M.R.O. 1—30,000—16-10-29.

MADRAS RECORD OFFICE.

Government of Madras.

Judicial **DEPARTMENT.**

G.O. No. 1212 Press Mis—

63-73

Dated 6 — 8 — 19 1866

25/26

Not to be folded or roughly handled

Government {1866} of Madras.

JUDICIAL.

Recd.	} 1866.	*Enclosures*
Regd.		*Spare copies*

Letter No. 1212, 6th August 1866.

AUGUST.

Nos. 63—73

Succession Act.

Communicating to the Government of India the opinion of this Government on the extension to Hindus, Muhammadans and Budhists of such parts of the Indian Succession Act, 1865, as relate to testamentary succession

GOVERNMENT OF MADRAS.

JUDICIAL DEPARTMENT.

Read—the following papers:—

No. 63. From the Honourable Sir A. BITTLESTON, *Kt.*, Puisne Justice of the Hight Court of Judicature, Madras, to His Excellency the Honourable the Governor in Council, Fort Saint George; dated Madras, 13th November 1865.

I have the honour to acknowledge the receipt of a letter from the Acting Secretary to Government, under dated 22nd September last, addressed to me by direction of your Excellency, and requesting my opinion as to the expediency of extending to Hindoos and Mahomedans such parts of the Indian Succession Act, 1865, as relate to testamentary succession.

2. Since the receipt of that letter, I have considered the several clauses of the Indian Succession Act relating to testamentary succession; and the result is that, in my opinion, those clauses, with the exceptions which I will presently point out, should be applied to Hindoos and Mahomedans, and probably also to the Burmese Buddhists.

3. As to Parts VIII, IX, and X of the Act (Sections 50 to 60), which relate to the execution, attestation, and revocation of Wills, there seems to me no reason why they should not be applied to the Wills of all Native Testators, as well as to the Wills of Europeans, East Indians, and others, to whom the Act now applies—and very many and strong reasons why they should; nor do I suppose that there will be, on the part of the Natives themselves, any objection to the application of these provisions to them (see the Bill IV of 1863, presented to the Legislative Council of Madras by the late Sadagopah Charloo).

4. With reference to the rules of construction given in Part XI of the Act, my opinion is that some of them may with advantage be applied to the Wills of Hindoos and Mahomedans; but some not. Of the former kind are Sections 61 to 79 both inclusive, Sections 82, 83, 85 and 88 to 93 both inclusive; of the latter kind are Sections 80, 81, 84, 86 and 87. Sections 80 and 81 provided for the cases of bequests to "heirs", "next of kin", "nearest relations", &c., or to the "representatives", &c., of a particular person, and direct that, if the class designated by those expressions forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person, and he had died intestate.

Now it seems to me that, though this may be a suitable provision for carrying out the intentions of the Testator in cases to which the English Statute of Distributions or the Rules of Succession *ab intestato* laid down by the Indian Succession Act would apply, it is not, at all events, equally suitable to the case of a Hindoo Testator, who, if he used such expressions in his Will as "family" or "kindred," or "nearest relations," would probably intend to include amongst the objects of his bounty others than those who, according to the Hindoo Law of Succession, would be his heirs. For example, if a Hindoo Testator bequeathed a sum of money to the "family of A. B," and the family of A. B. consisted of a son and a wife and daughters, the son would take the whole, according to the Hindoo Law of Inheritance, upon the death of A. B. intestate. Or take the case of a similar bequest to the family of one who was a member of an undivided family, consisting of brothers and nephews, as well as sons and daughters. How would this clause be applied? Would the bequest be treated as

self-acquisition of A. B., in which case the brothers and nephews would be excluded, or as part of the family property descending according to the Rule of Hindoo law in such a case?

In dealing with expressions of this kind in Native Wills, it seems to me dangerous to tie the Courts down by rules of construction which have been framed with reference to the English Law of Succession.

As to the Wills of Mahomedans, there would, I conceive, in one respect, be less objection to the application of these Sections, because by the Mahomedan Law of Inheritance separate and very definite provision is made in the distribution of a deceased person's estate for all those standing in any near degree of relationship to the deceased; but even as regards Mahomedans, it is open to grave doubt whether a Testator using such words as "legal representatives" or "personal representatives" would generally intend to include therein all persons entitled to succeed to his estate upon an intestacy, whether as sharers or residuaries; and, further, as the Mahomedan Testator cannot give legacies to his heirs, but must select the objects of his bounty amongst strangers, these Sections would either be wholly inapplicable, or would involve an extension of the testamentary power.

Again, by the 84th Section, a bequest to A and his children gives the whole interest to A; but under a bequest to A and his brothers, they take jointly. But a Hindoo Testator, to whom the idea of a father and his sons being in a state of natural coparcenary is familiar, would not think of any such distinction; and his intentions would probably be frustrated by the application of such a rule of construction.

So as to the 86th Section, I think it cannot safely be applied to Native Wills—so much of it, at all events, as strictly ties down the construction of terms of relationship, in the use of which Natives are generally vague and inaccurate to a perplexing extent; but the provisions at the end of the same Section as to the half-blood, and as to children *in ventre matris*, might probably be adopted without inconvenience.

The general rule laid down by Section 87, that words expressing relationship shall denote only legitimate relatives, is also, in my opinion, scarcely applicable to the Wills of Hindoos and Mahomedans, whose notions with reference to legitimacy and illegitimacy are so different from those entertained generally by Europeans.

5. Part XII concerning void bequests contains the rule against perpetuity (Section 101), the prohibition of directions to accumulate except in two cases (Section 104), and the provision against death-bed bequests to religious or charitable uses (Section 105). It is probable enough that some objection may be felt to these restraints upon the testamentary power, and especially to that imposed by Section 105, by many amongst both the Hindoos and Mahomedans. The latter may say that their own law sufficiently secures the interests of the near relations of a deceased by confining the testamentary power to one-third of his estate, and that death-bed endowments being clearly sanctioned by their law to that extent, violence will be done to their religious feelings by such an alteration as Section 105 would introduce. The Hindoos would have less substantial ground of objection; the testamentary power being foreign to their own law, and having been derived by them from English law, they cannot with much reason complain if the Legislature, on grounds of public policy, should see fit to subject the exercise of it to such restraints as the English Law imposes. The grounds of public policy are no doubt very strong in favor of these restrictions; and in the absence of any decided and very general feeling against it on the part of the classes to be affected, particularly the Mahomedans, I should recommend the extension of Chapter XII in its entirety both to Hindoos and Mahomedans.

