pre-deceased son or daughter the property will not devolve according to the order mentioned in sub-section (1) but upon the heirs of the father, if the property had come to her from her father or mother. The heirs of the mother finds no place even if the property came to her from her mother.

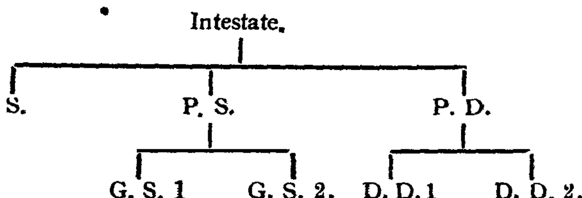
ILLUSTRATIONS to Sections 15 & 16.

1.



If the intestate dies leaving a son, a daughter and husband, the 3 person shall inherit simultaneously in equal shares (Sec. 15 (1*a*).

2.



The intestate has got a son, 2 grandsons, by a predeceased son and 2 daughters by a pre-deceased daughter. The son will get 1/3rd share, the 2 grandsons will together get 1/3rd, each taking 1/6th and the 2 daughters by the pre-deceased daughter will together get 1/3rd, i. e., 1/6th each.

3. The surviving heirs are husband's brother and the mother and and father. The husband's brother being the heir of the husband gets the entire heritage to the exclusion of the father and mother as the husband's heir is in 2nd entry while mother and father are in the third entry.

4. A female intestate dies leaving her brother (father's son) and sister (father's daughter). The property had devolved on her from her father. After her death the property will devolve on her brother and sister in equal shares as they are the heirs of her father. The father will be treated as an intestate and the property will devolve on his heirs as per order specifid in section 8.

5. The female intestate who inherited the property from her mother, dies leaving a father, brother and sister. The property having been inherited by the intestate from her mother will on her death devolve upon the heirs of her father, father himself being excluded as clause (*c*) of Section 15 does not apply. Her brother and sister will get in equal shares to the exclusion of the father (S. 15, sub-section (2) (*a*) and S. 16, Rule 3).

Under Rule 3, the father will be deemed to have died immediately after the intestate's death. A case like this was not contemplated by the legislature.

6. The surviving heirs are mother, brother and sister. The property was inherited by the intestate from her father. Mother, brother as well as her sister will get equal shares as the mother as widow, brother as son of her father and sister as daughter of her father will inherit inasmuch as they are heirs of class I of her father.

So we see that in illustration Fo. 5, the father is excluded, but in this illustration the mother is not excluded as she gets as the widow of the intestate's father.

7. The intestate dies leaving her husband, brother and sister. The property is her self acquired. After her death her property will devolve upon the relatives mentioned in section 15. Husband will get the entire property to the exclusion of brother and sister as they being heirs of father is in the fourth entry while the husband is in the first entry.

17. Special provisions respecting persons governed by ***Marumakkattayam*** **and** ***Aliyasantana*** **laws**:—The provisions of section 8, 10, 15 and 23 shall have effect in relation to persons who would have been governed by the Marumkkattayam law or Aliyasantana law if this Act had not been passed as if—

(*i*) for sub-clauses (*c*) and (*d*) of section 8, the following had been substituted, namely :—

"(*c*) thirdly, if there is no heir of any of the two classes, then upon his relatives, whether agnates or cognates".

(*ii*) for clauses (*a*) to (*e*) of sub-section (1) of section 15, the following had been substituted, namely :—

"(*a*) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the mother;

(*b*) secondly, upon father and the husband;

(*c*) thirdly, upon the heirs of the mother;

(*d*) fourthly, upon the heirs of the father; and

(*e*) lastly, upon the heirs of the husband;"

(*iii*) clause (*a*) of sub-section (2) of section 15 had been omitted;

(*iv*) section 23 had been omitted.

Note—

It deals with the order and rules of succession to the property of the intestate who were governed by the Marumakkattayam law or Aliyasantana law, before the commencement of this Act. In the case of those who were governed by the aforesaid laws, the order of seccession to intestate males as provided in section 8 or to females as provided in section 15 will apply with the variations mentioned in section 17. Section 23 which deals with the devolution of interest in dwelling houses will not apply to them.

Section 8 & 15 after modification stands as follows :—

S. 8. The property of a male Hindu who were governed by ***Marumakkattayam*** and ***aliyaeantana*** law before the passing of this Act shall devolve in the following way :—

(a) firstly, upon the heirs, being the relatives specified in class I of the schedule;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the schedule;

(c) thirdly, if there is no heir of "any of the two clauses, then upon his relatives, whether agnates or cognates".

S. 15. The property of a female Hindu dying intestate who was governed by ***Marumakkattayam*** and ***aliyasantana*** law before the passing of

this Act, shall devolve according to the rules set out in S. 16—

(a) firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the mother;

(b) secondly, upon the father and the husband;

(c) thirdly, upon the heirs of the mother;

(d) fourthly, upon the heirs of the father; and

(e) lastly, upon the heirs of the husband".

(2) Notwithstanding anything contained in subsection (1),—

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband."

18. Full blood preferred to half blood :—Heirs related to an intestate by full blood shall be preferred to heirs related by half blood, if the nature of the relationship is the same in every other respect.

Note—

Heirs related by full blood shall be preferred to those related by half blood if the nature of the relationship is otherwise the same. Full blood shall exclude the half.blood. This is the text of Hindu Law confirmed by the Privy council in *Garu Das* Vrs. *Mahanth Lal Das,* 1933 P. C. 141, Hence this section is according to the existing Law.

ILLUSTRATIONS.

1. A brother by full blood is preferred to a brother by half-blood; but a brother by half blood succeeds where there is a brother's son by full blood, a brother being a nearer heir then a brother's son.

2. A paternal uncle by half blood is preferred to a paternal uncle's son by full blood, an uncle being nearer heir than an uncle's son.

19. Mode of succession of two or more heirs:—If two or more heirs succeed togrther to the property of an intestate, they shall take the property—

(*a*) save as otherwise expressly provided in this Act, per capita and not per Stirpes; and

(*b*) as tenants-in-common and not as joint tenants.

Synopsis.

1. Scope. • 2. Widows and daughters.

Note—

1. Scope :—This section deals with the mode of succession. Unless otherwise provided in this Act such as in the case of the children of pre-deceased son or daughter and that of a pre-deceased son of a pre-deceased son, the heirs take *per capita* and not *per stirpes* and the co-heirs take as tenants in common and not as joint tenants.

