PARSI LAW

EMBODYING

The Law of Marriage and Divorce

AND

Inheritance and Succession

Applicable to Parsis in British India

BY

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1934.

TO

THE SACRED MEMORY

OF

SIR DINSHA D. DAVAR

JUDGE OF THE HIGH COURT OF JUDICATURE AT BOMBAY,

WHOSE ZEAL IN THE CAUSE OF THE ZOROASTRIAN RELIGION
WILL ALWAYS BE GRATEFULLY REMEMBERED
BY
HIS CORELIGIONISTS,

This Work

ON THE LAW OF THE COMMUNITY
TO WHICH HE BELONGED

AND

WHICH HE LOVED AND SERVED SO WELL,

IS

HUMBLY AND RESPECTFULLY INSCRIBED.

FOREWORD.

I am sure the second edition of this little book on the law applicable to Parsis will be welcomed by practitioners as well as by members of the community generally. The exposition of the law is both lucid and exhaustive, and the book gives all the information that is necessary. The main subjects are dealt with under appropriate headings, and all the decided cases are noted in their proper places. I am glad to find that the author has also summarized the relevant portions of the Indian Succession Act, but the chief interest of the book must centre round the Parsi Marriage and Divorce Act and the principles embodied in its most important sections. The Act was passed as far back as 1865, and has outgrown its usefulness. The preamble makes it clear that the Parsi community of the time represented to the Government the necessity of defining and amending the law relating to marriage and divorce and the expediency of making it conformable to the customs of the community. The greatest benefit conferred by the statute was to make marriage strictly monogamous among the Parsis. But the conditions to which it was suited have considerably changed since 1865, and further amendments have become necessary. New conditions bring new ideas, and new ideas require new adaptations and adjustments. The law relating to divorce specially needs changing, without forgetting that marriage is the most important relation of human life, and having due regard also to the duties and obligations arising out of the union of husband and wife. No one will approve of a state of society where marriage can be thought-

lessly entered upon and dissolved at pleasure. That was the condition in Rome at the close of the Republic and the commencement of the Empire, when men like Cæsar, Pompey, Cicero and others left their wives at will, and Augustus and his successor did not scruple to follow their example. But the law relating to divorce should now be more expansive, and not circumscribed within the narrow limits which the sixties of the last century probably required. To give another instance, a wife can sue the husband for judicial separation under the Act, but on the same, and at times stronger, grounds the husband cannot sue his wife. Is not this an anomaly? The time is certainly ripe when other legislation will serve the needs of the community better. Until then the provisions of the existing Act must continue to solve the legal problems that arise out of the misery of broken homes.

More than thirty years have elapsed since the first edition of this book was published. Since then the number of matrimonial suits in Bombay has grown every year, but it is still within bounds. To those who have to deal with such suits in some form or other this little hand book will be really helpful whenever the occasion for reference arises.

High Court,
Bombay,
23rd April 1934.

B. J. WADIA.

PREFACE.

Three decades have elapsed since a small book—the only one extant—on the subject of Matrimony and Divorce and on the law relating to Inheritance and Succession applicable to the Parsi Community in British India was first published by the author in the year 1902.

Prior to that publication of 1902, the late Seth Sorabjee Shapurjee Bengalee had brought out a book as far back as in the year 1868, containing the Report of the Parsi Law Commission before the enactments of 1865, as well as the bare Acts 15 and 21 of 1865, concerning Marriage and Divorce, and Inheritance and Succession among the Parsis.

The present work is not a mere revision, with a few additions here and there, of that small book on Parsi law published by the author in 1902. It is a thoroughly revised and rewritten new work.

It embodies the Parsi Marriage and Divorce Act of 1865 fully annotated with case-law, both English and Indian brought upto date. It is observed in the case of *Ganesh v. Harihar*, 6. Bom. L. R. 505 that where an Indian Act was passed for the purpose of extending to India the provisions of an English Act, English decisions may be referred to as a guide to construe the Indian Act. Hence English cases have been referred to where necessary together with the new and important Indian cases decided during the intervening period between 1902 and May 1934.

At the end of Part I are given:—

(1) The Law as to Bridal presents among the Parsis :

(2) Rules and Regulations for the Parsi Chief Matrimonial Court in the Bombay Presidency. Ch. 33 (Rules and Forms of the Bombay High Court 1930) : and

(3) Table of fees.

This forms the subject-matter of Part I of this work.

Part II comprises (1) the Special Rules for Parsi Intestates, contained in Act 21 of 1865, now embodied in Part V Chapter III of the present Indian Succession Act 39 of 1925 with full notes and commentaries, and (2) a Summary of Testamentary Succession contained in the said Act of 1925 with notes and cases necessary for a clear understanding of the matter.

Introductions, stating the state and condition of the Parsi Community from its advent into British India 1300 years ago, and of the law prevailing prior to the two social enactments of 1865 for Parsis, differing in many ways in its application to Parsis in the Presidency towns and in the Mofussil, and selected portions from the Parsi Law Commission Report in 1862, are added to both the parts.

The author has spared no pains to meet the requirements of the profession and the needs of the Community giving close and elaborate details wherever necessary. An attempt to make the work as clear, complete and exhaustive as possible, and to make it a comprehensive and accurate treatise on the subject to serve a wide circle of readers has entailed a large increase in the size of the work much beyond the limited space occupied by his first book published in 1902.

A table of contents and a list of cases in the beginning, and a full and copious index at the close of the work will, it is hoped, render reference very easy.

All available authorities on the subjects dealt with have been carefully consulted.

The author acknowledges with thanks the assistance received by him from Sanjiv Rao's Law of Marriage and Divorce in British India, Henderson's Testamentary Succession and Administration of Estates and Paruck's, and Bose's Indian Succession Act, 1925.

It is hoped that the work will prove instructive and interesting as well as of use and service to those for whom it is primarily intended.

It is also hoped that it will prove a helpful guide to the delegates of the several Parsi Matrimonial Courts in the Presidency Towns and in the Mofussil.

May 1934.

CONTENTS.

The references throughout are to pages.

PART I. MARRIAGE AND DIVORCE.

	PAGE.
Introduction	1-12
Parsi Marriage and Divorce Act, 1865 ...	1-113
I. Preliminary	15-19
II. Of Marriage between Parsis	19-34
III. Of Matrimonial Courts ...	34-40
IV. Of Matrimonial Suits	40-98
V. Of the Children of the Parties	99-101
VI. Of the Modes of enforcing Penalties under this Act ...	102-103
VII. Miscellaneous ...	103-104
Law as to Bridal Presents amongst Parsis	105-107
Rules and Forms of the High Court for Parsi Chief Matrimonial Court in Bombay Presidency	108-112
Table of Fees	113

PART II. INHERITANCE AND SUCCESSION.

	PAGE.
Domicile	114-118
Marriage	118-123
Legacies to Creditors and Portioners ...	123
Intestate Succession.	
Introduction	124-139
Special Rules for Parsi Intestates	130-149
Testamentary Succession.	
Wills and Codicils ...	150-153
Execution of Wills.	153-158
Revocation ,,	158-160
Alterations ,,	160, 161
Revival ,,	162
Construction ,,	162-171
Residue and Residuary Legatee	171-173
Doctrine of Lapse ...	173, 174
Legacies	175-180
Bequest to Executor ..	180
Annuities	181, 182
Onerous Bequests.	182, 183
Contingent ,,	183
Conditional ,,	183-185
Void ,,	185-193
Testamentary Succession.—*(contd.)*	
Vesting of Legacies.	193-195
Ademption ,,	195-197
Abatement ,,	198
Refunding ,,	198-200
Election	200-202
Gifts in contemplation of death ...	202
Representative title to deceased's property on Succession ...	202-204
Grant of Probate and Letters	204-209
Limited Grants ...	209-212
Alteration and Revocation of Grants ...	212
Granting and Revoking Probate and Letters	213, 214
Executor or Administrator	214-217
Executor of his own Wrong	217, 218
Assent to Legacy by Executor or Administrator	218

TABLE OF CASES.

The references throughout are to pages.

Abdul v. Amir, 188
Adv. Gen. v. Fardoonji, 192
„ v. Hormusji, 163, 164
„ v. Karamali, 164
„ v. Money, 188
Amed v. Bai Fatma, 49
Alangamonjore v. Somamoni, 186
Allbless case, 191
Allen v. Allen, 75
Andrew v. Trinity College, 182
Angle v. Angle, 68
Antao v. Ardeshir, 169
Ardeseer v. Pirozbai, 2, 3, 6, 17, 29, 34, 84
Ardeshir v. Avabai, 10, 17, 89, 95, 96
„ v. Maneksha, 217
„ v. Shirinbai, 191, 192
Ashburner v. Macquire, 176, 196
Avabai v. Jamasji, 18, 27, 28, 29
„ v. Jerbai, 55
„ v. Khodadad, 20, 30, 32, 33.
„ v. Pestonji, 154
Avery v. Bowden, 97

B. v. B., 43, 44
Baburam v. Kokla, 84
Backet v. Home, 154
Bacon v. Bacon, 67
Balkrishna v. Vinayak, 192
Balmukund v. Bhugwandas, 155
Banaji v. Mithibai, 187
Barlee v. Barlee, 83, 96
Barnes v. Barnes, 68, 99
Basing v. Basing, 55
Beaman v. Beaman, 53
Beatrice v. Phillip, 65
Bell v. Bell, 56
Bennett v. Bennett, 71, 81
Bent v. Bent, 78
Bernestine v. Bernestine, 69
Besant v. Wood, 87
Best v. Best, 46
Bhagabati v. Kalicharan, 163
Bhavrao v. Lakshmibai, 115
Bhawanji v. Devji, 153
Bhoba Torini v. Pearylal, 184
Bindu v. Kanisilia, 84
Blackmore v. Blackmore, 71
Bland v. Bland, 50
Bleare v. Burgh, 194
Blight v. Hortwoll, 181
Bomonji v. Nusserwanji, 91
Bonnard v. Emile, 116
Borgouha v. Borgouha, 40
Bostock v. Bostock, 67
Bollamley v. Shiron, 176
Boyd v. Boyd, 100
Boys v. Morgan, 172
Boyton v. Boyton, 100
Bradley v. Bradley, 81
Briggs v. Morgan, 44
Bright v. Bright, 39
Broadhead v. Broadhead, 75
Brook v. Garrod, 185
Buchman v. Buchman, 193, 194
Buchooboye v. Merwanji, 72
Buckmaster v. Buckmaster, 55
Burjorji v. Pestonji, 105
„ v. Phirozshah, 107
Burnelt v. Manu, 135
Burt v. Burt, 50
Burton v. Sturgeon, 56
Butler v. Butler, 67, 72
Byramji v. Jamsetji, 105
„ v. Ratnagar, 162, 167

C. v. C., 42
Capstick v. Capstick, 72
Cargill v. Cargill, 55
Caroline v. Pinto, 116
Carryr v. Carryr, 56
Cawasji v. Ratanbai, 195
„ v. Shirinbai, 63, 85, 86
„ v. Pirozbai, 191
„ v. Rustomji, 191
Chadunbai v. Dady, 185
Chambers v. Chambers, 100
Chapman v. Chapman, 171
Cheese v. Lovejoy, 159
Chetwynd v Chetwynd, 100
Chotun Bebee v. Ameechand, 88
Churchward v. Churchward, 68
Clark v. Clark, 87
Codrington v. Codrington, 100
Collard v. Collard, 47
Cood v. Cood, 69
Cooke v. Cooke, 67, 81
Coppinger v. Coppinger, 69
Colterall v. Sweetman, 41
Covell v. Covell, 80
Cramp v. Cramp, 67

Crew v. Crew, 67
Cripps v. Walcott, 171
Croix v. Croix, 68
Cromwell v. Cromwell, 101
Cursetji v. Rustomji, 120
Curtes v. Curtes, 66, 67
Cutler v. Cutler, 54

D'Aguilar v. D'Aguilar, 66
D'Alton v. D'Alton, 100
Dadaji v. Rukhmabai, 84
Dadina v. Adv. Gen., 191
Dady v. Adv. Gen., 191, 192
Dalal v. Dalal, 88
Dalhousie v. Mc'Donall, 118
Day v. Day, 178

Dayabhai v. Damodar, 208
De Blaquiere v. De Blaquiere, 80
DeSouza v. Sec. of State, 203
Deane v. Test, 194
Deenshah v. Pestonji, 1
Devasagayam v. Naiyagam, 70
Dhunbaiji v. Nowroji, 191
Dhunjibhai v. Hirabai, 51, 83, 91, 107, 120
,, v. Navazbai, 122
Dhunjishaw v. Sorabji, 217
Digambar v. Narayan, 208
Din Tarini v. Krishna, 158
Dinbai v. Hormusji, 190
,, v. Nusserwanji, 145, 162, 163, 164
Dinshaw v. Sorabji, 167
Doe v. Hiscocks, 166
Dolphin v. Robins, 118
Dorabji v. Jerbai, 23, 39, 48, 97
Duggan v. Duggan, 100
Dular Koer v. Dwarkanath, 84
Dunn v. Dunn, 73, 74
Duplany v. Duplany, 70
Durant v. Durant, 67
Dyke v. Walford, 144

Edwards v. Edwards, 69, 163
Ellis v. Ellis, 65, 73, 74
Elliot v. Gurr, 41
Enohi v. Whylie, 205
Erachshaw v. Dinbai, 75
Erasha v. Jerbai, 122, 144-146, 174
Evans v. Evans, 47, 51, 67, 171
Exparte Cranmer, 152
Fakirgauda v. Gangi, 88
Fatima v. Adv. Gen., 187
Fernandez v. Gonsalves, 12
Ferrers v. Ferrers, 65
Fisher v. Keane, 56

Fitzgerald v. Chapman, 56
,, v. Fitzgerald, 54
Forbes v. Ameroonisa Begam, 200
,, v. Forbes, 116
Forden v. Forden, 72
Fowle v. Fowle, 50, 52-55, 72, 74
Framji v. Adarji, 203
,, v. Shapurji, 91
French v. French, 55
Furdoonji v. Dinbai, 87
,, v. Jamshedji, 127
,, v. Navazbai, 211, 213

G. v. M., 43
Gatehouse v. Gatehouse, 54
Gatha Ram v. Mohita, 88
Gathree v. Walrord, 183
Georgucopulas v. Georgucopulas, 75
Gethin v. Gethin, 68
Getty v. Getty, 47
Gheesta's case, 126
Gibson v. Gibson, 54
Gillinis v. Steele, 200
Goodheim v. Goodheim, 72
Goolbai v. Maneckji, 91
Goostadji v. Kakoosji, 130
Gopal v. Manaji, 45
Gordan v. Gordan, 71
Gorewala's case, 191
Graham v. Londondary, 107, 120
Grant v. Grant, 46, 163
Graves v. Graves, 55
Green v. Green, 50
Gulab v. Thakerlal, 151
Gulbai v. Behramsha, 39, 61, 82, 97
,, v. Rustomji, 183
Gurney v. Gurney, 157
Gwillim v. Gwillim, 154

H. v. H., 42
Haigh v. Haigh, 78, 82
Halifex v. Wilson. 193
Hall v. Hall, 59, 61
,, v. Warren, 164
Hancock v. Peaty, 41
Harris v. Brown, 193
,, v. Harris, 46
Harrison v. Harrison, 58, 62, 69
Harry v. Harry, 165
Harvey v, Fernie, 118
Hassanbhai v. Popatlal, 123
Hawkes v. Hawkes, 161
Hawkins v. Hawkins, 72
Hearn v. Baker, 171
Hemsore v. Hemsore, 64
Henderson v. Henderson, 56
Heys v. Heys, 54

Higgens v. Dawson, 165
Hill v. Admor. Gen., 121
, v. Crook, 165
„ v. Hill, 62
Hirabai v. Dhunjibhai, 72, 73, 81, 84-88, 97
„ v. Dinshaw, 131
Hirjibhai v. Burjorji, 144-147
Hodiwala's case, 190
Holloway v. Holloway, 53, 64
Homabaee v. Punjeeabhai, 134
Honeywood v. Honeywood, 182
Hooley v. Halton, 169
Hope v. Hope, 86
Hormusji v. Dhanbaiji, 207, 208
„ v. Dhunjishaw, 151, 161,
„ v. Rustomji, 122
Howard v. Howard, 47
Hove v. Dartmouth, 177
Hughes v. Hughes, 69
Hunt v. Hunt, 68
Hurley v. Hurley, 59
Hussenbhoy v. Ahmedbhoy, 180
Hyde v. Hyde, 6, 72, 100
In re Coleman, 170, 192
„ Ibrahim, 59
„ H. C. Cowbury, 160
„ Portal, 166
„ Manchershaw Damania, 208
„ Warden Charities, 192
„ Weir Hospital, 193
In the goods of Broughton, 161
„ Geale, 151
„ Harris, 161
„ Kirby, 161
„ Macabe, 161
„ Olding, 155
„ Peary, 152
Jackson v. Jackson, 42, 52, 193
Jaffreys v. Jaffreys, 53
Jaiji v. Macleod, 166
Jairam v. Kessavji, 165
„ v. Kooverbai, 193
Jamna v. Dayalji, 88
„ v. Gordhanbhai, 51
Jamshedji v. Soonabai, 188-191
Jebulal v. Binda, 174
Jehangir v. Avabai, 88
„ v. Kaikhoshru, 163, 179, 183
„ v. Kukibai, 203, 205, 216
„ v. Pirozbai, 132, 137, 140
Jinkins v. Morris, 152
Jinkin v. Cowling, 160
Jivaji v. Bomonji, 26
Jivi v. Narsingh, 84
Jogendronundini v. Hurrydoss, 66
John v. Crook, 164
„ v. Helen, 65, 67
„ v. Mary, 64
Johnson v. Johnson, 174
Jones v. Jones, 56, 74
Jugjivandas v. Brijdas, 123
Kaikhoshru v. Shirinbai, 162, 194, 195
Kaoosji v. Awan Baee, 27, 107
Kankoo v. Shiva Toya, 52, 64, 70
Kashibai v. Shiripat, 118
Kawasji v. Dinbai, 208
„ v. Shirinbai, 17
Keats v. Keats, 65
Kelly v. Kelly, 78, 87, 101
Kemp v. Kemp, 81
Kennedy v. Kennedy, 54
Kershasji v. Kaikhoshru, 135
Kharshedji v. Kekobad, 159, 160
Khimchand v. Sobhagchand, 64
Khoorshedbanoo v. Burjorji, 80
Khoorshedji v. Meherwanji, 156
King v. King, 64, 67
Kirby v. Potter, 176
Kirk v. Kirk, 81
Knight v. Cameron, 194
Koober v. Jan, 88
Khusrubhai v. Hormuzsha, 217
Khumbatta v. Khumbatta, 6, 18, 49, 118
Khatijabai v. Umarsaheb, 49
Lady Aimai Wadia v. Sir J. J. Bart., 56
Longston v. Longston, 164
Lassonee v. Tierney, 180
Ledlie v. Ledlie, 50
Limboowala's case, 190, 192
Limji v. Bapuji, 187, 190, 192
Lloyed v. Lloyed, 67
Longford v. Pardon, 151
Lopes v. Lopes, 41
Lovett v. Lovett, 153
Lucas v. Lucas, 41
Macdonald v. Macdonald, 52
Macleod v. Macleod, 99
Manchershaw v. Kamrunnissa Begam, 132
Manekbai v. Hormusji, 155
„ v. Meherbai, 18
Manekji v. Sir Dinshaw, 191
„ v. Goolbai, 91
„ v. Nanabhai, 195
Margaret v. Harry, 60, 70, 72
Marker's case, 191

Marsh v. Marsh, 100
Marshall v. Marshall, 87, 88
Martin v. Martin, 99
Mary v. George, 163
Mason v. Mason, 69
Mayhew v. Mayhew, 74, 75, 120
Mayor of Lions v. Adv. Gen., 192
,, v. E. I. Coy., 188
Meara v. Meara, 54
Meherbai v. Hormusji, 63, 70
,, v. Pirozbai, 120
Meherwanji v. Avabai, 27, 28, 55, 98, 107
,, v. Poonjeabhai, 156
,, v. Rustomji, 105
Melaram v. Thanooram, 88
Midgley v. Wood, 68
Milford v. Milford, 101
Miller v. Admor. Gen., 119, 121
Mills v. Farmer, 192
Mirza Kurratutarini v. Nawab Mizal-ud-dowla, 150
Mithibai v. Canji, 205
,, v. Limji, 132, 169
Modee Kaikhoshru v. Cooverbai, 156
Moggridge v. Thackwell, 188, 192
Moonshee Bazloor v. Shamsoonnissa, 51, 84
Moreno v. Moreno, 65, 66, 69
Morgan v. Morgan, 47
Morris v. Morris, 81
Mortimer v. Mortimer, 69
Morton v. Seaton, 44
Moss v. Moss, 66
Motibai v. Dosibai, 133
,, v. Jamsetji, 153
,, v. Karsandas, 208
,, v. Motibai, 61, 79–81
Municipality of Bom. v. Secretary of State, 181
Muncherji v. Mithibai, 97, 136, 140–142
,, v. Motibai, 82, 97
,, v. Nusserwanji, 106
Murphy v. Murphy, 39

Nachimson v. Nachimson, 49, 118
Nanu v. Adv. Gen., 192
Naorojee v. Dhunabaee, 11
,, v. Kharshedji, 2
,, v. Pirozbai, 118, 124, 131, 164, 174
,, v. Putlibai, 161, 164, 179, 183, 207
,, v. Rogers, 18, 23, 118, 126, 131, 132
Narayan v. Shrinivas, 45
Narki v. Phelki, 45
Natall v. Natall, 75, 119
Navazbai v. Pestonji, 218
Nawee Baboo v. Pestonji, 127, 128, 156
Newman v. Barton, 198
Newton v. Sherry, 200
Nicholson v. Nicholson, 69
Norendranath v. Kamalbasini, 163
Noys v. Mordanut, 200
Nusserwanji Wadia v. Eleanora, 59, 87, 88

Okhoymoney v. Nilmoney 171
Ottway v. Hamilton, 77
Otway v. Otway, 62, 64, 82, 85
Over v. Over, 47, 64

Padamji v. Putlibai, 162
Page v. Page, 174
Palmer v. Palmer, 67
Pandurang v. Vinayak, 161, 166,
Patrickson v. Patrickson, 64
Paulappa v. Lea Hangal, 41
Payne & Co. v. Pirosha, 18, 48, 57, 58, 74, 76, 77, 96, 104, 106, 120, 131
Peacock v. Peacock, 65
Pears v. Pears, 69
Peshotam v. Meherbai, 1, 14, 21–24, 35, 92, 93
Pestonji v. Framji, 123, 165
,, v. Khurshedbai, 138, 145, 170, 194
,, v. Khurshedji, 170
,, v. Meherbai, 203
Philip v. Philip, 100
Pickering v. Stamford, 173
Pirosha v. Pestonji, 213
,, v. Soonabai, 47
Poonjeeabhai v. Noosherwanji, 156
Portsmouth v. Portsmouth, 41
Powell v. Evans, 217
,, v. Powell, 161
Premchand v. Bai Gulab, 64, 67
Price v. Price, 66
Purshotamdas v. Bai Mani, 84
Putlibai v. Sorabji, 187

Rai Bishenchand v. Karmali, 170
Rajnikant v. Kiko, 178
Ramsay v. Boylr, 56
Ratanbai v. Cawasji, 162, 163
Rathnammal v. Manikkam, 41
Re Russel, 166
Ruberio v. Ruberio, 64
Reg. v. Dossabhai, 95

Ridgway v. Ridgway, 67
Roberts v. Roberts, 66
Robertson v. Broadbent, 163
„ v. Robertson, 58, 82
Robinson v. Robinson, 47
Roby v. Roby, 54
Rogers v. Naoroji, 125
„ v. Rogers, 68
Russell v. Russell, 51, 84, 86

S. v. B., 43, 73, 97
Sadanand v. Pradhan, 59
Sajid Ali v. Abad Ali, 152
Saklat v. Bella, 26
Santaji v. Ravji, 203
Santoo v. Pinto, 117
Sarkies v. Prosonomoyee Dossee, 120
Savage v. Tyres, 180
Scott v. Scott, 84, 94
„ v. Tyler, 183
Seaman v. Dee, 217
Seddon v. Seddon, 100
Shah Mukhunlal v. Babu, 200
Shamu Potter v. Abdul Kadir, 155
Shapurji v. Dossabhai, 121, 125, 132, 138, 142
„ v. Rustomji, 137
Sherring v. Sherring, 47, 64
Shirinbai v. Kharshedji, 14, 23, 24, 92, 93, 97
„ v. Ratanbai, 162, 167, 172
Short v. Short, 69
Simons v. Simons, 47
Sir Dinshaw v. Sir Jamsetji, 14, 15 24, 26
Skrymasher v. Northcote, 171
Smith v. Massey, 188
„ v. Smith, 71, 72, 154
Somerville v. Somerville, 115, 117
Sorabji v. Bachoobai, 24, 47
Sparrow v. Harrison, 44
St. Paul v. St. Paul, 64
Stanley v. Stanley, 81
Stokes v. Check, 179, 181
Stone v. Stone, 68
Streatfield v. Streatfield, 200
Stuart v. Stuart, 51, 66
Subba Reddi v. Dorasami, 160
Suggate v. Suggate, 100
Symons v. Symons, 64

Taylor v. Taylor, 177
Thomas v. Thomas, 72, 81
Thompson v. Thompson, 51, 53, 66, 87
Townley v. Watson, 161
Townshed v. Townshed, 54
Tribhuvandas v. Smith, 202
Turton v. Turton, 65
Tyebji v. Jetha, 59

Udney v. Udney, 114
Uzir v. Eli Seba, 67

Wadia's case, 191
Walker v. Walker, 59
Wallis v. Hodgson, 135
Walsh v. Walsh, 40
Waring v. Waring, 51, 152
Warren v. Warren, 47
Warrender v. Warrender, 118
Watkins v. Watkins,
Watson v. Watson, 48
Webb v. Needham,
Weldon v. Weldon, 83
Wells v. Wells, 71
Westmeath v. Westmeath, 87
Wheeler v. Alderson, 152
Whitecomb v. Whitcomb, 117
Wickins v. Wickins, 64
Williams v. Goude, 153
„ v. Williams, 47, 70
„ v. Tyler, 161
Wilkinson v. Wilkinson, 40, 64
Windham v. Windham, 65
Wood v. Wood, 52, 54, 82

X—. v. X—., 54, 64

Yamunabai v. Narayan, 84, 87
Yeatman v. Yeatman, 52

PARSI LAW.

PART I.

MARRIAGE AND DIVORCE AMONG PARSIS

INTRODUCTION.

No recognized laws for Parsis governing their social relations upto 1865 : The followers of Zoroaster, the Parsees, or the descendants of the ancient Magi of Persia emigrated from their own country to India upwards of 1000 (now 1300) years ago, when it was overrun by the followers of Moohummed, having had before them the alternative of dying by the sword, or of submitting to the religion of the conquerors. It appears that their ancient books concerning their law now rests on tradition and compilations of their learned men since their arrival in India. (*Deenshah v. Pestonji*, 2 Borr. at page 392.)

From their arrival in India in A.D. 717 upto 1865, the Parsees had no recognized laws to govern their social relations. When they settled in Western India, they probably brought with them a system, both of law and custom, from Persia. But it was all unwritten and fell into disuetude, and this mere handful of Persian strangers gradually and naturally adopted much of the law and usage that obtained in the Hindoo community, *inter alia* as to marriage. (*Peshotam v. Meherbai*, 13 Bom. at page 307.)

On the landing of the Parsees in this country, they entered into a compact with the Hindoo ruler at the town of Sanjan, where they settled. It cannot be said that they retained their own laws, because by the compact they entered into, they bound themselves to an observance of many of the customs of the Hindoos, and although they have preserved their religion, the customs of the country and will of the ruling authority have predominated. *(Naoroji v. Kharshedji,* 28 Bom. at page 21.)

Till 1865 English Law of marriage applied to them : — "Previous to the Legislation of 1865, the law applicable to Parsees was the English law, except so far as it was varied by Act IX of 1837, and except as to marriage, bigamy, and, since the decision of the Privy Council in *Ardeseer v. Pirozbai,* except as to Matrimonial suits at the Ecclesiastical side of the Court."

"Before that year (1865), the English law of marriage was made applicable to the Parsis, who had scarcely the idea of illegitimacy, and the law of divorce was applied to them, to whom the indissolubility of marriage and the pecuniary penalty of dishonour were equally abhorrent."

"The necessity for special legislation regulating the law of marriage and divorce among Parsis had long been foreseen. In 1837, Sir John Awdry expressed himself that an enactment having the force of law on the subject was desirable. Similar views to these were expressed in 1843 by Sir E. Perry ; and in the year 1856 the claims of the Parsis had found their ablest advocate in a third judge, Sir Joseph Arnold."

"In fact for years and years together, after their advent in India the Parsis were left without any law governing their social and moral duties and obligations."

[*Rep. of pro. of Leg. Coun. of Ind. when Hon'ble Mr. Anderson introduced P. M. and D. Bill.*]

"Previous to the establishment of the High Court of Judicature the Parsis of the town of Bombay, a body constituting the preponderating majority of the entire Parsi population of India, far in advance of any other portion of the Parsi race in wealth, intelligence and civilization had, since the Privy Council decision in 1856, been living in a state of lawlessness as to all that regards the marriage tie, of which even in the most barbarous communities, there are not many will attested examples. They had no law at all on the subject. Each man did as seemed good in his own eyes."

"The urgency of taking some action was demonstrated in the year 1856. In that year a new phase arose in the legal status of the Bombay Parsis. On the 17th of July 1856 the Privy Council decided in the case of *Ardeseer v. Pirozbai*, 10 M.P.C. Cases 375 that the late Supreme Court on its Ecclesiastical side had no jurisdiction to entertain a suit brought by a Parsi wife against her husband, for restitution of conjugal rights and for maintenance. It was indeed intimated by the Privy Council that the late Supreme Court, on its Civil side, might possibly administer some kind of remedy for the violation of the duties and obligations incident to, or arising out of, the matrimonial union between the Parsis; but it is very doubtful, to say the least of it, whether the machinery of the late Supreme Court as constituted by the Charter of 1823, could be adopted to the purpose of effecting such relief; and it is quite certain that no Parsi during the existence of the late Supreme Court was found to try the hazardous and costly experiment."

" Practically the result had been that as regards the enforcement of all duties and obligations (other than those of mere property) arising out of the marriage union, the Parsis of Bombay became, during the existence of the late Supreme Court, absolutely *ex leges,* deprived of all the sanctions, freed from all the obligations, of any law that could be authoritatively enforced, dependent solely on the awards of a *Panchayet*, which though once a vigorous and comparatively efficient domestic tribunal, had from various causes long ceased to exert authority or even to command respect."

" The result of this state of things on the domestic morals of the Bombay Parsis was proved to have been exceedingly damaging and several cases of bigamy had occurred in the Parsi community. The Parsis thereupon made repeated representations to the Government, as a consequence whereof a Commission was appointed by the Bombay Government to enquire into the usages recognized by Parsis in India, and into the necessity of special legislation in connection with them. A large body of the leading Parsis formed themselves into the Parsi Law Association, and on the 15th February 1862, a numerously attended deputation from the Managing Committee of that Association presented the Draft of a "Supplemental Code of Betrothment, Marriage and Divorce," to the said Commission appointed by the Government of Bombay."

"The Mofussil objections to the Supplemental Draft Code were objections merely of details, not of principle. In principle and substance the majority of the mofussil Parsis agreed with the vast majority of those of the Presidency town in wishing the Supplemental Draft Code to become law."

[*P. L. Com. Rep.* 13-10-1862.]

And the Parsis did not ask in vain from the great British Government the vindication by enactment of their moral law, for on the 7th day of April, 1865, "The Parsi Marriage and Divorce Act, XV of 1865" was passed as a Special Legislation for them in India.

—

The Parsi Marriage and Divorce Act, XV of 1865.

Marriage: – Marriage is a solemn contract between a man and a woman by which they are united for life, and assume the legal relations of husband and wife. There are different forms of marriage – Monogamy, the right to have only one wife, or Poligamy, the right to have a plurality of wives. Among the most civilized countries monogamy is the prevailing practice.

(The New Popular Encyclopedia. Vol. IX.)

Marriage as understood in Christendom:—The only kind of marriage the English law recognizes is one which is essentially "the voluntary union for life of one man with one woman to the exclusion of all others." (*Ardeseer v. Pirozbai,* 10 M.P.C. Cases 375; *Hyde v. Hyde and Woodmansee,* (1866) L. R. 1 P. & D. 130; *Khumbatta v. Khumbata,* 36 Bom. L. R. at page 15.)

Marriage under Parsi Marriage and Divorce Act, 1865 means a marriage between Parsis, whether contracted before or after the commencement of this Act; and "husband" and "wife" respectively mean a Parsi husband and a Parsi wife. (Sec. 2.)

The learned Dastoor Darab in his translation from the German of Dr. W. Geiger's Civilization of the Eastern Iranians in ancient times (1885) at page 67, coming to the question whether monogamy or polygamy existed amongst the Avesta people says:—"Unfortunately in the Avesta there is a lack of positive testimony as much concerning the one (monogamy) as concerning

the other (polygamy); and we must, therefore, content ourselves with merely indirect proofs and conclusions drawn from analogy. The Parsis of India live, as we know, in monogamy. But that is no way an original custom. A short time ago bigamy was in general use. Under such circumstances, I consider it almost certain that plurality of wives was not prohibited by the Avesta nation. Probably every one was free to do as he liked. Whoever was able to maintain more wives and a larger household could marry *several*; whoever could not afford it, contented himself with only *one*. The precepts of their religion left the question wholly untouched, because there was no question at all of that custom being allowable or not allowable, or of its being right or wrong, but simply as accidental or personal ability or inability. In this way the silence of the Avesta is most simply explained."

Parsi Marriage and Divorce Act, 1865, based upon English Law of Divorce: The Parsi Marriage and Divorce Act, XV of 1865 puts together generally the English Statue Law—the Matrimonial Causes Act, 1857 keeping in mind the customs and usages of the Parsi community in India. In many of the most important sections in this Act the principles and provisions are exactly the same as those of the English Divorce Act.

The jurisdiction in matrimonial matters formerly exercised by the *Ecclesiastical Courts* was in 1857, transferred to a new court created for that purpose with new powers added by the Matrimonial Causes Act, 1857 (20 & 21 Vic. C. 85) and is now vested in the Probate and Divorce Division of the High Court of Judicature. *(Ruling cases by Robert Campbell* 1897. Vol. XII. p. 805.)

The Parsi Marriage and Divorce Act, 1865, is divided into seven parts.

Part I.– Preliminary, consists of two sections (Ss. 1, 2)

Part II.–Marriage between Parsis, covers eleven sections (Ss. 3–14).

Part III.–Parsi Matrimonial Courts, consists of twelve sections (Ss. 15–26), and deals with the constitution, power, etc. of the Special Courts under this Act.

The Special Courts, called Parsi Matrimonial Courts, deal with and decide all cases and questions under the Parsi Marriage and Divorce Act, 1865, regarding the social and marital relations among the Parsis in India.

In former days all social and religious questions pertaining to the Parsi community were decided by their *Panchayet.* The term *Panchayet* has also been taken by the Parsis from the Hindus around them. The body of the Parsi *Panchayet* consisted of well-known and opulent personages from the community.

By the establishment of the Parsi Matrimonial Courts the serious objection to the constitution of the *Panchayets* (as courts of first instance) originally proposed, as a court private, informal and irresponsible, has been removed. They are presided over by skilled and experienced judges, and are subject to the checks and safe guards of established legal proceedings. The presiding judges are helped by Parsi delegates, who determine all questions of fact.

Part IV.—Matrimonial suits, contains seventeen sections **(Ss. 27–43).** Under this part five kinds of Matrimonial **suits are dealt with:—**

(1) **Suit for Decree of Nullity of Marriage.**—Sections 27 and 28 provide for cases in which a Parsi can obtain a declaration for nullity of his or her marriage.

(2) **Suit for Decree of Dissolution in case of Absence.**—Section 29 makes continual absence for seven years or upwards a ground for dissolution of marriage.

(3) **Suit for Divorce.**—Section 30 gives the right to a husband to sue for complete dissolution of marriage (divorce) on the ground of adultery of his wife. In order, however, to enable a wife to get a divorce from her husband, mere adultery of the husband is not sufficient.

Cases of divorce are possible and occur only among communities, in whom the practice of monogamy prevails. Divorce among Polyandrous and Polygamous castes is not possible.

(4) **Suit for Judicial Separation.**—Section 31 lays down the grounds on which judicial separation can be obtained by a wife from her husband.

Divorce distinguished from Judicial Separation :—" Divorce is a separation, by law, of husband and wife, and in the strictest sense is a complete dissolution of marriage bond (divorce *a vinculo matrimoni)*, whereby the parties become as entirely disconnected as those who have not been joined in wedlock, being thus distinguished from a Judicial Separation (divorce *a mensa et thoro,* from bed and board), whereby the parties are legally separated, but not unmarried. Judicial separation is not attended by a liberty to either party of marrying again." *(The New Povular Encyclopedia.* Vol. IV.)

(5) **Suit for Restitution of Conjugal Rights.**—Section 36 treats about the decree for restitution of conjugal rights and provides for the enforcement of the decree in case it is not obeyed.

Mr. Justice Melvill in the case of *Ardeshir v. Avabai,* 9 B.H.C. at pages 293, 294, as regards suits for restitution of conjugal rights in the judicial systems of several nations remarked:—"The suit for restitution of conjugal rights is not one which commends itself to all minds, and has not found a place in the judicial system of all nations. Closely as the Americans have in general followed the English law, they have deliberately excluded from their system the suit for restitution of conjugal rights. The Code Napoleon, which governs the greater part of Europe, has no process for compelling the cohabitation of discordant couples or for constraining them, as Blackstone sarcastically remarks, "to come together again if either party be weak enough to desire it contrary to the inclination of the other."

The learned judge at pages 295, 296 of the report goes on:—"Now it is not my business, nor in the remarks which I have made do I intend to criticize the policy of the Legislature in introducing into the Parsi Marriage and Divorce Act the suit for restitution of conjugal rights. That measure was in accordance, not only with the English Law, but also with the feelings of the Parsi community; for the Draft Bill, on which the Act was founded, was drawn up by a Commission composed equally of Parsis and Europeans. But in endeavouring, as I am obliged to endeavour, to conjecture what were the intentions of the Legislature, I think that I may fairly refer to considerations which must have been present to the minds of the Framers of the Act, and could hardly have failed to influence them. They must have known that in England it has been enforced hesitatingly, and not without strong protest by those who have thought and written on the subject. It could not have failed to occur to them that to force a woman to live with a husband, whom she detests can be of no real benefit to him, and to punish her with extreme severity for refusing to do so is only to make our courts the instrument of the husband's revenge. It could hardly have occurred to them that the dignity of a court required that this particular act of disobedience should be punished more severely than any other act of disobedience. And, therefore, it seems that in the minds of the Framers of the Act, there must have been present many considerations which would induce them to mitigate, and none which would induce them to increase, the penalties by which cohabitation might be enforced under the general provisions of the Code of Civil Procedure."

Infant marriages:—Section 37 is the only section in which reference to infant marriages among Parsis is made under the Act.

In the report of the Parsi Law Commission it is remarked :—" The European members of the Commission regarding the practice of infant marriages and betrothals (a practice plainly derived from the Hindus and not in any way sanctioned by Zoroastrian Scriptures or ancient Zoroastrian usage) as very hostile to the progress of the Parsi Community in civilization and morality, cannot recommend the enactment by the Indian Legislature of any laws that have a tendency, directly or indirectly, to sanction this practice. The members of the Parsi Community, who have prepared or who support this Draft Code, are pressing its enactment on the Indian Legislature, as a concession due to their admittedly rapid progress in civilization and intelligence. They can make no case for asking from the Indian Legislature, any encouragement to practices, which are alike opposed to the principles of those who are invited to legislate and to the interests of those on whose behalf legislation is solicited."

The Hon'ble Mr. Anderson in moving for leave to introduce the Parsi Marriage and Divorce Bill on 23rd December 1864 in the Council briefly adverted to the question of Infant Marriages among Parsis as follows :—" Sir Joseph Arnold's Commission and the Government of Bombay both consider that the proper course is, not to prohibit such marriages by explicit legislation, but at the same time, not to assert and vindicate the obligations arising from such contracts by express provisions. If disputes regarding these marriages can be amicably arranged, the Legislature should not object, but it cannot be called on to recognize customs, which it deems and which many Parsis deem injurious, which derive no sanction from the religious law of the Parsis, but have been gradually adopted from the Hindus around them."

Betrothal (Mangnee): - In ancient times specific performance of betrothals was allowed, and the contract to marry was held indissoluble.

In the old case of *Naoroji v. Dhunabaee,* his mother-in-law, 1 Borr. 382 decided by the Court of Appeal on 21—10—1811 on the unanimous opinion of the *Panchayet,* it was *held* that the contract of marriage was indissoluble, that breach of contract of marriage was never permitted under any circumstances by the Rules of the Parsis and such a contract was enforceable, as no *Mangnee* was in their sect permitted to be broken. Nay, the Dastoors and two others added that if betrothal was broken, the bride could not contract a second marriage.

Betrothal amongst Parsis *at present* is a mere promise to give a girl in marriage. It precedes the marriage and is revocable. Though specific performance of a promise to marry cannot be granted, yet the injured party has a resort to the Civil Courts for damages. Betrothal is not an actual and complete marriage. The ceremony of betrothal does not amount to a binding irrevocable contract of which the Court would give specific performance. For the breach of promise to marry or to give a girl in marriage, a money penalty has, in England at least always, been considered adequate; and if the matter is to be settled on the principles of equity and good conscience, it can hardly be said that the Courts in this country should interfere to enforce a marriage between parties, one of whom is unwilling whilst the other can obtain a money remedy for his disappointment.

The damages in an action for breach of promise of marriage are not measurable by any fixed standard and are almost entirely in the discretion of the jury. The injury to the affections of the plaintiff, the prejudice to his or her future life and prospects of marriage, the rank and conditions of the parties, and the defendant's means &c. are all matters to be taken into consideration.—Halsbury's Laws of England Vol. 16 p. 277. *(Fernandez v. Gonsalves*, 26 Bom. L.R. at page 1047.)

Part V.—Children of Parties, contains two sections (Ss. 44 and 45).

Part VI.—Mode of enforcing Penalties under this Act, contains five sections (Ss. 46–50).

Part VII.—Miscellaneous, contains two sections (Ss. 51 and 52).

THE PARSI MARRIAGE AND DIVORCE ACT.

ACT No. XV OF 1865.

Passed on the 7th April 1865.

An Act to define and amend the Law relating to Marriage and Divorce among the Parsis.

This Act where in force :—By section 3 of the Laws Local Extent Act (XV of 1874) this Act has been declared to be in force in the whole of British India, except the Scheduled Districts.

It has been declared under the Scheduled Districts Act (XIV of 1874) to be in force in the following Scheduled Districts :—

Sindh; West Jalpaiguri; The Districts of Hazaribagh, Lohardaga and Manbhum, and Pargana of Dhalbhum. The Scheduled Districts in Ganjam and Vizagapatam; The Scheduled portion of the Mirzapur District; Jaunsar Bawar; Dera Ismail Khan and Dera Gazi Khan; The District of Silhat; The rest of Assam (except the North-Lushai Hills; Scheduled Districts of Kumaon and Garwal; The North Western Provinces Tarai; British Baluchistan; and Upper Burma (except the Shan States.) And under the same Act it has been declared not to be in force in the Scheduled Districts of Lahaul.

Preamble.—Whereas the Parsi Community has represented the necessity of defining and amending the law relating to Marriage and Divorce among Parsis; And whereas it is expedient that such law should be made conformable to the customs of the said community; It is enacted as follows :—

Customs of the Community :— " The customs recognized as Laws by the Parsis in India are not Parsi customs. They are purely Hindu customs, which had insensibly crept among them, to which they had become habituated, and which they had acquiesced in regarding as having the force of customary law, in the course of 1200 years of sojourn in the land."

" The Parsis had in fact no laws and no records of their ancient customs when they first settled in India. And the rules which by their engagement with the Hindu Chief of Sanjan they bound themselves to obey, together with the customs of the Hindus, which they had unconsciously picked up in their intercourse with the Hindus in India, form the only body of rules for them. They thus had, among others, introduced among them and adopted the Hindu customs as to marriage."

" A well-established and ancient usage prevailing amongst a community must over-ride such of the tenets of its religion as are shown to have fallen into disuetude and conflict with ancient usage prevailing in the community.—*Peshotam v. Meherbai*, 13 Bom. 302 and *Shirinbai v. Kharshedji*, 22 Bom. 430."

Parsi Community consists of whom :— " The Parsi Community consists of Parsis, who are descended from the original Persian emigrants, and who are born of both Zoroastrian parents, and who profess the Zoroastrian religion, who came to India either temporarily or permanently, and the children of Parsi fathers by alien mothers, who have been duly and properly admitted into the religion."

[*Sir Dinsha v. Sir Jamsetji*, 33 Bom. 509=11 Bom. L.R. 85.]

I.—Preliminary.

Short title. Sec. 1. This Act may be cited as "The Parsi Marriage and Divorce Act, 1865."

Meaning of, and distinction between, the terms Parsis and Zoroastrians:—In the important case of *Sir Dinsha v. Sir Jamsetji,* 33 Bom. 509=11 Bom. L.R. 85 Davar, J. at pages 538, 539 of the report observes:—

"Before the controversy in connection with the French lady arose, no one had the remotest idea that a Zoroastrian could be anybody other than a member of the Parsi Community. For centuries, the only people who in India professed the Zoroastrian religion were the members of the Parsi Community born in the religion of their fathers. The Zoroastrian religion was professed by the Parsis alone in India; and small wonder, therefore, if the expressions Zoroastrians and Parsis came to be loosely used, as if the two words meant one and the same thing. Before 1903 no one ever gave a thought to the distinction between the two terms—Zoroastrians and Parsis."

"A Zoroastrian is a person, who professes the Zoroastrian religion. A Zoroastrian need not necessarily be a Parsi. Any one who professes the religion promulgated by Zoroaster, be he an Englishman, Frenchman or American, becomes a Zoroastrian, the moment he is converted to that faith. But how can he become a Parsi? Supposing a Parsi lady becomes a Christian and marries a Frenchman, can it be said that she had become a Frenchwoman? And if she adopts Christianity and marries an Englishman, does she become an Englishwoman? One has only to see how the word Parsi came into existence and what it is meant to designate to realize that the word Parsi has only a racial significance, and has nothing whatever to do with his religious professions. Mr. Dossabhoy Framji in his "History of the Parsis" says, the word takes its derivation from *Pars* or *Fars,* a province in Persia from which the original Persian emigrants came to India. It will thus be seen that the word Parsi, when used in India, only means the people

from *Pars*. When the emigrants from Persia settled in India, the people around them probably knew little of their religion, but they knew they came from *Pars* or *Fars*, and they called them Parsis. Thus, all descendants of the original emigrants came to be known as Parsis. A Parsi born must always be a Parsi; no matter what other religion he subsequently adopts and professes. He may be a Christian-Parsi, and he may be any other Parsi, according to the religion he professes; but a Parsi he always must be. The word Zoroastrian simply denotes the religion of the individual; the word Parsi denotes his nationality or community, and has no religious significances whatever attached to it."

And Beaman, J. at pages 584, 585, says:—

"The term Parsi was first used by outsiders to describe to each other by reference to the place of origin—this strange new people. Outsiders could not, ofcourse, have known, and presumably cared little, about the religious tenets of such immigrants. They were foreigners, and they came from Persia. Enough then to describe them as Parsis. Among the Parsis themselves the case was altogether different. They had no reason to be proud of their place of origin; they had nothing to look for from Persia. But they had their religion. They were first and last Zoroastrians, irrespective of this fact that persecution had driven Zoroastrianism out of Persia. As time went on, no doubt, the tribal sentiment grew and throve, and then was superimposed upon the first simple bond of a common religion, the bond of a common tribal descent. So that as the Community prospered and acquired wealth and importance, it accepted the popular name of Parsis, as though it really was a national or tribal distinction. And along with the secularizing process went a corresponding weakening of the original religious tie, so that it is quite true to-day to say that it is more accurate to describe the Indian Zoroastrians as Parsis—thereby implying a caste, or communal or tribal organization—than it would be to define them as men and women professing the Holy Zoroastrian Faith."

"For many hundreds of years the Zoroastrian Community in India had meant one thing—and one thing only to them—their own select people. And the Holy Mazdiasni Faith, as far as they knew, was professed by that select body and by them alone. Being a member of the good religion was doubtless at that time synonymous with being a member of what may now fairly be called the Parsi caste."

Thus upto the date when the Juddin-case was decided by the High Court of Bombay, the words Parsis and Zoroastrians seem to have been used as synonymous, and it was only in this important case concerning the Parsi Community that for the first time the meaning of, and the distinction between, the terms Zoroastrians and Parsis, as aforesaid, were expressed and stated by the two learned Judges.

This Act based on English Divorce Act of 1857:—In the case of *Ardeshir v. Avabai.* 9 B.H.C. at page 303 Sargent, C.J. says:—

"In the report made by the Commissioners appointed to enquire into the usages of the Parsi Community it appears that the statement relating to marriage and divorce, which was framed by the managing committee of the Parsi Law Association, and upon which the present Act was passed, was in itself, with one addition, based upon the English Divorce Act of 1858."

"That the Parsis of Bombay are not subject to the ecclesiastical law was settled by the decision of the Privy Council in *Ardeseer v. Pirozbai*, 6 M.I.A. 349, and though their customs have been modified by Act XV of 1865, they are no more now governed by the ecclesiastical law than they were before."