6. Parts XIII to XXVII lay down general rules, which seem to me, for the most part, as applicable to Native as to European Wills, except that such clauses as 165 and 166 would rarely come into operation as regards Hindoos, and never as regards Mahomedans.

7. So much of Parts XXIX, XXX, and XXXI as strictly relate to Probate may, and should, I think, be extended to Hindoos and Mahomedans; but those sections which provide for the grant of Letters of Administration, with Will annexed, to the persons who would be entitled to Administration in case of intestacy (sections 195, 198, 230, 231) will require, as it seems to me, some modification or explanation, for the purpose of making it clear that the rules laid down in the 201st and following sections, as to the order in which the relations of a deceased are entitled to Administration in case of intestacy, are not intended to apply to the cases of Hindoos or Mahomedans. Where Probate cannot be granted to the Executor, or to a universal or residuary legatee, the Letters of Administration, with Will annexed, should be granted to the person or persons who, according to Hindoo or Mahomedan Law (as the case might be), would be entitled to succeed to the estate of the deceased, or, in the case of undivided Hindoo families, to the managing member of the family. Some provision to this effect should be added, in order to carry out properly the extension to Native Testators of the Sections of the Succession Act relating to Probate; and I think it very desirable, seeing that the Jurisdiction to grant Probate and Letters of Administration will be conferred upon every District Judge, to declare in what order the relations of a deceased Hindoo or Mahomedan are entitled to Administration. The practice existing in the Supreme and High Courts of granting Letters of Administration as to Native estates is not free from practical difficulty, arising from the difference between the English Law of Succession and that of the Hindoos and Mahomedans; but I believe that the general rule adopted is to let the grant of Administration follow the interest. This rule, however, cannot always be acted on without great inconvenience, as where the deceased was a member of an undivided Hindoo family, and left both sons and brothers—the sons being entitled in interest to the undivided share of the deceased, but one of the brothers being entitled to the management of the whole family estate as the senior member of the family. A few rules on this subject, framed in accordance with the Succession Law of Hindoos and Mahomedans, would greatly facilitate the proper working of the proposed law.

8. Parts XXXIII to XL, both inclusive, appear to me to contain rules very suitable for the guidance of Executors under the Wills of Hindoos and Mahomedans, and properly applicable to them. The only doubt which I feel is whether the distinction as to interest (sections 311 and 312) in cases where the Testator is a parent or more remote ancestor of the Legatee ought to be maintained in the distribution of Native estates. The reason of the English rule, founded upon the natural obligation of a parent to maintain his children, hardly applies in the case of Hindoo parents, the maintenance of whose children constitutes a charge upon their property, independently altogether of testamentary bounty.

9. As to the Stamps and fees imposed by section 329, there can be no reason why Hindoo and Mahomedan estates should not bear the same burden as other estates to which the Law of Testamentary Succession contained in Act X of 1865 is already applicable.

10. Having now pointed out the parts of the Indian Succession Act which seem to me to be properly applicable to the Hindoos and Mahomedans, and having mentioned briefly the reasons why I think other parts of the Act should not be extended to those classes of Her Majesty's Indian subjects, I have only to add that, in my opinion, it would be better to extend to them the operation of the whole of this Act (so far as regards testamentary succession) than to leave the law in its present state.

No. 64. From the Honourable W. HOLLOWAY, Judge of the High Court of Judicature, Madras, to His Excellency the Honorable the Governor in Council, Fort Saint George; dated Madras, 16th January 1866.

I have the honor to acknowledge the receipt of Mr. Secretary Hudleston's letter dated 21st September.

2. I have the honor to state that, in my opinion, the provisions of the Succession Act as to the execution of Wills should be extended to the Wills of Hindoos and Mahomedans. In the judgment of the High Court of Madras, to which Mr. Secretary Bayley refers, I have already expressed a strong opinion as to the mischief of permitting nuncupative Wills.

3. I also see no reason for not extending to the Wills of Hindoos all the admirable rules for the construction of Wills when made contained in the Succession Act.

4. The Mahomedan Law, as your Excellency is probably aware, contains a very elaborate system of testamentary construction. I have carefully considered these rules—a subject of considerable controversy among the Mahomedan Doctors. The prevailing principle, however, is the same as that of the rules in the Succession Act, that the effort of the Court should be to give effect to the intention of the Testator as he has embodied it in his language.

5. I question the advisability of enacting the provisions against perpetuities. Practically, the question does not often arise, and the strong tendency of English lawyers is calculated to reduce the supposed evils of such devises within the narrowest limits. I would, therefore, not extend these provisions to the Wills of either Hindoos or Mahomedans, for the special reason that a provision against a problematical evil will be liable to misapprehension, and mischievous misconstruction.

6. The provisions as to superstitious uses seem to me eminently wise and politic, and necessary in all countries to prevent priestly influence from disappointing the just expectations of a Testator's kindred. I would, therefore, extend them to Hindoo Wills, which, as the creature of the English Courts, and in this Presidency of very recent creation, the legislature is quite entitled to subject to any restrictions thought to be expedient.

7. The Mahomedan Law expressly authorizes the devotion of one-third of the Testator's property to such purposes, and the legislation upon Mahomedan Wills differs altogether in principle from that upon Hindoo Wills. These are of recent invention, while those have been legalized throughout many centuries of Mahomedanism. I am not disposed to recommend the enlargement of the powers of Executors. The question is, however, social and political, rather than legal. In addition to my special objections to these changes, I am much influenced by a strong, and, as I conceive, sound general objection to introducing important changes in the substantive law by indirect legislation. I see no objection to the provisions as to custody and probate of Wills. The propriety of introducing them will depend much upon the practicability of proper arrangements. I have no information what these arrangements are to be, and am therefore unable to offer an opinion upon them.

8. In conclusion, I have to express the great reluctance with which I furnish an opinion favoring further legislation. I regard the rapidity with which legislation is now proceeding as a very great evil. If it continues, I do not think that either Judges or Practitioners, and still less the public, will know from day to day the Law which governs them. Statutes, unless very carefully constructed, do not afford certainty, but doubt and litigation is not repressed, but aggravated, by every fresh enactment.