2. Widows and daughters :—Co-heirs such as widows and daughters under the Hindu law take as joint tenants with rights of survivorship and under the Hindu law as it was before the Hindu Succession Act, the widows used to take as joint tenants and after the death of one widow or one daughter the property used to devolve on the surviving widow or daughter as the case might be. This Act now provides that the co-heirs shall now take as tenants in common and the property after her death shall go to her heirs and not to the surviving co-heirs. The interest acquired by them whether before or after the Act is an absolute interest as provided in section 14.

20. Right of child in womb :—A child who was in the womb at the time of the death of an intestate and who is subsequenlty born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate.

Note—

A child who was in the womb at the time of the death of the

intestate is considered as in existance and after his or her birth, he or she is entitled to a share which shall be deemed to have vested in the child as from the death of the intestate.

Under the Hindu law as it was before this Act, a son if born to the intestate ofter his death who was conceived before his death was entitled to a share and if the properties have been partitioned among the other heirs, before the birth of the son, the partition is liable to be re-opened. Now under this Act a child, whether male or female is entitled to a share in the property of the intestate if it was conceived before his death and was born alive.

21. Presumption in cases of simultaneous deaths :— Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other, then, for all purposes affecting succession to property, it shall de presumed, until the contrary is proved, that the younger survived the elder.

Note—

When two persons have died in a circumstance that it becomes difficult to say with certainty as to who died later; the presumption is that the younger survived the elder. This is based on the principle that in such cases the younger will be considered to have sustained longer.

But there may be cases where the younger will die earlier than elder people in that case also unless it is proved by evidence that the younger person died earlier, the presumption will be that the elder has died earlier, and the younger person has died later. The onus in cases will be on the person who alleges that the younger person died before the elder one.

22. Preferential right to acquire property in certain cases :—(1) Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with other, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to aquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in class I of the Schedule proposing to acqnire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation :—In this section, "court" means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on; and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf.

Synopsis.

1. Scope.
2. "Court"
3. Distinction between the law of pre-emption & the right under section 22.

Note—

1. Scope :—This section deals with the right of pre-emption to be exercised by a co-heir. The Hindu law of succession now provides for a number of heirs who succeed as simultaneous heirs with no rights of survivorship. Where therefore more than one heirs inherit the property of the intestate as simultaneous heirs being specified in class I of the Schedule, and any one of such heirs proposes to transfer the share inherited by him or her, the other heirs shall have a preferential right to purchase the interest proposed to be transferred.

Sub-section (2) lays down that if any share is proposed to be transferred under sub-section (1), the consideration for the interest proposed to be transferred shall be determined by the court and if after the proceeding

for determining the amount of consideration, the heir proposing to acquire is not willing to purchase, the cost of or incident to the application shall be payable by him.

Sub-section (3) lays down that if there are more than one co-heir willing to purchase the interest of another co-heir who is willing to transfer, the heir who offers the highest consideration will be preferred.

2. Court :—"Court" in section 22 means the court of ordinary civil jurisdiction within whose jurisdiction the property or the business sought to be transferred is situate. It includes any other court which the State Government may by notification in the official gazette specify in this behalf. In the absence of any such notification the court of ordinary civil jurisdiction where the immovable property or the business is situate. will be the court within the meaning of this section.

3. Distinction between the law of pre-emption under the Mohamadan Law and the right under section 22 of this Act— The right conferred by section 22 is not a right of pre-emption properly so called. The right of pre-emption or 'Shufaa' is a right which the owner of an immovable property possesses to acquire by purchase another immovable property which has been sold to another person. A tenant can not claim pre-emption. The law of pre-emption is applicable to Hindus by custom in some provinces and the right is exercisable only after the sale is complete. The right conferred by section 22, Hindu Succession Act is only a preferential right of purchasing the share proposed to be sold by one co-sharer in immovable property or in any business. This right is exercisable before the property is actually sold. For the purpose of claiming the right of pre-emption by a co-shares (Shafi-i-Sharik) under the Mohamedan Law, certain demands are necessary to be performed. No person is entitled to the right of pre-emption unless (i) he has declared his intention to assert the right immediately on receiving information of the sale which is known as Talab-i-mowasiat and unless (ii) he has with the least possible delay affirmed the intention, referring expressly to the fact that the Talab-i-mowasiat had already been made and has made a formal demand (*a*) either in the presence of the buyer, or the seller, or on the premises which are

the subjects of sale and (*b*) in the presence of atleast of two witnesses. This formality is called 'Talab-i-ishad'. No such formality is necessary in the case of the right conferred on a co-sharer under this Act.

No provision has been made in the Hindu Succession Act for claiming the right of re-purchase after the share has been sold to a third person.

If a co-heir sells away his or her interest to a third party, the other co-heir has no remedy left to him under this Act. He may claim the right of pre-emption apart from this Act under the Mohamadan Law in those provinces where it applies to Hindus by custom. The law of pre-emption which applies to Hindus by custom has not been taken away by the Hindu Succession Act.

Under the Mohamadan Law three classes of persons described below are entitled to claim pre-emption:

(*i*) a co-sharer in the property known as 'Shafi-i-sharik';

(*ii*) a participator in immunities and appendages, such as a right of way or a right to discharge water known as 'Shafi-i-Khalit'; and

(*iii*) owner of adjoining immovable property known as 'Shafi-i-jar' but not their tenants (***Guman singh*** Vrs. ***Tripool singh***, 8 W. R. 437).

The right of pre-emption which is claimed by the owners of adjoining land (Shafi-i-jar) by custom has now been held unreasonable and as contravening the provisions of Art. 19 (1)(*f*) of the Indian Constitution as infringing the fundamental right of a person to hold and to acquire property. (***Babulal & others*** Vrs. ***Gowardhan Das & others***, A. I. R. 1956 M. B. 1 F. B.; ***Punch Gajwar*** Vrs. ***Amar singh***, 1954 Raj 100, F. B. and ***Motibai*** Vrs. ***Kand Kari Channaya*** 1954, Had. 161 F. B.)

23. Special provision respecting dwelling houses :— Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her property includes a dwelling house wholly occupied by members of his or

her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

Note—

"Dwelling House" :—This section makes special provision with regard to dwelling houses. Under this Act a number of female heirs succeed simultaneously with male heirs specified in class I of the Schedule. Provision has therefore been made that if the residential house which was occupied wholly by the intestate for his or her family members' dwelling purpose, is inherited by the male and female heirs as co-heirs, the female heir shall not be entitled to claim partition of the house so long as the male heirs do not partition the same among themselves. Though female heir cannot claim partition she will have a right of residence in the same but in case the female heir is a daughter she shall be entitled to a right of residence only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

Suppose the property has been inherited by one male and some female heirs. In such cases there is no question of partition among males. Therefore the female heirs cannot have any right to claim partition of the dwelling house.