"It is true that the provisions of Act XV of 1865 are in many respects similar to the marriage law administered in England since 1857, and in construing it the decisions of the Divorce Court and Probate Division may often be useful guides; but it must be always remembered that though the laws are in certain points similar they are not the same, and that the decisions under the one can only assist by analogy in the construction of the other."

[*Kawasji v. Sirinbai*, 23 Bom. at page 282.]

"The Parsis are generally governed by English law—*Naoroji v. Rogers*, 4 B.H.C. 1; *Manekbai v. Meherbai*, 6 Bom. 363; and there is no express enactment excluding them from the operation of the English Common Law as there are in cases of Hindoos and Muhammadans."

"The Common Law of England applies to Parsis, who inhabit the town and island of Bombay. It was so held in the case of *Naoroji v. Rogers*, 4 B.H.C. 1. This case has been followed by a series of decisions of the Bombay High Court, holding that except where there is special legislation affecting the community, the Common Law of England applies to the Parsis residing in the Presidency Town of Bombay."
[*Payne & Co. v. Piroshah*, 13 Bom. L.R. at pp. 923, 930.]

This Act not retrospective:—The provisions of this Act do not in any way affect the validity or the consequences of a marriage contracted before it came into operation. (*Avabai v. Jamasji*, 3 B.H.C. 113.)

Interpretation clauses. Sec. 2. In this Act, unless there be something repugnant in the subject or context:—

"**Priest,**" means a Parsi Priest and includes Dastur and Mobed:

"**Marriage,**" means a marriage between Parsis whether contracted before or after the commencement of this Act; and "*husband*" and "*wife*" respectively mean a Parsi husband and a Parsi wife.

Marriage among Parsis as in English law means a monogamous marriage, solemnized in accordance with the requirements of Sec. 3 of this Act.

The forms necessary to constitute a valid marriage and the construction of the marriage contract depend on the *lex contractus*—the law of the place, where the marriage ceremony is performed. (*Khumbatta v. Khumbatta*, 36 Bom. L.R. 11.)

"**Section,**" means a section of this Act:

"**Chief Justice,**" includes Senior Judge:

"**Court,**" means a Court constituted under this Act:

"**British India,**" means the territories which are or shall be vested in Her Majesty or Her successors by the Statute 21 & 22 Vic. cap. 106, entitled "An Act for the better Government of India."

And, in any part of British India in which this Act operates "**Local Government,**" means the persons authorized to administer executive Government in such part of India, or the chief executive officer of such part, when it is under the immediate administration of the Governor-General of India in Council, and when such officer shall be authorized to exercise the powers vested by this Act in a Local Government: and

"**High Court,**" means the highest Civil Court of Appeal in such part.

II.—Of Marriages between Parsis.

Requisites to Validity of Parsi Marriage. Sec. 3. No marriage contracted after the commencement of this Act shall be valid, if the contracting parties are related to each other in any of the degrees of consanguinity or affinity prohibited among Parsis, and set forth in a table which the Governor-General of India in Council shall, after due enquiry, publish in the *Gazette of India,* and unless such marriage shall be solemnized according to the Parsi form of ceremony called "Asirvad" by a Parsi priest in the presence of two witnesses independently of such officiating priest; and unless, in the case of any Parsi who shall not have completed the age of twenty-one years, the consent of his or her father or guardian shall have been previously given to such marriage,

Meaning of "*marriage*" is given in section 2 *supra*.

The requisites to the validity of a Parsi marriage contracted after the commencement of this Act are laid down in this section. (*Avabai v. Khodadad*, 22 Bom. L.R. 913.)

They are:—

(1) The contracting parties must not be related to each other in any of the degrees of consanguinity or affinity prohibited among Parsis.

Table of Prohibited Relations.

A man shall not marry his—

1 Paternal grand-father's mother.
2 Paternal grand-mother's mother.
3 Maternal grand-father's mother.
4 Maternal grand-mother's mother.
5 Paternal grand-mother.
6 Paternal grand-father's wife.
7 Maternal grand-mother.
8 Maternal grand-father's wife.
9 Mother or step-mother.
10 Father's sister or step-sister.
11 Mother's sister or step-sister.
12 Sister or step-sister.
13 Brother's daughter or step-brother's daughter, or any direct lineal descendant of a brother or step-brother.
14 Sister's daughter or step-sister's daughter, or any direct lineal descendant of a sister or step-sister.
15 Daughter or step-daughter, or any direct lineal descendant of either.
16 Son's daughter or step-son's daughter, or any direct lineal descendant of a son or step-son.
17 Wife of son or of step-son, or of any direct lineal descendant of a son or step-son.
18 Wife of daughter's son or of step-daughter's son, or of any direct lineal descendant of a daughter or step-daughter.
19 Mother of daughter's husband.
20 Mother of son's wife.
21 Mother of wife's paternal grand-father.
22 Mother of wife's paternal grand-mother.
23 Mother of wife's maternal-grand father.
24 Mother of wife's maternal grand-mother.
25 Wife's paternal grand-mother.
26 Wife's maternal grand-mother.
27 Wife's mother or step-mother.
28 Wife's father's sister.
29 Wife's mother's sister.
30 Father's brother's wife.
31 Mother's brother's wife.
32 Brother's son's wife.
33 Sister's son's wife.

A woman shall not marry her--

1 Paternal grand-father's father.
2 Paternal grand-mother's father.
3 Maternal grand-father's father.
4 Maternal grand-mother's father.
5 Paternal grand-father.
6 Paternal grand-mother's husband.
7 Maternal grand-father.
8 Maternal grand-mother's husband.
9 Father or step-father.
10 Father's brother or step-brother.
11 Mother's brother or step-brother.
12 Brother or step-brother.
13 Brother's son or step-brother's son, or any direct lineal descendant of a brother or step-brother.
14 Sister's son or step-sister's son, or any direct lineal descendant of a sister or step-sister.
15 Son or step-son, or any direct lineal descendant of either.
16 Daughter's son, or step-daughter's son, or any direct lineal descendant of a daughter or step-daughter.
17 Husband of daughter or of step-daughter, or of any direct lineal descendant of a daughter or step-daughter
18 Husband of son's daughter or of step-son's daughter, or of any direct lineal descendant of a son or step-son.
19 Father of daughter's husband.
20 Father of son's wife.
21 Father of husband's paternal grand-father.
22 Father of husband's paternal grand-mother.
23 Father of husband's maternal grand-father.
24 Father of husband's maternal grand-mother.
25 Husband's paternal grand-father.
26 Husband's maternal grand-father.
27 Husband's father or step-father.
28 Brother of husband's father.
29 Brother of husband's mother.
30 Husband's brother's son, or his direct lineal descendant.
31 Husband's sister's son, or his direct lineal descendant.
32 Brother's daughter's husband.
33 Sister's daughter's husband.

Note.—In the above table the words "Brother" and "Sister" denote brother and sister of the whole as well as half-blood. Relationship by step means relationship by marriage.

(Gazette of India, 9th September, 1865, pp. 981, 982.)

(2) The marriage must be solemnized according to the Parsi form of ceremony called "Asirwad."

"Asirwad" is a sort of invocation addressed to the bride-groom and the bride by the officiating priest at the time of marriage.

The ceremony of "Asirwad" includes a prayer (the *nikah*) or exhortation to the parties. (*Peshotam v. Menerbai*, 13 Bom. at page 311.)

(3) The ceremony of "Asirwad" must be performed by a Parsi priest.

The meaning of "*priest*" is given in section 2 *supra*.

The ceremony of "Asirwad" is generally performed by two priests: but the marriage is not invalid if one priest has performed the ceremony.

(4) The ceremony of "Asirwad" must be performed by the priest in the presence of two Parsi witnesses independently of such officiating priest.

(5) In case the husband or the wife, or both, may not have completed the age of twenty-one years, the consent of his or her father or guardian must have been previously obtained.

Meaning of "husband" and "wife" is given in section 2 *supra*.

Previous consent of father.—In the case of *Peshotam v. Meherbai*, 13 Bom. 302 the facts were as follows:—In 1868 the plaintiff and defendant, then of the ages of seven and six years respectively, went through the ceremony of marriage in the presence of their respective parents and according to the rites of their religion. The formal consent on behalf of the plaintiff was not given by his father, but by his uncle, with whom he was living and by whom he had been adopted. Nineteen years afterwards the plaintiff filed a suit praying for a declaration that the pretended marriage was null and void and did not create the *status* of husband and wife between him, the plaintiff and the defendant. The defendant resisted the suit and claimed to be the lawful wife of the plaintiff. The plaintiff and the defendant never lived together as man and wife, nor was the marriage ever consummated. It was *held* that under the circumstances the formal consent of the uncle and the tacit consent of the father were enough to satisfy the requirements of section 3 of Act XV of 1865, which requires the previous consent of the father or guardian to the marriage; that such a suit not being in the category of suits relegated to a special court by Act XV of 1865, the jurisdiction to try it remained in the High Court, to which it had been given by section 12 of the Letters Patent; that the law to be applied was the English law, subject, however, to any well established usage; that by the English law such a marriage would be incohete and imperfect marriage capable of repudiation by either party after arriving at years of discretion; but capable also of being made a valid and binding marriage by the consent of the parties thereto after they had arrived at such age; that the circumstances of the case showed that there had been such acquiescence in, and acceptance of, the marriage by the plaintiff after arriving at years of discretion as to render the marriage valid and binding in him, and incapable of subsequent repudiation. Consummation is the best proof of consent to a marriage, but is not the only proof.

Previous consent of Guardian.—In *Dorabji v. Jerbai*, 16 Bom. 136, the plaintiff and defendant were Parsis. The husband filed this suit in April 1891, stating that in March 1885, he and the defendant went through the ceremony of *Ashirwad* at Akola in the Berar Assigned Districts. He alleged that he was at the time only nineteen years of age and that his mother and guardian had not given her previous consent to the ceremony, nor was she present at it. He and the defendant subsequently, cohabited at Bhusawal until the 8th April 1885, but since then he had not lived with the defendant. He further alleged that the defendant had been guilty of adultery, and he prayed that, if necessary, it might be declared that the *Ashirwad* ceremony did not constitute a valid marriage, but that if the marriage should be declared valid, it might be dissolved. The delegates having found that at the marriage the requirements of section 3 were complied with, *held*, assuming that there was no special law or usage in the Berars on the subject as to the requisites of a valid marriage between Parsis in that district, or that, if there was no such law or usage, it was in accordance with section 3 of the Act, the marriage between the plaintiff and the defendant was valid and capable of being dissolved.

Age of majority of a Parsi for purposes of marriage:—In the case of *Shirinbai v. Kharshedji*, 22 Bom. 430 it was held that within three years after attaining the age of 21 years, a Parsi female can sue to have her marriage ceremony, performed while she was only 3 years of age, declared null and void. She attains her majority on reaching the age of 21 years.

"A Parsi suing to have a marriage declared void is "acting in the matter of marriage" and, therefore, the majority Act IX of 1875, which makes the age of 18 the age of majority, does not apply to a question of limitation with regard to such suit. The age of majority in such a case is that prescribed by the Parsi Marriage and Divorce Act XV of 1865, viz: 21 years." *(Ibid.)*

"When the Parsi Marriage and Divorce Act XV of 1865 was passed, twenty-one was the age of majority for Parsis in the Presidency Towns, as the English law in that respect applied to them.—*Peshotam v. Meherbai*, 13 Bom. 309; *Naoroji v. Rogers*, 4 B. H. C. 1. There is no evidence to show that a different law as to the age of majority amongst Parsis prevailed in the mofussil. The legislature in Act XV of 1865 adopted 21 years as the age of majority among

Parsis, enacting by section 3 that no marriage contracted after the commencement of the Act should be valid, unless in the case of any Parsi who should not have completed the age of 21 years, the consent of his or her father or guardian should have been previously given to such marriage. The Schedule to the Act (see last column of the form of marriage certificate) shows that the age of 21 was inserted in section 3 as denoting the limit of the age of infancy. For the purpose of the Act it must, therefore, be taken that minority does not cease amongst Parsis until the age of 21, and it was so held by Candy, J. in *Sorabji v. Bachoobai,* 18 Bom. 366. The present suit is not, however, brought under the provisions of that Act (P. M. & D. Act), as (probably by an oversight) no provision is contained in it dealing with a case like the present where it is alleged that a marriage though in form a marriage is invalid in law, the element of consent being absent—*Peshotam v. Meherbai.* It is, we think, to be regretted that a case like this cannot be tried before the special Parsi tribunal constituted by the Legislature for the trial of cognate cases." (*Shirinbai v. Kharshedji,* 22 Bom. at pages 434, 435.)

Conversion of Juddins:—The important and historic case of *Sir Dinshaw v. Sir Jamsetji,* 33 Bom. 509=11 Bom. L.R. 85 arose under the following circumstances. One of the plaintiffs Mr. R. D. Tata married in Paris a French lady in the year 1903. They then came to Bombay, and after getting the *navjot* ceremony performed, the French lady was admitted to the Zoroastrian faith. After that Mr. Tata married her according to the Parsi customary marriage ceremony. Thereafter, questions arose whether she could get the benefit of Parsi religious trust-funds, whether she could enter fire-temples etc., and whether her remains after her death could be deposited in the Tower of Silence or not, as she had followed the Zoroastrian faith and had become a (female) Parsi. This caused a great stir among the Parsi community, and it was resolved that Mrs. Tata could not take advantage of the Anjuman Funds and Properties; nor could she enter fire-temples etc., nor could her remains be carried to the Tower of Silence

after her death. Thereupon the trustees of the arsi Anjuman Funds issued public notices; correspondence began between the trustees and the solicitors of Mr. Tata, and at last in the year 1906, the above suit was filed in the High Court of Judicature at Bombay. By special motion the suit was heard by a special bench consisting of the late Justices, Dinshaw Davar and Beaman. *Held* (a) that although the conversion of Juddins is permissible amongst Zoroastrians, such conversions were entirely unknown to the Zoroastrian community in India, and far from being customary or usual for it to convert a Juddin, the Zoroastrian community of India has never attempted, encouraged or permitted the conversion of Juddins to Zoroastrianism: (b) that even if an entire alien—a Juddin—is duly admitted into the Zoroastrian religion after satisfying all conditions and undergoing all necessary ceremonies, he or she would not, as a matter of right, be entitled to the use and benefit of the funds and institutions under the defendant's management and control these were founded and endowed only for the members of the Parsi community.

"The facts to be gathered from the documentary evidence before the Court appear to be that in the early part of the last century Parsi children by alien mothers were allowed to be invested with Sudra and Kusti without much difficulty; but when the evil grew, there was opposition to this practice, and at first such practices were sought to be restricted by making the previous permission of the *Panchayet* necessary; but later on the feeling against admissions grew stronger and stronger, and it was resolved not to admit such children at all, and various pains and penalties were prescribed for those who transgressed the Resolutions passed by the Anjuman."

"It was not the intention of the founders of the trust in question to extend their benefits to any one, who was not in the most rigid caste sense a Parsi, that is, born into the community of the Indian Zoroastrians, and born of an Indian Zoroastrian father."

(*Ibid.* at pp. 553, 598.)

It may be noted that Mrs. Tata, on her conversion to, and professing, the Zoroastrian religion, became a Zoroastrian; but on that account she could not become a Parsi woman, and could not be called and recognized as a female Parsi.

In the Privy Council case of *Saklat v Bella*, 28 Bom. L.R. 161, the facts were as follows.—In 1915 a girl, whose father was Goanese Christian and mother a Parsi, was converted to, or initiated into, the Zoroastrian religion, and began to attend the temple and within the sacred precincts thereof, to face the sacred fire and to perform the ceremonies in common with other worshippers. *Held*—that only those were entitled, as of right, to the benefits of the temples and to use, attend or participate in the religious ceremonies performed there, who were professed members of the Parsi community, i.e., racial Parsis or persons deemed after a long lapse of ages to be racial Parsis, and consequently mere converts to the Zoroastrian religion were not such racial Parsis, and not entitled within the contemplation of the donors or founders of the aforesaid (religious) trusts, and had, therefore, no right of, and may be excluded or expelled by the trustees as trespassers from, entering the temple:—*Sir Dinshaw v. Sir Jamsetji*, 33 Bom. 509=11 Bom. L.R. 88.

Conversion of a Parsi to Jewish Faith:—In the case of *Jivaji v. Bomonji*, 5 Bom. L.R. 655 it was *held*:—"No question arises in the Parsi Matrimonial Act unless the parties are Parsis. It is competent to a Parsi to become a convert to the Jewish faith and to contract a valid marriage with a Jewess in London according to the Jewish rites."

Re-marriage save after divorce unlawful during life-time of first wife or husband. Sec. 4. No Parsi shall, after the commencement of this Act, contract any marriage in the life-time of his or her wife or husband, except after his or her lawful divorce from such wife or husband by sentence of a Court as hereinafter provided, and every such marriage contracted contrary to the provisions of this section shall be void.

Second marriages during life-time of first wives formerly not unlawful; but not allowed without sufficient cause:—Formerly second marriages among male Parsis (the first wife being alive) had been very numerous among the members of the community, without any former precedent of the rigid enforcement of the penalties of the law, if any such existed, and such second marriages had been frequent down to the date on which Act XV of 1865 came into operation. (*Avabai v. Jamasji*, 3 B. H. C. at page 114.)

In the case of *Merwanji v. Avabai*, 2 Borr. at pages 209, 213 in appeal to the Sudder Adaulat, it was observed:—"The question of the right of a Parsi to contract a second marriage, and the circumstances under which such marriages were esteemed admissible and regular had been considered by the Court of Appeal in the case No. 554, that of *Kaoosjie versus Awan Baee*. In the proceedings of that Court under date the 16th December 1827, in the suit, the following observation was recorded:—In general it seems to result that second marriages are not strictly allowed without sufficient cause, but that such a second marriage when made cannot be dissolved."

Under this Act remarriage, after divorce alone, lawful in life-time of wife or husband:—Unless a decree of nullity of marriage under sections 27 or 28, or a decree for dissolution of marriage under section 29, or a decree for divorce under section 32 of this Act is obtained, no Parsi can now (i.e., after the commencement of this Act) legally remarry in the life-time of his or her wife or husband. Then again the provisions of section 43 of this Act must be complied with, and the respective parties can marry again (as if the prior marriage had been dissolved by death) only when the time limited for

appealing—three calendar months—against any decree dissolving a marriage shall have expired without any such appeal being presented, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved.

In all monogamous marriages the existence of a first marriage is a bar to a second valid marriage. Such marriages, unlike other contracts, cannot be suspended or annulled by the parties to the marriage at their will merely.

Punishment for Bigamy. Sec. 5. Every Parsi, who shall, after the commencement of this Act and during the life-time of his or her wife or husband, contract any marriage without having been lawfully divorced from such wife or husband, shall be subject to the penalties provided in sections 494 and 495 of the Indian Penal Code for the offence of marrying again during the life-time of a husband or wife.

Second marriages, before this Act came into force, not set aside as bigamous :—In the case of *Avabai v. Jamasji*, 33 B. H. C. at page 116 it was observed:—"There appears no reason why marriages contracted before the passing of the Parsi Marriage and Divorce Act, 1865 should be made subject to the consequences of the Act. When it was passed nothing could have been further from the intention of the Legislature than to give retrospective effect to it. Hence questions with reference to past marriages cannot be raised under this Act. They must be governed by the law, which prevailed before it came into operation."

And second marriages solemnized during the life of the first wife or husband, prior to the coming into force of this Act could not be treated as void and bigamous. *(Ibid.* 115.)

"The case of *Meherwanji v. Avabai*, 2 Bom. 209 shows that the Suddar Adaulat of Bombay used to take cognizance of matrimonial suits between Parsis and afforded them such relief as a due regard to their own laws and customs allowed. The case also proves that these laws and customs were wholly at variance with the principles, which

governed the matrimonial law of the diocese of London, and incompatible with the Ecclesiastical Law, as in such cases was administered. One instance would suffice. It appears that under many circumstances the husband was, in those times, permitted to take a second wife, the first one being alive." (*Ardeseer v. Pirozbai*, 4 W.R. (P.C.) at p. 94.)

See the case of *Avabai v. Jamasji*, 3 B.H.C. 113 given in notes under section 30 *infra*.

Certificate and registry of Marriages. Sec. 6. Every marriage contracted after the commencement of this Act shall, immediately on the solemnization thereof, be certified by the officiating priest in the form contained in the schedule to this Act.

The certificate shall be signed by the said priest, the contracting parties, or their fathers or guardians when they shall not have completed the age of twenty-one years, and two witnesses present at the marriage; and the said priest shall thereupon send such certificate, together with a fee of two rupees to be paid by the husband, to the registrar of the place at which such marriage is solemnized.

The registrar, on receipt of the certificate and fee, shall enter the certificate in a register to be kept by him for that purpose, and shall be entitled to retain the fee.

Certificate and registry of Marriage:—Sections 6 to 8A treat about the certificate and registry of Parsi marriages according to the provisions of the English Law on the subject.

A marriage between Parsis is governed by the P.M. & D. Act, 1865, the provisions of which are, on the subject, exhaustive. As to forms of celebration it generally follows the provisions of the Christian Marriage Act. It may be proved by production of the marriage certificate or a certified copy of the entry in the marriage register.

Form of Certificate.

SCHEDULE.

(See Section 6.)

Date and place of marriage.	Names of the husband and wife.	Condition at the time of marriage.	Rank or profession.	Age.	Residence.	Names of the fathers or guardians.	Rank or profession.	Signature of the officiating priest.	Signature of the witnesses.	Signature of father or guardian when husband or wife is an infant.

Certificate not a requisite of Marriage:—The Legislature in laying down the requisites for a valid (Parsi) marriage in section 3 has not included the registration of the marriage dealt with by subsequent sections of the Act, Section 6 requires that immediately upon the solemnization of the marriage a certificate is to be given by the officiating priest in the form contained in the Schedule to the Act. The wording of the section shows that the certificate is given after the marriage has been contracted and solemnized, and therefore, the certificate is not in itself one of the requisites for a valid marriage under the Act *(Avabai v. Khodadad,* 22 Bom. L.R. at page 915=45 Bom. 146.)

Appointment of Registrar. Sec. 7. For the purposes of this Act a registrar shall be appointed.

Within the local limits of the ordinary original civil jurisdiction of a High Court, the registrar shall be appointed by the Chief Justice of such court, and without such limits, by the Local Government.

Every registrar so appointed, may be removed by the Chief Justice or Local Government appointing him.

Meanings of "High Court," "Chief Justice," and "Local Government" are given in section 2 *supra*.

Appointment of Registrars of Parsi Marriages :—

For Surat and Poona.—The District Registrars at Surat and Poona, appointed under Act XVI of 1864 (now Act III of 1877) have been appointed also Registrars for the purposes of Act XV of 1865 under provisions of section 7. (Bom. R. & O. Vol. I, 1896 page 27.)

In Sind.—The Deputy Registrar is appointed Registrar in Sind under section 7 of Act XV of 1865. (*Ibid.*)

For Burma, Central Provinces and N. W. Frontier Province (See Bur. R. & O., Cen. Pro. R. & O., and Gaz. of Ind. 1901, Part II, respectively).

For Quetta District.—(See Gaz. of Ind. 1898, Part II.)

For Cantonment of Baroda.—(See Gaz. of Ind. 1911, Part II.)

Marriage-registry to be open for public inspection. Sec. 8. The Register of marriages mentioned in section 6 shall, at all reasonable times, be open for inspection; and certified extracts therefrom shall, on application, be given by the Registrar on payment to him by the applicant of two rupees for each such extract.

Every such register shall be evidence of the truth o the statements therein contained,

Effect of entry in the Register of Marriage:—Section 8 para 2 lays down the effect of an entry in the Register of Marriage. It says that every such register shall be evidence of the truth of the statements therein contained. A proper record of marriages duly solemnized between Parsis is required to be secured. The absence of any entry in the Register does not affect the validity of the marriage, and the only way in which it would affect a suit under the Act would be as regards the manner of proof. (*Avabai v. Khodadad*, 22 Bom. L.R. at pages 915, 916 = 45 Bom. 146.)

Where there is no certificate and no entry in the marriage-register any other relevant evidence is admissible in proof of the marriage having taken place. (*Ibid.* 913.)

Transmission of Certified copies of Certificates in marriage-register to Registrar-General of Births, Deaths and Marriages. Sec. 8A. Every registrar, except the registrar appointed by the Chief Justice of the High Court of Judicature at Bombay shall, at such intervals as the Local Government by which he was appointed from time to time directs, send to the Registrar-General of Births, Deaths and Marriages for the territories administered by such Local Government, a true copy certified by him in such form as such Local Government from time to time prescribes, of all certificates entered by him in the said register of marriages since the last of such intervals.

This section is noted down here as amended by Act 38 of 1920. It was added as 8A by section 31 of Births, Deaths and Marriage Registration Act 6 of 1886.

Penalty for solemnizing marriage contrary to 4th section. Sec. 9. Any priest knowingly and willingly solemnizing any marriage contrary to and in violation of section 4 shall, on conviction thereof, be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two hundred rupees, or with both.

Sections 9 to 14 deal with registers and lay down certain penalties with reference to certain acts or omissions connected with the certificate or the register. The object of these penalties is to secure that this most desirable record of marriage, shall be properly maintained. (*Avabai V. Khodadad,* 22 Bom. L. R. at p. 915.)

Penalty for priest's neglect of requirements of 6th section. Sec. 10. Any priest neglecting to comply with any of the requirements affecting him contained in section 6 shall, on conviction thereof, be punished for every such offence with simple imprisonment for a term which may extend to three months, or with fine which may extend to one hundred rupees, or with both

Penalty for omitting to subscribe and attest the certificate. Sec. 11. Every other person required by section 6 to subscribe or attest the said certificate, who shall wilfully omit or neglect so to do, shall, on conviction thereof, be punished for every such offence with a fine not exceeding one hundred rupees.

Penalty for making false certificate. Sec. 12. Every person making or signing or attesting any such certificate containing a statement which is false, and which he either knows or believes to be false, or does not know to be true, shall be deemed to be guilty of the offence of forgery as defined in the Indian Penal Code, and shall be liable, on conviction thereof, to the penalties provided in section 466 of the said code.

Penalty for not registering certificate. Sec. 13. Any registrar failing to enter the said certificate pursuant to section 6 shall be punished with simple imprisonment for a term which may extend to one year, or with fine which may extend to one hundred, rupees, or with both.

Penalty for secreting, destroying or altering the register. Sec. 14. Any person secreting, destroying or fradulently altering the said register in any part thereof, shall be punished with imprisonment of either description as defined in the Indian Penal Code for a term, which may extend to two years, or if he be a registrar, for a term, which may extend to five years, and shall also be liable to fine, which may extend to five hundred rupees.

III.—Of Parsi Matrimonial Courts.

Constitution of Special Courts under this Act. Sec. 15. For the purposes of hearing suits under this Act, a special court shall be constituted in each of the Presidency towns of Calcutta, Madras and Bombay, and in such other places in the territories of the several Local Governments as such Governments respectively shall think fit.

Special Court has no power to deal with a case where there is no marriage at all: "There is no doubt but that the Parsis in India are, as a general rule, subject to English law, and all ordinary disputes between Parsis are now regulated in conformity with the laws of England. But in Parsi matrimonial matters a special court has been created. It has only power to grant a decree of nullity of marriage; it has no power to deal with a case where there never was a marriage at all. It was, however, at the same time intimated by their Lordships (in *Ardeseer v. Pirozbai*, 6 M. I. A. 348) that the Supreme Court on its civil side might possibly administer some kind of remedy for the violation of the duties and obligations arising out of the matrimonial union between Parsis. The High Court inherited all the powers of the Supreme Court, and was also specially empowered in

the exercise of its ordinary original civil jurisdiction "*to try suits of every description.*" This wide jurisdiction would cover such cases as are not within the jurisdiction of the Special Parsi Court.....

The words "*to try suits of every description*" comprise matrimonial suits, subject of course to the provisions of Parsi Marriage Act, which assigns to a special tribunal most of the questions incidental to the matrimonial contract."

[*Peshotam v. Meherbai*, 13 Bom. at pp. 309, 310.]

Order constituting Parsi Chief Matrimonial Court:—

In Bombay.—"The Honourable the Governor in Council of Bombay is pleased to notify under the provisions of Act XV of 1865, section 15, that the Parsi Chief Matrimonial Court of Bombay has been constituted in the Presidency town in Bombay. (Bom. R. & O. Vol. I 1896, page. 27.)

In Madras, Central Provinces, and *Lower Burma.* (See Mad. R. & C., Cen. Pro. R. & O., and Bur. Gaz. 1903.)

Parsi Chief Matrimonial Courts. Sec. 16. The Courts so constituted in each of the Presidency towns shall be entitled the Parsi Chief Matrimonial Court of Calcutta, Madras or Bombay, as the case may be.

The local limits of the jurisdiction of the Parsi Chief Matrimonial Court shall be conterminous with the local limits of the ordinary original civil jurisdiction of the High Court.

The Chief Justice of the High Court, or such other judge of the same Court, as the Chief Justice shall from time to time appoint, shall be the judge of such Matrimonial Court, and in the trial of cases under this Act, he shall be aided by eleven delegates.

Parsi District Matrimonial Courts. Sec. 17. Every Court so constituted at a place other than a Presidency-town shall be entitled the Parsi District Matrimonial Court of such place.

Subject to the provisions contained in the next following section, the local limits of the jurisdiction of such Court shall be conterminous with the limits of the district in which it is held. The judge of the principal Court of original civil jurisdiction at such place shall be the judge of such Matrimonial Court; and in the trial of cases under this Act, he shall be aided by seven delegates.

Order constituting Parsi District Matrimonial Courts in Surat, Poona and Sind.—"The Honourable the Governor in Council of Bombay is pleased to notify under the provisions of Act XV of 1865 section 17, that Parsi District Matrimonial Courts have been constituted in the towns of Surat and Poona respectively."

"Under the provisions of section 17 of Act XV of 1865, the Honourable the Governor in Council is pleased to constitute the District Court of Karachi as the Parsi District Matrimonial Court for the Province of Sind.

[Bom. R. & O. Vol. I 1896, p. 27.]

Power to alter territorial jurisdiction of District Courts. Sec. 18. The Local Government may, from time to time, alter the local limits of the jurisdiction of any Parsi District Matrimonial Court, and may include within such limits any number of districts under its Government.

Local limits of jurisdiction of Parsi District Matrimonial Courts :—

Of Surat, include the Districts of Surat and Ahmedabad:

Of Poona, include the Districts of Poona, Ahmednagar, Satara, and Kaladgi (now Sholapur—Bijapur):

Of Province of Sind to be conterminous with those of the Province of Sind.

[Bom. R. & O. Vol. I 1896, pp. 28, 29.]

Certain Districts to be within jurisdiction of Chief Matrimonial Court. Sec. 19. Any district which the Local Government on account of the fewness of Parsi inhabitants, shall deem it expedient to include within the jurisdiction of any Matrimonial Court, shall be included within the jurisdiction of the Parsi Chief Matrimonial Court for the territories under such Local Government, where there is such Court.

"Under Section 19, the Honourable the Governor in Council is pleased to direct that the *Settlement of Aden and its dependencies* shall be included within the jurisdiction of the Parsi Chief Matrimonial Court of Bombay." (Bom. R. & O. Vol I. p. 28.)

For Orders, *including* all districts *in Madras Presidency* where the Act is in force, within the jurisdiction of the Parsi Chief Matrimonial Court at Madras, and *including* all districts *in Upper Burma and* those *in Lower Burma* within the jurisdiction of the Parsi Chief Matrimonial Court at Rangoon, see Mad. R. & O., and Bur. Gaz. 1907, respectively.

Court-Seal. Sec. 20. A seal shall be made for every Court constituted under this Act, and all decrees and orders, and copies of decrees and orders of such Court, shall be sealed with such seal which shall be kept in the custody of the presiding judge.

Appointment of delegates. Sec. 21. The Local Government shall, in the Presidency towns and districts, subject to their respective Governments, respectively appoint persons to be delegates to aid in the adjudication of cases arising under this Act.

The persons so appointed shall be Parsis their names shall be published in the official Gazette; and their number shall, within the local limits of the ordinary original civil jurisdiction of a High Court, be not more than thirty, and in the districts beyond such limits not more than twenty.

No trial under this Act can be satisfactory in which a delegate, who is to all intents and purposes a member of a jury, cannot understand the proceedings. A delegate is in a similar position to a juror and cannot be challenged in appeal. (43 I. C. 71.)

Power to appoint new delegates. Sec. 22. The appointment of a delegate shall be for life.

But whenever a delegate shall die, or be desirous of relinquishing his office, or refuse or become incapable, or unfit to act, or be convicted of an offence under the Indian Penal Code or other law for the time being in force, then and so often, the Local Government may appoint any other person being a Parsi to be a delegate in his stead; and the name of the person so appointed shall be published in the Official Gazette.

Delegates to be deemed public servants. Sec. 23. All delegates appointed under this Act shall be considered to be public servants within the meaning of the Indian Penal Code.

Selection of delegates under sections 16 and 17 from those appointed under section 21. Sec. 24. The delegates under sections 16 and 17 to aid in the adjudication of suits under this Act shall be taken under the orders of the presiding Judge of the Court in due rotation from the delegates appointed by the Local Government under section 21.

Practitioners in Matrimonial Courts. Sec. 25. All advocates, vakils and attornies-at-law entitled to practise in a High Court shall be entitled to practise in any of the Courts constituted under this Act; and all vakils entitled to practise in a District Court shall be entitled to practise in any District Matrimonial Court constituted under this Act.

Court in which suits to be brought. Sec. 26. All suits under this Act shall be brought in the Court within the limits of whose jurisdiction the defendant resides at the time of the institution of the suit.

When the defendant shall, at such time, have left British India, such suit shall be brought in the Court at the place where the plaintiff and defendant last resided together.

Suit to be brought in Court within whose jurisdiction, defendant resides at time of its institution : —At the time of the filing of the suit the plaintiff and defendant (both Parsis), in the case of *Dorabji v. Jerbai*, 16 Bom. at page 139, were living in Bombay. It was *held* that the Court's jurisdiction was not barred merely by the circumstance that the parties were married at Akola in the Berars. The Parsi Marriage and Divorce Act is not in force at Akola; but section 26 of the Act permits a husband or wife to bring a suit in the Court established under this Act within the limits of whose jurisdiction the defendant resides at the time of the institution of the suit.

The High Court on its original side has no jurisdiction in a suit between a Parsi husband and a Parsi wife to make an order for permanent alimony unaccompanied by any order for judicial separation, which lies within the jurisdiction of the Parsi Chief Matrimonial Court at Bombay. (*Gulbai v. Behramsha*, 16 Bom. L.R. 211.=38 Bom. 615.)

Last resided together:—In a petition for dissolution of marriage where the husband and wife had no permanent residence, but last lived together in a hotel at Bombay for the greater portion of a month, the husband being then on leave from active service in Mesopotamia—*Held* that there was a sufficient residence within the meaning of the Indian Divorce Act 4 of 1869 to give the Court jurisdiction to entertain the suit.—*Bright v. Bright*, 36 Cal. 964. (*Murphy v. Murphy*, 22 Bom. L.R. 1077.)

The word "resided" does not mean having had sexual intercourse, The word "together" does not govern the word "resided," but only the words "last resided." (*Borgouha v. Borgouha*, 22 Bom. L.R. 361.)

It is not essential for residence that the parties should have a house of their own. It will be sufficient to find the place, where the parties lived together. (*Walsh v. Walsh*, 29 Bom. L.R. 308.)

See also the case of *Wilkinson v. Wilkinson*, 25 Bom. L.R. 945 = 47 Bom. 843.

IV.—Of Matrimonial Suits.

Reliefs provided by this Act, are:—

(*a*) *Nullity of Marriage.*

(*b*) *Dissolution of Marriage in case of Absence.*

(*c*) *Divorce or Judicial Separation.*

(*d*) *Restitution of Conjugal Rights.*

(*e*) *Other incidental reliefs, such as, (1) Alimony, (2) Custody of children, and (3) Settlement of wife's property.*

(a) For a Decree of Nullity.

In case of lunacy or mental unsoundness. Sec. 27. If a Parsi, at the time of his or her marriage, was a lunatic or of habitually unsound mind, such marriage may, at the instance of his or her wife or husband, be declared null and void, upon proof that the lunacy or habitual unsoundness of mind existed at the time of the marriage and still continues.

Provided that no suit shall be brought under this section, if the plaintiff shall, at the time of the marriage, have known that the respondent was a lunatic or of habitually unsound mind.

Marriages declared null and void under this Act:—This Act only deals with nullity of marriage arising from *mental and physical incapacity.* Thus a Parsi marriage may be declared null and void (1) in case of lunacy or mental unsoundness of mind (Sec. 27), and (2) in case of consummation rendered impossible from natural causes (Sec. 28). And under both these sections the grounds on which the marriage is declared null and void are the same, whether the suit is brought by the husband or by the wife.

Proof of Marriage:— The mere bare assertion of the petitioner that she married the respondent is insufficient. Strict proof of the marriage is required.– *Cotterall v. Sweetman,* 1 Rob. 321. (*Rathnammal v. Manikkam,* 16 Mad. at p. 456.)

The presumption in favour of everything necessary to give validity to a marriage is one of very exceptional strength, and the evidence to rebut the presumption must be strong, distinct, satisfactory and conclusive.— *Lopes v. Lopes,* 12 Cal. 706. (*Lucas v. Lucas,* 32 Cal. p. 191.)

Mental incapacity must have existed, unknown to petitioner at time of marriage and continued when suit filed:—The plaintiff will not be entitled to the relief under this section (Sec. 27) if the mental incapacity of the defendant had supervened subsequently, and had not existed at the time of marriage. Nor will the plaintiff succeed in the suit if he or she be found to be aware of the defendant's lunacy or mental unsoundness at the time of marriage. (*Hancock v. Peaty,* 36 L. J. P. & M. 57; *Portsmouth v. Portsmouth,* 1 Hagg. E. R. 355.)

Idiocy at the time of the marriage not within the knowledge of the husband annuls the marriage.—*Elliot v. Gurr,* (1834) 2 Phill. 16. (*Paulappa v. Lea Hangal,* 8 Bom. L.R. 982.)

Upon a petition for nullity of marriage on the ground of insanity, the question which the Court has to determine is not whether the respondent was aware that he was going through the ceremony of

marriage, but whether he was capable of understanding the nature of the contract he was entering into, free from the influence of morbid delusions on the subject. The Court has to look at the nature of the alleged unsoundness of mind to see whether it is of a character which might come on suddenly, or whether it is a matter of progressive growth and development, and to ascertain whether the respondent's insanity can be traced back to an early period to such an extent as will justify the Court in coming to a conclusion that it existed before as well as after the marriage contract was entered into.—*Jackson v. Jackson* (1908) P. 308. (10 Bom. L. R. Journal, pp. 186, 187.)

In case of impotency. Sec. 28. In any case in which, consummation of the marriage is, from natural causes, impossible, such marriage may, at the instance of either party thereto, be declared to be null and void.

Impotency means physical and incurable incapacity to consummate the marriage. If consummation is impossible from natural causes in a husband or in a wife, and the incapacity to consummate be permanent and irremovable, the wife or the husband can get a decree, under section 28 of this Act, for nullity of the marriage. If, however, the consummation of marriage were neither impracticable nor impossible from such natural causes, at the time of the marriage, but become so subsequently, no relief will be granted.

In the absence of an express allegation and strict proof that the party was impotent i.e., physically unfit for consummation both at the date of marriage and at the date of the institution of the suit, a suit for declaration of nullity of marriage on the ground of impotency is not maintainable.

A decree of nullity can be pronounced in a case where, although the husband is not impotent as regards all women, he may be regarded as impotent in fact as regards a particular woman, viz., his wife.- *C. v. C.* (1921) P. 399. (*H. v. H.*, 30 Bom. L.R. at page 527.)

English Law rule of impotency quoad hanc :—In the case of impotence, the Court can interfere where there is a practical impossibility of consummation of the marriage. There are, however, cases in which one of the couple, though both be capable of sexual intercourse has repugnance for the other, resulting in practical impossibility of consummation. (*B. v. B.*, (1901) P. 39.)

Application of this rule in suit by Parsi wife for nullity of marriage on ground of her husband's impotency :—In March 1882, the plaintiff and defendant, Parsis, were married according to the rites and ceremonies of their religion. In October 1882, the plaintiff attained puberty, and for seventeen months from that time she lived with the defendant in his parent's house ; but there was no consummation of the marriage. There was no physical defect in either plaintiff or defendant, nor any unwillingness in the plaintiff to consummate the marriage ; but the defendant had always entertained such hatred and disgust for the plaintiff as to result, in the opinion of the medical experts, in an incurable impotency in the defendant *as regards the plaintiff*.

The delegates unanimously found, on the evidence, that the consummation of this marriage had from its commencement been impossible ; because the defendant was from a physical cause, namely impotency, as regards the plaintiff, unable to effect consummation ; and that there was no collusion or connivance between the parties. *Held* that such impotency *quoad the plaintiff* must be regarded as one of the causes going to make consummation of a marriage impossible under section 28, there being nothing in the Act to suggest a contrary opinion.—*G. v. M.*, 10 App. Ca. 171.

[*S. v. B.*, 16 Bom. 639.]

Delay :—In suits of nullity of marriage, action must be taken with reasonable promptness. Lapse of time, however, is no bar to a suit for nullity of marriage *per se*.

When the impotence is undoubted, mere delay is not sufficient to disentitle the injured party to relief. (*B. v. B.*, 2 Ec. & Ad. 248; *Morton v. Seaton, 3 Phill. 159.*)

Three years rule in England :— Before a suit for nullity can be brought the Court usually requires that there should have been a triennial (three years) cohabitation; the rule only applies when the impotence is left to be presumed from continual non-cohabitation, and not when it is painly proved *aliunde.* (*Sparrow v. Harrison,* 3 Curt. 27; *Briggs v. Margan,* 3 Phill. 329.)

(b) For a Decree of Dissolution in case of Absence.

A Parsi marriage may be dissolved in case of: —

1. Continued absence of any one of the parties for seven years (S. 29), and

2. (a) Adultery of the wife, (b) adultery, or bigamy with adultery, or adultery with cruelty, or adultery with desertion of two years or upwards, or rape, or unnatural offence of the husband (S. 30).

In case of absence for seven years. Sec. 29. If a husband or wife shall have been continually absent from his or her wife or husband for the space of seven years, and shall not have been heard of as being alive within that time by those persons who would naturally have heard of him or her, had he or she been alive, the marriage of such husband or wife may, at the instance of either party thereto, be dissolved.

"When the question is whether a man is alive or dead, and it is shown that he was not alive within thirty years, the burden of proving that he is alive is on the person who affirms it."

"Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years, by those, who would naturally have heard of him, if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

[Ss. 107 and 108. Ind. Evi. Act, 1872.]

Where a person is not heard of for seven years by those who would naturally have heard of him if he had been alive, the only presumption that arises under section 108 of the Indian Evidence Act, 1872 is as to the fact of his death (at the time the question is raised, that is, at the time of the suit and not at some antecedent date), without reference whatever to the date of the death. The date of the death must be proved by the party interested in establishing that a person died on or before a particular date. The section does not require the Court to hold the person dead at the expiration of seven years therein indicated, but merely provides that the burden of proving that he is alive at the time of the suit is shifted to the person who affirms it.—*Narki v. Phelki,* 37 Cal. 103; *Narayan v. Shrinivas,* 8 Bom. L.R. 226. (*Gopal v. Manaji,* 25 Bom. L.R. 134.)

(c) For Divorce or Judicial Separation.

On ground of wife's adultery. Sec. 30. Any husband may sue that his marriage may be dissolved, and a divorce granted, on the ground that his wife has, since celebration thereof, been guilty of adultery;

On ground of husband's adultery, and any wife may sue that her marriage may be dissolved, and a divorce granted, on the ground that, since the celebration thereof, her husband has been guilty of adultery with a married, or fornication with an unmarried, woman not being a prostitute, or of bigamy coupled with adultery, or of adultery coupled with cruelty, or of adultery coupled with desertion for two years or upwards, or of rape, or of an unnatural offence.

In every such suit for divorce on the ground of adultery the plaintiff shall, unless the Court shall otherwise order, make the person, with whom the adultery

is alleged to have been committed, a co-defendant, and in any such suit by the husband the Court may order the adulterer to pay the whole or any part of the costs of the proceedings.

This section taken from English Law : -This section which lays down the grounds of divorce is taken almost exactly from section 27 of the Matrimonial Causes Act, 1857 (20 & 21, Vict. C. 85.)

Under this section as well as section 27 of the English Act, the ground upon which the husband can proceed in law against his wife for divorce from her is *adultery alone* committed by the wife since the celebration of their marriage. The ground, however, on which the wife can sue her husband for divorce under the two sections of the English and Indian Acts respectively is not adultery alone by the husband. The adultery, in his case, must be accompanied by some circumstances of aggravation.

Adultery in a woman is the act of sexual intercourse by her with a married man, who is not her husband. *Adultery in* a *man* is the act of sexual intercourse by him with a married woman, who is not his wife.

Adultery. See S. 497. Ind. Pen. Code

Evidence and Presumption of adultery :—It must be proved that the woman, with whom the person alleged committed adultery was the legally married wife of another man, and that the husband, the defendant, had sexual intercourse with that woman. The adultery must be proved to have been actually committed. Mere opportunity to commit adultery is not sufficient. There must be some overt act or some proximate circumstances. (*Harris v. Harris*, 2 Hagg. 379 ; *Grant v. Grant*, 2 Curt. 57 ; *Best v. Best*. 1 Add, 487.)

Mere admission of adultery by either party not to be accepted : —The admission of adultery by the husband or the wife alone should never be accepted as sufficient to establish adultery without corroboration either by

witnesses or at least by strong surrounding circumstances.—*Evans v. Evans*, (1849) I Rob. 165; *Simons v. Simons*, (1847) I Rob. 165. (*Collard v. Collard*, 44 All. 254).

"In all divorce cases amongst other things, the judge has to satisfy himself whether there is any collusion between the parties, and further as to the complete honesty and truth of the petition."—(*Howard v. Howard*, 44 All. 728.)

"The true test seems to be whether the Court is satisfied from the surrounding circumstances in any particular and exceptional case that the confession is true. If so satisfied, it is open to the Court to grant relief, notwithstanding the absence of independent corroborative testimony."—*Getty v. Getty*, (1907) P. 334; *Warren v. Warren*, (1925) P. 107; *Robinson v. Robinson*, (1858) I Sw. & Tr. 393, 394; *Williams v. Williams*, (1865) L. R. I. P. & D. 29.

[*Over v. Over*, 27 Bom. L. R. at pp. 251, 254, 261=49 Bom. 368.]

In a case of petition for divorce, it is obligatory upon the Court carefully to consider all the circumstances of the married life and in particular the circumstances relating the petitioner's adultery.—*Morgan v. Morgan*, (1869) I. P. & D. 644. (*Sherring v. Sherring*, A.I.R. 1928 All. 338.)

Divorce-suit by Parsi Husband—Defendant under twenty-one:—In the case of *Sorabji v. Bachoobai*, 18 Bom. 366, it was held that in a suit by a husband for divorce under section 30 of the P. M. & D. Act, 1865, the defendant, if under the age of twenty-one years, although more than eighteen, must be deemed to be a minor, and a guardian for suit of the defendant must be appointed.

"The Indian Majority Act 9 of 1872 is not applicable, to Parsis, when the question is as regards capacity of a person to act in the matter of marriage or divorce.—Sec. 2 (a)." (*Ibid.* at page 367.)

Parsi Husband's suit for Divorce for Wife's Adultery, subsequently compromised:—The facts and circumstances of the case No. 3 of 1910 (*Pirosha v. Soonabai*) of

the file of the Parsi Chief Matrimonial Court at Bombay have been set out shortly by Davar, J. in the case of *Payne & Co. v. Pirosha*, 13 Bom. L.R. at pages 927, 928.

Husband's Suit for Divorce for Wife's Adultery:—In an application for dissolution of marriage by husband on the ground of wife's adultery direct evidence will not ordinarily be available, but there ought to be such clear and cogent evidence both as to inclination, opportunity and conduct as to lead to the inevitable inference that the offence has been committed. The burden of proving misconduct of the wife in such a case is heavily upon the husband. (*Watson v. Watson*, A. I. R. 1926 Cal. 703=43. C.L.J. 37.)

Parsi Husband's suit for Divorce for Wife's Adultery—Court's Jurisdiction under this Act in case of valid marriage outside British India:—The circumstances of the case of *Dorabji v. Jerbai*, 16 Bom. 136 have been given under the heading "*Previous consent of Guardian*" in notes under sec. 3 *Supra*.

In the above case at page 139 it was observed:—"Section 30 provides for suits for the dissolution of a marriage, and the word "Marriage" is defined in sec. 2 as meaning, "a marriage between Parsis whether contracted before or after the commencement" of the Act. The provisions of sec. 30, therefore, apply only to marriages celebrated in accordance with the requirements of sec. 3. That section applies to marriages whensoever celebrated. It applies also to valid marriages wheresoever celebrated. If it had been the intention of the Legislature to give relief to Parsi husbands and wives, in proper cases, only if they had been married in British India, that intention would have been clearly expressed. In the Indian Divorce Act of 1869 the Courts established thereunder have their jurisdiction in respect of marriages expressly limited. Those Courts can make no decree of dissolution of marriage unless the marriage has been solemnized in India. No

such limitation of the jurisdiction of this Court is to be found in Act XV of 1865. "As in this case, both the parties were domiciled within the territorial jurisdiction of the Court at the time of the marriage, and were so domiciled at the time of the filing of the suit, and the adultery was also committed within the jurisdiction, it was *held* that the Court had jurisdiction, and its jurisdiction was not barred merely by the circumstance that the parties were married at Akola."

Under Mahomedan Law a wife of 16 years of age is entitled to sue for divorce without a next friend by virtue of sec. 2 (a) of the Ind. Maj. Act. The case of Parsis is different. *Khatijabai v. Umarsaheb* 52 Bom. 295. followed. (*Ahmed v. Bai Fatma,* 55 Bom. 160.)