9. The word "confidential" upon the letter of the Government of India has compelled me to inflict upon your Excellency my own handwriting. I have to apologize for my delay in replying to Mr. Secretary Hudleston's communication. I could not with propriety give an opinion upon fresh legislation, until I had carefully considered the provisions of the Law which it was intended to alter.

No. 65. From the Honourable L. C. INNES, Judge of the High Court of Judicature at Madras, to His Excellency the Honorable the Governor in Council, Fort Saint George; dated Madras, November 1866.

In accordance with a request conveyed in the letter of Mr. Hudleston, of the 21st September, I have the honor to offer my opinion on the points referred to in the letter of the Secretary to the Government of India to the Government of Fort Saint George, dated 22nd August last.

2. I think that Chapter VIII and Chapters X to XXVII of the Indian Succession Act, in so far as they relate to the execution, revocation, interpretation, and probate of Wills—with exception of a few sections—might with advantage be extended to the Hindoos of British India, following the ordinary Hindoo Law of property as distinguished from the Law called *Aliya Santana* and *Marumakkatayam* prevailing on the Western Coast of Southern India.

3. I also think that, with certain exceptions, Chapters VIII and X, relating to the execution and revocation of Wills, and Chapter XI, containing simple rules relating to the construction of Wills, might be extended to Mahomedans.

4. The provisions of the Mahomedan Law on the subject of the Chapters XII to XXVII, relating to bequests, are in some points in conflict with the provisions of the Succession Act, and are in other respects so full and ample as to render further legislation undesirable. It would be exceedingly impolitic to impose upon the Mahomedans such a body of Law as would have the effect of superseding any part of their existing Law, which they regard as of Divine origin.

5. I do not understand that it is proposed to extend Chapter XXVIII as to gifts made in contemplation of death to others than the classes to whom the Succession Act is at present applicable; but, I think it might with some advantage be extended to Hindoos. The rule of the Mahomedan Law appears to be that the gift does take effect, notwithstanding recovery; and as there is this distinct provision in the Mahomedan Law, it would be improper to interfere with it.

6. By the Succession Act, as by the English Law, the testamentary power is unlimited as to the nature and amount of the property of the Testator. But by the Mahomedan Law it is limited—a Will not being valid beyond a third of the estate of the Testator, except with the assent of the heirs, such assent to be given *after* the death of the Testator. By Hindoo Law, the testamentary power is limited in some relations of life as to the amount of property which a man may bequeath, and in others as to kind. For instance, by the Law, as at present understood, the Will of a father with male issue living would be valid as to the whole of his moveable property, which is at his absolute control; while his Will bequeathing his immoveable property to strangers, without the concurrence of his sons, would not be valid; and if he has no heirs he may will away the whole, whether moveable or immoveable.

7. While by the Succession Act, therefore, all that has to be done on an application for Probate is to determine whether the Will was actually executed by a person who was of sound mind, and not a minor, and to grant Probate of the Will, vesting all the property of the deceased in the Executor (Section 242), or limiting it to the particular bequest (Sections 219 to 228); in the case of Hindoo and Mahomedan Wills, there would have to be made the still further inquiry which is not contemplated by the Succession Act, whether, as to the nature and extent of the property bequeathed, the Will is valid. Unless this inquiry were made, the grant of Probate—which (Section 179 or Sections 219 to 228) would vest in the Executor, or (Section 198) Administrator with grant of Probate, the whole property of deceased, or the whole property bequeathed by him—would generally be a source of great annoyance and injury to those rightfully entitled to resist the Will, on the ground of its being invalid in respect of the nature or amount of property bequeathed by it, or both.

8. It is true that these questions might subsequently be settled in a regular suit, but in the meantime the Executor, or (Section 198) Administrator with a grant of Probate, is in possession of the whole estate, a great part of which perhaps could not have been validly willed away, and, under the authority of the grant of Probate, is doing acts prejudicial to the interests of the rightful heirs, and in many cases irreparably so.

9. Unless such questions could be summarily determined by the Judge prior to a grant of Probate, it seems to me that more mischief than advantage would follow from the extension of that part of the Succession Act to Mussulmans and Hindoos. I think it desirable that provisions should be added to the Act giving the Judge the power to determine these questions for the purposes of granting Probate, leaving the final and conclusive determination of them, if further disputed, to a decree in a regular suit, and to take security from the person to whom Probate may be granted for the restitution or refund of property to which it may be eventually found that he is not entitled.

10. I will now notice the exceptions to which I have referred in paragraphs 2 and 3 of this letter—

Chapter X—Section 56 should be entirely excepted,—and the words, "by marriage or" in Section 57.

"Chapter XI—Section 82. To this Section, I would add the following words: "or, where the bequest of the entire interest is not valid, to such portion of the "whole as the Testator could validly bequeath out of such property, unless it appears "from the Will that a more restricted interest was intended for him."

Chapter XI—Section 86 should, I think, be excepted; the mischief against which it is directed arising entirely from the possibility of misunderstanding the meaning of certain English terms of relationship, which are sometimes loosely used in a sense other than that which they strictly convey. The Native terms are more numerous and better distinguished, and the mischief, as far as I am aware, has in regard to them no existence, or, where it has, the particular Native terms so liable to be misunderstood should take the place of the English terms appearing in this Section.

The 3rd and 4th Articles of Section 88 would seem to be repugnant to the Doctrines of Mahomedan Law (Bailey's Digest, page 630).

Chapter XII—Section 105. A niece is apparently not in the line of Hindoo heirs though a son of a niece is.

In place of the words "nephew or niece," I would, in reference to Hindoos, insert the words "nephew or son of a niece."

Chapter XXIX—Section 179. The Executor or Administrator with grant of Probate (Under Sections 195-6-7 or 8) would not, I apprehend, under the limited power which a Hindoo or a Mahomedan has of bequeathing property, be his legal representative for *all* purposes, but only for purposes of the Will. It would be incorrect to say, "and all the property of the deceased vests in him as such," because only such property could vest in him as could be validly bequeathed.

This Section, Section 242, and other Sections conveying a similar wrong view of the powers of an Executor of a Hindoo Will, would, I conclude, require modification.