This section does not apply to persons governed by Marumakkattayam and Aliyasantana Laws, vide S. 17 (IV).

24. Certain widows re-marrying may not inherit as widows :—Any heir who is related to an intestate as the widow of a pre-deceased son, the widow of a pre-deceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date the succession opens, she has re-married.

Note—

Widow of a pre-deceased son, widow of a pre-deceased son of a predeceased son or widow of a brother shall not succeed to the property of the intestate if those widows were remarried before the death of intestate, i. e., before the succession opens. Daughter-in-law, grand daughter-in-law or brother's wife who have become widows during the life-time of the intestate shall not be entitled to succeed if they have remarried before the succession opens. They must be widows at the time the succession opens. Subsequent re-marriage will not disinherit them.

25. Murderer disqualified :—A person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession in which he or she committed or abetted the commission of the murder.

Note—

"Murderer" :—According to the Hindu Law as settled by judicial decision a murderer is disqualified from inheriting the property of the person murdered upon the principles of justice, equity and good conscience. Not only the murderer is disqualified but no one can claim through the murderer. This was decided by the Privy Council in *Kenchava* Vrs. *Giri Malappa*, 1924 P. C. 209=51 I. A. 368. Section 25 lays down the principles of law laid down in the aforesaid Privy Council case. Under this section, the murderer as well as a person who abets in the commission of the crime or any person claiming through them can not inherit.

Section 27 of the Act lays down that the person disqualified will be considered to have died before the intestate. Therefore the person disqualified could not be a fresh stock of descent and he cannot transmit the heritage to his heirs.

Section 25 includes the abettor of murder also as being excluded from inheritance.

ILLUSTRATIONS.

'A' has a son 'B', a grandson 'C' by 'B' and a daughter 'D'. B, the son murders A. B, the son will be excluded from inheritance of A's property, and B will be deemed to have pre-deceased A. In this case C,

as the son of a pre-deceased son shall be entitled to succeed to A, as C is not claiming through his father but as the son of a pre-deceased son he is entitled to succeed in his own right, he being specified in class I of the Schedule.

26. Convert's descendants disqualified :—Where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens.

Note—

A person who has ceased or ceases to be a Hindu by conversion to another religion, ceases to be a Hindu and his descendants will also not be deemed to be a Hindu till he is reconverted into Hinduism. Descendants of such persons therefore cannot inherit the property of a Hindu intestate.

Change of religion and loss of caste under the Hindu law entailed forfeiture or exclusion from inheritance. The Caste Disabilities Removal Act (XXI of 1850) virtually sets aside the provisions of Hindu law which penalised the renunciation of a religion or exclusion from caste. The Patna High Court in *Ram Pargas* Vrs. *Mst. Daham Bibi*, 1924 Pat. 420, held that a convert or an outcaste retains his right of inheritance whether the right occurs before or after conversion to another religion or exclusion from caste. It followed the decision of the P. C. in *Khani Lal* Vrs. *Kunwar Gobinda Krishna Narayan* (33 All. 356 P. C.). Section 26 of the Hindu Succession Act now makes it clear that the descendants of such converts cannot inherit his Hindu relative unless he had become a reconvert to Hinduism before succession opens.

"Change of religion and loss of caste, which at one time were grounds of forfeiture of property and of exclusion from inheritance have caused to be so ince the passing of the Caste Disabilities Removal Act, 1850. But that Act applies only to protect the actual person who either renounces his

religion or has been excommunicated. Consequently where the property of a Muslim converted from Hinduism has passed according to Muslim law to his descendants, Hindu collaterals cannot claim by virtue of that Act to succeed under Hindu law. This clause therefore lays down that *the heir* should be a Hindu when the succession opens. Reconversion after the succession opens will not, therefore, be possible and this restriction will in most cases remove any abuse of the provision contained in the clause."—Note on the Bill.

27. Succession when heir disqualified :—If any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the intestate.

Note—

This section clarifies the position that disqualified persons shall be deemed to have pre-deceased the intestate meaning thereby that the heritable property of the intestate shall not pass on to the heirs of the disqualified persons.

28. Disease, defect, etc., not to disqualify :—No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity, or save as provided in this Act, on any other ground whatsoever.

Note—

Under the Hindu law there were various grounds of exclusion from inheritance :—

Unchastity—A widow who is an unchaste at the time of her husband's death is excluded from inheritance under the Hindu law. In the case of other female heirs under the Dayabhag school of Hindu law, unchastity is a ground for exclusion from inheritance. According to Mitakshara the only female liable to exclusion from inheritance is the widow (31 Bom. 495, 31 Mad. 100, 1924 Pat. 420).

Unchastity is not a bar for inheriting the property of a female. It is, therefore, not a bar to inheriting a Stridhan, even according to Dayabhag law (*Nagendra* Vrs. *Binoy*, 30 Cal. 521). Now under the Hindu Succession Act, unchastity is no ground for exclusion from inheritance in

any case. Section 28 clearly lays down that no person shall be disqualified from inheritance on any ground whatsoever other than those provided in the Act. The Act does not make unchastity a ground for exclusion. This section also lays down that no person shall be disqualified from inheritance on the ground of any disease, defect or deformity,

Before this Act according to Hindu law the following were held to exclude a person from inheritance :—

(*a*) Blindness, deafness and dumbness if they were congenital and incurable;

(*b*) Congenital want of any limb or organ;

(*c*) Lunacy;

(*d*) Idiocy;

(*e*) Leprosy; and

(*f*) Other incurable diseases.

The Hindu inheritance (removal of disabilities) Act, 1928, which applied only to Mitakshara school of Hindu law declared that no person shall be excluded from inheritance on any of these grounds unless he was from birth a lunatic or an idiot. Section 28 removes all such disqualifications. Under this Act, therefore, the grounds for exclusion are only the following :—

(*a*) Widows referred to in section 24 who had remarried before the succession opens;

(*b*) Murderer or abettor and his heirs (Sec. 25);

(*c*) Descendants of Hindu converted to other religion. (Sec. 26).

Escheat

29. Failure of heirs :—If an intestate has left no heir qualified to succeed to his or her property in accordance with the provisions of this Act, such property shall devolve on the Grvernment; and the Governmen shall take the property subject to all the obligations and liabilities to which an heir would have been subject.

Note—

This section lays down that if an intestate dies leaving no heir as provided in this Act, the property shall escheat to the Government. The Government will take possession of the property with all assets and liabilities as an heir of the intestate.