There is no matrimonial law in British India applicable to the inhabitants generally. The Courts apply different laws to the several religious communities. In the case of Hindus, marriage is regarded as a sacrament, and there is no right of divorce, although amongst low caste Hindus, divorce, usually of a most informal character, is recognized by custom. In the case of Mahomedans marriage is a contract, and divorce is allowed at the will of the husband by *talak.* In the case of Christians and also in the case of Parsis, the right to divorce is regulated by Acts of the legislature. (*Khumbatta v. Khumbatta,* 36 Bom. L.R. at p. 17.)

The rights and obligations of parties relating to the dissolution of the marriage do not form part of the marriage contract, but arise out of, and are incidental to, such contract and are governed by the *lex domicile.*— *Nachimson v. Nachimson,* (1930) P. 217. (*Ibid.* 11.)

Wife's Suit for Divorce for Husband's Adultery :—Marital faithlessness or adultery on the husband's part will, beyond a doubt, be proved from the facts of the husband's putting of a woman for years to-

gether as completely as possible, into the place of his wife, of her managing the husband's house, of her being the "lady of the house," of her bearing him children, and "helping him generally in his business in every thing," and that without any disguise whatever, without any acquiescence or connivance of all facts by his wife. (*Fowle v. Fowle*, 4 Cal. at p. 273.)

"**Fornication**" is the act of incontenancy in single persons; for, if either party be married it is adultery. (Wharton's Law Lexicon.)

Under this section fornication with an unmarried woman, who is a prostitute is excusable and does not form a ground for divorce by the wife against her husband.

Bigamy with Adultery:—Adultery alone of the husband is not a sufficient ground for divorce sought by a Parsi wife against her husband. Bigamy is one of the circumstances of aggravation to be joined to adultery under sec. 30.

In order to establish an allegation of bigamy it is necessary to prove such a marriage as, but for the former marriage, would be valid. The adultery, which must be joined to bigamy, must have been committed with the same person with whom the bigamy is committed. It is not enough to prove a bigamous marriage with one woman and adultery with another. There should be proof of adultery and bigamy with the same woman. (*Burt v. Burt*, 20 L. J. P. & M. 133.)

Adultery with Cruelty:—The next circumstance of aggravation to be joined to adultery is cruelty.

A former decree of judicial separation in favour of a wife is no bar to her petition for divorce on the ground of adultery and cruelty.—*Green v. Green*, 29 L. T. Rep. (N. S.) 251; *Bland v Bland*, 35 L. J. P. & M. 104. (*Ledlie v. Ledlie*, 22 Cal. 544.)

Cruelty:—Cruelty means legal cruelty, as explained in English decisions, i.e., injury causing danger to life or limb, or health (bodily or mental), or reasonable apprehension of injury to life or limb or health. The

definition of legal cruelty is that which may endanger the life or health of the party.—*Russell v. Russell*, (1813) 64 L. J. P. & M. 105; *Waring v. Waring*, 2 Phil. 132. (*Dhunjibhai v. Hirabai*, 2 Bom. L. R. at page 848; *Thompson v. Thompson*, 39 Cal. at page 398; *Stuart v. Stuart*, 53 Cal. 436.)

In **Moonshee Buzloor Raheem v. Shumsoonnissa Begam,** 11 M. I. A. at page 611 it was said—"As to what constitutes cruelty in law, there is the leading case of *Evans v. Evans*, 1 Hagg. Con. 38. In this case Lord Stowell observes—"Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, if they do not threaten bodily harm, do not amount to legal cruelty.....No husband could be found guilty of legal cruelty towards his wife, unless he had either inflicted bodily injury upon her, or had so conducted himself towards her as to cause actual injury to her mental or bodily health, or so as to raise a reasonable apprehension that he would either inflict actual bodily injury upon her or cause actual injury to her mental or bodily health, In a word, he must so have conducted himself towards her as to render future cohabitation more or less dangerous to her life or limb or mental or bodily health....." "There must be actual violence of such a character as to endanger personal health or safety; or there must be a reasonable apprehension of it." "The Court." as Lord Stowell said in *Evans v. Evans*, 1 Hagg. Con. 37. "has never been driven off this ground."

Where there a distinct violence by the husband towards his wife, which would cause a reasonable apprehension of future danger, a single act of cruelty, is tantamount to legal cruelty. (*Jamna v. Gordhanbhai*, 9 Bom. L. R. Journal, Notes of cases, page 72.)

Adultery with wilful desertion for two years or upwards:—To sustain a charge of adultery by a wife against her husband, wilful desertion for two years or upwards is the third circumstance of aggravation to be coupled with adultery.

Desertion : – In considering what desertion is, it is laid down in *Macqueen on Divorce* p. 212—"There must be a deliberate purpose of abandonment of conjugal society."

"A husband, who withdrew from cohabitation with his wife, may be guilty of the offence of desertion, although he continues to support her."—*Yeatman v. Yeatman*, L.R. I. P. & D. 489; *Macdonald v. Macdonald*, 4 Sw. & Tr. 242.

"We think its (Probate & Divorce Court's) decisions must usually and necessarily be a guide to the Courts in India, except where the facts of any particular case arising out of peculiar circumstances of Anglo-Indian life, constitute a situation, such as the English Court is not likely to have had in view."

[*Fowle v. Fowle*, 4 Cal. at pp. 265, 266, 276.]

Green, C. J. in *Wood v. Wood*, 3 Cal. at pages 493, 494 says:—"Now we do not for a moment dispute the proposition that either where the separation is the act of the wife, or where the wife of her own free will assents to a complete separation, there can be no desertion; nor until husband and wife have again cohabited can subsequent conduct transform what was voluntary separation into desertion by the husband."

Desertion must be wilful :—Desertion means a wilful abstention by the husband against the wish of the wife. (*Kankoo v. Shiva Toya*, 17 Bom. 624; *Jackson v. Jackson* 44 Cal. 1091.)

The word "wilful" means governed by will without yielding to reason—of set purpose—voluntary—or done or suffered by design. Mere refusal of the marital

intercourse does not constitute desertion, It is desertion if one party to a marriage, without the consent, direct or indirect, or against the will of the other, wilfully, without cause or reasonable excuse, makes the other live apart. *Thompson v. Thompson*, 1 Sw. & Tr. 231; *Beaman v. Beaman*, 2 Sw. & Tr. 652. (*Fowle v. Fowle*, 4 Cal. at p. 266.)

"The law upon this subject is very clearly and expressly laid down by Lord Penzance in *Jaffreys v. Jaffreys*, 33 L. J. P. & M. 84:—It must not be supposed that a husband can neglect and throw aside his wife, and afterwards, if she is unfaithful to him, obtain a divorce on account of infidelity. The Legislature never intended that such a man should be entitled to a divorce."

"If chastity be the duty of the wife, protection is no less that of the husband. The wife has a right to the comfort and support of the husband's society, the security of his house and name, and the just protection of his presence so far as his position and avocation will admit. Whoever falls short in this regard, if not author of his misfortune, is not wholly blameless in the issue; and though he may not have justified the wife, he has so far compromised himself as to forfeit his claim for a divorce."

"The propriety and wisdom of the principles thus laid down cannot for a moment be questioned, and if their recognition and application is essential to the condition of life in England, how much more indispensable are they to the state of society in this country. The power given to the Courts to dissolve the marriage-bond was not granted in the interest of the husbands who, having grown tired of their wives, deliberately separate from them, careless as to what becomes of them, and virtually encouraging them to go astray."

[*Holloway v. Holloway*, 5 All. at pp. 75, 76.]

Where the husband establishes a new home and requests his wife to follow there and furnishes the means with which to travel, and she declines to take up her residence with him, the husband is not thereby guilty of deserting his wife. But the wife is guilty of deserting him. The right of the husband to compel his wife to follow him wherever he chooses to go is

not absolute. His selection of a domicile must be reasonable. From mere whim or caprice he could not change his house. He may do so, however, as often as his business, his comfort, or his health may require.—*Roby v. Roby*, (Idaho) 77 P.R. 213; *Kennedy v. Kennedy*, 87 Ill. 250; *Cutler v. Cutler*, 2 Brews (Pa) 511. (8 Bom. L.R. Journal at pages 273, 274.)

The husband's refusal to abandon his bad habits—*Gibson v. Gibson*, 29 L.J.P. & M. 25, and his leaving his wife and expressing his intention not to return to cohabitation, although the wife, after deserting made use of casual expressions purporting that she did not desire to see him—*Meara v. Meara*, 35 L.J.P. & M. 33, have been held to amount to desertion. *(Fowle v. Fowle*, 4 Cal. at p. 264.)

Even gross and habitual intemperance combined with violence of temper do not constitute sufficient reasons justifying the husband to go away from his wife, leaving her to support herself, and not troubling himself as to how she is living.—*Heyes v. Heyes*, L. R. 13 P. D. 11. (X—v.X—., 22 Mad. 328.)

Separation purely for reasons of convenience by the consent of the wife, with no intention of a permanent separation, does not amount to separation. And a separation under sheer pressure of circumstances is not abandonment against the will of the wife, though subsequent events may turn the original honest and innocent separation into a desertion.—*Townshed v. Townshed*, L. R. 3 P. & M. 129; *Fitzgerald v. Fitzgerald*, L. R. I. P. & M. 694. (*Wood v. Wood*, 3 Cal. at page 491.)

Desertion—Commencement and Completion: Desertion commences when the intention to desert is complete, when the husband makes up his mind to abandon his wife, and live with another woman.—*Gatehouse v. Gatehouse*, 36 L. R. P. & M. 121. It commences in fact when the person deserted becomes aware of it. After such a knowledge of desertion against her will and wish, the

wife should have taken steps towards renewal of that intercourse, which had been suspended, so as to sustain an action of desertion.—*Graves v. Graves*, 33 L. J. P. & M. 66; *Buckmaster v. Buckmaster*, L. R. 1 P. & D. 713. (*Fowle v. Fowle*, 4 Cal. at p. 279.)

No decree can be passed on a petition for divorce made before the two years period of desertion is over, as it is premature and without a cause of action. A *bona fide* offer to return before the completion of two years will not constitute desertion. But when the offence of desertion has once commenced or has been completed the person deserted gets a complete right to relief, and it is not lost by the other party, making, subsequently to the two years, a *bona fide* offer to return.—*French v. French*, 62 L. R. 609; *Cargill v. Cargill*, 4 Jur. N. S. 764; *Basing v. Basing*, 33 L. J. P. & M. 150. (*Ibid.* at p. 264.)

Bigamy coupled with adultery or adultery coupled with wilful desertion for two years or upwards:—In the case of *Avabai v. Jerbai*, 3 B. H. C. 113, a Parsi residing in Bombay, after this Act was passed, but before it came into operation, contracted a second marriage during the life-time of his first wife, from whom he had not been divorced and whom he had wilfully deserted for two years. In appeal Couch, C. J. at pages 115, 116 of the report remarks:—"I am of opinion that the learned Judge was right in rejecting the plaint. There could be no adultery in the respondent's cohabiting with the second wife, if the marriage was not illegal. The second marriage in the case is alleged to have taken place on the 30th of July 1865, before Act XV of 1865 commenced and took effect. The preamble of the Act and section 4 show what the state of the law with regard to marriages was among the Parsis, that the customs of the sect were such that such second marriages could not be set aside; and the opinion is strengthened by the case cited (*Meherwanji v. Avabai*, 2 Borr. 231) from Borrowdale by the learned Judge."

"But bigamy coupled with adultery must have reference to a marriage which was unlawful, and therefore bigamous. I do not see any reason why marriages contracted before the passing of the Act should be made subject to the consequences of the Act. When it was passed nothing could have been further from the intention of Legislature than to give retrospective effect to it. Hence questions with reference to past marriages cannot be raised under this Act. They must be governed by the law which prevailed before it came into operation." *(Ibid.)*

Rape.—(See S. 375 I. P. Code.)

Unnatural Offence.—(See S. 377 I. P. Code.)

Under the provision in the last paragraph of Sec. 30 the *person with whom the adultery is alleged to have been committed is to be made co-defendant in* case the *suit* is brought either *by* the *husband or by* the *wife*. This part of the section differs from the English Law on the point.

Divorce proceedings are of a peculiar character; there may be collusion or connivance; there are no King's Proctors in this country. The Court should have every help to come to the truth. There are two reasons why an alleged adulterer is made a party (in India)—(a) that he may protect himself, and (b) public policy requires that divorce should not be lightly granted.—*Fisher v. Keane*, L. R. 11 Ch. D. 353; *Carryr v. Carryr*, 34 L. J. Mat. 47; *Jones v. Jones*, (1896) P. 165 169; *Bell v. Bell*, L. R. 8 P. D. 217. (*Ramsay v Boylr*, 30 Cal. at p. 494.)

Under a marriage settlement defendant No. 3 took, on the death of her husband, certain interest during her life. Subsequently defendant No. 3 obtained a divorce from her husband (7-4-1926). After the death of the husband a question arose whether she took interest in the settled property. *Held* :—that the life-interest which she took under the settlement was unaffected by her divorce—*Fitzgerald v. Chapman*, (1878) 1 Ch. D. 563; *Burton v. Sturgeon*, (1876) 2 Ch. D. 318. (*Lady Aimai Wadia v. Sir J. J. Bart.*, 32 Bom. L. R. 1175.)

"Where a petition for divorce alleges adultery with a named person and with some person or persons unknown, leave to dispense with the named co-respondent must first be given by the Court before relief can be granted on the petition." (*Henderson v. Henderson*, 26 Bom. L. R. at p. 469.)

Husband liable in first instance for his wife's costs in divorce-suit under Common Law.

Rule applicable to Parsis :—In the case of *Payne & Co. v. Pirosha.* 13 Bom. L. R. 920 the plaintiffs, Messrs. Payne & Co. maintained this suit against their client's husband, the defendant, to recover from him their costs as between attorney and client as necessaries supplied by them to the defendant's wife.

"The Common Law of England applies to Parsis residing in the Presidency town of Bombay. The result of all the most important cases on the subject is admirably summed up in Halsbury's Laws of England, Vol. XVI at pages 428 and 429, where it is stated—

"A wife, who is deserted by her husband or is turned away by him without adequate cause, or is compelled to leave him in consequence of his misconduct, has, by implication of law, authority to pledge his credit for the costs of taking advice, and for costs as between solicitor and client of and in connection with such legal proceedings, as may be necessary for her security and protection, or as may reasonably be incurred in taking proceedings against him."

"A wife also has authority, by implication of law, to pledge the credit of her husband for costs reasonably incurred by her in respect of the prosecution or defence of the proceedings for a dissolution of the marriage instituted by her or by her husband, or in respect of proceedings for a judicial separation, the solicitor acting for her being entitled in the event of success to sue the husband for all the extra costs reasonably incurred beyond those allowed on taxation between party and party."

" It is not necessary, in order to charge the husband, that the wife should be successful in the proceeding, but the costs must be incurred reasonably."

" The foundation of the Common Law Rule is that when the wife finds it necessary to protect herself and her interest, more especially if she be attacked by her husband, she ought to have the means to do so, and is, therefore, entitled to pledge her husband's credit for all proper and reasonable costs necessary to defend herself."

" In a divorce suit the costs of the wife payable by the husband are not limited to the amount paid into the court, or secured by the husband for that purpose. When the defence was fairly and reasonably conducted, the solicitor ought to be paid in full his costs, his costs properly incurred."—*Robertson v. Robertson,* 6 P. D. 119. [*Payne & Co. v. Pirosha,* 13 Bom. L.R. at pp. 930-932, 936.]

And at page 938 of the report it is summed up—" The result of the reasoning in the judgments of their Lordships of the Court of Appeal in *Harrison v. Harrison,* 13 P. D. 180 is, that the solicitors must make all efforts to secure their costs from the real debtor, the husband, before they can be allowed to apply for a charging order against the wife's property recovered or preserved in the suit through their exertions."

Result of English Common Law applied to Parsis of Bombay :—In the case of *Payne & Co. v. Pirosha,* 13 Bom. L. R. at page 939 the learned judge observes :—" I am thus driven to decide every point in this case against the defendant. I have done so with great reluctance and much regret. The question raised in this suit has never before arisen in a case tried by the Parsi Chief Matrimonial Court. My decision may be of small importance so far as the parties to the present suit are concerned, but I am afraid, it will have a most disasterous effect on the Parsi community; and to the unfortunate husband, who may have to resort to the Matrimonial Court, there will

now be an added terror to the usual unpleasantness associated with suits arising out of domestic troubles. As soon as his troubles are over in the Matrimonial Court, he will be faced with the possibility of a suit at the instance of his wife's solicitors for all her expenses under the guise of necessaries supplied to her, although he may have been successful in the suit. This is the result of my present judgment, and the result is most deplorable, and is entirely due to the fact that English Common Law is held to be applicable to the Parsis of Bombay."

Costs—Matrimonial Suits—Practice:—In Matrimonial causes the fund paid in by the husband in Court is for the benefit of the wife's attorney, and she is entitled to have it so applied, whatever the result of the litigation, provided ofcourse that the attorney is in no way to blame. *Hall v. Hall,* (1891) P. 302; *Hurley v. Hurley,* (1891) P. 367. "The case of *Walker v. Walker*, (1897) 76 L.T. 234 shows that the solicitor or attorney, who takes up a hopeless case, must not assume that his costs will be provided for." (*Nusserwanji Wadia v. Eleonora Wadia,* 15 Bom. L.R. at p. 604=38 Bom. 125.)

Solicitor's Lien:—The rights and duties of attorneys are in no way part of the indigenous law or practice in India. The attorney's lien in the High Courts of India is governed exclusively by the law as existed in England before the passing of the Solicitors Act, 1860, and by that law the solicitor had a lien for his costs on any funds or sum of money recovered for, or which became payable to, his client in the suit. But this lien is a particular lien and is not available for the general costs for all business done by the solicitors for the clients, but only extends to the costs of the suit in which the property has been acquired or preserved by their exertions—*Tyabji & Co. v. Jetha & Co.* 51 Bom. 855. The lien does not attach to immovable property, but with this exception it applies to property of every description, including costs ordered to be paid to the client. (*Sadanand v. Pradhan,* (1927) 52 Bom. 336.)

See also *In re Ebrahim,* (1929) 55 Bom. 377.

Court may order adulterer to pay costs:—The provision made in the third paragraph of this section (Sec. 30) as to the Court's discretion in ordering whole or part of

the costs of the proceedings to be paid by the adulterer in divorce suits by the husbands corresponds with section 34 of the Matrimonial Causes Act, 1857.

Grounds of judicial separation. Sec. 31. If a husband treats his wife with such cruelty or personal violence as to render it in the judgment of the Court improper to compel her to live with him, or if his conduct afford her reasonable grounds for apprehending danger to life or serious personal injury, or if a prostitute be openly brought into or allowed to remain in the place of abode of a wife by her own husband, she shall be entitled to demand a judicial separation.

A suit for judicial separation is the modern equivalent for the ecclesiastical divorce *a mensa et thoro.* (*Margaret v. Harry*, 26 All. at p. 558.)

As regards the persons entitled to sue for judicial separation, while this section allows the wife alone to demand such separation from her husband, the English Law section (S. 16 Matri. Causes Act, 1857.) allows it to be obtained either by the husband or the wife. The two sections again differ from each other *in respect of* the *grounds of judicial separation.*

Cruelty or violence rendering improper for wife to live with husband:—There must be proof of bodily injury or of a reasonable apprehension of such bodily injury.

" In the Divorce Court cruelty is treated as a question of fact, and in general the test is, whether bodily injury or a reasonable apprehension of it, or injury to health, has been occasioned by the conduct complained of. In connection with actual violence it should be observed that the question is sometimes complicated by the husband pleading that it was due to mental disorder. Obviously the probability of recurrence is the main test in such cases whether legal cruelty has been committed or not. If the man is actually insane, then acts of

violence committed in that condition are no grounds for separation.—*Hall v. Hall*, 3 Sw. & Tr. 347. Injury to health may also be caused otherwise than by actual violence or threats of violence. Neglect, coldness and insult—expressions of hatred and loathing may be carried to such an extent as to seriously affect the wife's health, and in that case may be ground for judicial separation. (3 Bom. L.R. Journal, at pp. 166, 167.)

In suit No. 2 of 1893 on the file of the Parsi Chief Matrimonial Court at Bombay, a Parsi wife filed in February 1893 a suit against her husband, praying (*inter alia*) for judicial separation and for permanent alimony. The parties were married on or about the 29th March 1875. The husband had, during his cohabitation with his wife, treated her with cruelty, until finally, on or about the 16th June 1891, he turned her out of his house together with her daughter. And hence the suit for judicial separation. The Parsi Chief Matrimonial Court passed a decree *nisi* for judicial separation in favour of the wife. An appeal, subsequently filed in the High Court by the husband against the decree *nisi*, was dismissed, and the decree was made absolute. (*Motibai v. Motibai*, 24 Bom. at pp. 466, 467.)

In *Gulbai v. Behramsha*, 16 Bom. L.R. 211=38 Bom. 615, the plaintiff filed a suit for maintenance against her husband on the ground of desertion. On the question arising whether a Parsi married woman was entitled to file a suit on the original side of the Court for maintenance, Macleod, J. at page 212 of the report thus observes: —" In the case of Parsis there is a Special Act, which establishes a special court for the purpose of deciding matrimonial disputes amongst the Parsis, and though there is apparently no provision, by which a Parsi wife can apply to the Parsi Matrimonial Court for an order of maintenance by itself on the ground of desertion, she can on certain grounds claim that she is entitled to demand judicial separation, and on the court granting a decree for judicial separation, the court can order the husband to provide her with permanent

alimony." It was *held* that the High Court on the original side had no jurisdiction in a suit between a Parsi husband and a Parsi wife to make an order for permanent alimony unaccompanied by an order for judicial separation, which lies within the jurisdiction of the Parsi Matrimonial Court.

The husband was convicted of cruelty to his wife and a separation order was made in favour of the wife. The wife thereafter remained and lived apart from her husband, who subsequently entreated her to return and live with him. She agreed to do so on the terms of a deed, whereby he covenanted not to assault her or conduct himself in such a way as to entitle her to obtain a further separation order, and that if he committed a breach of that covenant he would pay her £ 150; and the wife covenanted that on payment by him of the £ 150, she would not demand or receive any weekly sum that might be ordered by the Justices to be paid to her under any further separation order that she might obtain. The wife returned to live with the husband, who again assaulted her; whereupon she obtained a further separation order from the Justices. She then brought her action for the recovery of the £ 150, due under the covenant. *Held*, that the covenant was not void as against public policy and that she was entitled to recover.—*Harrison v. Harrison*, (1910) 7 K.B. 35. (12 Bom. L. R Journal, 17, 18.)

Judicial separation can only be given, when the petitioner comes to Court with a pure character and is free from all matrimonial misconduct. In general it is not open to a guilty party to obtain relief in a matrimonial suit either by way of judicial separation or divorce.—*Otway v. Otway*, (1888) 13 P. D. 141. (*Hill v. Hill*, 25 Bom. L. R. 289.)

On "*Cruelty*" see notes and cases under Sec. 30 *supra*, as also cases on Sec. 36 under the heading "*Cruelty or personal violence.*"

Distinction between divorce and judicial separation:—Divorce is either (a) divorce *a vinculo matrimonii* (from the bond of marriage)—the complete dissolution of the marriage cantract, carrying with it the power of remarriage on the part of both the parties to the marriage,—the complete and entire dissolution and severance of

the marriage union of the couple, whereby the parties thereto get the freedom of marrying again, as in the case of death of either party, or (b) divorce *a mensa et thoro* (from bed and board)—the incomplete severance of the marriage union carrying with it no power of remarriage on the part of the couple, and which incomplete severance is now called "judicial separation," giving a legal warranty to the parties—the husband and the wife—to live separate from each other. In spite of such a decree, unlike in divorce, they remain husband and wife, and none of them could, in the life time of the other, marry again, and the obligation to maintain the wife on the husband's part continues.

In divorce either *by* the *wife or* the *husband*, adultery is a necessary element; *in judicial separation* under this section, adultery is not at all an element.

In divorce the decree takes effect when the provisions of section 43 of the Act (XV of 1865) are complied with; while *in judicial separation* the decree being final takes effect immediately from the day on which it is dated.

The case of *Cawasji v. Sirinbai*, 23 Bom. 279 decided that an agreement between a Parsi husband and a wife for their living separate is a lawful and binding agreement.

Suits for divorce or judicial separation. Sec. 32. In a suit for divorce or judicial separation under this Act, if the Court be satisfied of the truth of the allegations contained in the plaint, and that the offence therein set forth has not been condoned, and that the husband and wife are not colluding together, and that the plaintiff has not connived at, or been accessory to the said offence, and that there has been no unnecessary or improper delay in instituting the suit, and that there is no other legal ground why relief should not be granted, then in such case, but not otherwise, the Court shall degree a divorce or judicial separation accordingly.

Grounds for divorce or judicial separation :—This section borrows its language substantially from the English Act, so far as it enumerates the legal grounds on which relief by way of divorce should be refused. *(Meherbai v. Hormusji*, 10 Bom. L. R. at page 1022.)

I. Court must be satisfied of truth of allegations in plaint:—A decree for dissolution of marriage cannot be made only on admissions, and without recording any evidence. A marriage must be strictly proved. Non-denial or even mere admission of marriage will not do.—*Patrickson v. Patrickson,* L. R. 1 P. D. 86. *(Kanku v. Shiva Toya,* 17 Bom. 625 ; *Wilkinson v. Wilkinson,* 25 Bom. L. R. 945 ; *Hemsore v. Hemsore,* 26 Bom. L. R. 467 ; *Over v. Over,* 27 Bom. L. R. 251 ; *Premchand v. Bai Gulab,* 29 Bom. L. 1136.=51 Bom. 1026.)

In the case of *John v. Mary,* 8 B. H. C. at p. 52 Mr. Justice Green remarks :— In matters of so important a nature as a dissolution of marriage, it is surely not an unreasonable requisition that persons seeking such relief must prove the facts, on which their right to a decree is founded, by the best evidence which the circumstances of the case will admit."

The petitioner must come to Court with clean hands.—*Otway v. Otway,* (1888) 13 P. D. 141. (*King v. King,* 4 Bom. at p. 443 ; *John v. Mary,* 8 B. H. C. at p. 53.)

Generally a guilty party in a matrimonial suit cannot obtain judicial separation or divorce. The neglect or misconduct depriving a petitioner of his right to a decree for divorce must be *wilful* neglect or misconduct, which has conduced to the respondent's first fault from virtue. The husband's causing or conducing to his wife's unchastity by his wilful neglect and misconduct may rightly be considered by the Court in exercising the discretion whether a divorce shall be granted against him in favour of the uncharte wife, the petitioner.—*St. Paul v. St. Paul,* 1 P. D. 739 ; *Symons v. Symons,* (1897) P. D. 167. (*Holloway v. Holloway,* 5All. 73 ; *X—v. X—,* 23Mad. 328 ; *Reberio v. Reberio,* 54 Cal. 80.)

As to discretion there cannot be a sound exercise of discretion by a court, when there is an omission to consider the necessary circumstances. (*Khimchand v. Sabhagchand,* 25Bom. L. R. 242.)

The court should endeavour to promote virtue and morality, and to discourage vice and immorality. It ought not to limit or restrict that discretion by laying down rules within which alone the discretion is to be exercised.—*Wickins v. Wickins,* (1918) P. 265. (*Sherring v. Sherring,* A. I. R. 1928 All. 338.)

II. Offence has not been condoned :—"It is well settled that resumption or continuance of cohabitation with complete knowledge of all the circumstances operates as *condonation*. Sir C. Creswell explained in *Peacock v. Peacock*, (1858) 1 Sw. & Tr. 183 that condonation is forgiveness of a conjugal offence with full knowledge of all the circumstances. Lord Chelmsford held in *Keats v. Keats*, (1859) 1 Sw. & Tr. 334 that condonation is a blotting out of the offence imputed, so as to restore the offending party to the same position as he or she occupied before the offence was committed. In *Ellis v. Ellis*, (1863) 4 Sw. & Tr. 154 condonation was explained to mean the complete forgiveness of all such offences as were known to or believed by the offended spouse so as to restore between the spouses the *status quo ante*. Consequently mere forgiveness is not condonation ; to be condonation it must completely restore the offending party, and must be followed by cohabitation. The best evidence of condonation is the continuance or resumption of sexual intercourse"—*Windham v. Windham*, (1863) 32 L. J. P. & M. 89 ; *Beatrice v. Phillip*, 44 Cal. 1091. (*Moreno v. Moreno*, 47 Cal. at p. 1074.)

Having received reasonably probable information of his wife's adultery, the husband ought to cease cohabitation with her, otherwise he condones. (*John v. Helen*, 5 Mad. 118.)

Husband's adultery and wife's adultery in respect of condonation :—"Much would be considered culpable in a husband, which is praiseworthy in a wife. A woman has not the same control over her husband, has not the same guard over his honour, has not the same means to enforce the observance of the matrimonial vow, his guilt is not of the same consequence to her, therefore the rule of condonation is held more laxy against her. Courts have often held condonation praiseworthy in a wife, and under similar circumstances culpable in a husband.—*Ferrers v. Ferrers*, 1 Hagg. Con. C. 133 ; *Turton v. Turton*, 3 Hagg. 338."

"*D'Aguilar v. D'Aguilar,* 3 Hagg. Ec. Rep. 774, 777, and *Curtis v. Curtis.* 1 Sw. & Tr. 75, 192, are a type of a class of cases in England, where it is undoubtedly said by high judicial authority, that condonation on the part of the wife must, in many cases, not be presumed from the mere fact of her continuing to cohabit with her husband, after infidelity or cruelty on his part; because a virtuous and self-denying woman will, for the sake of her children or for the peace or reputation of her family, submit to live and sleep with her husband as a matter of duty, against her own inclinations, and without any intention of condoning his offence."

[*Jogendromidi Dossee v. Hurrydoss,* 5 Cal. at p, 506.]

Revival of condoned offence:—"Mr. Justice Fletcher in *Thompson v. Thompson,* (1911) Cal. 395, has conclusively shown, upon an exhaustive review of all the relevant authorities on the subject, that condoned adultery is revived by a subsequent matrimonial offence. This principle is based on the theory that condonation of matrimonial offence implies that no further matrimonial offence shall occur. Amongst recent cases, where this doctrine has been recognised and applied may be mentioned *Price v. Price,* (1911) P. 201, *Moss v. Moss,* (1916) P. 155, *Roberts v. Roberts,* (1917) 117 L. T. 157. We may then treat it as well settled that condonation of past matrimonial offences is impliedly conditioned upon the future good behaviour of the offending spouse, and it follows that if after condonation, the offences are repeated, the right to make the condoned offences a ground for divorce revives; to constitute a revival of the condoned offences, the offending spouse, need not, however, be guilty of the offences of the same character as those condoned; any misconduct is sufficient which indicates that the condonation was not accepted in good faith and upon the reasonable conditions implied." (*Moreno v. Moreno,* 47 Cal. at pp. 1074-1076, *Stuart v. Stuart,* (1926) 53 Cal. 436.)

It is a clear proposition of English Divorce Law that condonation of adultery is not absolute, but is only conditional, and that if there is a subsequent matrimonial offence, the condonation goes, and the original offence is revived. Condonation is not forgiveness in the ordinary sense, but it is a conditional reinstatement of the offending spouse ; it is always subject to the condition that the offence must not recur.—*Palmer v. Palmer,* (1860) 2 Sw. & Tr. 61 ; *Curtis v. Curtis,* 1 Sw. & Tr, 192 ; *Cramp v. Cramp,* (1928) P. 158. (*Premchand v. Bai Gulab,* 29 Bom. L. R. at p. 1344 ; *King v. King,* (1925) 47 All. 50.)

For the revival of an offence which has been condoned, an offence less than would be required to found a petition may be sufficient.— *Durant v. Durant,* (1825) 1 Hagg. Ec. Rep. 761 ; *Bostock v. Bostock,* 1 Sw. & Tr. 221 ; *Cooke v. Cooke,* (1863) 3 Sw. & Tr. 126 ; *Ridgway v. Ridgway,* (1881) 29 W. R. (Eng.) 612 ; *Evans v. Evans,* 2 No. of Cas. 474. (*John v. Helen,* 5 Mad. 118.)

III. Husband and wife are not colluding together :— Putting forward false facts and facts which are true but which have been corruptly and fraudulently preconcerted to form the basis of the judgment is *collusion.*

The word collusion in section 30 of the English Divorce Act has a far wider meaning than connivance, and extends to cases where the original ground of the petition has not been connived at, but where the parties have subsequently agreed to use it as a means of divorce, so that collusion in this sense may exist without any connivance at all.– *Lloyed v. Lloyed,* 1 S w. & Tr. 567; *Crewe v. Crewe,* 3 Hagg. 130. (*Uzir v. Eli Seba,* 11 Cal. at p. 654.)

" The object of the special provision with regard to collusion is to compel the parties to come into the Court of Divorce with clean hands; it is to oblige them to bring all material and pertinent facts to the notice of the Court ; to prevent their binding the eyes of the Court in any respect; to oblige them so to act as to enable the Court to be in a position to do justice between the parties.— *Butler v. Butler,* (1890) P, D, 66 ; *Bacon v. Bacon* (1877) 25 W. R. (Eng.) 560."

"On this principle it has been held that the bar of collusion applies, even though the parties concur in getting up a true case—*Midgley v. Wood,* (1860) 30 L. J. P. & M. 57, *Gethin v. Gethin,* 31 L. J. P. & M. 43, or even if the facts suppressed, though pertinent and material, would not have been sufficient to establish the counter-charge—*Hunt v. Hunt,* (1877) 47 L. J. P. & M. 22; *Barnes v. Barnes,* 37, L. J. P. M. 4; so too, it constitutes collusion, if the initiation of a divorce suit be procured and its conduct provided for by agreement (specially if abstention from defence be a term), although it does not appear that any specific fact has been falsely dealt with or withheld.—*Churchward v. Churchward,* (1895) P. 7."

[Croix v. Croix, 44 Cal. at p. 1110.]

IV. Plaintiff has not connived at the offence:—To constitute "*connivance*" there must be something more than mere negligence, than mere inattention, than overconfidence, than dulness of apprehension, than mere indifference. There must be intentional concurrence. Mere imprudence and error of judgment are not connivance; and in determining whether the husband's behaviour has barred him from relief on proof of his wife's adultery, the honesty of his intention, not the wisdom of his conduct, is to be considered. And if a husband has connived at the adultery of his wife with one man, he is not entitled to a separation on the ground of her adultery with another. (*Rogers v. Rogers,* 3 Hagg. E. R. 2; *Stone v. Stone,* 3 No. of Cas. 278.)

Connivance distinct from condonation:—*Connivance* always precedes the event. *Condonation* always succeeds the event. *Connivance* always and necessarily involves criminality. *Condonation* is often meritorious and praiseworthy in a wife's case. (*Angle v. Angle,* 6 No. of Cas. 192.)

Connivance is an act of the mind and implies knowledge or acquiescence in the Act. It is a voluntary blindness to some present act or conduct, to something going on before the eyes, and is applicable to anything past or future. As a legal doctrine connivance has its

source and its limits in the principle—*volenti non fit injuria*—a willing mind. That is all that is necessary. *Condonation* is a pardoning, remission or forgiveness of the adulterer of the offence known and intended to be condoned, and not of other unknown or subsequent offences. (*Bernestine v. Bernestine,* (1893) P. 292.)

Accessory to implies more than connivance, which is merely knowledge with consent. A *conniver* abstains from interference; an *accessory* directly commands, advises or procures the crime. *Accessory* must be an accessory *before* the fact—one who, though being absent at the time the offence is committed yet procures, counsels or commands another to commit a crime. Absence is necessary to make him an accessory, for, if he be present he becomes a principal. (*Wharton's Law Lexicon.*)

V. There has been no unnecessary or improper delay in bringing suit:—Circumstances of each case will determine, "what is reasonable delay" for delay to be not improper. "The Courts look with great suspicion on petitions for dissolution presented on the ground of adultery, after a long delay by a husband, and relief is given, as is said in *Mortimer v. Mortimer,* (1820) 2 Hag. Con. 310, *vigilantibus non dormientibus*; yet delay will generally be excused, if it is really due to poverty—*Cood v. Cood,* (1838) 1 Curt. 755. But although poverty is almost always a sufficient excuse, if convincingly established—*Short v. Short,* (1874) L. R. 3 P. & D. 193, it must not be supposed that there is no lapse of time where a line may be drawn. These principles have been recognized in a long series of decisions.—*Harrison v. Harrison,* (1864) 3 Sw. & Tr. 362; *Nicholson v. Nicholson,* (1873) L. R. 3 P. & D. 53; *Mason v. Mason,* (1882) 7 P. & D. 233; *Edwards v. Edwards,* (1900) 17 T. L. R. 38; *Pears v. Pears,* (1912) 107 L. T. 505, *Hughes v. Hughes,* (1915) 32 L. T. R. 62; *Coppinger v. Coppinger,* (1918) 34 L. T. R. 588." (*Moreno v. Moreno,* 47 Cal. at p. 1077.)

If the petitioner delays in seeking relief—to sue either for divorce or for judicial separation—he or she will be deprived of his or her right to the relief, he or she would otherwise be entitled to. The delay must be unreasonable and improper and must be understood to be culpable delay, somewhat in the nature of connivance or acquiescence. It lies upon the petitioner to explain the delay, in bringing the suit, where such delay exists. The delay must be sufficiently accounted for. *(Kanku v. Shiva Toya,* 17 Bom. at p. 626; *Williams v. Williams,* 3 Cal. at p. 691; *Devasagayam v. Naiyagam,* 7 M. H. C. 284.)

VI. There is no other legal ground why relief should not be granted:—Adultery of a female petitioner for divorce is under Parsi Law a ground on which the Court can refuse a divorce. Section 31 of the English Divorce Act specifies all the legal grounds, when the Court shall decree a dissolution of marriage. Section 32 of the Parsi Marriage and Divorce Act, 1865 does not so specify all the legal grounds on which a petitioner seeking for divorce shall or may be non-suited. *(Meherbai v. Hormusji,* 10 Bom. L. R. 1019.)

This was an appeal (No. 196 of 1907) from the decision of the Judge of the Parsi Matrimonial Court at Surat in suit No. 2 of 1907. At pages 1022, 1023 of the report the Judge observed:—"But section 32 of the Parsi Act is not, whereas the corresponding section of the English Act, is exhaustive. "The words "other legal grounds," construed as they must be on the principle of *ejusdem generis,* mean any other legal ground which is of the same kind as any of the legal grounds previously mentioned. As the section borrows its language substantially from the English Act so far as it enumerates the legal grounds, and as the latter Act treats the adultery of a petitioner suing for divorce as a ground similar in character to certain other grounds which are the same as those enumerated in the Parsi Act, I think it a reasonable construction of the latter Act to hold that the Legislature intended that where such adultery is proved, relief by way of divorce should be refused. This construction is supported by what we have ascertained to be the invariable practice on the Parsi matrimonial side of this Court."

Desertion without reasonable excuse by a wife constitutes no bar in point of law to her suit for judicial separation.—*Duplany v. Duplany,* L. R. 1892, P. 53. (*Margaret v. Harry,* 26 All. at p. 558.)

Alimony pendente lite. Sec. 33. In any suit under this Act for divorce or judicial separation, if the wife shall not have an independent income sufficient for her support and all the necessary expenses of the suit, the Court, on the application of the wife, may order the husband to pay her monthly or weekly during the suit, such sum not exceeding one-fifth of her husband's net income, as the Court, considering the circumstances of the parties, shall think reasonable.

Alimony pendente lite.—The temporary provision made to enable the wife to live during the progress of the suit is generally spoken of as "*alimony pendente lite*," or "*alimony pending suit.*"

"Under this section alimony pending the suit may be ordered to be paid to the wife by the husband to enable her either to proceed or defend herself in a divorce suit, or to seek judicial separation from him, if she has no means to do so. In allotting alimony *pendente lite*, the wife must be considered as innocent. Her omission to file an answer to a petition charging her with adultery is no ground for refusing to allot alimony or allotting less than the usual amount—*Smith v. Smith*, 32 L. J. (P. & M.) 91; and such alimony ceases when the adultery has been fully established.—*Wells v. Wells*, 33 L. J. (P. & M.) 151, (*Bennett v. Bennett*, 11 Cal. at p. 355.)

If in a suit for nullity of marriage, it clearly appears on the face of the proceeding and answer taken together, that the marriage is void, alimony *pendente lite* will not be ordered. In a suit by a husband for a divorce on the ground of his wife's adultery, an application by the wife for alimony *pendente lite* will be refused, if at the time of applying she is living with the co-respondent, or if she is living apart from her husband under such circumstances that she does not pledge her husband's credit. She does not, however, for that reason, get disentitled to her costs *pendente lite*. (*Blackmore v. Blackmore*, 16 W. R. 893; *Gordon v. Gordon*, 3 B. L. R. Ap. 13.)

Alimony pending the suit is payable from the date of the service of the citation and continues till the decree *nisi* is made absolute. It does not cease on a decree *nisi* being made. "Till the decree *nisi* is made absolute, the suit is clearly pending."—*Forden v. Forden,* L. R. (1894) P. D. 307. *(Thomas v. Thomas,* 23 Cal. at p. 915.)

In fixing the amount of alimony pendente lite the Court has to consider the circumstances of the parties; e.g., the rank and condition of the husband; children of marriage dependent on him for their support; the wife's original station (before marriage) in life; her separate income, &c. (*Hawkins v. Hawkins,* 1 Hagg. Ec. Rep. 526; *Capstick v. Capstick,* 33 L. J. P. & M. 105; *Butler v. Butler,* Ir. Ec. Rep. 629; *Smith v. Smith,* 2 Phill, 152; *Goodheim v. Goodheim,* (1916) P. I; *R.—v.—R.,* 14 Mad. 95; *Margaret v. Margaret,* 26 All. at p. 558.)

In granting alimony to the wife the Court ought not, even if it had the power, to tie up the husband's property or convert alimony into an absolute interest and charge upon his estate.—*Hyde v. Hyde,* 4 Sw. & Tr. 80. *(Fowle v. Fowle,* 4 Cal. at p. 261.)

In an old Parsi case—*Buchooboye v. Merwanjee,* decided on 8th August 1844 it was held that Parsis being subject to English Law generally, it follows that as a Parsi husband is liable for the debts of his wife and absorbs his wife's property, a Parsi wife is entitled to alimony on exactly the same principles as an English wife would be if she claimed it.

Suit for judicial separation by Parsi wife—Alimony "during suit":—In *Hirabai v. Dhanjibhai,* 17 Bom. 146, the plaintiff (wife) sued her husband for judicial separation in the Parsi Chief Matrimonial Court at Bombay. Alimony was granted to her by an order dated 11th July 1891, directing the defendant (the husband) to pay alimony to the wife from the 15th April 1891, "until the final decree herein be passed." On the 18th July 1891, the suit was dismissed, and after that date the defendant ceased to pay alimony. The plaintiff obtained a rule for review of judgment, which was discharged on the 27th January 1892; she filed an appeal against the

decree dismissing the suit and against the order refusing a review. She now applied for an order directing the defendant to pay her all the arrears of alimony "*pendente lite*" from the date of filing the suit, or so much as had not been paid, and that he should pay her further alimony until the final disposal of the appeal. The Court dismissed the application holding: that the words " final decree herein " contained in the order dated 18th July 1891, by which alimony was granted, meant the decree in the suit and not in the appeal; that the Parsi Matrimonial Court constituted under Act XV of 1865 had no power to award alimony *pendente lite* after decree and pending appeal; that an unsuccessful wife is not entitled to claim alimony after final decree and pending appeal, nor for the period during which she is seeking review of judgment.

The words, " during the suit " in section 33 of Act XV of 1865, include the period upto the making of a final or absolute decree. (*Ibid.*)

Mr. Justice Jardine in the above case at page 150 of the report observes :—" In no section of this Act (XV of 1865) does the word " suit " or " sue " necessarily take the meaning which includes appeal. Section 33 of Act XV of 1865 empowers this Court to order the husband to pay alimony " during the suit." It is the practice here to pass a decree *nisi* in the first instance upon a sentence of divorce. Since the Court was erected there had been six sentences of nullity before I passed such a sentence in *S. v. B.*, 16 Bom. 639. I followed these precedents in *S. v. B.*, 16 Bom 639. I am informed by the Clerk of the Court that there has been only one successful suit for judicial separation (No. 3 of 1870) : there the first decree made was a decree *nisi* to be made absolute after three months. As section 33 of this Act (XV of 1865) does not limit the Judge's discretion as section 36 of the Indian Divorce Act does, *Ellis v. Ellis*, 8 P. D. 189 and *Dunn v. Dunn*, 13 P. D. 93 should guide the practice in allotment of alimony for the time following a decree *nisi*. In *Ellis v. Ellis*, 8 P. D. 189, a decree *nisi* had been obtained by a wife, and was not appealed against. It was held that the Judge

Ordinary had power to order alimony *pendente lite*, notwithstanding a decree *nisi* has been made for dissolution of marriage. For until the final decree the Court can make no permanent provision for the wife; therefore it seems reasonable that it should have power to make some temporary provision. The case of *Ellis v. Ellis*, has been distinguished from cases where the guilt of the wife has been established. In *Dunn v. Dunn*, 13 P. D. 93, Cotton, L. J. says:—*Ellis v. Ellis* was an entirely different case. The wife there took the proceeding against her husband, and she had in no way forfeited her rights against him. The case was one where it would be proper ultimately to grant permanent alimony, and we thought it reasonable that in the meantime she should have intermediate alimony." (*Ibid.* at pp. 151, 152.)

English rule of husband's liability for his wife's costs applicable to Parsis: - "Section 33 of this Act does incorporate the English Law that the husband is bound to provide for his wife. The intention seems to be to put it in a modified form, viz: with reference to the husband's income. Again section 16 of the Indian Divorce Act shows how the Statutory and Common law liability goes hand in hand. The provisions of section 33 of the Parsi Marriage and Divorce Act, 1865 relate merely to orders pending the suit The payments contemplated in this section are merely payments *"during the suit,"* and does not in any way limit or qualify the liability of the husband to his wife's solicitors." (*Payne & Co. v. Pirosha*, 13 Bom. L. R. at pp. 925, 933.)

"The principles laid down as to costs in England are to be followed; and the question of costs is in the discretion of the Court. Under the English cases the wife would be allowed her costs even though not successful. In *Jones v. Jones*, L. R. 2 P. & D. 331, it is shown that the same rule holds good in appeal." (*Fowle v. Fowle*, 4 Cal. at pp. 269, 281.)

In *Mayhew v. Mayhew*, 19 Bom. 293, Mr. Justice Farran, while holding that the Court has discretion to make the husband pay the wife's costs already incurred, and to give security for future costs, at pages 295, 296 of the report says—"The rule has always been that an order

as to costs pending the hearing ought not to be made against the husband, if the wife is possessed of means (technically styled separate property) sufficient to enable her to pay her own costs in the first instance. Section 4 of the Succession Act (X of 1865) enlarges the possibilities of the wife possessing means to pay her own costs, but (if she does not possess such means) does not do away with the advisability of the rule. The passing of the Married Women's Property Act in England, even that of 1882 (45 and 46 Vict. C. 75.) has not produced any alteration in the rule of the Divorce Court there.—*Allen v. Allen*, L. R. (1894) P. 134, and ought to govern the practice of Indian Courts. This view is in accordance with the practice hitherto followed in this Court, and with judgment in *Natall v. Natall*, 9 Mad. 12 and *Broadhead v. Broadhead*, 5 B. L. R. Ap. 9. The Court has, however, a discretion in the matter. It is manifestly a case in which the costs of the respondent ought to be kept within the narrowest possible limit consistent with its being able to place her case fairly before the Court. No extravagances in the way of costs can be allowed against the petitioner.

In *Georgucopulas v. Georgucopulas*, 29 Cal. 619, in a suit for judicial separation by the wife against the husband, Stephen, J. in making an order for the costs, observes at page 621 of the report—"I must consequently fall back on the general principle as stated in *Brown & Powles on Divorce*, quoted in *Mayhew v. Mayhew*, 19 Bom. at page 295—"It is not considered just either that a wife should be left without the means of putting her case fairly before the Court, or that a practitioner should run the risk of losing the proper remuneration for his labours, if he takes up a case, which he honestly believes to be genuine, but which may after all turn out to be unfounded. It is a rule of public policy. This is a part of the Law of England and I am therefore bound by it I think, therefore, that the wife is entitled to the relief which she claims."

The Presidency Small Causes Court has jurisdiction to entertain a suit by a Parsi wife to recover costs incurred by her in a matrimonial suit and to recover arrears of maintenance awarded by arbitrators. (*Erachshaw v. Dinbai*, 22 Bom. L.R. 1293.)

Under section 33 "all necessary expenses of the suit" may be awarded to wife by Court :—Section 33 of the Parsi Marriage and Divorce Act, 1865 and the table of fees settled for cases tried under the Act do not limit the costs, to be awarded to a wife in matrimonial suits, to one-fifth of the husband's income and to the amounts mentioned in the table. (*Payne & Co. v. Pirosha*, 13 Bom. L. R. at p. 935.)

In this case at page 933 of the report the learned Judge remarks :—" It seems to me to be quite clear that when the Parsi Marriage and Divorce Act was framed, and even later on when the table of fees was settled, the question that has arisen, was never present to the minds of the framers of the Act and the table. Section 33 of the Act merely contemplates cases where the wife may not have means sufficient to pay "all the necessary expenses" of presenting or defending a suit for divorce or judicial separation, and limits the husband's liability to pay such expenses as well as his wife's maintenance pending the suit to one-fifth of his net income. It is very difficult to decide what is the significance to be attached to the word *only* (the following fees only shall be allowed in cases tried under Act XV of 1865) in the heading to the table of fees. No doubt, the framers of the table desired that the costs in a Parsi matrimonial suit should be as low as possible.