No. 66. From C. COLLETT, Esq., Civil and Session Judge of Vizagapatata, to the Acting Secretary to Government, Fort Saint George; dated Vizagapatam, 27th October 1865.

In reply to your letter of the 21st September, No. 1367, I have the honor to submit my opinion that it is desirable to extend many parts of the Indian Succession Act of 1865 to the Wills of Hindoos and Mahomedans. Except the introducing of a rule against perpetuities, and controlling charitable bequests, the intention is, I believe, only to regulate the forms and solemnities of their Wills, without defining or affecting their testamentary capacity. If this is all that is attempted, I think that it may be safely and usefully done.

2. It will, I think, be wisely left to the Courts, by what is really judiciary legislation, to define and limit the testamentary capacity and gradually mould ancient Hindoo Law so as to fit in with modern necessities. On this side, at least, the cases on Hindoo Wills have after all not gone far; in all there have been special circumstances, and much remains to be decided as to the relative rights of Hindoo Testators and male heirs, and as to what is self-acquired property. The Law as to essentials, as distinguished from forms, should, I conceive, be left untouched by legislation.

3. Hence, for Hindoos and Mahomedans, I would leave the definition of a minor to be regulated by their own laws, and not as in the Act. All the Hindoo Schools do not agree as to the exact day on which majority is attained, but I think that it would be a needless interference with the laws of inheritance and succession, which the State is bound to respect, if the age of majority for the purposes of making a Will should be fixed at 18. It would be an anomaly that a gift, or other alienation,

inter vivos, by a Hindoo aged 17, should be upheld in our Courts and yet the same gift by Will should be held as invalid, the theory as to Hindoo Wills being that what a Hindoo may alienate in his life-time he may give away by Will. If the Legislature were about to create the capacity to make a Will, it might fix 18, or any other age that seemed proper; but that is not what the Legislature intends to be about to do. I, therefore, think that no consideration of 18 being a more desirable age than 16 should be regarded.

4. I will now go rapidly through the Act, specifying what parts might, as I conceive, be applied to the Wills of Hindoos and Mahomedans.

5. In Part I, the whole of Section 3 except the definition of "minor", might be applied. Instead of that definition, it might be enacted that, in the cases of Hindoos and Mahomedans, the period of minority shall be determined by the Hindoo and Mahomedan Laws respectively, and the words "a person of full age according to Hindoo or Mahomedan Law" shall be substituted for the words "a person of the age of 18 years," or "who has completed the age of 18 years," wherever occurring in other parts of the Act.

6. I think that nothing more in the Act is applicable till we come to Part VIII. Some portions of Part VII are quite general, but clearly part of Section 16 could not be applied, nor should, I think, Section 17, that being a matter better left to the Hindoo and Mahomedan Laws. Then, as to explanations 2, 3, and 4 in Section 46, and Sections 48 and 49, there seems to me no need to expressly apply them, as the Courts would now, without doubt, act on the principles embodied in them.

7. Part VIII might be applied, and so might Part IX, with the necessary amendment of "full age" in Section 52. I think also part X might be applied, and I see no difficulty from leaving Sections 56 and 57 untouched.

8. Part XI and Parts XIII to XXVII (inclusive) might also, with advantage, be expressly applied. I say "expressly," because it occurs to me that there can be little doubt that every Court would now in fact apply the principles embodied in these Parts. Sections 88 and 93 are not indeed quite consistent with the rules in Macnaghten's Mahomedan Law, Chapter 6, Sections 13 and 14; but, after all, these are only rules of construction, and Sections 88 and 93 may well be substituted. The principles laid down in these parts are perfectly general and are deduced with more or less of amendment from an enormous mass of English or European decisions. There is nothing whatever in Hindoo or generally in Mahomedan Law to guide a Court in the decision of such points. Before the Act was passed, the Court would probably have tried to ascertain the rule from the English decision; now a Judge would rightly say:—"The Legislature has laid down a clear rule on the point in regard to other Wills; the matter depends on general principles, and on no specialty of Hindoo or Mahomedan Law. I cannot adopt a safer guide, and shall apply the rule to this Will." That is, I conceive, what every Judge would now do, and with the further advantage of not being hampered by the mere letter of the law. But still it would, I think, be better to forego this last advantage, and expressly require the Courts to apply these parts to Hindoo and Mahomedan Wills.

9. I return to Part XII.—Sections 99 and 100 are quite general, and would, in fact, be now applied by the Courts. I certainly think that Sections 101 to 104 should be applied. It does not seem to me that this would be an interference with any existing rights of property. Of course, in fact, a person has only just such rights as the particular law to which he is subject has chosen to recognize. But what I mean is that, though all systems of law which have recognized absolute ownership in individuals, have recognized certain rights as necessarily incident thereto, neither have all, or even most of such laws, in point of fact, recognized absolute testamentary power; nor is such power, I apprehend, necessarily or properly to be inferred from an absolute ownership during life; and much less is an unrestricted power to regulate the enjoyment of property after death.

10. If, as is supposed, the primitive purpose of a Will was to transmit the legal personalty of the Testator—and on this, by a natural change of ideas, there has, under some laws, been engrafted the concession to part among strangers the property that would have been incident to the universal succession—yet, it seems to me, there is no pretence therefore, to exaggerate such concession into a power to regulate for ever the enjoyment of the property. Hindoos may have reached the second stage in the use of testamentary powers, but I do not think that they have often, at least on this side of India, tried to create perpetuities; and, any how, such a claim is neither to be deduced from any right, nor to be recommended by any expediency. The power to part property at death looks so much like one of the ordinary rights of dominion which a man uses during life, that many accustomed to its use have come to mistake it for, and call it, such. It may be well to leave such power, when established, intact, justified as its use is by some advantages; but to restrain perpetuities is not to limit the proper consequences of that or any other right. Because a Hindoo has acquired the right to make a gift by Will of what he may make a gift during life, it does not, therefore, follow that he can claim to regulate the enjoyment under the gift after his death, just the same as he might during his life.

11. So that if the State has now, by long acquiescence in judiciary legislation, silently recognized a variously limited testamentary power in Hindoos, yet no Hindoo can justly complain if it now restricts the power to create perpetuities—a power which it has not in fact recognized; which pure Hindoo Law would not have recognized; and the restriction of which will not disappoint any reasonable or well-founded expectation arising either from the testamentary powers recognized, or from absolute ownership during life.