CHAPTER III.

TESTAMENTARY SUCCESSION

30. Testamentary Succession :—(1) Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordanee with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus.

Explanation :—The interest of a Male Hindu in a Mitakshara coparcenary property or the interest of a member of a *Tarwad*, *Tavazhi*, *Illom*, *Kutumba* or *Kavaru* in the property of the *Tarwad*, *Tavazhi*, *Illom*, *Kutumba* or *Kavaru* shall, notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this sub-section.

(2) For the removal of doubts it is hereby declared that nothing contained in sub-section (1) shall affect the right to maintenance of any heir specified in the Schedule by reason only of the fact that under a will or other testamentary disposition made by the deceased the heir has been deprived of a share in the property to which he or she would have been entitled under this Act if the deceased had died intestate.

Synopsis.

1. **In general.**
2. **Hindu Law of maintenance.**
3. **Persons entitled to maintenance.**
4. **"Capable of being disposed of by him".**
5. **Power of disposal of the guardian of a Minor Hindu —Hindu Minority and guardianship Act, 1956.**

Note—

1. **In general** :—This section enables a Hindu to dispose of his property by will. Under the Hindu Law any member of a Mitakshara joint family cannot transfer his undivided interest in the co-parcenary property (*Madho Prasad* Vrs. *Meharban Singh*, 18 Cal. 157 = 17 I. A. 194; *Manna Lal* Vrs. *Karu Singh*, 1 P. L. T. 6; *Roku Ram* Vrs. *Atma Ram*, 1933 Lah. 343). But Section 30 enables a co-parcenar of the Hindu Mitakshara family to transfer his interest by will. It also enables a member of a ***Tarwad, Tavazhi, Illion, Kutumba*** or ***Kavaru*** to transfer their interest in the property by will.

This enables a member of a joint family to deprive his heir from inheriting his property and to transfer his interest to any other person he chooses by means of a will.

Sub-section (2) acts as a proviso and lays down that the transfer by will shall not deprive the heirs specified in the Schedule from claiming maintenance from out of the property of the testator. This proviso should not be considered as broad enough to include all heirs to claim maintenance. The property to the donee pesses subject to the liability to maintain the heirs who have been deprived of their share but were entitled to be maintained.

The words "shall affect the right to maintenance of any heir specified in the Schedule" has to be read as meaning only those relatives who were irrespective of this Act entitled to claim maintenance under the Hindu Law from the testator. See in this connection Restriction No. 1, Schedule III, Indian Succession Act, 1925, which runs thus "Nothing herein contained shall authorise a testator to bequeath property which he could not have alienated ***inter vivos***, or to deprive any person of any right of maintenance of which, but for the application of these sections, he could not deprive them by will.

In a case in which the father-in-law had disposed of his property by will, it was held by the High Court of Bombay (25 B. 263, and the H. C. of Madras I. L. R. (1939) Mad. 242) that the daughter-in-law was not entitled to maintenance out of the property in the hands of the devisee. The Calcutta H. C. in ***Fool Kumari Dasi*** Vrs. ***Debendra Nath Seal***,

1942 Cal. 474 on the other hand held that a widowed daughter-in-law is entitled to maintenance from the devisee by will or gift.

Under section 39 T. P. Act, where a third person has a right to receive maintenance from the profits of immovable property and such property is transferred, the right may be enforced against the transferee, if he has notice thereof or the transfer is gratuitous, but not against the transferee for consideration and without notice of the right nor against such property in his hand. Therefore though under section 39 T. P. Act, a right of maintenance can be enforced against a transferee with notice or a gratuitous transferee, the rule does not apply where the debts having precedence over the right of maintenance, a transfer of the family property is, in liquidation of such debts. (2 Bom. 494, I. L. R. (1940) 1 Cal. 255;). But if the maintenance has been made a charge upon the property it will take precedence over the right of a subsequent purchaser of the same property in execution of a money decree even though such decree is in respect of a debt binding on the husband (1928 Mad. 713 at 718 F. B.).

2. Hindu Law of Maintenance :—The Hindu Law of Maintenance has not been over-ridden by this Act. Persons who are entitled to be maintained under the Hindu law will continue to be entitled to claim maintenance unaffected by the Hindu Succession Act. Section 30 speaks only about the right of maintenance of the relatives mentioned in Class I of the schedule and provides that if those relatives are deprived of their inheritance by testamentary dispositions, they shall continue to be maintained by the devisee. Those who are not entitled to claim maintenance under the Hindu law shall not be entitled to the benefit of this section. The question therefore arises who are entitled to maintenance under the Hindu law and which of them are entitled to the benefit of this section.

3. Persons entitled to maintenance under the Hindu Law:—

(1) *Minor sons* :—A father is under a personal obligation to maintain his minor sons. Minor son is therefore bound to be maintained by the father from out of his separate and self acquired property. But the father is under no obligation to maintain his adult son from out of his separate property. (*Ammakannu* Vrs. *Appu*, 11 Mad. 91; *Boopati Nath Chakravarti* Vrs. *Basanta Kumari Debi*, 1936 Cal. 556). So far as the co-parcenary

property is concerned, the interest of the son can not be disposed of by the father and the question of maintaining the son will not arise as the son will have a share in the co-parcenary property. The question will arise only when the father disposes of his separate and self acquired property by will. An adult son is therefore not entitled to the benefit of this seetion either under the Mitakshara or the Dayabhag law.

(II) *Daughters* :—A father is bound to maintain his unmarried daughters. On his death she is entitled to be maintained out of his estate (23 Bom. 291). A married daughter is also entitled to be maintained by the father if she is unable to obtain maintenanse from her husband or father-in-law. Unmarried and unprovided for daughters shall be entitled to the benefit of this section.

(III) *Grand children* :—Grand father is under no obligation to maintain his grand children but the Calcutta High Court has held in ***Provash*** Vrs. ***Provash*** I. L. R. (1946) 2 Cal. 164 that the grand father is morally bond to maintain his grand children and this moral obligation becomes legal obligation on the part of those who inherit the grand father's property.

(IV) *Aged parents* :—Aged parents are bound to be maintained by the son (8 Mad. 236). A son is not morally bound to maintain his step-mother but if he has inherited any property from his father he is bound to maintain his step mother (9 Cal. 279; I. L. R. 1948 Mad. 803).

(V) *Unmarried sister* :—A Hindu is under no personal obligation to maintain his sister, but if he inherits his father's estate, he is bound to maintain his unmarried sister, in as much as the father was bound to maintain his unmarried daughter.