The learned Judge then, on pape 934 of the report points out instances in which no provision is made for costs in the table :--For cost, of correspondence, of commission to take evidence, of preparing a brief for the advocate, or preparing or drafting a plaint or written statement, and concludes that it is clear that the word *only* in the heading to the table of fees does not mean that the Court has no power to award anything more than what is fixed in it, and that the table is exhaus-

tive and excludes all and every item of costs other than those mentioned in it. At the bottom of the table of fees the following appears :— "Costs between party and party will be taxed by the clerk of the Court." In respect of this provision at page 934 of the report, it is also pointed out :—"The provision at the foot of the table for party and party costs also leads to the inference that the awarding of attorney and client costs by the Parsi Matrimonial Courts was within the contemplation of the framers."

"On having the records of the Parsi Chief Matrimonial Court searched, I find that Mr. Justice Melvill on the 18th of January 1883 in suit No. 3 of 1882 made an order in the following terms :— "Plaintiff ordered to pay all costs to be taxed between attorney and client." In that suit the husband sued for dissolution of his marriage and charged his wife with having committed adultery and procured abortion. His solicitor eventually asked permission to withdraw the suit and the Court made the order for costs in the terms set out above."

On page 935 of the report it is further remarked :—"Then again it must be remembered that the table of fees contemplates merely party and party costs as between the parties to a Parsi matrimonial suit, and does not touch the rights of a wife's solicitors to recover from the husband their attorney and client costs as necessaries supplied by them to the wife. But even if the contentions of the defendant were to be allowed, and it was found that under section 33 of the Act and the table of fees, the costs to be awarded to a wife in a matrimonial suit are to be limited to one-fifth of the husband's income and to the amounts mentioned in the table, there is clear authority for holding, that that does not affect the rights of the wife's solicitors to recover their attorney and client costs from the husband. In *Ottaway v. Hamilton*, 3 C. P. D. 393, it was *held* that a wife's solicitor may sue the husband for extra costs, *i.e.*, costs reasonably incurred by him beyond the costs taxed and allowed as between party and party. In this case it is laid down that the solicitor's Common Law right to sue the husband as for necessaries supplied to the wife is *not* limited to the statutable rights and remedies for costs given to the wife under the Divorce Acts. For these reasons, it seems to me, that the defendant's contentions based on section 33 of the Act and the table of fees cannot prevail."

Permanent alimony. Sec. 34. The Court may, if it shall think fit, on any decree for divorce or judicial separation, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross-sum, or such monthly or periodical payments of money for a term not exceeding her life, as, having regard to her own property (if any), her husband's ability, and the conduct of the parties, shall be deemed just, and for that purpose may require a proper instrument to be executed by all necessary parties, and suspend the pronouncing of its decree until such instrument shall have been duly executed.

In case any such order shall not be obeyed by the husband, he shall be liable to damages at her suit, and further to be sued by any person supplying her with necessaries during the time of such disobedience, for the price or value of such necessaries.

This section corresponds with section 32 of the Matrimonial Causes Act (20 & 21 Vict. C. 35), 1857.

Permanent alimony is the provision of a permanent character directed to be paid to the wife upon divorce or judicial separation being pronounced.

The Court is empowered to order permanent alimony to the wife when a husband obtains a divorce on the ground of her adultery. And so is the Court bound by the practice of the Ecclesiastical Court, in allotting permanent alimony after a decree of judicial separation.—*Bent v. Bent*, 2 Sw. & Tr. 392; *Haigh v. Haigh*, L.R. I. P. & D. 709. (*Kelly v. Kelly*, 5 B.L.R. 71.)

In suit No. 2 of 1893 of the Parsi Chief Matrimonial Court at Bombay the husband, against whom a decree for judicial separation had been obtained by his wife, was, by an order directed, to pay his wife permanent alimony at the rate of Rupees 70 per mensem during her life,

and to execute, on the decree for judicial separation being made absolute, a proper instrument charging his immovable property at Abdul Rehman Street with payment of the said sum to the wife during her life. This order was embodied in the final decree absolute, and the instrument of charge was accordingly executed and duly registered. On the death of the husband the question arose whether the widow was entitled to receive, out of the estate of her deceased husband, permanent alimony at Rupees 70 per month, and also to her distributive share out of the remaining estate of the deceased, or whether the widow was only entitled to her distributive share in the estate, and that the payment of permanent alimony should cease entirely from the day of the death of her deceased husband. (*Motibai v. Motibai*, 24 Bom. at p. 466.)

Mr. Justice Russell in the above case at pages 469, 471 observed :— " With regard to the argument that there was no consideration for the covenant in the deed, it appears to me that, having regard to the terms of section 34 of the Parsi Marriage Act, there was ample consideration. I must, therefore, hold that Motibai is entitled to be paid out of the immovable property comprised in the deed of charge the sum of Rupees 70 per month during her life, and she is also entitled to her distributive share in the estate of the deceased."

It was also observed in the above said case that under section 34 of the Parsi Marriage and Divorce Act there was no provision for varying the amount of permanent alimony just as there was in section 37 of the Indian Divorce Act 4 of 1869.

This point did not arise in, and was not necessary for the decision of the case. It was consequently merely *obiter, dictum*.

The point whether the amount of permanent alimony awarded in a Parsi matrimonial case could be varied or not arose in Matrimonial Suit No. 2 of 1929 in the High Court of Bombay in the case of *Khorshedbanoo v. Burjorjee.* In that case an order for permanent alimony at the rate of Rs. 125 per month was passed against the defendant, who was then drawing a fairly large salary. His employment having subsequently terminated he was unable to pay the alimony. On his application to suspend payment, Mr. Justice B. J. Wadia decided that the Court had jurisdiction in a proper case to reduce the amount of permanent alimony. He pointed out that the statement of Russell, J. in the above case was merely an *obiter dictum*, that the Parsi Marriage and Divorce Act did not specifically prohibit modification of the amount of permanent alimony, and that (as pointed out by Davar, J. in 13 Bom. L. R. 920 at 930 and in 4 B. H. C. Rep. 1.) in the absence of a specific provision in the Parsi Act, the principles of English law would apply to Parsis, and that in England an order for permanent alimony could have been varied by the Eccliesiastical Courts. (Halsbury, Vol. 16, p. 570, para. 1156, 1st edition.) See also *Covell v. Covell*, L. R. 2 P. & D. 411 to 414; *De Blaquiere v. De Blaquiere*, 3 Hagg. Ecc. Rep. 325 at 329.

It can now be done under the Matrimonial Court's Acts of 1884 and 1907.

For the abeve reasons Mr. Justice B. J. Wadia decided that the permanent alimony decreed should be reduced from Rs. 125 to Rs. 50 per month. At the same time he pointed out that the jurisdiction must not be lightly exercised and should only be invoked in exceptional circumstances.

Permanent Alimony (permanent provision) is generally decreed from the date of the sentence. It is ordered to be paid after a final decree absolute. It commences from a final decree absolute for divorce or judicial

separation. The Court has no power to grant it until an application is made to make the decree *nisi* absolute.—*Cooke v. Cooke*, 2 Phill, 41; *Bradley v. Bradley*, L. R. 3 P. D. 471; *Bennett v. Bennett*, 11 Cal. 354.

Section 34 of the Parsi Marriage and Divorce Act, 1865 treating about permanent alimony, does not make any distinction between "*permanent alimony*," or "permanent provision," and "maintenance" as in English law; but permanent provision is made under this section for the wife on a final absolute decree for divorce or judicial separation.

[*Motibai v. Motibai*, at pp. 465, 466 = 2 Bom. L. R. 602.]

"Secure to wife such gross sum."—In the reported cases of *Morris v. Morris*, (1861) 31 L. J. P. & M. 33, *Stanley v. Stanley*, (1898) P. 227, and *Kirk v. Kirk*, 1902 P. 145 it was decided that the Divorce Court is authorized to award absolute payment of a lump sum to the petitioner's wife.

The words "for a term not exceeding her life" in section 34 of P. M. & D. Act, 1865 qualify monthly or periodical payments of money, they do not qualify "gross sum." The plain meaning of the words in this section appears to be, that the "gross sum" should be paid absolutely to the wife, and that the "monthly or periodical payments of money" only should be for a term not exceeding her life, i.e., such payments only should be limited for the period of her life.

Alimony *pendente lite* is payable from the date of the service of the citation, and continues payable till the decree *nisi* is made absolute. It generally ceases on a verdict finding the wife guilty of adultery. (*Thomas v. Thomas*, 23 Cal. at p. 915; *Hirabai v. Dhunjibhai*, 17 Bom. at p. 152.)

Permanent alimony is always larger in amount than alimony *pendente lite*. (*Kempe v. Kempe*, I Hagg. E. R. 532.)

The points to be considered by the Court in fixing permanent alimony under sec. 34 of the P. M. & D. Act, 1865 are:—the wife's property (if any), her husband's ability, and the conduct of the parties.

The circumstances to be regarded by the Court according to the English cases are:—the husband's ability, the wife's property and income, the position in life of the parties, their ages and respective means, the amount of the provision actually made, the existence or non-existence of children, and who is to have the care and custody of them, and any other circumstance important in any particular case. (*Wood v. Wood*, (1891) P. 272; Rattigan on Divorce 1897.)

The amount to be allowed as permanent alimony is left to the discretion of the Court. It is to be exercised according to the circumstances of each case. It was not intended by the Legislature that a guilty wife should be turned out into the streets to starve. (*Robertson v. Robertson*, 8 P. D. 94; *Otway v. Otway*, 2 Phill. 109; *Haigh v. Haigh*, 38 L. J. Mat. 37.)

"And where the amount awarded to the wife by the Parsi Chief Matrimonial Court did not exceed one-third of the husband's income, the High Court refused to interfere in appeal, following the practice of the Court of Divorce in England." (*Mancherji v. Motibai*, P. J. for 1894, at p. 108.)

The case of *Gulbai v. Behramsha*, 16 Bom. L.R. 11 decided that if a Parsi wife sues for permanent alimony she must do so in a particular manner and in a particular court.

Payment of alimony to wife or to her trustee. Sec. 35. In all cases in which the Court shall make any decree or order for alimony, it may direct the same to be paid either to the wife herself, or to any trustee on her behalf to be approved by the Court, and may impose any term or restrictions, which may seem expedient, and may, from time to time, appoint a new trustee, if for any reason it shall appear to the Court expedient so to do.

Section 38 of the Indian Divorce Act, 1869 exactly corresponds with this section of the Parsi Marriage and Divorce Act, 1865.

(d) For Restitution of Conjugal Rights.

Suit for restitution of conjugal rights. Sec. 36. Where a husband shall have deserted, or without lawful cause ceased to cohabit with his wife, or where a wife shall have deserted, or without lawful cause ceased to cohabit with her husband, the party so deserted or with whom cohabitation shall have so ceased, may sue for restitution of his or her conjugal rights, and the Court, if satisfied of the truth of the allegations contained in the plaint, and that there is no just ground why relief should not be granted, may proceed to decree such restitution of conjugal rights accordingly.

If such decree shall not be obeyed by the party against whom it is passed, he or she shall be liable to be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

Restitution of conjugal rights is the compulsory renewal of cohabitation between husband and wife, who have been living separately. Where one of the married persons withdraws from living with the other without lawful cause, the deserted party may, by suit in the Divorce Court, compel the party withdrawing to return to cohabitation. (*Barlee v. Barlee.* 1 Add. 305; *Dhunjibhai v. Hirabai.* 2 Bom. L.R. 845=25 Bom. 644.)

A suit for restitution of conjugal rights was not part of the English common law or English equity. It was peculiar to the ecclesiastical courts. The ecclesiastical courts were compelled to have recourse to the courts of law and equity, to enforce their process for contempt, which they themselves could only enforce by excommunication.

See *Weldon v. Weldon,* L. R. 9 P. D. 52.

The Privy Council in the year 1856, before the enactment of this Act, in the case of *Ardeseer v. Pirozbai*, 6 M. I. A. 348 declared that the Supreme Court of Bombay, on its ecclesiastical side, was incompetent to entertain a suit for restitution of conjugal rights at the instance of a Parsi wife against her husband.

In the case of Parsis, the Legislature has by Act XV of 1865 made express provision by section 36 for suits by either party to the marriage for restitution of conjugal rights, if such party be deserted by the other, or if such other had without lawful cause ceased to cohabit with the plaintiff, and for the enforcement of the decree. -*Scott v. Scott*, 34 L. J. P. & M. 23. (*Hirabai v. Dhanjibhai*, 2 Bom. L. R. 845.)

In *Purshotamdas v. Bai Mani*, 21 Bom. at page 615, Farran, C. J. stated as follows:—"The law which we are bound to follow upon the subject is, we think, that laid down in *Dadaji v. Rukhmabai*, 10 Bom. 301, where Sir Charles Sargent, C. J. says: "It may be advisable that the law should not adopt stringent measures to compel the performance of conjugal duties. Civil courts, in our opinion cannot, with due regard to consistency and uniformity of practice (except perhaps under the most special circumstances), recognize any plea other than marital offence by the complaining party, as was held to be the ground up n which the Divorce Court in England would refuse relief in *Scott v. Scott*. The decision in that case was given after considering all cases cited upon the subject, and was a most carefully considered judgment. It has been adopted as the correct view in *Bindu v. Kanusilia*, 13 All. 126, and ought, we think, to be considered as settling the law. It would, in our opinion, lead to great doubt and difficulty if any other view of the law were adopted."

In a suit for restitution of conjugal rights the Court must consider the entire conduct of the parties so as to be able to judge whether the plaintiff deserves at the hands of the Court the relief, he seeks, and whether such a relief is not unreasonable in the particular case against the defendant.- *Russell v. Russell*, (1897) A.C. 485; *Ardeseer v. Pirozbai*, (1856) 6 M. I. A. 348; *Moonshee Buzloor Raheem v. Shumsoonnissa Begam*, (1867) 11 M. I. A. 551; *Yamunabai v. Narayan*, (1876) 1 Bom. 164; *Dadaji v. Rukhmabai*, (1886) 10 Bom. 301; *Dular Koer v. Dwarkanath*, (1901) 34 Cal. 971; *Baburam v. Kokla*, (1923) 46 All. 210. (*Jivi v. Narsingh*, (1926) 29 Bom. L. R. 332=51 Bom. 329).

The word "**lawful**" in this section must refer not to English ecclesiastical law, to which the Parsis were never subject, but to the law to which they are subject.—*Cawasji v. Sirinbai*, 23 Bom. at p. 281. (*Hirabai v. Dhanjibhai*, 2 Bom. L. R. at p. 847.)

Unless the word "*lawful*" was used by the Legislature in some peculiar and technical sense, it seems clear that, if a husband has contracted to allow his wife to live apart, and she chooses to do so, she has a lawful cause for so doing. Her will doubtless is the cause, and the existence of a contract makes it "*lawful*."

The word "*lawful*" is a plain English word and must be construed in its ordinary sense as having reference to the law to which the partics are subject. If it had been intended, as in Act IV of 1869 applicable to Christians, to exclude a defence of this sort, a section like 33 of the Act would have been necessary.

[*Cawasji v. Shirinbai*, 23 Bom. at pp. 280-282.]

The word "**just**" in section 36 is not intended to have any different signification from the word "*lawful*," for it is not clear on what ground it can be "*just*" to refuse a decree for restitution of conjugal rights, unless it is "*lawful*" for the unwilling spouse to refuse cohabitation. (*Hirabai v. Dhunjibhai*, 2 Bom. L. R. at p. 847.)

Lawful grounds justifying refusal to cohabit.

In matrimonial causes the petitioner, to be entitled to relief, must come to court with clean hands. (*Otuay v. Otway*, 13 P. D. 141.)

"The question, what constitutes a lawful ground among the Parsi community for the refusal of the husband to live with his wife and *vice versa*, is one, the determination of which lies within the cognizance of the delegates."

"To justify a refusal for the restitution of conjugal rights the causes must be grave and weighty, and such as to show a moral impossibility that the duties of married life can be discharged."

[*Hirabai v. Dhunjibhai*, 2 Bom. L. R. 845.]

"Some grounds which suggest themselves as clearly lawful grounds and justify refusal to cohabit are, adultery, which entitles a husband under the Parsi Marriage and Divorce Act to obtain divorce from his wife, and an agreement to live separate, constituting a binding contract between the parties. Cruelty or personal violence of the kind mentioned in section 31 (of the Act) constitutes another lawful ground why a wife may refuse to cohabit with her husband. All these grounds are mentioned by some express law binding on Parsis and they are therefore lawful. But they do not seem to be exhaustive. It seems reasonable to treat the word "*lawful*" in this section as having a wider meaning and as indicating the law, whether statutory or customary, governing the marriage relations of Parsis. The fact that in regard to Mahomedan and Hindu laws, the Courts have determined as questions of law the grounds on which they refuse to direct wives to return to their husbands, affords no argument for taking out of the cognizance of the delegates the determination of the question, what constitutes a lawful ground amongst a special community, such as the Parsis. for the refusal of a husband to live with his wife." (*Ibid.* at pp. 847, 848.)

Adultery:—A wife guilty of adultery cannot maintain a suit for restitution of conjugal rights against her husband. (*Hope v. Hope,* 1Sw. & Tr. 94.)

Agreement to live separate:—Under section 36 of the Parsi Marriage and Divorce Act, 1865 an agreement between a husband and a wife to live separate bars a subsequent suit for restitution of conjugal rights. (*Cawasji v. Sirinbai,* 23 Bom. 279.)

"In this country between Parsis the contract of separation appears as binding as a similar contract between Christians in England. Considering how fully the Parsis have adopted the western ideas of marriage, and how readily they have accepted the Act of 1865, it is not likely that it will ever be contended that such a contract is void." (*Ibid.* 281.)

"The English law on the subject is very clearly explained by Lopes, L. J. in *Russell v. Russell,* (1895) P. at pages 332, 333—The effect of the Judicature Acts has been indirect, but at the same time, very

important. It is, however, confined to separation deeds. These, as is well known, were treated as illegal and void by the Ecclesiastical Courts.—*Westmeath v. Westmeath*, 2 Hagg. Ec. Supp. 1, 115. But when it was settled, as it ultimately was—*Besant v. Wood*, (1878) 12 Ch.B. 605, that the Court of Chancery would restrain a suit for restitution of conjugal rights, if brought contrary to a covenant not to institute such a suit, and when the Judicature Acts made the Divorce Court a Division of the High Court, and abolished injunctions to stay actions, and substituted in all branches of the High Court defences instead of such injunctions, it followed that a separation deed containing a covenent not to sue for restitution of conjugal rights became a defence to a suit for such restitution."—*Marshall v. Marshall*, (1879) 5 Ex. P.D. 19; *Clark v. Clark*, (1885) 10 P.D. 188. (*Ibid.*)

Cruelty or personal violence :—In *Yamunabai v. Narayan*, 1 Bom. at page 174, Melvill, J. sitting as Court in Appeal observes :—"In a suit between *Hindus* we consider that the only safe and practical criterion of cruelty is that contained in the definition which guides the English courts, namely, that there must be actual violence of such a character as to endanger personal health or safety, or there must be reasonable apprehension of it. In a suit between *Mahomedans* the Privy Council has expressed its opinion that the same definition is applicable And in the Parsi Chief Matrimonial Court of Bombay, over which I now preside, a similar definition was adopted at an early period of the Court's existence."—*Furdoonji v. Dinbai*, 23rd November 1869.

Cruelty in the legal sense need not necessarily be physical violence. A course of conduct, which, if persisted in, would undermine the health of the wife, is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights—*Kelly v. Kelly*, 5 B. L. R. 71. (*Thompson v. Thompson*, 39 Cal. 395.)

The High Court has no jurisdiction to grant a decree for restitution of conjugal rights either against a Parsi respondent, who is not a Christian or a respondent, who is not within its jurisdiction. (*Nusserwanji Wadia v. Eleonora*, 15 Bom. L. R. 593=38 Bom. 125.)

The case of *Nusserwanji Wadia v. Elenor,* (1913) 15 Bom. L.R. 593 was *overruled by* the *Full Bench case of Dalal v. Dalal,* 32 Bom. L. R. 1046=(1930) 54 Bom. 877. The High Court of Bombay can entertain a petition for restitution of conjugal rights brought by a Christian Russian wife residing in Bombay at the time of the petition, and who has married a Parsi in France according to the French Law.

Demand to be made before filing such suit:—The English law requires that in suit for restitution of conjugal rights, there should be demand to return to cohabitation by the husband upon the wife and *vice versa*, before a petition is presented for such rights. *(Marshall v. Marshall,* 5 P. D. 23.)

The Indian Limitation Act appears to recognize the necessity of a husband asking his wife to join him, or to return to his house, before he can file a suit to compel her to do so. *(Fakirgauda v. Gangi,* 23 Bom. 310; *Hirabai v. Dhunjibhai,* 2 Bom. L. R. 845.)

A decree in a suit for restitution of conjugal rights should not decree possession of the person of the wife. A decree ordering such possession cannot be enforced. The wife cannot be treated as a chattel and ordered to be delivered up. *(Chotun Bebee v. Ameerchand.* 6 W. R. at p. 106; *Koober v. Jan,* 8 W. R. 467; *Melaram v. Thanooram,* 9 W. R. 552; *Gatha Ram v. Mohita,* 14 B. L. R. 298; *Fakirgauda v. Gangi,* 23 Bom. 307.)

In decreeing a suit for restitution of conjugal rights, it is not proper for the Court to issue an injunction to the parents of the wife restraining them from keeping her under their roof. *(Jamna v. Dayalji,* 22 Bom. L. R. 214.)

Decree for restitution of conjugal rights—how enforced:—A decree for restitution of conjugal rights under the Parsi Marriage and Divorce Act, 1865 is enforceable only in the manner provided by second paragraph of section 36 of the Act. *(Jehangir v. Avabai,* 9 B. H. C. 290.)

In appeal in the case of *Ardeshir v. Avabai*, 9 B. H. C. at pages 303, 304, Sargent, acting Chief Justice observes: -In the report made by the Commissioners appointed to make an enquiry into the usages of the Parsi community it appears, " that the statement relating to marriage and divorce, which was framed by the managing committee of the Parsi Law Association and upon which the present Act was based, was itself, with one addition, based on the English Divorce Act of 1858." That Act treats a decree for restitution of conjugal rights like all other decrees and orders. But if the Legislature had no object in view in punishing disobedience of its decree, we should expect to find a general provision in the Act applicable to all cases of contempt. If, therefore, the Legislature intended that the provisions of Civil Procedure Code should continue to be applicable as the appropriate means of enforcing a decree of the Court, we have a difficulty in seeing any ground for the enactment of the latter part of section 36 of the Act.

"The measure provided by the Act is doubtless not a stringent one for compelling a woman to return to her husband, but it may well be that the Framers of the Act, recognizing the futility of attempting to force a woman to return to her husband, considered that a less severe penalty than is provided by the Code of Civil Procedure in other cases would best accord with the feelings of the Parsi community. On the whole we are of opinion that the Judge was right in refusing to put in force section 200 of the Code of Civil Procedure, and that the rule *nisi* was rightly discharged with costs." (*Ibid.*)

See the case of *Ardeshir v. Avabai*, in notes under section 40 under the heading—*Civil Procedure Code applied "so far as applicable."*

Limitation for suits for restitution:—Having regard to section 33 of the Indian Limitation Act, 1877 and article 35 in the second schedule to that Act, a suit under the Parsi Marriage and Divorce Act by a wife for restitution

of conjugal rights is barred by lapse of time, when restitution has been demanded by her, and refused by the husband being of full age and sound mind, more than two years prior to the commencement of the suit. (*Dhunjibhai v. Hirabai*, 25 Bom. 644=3 Bom. L.R. 371.)

The withdrawal without reasonable excuse either by husband or wife from the society of the other is a continuing wrong. The wrongful act complained of creates a continuing source of injury every moment of time during which the husband or wife remains withdrawn from the society of the other, without reasonable excuse the wrong continues. Section 23 is therefore applicable, and thus a fresh period of limitation begins to run at every moment of the time during which the wrong continues. The cause of action is the one being withdrawn from the society of the other without reasonable excuse. The cause of action is not created by a demand that withdrawal should cease, and a refusal to comply with that demand. The obligation exists apart from any demand. (*Ibid.* at pp. 653, 654.)

A decree for restitution of conjugal rights takes effect immediately from the day on which it is dated.

A second withdrawal of a wife from cohabitation constitutes a cause of action just as much as a first withdrawal. A subsequent withdrawal of a wife gives a fresh cause of action, and unless it can be shown that a second suit for restitution of conjugal rights is barred by some section of the Parsi Marriage and Divorce Act, such a suit is maintainable.

It seems that had the husband Ardeshir in 9 B. H. C. 290 brought a second suit for restitution of conjugal rights under section 36 of the Parsi Marriage and Divorce Act, he might have succeeded.

No suit to enforce marriage or contract arising out of marriage, when husband under 16, or wife under 14 years. Sec. 37. Notwithstanding anything herein before contained, no suit shall be brought in any Court to enforce any marriage between Parsis, or any contract connected with or arising out of any such marriage, if, at the date of the institution of the suit, the husband shall not have completed the age of sixteen years, or the wife shall not have completed the age of fourteen years.

Betrothal among Parsis :—Formerly among the Parsis betrothal was, according to the rules and customs of the sect, held as indissoluble. (See pages 11 and 12 *supra.*)

Amongst Parsis betrothal, at present, is merely an engagement and can be broken off at any time before the actual marriage is solemnized. It is a contract or promise to marry. It does not constitute the actual marriage and is revocable. Though specific performance of the contract to marry cannot be enforced, the usual remedies in civil courts for pecuniary damages, arising out of the breach of promise to marry, are available to the party aggrieved. The Specific Relief Act, I of 1877 section 21 clause (b) and the last illustration under that clause provide that a contract to marry cannot be specifically enforced.

In *Bomonji and Bai Nawazbai v. Nusserwanji*, 27 Bom. 100, a Parsi father and daughter sued for damages for the defendant's breach of his promise to marry the daughter. The defendant alleged that the suit was really a suit for the benefit of the father, who sought to make money out of his daughter's betrothal; that he (the father) was an undischarged insolvent, and not in a position to pay costs, if he lost the suit; and that the second plaintiff (the daughter) had no property in India. The defendant took out a summons under section 380 Civil Procedure Code, requiring the plaintiffs to give security for costs. The Court ordered that security for costs should be given.

In *Goolbai v. Maneckji Limji* (unreported suit No. 347 of 1877), the plaintiff Goolbai sued the defendant Maneckji for breach of promise of marriage, and obtained a decree for Rupees 3,000 as damages and costs of the suit. Maneckji, the abovenamed defendant appealed and Goolbai, the above named plaintiff opposed, and it was held that poverty is no ground for requiring an appellant to give security for the costs of the appeal. (*Maneckji v. Goolbai*, 3 Bom. 241.)

In *Framjee v. Shapurji* (Suit No. 342 of 1912) the plaintiff stated that he was engaged to be married to one Mcherbai, the adopted daughter of the defendant; and that the defendant had failed to carry out the alleged arrangement. He, therefore, claimed damages for

breach of the promise to give Meherbai in marriage, and the return of gifts and presents of the value of Rupees 7,000. The defendant denied that there was any contract of marriage between the plaintiff and Meherbai, or that the defendant ever gave his consent to such contract. The defendant submitted that the suit must be dismissed with costs. On the case being called on before Mr. Justice Macleod, counsel for the plaintiff said that he did not wish to proceed with the case. The suit was, therefore, dismissed with costs. (The Times of India, Monday 16th June, 1913.)

Infant marriages among Parsis :— This Act does not deal with the question of infant marriages among Parsis. The only reference to infant marriages is in section 37 of this Act, which says that no suit can be brought to enforce a marriage, if at the date of the suit the husband is not over sixteen or the wife not over fourteen. The validity of such a marriage, which has inured after those ages are reached, is not decided. (*Peshotam v. Meherbai,* 13 Bom. 303.)

"Although the practice of infant marriages is one which finds no warrant in their own religious system, the Parsis in Western India have, in the course of centuries, so generally adopted them from their Hindu neighbours as to give such marriages amongst themselves all the validity they possess amongst Hindus, making them independent of any question of subsequent consent or non-consent by the parties thereto." *(Ibid.)*

In connection with the legality and validity of infant marriages may be cited the cases of *Peshotom v. Meherbai,* 13 Bom. 303 and *Shirinbai v. Khurshedji,* 22 Bom. 430. In these two cases, infant marriages, though not permissible or legal according to the tenets of the Zoroastrian religion as gathered from the Zend Avesta, the Ravayats and other sources, were held legal and binding, on the ground of a usage that had sprung up amongst the Parsis of performing such marriages.

In *Peshotam v. Meherbai*, 13 Bom. at page 311, Scott, J., held that usage must prevail over tenets. The learned Judge said:—"The Zoroastrian system would seem not to have contemplated marriage in infancy. The marriage ceremony of *Ashirvad* includes a prayer *(the nikah)* or exhortation to the parties, which would be senseless if it were not addressed to persons capable of matrimonial union in every sense. The Zend Avesta contains many passages, which exclude the idea of infant marriage. But custom seems to have wandered from the pure doctrine of the Zend Avesta; and the law whether English or Persian can only be applied subject to any well-established usage."

In the case of *Peshotam v. Meherbai*, 13 Bom. 303, the husband had sought a divorce from his wife, while in *Shirinbai v. Kharshedji*, 22 Bom. 430, it was the wife seeking release from the husband. Both these cases fall under section 37 of this Act. In *Peshotam's case* the plaintiff (the husband) might have got divorce from his wife, had he sued for it soon after attaining majority. In *Shirinbai's case* the plaintiff (the wife) sued for divorce against her husband immediately on attaining the age of twenty-one years; but the Sub-Judge's Court at Broach held the marriage valid and binding, as the custom of infant marriage among the Parsi community was found established and recognized. On appeal, the District Judge confirmed the lower Court's decree. And the High Court, as Court of Second Appeal, refused to interfere and look into the question of fact as to whether the evidence established the existence of infant marriage among the Parsis. It appears that if Shirinbai, the plaintiff had brought the suit for nullity against her husband, in the first instance, in the High Court of Judicature at Bombay, she might possibly have succeeded in having her marriage declared null and void.

The question of declaring a marriage null and void on the ground of its being an infant marriage by the High Court of Bombay is not likely to arise, as infant marriages are getting almost obsolete now. Cases of such marriages may be said to be now a thing of the past.

Suits with closed doors. Sec. 38. In every suit preferred under this Act, the case shall be tried with closed doors, should such be the wish of either of the parties.

Trial in camera:—Under this section, *at the wish* of either party to the suit under this Act, the Court *shall* try the case *in camera*.

Section 53 of the Indian Divorce Act, 1869 provides that the whole or any part of any proceeding under the Act *may* be heard, *if the Court thinks fit*, with closed doors.

The Probate, Divorce and Admiralty Division has no power either with or without the consent of the parties, to hear a nullity suit or other matrimonial suit *in camera* in the interest of public decency. "It is open to a party in a matrimonial suit, upon proof that justice cannot be done otherwise, to apply for a hearing *in camera.*"—*Per* Viscount Haldome, L. C. "In cases where it is shown that the administration of justice would be rendered impracticable by the presence of the public, an order for hearing a matrimonial suit *in camera* may be lawfully made."—*Per* Earl Loreburn. (*Scott v. Scott*, (1913) A. C. 417.)

[15 Bom. L. R. Journal page 124.]

Absence of delegates during trial. Sec. 39. Notwithstanding anything contained in section 16 or section 17, where in the case of a trial in a Parsi Chief Matrimonial Court not less than nine, or in the case of a trial in a Parsi District Matrimonial Court not less than six, delegates have attended throughout the proceedings, the trial shall not be invalid by reason of the absence during any part thereof of the other delegate or delegates.

Where at any stage of a trial in a Parsi Chief Matrimonial Court less than nine, or in a Parsi District Matrimonial Court less than six, delegates are present, who have attended throughout the proceedings, and the presiding Judge is of opinion that it is not possible without undue delay to secure the attendance throughout the proceedings of nine or six delegates, as the case may be, the proceedings shall be stayed and a new trial shall be held with the aid of fresh delegates.

This section has been added by Act XX of 1922.

Civil Procedure Code applied. Sec. 40. The provisions of the Code of Civil Procedure shall, so far as the same may be applicable, apply to suits instituted under this Act.

Civil Procedure Code applied, "so far as applicable": - Mr. Justice Melwill whilst discharging the rule *nisi* with costs in the case of *Ardeshir v. Avabai*, 9 B.H.C. at page 292 in his elaborate and learned judgment observes:—"By section 40 of the Parsi Marriage and Divorce Act, it is enacted that the provisions of the Code of Civil Procedure shall apply, so far as the same may be applicable, to suits instituted under this Act. It is to be regretted that this section was not drafted in such a manner as to indicate more clearly the intention of the Legislature—*Reg. v. Dossabhai.* As it is there is nothing in the Act to show whether the Legislature intended that the punishment provided in section 36 should be in addition to, or in substitution for, the ordinary remedies provided by section 200 of the Code of Civil Procedure. If the imprisonment and fine, which may be awarded under section 36, were intended simply as a punishment for an offence, simply as a mode of vindicating the dignity of the Court, then I see no reason why the party aggrieved by the disobedience to the decree should not have his civil remedy. But if on the other hand, such imprisonment and fine were intended to operate solely in satisfaction of the decree, or in satisfaction of the decree as well as *in poenam* for the contempt, then the party aggrieved has no remedy beyond that specially provided."

"The Framers of the Act seem to have preferred to follow the English Law in regard to the nature, though not in regard to the extent, of the penalty by which obedience should be enforced, and disobedience punished. The writ *de contumniace capiendo* may be regarded as a commitment in execution, as well as for contempt, and may be satisfied by the husband waiving his rights, as well as by the wife obeying the monition, and so purging the contempt. The penalty provided in section 36 of the Parsi Marriage and Divorce Act appears to be of the same nature, but it differs from the English process, in as

much as a definite term is fixed for its duration. Under the English process the duration of imprisonment to which an obstinately recusant wife might be subjected is unlimited, and in the case of *Barlee v. Barlee*, 1 Add 301, the wife was actually confined, until she became lunatic. The Framers of the Parsi Marriage and Divorce Act may well have recoiled before such a precedent, and may reasonably have considered that it was not desirable to subject a wife even to imprisoment for so long a period as two years, to which she would be liable under the Code of Civil Procedure. The contempt of Court would certainly be sufficiently punished by simple imprisonment for one month and a fine of two hundred rupees. And, on the other hand, regarding the commitment as a process in execution, it might well be considered that if imprisonment for a month would not induce a woman to overcome her dislike to her husband, it would be cruelty to attempt to force her to the lowest degradation of a human being by a further prolongation of her imprisonment. On the best consideration then, which I am able to give to the matter, I am of opinion that the intention of section 36 of the Parsi Marriage and Divorce Act is, that the penalty therein provided should operate not only as purging of the contempt, but in full satisfaction of the decree." (*Ibid.*)

See also this case (9 B. H. C. 290.) under the heading " *Decree for Restitution-how enforced,*" at pages 88, 89 *supra.*

See also the case of *Payne & Co. v. Pirosha,* 13 Bom. L. R. 920 as to costs under notes on section 36 at pages 57-59 *supra.*

Determination of questions of law and procedure, and fact.

Sec. 41. In suits under this Act, all questions of law and procedure shall be determined by the presiding Judge; but the decision on the facts shall be the decision of the majority of the delegates "who have attended throughout the trial."

" Provided that, where such delegates are equally divided in opinion, the decision on the facts shall be the decision of the presiding judge."

The words in the first paragraph in inverted comas have been substituted for the last words " *before whom the case is tried* " in the original section, and the second paragraph—the proviso - has been newly added, by Act XX of 1922.

Under the Parsi Marriage and Divorce Act *questions of fact* are questions, which the Act specifically directs to be tried by the Parsi delegates in the Parsi Matrimonial Court, and not by the Judge. (*Hirabai v. Dhanjibhai*, 2 Bom. L. R. 845 ; *Gulbai v. Behramsha*, 16 Bom. L. R. at p. 212.)

The decision of the majority of the delegates in this section (S. 41,) is conclusive. (*Dorabji v. Jerbai*, 16 Bom. at p. 138 ; *S. v. B.*, 16 Bom. 639.)

In leaving the question of cruelty to the delegates in trials under this Act, the Court should adopt the rule expressed by the Court of Exchequer-Chamber in the case of *Avery v. Bowden*, 6 E. and B. 973 "that if the evidence was such that the jury could conjecture only and not judge, it ought to go to the jury." (*Muncherji v. Motibai*, P. J. for 1894 at p. 109.)

The statutary law must doubtless be pointed out by the Court, but the customary law is a matter, like other matters of fact, within the cognizance of the delegates. That the custom binding on the conscience of Parsis, and as such forming the law subject to which the status of marriage is entered into, is to be ascertained as a question of fact, like any other customary law peculiar to a particular community, needs little support from authority, as it is a principle which is universally recognized by the Courts. But if authority is desired reference may be made to *Shirinbai v. Kharshedji*, 22 Bom. 430, in which this Court treated as a question of fact, not open to second appeal, the finding as to the existence of a custom binding amongst Parsis sanctioning infant marriages. (*Hirabai v. Dhunjibhai*, 2 Bom. L. R. at pp. 847, 848.)

Appeal to High Court. Sec. 42. An appeal shall lie to the High Court from the decision of any Court established under this Act, whether a Chief Matrimonial Court or District Matrimonial Court, on the ground of the decision being contrary to some law, or usage having the force of law, or of a substantial error or

defect in the procedure or investigation of the case, which may have produced error or defect in the decision of the case upon the merits and on no other ground :

Provided that such appeal is instituted within three calendar months after the decision appealed from, shall have been pronounced.

The second paragraph of this section provides the time—three calendar months—within which, after pronouncement of the decision appealed from, the appeal must be made.

Liberty to parties to marry again. Sec. 43. When the time hereby limited for appealing against any decree dissolving a marriage shall have expired and no appeal shall have been presented against such decree, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death.

This section is taken from the English law. Its provisions are exactly the same as those of section 37 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. C. 85.)

This section treats about decrees dissolving marriage, and seems not to cover cases of decrees for nullity of marriage.

A decree *nisi* for dissolution does not alter the status of the parties. The converture continues till the decree is made absolute. The decree becomes absolute when the provisions of section 43 are complied with. After decree absolute, the divorced woman is no longer a wife and divorced man no longer a husband. She is free from him and he from her; and then alone, the parties are at liberty to marry again, as if the first husband or wife, as the case be, were dead.

In the case of *Meherwanjee v. Awanbaee,* (his wife) 2 Borr. at page 213, it is found from the evidence of the Davar as a witness that no woman who had received a divorce from her husband, was ever permitted to marry again, unless indeed the husband apostatized, or became incurably diseased, or deranged, in which case the Anjooman would grant her permission to marry again.

V.—Of the Children of the Parties.

Custody of children pendente lite. Sec. 44. In any suit under this Act for obtaining a judicial separation or decree of nullity of marriage, or for dissolving a marriage, the Court may from time to time pass such *interim* orders and make such provision in the final decree as it may deem just and proper, with respect to the custody, maintenance and education of the children under the age of sixteen years, the marriage of whose parents is the subject of such suit;

Orders as to custody of children after final decree, and may, after the final 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 final decree, or by *interim* orders in case the suit for obtaining such decree were still pending.

The English Divorce Courts used to make orders for custody and maintenance of children under sixteen; but since 1894 they are making such orders for children upto twenty-one years; while under sec. 44 of P. M. & D. Act, 1865 such orders are made in the case of children under sixteen.

The innocent and not the guilty party has a *prima facie* right to the custody of the minor children. (*Martin v. Martin*, 29 L.J. P. & M. 106; *Barnes v. Barnes* L. R. I. P. & 463.)

In *Macleod v. Macleod,* 6 B. L. R. 318 it was held that when a wife obtains a decree for judicial separation on the ground of her husband's cruelty and adultery, and there is nothing to impeach her own conduct the Court would allow her to have the custody of the children. The Court has no power to make any order as to the custody of the children of the marriage in suits for

restitution of conjugal rights—*Chambers v. Chambers*, 39 L. J. (P. & M.) 56, nor where a petition for dissolution of marriage is dismissed—*Seddon v. Seddon*, 31 L. J. (P. & M.) 101. But on pronouncing a decree of dissolution of marriage, the Court will make an order that a child in the custody of the respondent be given up to the petitioner, when the child is of an age that entitles the petitioner to the custody by common law.—*Boyd v. Boyd*, 29 L. J. (P. & M.) 79.

And at page 319 of the above mentioned case Phear, J. observes:—I think I ought to be guided in this matter by the English decisions in the case referred, especially those of *Hyde v. Hyde*, 29 L. J. (P. & M.) 150, *Duggan v. Duggan*, *Ibid* 159, and *Suggate v. Suggate*, 1 Sw. & Tr. 492. These are summed up by the Judge Ordinary in *Chetwynd v. Chetwynd*, 1 L. R. P. & D. 39. He says:—"When parents cease to live together, the legal right to the custody of children of this age (a girl nearly 10 years of age, and a boy of 8) is with the father. But the Court has power to infringe upon this right; and when the common home has been broken up by the conduct of the father, it frequently exercises its power in favour of the injured mother. Several cases to that effect were cited in argument. It will be found, on reference to these cases, that it has been an invariable element in the decision that the wife herself has been free from blame. Thus in *Marsh v. Marsh*, 1 Sw. & Tr. 312, the wife is spoken of by the judge as the "unoffending wife," and there was no evidence, however slight, of misconduct on her part. In *Boyton v. Boyton*, 2 Sw. & Tr. 276, the full Court spoke of the marriage as being dissolved by reason of the misconduct of the husband, the wife not having been to blame. And again in *Suggate v. Suggate*, 1 Sw. & Tr. 492, there was no imputation on the wife's conduct towards her husband during the cohabitation, though an attempt was made to prove her habits to be such as not to fit her for the education of the children—an attempt which the Court pronounced to have failed."

In dealing with an application for custody of, and access to, children, the Court considers *first*, what is for the benefit of the children—that should be the paramount consideration with the Court; and *secondly*, the interests of the innocent party to the suit. (*D'Alton v. D'Alton*, 4 P. D. 87; *Philip v. Philip*, 41 L. J. P. & M. 89; *Codrington v. Codrington*, 3 Sw. & Tr. 491.)

In *Kelly v. Kelly*, 5 B. L. R. 71, it was held that when the marriage was dissolved on account of the wife's adultery, she was not entitled to have access to the children of the marriage.

When alimony had been allotted to the wife, and the only child of the marriage left in her custody *pendente lite*, the Court refused to order the husband to contribute to its maintenance. (*Cromwell v. Cromwell*, 19 L. T. Rep. (N. S.) 611.)

The innocent wife will not be deprived of the custody of her children, simply because she is obliged to ask for allowance; and the Court will order payment of a moderate amount for their maintenance. (*Milford v. Milford*, 1 P. & D. 715.)

Settlement of wife's property for benefit of children. **Sec. 45.** In any case in which the Court shall pronounce a decree of divorce or judicial separation for adultery of the wife, if it shall be made to appear to the Court that the wife is entitled to any property in possession or reversion, the Court may order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the children of the marriage or any of them.

Under this section, in the case of divorce or judicial separation for adultery of the wife, the Court has discretion—and the discretion must be exercised judicially—to make an order of settlement of whole or part of the wife's property for the benefit of the children of the marriage or any of them; while under the English law on the subject, the Court may order a settlement of such property for the benefit of the innocent party and of the children of the marriage, or either or any of them. And under section 39 of the Indian Divorce Act, 1869 the settlement may be ordered by the Court of such property for the benefit of the husband, or of the children of the marriage, or of both.

VI.—Of the Mode of enforcing Penalties under this Act.

Cognizance of offences under this Act. Sec. 46. All offences under this Act may be tried by any officer exercising the powers of a Magistrate, unless the period of imprisonment to which the offender is liable shall exceed that which such officer is competent to award under the law for the time being in force in the place in which he is employed.

When the period of imprisonment provided by this Act exceeds the period that may be awarded by such officer, the offender shall be committed for trial before the Court of Session.

Punishment of offences under Act committed within local limits of High Court. Sec. 47. If any offence which by this Act is declared to be punishable with fine, or with fine and imprisonment not exceeding six months, shall be committed by any person within the local limits of the ordinary original civil jurisdiction of the High Court, such offence shall be punishable upon summary conviction by any Presidency Magistrate of the place at which such Court is held.

Levy of fines by distress. Sec. 48. All fines imposed under the authority of this Act may, in case of non-payment thereof, be levied by distress and sale of the offender's movable property by warrant under the hand of the officer imposing the fine.

Procedure until return made to distress warrant. Sec. 49. In case any such fine shall not be forthwith paid, such officer may order the offender to be arrested and kept in safe custody until the return can be conveniently made to such warrant of distress, unless the offender shall

give security to the satisfaction of such officer for his appearance at such place and time as shall be appointed for the return of the warrant of distress.

Imprisonment if no sufficient distress. Sec. 50. If upon the return of the warrant it shall appear that no sufficient distress can be had whereon to levy such fine, and the same shall not be forthwith paid, or

in case it shall appear to the satisfaction of such officer, by the confession of the offender or otherwise, that he has not sufficient movable property whereupon such fine could be levied if a warrant of distress were issued,

any such officer may, by warrant under his hand, commit the offender to prison for any term not exceeding two calendar months when the amount of fine shall not exceed fifty rupees, and for any term not exceeding four calendar months when the amount shall not exceed one hundred rupees, and for any term not exceeding six calendar months in any other case; the commitment to be determinable in each of the cases aforesaid on payment of the amount of fine.

VII.—Miscellaneous.

Rules of procedure of P. M. Courts to be made by High Court. Sec. 51. Subject to the provisions contained or referred to in this Act, the High Court shall make such rules and regulations concerning the practice and procedure of the Parsi Chief and District Matrimonial Courts in the Presidency or Government, in which such High Court shall be established, as it may from time to time consider expedient, and shall have full power from time to time to revoke or alter the same.

All such rules, revocations and alterations shall be *published* in the official Gazette.

This section is taken from section 63 of the Matrimonial Causes Act, 1857.

Under this section (S. 51), the High Court has power to pass rules with regard to *practice* and *procedure*. It cannot legislate under this section of the Act. How can it then under this Act take away the Common law right of the solicitor. (*Payne & Co. v. Pirosha*, 13 Bom. L. R. at p. 923.)

Power to invest Chief executive officer with powers of Local Government. Sec. 52. The Governor-General of India in Council may invest the chief executive officer of any part of British India under the immediate administration of the Government of India with the powers vested by this Act in a Local Government.

Commencement and extent of Act. Sec. 51. Repealed by the Repealing Act XII of 1876.

Law as to Bridal Presents Among Parsis.

Custom prevailing amongst Parsis as to ownership in presents made to bride, at or after betrothal, and at or after marriage.

In *Burjorji Sorabji v. Pestonji Hormusji*, (Suit No. 600 of 1876) decided on 20th September 1877, Bayley, J. held that a custom was proved that "ornaments and moneys, given on marriage by a husband, or his parents and relations, to his wife are subject to the joint control of husband and wife during marriage, and on the death of either belong to the survivor."

In *Merwanji Burjorji v. Rustomji Nanabhoy*, (Suit No. 259 of 1883), decided on the 4th September 1884, Birdwood, J. referred to the above case of *Burjorji v. Pestonji* and held, "that the above custom embraces gifts from the bride's side as well as from the husband's, and was unaffected by the birth of children."

In *Byramji Bhimjibhai v. Jamsetji Nawroji Kapadia*, 16 Bom. 630, Parsons, J. finding the above two cases decided by the Bombay High Court upon the customs as to ownership of presents made to a bride at betrothal and between betrothal and marriage, and at marriage, and the increment thereof, held that "such presents belong to the husband and wife jointly during their lives, and on the death of either pass absolutely to the survivor. Further that with regard to special and costly clothes (i.e., those intended to be worn only on special occasions and ceremonies) presented during the same period, the same custom prevails."

In the above case of 16 Bom. 630, Parsons, J. after citing the two unreported cases, at page 633 says :-

"These apparently are the only cases that have been decided by this Court on the question. From a perusal of these cases themselves, I think that they may be taken as establishing the custom contended for by the plaintiff, in respect of presents of ornaments and money made to the bride, either by her relations or by her husband or his relations, at betrothal, and between betrothal and marriage, and at marriage, and of the increment thereof if any."

And at page 634 of the said report, the learned Judge further says:—"With regard to presents made after marriage, such as those made on or during pregnancy, or on the birth of the first child, or the first birthday of the first child, or on the thread ceremony of the plaintiff's cousins &c. &c., which are also claimed in the plaint, I cannot hold that any such custom as is contended for by the plantiff is proved. No evidence is adduced of any, and it is only natural to suppose that there would be none, since at these times the husband and wife would hold a distinct individuality and a defined position with regard to each other, and it would be as easy to give to the one as to the other, or to the two jointly according to whomsoever the donor might in each case wish his present to go. Most certainly the custom cannot be further extended, as the plaintiff here wishes to do, so as to embrace presents, such as toys and ornaments, which were given expressly to, and for, the use of his children, either soon after their birth, or when they were a year old."

In *Muncherji v. Nusserwanji*, 20 Bom. at page 11, Farran, C. J. observes:—"It is customary amongst Parsis for the father of the bridegroom, on the occasion of the marriage of his sons, to give ornaments or money for the purchase of ornaments to the bride. Such ornaments are considered to be the joint property of the husband and wife."

In the recent case of *Payne & Co. v. Pirosha*, 13 Bom. L. R. at page 929 it is remarked—"Ornaments presented to the wife on her marriage were under the Rulings of the Bombay High Court, the joint property of the husband and the wife."