12. I see no objection to applying Section 105; it does not deprive a person of the religious benefit of charitable bequests, but only ensures due deliberation in the act. It occurs to me that the limit "a nephew or niece or other nearer relative" is not a very apt one, as applied to Hindoos. A nephew may be a sister's son; and I am satisfied that the better opinion is that, according to the Mitacshara Law, sister's sons are not in the line of heirs at all; and even in Bengal they are very distant relations. Of course, a niece, and especially a sister's daughter, would be still further off. This Section would, therefore, need alteration.

13. I would suggest that the limit should be for Hindoos the nearer Sapindas, and for Mahomedans perhaps the limit might be the legal sharers and residuaries; but the Mahomedan Law provides already some restraint, as the power to will is limited to one-third of the estate. As to Mahomedans, also, I wish to speak with less certainty of opinion, as cases among this race so seldom occur in this part of India.

14. I go on now to Part XXVIII, and I think this might very well be extended expressly to Hindoos and Mahomedans. The words in Section 178, "which he could dispose of by Will," prevent its extending the power of alienation beyond what their laws would now allow.

15. Parts XXIX to XXXI are concerning the grant of Probate and of Letters of Administration. It is not, I believe, proposed to extend the Act so far as it relates to Letters of Administration on intestacy; but there appears to me to be so much on this subject in these Parts that might with great benefit be extended, and so little that would need alteration that I would beg to suggest the extension. Sections 200 to 205 (inclusive) would need alteration; but a short Section might be substituted, that, in the cases of Hindoos and Mahomedans, persons shall be entitled to obtain Letters of Administration in the order of their heirship according to Hindoo or Mahomedan Law and where several are heirs in the same degree, the Courts may grant the Letters to one or more of such.

16. In Parts XXXII to XL, concerning Executors, their powers and liabilities, and concerning the payment of legacies and so on, there seems to me nothing that might not with advantage be extended to Hindoos and Mahomedans. Indeed some of the Sections only lay down principles which Courts would now in fact apply to the Wills of such persons. Other Sections contain indeed purely arbitary rules, but none that I observe inconsistent with Hindoo or Mahomedan Law. When Hindoo Wills

are drawn according to Hindoo fashion, there is seldom or never, according to my experience, any person appointed as Executor; but Sections 196 and 198 seem to me to get over that difficulty in a satisfactory way, and no doubt Hindoo Testators will soon see the advantage of selecting their own Executors.

No. 67. From the Honorable J. B. NORTON, Advocate-General, Madras, to the Acting Secretary to Government, Fort Saint George; dated Madras, 5th October 1865.

I have the honor of acknowledging the receipt of your letter, in the Judicial Department (No. 1366), under date 21st September 1865, and, in reply, I beg to state, for the information of His Excellency the Governor in Council, that the extension to the Hindoos and Mahomedans of that part of the Indian Succession Act, 1865, which relates to testamentary succession, will be, in my opinion, a very beneficial measure on the part of the Indian Legislature.

2. I observe that it is not sought in any way to interfere with the testamentary power of the Natives, as it is at present established by the Judicial tribunals in the several Presidencies, but only to ensure the beneficial exercise of that power by the introduction of wise and salutary rules, regulating the mode and form of Wills on the one hand, and their construction on the other.

3. The testamentary power of the Hindoos, who form the far larger portion of the population, is now too firmly established by legal decisions, in all the Presidencies of India, to be shaken by any recurrence to the ancient law. That the Mahomedans possess a limited power of bequest has never been disputed.

4. This granted, it seems to follow, naturally, that the best guarantees for the *bonâ fide* execution of Wills, and against fraud, should be taken which circumstances admit of, and hence it appears to me that the same safe-guards which the law has created with respect to Europeans ought to be extended to the Natives. Nor do I know how this protection can be better secured than by the proposed extension of the Indian Succession Act, 1865, which appears to me, in the parts I shall proceed to mention, as well calculated for securing the genuineness and efficacy of Native Wills as of those of Europeans. What and how great are the dangers surrounding the execution of his testamentary power by a Native, are well pointed out in the able paper circulated by the Secretary to the Government of India.

5. Further, having once laid down rules for constituting a legal Will, it would be, in my judgment, not only illogical, but unjust, to refrain from applying to the Wills of Natives the rules of construction which have been, with consummate skill and care, framed for determining what was the intention of the European Testator.

6. In this part of the Code, the learned Commissioners have winnowed and sifted the English decisions, freed the Law from technicalties and puzzling distinctions, and given us a simple body of rules admirably adapted for deciding what was a Testator's intention, be he of what creed, colour, or nation he may.

7. It would be an anomaly to have the Wills of one class of Her Majesty's subjects decided on, in our Courts, by one set of rules, another by another. Though Judges, in deciding upon Native Wills, might very likely take the constructive rules of the Indian Succession Act for their guide in many respects, this would not be compulsory, unless those rules were extended together with Part VII, &c., of the Act.

8. I am of opinion that taking out Probate of a Will before it is acted on should be made compulsory. The only jurisdiction which the Mofussil Courts have at present in respect to Wills is very imperfect. The whole matter may come before the Courts in a regular Civil Suit, when the Court may pronounce upon the *factum* and the effect, genuineness, and efficacy of a Native Will. This excepted, they can only interpose when a Will is alleged in an inquiry under Act XXVII of 1860. The whole machinery of our Courts with respect to the issue of certificates, the equivalent of Probates, is very defective. The rules of the Indian Succession Act appear very simple and inexpensive, while they offer a strong check upon the perpetration of fraud.

9. If taking out Probate, or Letters of Administration *cum testamento annexo*, be made compulsory, the Executor or Administrator *cum testamento annexo* will become a personage of much importance. Even as the Law stands now, although it has been expressly decided by our High Court that a Hindoo Executor need not take out Probate, and that Administration to the estate and effects of a member of an undivided family is not necessary, on the ground that there is always a legal representative yet, in practice, it often becomes indispensable to take out Probate or Administration, as the case may be, where the power of the alleged representative is not acknowledged until he clothes himself with such legal insignia of his character. I need only mention the endorsement of, or payment of interest on, Government Promissary Notes.

10. It appears to me, therefore, that the proposed measure would not be complete without the extension of that part of the Succession Act which applies to the Office of an Executor.