(VI) *Wife* :—Wife is entitled to be maintained by her husband whether he possesses property or not. When a man marries a girl accustomed to a certain style, he undertakes the obligation to maintain her in that style (*Prem Pratap singh* Vrs. *Jagat Pratap Kunwari* I. L. R. (1944) All. 118). She is under section 25, Hindu Marriage Act, 1955 entitled to permanent maintenance in certain cases. Section 25 invests the court power to grant permanent maintenance while exercising jurisdiction under the Hindu Marriage Act. This order may be made at the time of the passing of the

decree or even subsequent to it on being moved by the party. Such order can under that Act be passed against the husband or wife.

Sub-section (1) of section 30 speaks of a disposition by will or other testamentary disposition by a Hindu of *his* proyerty. It does not speak of a disposition by a female Hindu. Sub-clause (2) of section 30 which is a sort of proviso to sub-section (1) will not therefore apply to testamentary dispositions by a female Hindu.

(VII) Widow is not bound to reside with the husband's family but she must not leave the husband's house for improper or unchaste purposes as she is entitled to retain her maintenance, unless she is guilty of unchastity or other dis-reputable practices after she leaves that residence (3 Bom. 415; 36 Bom. 131; 57 All. 672 P. C.).

(VIII) Disqualified heirs are entitled to maintenance for self and their family out of the property which he would have inherited but for the disability (*Ram Satya* Vrs. *Lolla Lalji*, 8 Cal. 149).

(IX) A concubine who is in the exclusive and continuous keeping of a Hindu is entitled to maintenance from the property of her deceased paramour (26 Bom. 163).

(XI) *Illegitimate sons* :—See note under section 6. Out of the aforesaid persons, section 30 (2) apply only to those relatives who are specified in Class I of the schedule. This right will not therefore extend to illegitimate children and concubine. They are not specified in Class I of the schedule and they are not heirs.

4. "Capable of being disposed of by him" :—S. 30 gives power to a Hindu to dispose of his property by will. So far as the separate and self-acquired property of a Hindu is concerned, he has got full right of disposal even when he is a member of the joint family. This Section, therefore, does not enlarge the power of a Hindu so far as his powers of disposition of his separate and self-acquired property is concerned. The explanation to this Section gives power to a member of a Hindu Mitakshara Joint family to dispose of his interest in the undivided property by will. Before this Act, a member of a Mitakshra Joint family had no right to

tranfer his interest in the undivided property in any way whatsoever. According to the Mitakshara Law, a co-parcener so long as he is joint, has not got any definite share in the coparcenary property, as such he can not transfer his undivided interest in the property.

Now, this Act (Section 6) does away with this aspect of the Mitakshara co-parcenary and gives a death blow to the law of survivorship where any member dies leaving any of the female relatives mentioned in class I of the Schedule or any male relative claiming through such female relatives (Vide Note 2 to Section 6).

Section 30 now gives power to any member of the co-parcenary to dispose of his interest by will. Under Section 6, the co-parcenary interest of a co-parcener passes on to his heirs and not to the surviving members of the co-parcenary, only when he dies leaving the relatives mentioned above. When a member dies without leaving any of the aforesaid relatives, the Law of survivorship is not affected and no question of Succession arises. This section, however, goes beyond Section 6 and empowers every member of the co-parcenary to dispose of his notional interest by will. The question of having his female relatives does not arise.

5. Power of disposal of the guardian of a Minor Hindu :— A dejure or de-facto guardian of a Hindu infant could burden the estate for purposes recognised by Hindu Law as legal necessity, which is binding on the estate (*Hanuman Prasad Pandey* Vrs. *Babnee Munraj Kumri*, 6 M. I. A. 393). But now, even the father as the natural guardian of his son can not burden or in any way alienate the minor's estate without the previous permission of the court The Hindu Minority and Guardianship Act, 1956, restricts the power of the natural guardian (S. 8) and de-facto guardian (S. 11) of a minor Hindu, vide the Act in the Appendix. Any property inherited by a minor Hindu under the Hindu Succession Act can not be alienated by the natural or de-facto guardian without the previous permission of the court. Permission will be granted only when the alienation is for necessity or for an evident advantage of the minor.

CHAPTER IV.

31. Repeals :—The Hindu Law of Inheritance (Amendment) Act, 1929, and the Hindu Women's Rights to Property Act, 1937, are hereby repealed.

THE SCHEDULE

(*See sec. 8*)

HEIRS IN CLASS I AND CLASS II.

Class I.

Son; daughter; widow; mother; and son of a pre-deceased son; daughter of a predeceased son; son of a predeceased daughter; daughter of a predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son of a predeceased son.

Class II.

I. Father.

II. (1) Son's daughter's son, (2) son's daughter's daughter, (3) brother, (4) sister.

III. (1) Daughter's son's son, (2) daughter's son's daughter, (3) daughter's daughter's son, (4) daughter's daughter's daughter.

IV. (1) Brother's son, (2) sister's son, (3) brother's daughter (4) sister's daughter.

V. Father's father; father's mother.

VI. Father's widow; brother's widow.

VII. Father's brother; father's sister.

VIII. Mother's father; mother's mother.

IX. Mother's brother; mother's sister.

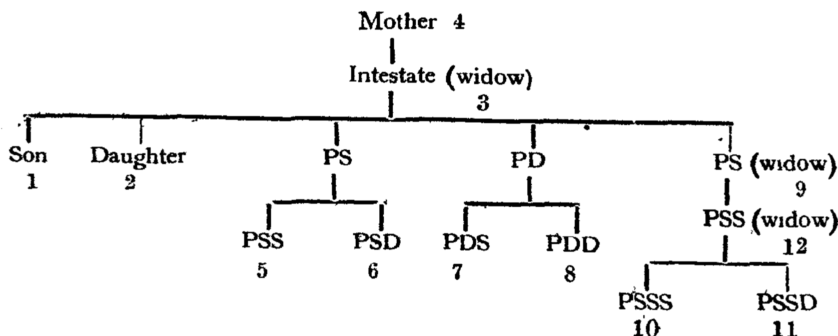
Explanation :—In this schedule, referance to a brother or sister do not include references to a brother or sister by uterine blood.