In *Dhanjibhai v. Hirabai*, 2 Bom. 75 it was held that in the absence of any rule applicable to Parsis other than the English law, following *Graham v. Londondary*, 3 Atk. 393, a Parsi husband has no right to demand, from the widow of his deceased father in whose hands they are, delivery to himself of ornaments purchased for his wife by his deceased father, as they are separate property of his wife.

Cases on the subject before the passing of the Act XV of 1865.

In appeal in the case of *Kaoosji Ruttonji v. Awanbaee*, his wife (Suit No. 554 of the Provincial Court's file) decided on the 16th December 1817, it was held that a Parsi disagreeing with his wife cannot retain the clothes and jewels of his wife against her will, which should be delivered up to her. (Cited in 2 Borr. at page 219.)

In the old case of *Meherwanji Nosherwanji v. Awanbaee*, his wife, decided on the 16th March 1822, the Zilla Judge dismissed the claim of the husband against his wife to compel him to enter into a security for the amount of the value of dower in her possession, on the ground of the property in question belonging to the wife as of right, and not being in its nature subject to the control of her husband, and because the claim was foreign to general practice and usage, and wholly unsupported by precedent, custom, or rule of caste. (2 Borr.)

The case of *Burjorji Bhimji v. Phirozshah Dhunjishah*, decided on the 10th September 1839 and reported at page 206 of the Report of Selected Cases decided by the Bombay Sudder Dewani Adalut from 1820 to 1840, shows that in ancient times the Zilla Courts used to decide cases pertaining to Parsis according to the opinions of the Modee, Dastoor, and Panchayet, and the usage and custom of the community. In this case a Parsi named Phirozshah married Hirabai, the sister of Barjorji in Samvat 1853. At the time of marriage Phirozshah had given to his wife clothes and ornaments. Some time after the marriage they separated. In Samvat 1876 and thereafter Phirozshah gave money to Hirabai. She died in Samvat 1881. By a will she gave all her property to her brother Burjorji, who under authority of that will took moneys lying with the bankers, in his own possession. Thereupon the said Pirozshah filed a suit against the said Burjorji to recover the clothes, ornaments and cash given by him to his wife, amounting in all to Rupees 24,500, claiming to be himself the sole legal heir of his deceased wife. The Assistant Judge of Surat dismissed the claim. On appeal to the Zilla Court, a decree for Rs. 10,480-7-6 was passed in favour of the said Phirozsha.

CHAPTER XXXIII.

(OF THE RULES AND FORMS OF THE BOMBAY HIGH COURT, 1930.)

Procedure. S. 753. All proceedings shall be regulated by the provisions of the Code of Civil Procedure, save so far as such provisions may be varied or modified by the following rules.

Plaint for nullity, or dissolution of marriage to state non-existence of collusion or connivance. S. 754. In cases when the plaintiff is seeking for a decree of nullity of marriage, the plaint shall state that no collusion or connivance exists between the plaintiff and the other party to the marriage or alleged marriage, and in cases of dissolution of marriage on the grounds of adultery, that no collusion or connivance exists between the plaintiff and the person alleged to have committed adultery.

(*Forms of Plaints are given. Nos. I and III, in the Sch. to this Chapter.*)

Summons to require that written statement should be filed. In default of written statement suit to proceed exparte. S. 755. The summons to the defendant shall require him (or her) to put in a written statement of his (or her) case, and of his (or her) answer to the material allegations in the plaint and to file the same, 10 days at the least before the day appointed for the hearing of the suit.

(*Forms of Written Statements are given. Nos. II and IV, in the Schedule to this Chapter.*)

No statement shall be received after such period without special order of the Court; in default, the Court shall be empowered to proceed *exparte* on the day appointed for the hearing of the suit.

Verification and stamping of plaint, &c. S. 756. All plaints, written statements, petitions and all responsive allegations must be duly verified and must be duly stamped, pursuant to the provisions of Act VII of 1870, otherwise they will not be received or filed.

In certain cases written statements to state non-existence of collusion or connivance. S. 757. In cases involving a decree of nullity of marriage or a decree of judicial separation, or of

dissolution of marriage, the defendant shall, in the written statement, state that there is not any collusion or connivance between the defendant and the other party to the marriage.

Application by wife for alimony. S. 758. When a written statement admitting the fact of a marriage between the parties has been filed, and the husband has appeared in the suit, the wife may proceed to file an application for alimony, in substance according to the form V in the Schedule to this Chapter, and a day shall be fixed for hearing such application.

Answer of husband to such application after service. S. 759. After an application for alimony has been filed a copy thereof shall be served forthwith upon the husband, and within fifteen days after such service he shall file his answer thereto, which shall be subscribed and verified in the manner provided for subscribing and verfying plaints, or in default the Court will proceed *exparte*.

Application for alimony pendente lite. S. 760. After the answer of the husband has been filed, the wife may apply to the Court to decree her alimony *pendente lite*, provided that the wife shall, four days before she so moves the Court, give notice to her husband or to his agent or pleader of her intention to do so.

When witnesses may be examined on such application. S. 761. The wife, subject to any order as to costs, may, if not satisfied with the husband's answer, apply to have a day fixed for hearing such application, when witnesses may be examined in support of and against such application for alimony. 107552

Application or notice for permanent alimony. S. 762. A wife, who has obtained a decree of judicial separation in her favour and has previously filed her application for alimony, may, unless in cases when an appeal is interposed, move the Court to decree her permanent alimony; provided that she shall, eight days at least before making any such application, give notice to the husband, his agent, or to his pleader, of her intention so to do.

Affidavits to be received and acted on, on motion. S. 763. The Court may receive in evidence and act upon affidavits produced in support of, or in opposition to, any interlocutory application or motion.

Affidavits, before whom made. S. 764. Such affidavits may be made before any Assistant Master or Associate at the Original Side or before the Registrar or Deputy Registrar at the Appellate Side of the High Court.

FORMS TO CHAPTER XXXIII.

(PARSI CHIEF MATRIMONIAL COURT.)

Schedule.

No. I.

FORM OF PLAINT FOR DISSOLUTION OF MARRIAGE.

To,

The Judge of the Parsi Chief Matrimonial Court at Bombay.

A. B.

vs

C. B. (*and R.S. as the case may be*).

The day of 19 .

1. That the plaintiff was on the day of 19 . lawfully married to *C. B.* at

2. That after his said marriage the plaintiff lived and cohabited with his said wife at and at and that the plaintiff and his said wife have had issue of their said marriage, three children, one son and two daughters (*as the case may be*).

3. That on the day of and other days between that day and the *C. B.* defendant at in the committed adultery with *R. S.*

4. That in and during the months of January, February, and March the said *C. B.* defendant frequently met the said *R. S.* at and on divers such occasions committed adultery with the said *R. S.*

5. That there is not any collusion or connivance whatever between the plaintiff and the said defendant *C. B.* and *R. S.*, or either of them in respect of this suit.

NOTE.—*If the plaintiff does not desire to make the person with whom adultery is alleged to have been committed a co-defendant, a prayer that the Court may order accordingly should be added.*

6. That the defendant resides (or the defendant has left British India and the plaintiff and the defendant last resided together), at within the jurisdiction of this Honourable Court.

The plaintiff, therefore, prays that Your Lordship will proceed to decree (*here state the relief sought*) and that plaintiff have further and other relief in the premises as to Your Lordship may seem met.

No. II.

FORM OF ANSWER TO No. I.

The day of 19

A. B
vs.
C. B.

1. The defendant *C. B.* by *P. A.* his pleader, agent, (*or in person*) saith that she denies that she committed adultery with *R. S.* as is set forth in the said plaint.

2. The defendant further saith that on the day of 19 and on other days between that day and the said *A. B.* the plaintiff, at committed adultery with *X. Y.*, being a married woman, &c.

(*In like manner the defendant is to state connivance, condonation, or other matters which may be relied on as a ground for dismissing the petition*).

3. The defendant further saith that she is not colluding or conniving with the plaintiff, that he may obtain a decree in this suit: Wherefore this defendant humbly prays—

That Your Lordship will be pleased to reject the prayer of the said plaint and decree, &c.

No. III.

FORM OF PLAINT FOR DECREE OF NULLITY OF MARRIAGE.

To

The Judge of the Parsi Chief Matrimonial Court at Bombay.

A. B.
vs
C. D.

The day of 19 .

1. That the plaintiff, then a spinster, was on the day of 19 , married in fact, though not in law, to the defendant, then a bachelor, at

2. That from the said day of 19 , until the day of 19 , the plaintiff lived and cohabited with the defendant at diverse places, and particularly at aforesaid.

3. That the said defendant has never consummated the said pretended marriage by carnal copulation.

4. That at the time of the celebration of the plaintiff's said pretended marriage, the said defendant was, by reason of his impotency or malformation, legally incompetent to enter into the contract of marriage.

5. That there is no collusion or connivance between the plaintiff and the said defendant with respect to the subject of this suit.

The plaintiff, therefore, prays that Your Lordship will proceed to declare that the said marriage is *null* and *void*.

No. IV.

FORM OF ANSWER TO NO. III.

The day of 19 .

A. B.
vs.
C. D.

1. That I, the defendant did consummate the said marriage so solemnized, and that the defendant was at the time of the said marriage, and from thence hitherto hath been and still is apt for coition, as will appear on inspection.

Wherefore the defendant humbly prays that Your Lordship will be pleased to reject the said petition and decree, &c.

No. V.

APPLICATION FOR ALIMONY.

To,

The Judge of the Parsi Chief Matrimonial Court at Bombay.

C. B.
vs.
A. B.

The day of 19 .

The application of *C. B.*, defendant, the lawful wife of *A. B.*, showeth :

1. That the said plaintiff *A. B.* has for many years carried on the business at and from such business derives the net annual income of Rs.

2. That the said plaintiff *A. B.* holds shares of the Railway Company amounting in value to Rs. and yielding a clear annual dividend to him of Rs.

3. That the said plaintiff *A. B.* is possessed of made in his said business of to the value of Rs. (*and so on for any other property movable or immovable the husband may possess*).

The defendant, therefore, humbly prays that Your Lordship will be pleased to allow her such sum or sums of money by way of alimony *pendente lite* (*or permanent alimony*) as to Your Lordship shall seem meet.

TABLE OF FEES.

The following fees only shall be allowed in cases tried under Act XV of 1865:—

	Rs.	a.	p.
For every plaint	20	0	0
For every other document	0	8	0
For issuing every summons and subpoena	1	0	0
For drawing and engrossing every decree or order ...	5	0	0
For sealing every document	1	0	0
For administering oath	1	0	0
For serving process	0	8	0
For attendance of attorney or advocate (when an advocate (O. S.) is not instructed) on the day of presenting plaint or written statement	45	0	0
For attendance at settlement of issues (if not settled at the hearing of the suit) or hearing of any contested motion :—			
For advocate (O. S.)	60	0	0
For attorney or advocate without advocate (O. S.) ...	45	0	0
For attorney or advocate with advocate (O. S.)	30	0	0
For attendance at hearing of suit on first-day :—			
For advocate (O. S.)	75	0	0
For advocate or attorney	60	0	0
For advocate or attorney with advocate (O. S.)	45	0	0
For attendance for each succeeding day :—			
For advocate (O. S.)	60	0	0
For attorney or advocate	45	0	0
For attorney or advocate with advocate (O. S.	30	0	0
For taxing bill of costs	4	0	0
Costs of execution	45	0	0
For allowing search in the proceedings	1	0	0
Charges for professional witnesses :—			
Brigade Surgeon	100	0	0
Surgeon-Major	75	0	0
Surgeon	50	0	0
Assistant Surgeon over 20 years' standing	50	0	0
Assistant Surgeon under 20 years' standing	25	0	0

Costs of necessary translations will also be allowed.

Costs between party and party will be taxed by the Clerk of the Court.

Dated this 10th day of September 1930.

(Bombay High Court Rules, 1930, at pp. 383, 384.)

PARSI LAW.

PART II.

SUMMARY OF IMPORTANT PORTIONS OF INDIAN SUCCESSION ACT,

No. XXXIX OF 1925.

The Indian Succession Act, XXXIX of 1925 consolidates all the numerous Statutes and Acts relating to Intestate and Testamentary Succession, and lays down the general law applicable to cases of intestate and testamentary succession in British India.

Among the Acts so condolidated are the Parsi Intestate Succession Act, XXI of 1865 and the Indian Succession Act, X 1865, which apply to, and with which, they are concerned, since these Acts relate to Intestate and Testamentary Succession among the Parsis.

Domicile.

Domicile is the legal conception of residence. It connotes residence and intention of making it home. It is the criterion established by law for the purpose of establishing the civil status of a man.--*Udney v. Udney*, L.R. 1 Sec. App. 441.

Succession to the immovable property in British India of a deceased person is regulated by the law of British India—*lex loci rei sitæ*, wherever he may have had his domicile at the time of his death.

Succession to his movable property is regulated by the law of the country in which he had his domicile—*jus domicile*, at the time of his death, irrespective of the place of his birth, or death, or the situation of such property.—*Bhavrao v. Lakshmibai*, 20 Bom. 607.

[*S. 5.*]

Section 5 applies both to intestate and testate succession.

Succession to his movable property in British India, in the absence of any domicile elsewhere, is regulated by the law of British India. *(S. 19.)*

If the domicile of the deceased be not in British India, the application of his movable property to the payment of his debts is to be regulated by the law of British India; and the creditor who has received part-payment of his debt must bring into account such part-payment for the benefit of the other creditors, before sharing in the proceeds of the deceased's immovable property. *(S. 324.)*

The executor or administrator in British India of a person not having his domicile in British India and dying leaving assets both in British India and in the country in which he had his domicile at his death, may, after payment of all his lawful debts, transfer the surplus or residue of his property, with the consent of the executor or administrator in the country of domicile of that person, to such executor or administrator, instead of himself distributing the surplus to the persons (residing out of British India) entitled thereto. *(S. 867.)*

Three kinds of Domicile :—I. *Domicile by birth or of origin ;* II. *Domicile by choice ;* and III. *Domicile by operation of law.*

I. **Domicile by origin** is that which a person acquires at his birth from his parents.

A person can have only one domicile for the purpose of succession to his movable property. (*S. 6.*)—*Somerville v. Somerville,* 5 Ves. 750.

It is a settled principle that no person shall be without a domicile, and the law attributes to every individual as soon as he is born, the domicile of his

father, if the child be **legitimate**— *Caroline v. Pinto,* 18 Bom. L. R 715 ;=41 Bom. 687, and the domicile of his mother, if the child be **illegitimate.** (Ss. 7, 8.)—*Forbes v. Forbes,* 2 Eg. R. 178.

This is called the domicile of origin or domicile by birth. It is the creation of law, not of the party and is thus involuntary.

Under sections 7 and 8 the birth-place of the child is immaterial.

Domicile of origin of a **posthumous** child is the domicile of his father at the time of the father's death.

Domicile of origin of **children of whose parents nothing could be known and ascertained** may be taken to be the place where they were found.

II. **Domicile of Choice** is when one is abandoned and another is acquired.

The domicile of origin continues, until a new domicile has been acquired. *(S. 9.)*— *Bonnand v. Emile,* 32 Cal. 631.

A man acquires a new domicile by taking up his fixed habitation in a country, which is not that of his domicile of origin. A British Indian domicile is, however, not acquired merely by residence in H. M.'s Civil, or Military, or Air-force service, or in the exercise of any profession or calling, or by residing in another country in the discharge of the duties of any public office, e.g., as its ambassador, consul or other representative of a foreign government. This immunity attaches to the wife, family and servants of the minister as well as to all persons attached to the legation or embassy. *(Ss. 10, 12.)*

Any person may acquire a domicile in British India by making and depositing in some office in British India (to be fixed by the Local Government) a declaration in writing under his hand of his desire

to acquire such domicile, provided that he has been resident in British India for one year immediately preceding the time of his making such declaration. (*S. 11.*)

Domicile of choice is the creation of the party and is voluntary. It is acquired by a combination of fact (residence) with intention (that the residence should be permanent). Change of residence alone, however long and continued, does not *per se* affect a change of domicile. There must be an intention to change the domicile. The abandonment of an acquired domicile *ipso facto* restores the domicile of origin. "A man cannot be without a domicile" and "He cannot have two domiciles at a time." The law leans very strictly in favour of the retention of the domicile of origin, presumption being generally against the change of domicile. (*Somerville v. Somerville,* 5 Ves. 786; *Santoo v. Pinto,* 18 Bom. L. R p. 717.)

III. **Domicile by Operation of Law** attaches to those who are under the control of another, e.g., minor, wife, lunatic.

Minor's domicile follows the domicile of the parent from whom he derived his domicile of origin; a minor cannot, during minority, acquire a new domicile. His domicile, however, does not change with that of his parent:—(a) if the minor is married, or (b) holds any office or employment in the service of H. M., or (c) has set up, with the consent of the parent, in any distinct business. (*Ss. 14, 17.*)

A minor cannot acquire a domicile until he is *sui juris.* (*Somerville v. Somerville,* 5 Ves. 787.)

Wife's domicile. By marriage a woman acquires the domicile of her husband, if she had not the same domicile before. A wife's domicile during her marriage follows the domicile of her husband. A wife's domicile no longer follows that of her husband, (a) if they are separated by the sentence of a competent Court, e.g., by divorce or by judicial separation, but not by her living apart from him by agreement—*Whitcomb v. Whitcomb,*

2 Curt. 35; *Warrender v. Warrender*, 2 C. & F. 488; or (b) if the husband is undergoing a sentence of transportation. (*Ss. 15, 16.*)—*Dolphin v. Robins*, 7 H. & L. Cas. 3190.

On marriage the wife automatically acquires the domicile of her husband. The status of the spouses and their rights arising under the marriage contract are governed by *lex domicile*—the law of the country in which for the time being they are domiciled.—*Harvey v. Farnie*, (1882) 8 App. Cas. 43; *Nachimson v. Nachimsom*, (1930) P. 217. *(Khumbatta v. Khumbatta*, 36 Bom. L. R. 11.)

A widow's domicile after the husband's death is the same as that of the husband, unless she has changed it after his death.—*Kashibai v. Shripat*, 19 Bom. 697. If she remarries, her domicile will be that of her second husband.—*Dalhousie v. Mc'Donall*, 7 C. & F. 817.

Lunatic's domicile. An insane person cannot acquire a new domicile in any other way than by his following the domicile of another person. (*S. 18.*)

If the lunatic is a minor, his domicile follows that of his parent.

Marriage.

Change introduced by section 20:—Section 20 of this Act, which corresponds to section 4 of the Indian Succession Act, X of 1865, and which applies to Parsis, has introduced a very important change in the law in the case of persons to whom hitherto the English law was applicable.

Until the Legislations of 1865 (Acts 10, 15 and 21), the Parsis as regards their property in the island of Bombay were uniformly governed by the English Law.—*Naoroji v. Rogers*, 4 B. H. C. 1. (*Naoroji v. Pirozbai*, 23 Bom. at p. 97.)

By the Common Law of England a married woman, during coverture, could acquire no legal right to her *personal chattels*. And as to her *chattels real*, the husband became possessed of them by marriage in her right. He was entitled to their rents and profits and might even dispose of them during marriage. If he survived her, they were his

absolutely. He could not, however, dispose of them by will; and if he failed to dispose of them in his life time and the wife survived him, she became entitled to them absolutely.

No person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried. (*S.* 20.)

Section 20 gets rid of the principle, so far as property is concerned, that the husband and wife are one person in law; for, it provides that after the first day of January 1866 *no interest shall be acquired, nor any power lost, by any person by marriage.*

This section is prospective and does not affect rights acquired before the first day of January 1866. It is thus evident that if a Parsi female married before the first day of January 1866 dies leaving property, it would neither devolve on her heirs as on an intestacy, nor would it go to the persons named in her will; but its distribution and disposition will be governed by the English Law. The will of such a Parsi female would be valid only so far as it relates to the disposition of her separate property ; and as to other property, if her husband's consent was obtained to the making of a will disposing of such other property, or if she survived her husband.

A Parsi married woman now is absolute owner of all property vested in, or acquired by, her ; and her husband does not, by his marriage with her, acquire any interest in such property.—*Natall v. Natall,* 9 Mad. 12.

In *Miller v. Administrator General,* 1 Cal. at page 420 Markby, J. observes :—"The Act deals with testamentary and intestate succession. But it is impossible in dealing with the rights, which arise upon death, to ignore the consideration of the rights which arise upon marriage. For the rights which arise upon marriage, only assume their real importance when the marriage tie is dissolved. And the first and most necessary thing to be done by the Succession Act in reference to marriage was to declare the *lex loci* of India as to the interest acquired upon marriage by the parties thereto in the property of each other. Until that was declared no sound legislation could take place. This was done by the fourth section of the Act."

The object of the legislature in passing Act 10 of 1865 and Act 3 of 1874 was to assimilate the position of a married woman to that of an unmarried one, so far as regards her dealings with her own property. Section 4 of the former Act combined with section 7 of the latter Act enables women, married since the first day of January 1866, to possess and sue and be sued in respect of such property, as though they were unmarried.—*Cursetji v. Rustomji*, 11 Bom. at pages 352, 353.

Rule as to Wife's Costs, not affected by S. 4 of Succession Act, 1865 :—

In *Mayhew v. Mayhew*, 19 Bom. at page 295 Farran, J. observes. "It does not appear to me that the provisions of section 4 of the Succession Act, 1865, affect the rule as to costs; and section 4 of the Succession Act, 1865 enlarges the possibilities of the wife possessing means to pay her own costs, but (if she does not possess such means) does not do away with the advisability of the rule. The passing of the Married Women's Property Act in England has not produced any alteration in the rule of the Divorce Court there.

And in *Payne & Co. v. Pirosha*, 13 Bom. L. R. at pages 932, 933, it is observed :—" When the wife is not possessed of separate property enabling her to defray her own costs, and when she finds it necessary to protect herself and her interest, more especially if she is attacked by her husband, she ought to have the means to do so; in such a case neither section 4 of the Indian Succession Act, nor the Married Women's Property Act makes any difference in the Common Law Rule, which makes the husband responsible for his wife's costs to her solicitors."

Section 20 does not affect the right to make a settlement, nor the usual effect thereof.—*Sarkies v. Prosonomoyee Dossee*, 6 Cal. 794.

Among Parsis a gift may be made to the separate use of a married woman, or a woman about to be married.—*Meherbai v. Pirozbai*, 5 Bom. 268,

In *Dhanjibhai v. Hirabai*, 2 Bom. 75, it was held that in the absence of any rule applicable to Parsis other than the English Law, following *Graham v. Landondary*, 3 Atk. 393, a Parsi husband has no right to demand from the widow of his deceased father in whose hands they are, delivery to himself of ornaments purchased for his wife by his deceased father, as they are separate property of his wife.

Effect of marriage between person domiciled and one not domiciled in British India. Section 20 of this Act declares the general *lex loci* of India, laying down a general rule as to the effect of marriage in respect of property when *both* the parties to the marriage have an Indian domicile. And section 21 of the Act lays down a special rule to govern a particular case, stating that where *either* of the parties has an Indian domicile—one domiciled and the other not domiciled—and the marriage takes place in British India, all his or her rights as regards the other's property—movable or immovable, are regulated by the territorial law of India.—*Miller v. Administrator General*, 1 Cal. at pp. 412, 420.

Sections 20 and 21 read together should be understood as laying down a general rule as to the immediate effect of marriage in respect of movable property of the married persons, not comprised in an *ante-nuptial* settlement, and not as laying down a rule intended to affect the law of succession.—*Miller v. Administrator General*, 1 Cal. 420. (*Hill v. Administrator General*, 23 Cal. at pp. 411, 412; *Shapurji v. Dossabhai*, 30 Bom. 359.)

Settlement of Minor's property in contemplation of Marriage. S. 22. The property of a minor may be settled in contemplation of marriage, provided the settlement is made by the minor with the approbation of the minor's father, or if the father is dead or absent from British India with the approbation of the High Court.

Sections 21 and 22 are not retrospective in effect.

Parts of Indian Succession Act, 1925, not applicable to Parsis.

The whole of Part IV, and the whole of Part V, except sections 30 and 49, and Chapter III (of this Part) containing "Special Rules for Parsi Intestates," do not apply to Parsis.

A person is deemed to die intestate in respect of all property, of which he has not made a testamentary disposition which is capable of taking effect. *(S. 30.)*

A man dies intestate—When he has left no will, or has made a will, which is not legally valid. When he has left a will and appointed executors, but there are no other provisions in it. When he has revoked the will he has made. When the sole legatee under his will, dies before him.

The cases of *Erasha v. Jerbai*, 4 Bom. 537 and *Hormusji v. Rustomji*, P. J. 1893 page 333 show that the use of mere negative words in a will unaccompanied by any effective disposition of the property by the testator cannot alter the course of the law of distribution.

In *Erasha v. Jerbai*, a Parsi by his will expressly directed that neither his daughter nor his widow should take any share of his property, the whole of which he bequeathed to his brother, who, however, predeceased him. The bequest to the brother lapsed, and there was an intestacy and the daughter and widow took the property.

In *Hormasji v. Rustomji* it was *held* that the exclusion of certain of a testator's heirs by a will, does not exclude them from sharing in that portion of the property, which has to be treated as intestate owing to certain bequests to religious uses being void.

Children's advancement not brought into hotchpot. S. 49. Where a distributive share in the property of a deceased intestate is claimed by a child, or any descendant of a child of such person, no money or other property, which the intestate may, during his life, have paid, given or settled to, or for the advancement of the child, by whom or by whose descendant the claim is made, shall be taken into account in estimating such distributive share.

It is remarked in the case of *Dhunjibhai v. Navazbai*, 2 Bom. 75—"The scheme of the Parsi Succession Act being so different from the English system of distribution, the rule as to advancement does not affect the Parsis, though section 42 (Act 10 of 1865)—Sec. 49 (Act 39 of

1925) does not apply to them. In exoluding from application to Parsis this section, doing away with the English rule that children's advancements are to be brought into hotchpot, it was not the intention of the legislature to preserve the English provision for that community."

The Succession Act gets rid of the distinction in English Law between *real* and *personal* property, and holds all property (*movable* or *immovable*) alike for the purpose of devolution and succession.

It abolishes the English law principle, that husband and wife are one person in law and denies the husband's right by marriage in the wife's property during marriage. (S. 20 *supra.*)

In respect of age of majority, while in English law it is the completion of the 21st year, under the Succession Act it is the completion of the 18th year.

Where a debtor bequeaths a legacy to his creditor and it does not appear from the will that the legacy is meant as a satisfaction of the debt, the creditor is *prima facie* entitled to the legacy as well as to the amount of the debt. (*S. 177.*)

Where a parent, who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child, and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child *prima facie* is entitled to the legacy as well as to the portion. (*S. 178.*)

No bequest gets wholly or partially adeemed by a subsequent provision made by settlement or otherwise for the legatee. (*S. 179.*)

The legatee gets the legacy and also the subsequent provision made for him.

Sections 177, 178 and 179 of the Succession Act, 1925 are departures from the English rule of performance or satisfaction. That rule is not observed in India. *(Hassanbhai v. Popatlal.* 14 Bom. L. R. 782 ; *Pestonji v. Framji,* 12 Bom. L. R. 863 ; *Jugjivandas v. Brijdas,* 7 Bom. L. R. at p. 301.)

Special Rules for Parsi Intestates.

Before giving the Special Rules for Parsi Intestates (Ss. 50—56) it is necessary to give briefly the laws by which the Parsis were, from their very sojourn in India upto the year 1865, governed in respect of devolution of their property, in the Presidency towns and in the Mofussil.

The matter has been selected and gathered from some very old and some recent cases, as well as from the Report of the Parsi Law Commission given in the first book (1868) on the Parsi Acts by the late Sheth Sorabjee Shapurjee Bengalee.

Introduction.

Since the decision in the case of *Naoroji v. Rogers*, 4 B. H. C. 1 it cannot be disputed that until the legislations of 1865 (Acts X, XV and XXI of 1865) "the law, uniformly applied to Parsis and their property by the Supreme Court in the island of Bombay, and since it was closed, by the High Court at its Original Jurisdiction side has been the English law," subject to certain specified exceptions. (*Naoroji v. Pirozbai*, 23 Bom. 87.)

There was a difference in the relative legal status of the Parsis of the Presidency towns and of the Parsis of the Mofussil, before the legislations of 1865. The Parsis of the Mofussil, and of the Presidency towns had been exposed, in the administration of law, to two different classes of evils:—in the Mofussil to the fluctation and uncertainty of decision necessarily arising from admitting proof of unwritten usage as evidence of what the law was and the consequent encouragement thus given to speculative litigation:—in the Presidency towns they laboured under a still greater inconvenience—they were subjected in matters of contract, inheritance and succession, to a system of laws, which were utterly unsuited to their social usages and requirements; while in matters matrimonial, since the Privy Council decision in 1856, the Parsis had been practically without law.

The division of property into "*personalty* and *realty*," in English law is not a division, which was recognized in the Indian Mofussil, Act IX of 1837 was not extended to the Mofussil, since the Courts had never enforced this branch of English law outside the Presidency towns; the non-extention was due to the fact that among Parsis in the Mofussil, the separate doctrines of English law of real property, were never held to govern. (*Shapurji v. Dossabhoy*, 7 Bom. L. R. pp. 991, 992=30 Bom. pp. 362, 363)

In the year 1835 a circumstance occurred, which rendered the Parsis living within the jurisdiction of the late Supreme Court of Bombay additionally anxious for positive legislation on matters connected with their rights of Inheritance and Succession. In that year a Parsi died intestate and his eldest son preferred a claim in the Supreme Court of Bombay to be entitled to the whole of immovable property of his deceased father by virtue of the English law of Primogeniture to the exclusion of the next-of-kin. The Parsis of the Presidency-town took alarm. Becoming apprehensive that the English law of real property was, for the first time, about to be applied or might be applied in that case, on the 20th November 1835 they transmitted to the Legislative Council a petition, very numerously signed, praying to be protected against this threatened application of the British Law. Their appeal to the Legislature was successful.

On the 15th May 1837 the Parsi Chattels Real Act IX of 1837 was passed, emancipating the Parsis of the Presidency towns from the English law of succession to real property.

(P. L. Com. Rep. 13-10-1862.)

The Parsi Chattels Real Act No. IX of 1837, enacted that from the 1st day of June 1837, all immovable property, situate within the jurisdiction of any of the Courts established by His Majesty's Charter shall, as far as regards the transmission, of such property on the death and intestacy of any Parsi having a beneficial interest in the same, or by the last will of any such Parsi, be taken to be and to have been of the nature of chattels real and not of freehold.

The Parsi Chattels Real Act IX of 1837, repealed by Act VIII of 1868 applied to all the Presidency towns, and not to the town of Bombay alone. (*Rogers v. Naoroji*, 4 B. H. C. at page 114.)

"On one occasion, in the Recorder's Court of Bombay, the law appears to have been administered to Parsis on the same principle as in the Mofussil. In the case of the "*Gheestas*," Sir James Mackintosh just before leaving India (in 1811) was induced, on evidence that such was Parsi usage, to admit to the right of inheritance, the illegitimate son of an intestate Parsi, because he had been invested with the sacred badge. This decision, which caused a great sensation among the Parsi Community at the time, was reversed by Sir John Newbolt.—P. L. Com. Report. (*Naoroji v. Rogers*, 4 B. H. C. at page 100.)

Though by the Passing of Act IX of 1837, the Parsis in the Presidency towns were somewhat benefited, the Mofussil Parsis derived no benefit from it. Even the Parsis in the Presidency towns got only partial relief, for though it relieved them from the operation of the English law of Primogeniture, yet *in all cases of intestacy*, the Parsis of the Presidency towns, *as regards every description of property* were subjected to the English Statute of Distribution (by which a third went to the widow and the residue was distributed equally amongst the children and their representatives), which being wholly unsuited to their requirements and quite at variance with their usages and customs, caused real and pressing inconvenience to the Parsis of the Presidency towns. (P. L. Com. Rep. 13-10-1862.)

Having no Code of laws recognized among themselves, having no ancient book of laws and having no authoritative account even of their unwritten law, no one of the Parsis knew the extent of his family rights, or the obligation of his family duties ; and a better and more satisfactory and permanent settlement of their inheritance and succession laws being, therefore, entirely necessary, the Parsis called a great meeting at Bombay on the 20th August 1855, to consider and adopt measures for procuring the enactment of law as adapted to their wants and their manners. The Managing Committee of the Parsi Law Association, appointed for that purpose, drew up a draft code and presented it to the Legislative Council of the 31st March 1860. The Select Committee of the Legislative Council then submitted their report, and a Commission was thereupon appointed *to enquire into the usages*

recognized as laws by the Parsi Community of India, and into the necessity of Special Legislation in connection with them. (26th December 1861). The Parsi Law Commission then made a report on the 13th October 1862." (*Ibid.*)

And at last a long standing grievance of the Parsi Community was removed in the year 1865. The British Government was pleased to pass "The Parsi Intestate Succession Act," XXI of 1865, which has been extended to the entire Parsi Community of India—whether in the Mofussil or the Presidency-towns, except the scheduled districts.

The Parsi Intestate Succession Act, 21 of 1865 no longer stands as a separate enactment, and the Parsis are now governed, in respect of both intestate and testamentary succession, by the Indian Succession Act, 39 of 1925.

Sections 50 and 52 treat about division of property of *a male Parsi intestate* among his widow and children, and where there is no widow, among his children.

Adoption among Parsis in former times.—From the case of *Furidoonji v. Jamshedji*, 1 Borr. 23, the following is gathered on the question of adoption amongst Parsis in the early part of the nineteenth century:—(a) The indespensible law of the Parsis is that where a man has no male issue, a son must be adopted either during his life by himself, or for him by his relations, after his decease; (b) If after the death of the father a son by his own free will and consent become the adopted son of another, he is entitled to two shares, one from the property of his real father, and another from that of the person who adopted him.

From another case on the subject of adoption, case of *Nawee Bahoo v. Pestonji*, 1 Borr. at pages 3 and 5, the following points are gathered, which appear to be evidently the outcomes of their (Parsis) being amidst the Hindus.

The Court ascertained from the evidence of the Dastoor, Modee and several other Parsis, (a) that a wife's consent was not necessary to render an adoption legal, though, if obtained it would be better;

(b) that seating the person to be adopted in the lap of the adopter was not necessary to complete the adoption, which was equally legal if the parties call each other by the names of father and son: (c) that any person may stand up and perform the *Uthumna*, or third day ceremony of the deceased without any prejudice to the title of the heir; (d) that the caste was divided on the following points—(1) Whether an only son could be adopted; (2) Whether an adopted son loses all title to the inheritance of his real father or not; and (3) Whether the adoption of one son did or did not preclude the adoption of another in his stead.

The usages recognized as law by the Parsis of India, as to the *right of females to inherit to intestate males prior to* the *legislation of 1865*, were *not Zoroastrian but Hindu usages* – to which, in the course of some twelve centuries of sojourn in India, they – the Parsis had become habituated, and which they acquiesced in as having the force of customary law. As a consequence the Parsis, like their Hindu neighbours had been averse to giving any share to females by way of inheritance in the property of a male Parsi dying intestate; and Parsi widows and daughters were generally not allowed any heritable share in the property of their husbands and fathers. They had been held entitled to nothing beyond maintenance. (P. L. Com. Rep. 13-10-1862.)

The Commission in their report say:-"The fair conclusion from the whole of this portion of the evidence appears to the Commission to be this,-that though not many passages can be adduced to show that the right of Parsi females to inherit on the death of their intestate husbands and fathers is explicitly laid down in Parsi works of authority, yet there is some evidence that such was the ancient rule: while on the other hand the practice of excluding from the inheritance the widows and daughters of male intestate Parsis is not authorized either by any tradition of ancient Persian usage or any text of ancient Persian books. It is clear, therefore, that a law affirming the right of Parsi females to inherit the property of their intestate male relatives cannot reasonably or with truth be objected to as having any tendency to offend the religious feelings of any class of the Parsi community."

As regards the amount of the shares of the widows and daughters, there was, as it appears from the report of the said commission, an absolute and strongly pronounced difference of opinion between the Mofussil Parsis and those of the Presidency-towns. The former were of opinion that the amount allocated ought not to exceed one-eight to each (widow and daughter). The amount fixed in the draft code, viz., half of a share to each of the daughters, they considered too high. But at last the Government was pleased to fix the amount of their shares as provided in S. 1 (Act 21 of 1865) = S. 50 (Act 39 of 1925).

In the case of *Naweebahoo v. Pestonji.* 1 Borr. in note on page 2, it is remarked :—In this and other Parsi cases the word "*Laws*" is applied to points laid down by the Modee, High Priests, and other members of the Parsi persuation. They have in fact no laws, for such books as they had before they emigrated from Persia were at the time all lost, and the Rules, which in their Engagement with the Hindu Chief of Sanjan they bound themselves to obey, form. together with the customs of the country, which they insensibly picked up in their intercourse with the people, a body of Rules or common law differing in few respects from that custom of the country founded on Hindu law, which regulates the whole of a Hindu's life. Even in matters connected with Hindu religion, as adoption, contract of marriage etc. the ceremonies of Hindus are the same as those performed by the Parsis; indeed in little else but their faith will they be found to differ materially from Hindus; and they may safely be pronounced to have "no law."

Sections 51 and 53 treat about the division of property of a *female Parsi intestate* among widower and her children, and where there is no widower, among her children.

With regard to the *right of Parsi females to inherit property left by other Parsi females dying intestate*, it was brought to the notice of the Commission that in numerous petitions of the Mofussil Parsis against the Draft Code (with one exception) *this* right is admitted to the fullest extent, though with variations of details that strikingly illustrate the fluctuating and uncertain nature of all law that is based on mere unwritten custom and usage.

Section 54 treats abouts the division of a predeceased child's share of intestate's property among the widow or widower and issue of such child.

Section 55 treats about the division of property when the intestate leaves a widow or widower, but no lineal descendants.

In *Goostadji v. Kakoosji*. 1 Borr. at page 322—on enquiry by the Court from the Dastoor as to who was the legal heir of a Parsi dying intestate, leaving a grandson and a second wife, by whom there was no issue, the answer was that if the first wife of the intestate be alive, she and the grandson will share equally the property between them. The second wife will retain only her dower (whatever property she brought from her own house) and the grandson inherits all the remainder, for he is heir, though there be no will in his favour. And the Court decided the grandson to be the heir, to the intestate.

Section 56 unlike all the six preceding sections of this Act, applies to cases where the intestate leaves neither widow or widower, nor lineal descendants.

Schedule II Part I. (See sec. 55 *infra*.)

Schedule II Part II. (See sec. 56 *infra*.)

Special Rules for Parsi Intestates.

(Ss. 50 to 56.)

Sections 50 to 56 of the Indian Succession Act, 1925 treating of "Special Rules for Parsi Intestates," are an entire reproduction of sections 1 to 7 of the Parsi Intestate Succession Act, XXI of 1865, except its section 8, which is reproduced in substance as section 31, in the Succession Act, 1925.

The Parsi Intestate Succession Act, XXI of 1865 passed on the 10th April 1865, relieved the Parsis and exempted them from the operation of a few particular sections of the Indian Succession Act, X of 1865 relating to intestate property, as being opposed to the social and religious usages of the Parsis, and stated the provisions by which partition of intestate property was to be regulated among them.

These Special Rules for Parsi Intestates extend to the entire Parsi Community in British India, and apply to Parsis of the Presidency towns, as well as of the Mofussil, except the scheduled districts.

See " *This Act where in force* " at page 13 *supra*.

Prior to Act XXI of 1865 Bombay Parsis, as to succession, were governed by English Law, modified by Act IX of 1837.

In the case of *Hirabai v. Dinshaw*, 28 Bom. L. R. 1334 Marten, C. J. observes (pages 1341, 1342):—" Until the recent legislation of the year 1865, the law uniformly applied to Parsis and their property in the island of Bombay by the Supreme Court, and since it was closed by the High Court at its Original Jurisdiction Side, has been as correctly stated in the clear and able Report of the Parsi Law Commission (of which *Sir Joseph Arnold* and *Mr. Justice Newton* were members), the English law except so far as it is varied by Act IX of 1837, ...

" In *Naoroji v. Pirozbai*, (1898) 23 Bom. 80, Sir Charles Farran said (page 98):-" It has not been contended before us that Parsis in the island of Bombay are not subject to English law generally. There are certain legislative and other well defined exceptions to the rule, but such exceptions do not include the law relating to wills, nor, so far as I am aware, the ordinary rules for their construction. The judgement in *Naoroji v. Rogers* has set at rest any doubts, which ever existed as to the law by which the Parsis are governed. I have, therefore, considered the question before us in the light of the English law being applicable to it. That law is now embodied in the Succession Act, but is virtually left unaltered by its condification."

"So, too in *Payne & Co. v. Pirozbai*, (1911) Mr. Justice Davar, who was himself a Parsi, said (page 929):-" I am afraid it is too late in the day now to raise the question as to whether the Common Law of England does or

does not apply to the Parsis in the town and island of Bombay. In *Naoroji v. Rogers*, (1867) 4 B. H. C. 1, Westropp, J. held that it did, and that case has been followed by a series of decisions of this Court holding that, except when there is special legislation affecting the community, the Common Law of England applied to the Parsis residing in the Presidency town of Bombay."

The principle which the *Mofussil Courts* had adopted was that there was no *lex loci*, in British India, and that their practice had been to ascertain in the best manner they could, what the law of the parties before them was, and the Courts there, acting under Regulation IV of 1827, sections 26 and 27 took evidence of, and enforced what was proved to be, the usage of the Parsis, in the locality. (*Jehangir v. Pirozbai*, 11 Bom. at page 4.)

The decisions in *Mithibai v. Limji*, 5 Bom. 506 and *Jehangir v. Pirozbai*, 11 Bom. at p. 4 are authorities for the view that before the coming into operation of the Parsi Intestate Succession Act, 1865, the law governing the Parsis in the Mofussil was the ascertained usage of the community, modified by the rules of equity and good conscience. It is true that in such cases the practice of the English Equity Courts would also be followed with necessary modification—*Manchershaw v. Kamrunisa Begam*, 5 B. H. C. 109; but the reference to these courts would be not for the purpose of introducing special or peculiar doctrines of English law, but rather with the purpose of elucidating the principles of equity and good conscience, and of giving systematic and uniform effect to them. (*Shapurji v. Dossabhoy*, 7 Bom. L. R. at p. 991=30 Bom. at p. 362.)

As to in respect of what property deceased is considered to have died intestate, see page 122 *supra*.

Division of property among widow and children of intestate. Sec. 50. Where a Parsi dies leaving a widow and children, the property of which he dies intestate shall be divided among the widow and children, so that the share of each son shall be double the share of the widow, and that her share shall be double the share of each daughter.

Sections 50 to 55 are intended to embrace all cases of a Parsi leaving lineal descendants, or a widow or widower.

Property. The word "Property" occuring in sections 50 to 56, includes movable and immovable property.

Before Act XXI of 1865, Parsi widows and maidens got maintenance only. The Parsis possessed nothing like a Code—the books they possessed before quitting Persia had almost perished, and the stipulations entered into by them with the Rana of Sanjan together with local Hindu usages insensibly adopted, constituted a collection of rules and domestic laws, differing in a few points from the customs of the country based on Hindu law. And thus the Parsis according to custom in cases of intestacy did not allow females any share and Parsi widows and maidens were only allowed maintenance. (*Motibai v. Dosibai*, P. J. for 1877 at p. 106.)

Shares of widow and children. According to the section, the widow gets twice as much as each daughter, and each son gets twice as much as the widow.

Examples.

If a Parsi dies leaving a widow, one son, and one daughter, his property is to be divided into seven equal shares. Out of these, two shares will go to the widow, four shares to the son, and the remaining one share will go to the daughter.

If in the above example, there be three sons and three daughters, the property will have to be divided into seventeen shares. Out of these, two shares will go to the widow, twelve shares among the three sons—each of them taking four shares, and the remaining three shares will be distributed equally among the three daughters—each daughter taking one share.

If there be no daughter but four sons and the widow, the property will have to be divided into nine equal shares, out of which one share will go to the widow and the remaining eight shares will be divided among the four sons—each son getting two shares.

If there be eight daughters and the widow, but no son, the property will have to be divided into ten shares. The widow gets two shares and the eight daughters take the remaining eight shares between them, each taking one share.

Children. The children may be either by the widow, or a predeceased wife. (Stokes.)

The word " Children "—son and daughter- does not include a step-son or a step-daughter, nor adopted son nor adopted daughter, but it includes a posthumous son and posthumous daughter.

Step-child. One's step-child is only a child of one's husband or wife by a former marriage, and consequently it does not inherit anything in the estate of the step parent.

Step-child is a son or daughter by marriage only. Step is a prefix, used in composition before father, mother, brother, sister, son, daughter, child &c. to indicate that the person thus spoken of is not a blood relation but is a relation by the marriage of a parent, e.g., step-mother to X is the wife of the father of X, married by him after the death of the mother of X.

At the present day, though an adoption is sometimes made among Parsis, yet it can carry with it no right of inheritance.

Adoption among Parsis. There is nothing like strict adoption amongst Parsis. A Parsi can adopt a son to perform his funeral ceremonies, but such adopted person will not inherit any portion of the deceased's estate, except under his will. Such adopted person is called "Paluk" or "Dharm-putr." An adoption made by a Parsi immediately before his death would render extremely improbable the execution of a will by him a short time previous thereto, and therefore calls for a very clear proof to establish its existence. Although in the cases of adoption by " Dharm-putr " (a partial adoption) it is not indispensably necessary that a declaration should be made on the third day after the decease, yet it is usual to make such a declaration and to take a writing from the " Dharm-putr." In the absence of any such writing, and upon the whole evidence the adoption (in the case) was pronounced to be as a *"Paluk-putr"* and not merely as a *"Dharm-putr."* A "Paluk" is appointed by the adoptive father in his life-time ; while a " Dharm-putr " is appointed after his death, for the performing of his funeral ceremonies. (*Homabaee v. Punjeabhaee,* 1 Sutherland's P. C. Judgements, at p. 28.)

In the recent case of *Kershasji v. Kaikhushru*, 31 Bom. L. R. at pages 1082–1084, it is found that a Parsi, among other things, claimed to be adopted son of the intestate and to have acquired by adverse possession the whole of the deceased's property at the date of the suit. Although the lower Court found in his favour that the custom of adoption did prevail in the Baroda State, where the parties were domiciled, yet it also held that the custom would not prevail in British India as regards immovable property situate there.

"It is elementary international law that the law which governs the land of a particular nation is the law of that nation. Consequently land in British India is governed by the law of British India as the *lex loci*, and not by the law of the domicile of the temporary owner. It follows, therefore, that having regard to the law of British India, and the Statutory provisions, which govern succession amongst Parsis, it is abundantly clear that there is no room in the law of British India for such a custom amongst the Parsis, as is now put forward." *(Ibid.)*

Posthumous children.—"As regards posthumous children, they would inherit though no express mention is made of them. Before the Parsi Intestate Succession Act was passed, a Parsi posthumous child would have inherited to his father dying intestate, under the English Law. By the Common Law of England, a child *en ventre* (i.e., in the womb) is looked upon as a person in *rerum natura*, so that such child is to all intents and purposes a child as much as if born in the father's life-time. Such a child succeeds under the English Statutes of Distribution to an intestate, although those Statutes contain no provision similar to what is found in section 23 of the Indian Succession Act X of 1865, as to the position of a child *en ventre*. (*Wallis v. Hodgson*, 2 Atk. p. 116; *Burnett v. Mann*, 1 Ves. 156.) From the fact that part third of the Indian Succession Act, 1865 (which includes sec. 23) is excluded from application to Parsis, it might, at first sight, appear that a Parsi posthumous child would not inherit to a Parsi intestate. But section 23 is a mere declaratory section as to the position a child *en ventre* occupies and the omission of the part third containing it, affords no ground for the argument that it was intended that a Parsi child *en ventre* should occupy a different position after the Parsi Intestate Succession Act than it did before in cases of succession. Section 86 of the Indian Succession Act, which applies to Parsis enacts that in a will, all words expressive of relationship apply to a child in the womb who is afterwards born alive. This also points to the conclusion that, the Legislature could not have intended a result in

the case of an intestacy different from that in the case of a will." (*As the point was somewhat doubtful the author went to the cost of procuring the opinion of an eminent counsel, viz., (the late) Mr. Inverarity on it, at the time, when he first published his "Parsi Law" in 1902.*)

In the case of *Muncherji v. Mithibai*, 1 Bom. 506, the posthumous daughter of the intestate was allowed a share in her father's property.

Division of property amongst children of male intestate, who leaves no widow. Sec. 52. Where a Parsi dies leaving children but no widow, the property of which he dies intestate shall be divided amongst the children, so that the share of each son shall be four times the share of each daughter.

Shares in a male intestate's property, of widow and of children, and of children when no widow. Section 50 defines the shares of the widow and children, 2 shares to the widow, 1 share to each daughter and 4 shares to each son. Section 52 provides for the shares of children, when there is no widow. 4 shares to each son and 1 share to each daughter. When there are no children but widow only, her share is provided for in section 55. When there is neither widow nor children the male intestate's property shall be distributed according to the provisions of section 56.

Examples.

If a male Parsi dies intestate, leaving one son and one daughter his property shall be divided into five shares, of which, four shares will go to the son and the one remaining share to the daughter.

If there be two sons and three daughters the property shall be divided into eleven shares, of which, eight shares will be given to the two sons between them—each son taking four shares, and the remaining three shares, the three daughters will take between them—each taking one share.

If there be sons only, or daughters only, the sons or daughters, as the case may be, shall take equal shares among themselves.

In sections 50 and 52, the children may be either by the widow, or by a predeceased wife of the male intestate; they are all his children and are entitled to succeed to their deceased father's property.

In the English law where there are sons and daughters only, and no widow, the sons and daughters share equally their intestate father's property.