11. If the extension is determined on, I presume that it will comprise the whole of Part VII. I would remark, in passing, that the Section 46 will have the effect of preventing by far the greater number of Hindoos from exercising the testamentary power for two years after they have attained their legal majority. No "Minor" (according to Section 46) can make a Will. "Minority," according to the definition given in the Section 3 ends at 18. Mr. Stokes in his edition of the Succession Act, states that the Commissioners have fixed on this age because it is that at which the Court of Wards "withdraws from the management of the estates of youthful "landholders." The instances in which the Court of Wards interferes in the managements of infants' estates are the exceptions, not the rule. The Court deals but with a fractional, or rather infinitesimal, number of infants' estates, as compared with the whole; and though it is true that Regulation V of 1804, Section 4, defers the attainment of majority by infants under its charge to the completion of their eighteenth year, all Hindoo infants whose estates are not managed by the Court of Wards still attain their legal majority at the age of sixteen.

12. I mention this, though I am not prepared to offer any objection to the extension of the Law as it stands. By the Roman Law, males at 14, and females at 12, were capable of exercising the testamentary power. The Ecclesiastical Courts in England followed this rule, and children could at these respective ages make Wills in England, until the passage of the Wills Act of 1838, 1 Vic., C. 26, which, by Section 7, provided that no Will made by any person under twenty-one years of age should be valid. The policy of the Law in England, then, has been to defer the period at which an individual can make a Will; and I see no reason why a similar course should not be followed here. A Hindoo at 12, 14, 16 or 18 is, generally speaking, certainly not so well informed, or intellectually advanced, as an Englishman of 21, class for class. I would only observe that, by the alteration of the Law in England, the capacity to exercise the testamentary power is made in all cases coincident and contemporaneous with the attainment of legal majority. The Succession Act, if extended to Hindoos, will, in all but exceptional cases, defer such capacity until a period of two years after legal majority has been attained.

13. Part VIII should be extended. Whether Section 50, Clause 3, is altogether adapted to the condition of the Hindoos may deserve consideration. It requires the witnesses to *sign* the Will. The Testator himself may make his mark, and that will be sufficient. To lay down any other rule would be to deny to all who could not write their names the power of making a valid Will. Requiring witnesses to *sign* no doubt affords a safeguard against fraud; but in the present state of national education, it may be that to insist on a witness *signing* his name will occasionally defeat the intention of *bonâ fide* Testators.

14. Part IX should be extended, if, as I presume, it is intended that our Native Soldiers on service should have the power of making "privileged" Wills.

15. Part X should be extended. I would remark that Sections 56 and 78 and 79 of Part XI seem scarcely suitable to the present condition of the Natives. They are framed to meet the ordinary case among ourselves of making a will under a "power of appointment." It may also be questionable, whether, according to Section 57, "Marriage" among the Natives should operate as a revocation of a prior Will.

16. Part XI, subject to my observations in paragraph 15, I would extend in its entirety.

17. Part XII, though perhaps somewhat in advance of the present state of Native Society, might be extended. I would not, however, extend Section 105.

18. Parts XIII. XIV. XV. XVI and XVII, I would omit; Part XVIII, extend; Part XIX to XXVIII inclusive I would omit.

19. Part XXIX I would extend, so far as it affects Testacy. When it is necessary that there should be an Administrator *cum testamento annexo*, I would render the taking out of *such* Administration compulsory. Though I would provide for the taking out of Letters of Administration at the option of the representative of an Intestate, I am not prepared to advocate at present the making Administration compulsory in all cases of *Intestacy*. I think this would be, for the present, introducing too sweeping and violent a change. In this respect, Section 190 is very considerably in advance of the present Law. Under Section 2 of Act XXVII of 1860, the representative of a deceased person may, and often does, recover debts due to the estate, even in a Court of Law, without having taken out Probate, Administration, or a Certificate. If the Court is satisfied that the debt is withheld "from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled," the production of Probate, etc., is not requisite.

20. If I am well founded in the above, Sections 191 and 192, 200, 201, 202, 203, 204, 205, 206 and 207 will require consideration. With respect to Section 201, I would remark that it does not appear to me suited to the *status* of either the Hindoos or the Mahomedans, more specially the former. It is based on the preferable right of the *widow* in English Law to administer to her deceased husband's estate, under 21 Hen. VIII, C. 5, S. 3. But put the case of an undivided Hindoo family, where the deceased has left a son or sons, and collateral male relations:—Here the widow is only entitled to maintenance. The eldest son would, I take it, be entitled ordinarily to Administration, or, if he were a minor, his eldest undivided Uncle. The Court might not often be able to deny the widow on the ground of "personal disqualification." She certainly has an "interest in the Estate of the deceased" to the extent of her right of maintenance. That is a charge upon the inheritance. It is on other grounds, which it is unnecessary to recapitulate, highly undesirable to trust Hindoo or Mahomedan females with the Administration of Estates, where any other fitting person can be found. They are the easy victims of the designing. Their management generally terminates either in the Estate being squandered, or in a Law Suit, frequently too late to do more than save the relics, if not absorb them in costs.

21. The extension of Part XXIX will probably entail a reconsideration of Act XXVII of 1860.

22. Parts XXX and XXXI, XXXII, XXXIII, and XXXIV should be extended. Section 204 falls under the remarks I have made with reference to Administration in cases of Intestacy. Section 239 may perhaps necessitate the reconsideration of Act XIX of 1841.

23. Parts XXXV to XXXIX inclusive need not, in my judgment, be extended.

24. I would extend Part XL.

25. And here I should break off, were it not that I gather, from the confidential nature of the communication, that my opinion of the expediency of the proposed measure from a legislative as well as a legal point of view, if not expected, will not be deemed intrusive. I feel the more emboldened in offering it, from the fact of my being a Member of the Legislative Council of Madras.