Note—

"Mother" has been placed in class I. Mother does not include "step mother". The word "mother" in class I and "father's widow" in entry No. VI of class II appears to be anomalous. If the intestate is the son who dies leaving his mother, father and daughter, mother being in class I along with the daughter, the mother and the daughter will take half and half. Now if the father had predeceased the intestate who dies leaving his mother and a daughter, will the entire estate of the intestate devolve on the daughter and the mother will be excluded as she is the father's widow and she is mentioned in class II entry No. VI ? Can it be said that "mother" in class I refers to "mother" to the exclusion of the "step mother" who will be treated as father's widow being in entry No. VI of class II ? Step mother is not an heir under the Hindu Law. This being the position can it be said that the word "mother" in class I means mother of the deceased when his father is alive and "father's widow" in class II will only mean the mother when the father had pre-deceased the intestate ? "Father's widow" in class II entry No. VI will also include "step mother". In ordinary parlance no one will call a "mother" as "father's widow". The word "father's widow" can be reconciled only if it means a "step mother".

Table A.

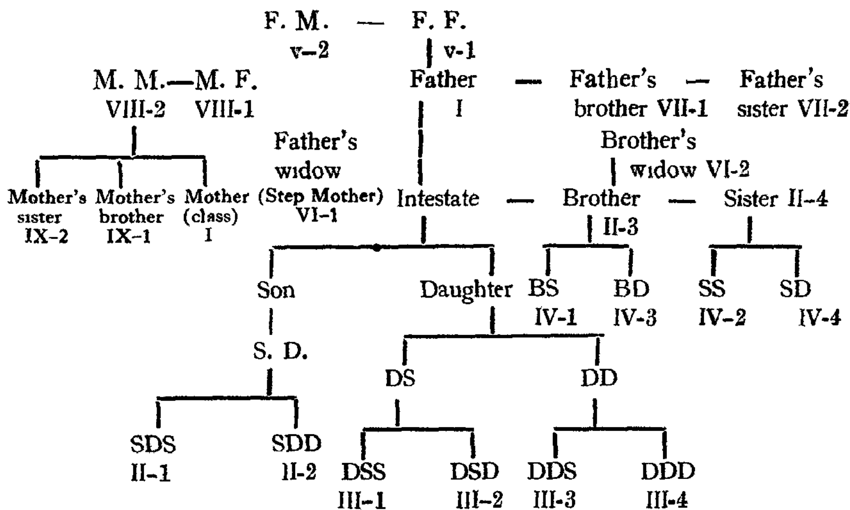
Class I heirs.



In this table PS stand for Pre-deceased son, PD for pre-deceased daughter, PSS for predeceased son's son, PDD for pre-deceased daughter's daughter, PSSS for son of a predeceased son of a pre-deceased son and PSSD for daughter of a pre-deceased son of a pre-deceased son.

Table B.

Class II heirs.



APPENDIX 1

HINDU MARRIAGE ACT XXV OF 1955

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THE HINDU MARRIAGE ACT, 1955

(*No. XXV of 1955*)

An Act to amend and codify the law relating to marriage among Hindus

Be it enacted by Parliament in the Sixth Year of the Republic of India as follows:—

Note:—The Act received the assent of the President on the 18th May, 1955 and was published in the Gazette of India, Extra-ordinary dated 18th, May 1955.

PRELIMINARY

1. **Short title and extent.**—(1) This Act may be called the Hindu Marriage Act, 1955.

(2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

2. **Application of Act.**—(1) This Act applies—

(*a*) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthna or Arya Samaj,

(*b*) to any person who is a Buddhist, Jaina or Sikh by religion, and

(*c*) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christan, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:—

(*a*) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(*b*) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and

(*c*) any person who is a convert or re-convert to the Hindu,

Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression 'Hindu' in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

3. **Definitions.**--In this Act, unless the context otherwise requires,-

(*a*) the expressions "*custom*" and "*usage*" signify any rule which, having been continuously and uniformly observed *for a long* time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family;

(*b*) "*district court*" means, in any area for which there is a city civil court, that court, and in any other area the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act;

(c) "*full blood*" and "*half blood*"—two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife and by half blood when they are descended from a common ancestor but by different wives;

(*d*) "*uterine blood*"—two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands;

Explanation.—In clauses (c) and (*d*), "*ancestor*" includes the father

and "*ancestress*" the mother;

(e) "*prescribed*" means prescribed by rules made under this Act;

(*f*) (*i*) "*Sapinda relationship*" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation;

(*ii*) two persons are said to be "*sapindas*" of each other if one is a lineal ascendant of the other within limits of *sapinda* relationship, or if they have a common lineal ascendant who is within the limits of *sapinda* relationship with reference to each of them;

(*g*) "*degrees of prohibited relationship*"—two persons are said to be within the "degrees of prohibited relationship"—

(*i*) if one is a lineal ascendant of the other; or

(*ii*) if one was the wife or husband of a lineal ascendant or descendant of the other; or

(*iii*) if one was the wife of the brother or of the father's or mother's brother or of the grandfather's or grandmother's brother of the other; or

(*iv*) if the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters;

Explanation.—For the purposes of clauses (*f*) and (*g*), relationship includes—

(*i*) relationship by half or uterine blood as well as by full blood;

(*ii*) illegitimate blood relationship as well as legitimate;

(*iii*) relationship by adoption as well as by blood;

and all terms of relationship in those clauses shall be construed accordingly.

4. **Over-riding effect of Act.**—Save as otherwise expressly provided in this Act,—

(*a*) any text, rule or interpretation of Hindu law or any custom

or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(*b*) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

HINDU MARRIAGES

5. Condititions for a Hindu marriage.—A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:—

(*i*) neither party has a spouse living at the time of the marriage;

(*ii*) neither party is an idiot or a lunatic at the time of the marriage;

(*iii*) the bridegroom has completed the age of eighteen years and the bride the age of fifteen years at the time of the marriage;

(*iv*) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;

(*v*) the parties are not *sapindas* of each other, unless the custom or usage governing each of them permits of a marriage between the two;

(*vi*) where the bride has not completed the age of eighteen years, the consent of her guardian in marriage, if any, has been obtained for the marriage.

6. Guardianship in marriage.— (*1*) Wherever the consent of a guardian in marriage is necessary for a bride under this Act, the persons entitled to give such consent shall be the following in the order specified hereunder, namely:—

(*a*) the father;

(*b*) the mother;

(*c*) the paternal grandfather;

(*d*) the paternal grandmother;

(*e*) the brother by full blood; as between brothers the elder being preferred;

(*f*) the brother by half blood; as between brothers by half blood

the elder being preferred:

Provided that the bride is living with him and is being brought up by him;

(*g*) the paternal uncle by full blood; as between paternal uncles the elder being preferred;

(*h*) the paternal uncle by half blood; as between paternal uncles by half blood the elder being preferred;

Provided that the bride is living with him and is being brought up by him;

(*i*) the maternal grandfather;

(*j*) the maternal grandmother;

(*k*) the maternal uncle by full blood; as between maternal uncles the elder being preferred:

Provided that the bride is living with him and is being brought up by him

(2) No person shall be entitled to act as a guardian in marriage under the provisions of this section unless such person has himself completed his or her twenty first year.