Division of property among widower and children of intestate. Sec. 51. Where a female Parsi dies leaving a widower and children, the property of which she dies intestate, shall be divided among the widower and such children, so that his share shall be double the share of each children.

Example—If a female Parsi die intestate leaving the widower, four sons and three daughters, her estate will be divided into nine shares. Out of these, two shares will go to the widower and the remaining seven shares will be distributed equally among the children —the sons and daughters getting each one share.

"Widower." By the word "widower" is meant a widower relatively to the deceased wife only, and without consideration of the fact or possibility of the widower remarrying. (*Jehangir v. Pirozbai*, 11 Bom. 1.)

"Widower and children." The children may be either by the widower, or the female's predeceased husband; they all are her children, and as such are entitled to succeed to the property of their deceased mother.

Where a Parsi female dies intestate her whole estate—real and personal, vests on her death in her husband and children under sec. 2 (Act 21 of 1865)=sec. 51. (Act 39 of 1925). This section sweeps away the English law upon the point; it distinctly provides for the husband's share in his wife's property. The words of the section are very wide. There is no distinction as to estates whether in possession or remainder, nor does this Act say from what date it shall come into force, and it applies to any Parsi woman dying possessed of property after the Act came into force. (*Shapurji v. Rustomji*, 5 Bom. L. R 252-255.)

A Parsi female died at Bombay leaving a will, whereby she gave her property to the separate use of her two daughters G. and M. G. died intestate leaving a widower (the plaintiff) but no children. M. also died intestate leaving a widower, sons and

daughters (the defendants). The widower of G. was held entitled to one moiety of the property left by the testatrix to her daughter G. The other moiety (the share of M.) would be distributed between the widower and children of M., the other daughter of the testatrix according to sec. 2 (Act 21 of 1865)=sec. 51 (Act 39 of 1935). The distribution of G.'s half share in the testatrix's property would be made under sec. 6 (Act 21 of 1865)=sec. 55 (Act 39 to 1925.) (*Shapurji v. Dossabhay,* 7 Bom. L. R. at pages 988, 989, 992.)

Division of property amongst children of female intestate, who leaves no widower. Sec. 53. Where a female Parsi dies leaving children, but no widower, the property of which she dies intestate shall be divided amongst the children in equal shares.

"Children but no widower." See "Widower and Children" in notes under sec. 51 *supra.*

Shares in a female intestate's property, of widower and children and of children, when no widower. Sec. 51 defines the shares of the widower and children,—2 shares to the widower, 1 share to each son and 1 share to each daughter. Sec. 53 provides for the children's share, when there is no widower,—the son and the daughter share equally. When there are no children, but widower only, his share is provided in sec. 55. When there is neither widower nor children, the female intestate's property shall be distributed according to the provisions of sec. 56.

In *Pestonji v. Khurshedbai,* 7 Bom. L. R. at page 210, it is remarked—"Among the Parsis it makes a difference when the intestate is a male and when the intestate is a female. When the intestate is a male (father), the share of each son shall be four times the share of each daughter *(Ss. 50, 52);* when the intestate is a female (mother), the children—son and daughter take equal shares. *(Ss. 51, 53.)*

It is to be remarked here that a Parsi daughter has a greater interest in her mother's property than the interest she gets in her father's property.

Division of predeceased child's share of intestate's property among widow or widower and issue of such child. Sec. 54. If any child of a Parsi intestate has died in his or her life-time, the widow or widower and issue of such child shall take the share, which such child would have taken if living at the intestate's death, in a manner, as if such deceased child had died immediately after the intestate's death.

Distribution of predeceased child's share.—In this section, we find the tendency prevalent amongst Parsis to provide for the families of deceased children. It is only under this section of the Act that the children of a predeceased child can take at all.

Before the passing of Act 21 of 1865, the daughters-in-law of a Parsi intestate would have got nothing and the only section of the Act, which explicitely gives her a share is its 5th section = Sec. 54 (Act 39 of 1925.) Under this section (S. 54) the share of a predeceased child male or female (son or daughter) passes to his or her heirs, and does not go to the benefit of other surviving heirs.

Example.—A Parsi dies intestate leaving a widow, a son, and a daughter, and a widow, a son, and a daughter of a predeceased son. The intestate's property shall be divided into eleven parts; out of which two parts will go to the (intestate's) widow, four to the (living) son and one to the (living) daughter as their respective shares. The remaining four parts—the share, which the predeceased son would have taken had he survived his intestate father will be divided among his widow, son and daughter according to sec. 50.—2 parts to predeceased son's widow, 4 parts to his son and 1 part to his daughter, out of the predeceased son's share 4/11th in his intestate father's property. Thus the widow (of the predeceased son) will get 2/7 of 4/11, his son 4/7 of 4/11 and his daughter 1/7 of 4/11 as their respective shares.

When the predeceased child leaves both a widow or widower and children, his share will be divided according to Sec. 50 or Sec. 51 just as the child happens to be a male or a female—a son or a daughter—*Jehangir v. Pirozbai,* 11 Bom. 1. *When such a child leaves children*

only, but no widow or widower, the shares of the children will be determined according to sec. 52 and sec. 53 respectively. *When such a child leaves a widow or widower but no issue,* the share of the widow or widower will be according to sec. 55. (*Mancherji v. Mithibai,* 1 Bom. 506.)

In *Mancherji v. Mithibai,* 1 Bom. 506, the intestate left among others a widow only of a predeceased son and relatives on his father's side. The widow was held entitled to one half of the share, the predeceased son (her late husband) would have taken had he outlived his father—the intestate in the case, and the relatives on the intestate's father's side were held entitled to the other half of the share of the predeceased son. (55 cl. b.)

In the above case if there was the widow only of the predeceased son, and no other relatives on the intestate's father's side, the widow would have taken the whole share of the predeceased son (her late husband.)

" Widower." See **" Widower "** in notes under sec. 51 *supra.*

In *Jehangir v. Pirozbai,* 11 Bom. I a Parsi died intestate leaving a widow (the defendant), and two daughters, and the heirs of a predeceased daughter J. surviving him. J. had been the wife of the plaintiff, and had died 34 years before the date of the suit, leaving as her heirs, her husband (the plaintiff) and one daughter still leaving. After J.'s death the plaintiff married again and his second wife was living at the date of the suit. Letters of Administration to the estate of the intestate were granted to his widow (the defendant). The plaintiff claimed a share in the estate of the intestate, contending that he was the widower of J., one of the daughters of the intestate and entitled as such under sec. 5 (Act 21 of 1865)=Sec. 54 (Act 39 of 1925). *Held,* that he was the widower of J., within the meaning of the said section, and as such was entitled to a share in the intestate's estate.

At page 5 of the above mentioned case it is remarked :—" If the Framers of the Act (21 of 1865) had wished to provide against remarriage in cases under sec. 5=sec. 54 (Act 39 of 1925) as in cases falling under sec. 7=sec. 56 (Act 39 of 1925) they might have used adequate language as in the 2nd Schedule articles 10 and 14, which refer to sec. 7=Schedule II Part II articles 10 and 14, which refer to sec. 56 (Act 39 of 1925). The omission to employ similar express words for cases falling under the aforesaid section is significant.

It may be noticed that in sec. 201 (Act 10 of 1865)= sec. 219 (a) (Act 39 of 1925) the word "widow," as appears from the illustration (II) includes a widow who has married again.

Childless widow or widower. Section 54 applies also to the case of a predeceased child leaving a widow or widower only, and the daughter-in-law or son-in-law, as the case may be, can take in the event of there being no issue of her or his marriage.

Amendment necessary.—In *Mancherji v. Mithibai*, 1 Bom. at pages 511, 512 Mr. Justice Green observes:—In my opinion it is not necessary, so far as the natural and grammatical sense of the words in the section are concerned that in order for the widow or widower to take and the issue to take, that there should be in existence at the time of the death of the intestate, both widow or widower and issue. It is not a condition precedent, to the application of this section that the predeceased son of an intestate Parsi shall have left both a widow *and* issue. .... It is impossible to suppose that it could have been the intention of the Legislature that such issue should take if they had one parent surviving, but should take nothing if wholly orphans. I am unable to see any relevance, where an intestate leaves no lineal descendants, of the circumstance that he or she left a widow or widower to the question whether the widow or widower of a predeceased son or daughter is to take or not. To make the Act harmonious amendments are, in my opinion, necessary in several respects .. .."

In the above stated case, the widow of a predeceased son was held entitled to a share in the estate of the intestate.

Division of property, when intestate leaves widow or widower, but no lineal descendants. Sec. 55. Where a Parsi dies leaving a widow or widower, but without leaving any lineal descendants,—

(a) His or her father and mother, if both are living, or one of them if the other is dead, shall take one moiety of the property in respect of which he or she dies intestate, and the widow or widower shall take the other moiety; *provided that*, where both the father and the mother of the intestate survive him or her, the father's share shall be double the share of the mother,

(b) Where neither the father nor the mother of the intestate survives him or her, the intestate's relatives on the father's side in the order specified in Part I of Schedule II shall take the moiety which the father and the mother would have taken if they had survived the intestate.

The next-of-kin standing first in Part I of that schedule shall be preferred to those standing second, the second to the third, and so on in succession; *provided that*, the property shall be so distributed as that each male shall take double the share of each female standing in the same degree of propinquity.

(c) Where there are no relatives on the father's side, the intestate's widow or widower shall take the whole.

Application of this section, Sections 50 to 54 are intended to embrace all cases of a Parsi (male or female) dying intestate leaving lineal descendants, or a widow or widower. Section 55 defines the shares when the intestate dies leaving a widow or widower, but no lineal descendants. When there are lineal descendants the widow or widower are not on the same footing, but when there are no such descendants, the widow or widower enjoy a position of equality.

Under this section the maternal relations have no right.

In *Shapurji v. Dossabhoy,* 7 Bom. L. R. 988 the widower was held entitled to one moiety of the property of his deceased wife. (See this case in notes under sec. 51 page 138 *supra.*)

In *Mancherji v. Mithibai,* 1 Bom. at page 511, a Parsi died intestate leaving him surviving a widow, sons, daughters, children of a predeceased son and the widow of another predeceased son, who had died without issue, and a posthumous daughter was afterwards born to the intestate; it was held that the last mentioned widow was entitled to one moiety of the share in the intestate's estate, which her husband would have taken had he survived the intestate (See the case in notes under sec. 54 *supra*), and the other moiety of such share devolved under this section = Sec. 6 (Act 21 of 1865) on the surviving issue of the intestate, including the posthumous daughter and children of his other predeceased son.

Schedule II. Part I. *(See Sec. 55.)*

(1) Brothers and sisters, and the children or lineal descendants of such of them as shall have predeceased the intestate.

The words "brothers" and "sisters" in this article refer to "brothers" and "sisters" on the father's side without reference to who the mother is, and consequently all brothers and sisters by the same father, whether by the same mother or not, come in under this article. The words "brothers" and "sisters" here refer both to brothers and sisters of the full-blood (i.e. those by the same father and same mother) as also to half-brothers and sisters by the same father but by different mothers.

(2) Grandfather and Grandmother.

(3) Grandfather's sons and daughters, and the lineal descendants of such of them as shall have predeceased the intestate.

(4) Great-grandfather and great-grandmother.

(5) Great-grandfather's sons and daughters, and the lineal descendants of such of them as shall have predeceased the intestate.

The words grandfather and grandmother, as also great-grandfather in articles (2) to (5) in this Part clearly refer only to paternal grand-parents and paternal great-grand-parents, since it is laid down in sec. 55 (b)—"where neither the father nor the mother of the intestate survives him or her, the *intestate's relatives on the father's side* in the order specified in Part I Sch. II shall take the moiety &c."

Part I Schedule II corresponds with the First Schedule of Act 21 of 1865, and is substantially identical with the first six articles of Part II Schedule II.

Division of property when the intestate leaves neither widow nor widower, nor lineal descendants. Sec. 56. Where a Parsi dies leaving neither lineal descendants, nor a widow or widower, his next-of-kin, in the order specified

in Part II Schedule II, shall be entitled to succeed to the whole of the property to which he or she dies intestate.

The next-of-kin standing first in Part II of same Schedule shall be preferred to those standing second, the second to the third, and so on in succession, *provided that,* the property shall be so distributed as that each male shall take double the share of each female standing in the same degree of propinquity.

Application of this section.—Sections 50 to 55 apply to cases where a Parsi dies intestate, leaving either lineal descendants or a widow or widower. Section 56 treats about cases where a Parsi dies intestate, leaving neither lineal descendants nor a widow or widower.

Where there is no kin, the Crown would, ofcourse, take as the last heir- *ultimus hæres.* (*Dyke v. Walford,* 5 Moo. P. C. 434.)

This section refers to Part II Sch. II, by providing that the persons entitled to succeed are the next-of-kin in the order set forth in Part II Sch. II. Under article 2 of this Part of the Schedule, surviving brothers and sisters would not exclude, but would share with, the children of a predeceased brother or sister.

Sections 55 and 56 deal with the case of a Parsi dying intestate, without leaving lineal descendants, the difference being that in the case of sec. 55 the intestate leaves a widow or widower, who takes a moiety, so that only a moiety has to be distributed among the next-of-kin; while in sec. 56 the intestate leaves neither a widow nor widower, and the next-of-kin take the whole.

The nearest living relations are lineal descendants, in different degrees, of predeceased brothers and sisters. (S. 56 and art. 2. Part II Sch. II.)

Article 2. Part II Schedule II.—The descent to lineal descendants is substitutional under art. 2, in the sense that they take nothing if the head of their branch of the family is living; whereas if he is dead, they stand in his place and take the share which he would have taken. (*Hirjibhai v. Burjorji,* 22 Bom. 909.)

Under this Act widows and children rank before brothers or sisters in the order of succession of the heirs of a Parsi intestate. Sec. 7 and article 2 of Second Schedule. (Act 21 of 1865) = Sec. 56 and article 2 of Part II Sch. II (Act 39 of 1925) are applicable only where deceased leaves neither lineal descendants, nor a widow or widower. (*Erasha v. Jerbai*, 4 Bom. 537.)

On the death of a child in the life-time of one of the parents, leaving neither lineal descendants nor a widow or widower, the child's share becomes vested in that parent under the provisions of this section. (*Pestonji v. Khurshedbai*, 7 Bom. L. R. at page 212.)

Next-of-kin. In both sections 55 and 56 the words "next-of-kin" and relatives are synonymous, and are collective names for the persons mentioned in Part I Sch. II and Part II Sch. II respectively.—*Hirjibhai v. Burjorji* 22 Bom. 909. In this case Jerbai, a Parsi widow died intestate and without issue. Her father, mother, three brothers and two sisters had predeceased her. Two of the brothers and one of the sisters had left children. Some of these children had also predeceased her, leaving children (grand-nephews and nieces of J.) Two of this last mentioned class had also predeceased Jerbai, leaving children (great-grand-nephews and nieces of J.) It was held that Jerbai's property should, in the first instance, be divided into three shares, i.e., one for each of the two predeceased brothers who left children, and one for the predeceased sister who left a child, each brother's share to be two-fifths and the sister's one-fifth; such respective shares to be sub-divided among the descendants of the two brothers and the sister respectively, no descendant being entitled to share concurrently with his or her ancestor and, on each division and sub-division, each male taking double the share of each female standing in the same degree of propinquity.

A Parsi leaving a son, two daughters and heirs of a predeceased daughter, died leaving a will. The residue of the estate was to be held in trust, the net income thereof to be paid to his son for life; in case of his death without issue but leaving only a widow, a sum of Rs. 10,000 was to be paid absolutely to the widow and half of the residuary estate was to be appropriated to certain charities and the other half to be divided amongst the heirs according to the Parsi law of succession, but excluding the son's widow from getting any share in the distribution. On the death of the son, his widow contended that though she was excluded as heir of the testator she was not excluded as an heir of the son. *Held*, that the widow was to be entirely excluded whether as heir of the son or otherwise. (*Dinbai v. Nusserwanji*, 28 I. Cas. 481) Cf. *Pestonji v. Khurshedbai*, 7 Bom. L. R. 207.)

Schedule II Part II *(See Sec. 56.)*

(1) Father and Mother.

(2) Brothers and sisters, and the lineal descendants of such of them as shall have predeceased the intestate.

The words "brothers" and "sisters" in this article are intended for "brothers" and "sisters" on the father's side, including all by the same father no matter who the mother is. It will be noticed that this article and article I of the first schedule are exactly in the same words, and therefore the same meaning must be given to them, when brothers and sisters on the mother's side are specially mentioned in article 7 of this (second) schedule. The words "brothers" and "sisters" here refer to full-blood brothers and sisters (i.e., those by the same father and the same mother) as also to half-brothers and sisters by the same father but by different mothers.

See *Erasha v. Jerbai*, 4 Bom. 537, at p. 145 *supra*.

In construing the (second) schedule, section 7 so far helps us as to show (1) that where it was intended that any class of relatives should, if living, absolutely exclude any other, they were placed within a separate article; (2) that, within the particular articles, differences in propinquity of blood are so far recognized that each degree constitutes a class, not for the purpose of excluding or being preferred to any other, but for the purpose of giving each male double the share of each female within it; (3) that all males within a particular article, or even within a particular degree of propinquity, do not necessarily take equal shares. Apart from section 7, there are no other legal provisions which appear to throw much light on the construction of article 2. It would not be safe to base any inferences regarding the article upon the provisions of English law or those of the Indian Succession Act in reference to the distribution of an intestate's property. Act 21 of 1865 was enacted for the express purpose of withdrawing the Parsis from the English law of intestate succession, which until then had governed them. Section 8 was enacted for the express purpose of exempting them from parts III, IV, V, of the Indian Succession Act, which was passed in the same year. There does not appear to be any usage, as distinct from law, existing among Parsis, prior to 1865 upon which article 2 may have been based or which might throw light upon its construction. (*Hirjibhai v. Bur'orji*, 22 Bom. at pp. 916, 917.)

In this article (art. 2, Sch. 2) the gift to lineal descendants is substitutional in the sense that they take nothing if the head of their branch of the family is living, whereas if he is dead, they stand in his place and take the share which he would have taken. In distributing an estate, therefore, "among brothers and sisters and the lineal descendants of such of them as have predeceased the intestate," the primary division must be *per stirpes*. If there are surviving brothers and lineal descendants of a predeceased brother, then each surviving brother will take equal share with the lineal descendants (of the predeceased brother) collectively. If all the brothers are dead, then the share which each would have taken, had he survived, will be taken by his lineal descendants. If in either case the predeceased was a sister, her lineal descendants will take her share only (which would be half of her brother). (*Ibid.* 909.)

In substitutional gifts the parties take *per stirpes*; in concurrent gifts they take *per capita*.

(3) Paternal grandfather and paternal grandmother.

(4) Children of the paternal grandfather, and the lineal descendants of such of them as have predeceased the intestate.

(5) Paternal grandfather's father and mother.

(6) Paternal grandfather's father's children, and the lineal descendants of such of them as have predeceased the intestate.

(7) Brothers and sisters by the mother's side and the lineal descendants of such of them as have predeceased the intestate.

The words "brothers and sisters by the mother's side" in this article mean only "brothers and sisters by the same mother but by different fathers."

Under section 55 the maternal relations have no right. (See Sec. 55 clause (b).)

Part I Sch. II is substantially identical with the first six articles of Part II Sch. II.

(8) Maternal grandfather and maternal grandmother.

(9) Children of maternal grandfather, and the lineal descendants of such of them as have predeceased the intestate.

(10) Son's widow.

(11) Brother's widow.

(12) Paternal grand father's son's widow.

(13) Maternal grand father's son's widow.

If not remarried at or before the death of the intestate.

(14) Widower's of the intestate's deceased daughters.

In articles 10 to 14, both inclusive, express words are used providing against remarriage.

(15) Maternal grandfather's father and mother.

(16) Children of the maternal grandfather's father and the lineal descendants of such of them as have predeceased the intestate.

(17) Paternal grandmother's father and mother.

(18) Children of paternal grandmother's father, and the lineal descendants of such of them as have predeceased the intestate.

Part II Sch. II corresponds with the Sec. Sch. of Act 21 of 1865.

Shares taken by females under sections 50 and 52, 55 and 56, and 51 and 53.

(1) In certain cases under these Special Rules for Parsi Intestates, female Parsis get one-fourth of what the male Parsis get. Sections 50 and 52 provide that each son shall have as his share four times the share of each daughter :

(2) In other cases, female Parsis get one-half of what the males succeed to. Sections 55 and 56 provide that in distribution of property each male shall take double the share of each female, standing in the same degree of propinquity : and

(3) In a third case, female Parsis share equally with the male Parsis. Sections 51 and 53 provide for equal shares among the children; sons and daughters have equal shares in their mother's property.

Succession among Intestate Parsis.

I. Widow or Widower with lineal descendants.

(*a*) *Widow and children.* (*S. 50.*)
Shares—Widow 2, Son 4, Daughter 1.

(*b*) *Widower and children.* (*S. 51.*)
Shares—Widower 2, Son 1, Daughter 1.

(*c*) *Children alone, no widow or widower.*

1. Male's (Father's) property. (S. 52.)
Shares—Son 4, Daughter 1.

2. Female's (Mother's) property. (S. 53.)
Shares—Son 1, Daughter 1.

Predeceased Child—Son or Daughter. (S. 54.)

Share—In all the above cases, his or her share passes on to his or her heirs—the heirs of such a child representing him or her in distribution of the property.

II. Widow or Widower without lineal descendants.

(*a*) *Widow or Widower and Parents.* (*S. 55* (*a*).)

Shares:—Widow or Widower ½: Parents ½.
If both parents alive, double share for father.
If one of the parents dead, the other takes the whole moiety.

(*b*) *Widow or Widower and Paternal relations, no parents.* (*S. 55* (*b*).)

Shares—*Widow or Widower* ½: *Paternal relations* ½.
They take the half in order specified in Part I Sch. II, in order of priority and subject to double shares for males.

(c) Widow or widower *alone*, no paternal relations. (S. 55 (c).)
Share—Widow or Widower, the whole.

III. Next-of-kin, neither lineal descendants, nor widow or widower (S. 56).

Share—Next-of-kin, the whole.
They take the whole in order set forth in Part II Sch. II, in order of priority and subject to double shares for males, as well as subject to representation or substitution.

Testamentary Succession.

The Indian Succession Act, 1865 was not only made applicable to persons of European descent, but also was made the law for all persons in British India (other than Hindus, Mahomedans, and Buddhists), including for instance, the Parsis who form so important a part of the community in some districts of India. (*Mirza Kurratulain v. Nawab Mizhatud-Doula,* 7 Bom. L. R. 875, 876, P. C.)

The provisions regarding Testamentary Succession are not retrospective, and it may be noted that wills made before the passing of the Indian Succession Act, 1865 are not governed by the Indian Succession Act, 1925, since sub clause (i) of section 58 says ... ... , nor shall they (provisions) apply to any will made before the first day of January 1866.

Wills and Codicils.

"Will" means the legal declaration of the intention of the testator with respect to his property, which he desires to be carried into effect after his death. (S. 2 (h).)

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

Codicil always follows a will. Where there is anything ambiguous in a will, the codicil can be used to control it, or to interpret its language.

Chief Requisites for a Valid Will.

I. Soundness of mind and age of majority.

II. Freedom from fraud, coercion or importunity.

III. Proper execution.

I. Soundness of mind and age of majority.

Every person of sound mind and not a minor may dispose of his property by will.

All Persons—married or single, male or female, of sound mind, who have completed the age of eighteen years are capable of making wills.

The general rule laid down in *Longford v. Pardon*, Ir. R. Ch. at page 77 is :—"A man is competent to make his will, if he has sufficient memory and intelligence to be able to comprehend the nature of his property, to remember and understand the claims of relations and friends, and to have a judgement of his own in disposing of his property ; ..... if a man possesses this amount of memory and intelligence, he is a competent testator ; if he is not able to perform the mental acts mentioned, he is not a competent testator."

The question is not whether the testator had capacity for will-making, but whether he had capacity to make the disputed will. In short, whether he understood the particular thing he was doing is the vital question.

"Minor" means any person subject to the Indian Majority Act, 1875, who has not attained his majority within the meaning of that Act, and any other person who has not completed the age of 18 years ; and "minority" means the status of any such person. (S. 2 (e).)

The Judicial Committee held in the case of *Gulab v. Thakerlal*, 27 Bom. L. R. 1082 that a minor's will has no legal effect, and that a minor is not capable of disposing of his property.

Though a minor is incapable of making a will and disposing of his property thereby, yet by **section 60** a *father of whatever age* (even an infant father) may, by will, *appoint a guardian or guardians for his minor child.*

The father alone it is to be noted can appoint a testamentary guardian.

A married woman can dispose of by will any property, which she could alienate by her own act during her life-time. (*Hormusji v. Dhunjishaw*, 12 Bom. L. R. 271.)

Deaf and Dumb persons can make wills, provided they are able to know what they do by it.—*In the Goods of Geale*, 3 Sw. & Tr. 431.

Blind persons may, likewise, make wills provided there appears sufficient proof of their knowledge and approval of the contents of their wills.—*In the Goods of Peary.* 1 Rob. 278.

Ordinarily **insane persons** may make wills during intervals in which they are of sound mind.

Idiocy is a natural incapacity, and therefore idiots are incapable of making wills. *Lunacy* is an acquired or supervening incapacity, and therefore lunatics can make wills during sane intervals.—*Jenkins v. Morris*, 14 Ch. D. 674; *Waring v. Waring*, 6 Moo. P. C. 341.

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

Drunkards.—The will of an habitual drunkard, shown to have been made while he was sober, was admitted to probate in *Airey v. Hill*, 2 Add. 206. (*Wheeler v. Alderson*, 3 Hagg. E. R. 602.)

The Old.—"Old age alone, or mere incapacity to manage his affairs does not deprive a person of the capacity of making a will. Extreme old age, however, tends to excite the jealousy and vigilence of the Court. The test in all cases of this kind, is simply whether the mental faculties retain sufficient strength fully to appreciate or comprehend the act to be done. A testator may be capable of understanding such business as falls to his lot, or of regulating succession to his property, though enfeebled in body, his vigour of mind impaired, and utterance defective and not in his "full senses"—*Ex parte Cranmer*, 12 ves. 445. (*Sajid Ali v. Abad Ali*, 23 Cal. at pp. 10, 11. P. C.)

In like manner any cause whatever that incapacitates a person from knowing what he is doing will be a bar to his capacity to make a will.

[*S. 59.*]

II. Freedom from fraud, coercion and importunity.

A will or any part of a will, the making of which has been caused by fraud, or coercion, or by such importunity as takes away the free agency of the testator, is void. *(Sec. 61.)*

The influence to vitiate an act must amount to force and coercion destroying free agency. Actual violence is not necessary; imaginary terror may be sufficient to constitute coercion.—*Williams v. Goude*, 1 Hagg. 581.

When a person, who is in such a feeble state of health that he cannot resist importunity, is pressed by another to make a will of a certain purport and makes a will merely to purchase peace and submission to such other person, the will is invalid. A will, however, made under the influence of acts of kindness and attention is not void.

The testator must be coerced into doing what he or she does not desire to do; that is undue influence. A testator may be led but not driven, and his will must be the offspring of his own volition and not the record of some one else's.—*Lovett v. Lovett*, F. & E. 581.

A man may act foolishly and even heartlessly; if he acts with full comprehension of what he is doing, the Court will not interfere with the exercise of his volition. (*Motibai v. Jamsetji*, 26 Bom. L. R. 579. P. C.)

III. Proper execution.

Execution of Unprivileged Wills.

Execution—The term "execution" in a document means the last act or series of acts, which complete a document. It is the formal completion of it.—*Bhamanji v. Devji*, 19 Bom. 635.

Sec. 63 treats about execution of unprivileged or ordinary wills, i.e., wills executed by persons not being soldiers employed in expeditions, or engaged in actual warfare, or airmen so employed or engaged, or mariners at sea.

Three Rules for Execution of Ordinary Wills:—

FIRST RULE.

(a) The **testator** shall **either sign,** or **put** (affix) his **mark,** to the will, or (b) **some other person** shall **sign** it, **(not put** his **mark)** in the testator's presence and by his direction.

"Signature" or "mark" in respect of the testator. But in respect of "some other person than the testator," "signature" only, in the testator's presence (i. e., the testator must be in such a position that he could, if he choose, have seen that "some other person"), and by his direction. That is what is required by the 1st rule. (*Avabai v. Pestonji*, 11 B. H. C. at p. 88.)

SECOND RULE.

The **"signature"** or **"mark"** of the **testator,** or the **"signature" (not mark)** of the **person signing for the testator,** shall be so placed that intention to give effect to the writing as a will be apparent.

THIRD RULE.

Two or more witnesses shall attest the will. Each witness must have seen the testator "sign" or affix his "mark" to the will, or he must have seen some other person "sign" the will, in the presence and by the direction of the testator, or each witness must have received "personal acknowledgment" of the testator's signature or mark, or of the signature of such other person signing for the testator, but more than one witness need not be present at the same time No form of attestation is required.

Two attesting witnesses atleast there must be under this 3rd rule.

The person signing for the testator is not competent as an attesting witness. The words "some other person" in this 3rd rule mean not only some person other than the testator, but also some person other than any of the attesting witnesses.—*Avabai v. Pestonji*, 11 B. H. C. 87.

"The rule to be gathered from the cases of *Gwillim v. Gwillim*, 3 Sw. & Tr. 200, *Smith v. Smith*, 1 P. & D. 143 and *Backelt v. Home*, 1 L. R. P. & D. 1 is, that it is sufficient acknowledgment of his signature, if the testator makes the attesting witnesses understand that the paper they attest is his will, even though they do not see him sign the will, or observe any signature to the paper they attest;

provided that the Court is satisfied that the testator's signature was on the will, when the witnesses attested it." *(Manekbai v. Hormusji;* 1Bom. 547; *Balmukund v. Bhugwandas,* 15 Bom. L. R. 209.)

The acknowledgment under this 3rd rule must be the testator's own. It is not sufficient acknowledgment of his (testator's) signature, if a third party and not the testator himself, were to ask the witnesses to sign the will. (*Shamu Patter v. Abdul Kadir,* 14 Bom. L. R. at pp. 1044, 1045.)

The acknowledgment is of the signature or the mark of the testator and not of the will. The witnesses attest the signature without any knowledge of the nature or contents of the document.

An acknowledgment, or a signature of the testator, after attestation by the witnesses, is not sufficient.—*In the goods of Olding,* 2 Curt. 685.

Form of Will.—Though a will is required to be in writing, yet no particular form is essential. It is only necessary that the document shows the testator's intention that it should operate after his death. A will speaks at the testator's death.

The test of the testamentary paper is that it is revocable.

Language of Will.—It is immaterial in what language a will may be written. A will or a codicil, or any part thereof, may be written on paper, parchment, or any other substance, in any character, and may be made or altered in pencil as well as in ink. (Stokes.)

Stamp or Registration not needed.—No publication of any will beyond what is involved in its due execution is necessary. A will need not be drawn on a stamped paper, and it need not be registered. Registration of Wills is not compulsory.

Parsi Wills in Ancient times.

In the case of a will dated 1784, and reported in 1 Borr. 225, 227 of *Poonjeeabhai v. Noosherwanji,* the Court, on the opinion of the Modee, held that a will made by a Parsi, though not signed by himself, but signed by his son in his name and in his stead, in consequence of the testator's infirmity, was valid and admissible according to ancient and existing customs of the Parsis.

The case of *Nawee Buhoo v. Pestonji,* 1 Borr. 1 shows that in those times (the decision being given on 10-2-1801), the requisites for the execution of ordinary wills as provided in section 63 of the Succession Act, 1925 were not strictly observed. And wills bearing only the testator's signature, though not attested by witnesses stood good and valid.

As far back as in 1817, the Recorder's Court at Bombay allowed a will, in the case of *Khoorshedji v. Meherwanji,* 1 M. I. A. Ca. 431, without date, in the testator's handwriting, though not signed by him, but attested by three witnesses and its probate was granted.

In the same case a codicil by the same testator, though neither in his handwriting nor bearing his signature, but only witnessed by two witnesses was allowed and probate was granted.

Disinherison of son. In the case of *Meherwanji v. Poojeeabhai,* 1 Borr. 141 a Parsi of Surat executed a will on 4-11-1808, disinheriting one of his sons on account of his wicked and exceedingly dissolute character. The will was upheld by the lower court, with which the Sudder Adawlat concurred and passed a decree on 17-5 1815.

Disinherison of Brother and Nephew. In the case of *Modee Kaikhoshru v. Cooverbai,* 4 W. R. P. C. 94 it was held "there is no restriction upon the testamentary power of disposition by a Parsi. In this appeal the husband of the respondent—Cooverbai, had made a will whereby he had given his property to his widow, the said Cooverbai to the exclusion of his brother Modee Kaikhooshru—the appellant.

Their Lordships of the Privy Council observe (pp. 97, 98):—"Among Parsis there existed a rule or usage by which a Parsi can make a will to the total disinherison of the heir. A Parsi without any male issue can by his will devise his property to his widow and daughters to the exclusion of his brother and nephews."

Incorporation of papers by reference. Sec. 64. If a testator, in a will or codicil duly attested refers to any other document, then actually written, as expressing any part of his intentions, such document shall be deemed to form a part of the will or codicil in which it is referred to.

For definition of "Codicil" see Sec. 2 (b) *supra*.

In order that a document, referred to by a will or codicil duly executed, may be incorporated in it:—(a) The document must be clearly identified with its description in the will, and (b) it must be already written and already existing at the date of the will or codicil.

As regards attestation, any person may be a witness and attest a will. No person, by reason of interest in, or his being an executor of, a will, shall be disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof. (*S. 68.*)

A legatee, &c. or executor, thus, can be a witness, but any benefit given by the will to him or any other person attesting the will, or to his or her wife or husband gets void. The legatee or any other person attesting the will loses the legacy.

As regards the effect of gift to an attesting witness it is provided that a will shall not be deemed as insufficiently attested by reason of any benefit thereby given either by way of bequest or by way of appointment to any person attesting it, or to his or her wife or husband; but the bequest or appointment shall be void so far as concerns the persons so attesting, or the wife or husband of such person, or any person claiming under either of them.

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

[*S. 67.*]

It is only the benefit given by the particular instrument attested which is avoided.—*Gurney v. Gurney*, 3 Dreid. 209.

Privileged Wills. *(Ss. 65, 66.)* The rules governing the execution of Privileged Wills are less formal than ordinary wills.

A privileged will is allowed to be made by a soldier employed in an expedition, or engaged in actual warfare, or an airman so employed or engaged, or any mariner being at sea.

Such a will may be in writing or may be made by word of mouth.

The soldier or airman or mariner must have completed the age of eighteen years to be entitled to make a privileged will.

He may make a will by word of mouth by declaring his intentions before two witnesses present at the same time, and such a verbal will shall be null at the expiration of one month after the testator, being still alive, has ceased to be entitled to make a privileged will.

Privileged will when made in writing:—(a) Wholly by the testator, need neither be signed nor attested. (b) Wholly or partially by another person and signed by the testator, need not be attested. (c) Wholly or partially by another person but not signed by the testator, the will shall be deemed to be his will, if it is shown that it was written by the testator's directions or that he recognized it as his will. (d) When the testator leaves written instructions for preparation of his will, but dies before it is prepared and executed, such instructions shall be deemed to constitute his will. (e) When the testator has given verbal instructions before two witnesses for preparing his will and they have been reduced into writing in his life-time but he has died before the will could be prepared and executed, such instructions shall be deemed to constitute his will, although they may not have been reduced into writing in his presence nor read over to him.

Revocation of Wills.

A will is said to be ambulatory, until the testator's death, and it is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property. *(S. 62.)*

The will of a person comes into operation upon his death only. The irrevocability of a document is perfectly inconsistent with its being a will. (*Din Tarini v. Krishna,* 36 Cal. at p. 156.)

An unprivileged (ordinary) will shall be revoked in the following ways only :—

1. *By marriage of the maker,* except when made in exercise of a power of appointment.

Revocation by marriage is known as revocation by operation of the law.

In every case of revocation, the intention to revoke—*animo revocandi*—must be shown.

The will of a Parsi gets revoked by marriage.

2. *By another will or codicil.*

The last will is always operative to the exclusion of previous contrary or inconsistent ones. Several wills (consistent) will be considered the wills of the testator and probate will be granted of all of them.

3. *By some writing declaring an intention to revoke* the same and executed in the manner provided for in unprivileged will.

The writing must declare the intention to revoke; it need not be in the form of a will.

4. *By Burning, tearing or otherwise destroying* the same by the testator, or by some person in his presence and by his direction with the intention of revoking the same.

It is not necessary that the will should be wholly burnt or wholly torn. It must be done to an extent so as to destroy its entirety.

"All the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying;—there must be the two." (*Cheese v. Lovejoy,* (1877) 2 P. D. 253, 258.)

Otherwise destroying means some mode of destruction *ejusdem generis* with burning or tearing.—In the goods of Turner, (1872) P. & D. 403. (*Kharshedji v. Kekobad,* 30 Bom. L. R. 473.)

In this case of *Kharshedji v. Kekobad*, Davar, J. at page 485 says: "I should just like to refer here to a case decided in 1924 (*In re H. C. Cowbury : Jinkin v. Cowling*, (1924) P. 113.). That was a case of partial tearing of the will, and the President (Sir Henry Duke) laid down that "when a will is found in the possession of the testator, partially torn, the presumption of law is that the tearing was done by the testator. But the burden of proof that this tearing was done *animo revocandi* is on the party alleging the revocation. Partial tearing, which leaves all the words of the will distinct and legible does not necessarily show an intention to revoke the will. In this case the learned President reviewed many of the old cases."

Section 70 which gives the 4 modes of revocation is exhaustive; an unpriviledged will, therefore, can be revoked in the modes and ways mentioned only therein. (*Subba Reddi v. Dorasumi*, 30 Mad. 369.)

Destruction through accidental or involuntary or mistaken acts, the *animo revocandi* being wanting is no destruction amounting to revocation. So too destruction by another, without the knowledge or permission of the testor, or destruction after testator's death, does not affect the validity of the will.

A privileged will or codicil may be revoked by the testator, by his marriage (S. 69), or by an unprivileged will or codicil, or by any act expressing an intention to revoke it and accompanied by the formalities for a valid privileged will, or by burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction with the intention of revoking the same.

Obliterations, interlineations or other alterations made in an unprivileged will after its execution shall not have any effect, except so far as the words or meaning of the will shall have been thereby rendered illegible or undiscernible, unless such alterations have been duly executed. The will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or on some other part of the will opposite or near

to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will. (*S. 71.*)

Section 71 applies when alterations are made in a will, *after* its execution, and *not before*. (*In the goods of Broughton*, 29 Cal. at p. 313.)

Obliterations are effective under this section (S. 71), only when they are made *animo revocandi*.—*Townley v. Watson*, 3 Curt. 126.

There is a general presumption that when alterations are made in pencil, before execution, the will being written in ink, they are deliberative; when in ink, final and absolute.—*Hawkes v. Hawkes*, 1 Hagg. 321.

Alterations effect a change, while interlineations supply a gap or complete an otherwise incomplete sentence.

Unattesed marginal notes and alterations made by the testator in his will, cannot be admitted to probate.—*In the goods of Harris*, 1 Sw. & Tr. 536. (*Nasroji v. Putlibai*, 15 Bom. L. R. 352; *Hormusji v. Dhunjishaw*, 12 Bom. L. R. 569.)

The fact that blank spaces are left in the body of a will is no objection to its being a valid will.—*In the goods of Kirby*, 1 Rob. 709. (*Pandurang v. Vinayak*, 16 Bom. 652.)

The Doctrine of Dependent Relative Revocation is founded on the desire to carry out the intention of the testator; and the Court holds that the condition or accompanying intention under which the testator destroyed the document being unfulfilled the act does not amount to an act of revocation. The Court should be satisfied that the testator only revoked the first bequest on the supposition that he had effectually substituted a new legacy.—*In the goods of MaCabe*, L. R. 3 P. & D. 94. (Haynes.)

Unless the mutilation or destruction is done *animo revocandi*, there is no revocation. And there must be the intention to set up and establish a will already in existence, and not a new or fresh will to be executed. (*Powell v. Powell*, 1 P. & D. 212; *Williams v. Tyley*, 1 Johns. 538.)

Revival of Will.

An unprivileged will or codicil, or any part thereof shall be revived only by its re-execution, or by a codicil executed as required, and showing an intention to revive the same; and when any will or codicil, partly revoked at first and then wholly revoked is revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless a contrary intention appears by the will or codicil. *(S. 73.)*

A will re-executed is said to be republised, i.e., the will is made *de novo*, and consequently it revokes any will of a date prior to that of the republication. It brings down the will to the date of the republication and makes it speak at that time, and thus extends its operation to subjects which have arisen between the date and republication.

The revoked will must be in existence.

Construction of Wills.

Rules as regards interpretation and construction of wills, are intended to serve as help and assistance to the Court in ascertaining the real intention of the testator, wherever doubts arise in respect of the language and words used in the wills of persons, to whom the Succession Act applies.

The executor may institute a suit for the construction of the will of the testator, whenever he finds any doubt in respect of the will. (*Padamji v. Putlibai*, 15 Bom. L. R. at p. 353; *Byramji v. Ratnagar*, 18 Bom. 1.)

The cases of *Dinbai v. Nasserwanji*, 49 Cal. 1005, *Kaikhoshru v. Shirinbai*, 43 Bom. 88, *Shirinbai v. Ratanbai*, 45 Bom. 711, and *Ratanbai v. Cawasji*, 24 Bom. L. R. at p. 1128, show the warnings of Privy Council not to apply decisions on English wills to the wills of Indians.

In the case of *Ratanbai v. Cawasji*, 24 Bom. L. R. at p. 1128, Shah, Ag. C. J. observes :—"It is hardly necessary to point out that the reference to the English decisions cannot be of any help to those questions" (questions relating to the construction of wills).

Their Lordships of the Privy Council point out in *Norendranath v. Kamalbasini Dasee*, (1896) L. R. 23 I. A. 18, 26, that "to construe one will by reference to expressions of more or less doubtful import to be found in other wills is for the most part an unprofitable exercise;" and they further point out that "to search and sift the heap of cases on wills, which cumber our English Law Reports, in order to understand and interpret wills of people speaking a different tongue, trained in different habits of thought and brought up under different conditions of life, seems also absurd."

To the same effect are the observations in *Bhagabati v. Kalicharan*, (1911) L. R. 38 I. A. 54, 65: and these observations are emphasized in the recent decision of *Dinbai v. Nasserwanji* in Privy Council Appeal No. 47 of 1921. The general principle is stated in these terms: "The rule of law is to ascertain the intention of the testator as declared by him and apparent in the words of his will, and to give effect to this intention so far as, and, as nearly as may be, consistent with law."

It is sufficient if the wording of a will is such that the intentions of the testator can be known therefrom. No technical words or terms of art are necessary to be used in a will. *(S. 74.)*

The fundamental principle in the construction of wills is to effectuate the intention of the testator so far as it is consistent with the rules of law. His real intention should be gathered and ascertained and given effect to.—*Grant v. Grant*, L. R. 5 C. P. 934. (*Dinbai v. Nasserwanji*, 25 Bom. L. R. 625, P. C.; *Advocate General v. Hormusji*, 29 Bom. 375.)

The Court, it has been frequently remarked, cannot make a will for the testator. It must construe the will he has made. The test to be applied in construing wills is—What did the testator mean, having regard to the word or words used? The question is not what the testator meant, but what is the meaning of the words used. This is the established rule of construction.—*Robertson v. Broadbent*, L. R. 8 H. L. 62; *Mary v. George*, 31 Mad. 283. (*Jehangir v. Kaikhoshru*, 13 Bom. L. R. at p. 152; *Edwards v. Edwards*, 16 Bom. L. R. 366; *Dinbai v. Nasserwanji*, 25 Bom. L. R. 625. P. C.)

A will not expressive of any definite intention is void for uncertainty. (*S. 89.*)

If there be two inconsistent wills of the same date or without any date, and if it cannot be established which one of them was executed last, both the wills are void for uncertainty.

The meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other. (*S. 82.*)

"In construing a will it must be read as a whole and each clause must be taken in conjunction with, and interpreted by, the other portions of the instrument."—*John v. Crook,* 12 Ch. D. 639. (*Naoroji v. Pirozbai,* 23 Bom. at p. 99.)

No part of a will is to be rejected as destitute of meaning, if it is possible to put a reasonable construction upon it ; and the intention of the testator is not to be set aside, because it cannot take full effect, but is to be effectuated as far as possible. *(Ss. 85, 87.)*

No word that has a clear and definite operation in the disposal of the testator's property, can be struck out.—*Hall v. Warren,* 9 H. & L. 420. *(Dinbai v. Nasserwanji,* 17 Bom. L. R. 182 ; *Naoroji v. Putlibai,* 15 Bom. L. R. 352.)

Where a clause is susceptible of two meanings according to one of which it has some effect, and according to the other of which it can have none, the former shall be preferred. But where two clauses or gifts in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail. *(Ss. 84, 88.)*

Lord Brougham in *Langston v. Langston,* (1834) 2 Cl. & F. 243 said : - "There are two modes of reading an instrument ; when the one that destroys and the other preserves, it is the rule of law and of equity following the law in this respect, that you should rather lean towards that construction which preserves than towards that which destroys. *(Advocate General v. Karmali,* 6 Bom. L. R. 601.)

If there is repugnancy, the last words in a will shall prevail. *(Advocate General v. Hormusji,* 7 Bom. L. R. 238.)

If the same words occur in different parts of the same will, they shall be taken to have been used every where in the same sense, unless a contrary intention appears. (*S. 86.*)—*Harry v. Harry*, (1863) 33 Beav. 445. (*Jairam v. Kessarji*, 4 Bom. L. R. 555.)

"The *will*," it was said in *Hill v. Crook*, 6 H. L. 285, "is the dictionary from which you can find the meaning of the terms, which the testator has used."

Where there is, ambiguity in the words as to the person or property used by the testator in his will, the Court shall enquire into every material fact as to the persons claiming to be interested under such will, the property claimed as the subject of disposition, the circumstances of the testator and of his family, and into every fact, a knowledge of which may conduce to the right application of the words, the testator has used. (*S. 75.*)

Thus where there is ambiguity in the language used by the testator the Judge is entitled by the use of extrinsic evidence to seat himself in the testator's chair. Where, however, the testator has left no uncertainty as to the person to be benefitted or the property, by which the benefit is to be conferred, the Judge is precluded from going outside the actual words used by the testator. Extrinsic evidence is admissible only to explain what is ambiguous and not to contradict what is clear.—*Higgins v. Dawson*, (1902) A. C. I. (*Pestonji v. Framji*, 12 Bom. L. R. at pp. 863, 864.)

When the words used in a will to designate or describe a legatee or a class of legatees sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect. A mistake in the name may be corrected by a description of the legatee, and a mistake in the description by the name of the legatee. (*S. 76.*)

The maxim "*Falsa demostratio non nocet*" applies.

When any word material to the full expression of the meaning has been omitted, it may be supplied by the context. (*S. 77.*)

Erroneous particulars in the description of the subject matter of a bequest shall be rejected, and the bequest shall take effect. A part of the description, however, shall not be rejected as erroneous, if any object answers the whole description. (*Ss. 78, 79.*)

In granting probate of a will, the Court can exclude therefrom such parts of the will as are not proved to have been prepared under instructions from the testator. (*Hormusji v. Dhunjisha,* 12 Bom. L. R. 569.)

Extrinsic evidence of the testator's intention is admissible in cases of *latent* ambiguity only, i.e., ambiguity not on the face of the will.—*Doe v. Hiscocks,* 5 P. & M. 363. It is, however, not admissible in cases of *patent* ambiguity or deficiency, i.e., ambiguity on the face of the will.—*Pandurang v. Vinayak,* 16 Bom. 652. (*Ss. 80, 81.*)

The province of the Court is to interpret not to make. It is to construe the expressions the parties have themselves furnished, not to supply others.

General words may be understood in a restricted sense and *vice versa,* when it may be collected from the will, that the testator meant to use them in a restricted or a wider sense. (*S. 83.*)

The description contained in a will of property, the subject matter of gift, shall, unless a contrary intention appears by the will, be deemed to refer to, and comprise, the property answering that description at the death of the testator. (*S. 90.*)—*Re Russel,* 19 Ch. D. 432.

A will is said to speak from the death of the testator, for it comes into operation on his death only.—*In re Portal,* 30 Ch. D. 53. (*Jaiji v. Macleod,* 30 Bom. 493.) Where the gift is of a distinct and specific

thing incapable of increase or diminution and not a genus, e. g., " My brown horse " or " My Holy Family picture," this is an indication of a contrary intention sufficient to exclude the rule which makes the will speak from the testator's death. In contrary intention the testator refers to the *date of* the *will as* the *point of time at which* the *quantum* of the property is *to be ascertained.*

Powers of Appointment.

When a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property. (*S. 69.*)

General powers. (*S. 91.*) Unless a contrary intention appears by the will, a bequest of testator's estate shall include any property which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power; and a bequest of property described in a general manner shall be construed to include any property to which such description may extend, which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power.—*Dinshaw v. Sorabji,* 9 Bom. L. R. 493; *Shirinbai v. Ratanbai,* 23 Bom. L. R. 618, P. C.

Special and limited powers. (*S. 92.*) Where the property is bequeathed to, or for the benefit of, certain objects as a specified person may appoint, or for the benefit of certain objects in such proportions as a specified person may appoint, and the will does not provide for the event of no appointment being made, if the power given by the will is not exercised, the property belongs to all the objects of the power in equal shares.—*Byramji v. Ratnagar,* 18 Bom. 1.