26. I am one of those who regard the entirety of the Indian Legislation during recent years with no inconsiderable anxiety; notwithstanding, I admit it to have introduced many wise, important, and salutary reforms. We have introduced vast changes in almost every department of our administration. Our policy now appears to me to be to wait and watch the results of the gigantic experiment going on, wherever and whenever we can do so: not to be constantly introducing alterations in the Law which are not absolutely called for. I believe that the Natives, though rapidly rising in material prosperity, were never more covertly discontented than at the present moment. Novel taxation, unadvisable as we know it to be, has had much to do

with this; and I think there is abroad a suspicion that we aim at gradually subverting all the whole institutions of the country. I should not hazard such an opinion lightly on any occasion, much less on the present. But I have for years past conversed and corresponded with many Natives, and my known opinions have made them more open with me than they probably would be with officials; though I perceive a greater reticence since my connection with Government. I am not blind to the probability that the knowledge, on the part of those with whom I have conversed, of my political opinions may have itself afforded a motive for misrepresentation and exaggeration.

27. Deeply impressed as I am with the conviction that I have formed a correct estimate of the state of Native feeling, I watch the course of our legislation with deep anxiety. This is one of those questions which it is easy to represent as an intermeddling with the old institutions of property. The Natives do not yet see that one of the necessary operations of an advancing civilization is to remove the fetters fixed by antiquity upon the free alienation of property. No nation is more conservative than the Hindoo: and I have myself not unfrequently heard it argued that the introduction of the testamentary power into Hindoo Law is the mere creature of our Law Courts, and an indefensible innovation upon the manners and customs of the people.

28. It is, I think, to be regretted that Mr. Justice Strange, for whom I have always entertained a sincere respect, should have fostered this notion in his work upon Hindoo Law. Even in the second Edition (Sections 169—171), he takes occasion to reiterate with increased vigour the dictum that a Hindoo Will is either illegal or superfluous. It is true that this opinion is opposed to many previous decisions of the Courts establishing Wills of Hindoos, and even to decisions of the Privy Council to the like effect. It is true, also, that the High Court has subsequently decided that a Hindoo Will, within certain limits, is valid. But the work of Mr. Justice Strange has, I think, gone far to foster the idea that there can be no such thing as an effective Will of a Hindoo. The learned author occupied a seat on the Bench of the Sudder Court when his work was published. It went forth, therefore, with a certain degree of authority. Its author brought great reputation, great abilities, great research, great labor, to bear upon his task of codifying the Hindoo Law in the briefest possible form. Once codified, he sought to stereotype it: for not only was the book speedily in the hands of all Mofussil Judges, Law Officers, and Vakeels, but the Sudder Court issued an Order, as I understand, prohibiting the inferior Courts from searching for, or relying upon, any other authority for legal positions than what was to be found in Mr. Justice Strange's book. The effect of such a doctrine, universally spread, and of such authority, may be easily conceived.

29. Did I think that the proposed extension would unsettle the Native mind, I should hesitate to recommend its immediate adoption, however fully I might feel convinced that the measure would, in fact and practice, operate beneficially.

30. But I do not think it will have that effect. Though it *may* operate upon every individual among the millions of Hindoos, practically its operations will be confined to comparatively few; for the masses do not make Wills, while those who do are precisely of the class best capable of appreciating the immense exercise of personal power implied in ensuring the direction of a man's property, after death has deprived him of its longer possession or enjoyment. Those who can appreciate this can scarcely fail to wish that the best security shall be taken for the effectual carrying out of their wishes and intentions, when it is no longer in their own power to superintend and guide the operation. To this class—the will-making class—I conceive that the proposed extension will be a boon, and will be so regarded by them. The class, I have no doubt, will rapidly, though gradually, increase and extend; for the desire to control the devolution of one's property, after one's death, is natural and common to all mankind.

31. Again, this measure will not, like a measure of taxation, fall coincidentally, and contemporaneously on *all*. It will touch only here a man and there a man, and this one at one time, that one at another. One leading element of discontent, if such there be, is, therefore, eliminated; and it is on these grounds that I have arrived at the conclusion that the proposed measure will be beneficial to the Natives of India at large, and that there exists no considerations of expediency which should prevent its immediate adoption.

No. 68. From the Honorable J. B. NORTON, Advocate-General, to the Chief Secretary to Government, Fort Saint George; dated Madras, 13th February 1866.

With reference to my letter, dated 5th October 1865, in reply to a letter from the then Acting Chief Secretary, No. 1366, in the Judicial Department, under date the 21st September 1865, I have the honor to request that the following observations may be added to what I have before written.

2. The Mahomedans have a well-recognized law of Wills, and, in connection therewith, laws regulating the Office of an Executor. These rules will be found gathered together in Mr. Bailey's recent work on Mahomedan Law, which I have had an opportunity of perusing since I despatched my letter of the 5th October last.

3. It occurs to me to notice that there is, in this respect, a wide difference between the Hindoos and the Mahomedans. With the former, as there was no Will, so there was no Executor. The British Legislature has, therefore, *a tabula rasa* to deal with in the case of the Hindoos.

4. Not so with the Mahomedans; and, in extending the Law of Testamentary Succession to this last class of subjects, the Legislature will, no doubt, look anxiously to see how far the proposed application of our law to them coincides, or clashes with, or supersedes, the Mahomedan Law as it at present stands.

No. 69. From T. KRISTNASAWMY IYER, Principal Sudder Ameen of Chittoor, to the Acting Secretary to Government, Fort Saint George; dated Chittoor, 18th October 1865.

I have the honor to acknowledge the receipt of your letter, No. 1367, dated the 21st September 1865, annexing copy of a letter from the Government of India, dated 2nd August 1865, marked "confidential," and directing me to communicate my views on the points therein specified, in regard to the extension to Hindoos and Mahomedans of such parts of the Indian Succession Act of 1865, as relate to testamentary succession.

2. In my humble opinion, it is highly desirable, for reasons shown in the letter of the Secretary to the Government of India that the provisions * contained in the Testamentary Act with respect to the execution of Wills, the effect of gift to an attesting witness, and the revocation of Wills, should be extended to the Hindoos and Mahomedans.

* Parts VIII, IX and X. Sections 50 to 60.