(3) Where any person entitled to be the guardian in marriage under the foregoing provisions refuses, or is for any cause unable or unfit, to act as such, the person next in order shall be entitled to be the guardian

(4) In the absence of any such person as is referred to in subsection (*l*), the consent of a guardian shall not be necessary for a marraige under this Act.

(5) Nothing in this Act shall affect the jurisdiction of a court to prohibit by injunction an intended marriage, if in the interest of the bride for whose marriage consent is required, the court thinks it necessary to do so

7. **Ceremonies for a Hindu marriage.**— (1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the *Saptapadi* (that

is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

8. Registration of Hindu marriages—

(*1*) For the purpose of facilitating the proof of Hindu marriages, the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such conditions as may be prescribed in a Hindu Marraige Register kept for the purpose.

(*2*) Notwithstanding anything contained in sub-section (*1*), the State Government may, if it is of opinion that it is necessary or expedient so to do, provided that the entering of the particulars referred to in sub-section (1) shall be compulsory in the State or in any part thereof, whether in all cases or in such cases as may be specified, and where any such direction has been issued, any person contravening any rule made in this behalf shall be punishable with fine which may extend to twenty-five rupees.

(3) All rules made under this section shall be laid before the State Legislature, as soon as may be, after they are made.

(4) The Hindu marriage Register shall at all reasonable times be open for inspection, and shall be admissible as evidence of the statements therein contained and certified extracts therefrom shall, on application, be given by the Registrar on payment to him of the prescribed fee.

(5) Notwithstanding anything contained in this section, the validity of any Hindu marriage shall in no way be affected by the omission to make the entry.

RESTITUTION OF CONJUGAL RIGHTS AND JUDICIAL SEPARATION.

9. Restitution of conjugal rights.—

(1) When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the

statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

(2) Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce.

10. Judicial separation.— (1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separatoin on the ground that the other party—

(*a*) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(*b*) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party; or

(*c*) has, for a period of not less than one year immediately preceding the presentation of the petition, been suffering from a virulent form of leprosy; or

(*d*) has, immediately before the presentation of the petition, been suffering from venereal disease in a communicable form, the disease not having been contracted from the petitioner; or

(*e*) has been continuously of unsound mind for a period of not less than two years immediately preceding the presentation of the petition; or

(*f*) has, after the solemnization of the marriage, had sexual intercourse with any person other than his or her spouse.

Explanation.—In this section, the expression "desertion", with its grammatical variations and cognate expressions, means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage.

(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

NULLITY OF MARRIAGE AND DIVORCE

11. **Void marriages.**—Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (*i*), (*iv*) and (*v*) of section 5.

12. **Voidable marriages.**—(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:—

(*a*) that the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceeding; or

(*b*) that the marriage is in contravention of the condition specified in clause (*ii*) of section 5; or

(*c*) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under sectiod 5, the consent of such guardian was obtained by force or fraud; or

(*d*) that the respondent was at the time of marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (*1*), no petition for annulling a marriage—

(*a*) on the ground specified in clause (*c*) of sub-section (1) shall be entertained if—

(*i*) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(*ii*) the petitioner has, with his or her full consent, lived with

the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(b) on the ground specified in clause (*d*) of sub-section (1) shall be entertained unless the court is satisfied—

(*i*) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(*ii*) that proceedings have been instituted in the case of a marriage solemnized before the commenement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

(*iii*) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree

13. **Divorce.**— (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

(*i*) is living in adultry; or

(*ii*) has ceased to be a Hindu by conversion to another religion; or

(*iii*) has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition; or

(*iv*) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or

(*v*) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or

(*vi*) has renounced the world by entering any religious order; or

(*vii*) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive; or

(*viii*) has not resumed cohabitation for a space of two years or upwards after the passing of a decree for judicial separation against that party; or

(*ix*) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree.

(*2*) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,—

(*i*) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(*ii*) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or beastiality.

14. No petition for divorce to be presented within three years of marriage.—(1) Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of divorce, unless at the date of the presentation of the petition three years have elapsed since the date of the marriage:

Provided that the court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented before three years have elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but, if it appears to the court at the hearing of the petition that the petitioner obtained leave to

present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of three years from the date of the marriage or may dismiss the petition without prejudice to any petition wich may be brought after the expiration of the said three years upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce before the expiration of three years from the date of the marriage, the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said three years.

15. **Divorced persons when may marry again** –When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again:

Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the court of the first instance.

16. **Legitimacy of children of void and voidable, marriages.**— Where a decree of nullity is granted in respect of any marriage under section 11 or section 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity:

Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null

and void or annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

17. **Punishment of bigamy.**— Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provisions of sections 494 and 495 of the Indian Penal Code (Act X L V of 1860) shall apply accordingly.

18. **Punishment for contravention of certain other conditions for a Hindu marriage.**— Every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the conditions specified in clauses (*iii*), (*iv*), (*v*) and (*vi*) of section 5 shall be punishable—

(*a*) in the case of a contravention of the condition specified in clause (*iii*) of section 5, with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both;

(*b*) in the case of a contravention of the condition specified in clause (*iv*) or clause (*v*) of section 5, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both; and

(c) in the case of a contravention of the condition specified in clause (*vi*) of section 5, with fine which may extend to one thousand rupees.

JURISDICTION AND PROCEDURE

19. **Court to which petition should be made** — Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized the husband and wife reside or last resided together.

20. **Contents and verification of petitions.**— (1) Every petition presented under this Act shall state as distinctly as the nature of the

case permits the facts on which the claim to relief is founded and shall also state that there is no collusion between the petitioner and the other party to the marriage.

(2) The statement contained in every petition under this Act shall be verified by the petitioner or some other competent person in the manner required by law for the verification of plaints, and may, at the hearing, be referred to as evidence

21. **Application of Act V of 1908** — Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908 (Act V of 1908)

22. **Proceedings may be *in camera* and may not be printed or published.**— (1) A proceeding under this Act shall be conducted *in camera* if either party so desires or if the court so thinks fit to do, and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except with the previous permission of the court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees.