Where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him. So also in a bequest with words of limitation, the legatee takes the whole interest of the testator therein, unless a contrary intention appears by the will. (*Ss. 95, 97.*)

Where there is an original gift to a person, and an alternative or substitutional gift to another person or to a class of persons, in the absence of a contrary inten-

tion, the first named or original legatee shall take the legacy, if he survives the testator; but if he be then dead, the person or class of persons named in the second branch of the alternative shall take the legacy. (*S. 96.*)

Thus when a bequest is to "A or B" or to "A or his heirs", if A survives the testator he takes the gift absolutely and B gets nothing. But if a dies before the date of the will or predeceases the testator, the legacy goes to B. The word "or" generally implies substitution, preventing a lapse.

A bequest simply to "heirs," "right heirs," "relations," "nearest relations," "family," "kindred," "nearest-of-kin," or "next-of-kin" of a particular person without qualifying terms, shall go to such person as if it had belonged to him and he had died intestate in respect of it, leaving assets for payment of his debts independently of such property. (*S. 93.*)

A bequests simply to "representatives," "legal representatives," "personal representatives," "executors," or "administrators" of a particular person, shall go to such persons as if it had belonged to them and had died intestate in respect of it. (*S. 94.*)

The "heirs," "right heirs" etc. take the bequest beneficially, while the "representatives," "executors" etc. do not take it beneficially but hold it as part of the estate they represent.

Description of legatees. (*S. 99.*) In a will:—

"Children" mean only lineal descendants in the first decree of the person whose children are spoken of.

"Grand children" mean only lineal descendants in the second decree of the person, whose grand children are spoken of.

"Nephews" and "Nieces" mean only children of brothers or sisters.

"Cousins," or "first cousins," or "cousins german" mean only children of brothers or of sisters of the father of the person whose "cousins" etc. are spoken of.

"First cousins once removed" mean children of cousins german, or cousins gorman of a parent of the person whose "first cousins once removed" are spoken of.

"Second cousins" mean only grand children of the person whose second cousins are spoken of.

"Issue" and "descendants" mean all lineal descendants whatever of the person whose issue etc. are spoken of.

Words expressive of collateral relationship apply alike to relations of full and half blood; and all words expressive of relationship apply to a child in the womb, who is afterwards born alive.

In the absence of any intention to the contrary in a will, the words "child," "son," "daughter," or any other word expressing relationship denote only a legitimate relative, or, where there is no such legitimate relative, a person who has acquired at the date of the will, the reputation of being such relative. (*S. 100.*)

The terms in sections 93, 94, 99, 100 are not exhaustive.

Under the Succession Act the question whether the words "heirs," "relatives" etc. are words of purchase or of limitation, depends not so much on an absolute hard and fast rule, as on the intention of the parties and the construction of the instruments in which they occur.—*Mithibai v. Limji*, 6 Bom. 151. (*Antao v. Ardeshir*, 1 Bom. L. R. 303.)

When a will purports to make two bequests to the same person it becomes a question whether the testator intended to make the second bequest instead of, or in addition, to the first. (*S. 101.*)—*Hooley v. Halton*, 2 W. & T. 313.

In such a case, if no intention of the testator could be known from the will, the following rules are laid down:—

1. A bequest of the same specific thing in the same or different documents implies only *repetition*—the same object cannot be given twice; it is physically impossible to do so. The legatee gets the specific thing only.

2. The bequest of the same amount twice in the same instrument also implies *repetition*. The legatee gets one such legacy only.

3. The same amount in different instruments produces a *cumulative* effect. The legatee gets both.

4. Double gifts of unequal amounts in same or different instruments are always *cumulative*. The legatee gets both.

Bequest to a Class.

Where a bequest is made to a class of persons under a general description only, those to whom the words of the description are applicable in their ordinary sense shall alone take the legacy. *(S. 98.)*

A Parsi left his property by will to his brother's widow for life and after her death to her issue; *Held*, that the legacy to the issue vested in them at the testator's death, and the widow constituted the stock in order to ascertain the distribution of the property among her issue. (*Pestonji v. Khurshedbai*, 7 Bom. L. R. 207.)

Jessel, M. R., *in Re Coleman*, 4 Ch. D. at page 109 speaking of gift to a class says: "The testator may be considered to have a primary and a secondary intention. His primary intention is that all members of the class shall take, and his secondary intention is, that if all cannot take, those who can shall do so." (*Rai Bishenchund v. Karamali*, 29 Bom. 133.)

When a bequest is made simply to a described class of persons, those alive at the death of the testator shall alone get the legacy. *(S. 111.)*

If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession is deferred until a time later than the testator's death by reason of prior bequest or otherwise, the property shall, at that time, go to such of them as are then alive, and to the representatives of any of them, who have died since the testator's death. (*Exception S. 111.—Pestonji v. Khurshedji*, 7 Bom. L. R. 207.

The interest vests in each member of the class as he is born, and although he may die before the time of payment or distribution, the representatives of those who die after the testator will take along with those alive at the time of distribution.

A child in the womb is a child in existence at the death of the testator and a bequest to children at a given period includes such child. (*Okhoymoney v. Nilmoney.* 15 Cal. 282.)

Where, however, a bequest is made only to such members of a class, as shall have attained a particular age, a person, who has not attained that age, cannot have a vested interest in the legacy. (*S. 121.*)

A bequest to such of certain persons as shall be surviving at some *period not specified*, shall go to those alive at the time of payment or distribution, unless a contrary intention appears by the will. (*S. 125.*)

When a *prior life-estate* in the bequest is *not given*, the *period of payment or distribution* is the death of the testator; but *when prior life-estate* is *given*, the period is the death of the life-tenant. And the survivors of the testator, or the life-estate holder (as the case be), will take the whole legacy.—*Cripps v. Wolcott*, 4 Madd. 11; *Hearn v. Baker*, 2 K. & J. 383. (*Evans v. Evans*, 25 Bom. 81.)

Contrary intention is indicated where a different point of time is mentioned in immediate connection with the words of survivorship. (*Ibid.*)

Residue and Residuary Legatee.

" *Residue* " means all of which no effectual disposition is made by the will other than the residuary clause.

When the disposition of the residue itself fails, to the extent to which it fails, the will is inoperative and the testator will be taken to have died intestate in respect of it.—*Skrymasher v. Northcote*, 1 Swnst. 566.

No particular mode of description is necessary to constitute a *residuary legatee.* It is sufficient if the intention of the testator is clearly expressed in the will, that the person designated shall take the surplus or residue of his property after payment of funeral expenses, debts and legacies. (*S. 102.*)

The words, " the rest of my property," " the surplus of my property," " the residue of my property " etc., are held to constitute residuary gifts.—*Chapman v. Chapman*, 4 Ch. D. 800 ; *Boys v. Morgan*, 9 Sim. 289.

Under a residuary bequest, the legatee is entitled to *all property* belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect. (*S. 103.*)

" *All property,*" that is, the residuary legatee is entitled to movables and immovables, to undisposed of properties, lapsed and void legacies and after acquired properties. He takes not only what is undisposed of by the expressions of the will, but whatever becomes undisposed of at the death by disappointment of the intentions of the will. (*Shirinbai v. Ratanbai.* 21 Bom. L. R. 384.)

If the legatee does not survive the testator, the legacy lapses and forms part of the residue of the testator's property. And where the share which lapses is a part of the general residue bequeathed by the will, that share shall go as undisposed of. (*Ss. 305, 308.*)

A part of the residue, of which the disposition fails, will not accrue in augmentation of the remaining parts as a residue of a residue but instead of resuming the nature of residue, devolve as undisposed of.

A legatee under a general residuary bequest is entitled to the produce of the residuary fund from the testator's death ; but when such legacy is contingent, the income accruing upon the fund between the testator's death and the vesting of the legacy, goes as undisposed of. (*S. 350.*)

The surplus or residue of the deceased's property, after payment of debt and legacies shall be paid to the residuary legatee when any has been appointed by the will. (*S. 366.*)

Investment of Residue.

Where a legacy not specific is given for life, the sum bequeathed is, at the end of the year, to be invested in authorized securities, and its proceeds to be paid to the legatee. (*S. 341.*)

In case of a contingent legacy, it need not be invested, but the executor or administrator may transfer the whole residue to the residuary legatee, on his giving security for payment of the legacy when it becomes due. (*S. 344.*)

Where a residuary bequest for life is made without direction to invest in any particular securities, the residue or so much thereof as is not invested at the testator's death is to be converted into money and invested in authorized securities. Where, however, there is a direction to invest in certain specified securities, the residue or so much thereof not so invested is to be converted and invested in such securities. (*Ss. 345, 346.*)

The executor or administrator may convert and invest the residue (under Ss. 345, 346) at such time and in such manner as he, in his discretion, thinks fit. And until such conversion and investment is made, the person entitled to the income gets interest at 3 per cent. per annum on the market value of the part of the fund invested. *(S. 347.)*

Doctrine of Lapse.

The general rule is that the legatee must survive the testator. If the legatee does not survive the testator but dies before the testator or happens to be dead at the date of the will, the legacy lapses i.e., gets extinguished and forms parts of the residue of the testator's property, unless the testator has, by his will, expressed that it should go to some other person. (*S. 105.*)

The word "or" generally in a bequest, e.g. to "A or his heirs" implies a substitution so as to prevent a lapse.—*Pickering v. Stamford.* 3 Ves. 493.

The use of mere negative words, unaccompanied by any effective disposition of property by the testator cannot preclude the proper heirs from succession according to law.—*Johnson v. Johnson,* 4 Bean. 318. (*Erasha v. Jerbai,* 4 Bom. 537.)

No lapse in the following cases :—

1. A legacy does not lapse where the predeceased legatee is the child or other lineal descendant of the testator, and any lineal descendant of his survives the testator. The bequest shall take effect as if the death of the legatee had happened immediately after the testator's death, unless a contrary intention appears by the will. (*S. 109.*)

The surviving lineal descendant of the predeceased child takes the legacy absolutely. (*Jebulal v. Binda,* 16 Cal. 549.)

2. A legacy does not lapse, if a legacy is given to two persons jointly, and one of them dies before the testator. In such a case, the legatees being joint-tenants, the survivor takes the whole, unless all the joint-legatees predecease the testator. Where, however, a legacy is given to several persons as tenants-in-common and not as joint-tenants, distinct shares being given to the several legatees, the share of the legatee dying before the testator does not go to the survivors, but lapses and forms part of the residue of the testator's property. (Ss. 106, 107.)—*Page v. Page,* 2 P. W. 489. (*Naoroji v. Pirozbai,* 23 Bom. 80.)

3. A legacy does not lapse, where the legatee is a trustee for another (where the bequest is made to one person for the benefit of another), who dies before the testator. (*S. 110,*)

Legacies.

Legacies are :—General, Specific, or Demonstrative.

A **general legacy** is one, which does not relate to any individual thing or some money, as distinguished from other things of the same kind, or other moneys, e. g., a diamond ring, a horse.

In the case of a general legacy, i. e., a bequest of something described in general terms, the executor must provide for it out of the testator's estate. (*S. 171.*)

A bequest of the income, i. e., interest or produce of property—movable and immovable, to a person without indicating any limitation as to duration is a legacy of the principal as well as the interest. To the legatee belongs the capital and the income.

Where *no time* is *fixed for payment of a general legacy*, *interest* runs from the expiration of one year from the death of the testator, except :—(1) where the bequest is in satisfaction of a debt, or (2) where the testator was a parent, or more remote ancestor of the legatee, or has put himself in *loco parentis* to the legatee, or (3) where a sum is bequeathed to a minor with direction to pay for his maintenance. In these cases interest runs from the testator's death. (*S. 351.*)

Where a general legacy is payable at a future time, the executor or administrator has to invest a sum sufficient to meet it in authorized securities. The intermediate interest forms part of the residue. (*S. 342.*)

Where a *legacy* is given *to* a *minor* and there is no direction in the will to pay or deliver it to any person on his behalf, the executor or administrator has to pay or deliver the same:—(1) into the District Judge's Court, (which granted the probate or letters of adminsitration with the will annexed), to the legatee's account, or (2) into the Court of Wards, if the legatee be a ward of that Court, to the legatee's account. The payment into these Courts shall be sufficient discharge for the payment. The money so paid is to be invested in authorized securities which with the interest thereon is to be transferred or paid to the person entitled thereto, or otherwise applied for his benefit as the Courts may direct. (*S. 348.*)

Where, however, *time* is *fixed for payment of* a *general legacy*, *interest* runs from the fixed time (the intervening interest forming part of residue of the testator's estate), except:—(1) where the testator was a parent, or a more remote ancestor of, or has put himself in *loco parentis* to, the legatee, and (2) if the legatee is a minor (unless specific sum is given by the will for maintenance, or unless the will contains a direction to the contrary). In these two cases interest runs from the testator's death. (*S. 352.*)

Specific legacy is where a bequest is made to any person of a specific part of the testator's property, distinguished from all other parts of his property, e.g., " the diamond ring presented to me by D," " my gold chain." (*S. 142.*)—*Bottamley v. Shirson,* 20 Eq. 309.

The legatee of a specific legacy gets the clear produce thereof from the testator's death. A specific legacy contingent in its terms does not comprise the legacy's produce between the testator's death and the vesting of the legacy. The clear produce of it forms part of the residue of the testator's estate. (*S. 349.*)

The following are not specific legacies:—

1. A bequest of a sum certain, merely because the stocks, funds or securities in which it is described in the will. (*S. 143.*)

To be a specific legacy it must clearly appear that the identical stock or fund, the testator meant to bequeath.—*Ashburner v. Macguire,* 2 W. & T. L. Cases.

2. A bequest of any stock in general terms, merely because the testator had, at the date of his will, an equal or greater amount of the specific kind. (*S. 144.*)

It must be the identical money to be specific legacy.—*Kirby v. Potter,* 4 Ves. 748.

3. A bequest of money, merely because it is not payable until some part of the testator's property is disposed of in a certain way. (*S. 145.*)

4. A bequest of the residue of the testator's property, merely because the residuary clause enumerates some items of property not previously bequeathed of which it may consist. (*S. 146.*)

The mere enumeration of particulars in the residuary clause under section 146, does not give a specific character to the bequest, because the whole clause is, in effect, a mere residuary clause. (*Taylor v. Taylor,* 6 Sim. 246.)

Where a specific bequest is made to several persons in succession, the property specially bequeathed is to be retained in the same form, though the property be of a wasting nature, because it is to be enjoyed by each of the persons *in specie*, without conversion. But where a general and not specific bequest is made to several persons in succession, and the property is of a wasting nature, unless otherwise directed, the property is to be converted in authorized securities, and put in a state so that the others may enjoy it after the decease of the first. (*Ss. 147, 148.*)

This is the rule in *Howe v. Dartmouth,* 2 W. & T. L. Cases.

Where there is a deficiency of assets to pay all the legacies, a specific legacy does not abate with the general legacies. (*S. 149.*)

Payment of Liabilities in respect of Subject of Bequest.

Where a specific legacy is subject at the testator's death to any charge (pledge, lien or incumbrance), created by the testator or by any person under whom he claims, the legatee, if he accepts the legacy, takes it subject to such charge and is liable to make good the amount of the charge, unless a contrary intention is indicated by the will. (*S. 167.*)

The testator's estate is, however, liable:—(1) for anything to be done to complete the testator's title to the thing bequeathed (*S. 168.*); (2) for payment of rent or land-revenue of immovable property which is specifically bequeathed payable periodically upto the testator's death; the rents etc. after the testator's death are to be borne by the legatee (*S. 169.*); (3) for calls and other payments due at the testator's death in respect of a specific bequest of stock in a joint stock company *Day v. Day*, 1 Dr. & Sm. 251; the specific legatee bears the calls etc. becoming due in respect of such stock after the testator's death. (*S. 170.*)

When the charge is created by the testator himself, the specific legatee gets the legacy redeemed and freed from the charge. But when the charge is not an incumbrance but a mere incident to the property the legatee takes the legacy subject to the charge.

Demonstrative Legacy. Where the testator bequeaths a certain sum of money, or a certain quantity of any other commodity, and refers to a particular fund or stock so as to constitute the same the primary fund or stock out of which payment is to be made, the legacy is said to be *demonstrative*. When specific property is given to the legatee, the legacy is *specific*. Where the legacy is directed to be paid out of specified property, it is *demonstrative*. (*S. 150.*)

Legacies directed to be paid out of the sale proceeds of land are demonstrative legacies. (*Rajanikant v. Kiko*, 34 Bom. L. R. 1124.)

Order of Payment of Legacies.

When a legacy is directed to be paid out of the subject of specific legacy:—1. The specific legacy shall first be paid to the specific legatee. 2. The demonstrative legacy shall be paid out of the residue of the fund,

3. If the residue be insufficient, the remaining portion of the demonstrative legacy shall be paid out of the general assets of the testator. *(S. 151.)*

Where a specific legacy is given from a fund and a demonstrative legacy is also given out of the same fund, and the testator having received portion of that fund, the remainder is insufficient to pay both the specific and the demonstrative legacy:—1. The specific legacy shall be paid first: 2. The demonstrative legacy shall, then be satisfied from the residue (if any) of the fund to the extent it will reach: and 3. The rest of the demonstrative legacy shall be paid out of the general assets of the testator. (*S. 157.*)

So also where assets are sufficient for payment of debts and necessary expenses:—1. The demonstrative legacy will be paid first from the fund out of which it is directed to be paid, until such fund is exhausted. 2. If after the fund is exhausted part of the demonstrative legacy still remains unpaid, the amount of such unpaid remainder will be met from the general assets. (*S. 339.*)

Bequests with directions as to application or enjoyment.

Subsequent restrictions upon absolute bequests are void.—It has been said that "*Equity, like nature, will do nothing in vain,*" and "*A Court of Equity will not compel that to be done, which the legatee may undo the next moment.*"

Following the principle, it is laid down in section 138 of the Succession Act, 1925 that: -Where an absolute bequest is given with a direction for its application or enjoyment in a particular manner for the benefit of the legatee, the legatee is entitled to the legacy, notwithstanding the direction.--*Stokes v. Check*, 29 L. J. Ch 922. (*Jehangir v. Kaikhoshru*, 15 Bom. L. R. 141; *Naoraji v. Putlibai*, 15 Bom. L. R. 352.)

Example.—If a sum is bequeathed towards purchasing a country residence, or to purchase an annuity for the legatee or to place him in business, but the legatee chooses to receive the legacy in money, he is entitled to do so, since the legacy is absolute.

Again, where a bequest is absolute and severed from the estate of the testator, but the mode of enjoyment of it by the legatee is restricted to secure a specified benefit for the legatee, on failure of such benefit, the legacy belongs to the legatee freed from the restriction. (*S. 139.*) The absolute gift prevails.

The rule of universal application is that where an absolute estate is granted, no limitation can be imported in the deed to derogate from the grant. Where there is an absolute gift, conditions restraining it are void.—*Lassonee v. Tierney,* 1 M. & G. 551. (*Hussenbhoy v. Ahmedbhoy,* 26 Bom. 319.)

Where, however, the bequest is neither absolute nor severed from the estate of the testator, but is given for certain purposes, and a part of those purposes fails, the legacy or its unexhausted part remains a part of the estate of the testator and does not go to the legatee. (*S. 140.*)

Where there is no absolute gift, the legatees do not take anything more than is given to them.—*Savage v. Tyres,* 7 Ch. 356.

Bequest to Executor.

If a legacy is given to a person named as an executor of the will, he shall not take the legacy, unless he proves the will or otherwise manifests an intention to act as executor.

When the executor is a legatee, his assent expressed or implied to his own legacy is necessary.

Executor-legatee has manifested an intention to act as executor, if he orders the funeral according to the directions in the will, though he dies a few days after the testator without having proved the will. (*S. 335.*)

Annuities.

An annuity is payable to the annuitant for his life only whether it is to be paid out of the property generally, or a sum of money is to be invested in the purchase of it. (*S. 173.*)

A simple grant of an annuity to a person carries no more than a life interest in the annuity in the absence of a contrary intention—*Blight v. Hortnoll*, 19 Ch. D. 294. (*Municipality of Bombay v. Secretary of State*, 5 Bom. L. R. 729.)

An annuity provided for any person, (a) out of proceeds of any property, or (b) out of property generally, or (c) money be invested for its purchase, is **perpetual** and vests (in the annuitant) in interest on the testator's death, and he has the option either to have the annuity purchased for him or to receive the money appropriated for that purpose by the will. (*S. 174.*)

The maxim "*Equity like nature does nothing in vain*" applies.—*Stokes v. Check*, 29 Ch. 922.

Where assets are not sufficient to pay all legacies given by the will, an annuity abates in proportion with other pecuniary legacies. (*S. 175.*)

Section 331 states that annuities are to be treated as general legacies for purpose of abatement.

Where an annuity and a residuary legacy are given, the whole of the annuity is to be satisfied before any part of residue is paid, and, if necessary, the capital of the testator's estate is to be applied for that purpose. (*S. 176.*)

Payment and Apportionment of Annuities.

Where *no time* is *fixed for* the *commencement of* an *annuity* by a will, it commences at the end of a year next from the testator's death: and the first payment is made at the end of a year next after that event. (*S. 338.*)

Where, however, the *annuity* is *directed to be paid quarterly or monthly*, the first payment becomes due, and may be paid, at the end of the first quarter or first month, as the case be, after the testator's death, but the executor is not bound to pay it till the end of the year. And where the *first payment* is *directed to be made within* a *given time after the testator's death, or on* a *certain day*, the successive payments are to be made on the anniversary of the earliest day on which the will authorizes the first payment to be made: and in the interval between the times of payment, if the annuitant were to die, an apportioned share of the annuity is to be paid to his representatives. *(Ss. 339, 340.)*

Where no fund charged with, or appropriated to, an annuity is given, a Government security of the specified amount is to be purchased. *(S. 343.)*

Interest on Annuity.

No interest is payable on the arrears of an annuity within the first year after the testator's death, although an earlier period than the expiration of that year may have been fixed by the will for its first payment. Where, however, a sum of money is directed to be invested to produce an annuity, interest is payable on it from the testator's death. The rate of interest shall be four per cent per annum. *(Ss. 354, 355, 353.)*

Onerous Bequests.

Where a bequest imposes an obligation on the legatee, he can take nothing by it, unless he accepts it fully. Where, however, a will contains two separate and independent bequests to the same person, the legatee may accept one of them and refuse the other although the former may be beneficial and the latter onerous. *(Ss. 122, 123.) Andrew v. Trinity College*, 9 Ves. 525.

Where the bequest is single—whole and entire—not separate and independent, the legatee must accept the whole or reject the whole. He cannot choose to accept what is beneficial and reject the onerous.—*Honeywood v. Honeywood*, (1902) 1 Ch. 347.

It is a question of the testator's intention in each case to be gathered from the will, whether the legatee should take all the legacies or none, or whether he may accept what is beneficial and repudiate what is burdensome.—*Guthree v. Walrond*, 22 Ch. D. 573.

Contingent Bequests.

Contingent bequest takes effect:—

1. When the contingency on which it depends is fulfilled. (*S. 120 supra.*)

2. Where a legacy is contingent upon the happening of a specified uncertain event, and no time is mentioned in the will for its occurrence, the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable. (*S. 124.*)

Where the occurrence of the contingency is not mentioned in the will, it must occur before the bequest becomes payable. (*Gulbai v. Rustomji*, 29 Bom. L. R. 380; *Jehangir v. Kaikhoshru*, 17 Bom. L. R. 197, P. C.; *Naoroji v. Putlibai*, 15 Bom. L. R. 352.)

Where a legacy is given to such of certain persons as shall be surviving at some period, the exact period not being specified, the legacy shall go to such of them, as are alive at the date of payment or distribution, unless a contrary intention appears by the will. (*S. 125.*)

Conditional Bequests.

Where a will imposes a *condition precedent* to the vesting of a legacy, the condition shall be considered to have been fulfilled, if it has been *substantially* complied with. (*S. 128*)—*Scott v. Tyler*, 2 W. & T. L. Cases. 146.

The word substantially means in greater part, or as far as it is possible, in other words *cypres*. (*Gour.*)

Where there is a bequest with a *condition subsequent*, as distinguished from a condition precedent, the bequest takes effect only when the condition is *strictly* fulfilled. (*Ss. 131, 132.*)

In the case of a *condition precedent*, the legatee has no vested interest until the condition is performed—the condition precedes the vesting of the estate; and the condition is taken as performed if it has been *substantially* complied with (*S. 128*): in case of a *condition subsequent*, the interest vests in the legatee in the first instance, subject to be divested by the non-performance of the condition, and the condition must be *strictly* fulfilled. (*S. 132.*) A *condition precedent* affects the acquisition of the estate; whereas a *condition subsequent* affects merely its retention.

The original bequest is not affected by the invalidity of second (ulterior) bequest. (*S. 133.*)

When the condition subsequent is invalid being impossible, illegal or immoral, the original bequest is single and absolute, and is not affected by the invalidity of the second (ulterior) bequest.

When there is a bequest to one person, and on its failure to another of the same thing, the second bequest takes effect on the failure of the first, though the failure may not have occurred in the way contemplated by the testator, unless the will shows an intention on the testator's part that the first bequest shall fail in a particular way before the second can take effect, and then in such a case the second bequest takes effect only on failure of the first bequest in that particular way. (*Ss. 129, 130.*)

A bequest may be made with the condition superadded that it shall cease to have effect, in case a specified uncertain event shall happen, or not happen. (*S. 134.*)

Section 134 illustrates the principle of forfeiture incurred by non-fulfilment of condition subsequent. There being no gift over, the forfeiture under this section would make the estate pass as on an intestacy. (*Bhoba Torini v. Pearylal*, 24 Cal. 646.)

Section 135 lays down that a condition precedent must be valid before it can operate. An invalid condition precedent invalidates a bequest, but not so an invalid condition subsequent. (*Gour.*)

If the legatee takes steps rendering impossible or indefinitely postponing the performance of the act required, for which no time is specified and on the non-performance of which, the subject matter of the bequest is to go over to another or the bequest ceases to have effect, the legacy shall go as if the legatee had died without performing such act. The legatee shall forfeit the legacy. (*S. 136.*)

When the will requires an act to be performed by the legatee within a specified time, either as a condition precedent or as a condition subsequent, the act must be performed within the specified time, unless the performance of it is delayed by fraud, in which case requisite further time shall be allowed. (*S. 137.*)—*Brook v. Garrod*, 3 R. & T. 605.

Void Bequests.

A bequest not expressive of any definite intention is void for uncertainty. (*S. 89.*)

As regards uncertain bequests when the intention as to the subject or object cannot be discovered from the words of the will, the bequest will be void for uncertainty. (*Chandunbai v. Dady*, 8 Bom. L. R. 902.)

A bequest to a person by a particular description, there being no person in existence at the testator's death, answering such description, is void. (*S. 112.*)

A bequest, however, to an unborn person standing in a particular degree of kindred to a specified individual, subject to a prior gift or deferred possession, is valid, if such person comes into existence at the testator's death or before the termination of the prior gift; and the property shall go to that person, or if he is dead, to his representatives. (*Exception. S. 112.*)

A gift to an unborn person directly, i.e., not through the medium of a prior gift or deferred possession is invalid and void. Thus, a bequest is made to the eldest son of B. At the testator's death B has no son. The bequest is void because it is to an unborn person. But when the bequest is made to A for life and after his death to the eldest son of C, though C had no son at the testator's death, yet in A's life-time a son is born to C. Upon A's death the legacy goes to C's son. (There is a gift deferred by a prior gift in this example.) When again in this second example after a life-bequest to A, the legacy is given to the eldest son of C. Though C had no son at the testator's death, yet in A's life-time a son is born to C. named D. Then D dies, and after D. A dies. The legacy shall go to the representatives of D.

A bequest to a person not in existence at the testator's death, subject to a prior bequest contained in the will, is void, unles it comprises the whole of the testator's remaining interest in it. (*S. 113.*)

In other words the deferred bequest must comprise the whole of the testator's remaining interest. Thus a mere life-estate cannot be bequeathed to an unborn person. A bequest to an unborn person, subject to a prior bequest must be an absolute gift of the remainder, otherwise the bequest is void. Section 113 deals with the rule against a possibility on a possibitity or double contingency or possibility.

Rule against perpetuity:—Any bequest the vesting whereof is delayed beyond a life or lives in existence at the testator's death, and the minority of the donee who must be living (born) at the close of the last life, is void. (*S. 114.*)

Section 114 puts a serious restriction upon the testator's power of creating successive interests in property by will. It treats of the Rule against Perpetuity or Rule against Remoteness and it is a rule of public policy.

"*Perpetuity*" means an interest which will not vest till a remote period.

The principle underlying these sections is not to fetter the creation of absolute estates by provisions and restrictions. These sections lay down restrictions upon the power conferred by section 112. (*Alangamonjore v. Sonamoni.* 8 Cal. at page 163.)

A gift to the heirs of A from generation to generation confirs on them, when ascertained, the same estate as if the gift were to X and Y, the heirs of A, *nominatom*. (*Banaji v. Mithibai*, 22 Bom. 355.)

"Except in the case of minority, there must be no interval between the determination of the preceding interests and the vesting of the person unborn at the testator's death, but subsequently born." (*Fatima v. Advocate-General*, 6 Bom. 42; *Limji v Bapuji*, 11 Bom. 41.)

In *Putlibai v. Sorabji*, 25 Bom. L. R. 1099 the testator wanted to limit the enjoyment of the property for an indefinite period, and the gift was held to be void.

Section 115 lays down the rule that if a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the provisions of sections 113 and 114, such bequest shall be void, not wholly, but in regard to those persons only.

A bequest in a will intended to take effect after, or upon failure of, prior bequest void under the three preceding sections, is also void. (*S. 116.*)

A direction to accumulate the income arising from any property shall be void; and the property shall be disposed of as if no accumulation had been directed. But accumulation is allowed in two cases:—(1) Where the property is immovable, or (2) where the accumulation is directed to be made from the death of the testator. In each case the direction shall be valid in respect only of the income arising from the property within one year next following the testator's death; and at the end of the year such property and income shall be disposed of respectively, as if the period during which the accumulation has been directed to be made had elapsed. (*S. 117.*)

The rule against accumulation is, like the rule against perpetuity, directed against the postponement of enjoyment.

A bequeaths a sum of money to B, to be paid to him when he shall attain the age of 18, and directs the interest to be accumulated till he shall arrive at that age. At A's death the legacy becomes vested in B; and so much of the interest as is not required for his maintenance and education is accumulated, not by reason of the direction contained in the will, but in consequence of B's minority.

Mortmain gifts, i. e., *death-bed bequests* to religious and charitable uses are prohibited in certain cases by *section 118.* No man, having a nephew or niece or any nearer relative shall have power to make a bequest to religious or charitable uses (purposes), except by a will executed not less then twelve months before his death—*Advocate-General v. Money,* 15 Mad. 468, and deposited within six month from its execution in some place provided by law for the safe custody of the wills of living persons.—*Abdul v. Amir,* 12 Cal. 976.

A person having a nephew, or niece, or any nearer relative (these relatives must be *legitimate relatives*—*Smith v. Massey,* 30 Bom. 500), must comply with, and fulfil, the two conditions for the execution, and depositing of the will (as required by the section) in order that a bequest to religious or charitable purpose may be upheld.

A charitable purpose must be one for the benefit of the public or a section of the public, and not for the private benefit of the donor, or his family, or of certain individuals. The objects must be wholly charitable.—*Moggridge v. Thackwell* (1803) 7 Ves. 136. (*Smith v. Massey,* 8 Bom. L. R. 322,=30 Bom. 580.)

Bequests to superstitious uses are allowed in India. (Stokes.)

The Statute of Mortmain does not extend to the territories of the East Indies—*Mayor of Lyons v. E. I. Coy.,* 1 M. I. A. 175. (*Jamshedji v. Soonabai,* 33 Bom. 122.)

Section 118 applies to Parsis :—It appears from the motion made by the Hon'ble Mr. Anderson in the Council held on the 7th April 1865 at Calcutta to consider the Succession and Inheritance (Parsi) Bill that the President of the P. L. Association had urged upon the Hon'ble member that section 105 of Act 10 of 1865 (now sec. 118 of Act 39 of 1925) was inapplicable to Parsis as they were in no degree priest-ridden, and it was consequently suggested that the Parsis should be exempted from the operation of that section. The Hon'ble Mr. Anderson,

however, appears not to have thought it at all advisable to allow this exemption. He said "I would remark that the section alluded to imports into India the 9th Geo. II, Cap. 36, commonly called the Statute of Mortmain. Now opinions may differ as to the propriety of that law; but it will be generally conceded that if such a law is made applicable to any portion of the community subject to the Succession Act, it must be made applicable to all who are so subject. I freely admit that the Parsis are not priest-ridden; but there is a principle which underlies all laws of Mortmain, and which addresses itself to a sentiment of deeper growth than priestly influence. That sentiment is the desire which men of all creeds and races feel on their death-bed to make terms, as it were, with the mysterious future by liberality exercised at the expense of their heirs. It is one of the subtlest of those mixed questions of laws and morals, to what extent a man is justified in influencing by testation the distribution of his property. The wisdom of successive generations has determined with this kind of testation that there ought to be the most ample security not only that the testator is in possession of his faculties, but that his mind is in an entirely healthy state capable of looking before and looking after, and in no way thrown off its balance by the fear of approaching dissolution. On considerations of this kind the laws of Mortmain have been founded, and to such considerations the Parsis are as subject as their fellowmen. I was unable, therefore, to recommend the amendment proposed by my friend to the select committee for adoption. And I may add that Parsis make such munificent use of their wealth during their lives, that the legislature is bound to guard, in some measure, their heirs from any testamentary profusion in favour of public objects, which the fear of death may possibly suggest."

Trusts for performance of Muktad, Baj, Rojgar, etc., ceremonies among Parsis are valid "Charitable Bequests."

In the case of *Jamshedji v. Soonabai*, 33 Bom. at page 211 = 10 Bom. L. R. 417 the late Mr. Justice Dinsha Davar held that trusts and bequests of lands or money, for the purpose of devoting the incomes thereof in perpetuity for the performance of *Muktad*, *Baj*, *Yejushni*, and other like ceremonies, are valid "Charitable", bequests, and as such exempt from the application of the rule of law forbidding perpetuities.

At page 175 of the report it is remarked :—" One has only to read the very clear and convincing evidence given in the case and to refer to the scriptural passages placed before the Court to come to an unhesitating conclusion that the Muktad ceremonies performed during the Farvardigan days have *nothing whatever*, to do with the souls of the dead and have not the least tendency of conferring any benefits on the souls of the dead members of a family."

" It is established by historic evidence that these ceremonies were performed in ancient Iran from the most olden times, and the Parsis after their domicile in India have continued to perform them. According to the belief prevailing amongst the faithful followers of the Prophet Zoroaster, the performance of the Muktad ceremonies confers public benefits. The fundamental principle underlying this belief is faith in the efficiency of prayers addressed to the Great Creator. (*Ibid. 186.*)

His Lordship did not follow the former decisions on the subject of trusts for Muktad and Baj, Rojgar ceremonies as the evidence available before him in this case was fuller and more reliable and tended to lead him to a different conclusion.

Since February 1887, when Mr. Justice Jardine decided *Limboowala's case* (*Limji v. Bapuji*, 11 Bom. 441), there have been other cases in which trusts in respect of Baj, Rojgar and other like ceremonies have been declared void. It may be noted that the decree in this case was practically a consent decree.

Thus the first case that came before the Court after the decision in Limboowala's case was (unreported) Suit No. 267 of 1890—*Dinbai v. Hormusji Hodiwala*, spoken of as *Hodiwala's case*. A Parsi of Surat by his will directed that the income of the residue of his property should be spent in the performance of religious ceremonies affecting the deceased members of his family. He left a mother and a widow, with whom evidently he was on bad terms and whom he had disinherited by his will. Mr. Justice Farran gave no judgement, but merely recorded a decree declaring that the bequests in the will were void, and that the mother and the widow were entitled to the residue of the estate. He assumed that Limboowala's case was rightly decided and merely followed it,

The next case is (unreported) suit No. 565 of 1889.—*Dhunbaiji v. Nowroji Bomonji* known as *Wadia's case*. Mr. Justice Farran held the trusts in this case, for the performance of Muktad and Rojgar ceremonies, void as not being charitable and offending against the law which forbids perpetuities. In this case, there was no contest; it was a friendly suit.

Then came the case relating to Baj, Rojgar and Muktad trusts (unreported) suit No. 281 of 1892.—*Cawasji Gorewala v. Pirozbai*, known as *Gorewala's case*. An oral judgement was delivered by Mr. Justice Parsons, and the trusts were held void.

After that the case in which the question of Baj, Rojgar and Muktad ceremonies came up before the Court for consideration was (unreported) Suit No. 96 of 1892,—*Manekji Albless v. Sir Dinshaw Petit* known as the *Albless case*. Mr. Justice Baley held the trusts void. The judgement here was also oral.

Then there was the (unreported) Suit No. 49 of 1895,—*Dadina v. Advocate-General*, spoken of as *Markar's case*, Mr. Justice Candy held the trusts void.

The last case was *Cawasji Pochkhanawala v. Rustomji Sethna*. 20 Bom. 511, and the trust was set aside.

In all these cases the Judges followed Limboowala's case.

(*Jamshedji v. Soonabai*, 33 Bom. at pp. 153, 158, 160.)

These seven are all the cases that came before the High Court from 1887 upto the time the case of *Jamshedji v. Soonabai*, was heard by the late Sir Justice Dinshaw Davar. His Lordship at pages 161, 162 remarks. "It seems to me amazing that no one in all the cases took the trouble to go to the original sources—the scriptures of the religion, to which the ceremonies belonged—to the sacred writings that are most undoubtedly authoritative, and—to the original texts founding the ceremonies and enjoining the performance thereof."

The cases of *Ardeshir v. Shirinbai*, (1899) and *Dady v. Advocate-General*. (1905) are two other cases on Baj, Rojgar trusts held invalid, besides the seven cases mentioned in the case of *Jamshedji v. Soonabai* above stated.

In *Ardeshir v. Shirinbai* 1 Bom, L. R. 721, the trust for Baj, Rojgar and Muktad ceremonies was held invalid. At page 722 it is observed:— "It is quite possible on the authority of *Limji v. Bapuji,* 11 Bom. 441 that the trusts, if impeached by those having an interest in doing so, be declared void. There is no doubt, however, that hundreds of such trusts are being carried out every day and will continue to be carried out under the terms of bequests similar to the present, until they are impeached and set aside in an independent proceeding. A trustee must assume the validity of a trust, until it is actually impeached."

In *Dady v. Advocate-General,* (1905) 7 Bom. L. R. 324 by a deed Poll in the nature of a deed of settlement, the settler (a Parsi) provided, that a sum of Rs. 600 should be expended annually on Baj, Rojgar and Muktad ceremonies out of the income of Rs. 20,000 that would remain after Rs. 7,000 had been expended for the settler's funeral ceremonies. The learned Judge (late Mr. Justice Tyabji) held such trusts to be invalid and void according to the decision in *Limboowala's case,* 11 Bom. 441.

Doctrine of Cypres.

The doctrine of *Cypres* applies only where the testator has shown that charity is the *substance* of the gift, and a particular disposition merely the *mode.* But where the testator has a particular object in view and *not* a *general* charitable intention, and if its object fails, the gift will not be applied *Cypres—Moggridge v. Thackwell,* 7 Ves. 36; *Mills v. Farmer,* 19 Ves. 482. (*The Mayor of Lyons v. Advocate-General,* 1 Cal. at page 309; *Nanu v. Advocate-General,* 9 Bom. L. R. 370.)

The doctrine of *Cypres* is applied, where from lapse of time and change of circumstances, it is no longer possible beneficially to apply the property left by the founder or donor in the exact way, in which he has directed it to be applied beneficially to similar purposes by different means.—*In Re Campolin Charities* (1881) 18 Ch. D. at page 323. (*Balkrishna v. Vinayak,* 34 Bom. L. R. at pp. 113, 114.)

In *Advocate-General v. Fardoonji,* 13 Bom. L. R. at page 341, Davar, J. said, "Since I discussed the question of the application of *Cypres* doctrine in *In Re Warden Charities,* 32 Bom. 214, the Appeal Court in England has discussed the same subject very elaborately

in *Re Weir Hospital* 1910 2 Ch. 124, and I find that the principles on which the Courts act have been re-affirmed and stated again with great clearness." The learned Judge then proceeds:—"In cases of charitable bequests, the Court has no right to set aside the wishes of the testator and substitute another charity in the place of one directed to be established by him, simply because the one might not be so useful as some other that the Court might substitute."

The other bequests which are treated as void under the Indian Succession Act, 1925 are bequests upon impossible, illegal or immoral conditions. (Ss. 126, 127.)

Vesting of Legacies.

If a legacy be given in general terms without specifying the time when it is to be paid, the legatee has a vested interest in it from the testator's death, and, if he dies without having received it, it shall pass to his representatives. (*S. 104.*)—*Harris v. Brown*, 28 I. A. 159.

Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives, if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be *vested in interest.* (*S. 119.*)

The vesting of interest does not get postponed:—

1. Where payment or possession of the legacy is postponed. Thus where futurity is annexed to the substance of the legacy, the gift is suspended.—*Halifax v. Wilson*, 16 Ves. 168. But if it appears to relate to the time of payment only, the legacy vests *instenter.*—*Jackson v. Jackson*, 1 Ves. Sen. 217.

2. Where prior interest in it is bequeathed to some other.—*Jairam v. Kuverbai*, 9 Bom. 507.

3. Where the income of the fund is directed to be accumulated till the time of payment.—*Bleare v. Burgh*, 2 Beav. 221.

4. Where upon the happening of a particular event, the legacy is to go to another.—*Deane v. Test*, 9 Ves. 147.

Section 119 applies only when no contrary intention appears by the will.—*Knight v. Cameron*, 14 Ves. 389.

(*Buchman v. Buchman*, 6 All. 583.)

Section 104 must be read in connection with section 119.—*Pestonji v. Khurshedbai*, 7 Bom. L. R. 207.

A residuary legatee's interest is a vested interest.

A Parsi by his will devised a house to his wife for her life and directed that after her deceased his executors should hold the house in trust for his son J., and in the event of J's death, in trust for J's widow (as to part if he so appointed) and for J's issue, and in default of such issue and subject to such appointment, in trust for the testator's son K. "if then living." J. died unmarried in the life-time of the testator's widow and of K. *Held* that upon the death of J. the house *vested absolutely* in K., subject to the life interest of the testator's widow. *(Kaikhoshru v. Shirinbai*, 21 Bom. L. R. 130.)

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

Where a fund is bequeathed to any person on his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age or directs the income or so much of it as may be necessary, to be applied for his benefit, the bequest of the fund is not contingent.

(*S. 120.*)

In the case of vested legacy payable at a future time, there is a complete severance of the legacy from the residue. Where there is a contingent legacy and interest in the meantime is not given to the

legatee, the interest remains part of the residue, and the principal will fall into the residue if the contingency does not happen. But if the interest in the meantime is given to the legatee, or if there is a direction to accumulate the interest, there would be a severance from the residue. (*Manekji v. Nanabhai*, 31 Bom. L. R. 969.)

A Parsi made his will on 10-2-1913, when his wife was *enciente*. The wife gave birth to a son on 27-5-1913. The testator died on 17-7-1913; and his son died on 2-7-1914. It was held that the bequest to the son was—"contingent" within the meaning of the "initial" clause of section 107 (Act 10 of 1865)=section 120 (this section) and not vested and did not fall within the exception to the section. (*Cawasji v. Ratanbai*, 27 Bom. L. R. 1.)

Where a bequest is made only to such members of a class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy. (*S. 121.*)

This section is an exception to the rule laid down in section 98 *supra*.

Gifts (estates and interests) in property may be either :—

1. *Vested in possession*, when the gift conveys a present title and interest and a present right of possession or enjoyment. (*S. 104*) *supra*; or

2. *Vested in interest but not in possession*, when the gift is present in interest, but its enjoyment is deferred. The legatee has a definite interest, which is sure to take effect some day or other (*S. 119*)—*Kaikhoshru v. Shirinbai*, 21 Bom. L. R. 133 P. C.; or

3. *Contingent*, when the gift gives neither present title nor present right of enjoyment, but both depend upon future uncertain event. (*S. 120.*)—*Cawasji v. Ratanbai*, 27 Bom. L. R. 1.

Ademption of Legacies.

A—Ademption of whole legacy.

A bequest gets adeemed (whole bequest) in the following cases :—

1. If a specific legacy does not belong to the testator at the time of his death, or has been converted into

property of a different kind, the legacy is adeemed; that is, it cannot take effect, because the subject matter has been withdrawn from the operation of the will. (*S. 152.*)

It is enough for ademption (extinction) that the specific legacy does not exist at the testator's death.—*Ashburner v. Macguire*, 2 W. & T. L. Cases at page 244.

2. A specific bequest of a right to receive something of value from a third party (a debt) gets adeemed by the testator himself receiving it. (*S. 154.*)

3. Where stock specifically bequeathed does not exist at the testator's death, the legacy is adeemed. (*S. 158.*)

B—Ademption pro-tanto.

An ademption in part takes place in the following cases:—

1. The receipt of a part of an entire specific legacy by the testator operates as an ademption *pro-tanto* (to the extent of the sum so received), of the legacy. (*S. 155.*)

2. The receipt, in like manner, of a portion of an entire fund or stock specifically bequeathed is an ademption only *pro-tanto* (to the extent of the amount so received), of the specific legacy and the rest of the fund or stock is applied to the discharge of the specific legacy. (*S. 156.*)

3. Where stock specifically bequeathed exits only in part at the testator's death, the specific legacy is adeemed *pro-tanto* (to the extent of the part of the stock which has ceased to exist). (*S. 159.*)

C—No Ademption.

No ademption takes place in the following cases:—

1. A specific legacy of goods under a description connecting them with a certain place by their removal from such place, (a) from any temporary cause e.g.,

to save them from fire, or (b) by fraud, or (c) without the testator's knowledge or sanction, or (d) where the place in which it is stated to be situated is only referred to complete the description of what the testator meant to bequeath. (*Ss. 160, 161.*)

The question is whether in clause (d) the locality referred to is essential to, and substantive part of, the bequest or merely descriptive. There is no ademption by removal where the mention of the place is only descriptive.

2. Where the specific legacy is not of debt, but of the money or other commodity to be received from a third person by the testator himself or by his representative, and the testator receives the same and does not mix it up with his general property. (*S. 162.*)

3. Where the specific legacy undergoes a change between the date of the will and the testator's death, (a) by operation of law, or (b) in execution of the provisions of any legal instrument under which the legacy was held, or (c) without the knowledge or sanction of the testator. (*Ss. 163, 164.*)

4. Where a specific legacy of stock: –(a) is lent to a third party on condition that it shall be replaced and it is replaced accordingly, or (b) is sold by the testator and an equal quantity of the same is afterwards purchased and belongs to the testator at the time of his death. (*Ss. 165, 166.*)

Notwithstanding the stock specifically bequeathed being (a) lent to another or (b) sold, the legacy does not get adeemed.

5. A demonstrative legacy is not adeemed by reason that the property on which it is charged by the will does not exist at the testator's death or has been converted into property of a different kind. (*S. 153.*)

6. No bequest shall be wholly or partially adeemed by a subsequent provision made by settlement or otherwise for the legatee. (*S. 179.*)

Abatement of Legacies.

General legacies shall abate or be diminished in equal proportions, if the testator's assets after payment of debts, necessary expenses and specific legacies are not sufficient to pay all the general legacies. (*S. 327.*)

On a deficiency of assets to pay legacies a *specific legacy* is not liable to abate with the general legacies. (*S. 149.*)

Where the assets are sufficient to pay debts and necessary expenses, the *specific legacy* is to be delivered to the legatee without any abatement. When, however, the assets are not sufficient to pay debts and specific legacies, then only the *specific legacies* abate rateably. (*Ss. 328, 330.*)

Demonstrative legacies, where the assets are sufficient to pay debts and necessary expenses, do not abate if the funds, out of which they are directed to be paid, exist. (*S. 329.*)

They, however, abate, when they become general legacies by reason of the primary funds, out of which they are payable ceasing to exist.

An *annuity* abates *pro-rata*, with the general legacies, when the assets are insufficient to pay all the legacies given by the will. (*S. 175.*)

A legacy for life and an annuity shall, for the purpose of abatement, be treated as general legacies. (*S. 331.*)

Refunding of Legacies.

In the event of the *assets* proving *insufficient* to pay all the legacies when the payment of a legacy is *compulsory* (under the order of a court), the executor or administrator can call upon the legatee to refund, but not when the payment of it is *voluntary*. (*Ss. 356, 357.*) —*Newman v. Barton*, 2 Vern. 205.

When the payment of a legacy is *voluntary* the unsatisfied legatee must first proceed against the executor or administrator, if he is solvent, before he can call upon a satisfied legatee to refund; but if the executor or administrator be insolvent, or not liable to pay, the unsatisfied legatee can oblige each satisfied legatee to refund in proportion; that is, by such sum as the satisfied legatee ought to have been reduced, if the estate had been properly administered. So too, when the executor or administrator has paid away the assets in legacies and he is afterwards obliged to discharge a debt of which he had no previous notice, he is entitled to call upon each legatee to refund in proportion. (*Ss. 363, 364, 359.*)

Where a legacy is conditioned, and the condition is not fulfilled within the prescribed time for its performance, and the executor or administrator has, thereupon, distributed the assets, and further time has been allowed for performance of the condition to the legatee on the ground of fraud, and the condition is performed accordingly, the legacy cannot be claimed from the executor or administrator, but the legatee may compel the other satisfied legatees to refund. (*S. 358.*)

If *assets* were *sufficient* to satisfy all the legacies at the testator's death, an unsatisfied legatee or one compelled to refund by a creditor cannot oblige a satisfied legatee to refund, whether the legacy was paid to him with or without suit, although the assets have subsequently become deficient by the wasting of the executor. (*S. 362.*)

A creditor, who has not received payment of his debts, may call upon a satisfied legatee to refund, whether the assets were or were not sufficient at the testator's death to pay both debts and legacies, and whether the legacy was paid by the executor or administrator voluntarily or not. Where, however, an executor or administrator has given notice to all creditors to send in their claims, he shall, at the expiration of the time mentioned in the notice, be at liberty to distribute the assets, or any part thereof, in discharge of such lawful claims

as he knows of and shall not be liable to any person of whose claim he had no notice at the time of such distribution. But the creditor in such a case is not without his remedy; for, he can follow the assets in the hands of those who may have received the same respectively. (*Ss. 361, 360.*)—*Newton v. Sherry*, 1 C. P. D. 246.