23. **Decree in proceedings** — (1) In any proceeding under this Act, whether defended or not, if the court is satisfied that—

(*a*) any of the ground for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(*b*) where the ground of the petition is the ground specified in clause (*f*) of sub-section (1) of section 10, or in clause (*i*) of sub-section (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(*c*) the petition is not presented or prosecuted in collusion with

the respondent, and

(*d*) there has not been any unnecessary or improper delay in instituting the proceeding, and

(e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties.

24. Maintenance *pendente lite* and expenses of proceedings.— Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.

25. Permanent alimony and maintenance.— (1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, while the applicant remains unmarried, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant and the conduct of the parties, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under subsection (1), it may, at the intance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it shall rescind the order.

26. **Custody of children.**—In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.

27. **Disposal of property** — In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented at or about the time of marriage, which may belong jointly to both the husband and the wife.

28. **Enforcement of, and appeal from, decrees and orders** —All decrees and orders made by the court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction are enforced, and may be appealed from under any law for the time being in force.

Provided that there shall be no appeal on the subject of costs only.

SAVINGS AND REPEALS

29. Savings.— (1) A marriage solemnized between Hindus before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same *gotra* or *pravara* or belonged to different religions, castes or sub-divisions of the same caste.

(2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.

(3) Nothing contained in this Act shall affect any proceeding under any law for the time being in force declaring any marriage to be null and void or for annualling or dissolving any marriage or for judicial separation pending at the commencement of this Act, and any such proceeding may be continued and determined as if this Act had not been passed.

(4) Nothing contained in this Act shall be deemed to affect the provisions contained in the Special Marriage Act, 1954 with respect to marriages between Hindus soleminzed under that Act, whether before or after the commencement of this Act.

30. Repeals.— The Hindu Marriage Disabilities Removal Act, 1946, the Hindu Marriage Validity Act, 1949, the Bombay Prevention of Hindu Bigamous Marriages Act, 1946, the Bombay Hindu Divorce Act, 1947, the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949, the Saurashtra Prevention of Hindu Bigamous Marriages Act, 1950 and the Saurashtra Hindu Divorce Act, 1952 are hereby repealed.

APPENDIX II.

THE HINDU MINORITY AND GUARDIANSHIP ACT, 1956

Received the assent of the President on 25th August, 1956 and was published in the Gazette of India, Extraordinary, Part II, section I, dated August 27, 1956.

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THE HINDU MINORITY AND GUARDIANSHIP ACT, 1956

No. 32 of 1956

An Act to amend and codify certain parts of the law relating to minority and guardianship among Hindus.

Be it enacted by Parliament in the Seventh Year of the Republic of India as follows:—

1. **Short title and extent.**—(1) This Act may be called the Hindu Minority and Guardianship Act, 1956.

(2) It extends to the whole of India except the State of Jammu and Kashmir and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

2. **Act to be supplemental to Act 8 of 1890.**—The provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of, the Guardians and Wards Act, 1890.

3. **Application of Act.**—(1) This Act applies—

(*a*) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(*b*) to any person who is a Buddhist, Jaina or Sikh by religion, and

(*c*) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:—

(*i*) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(*ii*) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and

(*iii*) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs

(3) The expression 'Hindu' in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

4. **Definitions.**—In this Act—

(*a*) "minor" means a person who has not completed the age of eighteen years.

(*b*) "guardian" means a person having the care of the person of a minor or of his property or of both his person and property, and includes—

(*i*) a natural guardian,

(*ii*) a guardian appointed by the will of the minor's father or mother,

(*iii*) a guardian appointed or declared by a court and

(*iv*) a person empowered to act such by or under any enactment relating to any court of wards;

(c) "natural guardian" means any of the guardians mentioned in section 6.

5. **Overriding effect of Act.**—Save as otherwise expressly provided in this Act,—

(*a*) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(*b*) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

6. Natural guardians of a Hindu minor —The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—

(*a*) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(*b*) in the case of an illegitimate boy or an illegitimate unmarried girl— the mothor, and after her, the father;

(*c*) in the case of a married girl—the husband;

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—

(*a*) if he has ceased to be a Hindu, or

(*b*) if he has completely and finally renounced the world by becoming a hermit (*vanaprastha*) or an ascetic (*yati or sanyasi*).

Explanation—In this section, the expressions 'father' and 'mother' do not include a step-father and a step mother.

7. Natural guardianship of adopted son —The natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother.

8. Powers of natural guardian.—(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit

of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the court,—

(*a*) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor, or

(*b*) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him.

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in sub section (2) except in case of necessity or for an evident advantage to the minor.

(5) The Guardians and Wards Act, 1890, shall apply to and in respect of an application for obtaining the permission of the court under sub-section (2) in all respects as if it were an application for obtaining the permission of the court under section 29 of that Act, and in particular -

(*a*) proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of section 4A thereof;

(*b*) the court shall observe the procedure and have the powers specified in sub sections (2), (3) and (4) of section 31 of that Act; and

(*c*) an appeal shall lie from an order of the court refusing permission to the natural guardian to do any of the acts mentioned in sub-section (2) of this section to the court to which appeals ordinarily lie from the decisions of that court.

(6) In this section, "court" means the city civil court or a district court or a court empowered under section 4A of the Guardians and

Wards Act, 1890, within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such court, means the court within the local limits of whose jurisdiction any portion of the property is situate.

9. **Testamentary guardians and their powers.**— (1) A Hindu father entitled to act as the natural guardian of his minor legitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided intrest referred to in section 12) or in respect of both.

(2) An appointment made under sub-section (1) shall have no effect if the father predeceases the mother, but shall revive if the mother dies without appointing, by will, any person as guardian.

(3) A Hindu widow entitled to act as the natural guardian of her minor legitimate children, and a Hindu mother entitled to act as the natural guardian of her minor legitimate children by reason of the fact that the father, has become disentitled to act as such, may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both.

(4) A Hindu mother entitled to act as the natural guardian of her minor illegitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property or in respect of both.

(5) The guardian so appointed by wiil has the right to act as the minor's guardian after the death of the minor's father or mother,as the case may be, and to exercise all the rights of a natural guardian under this Act to such extent and subject to such restrictions, if any, as are specified in this Act and in the will.

(6) The right of the guardian so appointed by will shall, where the minor is a girl, cease on her marriage.

10. Incapacity of minor to act as guardain of property.— A minor shall be incompetent to act as guardian of the property of any minor.

11. *De facto* guardian not to deal with minor's property.—After the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the *de facto* guardian of the minor.

12. Guardian not to be appointed for minor's undivided interest in joint family property.—Where a minor has an undivided interest in joint family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest.

Provided that nothing in this section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect of such interest.

13. Welfare of minor to be paramount consideration.— (1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provision of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

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