The refunding shall in all cases be without interest. (*S. 365.*)—*Gillinis v. Steele*, 1 Swanst. 200.

(Transfer of assets from Bri. Ind. to executor or administrator in the country of domicile for distribution. S. 267, at p. 115 *supra.)*

Doctrine of Election.

Election takes place, where a person, by his will, either believing or not believing what he professes to dispose of to be his own, disposes of property, which he has no right to dispose of; the owner of the property must elect either to conform to such disposition or to dissent from it—he must either give up what is his own or lose the legacy. If the legatee dissents from the disposition, he forfeits all interest (benefit) provided for him by the will. The interest so relinquished devolves as if it had not been disposed of in the legatee's favour, subject to the charge of making good to the disappointed legatee the amount or value of the gift attempted to be given to him by the will. (*Ss. 180-182.*)

The principle of election is based on the maxim "He who takes the benefit must bear the burden" and a legatee, therefore, cannot take under and against the same instrument. (*Forbes v. Ameroonisa Bagam*, 10 Moo. I A. at p. 356; *Shah Mukhunlal v. Babu Sree Kishen*, 12 Moo. I. A. at p. 186.)

Noys v. Mordaunt and *Streatford v. Streatford*, 1 W. & T. Leading Cases have conclusively established the doctrine of election founded upon the principle that there is an implied condition that he who accepts a benefit under an instrument, must adopt the *whole* of it, confirming with all its provisions and renouncing every right inconsistent with them.

No question or case of election arises where the testator does not dispose of any property of the legatee, as also when he does not give any property of his own.

A bequest for a person's benefit (e.g., a bequest to trustees for that person's benefit), is for the purpose of election the same as a bequest to himself. (*S. 183.*)

A person is put to his election when he derives any benefit under a will *directly* only ; but he is not put to his election when he derives benefit under the will indirectly. And a person taking a benefit under a will in his individual capacity may, in another character (e.g., as an executor), elect to take in opposition to the will. (*Ss. 184, 185.*)

Section 186 provides for an exception to the foregoing provisions and states that where a particular gift is expressed *to be in lieu* of something belonging to the legatee, which is also in terms disposed of by the will. then if the legatee claims that thing, he must relinquish the particular gift, but he is not bound to relinquish any other benefit given to him by the will.

Acceptance of the benefit given by the will *constitutes* an *election* by the legatee to take under the will, (a) if he has knowledge of his right to elect and of those circumstances, which would influence the judgment of a reasonable man in making an election, or (b) if he waives inquiry into the circumstances. And such *knowledge or waiver of enquiry* (1) *shall be presumed* by actual enjoyment by the legatee for two years of the benefits provided for him by the will, or (2) *may be presumed* from any act of the legatee rendering it impossible to place the persons interested in the subject matter of the bequest in their original position. (*Ss. 187, 188.*)

If the legatee does not elect within one year after the testator's death, he shall be called upon after that time to make his election; and if he fails within a reasonable time to comply with such requision, he shall be deemed to have elected to confirm the will. (*S. 189.*)

An election once made is final and binding upon both the parties and their representatives. (*Tribhuvandas v. Smith*, 20 Bom. 316.)

In case of disability, e.g., minority or unsoundness of mind of the legatee, the election shall be postponed, until the disability ceases or until the election is made by some competent authority. (*S. 190.*)

Gifts in Contemplation of death. *Donatio Mortis Causa.*

A gift is said to be made in contemplation of death, where a man, who is ill, and expects to die shortly of his illness, delivers the possession of any *movable* property to keep as a gift, in case the donor shall die of that illness. (*S. 191.*)

Any movable property, which the donor could dispose of by will may be the subject of such gift; e. g., a watch, a bond, a bank-note, a promissory-note, etc.

Such a gift is resumable by the giver.

Such a gift must be made in expectation—in contemplation, of the conceived approach of death.

Such a gift takes effect only on the donor's death by his existing illness. If he recovers from that illness or if he survives the donee, the gift does not take effect.

Such a gift must be actually delivered. The delivery must be absolute. If actual delivery cannot be made, delivery of some effectual means of coming at the possession, or the making use of the thing given, is enough, i. e., the key of a trunk.

Representative title to property of deceased on succession.

The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes and all (movable or immovable) property of the deceased person vests in him as such. (*S. 211.*)

"Executor," means a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided. (*S. 2 (c).*)

"Administrator," means a person appointed by competent authority to administer the estate of a deceased person when there is no executor. (*S. 2 (c).*)

The property of the deceased vests in the legatee for the purpose of enjoyment, but it vests in the executor for the purpose of administration and the enjoyment of the property must be postponed to the due administration of the property. (*Jehangir v. Kukibai*, 27 Bom. 281.)

It is only the actual property of the deceased that vests in the executor or administrator; therefore, property vested in a testator as executor of another does not vest in his executor. The executor of an executor is not derivative executor of the original testator. (*De Souza v. Secretary of State*, 12 B. L. R. 422.)

The administrator under section *S. 211* steps into the shoes of the deceased in respect of all his rights and obligation, and he can do what the deceased could have done, e. g., pay or promise to pay barred debts of the deceased. (*Pestonji v. Meherbai*, 30 Bom L. R. 1407.)

No right to any part of the intestate's property can be established in any Court of justice, unless letters of administration have first been obtained. And no right as executor or legatee can be established in any Court of justice, unless probate or letters of administration with the will or with a copy of an authenticated copy of the will has or have been obtained. (*Ss. 212, 213.*)—*Framji v. Aderji*, 18 Bom. 337.

The Parsis are subject to sections 212 and 213 and therefore, fall within the restrictions of sec. 370 *infra*.

Section 214 distinctly and imperatively forbids any Court to pass a decree against a debtor of the deceased for payment of his debt, unless the person claiming produces probate, or letters of administration, or succession certificate. (*Santaji v. Ravji*, 15 Bom. 105.)

The Succession Certificate Act does not apply to Parsis. In the case of a Parsi, therefore, no decree for a debt can be passed without production of probate or letters of administration.

A grant of probate or letters of administration in respect of an estate supersedes any certificate previously granted, in respect o any debts or securities included in the estate. A succession certificate is granted only for the purpose of collecting debts. (*S. 215.*)

The grantee of probate or letters of administration alone, can sue or prosecute any suit, or otherwise act as the deceased's representative, until such probate or letters has or have been recalled or revoked. (*S. 216.*)

Grant of Probate and Letters.

Where the deceased has died **intestate,** those connected with him by marriage or by consanguinity, are entitled to obtain **letters of administration** of his estate in the following order:—

(a) Widow (if any), unless she be excluded either on the ground of some personal disqualification, e. g., she is a lunatic, or has committed adultery, or has been barred by her marriage settlement of all interest in her husband's estate, or because she has no interest in the deceased's estate.

It is not a good cause for her exclusion, on the ground of personal disqualification, if she has remarried since the death of her husband.—*Webb v. Needham,* 1 Add. 494.

Any person or persons, solely entitled to administration in the absence of widow, may, if the Court thinks fir, be associated with the widow.

(b) The person or persons beneficially entitled to the estate according to rules of distribution of an intestate's estate.

When, however, the mother of the deceased is one of the class of persons so entitled, she shall be solely entitled to administration.

(c) Those standing in equal degree of kindred to the deceased are equally entitled to administration.

(d) The widower has the same right of administration of her estate, as the widow has in respect of her husband's estate.

(e) A creditor, in default of persons connected by marriage or consanguinity.

Where the deceased has left property in British India, letters of administration shall be granted according to the foregoing rules, notwithstanding that he has his domicile in a country in which the law relating to testate and intestate succession differs from the law of British India.

[S. 219.]

Lex situs prevails over *lex domicile.—Enohi v. Whylie,* 10 H. L. C. I.

Probate shall be granted only to an executor appointed by the will. The appointment may be expressed or implied (according to tenor), or may be for any limited purpose specified in the will. (*Ss. 222, 242.*)

"Probate," means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the testator's estate. (*S. 2 (f).*)

When several executors are appointed, probate may be granted to them simultaneously, or at different times. (*S. 224.*)—*Jehangir v. Kukibai,* 5 Bom. L. R. 281 ; *Mithibai v. Canji,* 26 Bom. 571.

Probate and Letters of administration cannot be granted to any person who is (i) a minor, or (ii) of unsound mind. (*Ss. 223, 236.*)

An infant may be appointed an executor, but probate will not be granted to him during minority. When, however, a minor is sole executor letters of administration with the will annexed may be granted to his legal guardian, or to another as the Court thinks fit, until the minor completes his 18th year. And when there are two or more minor executors, then too, administration will be granted until one of them completes his 18th year.

In case of a sole executor or person entitled to letters of administration being a minor or lunatic, letters of administration with or without the will annexed, as the case be, may be granted to his committee, or to another as the Court thinks fit, for the use and benefit of the minor till he attains his age of majority, or of the lunatic till he becomes sane.

[*Ss. 244—246.*]

A separate probate of a codicil discovered after grant of probate may be granted to the executor, if the codicil in no way repeals the appointment of executors made by the will. But if different executors are appointed by the codicil, the probate of the will must be revoked and a new probate granted of the will and codicil together. (*S. 225.*)

Letters of administration entitle the administrator to all rights belonging to the deceased as effectually as if the administration had been granted at the moment after his death, but do not render valid any of his intermediate acts tending to diminution or damage of the intestate's estate. (Letters of administration here include letters of administration with the will annexed.)

Probate of a will when granted establishes the will from the testator's death and renders valid all intermediate acts of the executor as such.

[*Ss. 220, 221, 227.*]

While probate renders all intermediate acts valid, letters of administration render valid only those acts beneficial to the deceased's estate, since the *executor* derives his title from the will, but the administrator gets his authority from the grant of the letters of administration. The estate vests in the *executor*; and though he cannot enforce his right without probate, yet he may before the grant of probate do almost all the acts incident to his office; an *administrator*, however, can generally do nothing as such before the letters of administration are granted to him. The *interest of the administrator*, however, *after* the *grant* of administration, in the deceased's property is the same as that of the executor.

It may be noted that probate can only be granted of instruments of a testamentary nature.

Marginal notes and alterations by the testator unattested by witnesses cannot be admitted to probate. (*Naoroji v. Putlibai*, 15 Bom. 352; *Hormusji v. Dhunjishaw*, 12 Bom. L. R. 569.)

Conclusiveness of probate or letters. S. 273. Probate and letters of administration shall have effect over all property and estate—movable or immovable of the deceased, throughout the province in which the same is or are granted, and shall be conclusive as to the representative title against all debtors of the deceased and all persons holding property belonging to him, and shall afford full indemnity to all debtors as regards the payment of debts to the grantees of probate or letters of administration.—*Hormusji v. Dhanbaiji*, 12 Bom. 164.

Section 228 enables a Court in British India to grant letters of administration with a properly authenticated copy of a foreign will (already proved and deposited in a competent Court abroad) annexed, thus avoiding the necessity of proving the original will.

When probate has been granted to several executors and one of them dies, the entire representation of the testator accrues to the surviving executor or executors. So do all the powers of the office become vested in the survivors or survivor upon death of one or more of several executors or administrators, in the absence of any contrary direction. *(Ss. 226, 312.)*

If an executor to whom probate has been granted has died leaving part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate; in such a case the Court shall grant administration to those persons to whom the original grant might have been made. (*Ss. 258, 259.*)

Acceptance and Renunciation of Executorship. S. 229. When the executor appointed has renounced the executorship, letters of administration shall not be granted to any other person, until a *citation* has been

issued, calling upon the executor to accept or renounce his executorship: provided that, when one or more of several executors have proved a will, the Court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved.

"*Citation*" is a summons to appear, applied particularly to process in the spiritual, probate and matrimonial courts. They are *compulsory* as in Ss. 229 and 235, or *discretionary* as in S. 283.

Citation under S. 229 being compulsory the grant without it is defective and revocable. (*Hormusji v. Dhunbaiji*, 12 Bom. 164.)

An executor called upon by citation to accept or renounce, is clearly compellable, if he accepts, to take out probate within a limited period. If he does not do so, letters of administration with a copy of the will annexed may be granted to any competent applicant. This is the principle of the decisions in the case of *Motibai v. Karsandas*, 19 Bom. 123 and *Dayabhai v. Damodar*, 19 Bom. 229. (*Kawasji v. Dinbai*, 18 Bom. L. R. at p. 767.)

Absence of citations, which are discretional, does not in itself invalidate the grant. (*Digamber v. Narayan*, (1910) 13 Bom. L. R. 38.)

Renunciation of Executorship.

Renunciation may be made orally in the presence of the Judge, or by a writing signed by him who renounces. An executor cannot be compelled to accept the executorship. If he renounces, or fails to accept within the time limited, the will may be proved, and letters of administration with a copy of the will annexed may be granted to a person entitled on intestacy. (*Ss. 230, 231.*)

After renunciation, the executor is precluded from ever thereafter applying for probate. Renunciation may be retracted before the grant of administration, but never after the grant of administration.

As regards rights of renunciation, there is no distinction made in the case of an executor or administrator, though there is no mention as regards renunciation by an administrator. (*In re Manchersha Damania*, 30 Bom. L. R. at pp. 1567-1570.)

Grant of Administration. When (a) the deceased has not appointed an executor in his will, or (b) the appointed executor is legally incapable, or refuses to act, or has predeceased the testator, or has died before proving the will, or (c) he dies after having proved the will, but before fully administering the testator's estate, the following persons may successively be granted *administration with the will annexed* as regards the whole or part of the estate, as the case may be :—

1. Universal or residuary legatee. 2. Representative of a deceased residuary legatee having beneficial interest, surviving the testator, but dying before the estate has been fully administered. 3. Persons entitled to administration on intestacy. 4. Any other legatee having a beneficial interest. 5. A creditor.

[*Ss. 232–234.*]

Letters of administration with the will annexed shall not be granted to any legatee other than a residuary legatee, until a citation has been issued and published calling upon the next-of-kin to accept or refuse administration. (*S. 235.*)

Limited Grants.

A.—Grants limited in Duration.

Probate may be granted, limited until the will or an authenticated copy of it be produced,—1. *Of a copy or draft* of a will (a) lost, or (b) mislaid since the testator's death, or (c) destroyed by wrong or accident and not by testator's act, and 2. *Of the transmitted copy* to the executor of a will in existence, but in possession of a person residing out of the province, the interest of the estate necessitating the probate without waiting for arrival of the original, as also 3. *Of the contents* of a will (a) lost, or (b) destroyed and of which no copy exists, nor the draft preserved, if the contents can be proved by evidence. 4. **Letters of administration may be granted,** limited as above, of a will not forthcoming, but believed to be in existence. *(Ss. 237–240.)*

B.—Grants for Use and Benefit of Others having Right.

I. Administration during Absence.

1. Letters of administration with the will annexed, may be granted to the agent or attorney (a) of an executor absent from the province, for the use and benefit of his principal, and (b) of a person absent from the province, who if present would be entitled to administration; and

Letters of administration may be granted to the attorney of a person absent from the province, entitled to administration in case of intestacy, limited until the executor or the person, as the case be, shall obtain probate or letters. (*Ss. 241-243.*)

II. Administration during Minority, and

III. For Use and Benefit of Minor or Lunatic—

See Ss. 244 to 246 at pp. 205, 206 *supra.*

IV. Administration Pending Suit.

An administrator pending a suit, touching validity of the deceased's will, or for obtaining or revoking any probate or any grant of administration, may be appointed by the Court with all rights and powers of a general administrator, other than the right of distributing the estate. He shall be subject to immediate control of the Court and shall act under its authority. (*S. 247.*)

An administrator appointed under this section, simply administers the estate during litigation.

C.—Grants for Special Purposes.

If an executor is appointed for any limited purpose, the probate shall be limited to that purpose. (*S. 248.*)

If an executor appointed for any limited purpose appoints an attorney or agent to take administration on his behalf, or if an executor appointed generally authorizes an attorney or agent to prove a will on his behalf limited to a particular purpose, letters of administration with the will annexed shall be limited accordingly. (*Ss. 248, 249.*)

Where a sole surviving trustee dies leaving no general representative, or one unable or unwilling to act, letters of administration limited to the trust property may be granted to the beneficiary or some other person on his behalf. (*S. 250.*)

When the deceased's representative is a necessary party to a pending suit. and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such a suit limited for the purpose of representing the deceased in the suit, until a final decree be made therein and carried into complete execution. (*S. 251.*)

An application under this section can be granted only by the Judge within whose jurisdiction the deceased had property at the time of his death, or a fixed place of abode or any property under section 270 *infra* of this Act. (*Furdunji v. Navazbai*, 17 Bom. 689.)

If at the expiration of twelve months from the date of probate or letters, the executor or administrator is absent from the province, letters of administration may be granted to any person the Court thinks fit, limited to the purpose of becoming and being a party to a suit to be brought against the executor or administrator, and carrying the decree which may be made therein into effect. (*S. 252.*)

Whenever necessary letters of administration may be granted to any person the Court thinks fit, limited to the collection and preservation of the deceased's estate and giving discharges for debts due to his estate, subject to the Court's directions. (*S. 253.*)

When a person has died intestate, or leaving a will, of which there is no executor willing and competent to act, or is residing out of the province at the time of such person's death, and the Court finds it necessary or convenient, it may, having regard to (a) consanguinity, (b) the amount of interest, (c) safety of the estate, and (d) probability that it will be properly administered, appoint some person other than the person, who under ordinary circumstances would be entitled to a grant of administration, and the administration in every such case may be limited or not as the Court thinks fit. (*S. 254.*)

D.—Grants with Exception and of Rest.

Whenever the nature of the case requires that an exception be made, probate or letters of administration with or without the will annexed shall be granted subject to such exception—*Hormusji v.*

Dhunjisha, 12 Bom. L. R. 569 ; and then the person entitled to probate or administration of the reminder of the deceased's estate may take a grant of probate or letters of administration, as the case be, of the rest of the estate. (*S. 257.*)

E.—Grants of Effects Unadministered— (Ss. 258, 259.)

When a limited grant has expired, and there is still some part of the deceased's estate unadministered, supplemental grants are made by granting letters of administration to those to whom original grants might have been made. *(S. 260.)*

Alteration and Revocation of Grants.

Errors rectified by Court. Errors in names and descriptions, or setting forth time and place of deceased's death, or the purpose in a limited grant, may be rectified by the Court, and probate or letters of administration may be altered and amended accordingly. (*S. 261.*)

Also if a codicil be discovered after grant of administration with will annexed, it may be added to the grant on due proof and identification, and the grant altered and amended accordingly. (*S. 262.*)

The Grant of probate or letters of administration may be revoked or annulled for just cause.—Just cause exists where— (a) the proceedings to obtain the grant were defective in substance ; or (b) the grant was obtained fraudulently by making a false suggestion, or by concealing something material to the case; or (c) the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant, though made in ignorance or inadvertently ; or (d) the grant has become useless and inoperative through circumstances ; or (e) the grantee has wilfully and without reasonable cause omitted to exhibit an inventory or account (as required), or has exhibited the same untrue in a material respect. *(S. 263.)*

Granting and Revoking Probate and Letters of Administration.

The District Judge in all cases, and the District Delegate in non-contentious cases may grant and revoke probate and letters within their respective districts. (*Ss. 264, 265.*)

The High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers conferred by the act upon him. (*S. 300.*)

Sections 270 and 271 state when probate or letters of administration may be granted by the *District Judge*; and sections 272, and 286 to 288 state when probate and letters of administration may be granted or refused by the *District Delegate.*

"*Caveat*" is a warning in the Probate Court to stop probate and administration being granted without knowledge of the caveator. It is filed by persons who want to oppose a grant of probate or letters of administration.

A person to be entitled to put in a caveat must have an interest in the deceased's estate; there should be no dispute whatever to the deceased's title to the estate. (*Pirojsha v. Pestonji*, 12 Bom. L. R. 366.)

In *Fardunji v. Navazbai*, 17 Bom. 689 letters of administration were not granted to a Parsi because the deceased had neither a fixed place of abode nor any property within the District Judge's jurisdiction.

The word "contentious" means the appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding. (*Explanation S. 286.*)

The petition for probate or letters shall be conclusive for the purpose of authorizing the grant. (*S. 275.*)

Sections 276 and 278 state the particulars required in the petition for probate and for letters of administration respectively.

Where the will, its copy or draft is not in English or not in the Court language, a translation thereof is to be annexed to the petition. (*S 277.*)

The requirements of petition for probate or letters of administration are given in sections 280, 281 and 282.

Administrators are required to furnish *administration-bonds.* (*S. 291.*)

No probate shall be granted until *after expiration of seven clear days*, and *no letters of administration* until *after expiration of fourteen clear days*, from the death of the testator or intestate, as the case be. (*S. 293.*)

Probate or letters of administration revoked or altered must be delivered by their respective grantees; otherwise the defaulting grantees are liable to punishment. (*S. 296.*)

All payments *bona fide* made to any executor or administrator before revocation of any probate or letters of administration shall, notwithstanding revocation, be legal discharge to the person making same. (*S 297.*)

The High Court, on application, may suspend, remove or discharge any executor or administrator and provide for successor in his place. It may give grantee of probate or letters any general or special directions in regard to the estate or its administration. (*Ss. 301, 302.*)

Executor or Administrator.

His Powers.

An executor or administrator can (a) sue in respect of all causes of action that survive the deceased, and (b) exercise same power for recovery of debts as the deceased had when living. (*S. 305.*)

All demands and all rights of action of or against the deceased at his death survive to and against his executor or administrator, except—(a) causes of action for defamation, assault, or other personal injuries not causing the death of the party; and (b) cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory. (*S. 306.*)

Personal rights of action die with the person.

Section 306 refers, and is confined to, civil actions only.

An executor or administrator may dispose of wholly or in part movable or immovable property of the deceased in any manner he likes. (*S. 307.*)

He may incur expenditure—(a) on such acts as be necessary for proper care or management of any property of the estate administered by him, and (b) with High Court's sanction, on such religious, charitable and other objects, and on improvements reasonable and proper in the case of such property. (*S. 308.*)

In the absence of any direction to the contrary, powers of several executors or administrators are exercisable by any one of them who has proved the will or taken out administration. (*S. 311.*)

The powers of an administrator of effects unadministered and during minority are the same, as those of original executor or administrator. (*Ss. 313, 314.*)

The powers of a married executrix or administratrix are the same as those of ordinary executor or administrator. (*S. 315.*)

An executor or administrator cannot receive or retain any commission or agency charges at a rate higher than that fixed in respect of the Administrator General by or under Administrator General's Act, 1913. And if he purchases directly or indirectly any part of the deceased's property, the sale is voidable at the instance of any other person interested in the property sold. (*Ss. 309, 310.*)

His Duties.

On application for probate or letters of administration with or without the will annexed, an executor or administrator must state the amount of assets likely to come to his hands. [*Ss. 276(d), 278(d).*]

The executor must perform the necessary funeral ceremonies of the deceased in a suitable manner, if there be property sufficient for the purpose. (*S. 316.*)

An executor or administrator must exhibit within six months from the grant of probate or administration, an inventory, and within a year from the grant, an account, of the estate. (*Ss. 176, 193.*)

In *Jehangir v. Kukibai,* 27 Bom. 281, it was held that where some only of several executors have proved the will, those who have not proved may call upon those who have proved to exhibit an inventory and account of the property of the deceased, since they have sufficient interest to do so.

The executor or administrator must collect with reasonable diligence the property of, and debts due to, the deceased at his death. (*S. 319.*)

The executor or administrator must observe the following order of priority provided in sections 320 to 323, while distributing the estate of the deceased:— (a) Reasonable funeral expenses of the deceased, according to his degree and quality, and death-bed charges including fees for medical attendance, and board and lodging for a month previous to his death, shall be paid first of all: (b) Expenses of obtaining probate or letters of administration, including the costs for or in respect of any judicial proceedings necessary for administering the estate, shall be paid next after the expenses stated in clause (a): (c) Wages of labourers, artizans or domestic servants for services rendered to the deceased within three months next preceding his death are to be paid after the expenses stated in clause (b): and lastly (d) other debts of the deceased according to their respective priorities (if any). Save as aforesaid no creditor shall have a right of priority over another; but the executor or administrator shall pay all such debts as he knows of, including his own equally and rateably as far as the assets of the deceased will extend.

Section 325 provides that debts of every description must be paid before any legacy. Thus after all the payments under sections 320 to 323, the legacies are to be paid— 1st Specific legacy, 2nd Demonstrative legacy, and 3rd General legacy.

If the deceased's estate is subject to any contingent liabilities, an executor or administrator is not bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due. (*S. 326.*)

Before distributing the assets the executor or administrator has to give notice requiring creditors and claimants of the deceased to send in their claims within the time stated in the notice.

His Liabilities.

When an executor or administrator (a) misapplies the estate of deceased, or subjects it to loss or damage, or (b) occasions a loss to the estate by neglecting to get in any part of his property, he is liable to make good the loss or damage so occasioned or the amount, as the case may be. (*Ss. 368, 369.*)—*Powell v. Evans*, 5 Ves. 843 ; *Seaman v. Dee*, 1 Vent. 198.

Devastation, or *Devastavit* is a kind of mismanagement of the estate and effects of the deceased in squandering and misapplying the same contrary to the duty imposed on executors or administrators, for which they shall answer out of their own pockets as far as they had or might have had assets of the deceased. (Wills on Exors.)

The executors are liable under sections 368 and 369 for negligence in the discharge of their duties, if it results in loss to the estate, even if they be not guilty of fraud, or collusion or corruption. (*Dhunjisha v. Sorabji*, P. J. for 1896 at p. 512 ; *Khusrubhai v. Hormuzsha*, 17 Bom. 637 ; *Ardeshir v. Maneksha*, 12 Bom. L. R. 53.)

Executor de son tort, or Executor of his own Wrong.

When a person improperly intermeddles with the estate of the deceased, while there is no rightful executor or administrator in existence, he is answerable to the rightful executor or administrator, or to any creditor or legatee of the deceased to the extent of the assets which may have come to his hands, after deducting payments made to the rightful executor or administrator and payments made in due course of administration.

The person who intermeddles improperty as above-said is called an "Executor of his own wrong"—executor *de son tort*. (*Ss. 303, 304.*)—*Navazbai v. Pestonji*, 21 Bom. at p. 404.

(1) Intermeddling with the deceased's goods for the purpose of preserving them or providing for his funeral, or for the immediate necessity of his family, or (2) dealing in the ordinary course of business of the deceased's goods received from another, does not make an executor *de son tort*. (*Exception S. 303.*)

Assent to Legacy by Executor or Administrator.

The assent of the executor or administrator is necessary to complete a legatee's title to his legacy. (*S. 332.*)

For the protection of the executor, the law imposes the necessity that every legatee—general or specific, of chattels real or personal, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect.

His assent may be either (1) verbal, or (2) express, or (3) implied from his conduct, or (4) it may be conditional (the condition must be enforceable, and there is no assent if it is not performed). (*Ss. 333, 334.*)

When the executor or administrator himself is a legatee, his assent to his own legacy is necessary to complete his title to it: his assent may be expressed or implied. It may be implied if in his manner of administering the property he does any such act referable to his character of legatee and not referable to his character of executor or administrator. (*S. 335.*)

Though his assent gives effect to the legacy from the testator's death, yet he is not bound to pay or deliver any legacy until the expiration of one year from the testator's death. (*Ss. 336, 337.*)

INDEX.

The references whole throughout are to pages.

Abatement—
Legacies treated as general for purpose of, 181
of legacies, 198

Ambiguity—
Evidence admissible in latent, 166
„ inadmissible in patent, 166

Acceptance—of executorship, 207-209

Accessory—Meaning of, 69

Account to be filed by executor or administrator, 215

Accumulation—Rule against, 187

Acknowledgment—
after altestation not sufficient, 155
is of testator's signature or mark, 155
of his own signature or mark by testator, 154, 155

Act—
9 of 1837 (Parsi Chattels Real), 2, 125, 136, 131
15 of 1865 (Parsi Mar. & Div.), 13-113
21 of 1865 (Parsi Int. Suc.), 127, 130, 131, 133, 138, 140-142, 145, 146
4 of 1864 (Ind. Div.), 48, 73, 74, 79, 82, 94
3 of 1872 (Mar. W.'s Ppty.), 120
14 of 1874 (Sch. Dist.), 13
15 of 1874 (Laws Loc. Ext.), 13
9 of 1875 (Ind. Maj.), 23, 47, 151
39 of 1925 (Ind. Suc.), 114-218

Ademption of legacies—195-197

Administration—
Citation before grant of, to legatee other than universal or residuary, 209
Letters of, Effect of, 206
„ Revocation of, 212
„ Time of grant of, 214
„ to whom granted, 204, 205, 209
„ to whom not granted, 205
„ when granted, 209
Limited grants of, 209-212

Administration-bond — 214

Administrator—
Duties of, 215-217
Liabilities of, 277
Meaning of, 203
Powers of, 214, 215
Representative title of, 202

Admission of adultery not to be accepted, 16, 47

Adoption among Parsis, 127, 134

Adultery—
Bigamy with, 50, 55
Court can refuse divorce to wife guilty of, 70
Evidence and presumption of, 46
Mere admission of, not to be accepted, 46, 47
of husband, 45
of wife, 45
Person with whom, committed to be made co-defendant, 56
Wife guilty of, cannot maintain suit for restitution, 86
with cruelty, 50
with wilful desertion for 2 years, 52-54

Advancement—English Rule of, not applicable to Parsis, 122

Age—
of majority for purposes of Parsi marriage is completion of 21 years, 19, 23
of majority for succession is completion of 18 years, 151
Old, no incapacity for making will, 152

Agreement to live separate bars suit for restitution of conjugal rights, 86, 87

Alimony—
Circumstances to be considered in fixing, pending suit, 72
Payment of, to wife or to her trustee, 82
pending suit, 71-77
Permanent, 78-82
Points to be considered in fixing permanent, 81, 82
Words "during suit" include period upto making of final or absolute decree, 73

Alterations in will—160, 161

Ambassador. (See Domicile)

Ambiguity—Latent and patent, 166

Annuities—
Abatement of, 181
Interest on, 182
Payment and apportionment of, 181, 182

Appeal to High Court from decision of Chief or District Mat. Court, 97

Appointment—
of delegates, 37, 38
Power of, 107

Asirwad—19, 21-23

Assent—
of executor or administrator necessary to complete legatee's title, 218
of executor or administrator to his own legacy, 218

Attestation of will-157

Attesting witness—
Any one can be, 157
Bequest to, 157
Mark of, not sufficient, 154

Baj, Rojgar. (See Trusts.)

Bequest—
Ademption of (See Ademption.)
Alternative 167, 168
Charitable 188
Conditional 183-185
Contingent 183
In perpetuity, 186
Lapse of, (See Lapse.)
Limited, (See Limited grants.)
of annuity. (See Annuities.)
Onerous, (See Onerous bequest.)
Original, not affected by invalidity of second bequest, 184
Payment of liabilities in respect of subject of, 177, 178
Residuary 172
Retention in form of specific, to several persons in succession, 177.
Rules of construction when two, to same person, 169
to class. (See Class.)
to creditors and portioners, 123
to executor, 180

Bequest-(*Contd.*)
to heirs, etc., 168
to representatives, ect., 168
to unborn persons, 168
Void (See Void bequests.)
with directions as to application or enjoyment, 179, 180
without words of limitation, 95

Betrothal—(*Manguee.*) 11, 12, 91, 92

Bigamy—
with adultery, 50
,, ,, or adultery with desertion for 2 years, 55, 56

Blind can make wills, 152

Bond from administrator, 214

Breach of promise to marry—Suit for damages for, 91, 92

Bridal presents—Law as to, 105-108

Brother—
Right of, by same mother, 147
,, , of intestate, 143, 146
,, full and half-blood, 143, 146
,, widow of, 148

Burning of will—159

Caveat—Meaning of, 213

Certificate—
of Parsi marriage, 30
punishment for making false, 33
,, ,, not registering, 33

Charitable bequests—
when valid, 188
void for uncertainty, 192

Chief Justice—Meaning of, 19

Child—Division of share of predeceased, 139

Children—
Advancement of, 122
Consent of father or guardian when, under 21 years, 22, 23
Custody of, pending suit, 99-101
Orders as to custody of, after final decree, 99
Rights of, of predeceased brother, 143
,, , of predeceased sister, 143

Children—(*Contd.*)
Share of posthmous, 135
" , when intestate's widow alive, 132
" , when intestate's widower alive, 137
" , when no widow, 136
" , when no widower, 138

Citation—208

Civil Procedure Code applied, 94–96

Codicil—
Discovery of, after grant, 212
Meaning of, 150
Revival of, 162

Class—
Bequest to, 170, 171
Survival in case of bequest to described, 170

Collusion—67, 68

Common Law—
applicable to Parsis, 57, 58
Result of, applied to Parsis, 58, 59
Wife's right as to her property under, 118, 119

Community—
Customs of Parsi, 14
Parsi, consists of whom, 14

Conclusiveness of letters and probate, 207

Conditional bequests—183–185

Conditions—precedent and subsequent, 183, 184

Condonation—
distinct from connivance, 68
Husband's and wife's adultery in respect of, 65, 66
Revival of, 66, 67
What is, 65

Conjugal rights. (See Restitution.)

Connivance distinct from condonation, 68

Consent of father or guardian when children under 21 years, 22, 23

Construction of wills—
Extrinsic evidence allowed in latent, but not in patent ambiguity, 166

Construction of wills—(*Contd.*)
Inquiries to determine questions as to objects or subjects of wills, 165
Interpretation of words repeated in different parts of will, 165
Last of two inconsistent clauses prevails, 164
Meaning of general and restricted words, 166
Misdescription of object, or subject, 165, 166
No part of will to be rejected, if it can be reasonably construed, 164
Power of appointment, 167
Testator's intention to be ascertained from wording of will, 163
Testator's intention to be effectuated as far as possible, 164
Testator's intention to be gathered from entire instrument, 164
When words may be supplied by context, 166

Consul. (See Domicile.)

Contingent bequest.—183

Conversion of Juddins—25, 26

Costs—
Court may order adulterer to pay, 59
Husband liable for wife's, in divorce suit, 57, 59
Practice as to, in matrimonial suits, 59
Rule as to wife's, not affected by S. 4 of Suc. Act (1865), 120
Word "only" in table of fees not exhaustive, 76, 77

Court—
Appeal to High, 97
Chief Matrimonial, 35
Constitution of Special, 34
District Matrimonial, 36
in which suits to be brought, 39
Meaning of, 19

Creditor—
Debt due to, to be paid equally and rateably, 216
entitled to debt as well as to legacy, 123
Grant of administration to, 209

Cruelty—
Meaning of, 50, 51

Custody of children—99-101

Customs of community, not Parsi but purely Hindu customs, 14

Daughter—
Share of grand father's, 143
„ great grand father's, 143
„ step, 134
„ , when son alive but no widow, 136
„ , when son alive but no widower, 138
„ , when widow and son of intestate alive, 132,133
„ , when widower and son of intestate alive, 137

Deaf and dumb can make will, 153

Death-bed charges—216
„ gifts—202

Debts—Payment of, of deceased before legacies, 216

Decree—
for dissolution in case of absence, 9, 44, 45
„ divorce, 9, 45-63
„ judicial separation, 9, 63-70
„ nullity of marriage, 9, 40-44
„ restitution of conjugal rights, 9, 83-90
Order as to custody of children after final, 99

Delay—
Effect of, in bringing nullity-suit, 43, 44
„ , in seeking relief to sue for divorce or judicial separation, 69, 70
What is reasonable, 69

Delegates—
Absence of, during trial, 94
Appointment of, 37, 38
Majority of, to determine questions of fact, 96, 97
Selection of, 38
to be deemed public servants, 38

Demonstrative legacy—
Abatement of, 198
Definition of, 178

Dependent Relative Revocation—161

Desertion—
Adultery with wilful, for 2 years, 52
Commencement and completion of, 54, 55
constitutes no bar to wife's suit for judicial separation, 70
must be wilful, 52, 54
What is, 52

Destroying of will—159

Devastation. (*devastavit*)—217

Dhurm-putr—134

Dissolution of marriage—
Decree for, cannot be made only on admissions, 64
in case of absence, 44

Distress—
Imprisonment if no sufficient, 103
Levy of fines by, 102
Procedure until return of, 102

Divorce—
among Parsis, 45
Decree for, (See Decree.)
distinguished from judicial separation, 9, 62, 63
Grounds for, (See Grounds.)
Remarriage after, lawful, 27, 28, 98
Suits for, by husband, 47-49
„ , by wife, 49, 50

Domicile—
Acquisition of new, 116
by operation of law
acquired by woman on marriage, 117
of lunatic, 118
of minor, 117
of wife during marriage, 117
Meaning of, 114
not acquired by residence, etc., 116
of choice, continuance of, 116
of origin, of illegitimate child, 116
„ of legitimate child, 116
Special mode of acquiring, in Bri. India, 116, 717

Donatio Mortis Causa—202

Election—
Postponement of, in case of disability, 202
What constitutes, 201
When takes place, 200

Evidence—
and presumption of adultery, 46
Extrinsic, admissible in latent ambiguity but not in patent, 166
mere, of adultery by either party not to be accepted, 46, 47

Execution—
of privileged will, 158
of unprivileged will, 153-155

Executor—
Assent of, to his own legacy, 218
„ , necessary to complete legatee's title, 218
Bequest to, 180
Duties of, 215-217
Liabilities of, 217
Meaning of, 292
Powers of, 214, 215

Executorship—Renunciation of, 208

Father—Right of intestate's, 141, 142

Fornication—50

Funeral expenses to be paid before all debts, 216

General legacy—
Interest on, when no time fixed for its payment, 175
Investment of, to be paid at future time, 175
Definition of, 175

Grand-father—
Right of, 143
„ maternal, 147
„ paternal, 147

Grand-mother—
Right of, 143
„ maternal, 147
„ paternal, 147

Granting and Revoking Probate and Letters, 213, 214

Grants—
Alteration and Revocation of, 212
Limited, (See Limited grants.)

Great-grand-father—
Right of, 143
„ his sons and daughters, 143

Great-grand-mother—Right of, 143

Grounds—
Lawful, justifying refusal to cohabit, 85-87
Meaning of other legal, in S. 32 of act 15 of 1865, 70
of divorce, 45-63
of divorce or judicial separation, 70
of judicial separation, 60-63

Guardian—testamentary, 153

High Court—
Appeal to, (See Appeal.)
Meaning of, 19
Punishment of offences under Act 15 of 1865 commited within local limits of, 102
Rules of procedure of Parsi Matri. Courts to be made by, 103

Husband—
Adultery of, 45
Effect of marriage between, and wife before and after Suc. Act, 1865, 119
Meaning of Parsi, 18
When can, obtain divorce, 45

Idiocy—152

Impotency—42

In camera—93, 94

Infant marriages—10, 11, 90, 92, 93

Illegitimate children—Domicile of, 116

Incorporation in Wills—157

Insane persons can make wills during same intervals, 152

Interlineations in will—160, 161

Intestate—
Meaning of, 122
Special Rules for Parsi, 124
Division among widow and children of, 132
„ widower and children of, 137
„ among children when no widow, 136
„ among children when no widower, 138
„ among widow or widower, when no lineal descendants, 141

Intestate—(*Contd.*)
Division when neither widow or widower, nor lineal descendants, 143
Division of predeceased child's share of property of, among widow or widower and issue of such child, 169

Inventory. (See Account.)

Juddins—Conversion of, 25, 26

Judicial separation—
Grounds of, (See Grounds.)
Suits for, (See Suits.)

Jurisdiction—
Aden and its dependencies to be included within, of Parsi Ch. Matri. Court of Bombay, 37
Local limits of, of Parsi Dist. Matri. Courts of Surat, Poona and Sind, 36
Suit to be brought in Court within whose, defendant resides at time of its institution, 39

Just—Meaning of, 85

Just cause for revocation of probate and letters, 212

Lapse—Doctrine of, 173–177

Latent ambiguity—166

Law—
as to bridal presents, 105–107
English, of marriage applied to Parsis till 1865, 2–5, 118
English Common, applies to Parsis, 18

Lawful—Meaning of word, 85

Legacy—
Abatement of, (See Abatement.)
Ademption of, (See Ademption.)
Creditor primafacie entitled to, as well as to debt, 123
Demonstrative, 178
General, (See General legacy.)
Lapse of, (See Lapse.)
Order of payment of, 178, 179
Refunding of, (See Refunding.)
Specific, 176
Vesting of, when contingent upon specified uncertain event, 194
Vesting of, when payment or possession postponed, 193

Legatee—
Assent of executor necessary to complete title of, 218
does not lose legacy by attesting a codicil, 157
Non-ademption of legacy by subsequent provision for, 197

Legatees—Description of, 168

Lex Domicilie—
governs movables of deceased, 115
governs rights and obligations of parties for dissolution of marriage, 49

Lex loci rei sitæ governs immovables of deceased in Bri. Ind., 114

Lien. (See Solicitor's lien.)

Limited grants—
during absence, 210
for special purpose, 210, 211
" use and benefit of others having rights, 210
in duration, 209
of administration, 209–212
" effects unadministered, 212
" the rest, 212
pending suit, 210
to collection and preservation of deceased's property, 211
to purpose of becoming party to suit, 211

Local Government—19

Lunacy—152

Lunatic—
Domicile of, (See Domicile.)
Probate or letters cannot be granted to, 205

Majority—Age of, under Parsi Mar. & Div. Act, 23, 27

Mangnee. (See Betrothal.)

Mark—
of testator, 153, 154
of witness not sufficient, 154
of some other person than testator not sufficient, 154

Marriage—
a solemn contract, 6
as understood by Christendom, 6
between Parsis, 6
Certificate of Parsi, 29
Dessolution of, by absence, 41

Marriage—(*Contd.*)
Effect of, before and after Suc. Act, 1865 on property of Parsi females, 119
Effect of, between domiciled and one not domiciled in British India on each other's property, 121
Interests and powers neither acquired nor lost by, 119
Meaning of, 18
Nullity of, 40–44
Parsi, if contracted in life time of his or her wife or husband, unlawful, 27
Proof of, 41, 46
Registers of Parsi, 19–22
Registrars of Parsi, 31
Settlement of minor's property in contemplation of, 121

Matrimonial Courts—
Chief, 35
District, 36
Practitioners in, 38

Matrimonial suits—40–101

Minor—
Meaning of, 151
Domicile of, 117
cannot make will, 150
Probate and letters cannot be granted to, 205
Appointment of legal guardian of, by his father, 151
Settlement of property of, in contemplation of marriage, 121

Minority—Meaning of, 151

Mortmain gifts—188–192

Mother—Right of Parsi intestate's, 146

Movable property—
Succession to, of deceased in Bri. Ind., 115
Application of, to payment of debts where domicile not in Bri. Ind., 115

Nullity of Marriage—40-44

Obliteration in wills—160, 161

Offences—102

Onerous Bequest—182, 183

Order—
Aden and its dependencies to be included within jurisdiction of Bombay Parsi Chief Matri. Court, 37
constituting Parsi Chief Matri. Court in Bombay, 35
constituting Parsi Dist. Matri. Court in Surat, Poona and Sind, 36

Paluk putr—134

Parsi Community—14

Parsi Mar. & Div. Act—
applicable to whole of Bri. Ind., except schedule districts, 13
basedon Eng. law of Div., 7
Preamble, 13
I. *Preliminary*, 15–19

II. Marriages between Parsis, 19–34
S. 3. Requisites of marriage, 19
S. 4. Remarriage when lawful, 27
S. 5. Punishment for bigamy, 28
S. 6. Certificate of Marriage, 29
S. 7. Appointment of Registrar, 31
S. 8. Marriage-register, 31
S. 8A. Transmission of certified copy of marriage register, 32
Ss. 9–14 treat about penalties, 33

III. Matrimonial Courts, 34-40
S. 15. Constitution of, 34
S. 16. Chief, 35
S. 17. District, 36
S. 18. Power to alter territorial jurisdiction of District, 36
S. 19. Certain districts within jurisdiction of Chief, 37
S. 20. Court-seal, 37
S. 21. Appointment of delegates, 37
S. 22. Power to appoint new delegates, 38
S. 23. Delegates public servants, 38
S. 24. Selection of delegates, 38
S. 25. Practitioners in, 38
S. 26. Court in which suit to be brought, 39

IV. Matrimonial Suits, 40-98
S. 27. in case of lunacy, 40
S. 28. in case of impotency, 42
S. 29. in case of absence for 7 years, 44

S. 30. on ground of wife's or husband's adultery, 45
S. 31. Grounds of judicial separation, 60
S. 32. for divorce or judicial separation, 63
S. 33. Alimony pending suit, 71
S. 34. Permanent alimony, 78
S. 34. Payment of alimony to wife or to her trustees, 82
S. 36. for restitution of conjugal rights, 83
S. 37. Infant marriages, 90
S. 38. with closed doors, 93
S. 39. Absence of delegates during trial, 94
S. 40. C. P. Code applied, 94
S. 41. Determination of questions of law and procedure, and fact, 96
S. 42. Appeal to High Court, 97
S. 43. Liberty to parties to remarry, 98

V. Children of Parties, 99-101
S. 44. Custody of children pending suit and after final decree, 99
S. 45. Settlement of wife's property for children's benefit, 101

VI. Mode of enforcing penalties Ss. 46-50, 102, 103

VII. Miscellaneous, 103, 104

Muktad. (See Trusts.)

Parsis—
Rule of advancement not applicable to
Suc. among, prior to 1865, 131, 132

Patent ambiguity—166

Pendente lite—(See Alimony.)

Permanent Alimony — (See Alimony.)

Perpetuity—Rule against, 186

Persons—
Blind, deaf, and dumb can make wills, 151, 152
Insane, can make wills during sane intervals, 152
of sound mind and not minors can make wills, 150

Power of appointment -107

Priest—Meaning of, 2, 8

Probate—
Conclusiveness of, 207
Effect of, when granted, 206
granted only to appointed executor, 205
Meaning of, 205
Revocation of, 212
Separate probate of codicil discovered after grant of, 206
Time for grant of, 214
To whom, not granted, 205

Prohibited relations—20, 21

Questions—
of fact decided by delegates, 96
of law and procedure determined by presiding Judge, 96

Refunding of legacies—198-200

Registrars of Parsi Mar.—31

Registry of Parsi Mar.—29

Renunciation of executorship—207

Residuary legatee—171,172

Residue—171

Restitution of conjugal rights —83, 86-90

Revival of Wills—162

Revocation—
of grants of probate and letters, 212
„ wills, 158-160

Rules and Forms of Bom. High Court—108, 109

Schedule—
Form of Parsi Mar. Certificate, 30
Part I. Sch. II, 143
II. „ II. 146

Settlement—
of Aden to be included within Jurisdiction of Chief Matri. Court of Bombay, 37
„ wife's property for children's benefit, 101
„ wife's property in contempla. of marriage, 121

Sister—
by same mother, 147
Right of full-blood, 143
intestate's, 143, 146

Solicitor's lien—59

Son—
Adopted, 134
Right of, of grand father, 143
„ , of great grand father, 143
„ widow of, 148
Share of, when daughter alive but no widow, 136
„ , when daughter alive but no widower, 137
„ , when widow and daughter of intestate alive, 132
„ , when widower and daughter of intestate alive, 137

Specific legacy—
Definition of, 176
Bequest which are not, 176, 177
not to abate with general legacies, 177

Step-child—134

Succession—
One domicile only to affect, to movables, 115
to immovables according to law of Bri. Ind., 114
to movables according to law of domicile, 115
to movables in absence of proof of domicile elsewhere, 115

Succession Act—Summary of, 114-218

Suits—
by husbands, 47-49
by wife, 49
for dessolution in case of absence, 44
„ divorce, 45
„ judicial separation, 60
„ nullity of marriage, 40-44
„ restitution, 83
with closed doors, 93

Table—
of fees, 113
„ prohibited relations, 20, 21

Tearing of will—159

Testamentary guardian—151

Trial—
Absence of delegates during, 94
with closed doors, 93

Trusts—for performance of Baj, Rojgar, Muktad, etc., ceremonies valid, 189-192

Unprivileged wills—153-155

Vesting of legacies—193-195

Void bequests—
Directions to accumulate, 187
for uncertainly, 185
Rule against perpetuty, 185, 187
to religious or charitable uses, unless conditions of 118th section complied with, 188-192
to unborn persons, 185, 186
upon illegal, immoral or impossible, condition, 193

Widow—
Right of brother's, 148
„ son's, 148
Share of, when children, 132
„ , when no lineal descendants, 142

Widower—
Meaning of, 137
Share of, when children, 137
„ , when no lineal descendants, 142
„ , of intestate's deceased daughter, 147

Wife—
Adultery of, 45
Divorce suit by, 49
guilty of adultery cannot sue for restitution, 86
Husband and, not colluding together, 67, 68
Meaning of, 18
When can, obtain divorce, 45, 46
„ , „ judicial separation, 63

Will—Constraction of, 162-170
Effect of alteration, interlineation or obliteration in, 160
Execution of privileged, 158
„ unprivileged, 153
Form of, 155
Language of, 155
Meaning of, 158
Requisites of, 150
Revival of, 262
Revocation of, 158-160
void for uncertainty, 185
„ if obtained by fraud, etc., 152

Witness—
Attesting, 154, 157
Effect of gift to attesting, 157
to Parsi Marriage, 19, 22

Zoroastrian—Meaning of, 15-17