3. Sections 61 to 98 of the Act contain, if I may say so, most excellent provisions for the interpretation of Wills, and I see no objection to extending them to the Hindoo and Mahomedan Wills. In the judgment delivered by the High Court of Madras in Arumagam Moodelly *versus* Annai Animal (Madras High Court Reports, Volume I, page 400), they observe that it would be improper and very unsafe, in construing Hindoo Wills, to follow the decisions of the English Courts upon the construction of English Wills, which are founded upon the peculiar effect ascribed to technical words, and to terms, ordinarily used by conveyancers, with reference to the real property Law of England. Although the present Testamentary Act is also based on English Law, yet, I find nothing in the rules of construction therein laid down, such as to render the application thereof improper or unsafe in the construction of Hindoo Wills. The obliteration of any distinction between real and personal property seems to be the principal modification effected by the Act in the English Law of Intestate and Testamentary Succession. This certainly has removed the intricacy and difficulty of much of the English Law, and rendered the Code, I think, adapted, to a great extent, to all classes of people. For a case such as the High Court had occasion to deal with in the judgment above quoted, section 84 of the Testamentary Act appears to me to afford sufficient provision. This section enacts that, where property is bequeathed to a person, and words are added which describe a class of persons, but do not denote them as direct objects of a distinct and independent gift, such person

Part XI.

is entitled to the whole interest of the Testator therein, unless a contrary intention appears by the Will. One might argue here that the words "whole interest," being made use of in this section in contradistinction to a restricted interest, such as interest for life, etc., convey a meaning similar to that of absolute interest, and that, therefore, where a bequest is made to "A * and his descendants," A, the first taker, would be vested with absolute interest in the property bequeathed, and, consequently, at his death without male issue, his property would under the Hindoo Law of Succession, go, if he were undivided, to his brother, or if divided, to his widow, in preference to his daughter or grand-daughter; and that, in either case, the intention of the Testator would be defeated, as, in using the term "descendants," it is clear that neither the brother nor the widow was intended by him. This is very true; but the proviso contained in the words "unless a contrary intention appears by the Will," used at the end of the section serves, I think, sufficiently to meet this argument, as, consistently with this proviso, no construction could stand which is found to defeat the intention of the Testator.

* This must be supposed to be a Hindoo.

4. The rule against perpetuity, contained in section 101 of this part, is also one on which I have no objection to offer. The High Court of Madras have already ruled, on grounds of general utility and public convenience, that the doctrine against perpetuity is equally applicable to the property of Hindoos, and that it is not opposed to any of the principles of Hindoo Law or usage.

Part XII. Void Bequests.

5. The Law contained in section 104 against a Testator creating an accumulating trust, to which Law the extraordinary Will of Mr. Thellusson gave rise, is not, in my opinion, the less beneficial to Natives.

6. As to bequests to religious or charitable uses, section 105 of the Act provides that no one having a nephew or niece, or any nearer relative, shall have power to make such bequest, except by a Will executed not less than 12 months before his death, and deposited within six months from its execution in some place provided by Law for the safe custody of the Wills of living persons. Objections occur to me in recommending the extension of this section alone to Natives.

7. In the first place, a man, with the sincerest desire to keep himself within the rule contained in the section, makes, *bonâ fide* and in good faith, a religious or charitable bequest, at a time when, with reference to his age and state of health, he has every reason to suppose that the prospect of his death is very remote. And yet, where, as is not unfrequently the case among human beings, he happens to die fortuitously before the expiration of 12 months from the time of the bequest, the bequest, to the utter defeat of his intention, becomes void and yet, for no demerit in the nature of the bequest itself, or intentional transgression of law on his part. This seems to me a hard case.

8. Secondly, the wording of the section is inapplicable to Hindoos, inasmuch as it seems to contemplate the nephew and niece of a Testator to be his near relatives; but, in the case of a Hindoo, where he is divided, the nephew is not at all a member of his family. As for a niece, she has no connection whatever with the deceased Hindoo's property, whether he were divided or undivided. She belongs altogether to a different Gotra.

9. Moreover, the only object of the section seems to me to be that provision should be made against death-bed bequests being made to charitable uses by persons, to the prejudice of their near relatives. But, considering the nature of the present age, in which Natives (particularly Hindoos, who constitute the majority of the community) are inclined to be sceptical in matters of faith, and who, under the new school of Political Economy, are not likely to fall into excess either of posthumous or contemporary benevolence, I think there is not much reason to apprehend that any such bequest would ordinarily take place as the section in question intends to guard against.

10. In the letter of the Secretary to the Government of India, it is stated that a Native may now, on his death-bed, when his mind is enfeebled by disease or fear, deprive his nearest relations of self-acquired property, which would otherwise have devolved upon them, and bequeath it in accordance with the dictates of his Priests and the promptings of his own superstition. I believe this remark has been made in order to show the expediency of extending section 105 to Natives. If I am correct in this belief, I find it beyond my power to see how this section, even extending it to Natives, serves to obviate the evil contemplated in all its contingencies. Supposing a Native, at his death-bed, makes a bequest of self-acquired property in favour of his concubine, and thus deprives his nearest relations of the property, which, otherwise would have devolved upon them, how does section 105 provide a remedy in such a case? The bequest is neither religious nor charitable, and does not, therefore, fall within the scope of the section. My impression is that no such peculiar restriction, as the section in question creates, with regard to religious and charitable bequests alone is called for in the case of Natives.

11. There is already the restriction that no man who has not completed the age of 18, or who is of unsound mind, could make a bequest. In the Madras Presidency particularly, there is the further restriction that a Hindoo could not devise by Will what he could not dispose of by gift during his life time. These, I think, might be taken as safe-guards against unjust bequeathments occurring to the serious detriment of the interest of the Testator's nearest relatives.

12. I have, however, one thing to bring to notice here. It has not yet been clearly settled in this Presidency how far a Hindoo possesses an independent right of alienation *inter vivos*. According to the Hindoo Law, the idea of property to any amount is hardly separable from that of family. The Head of a Hindoo family is not, properly speaking, his own master, but a trustee, more or less, for numerous interests, which the Shaster has shown great anxiety in protecting. It is, therefore, one of the fundamental principles of the Hindoo Law that no man can make an alienation of the *whole* of his property, whether ancestral or self-acquired, real or personal, so as to leave his family destitute. This restriction, of course, does not apply to a Hindoo, single and not having family; remoter heirs, in this respect, not being objects of legal care. With a Hindoo having a son or grandson, the restriction is greater with regard to property ancestral, than with regard to that self-acquired. Even of self-acquired property, according to Sir Thomas Strange's Work on Hindoo Law, the law, as current in the Madras Presidency, leaves to a father unqualified dominion only over personalty, although, according to the Bengal School, his power is unrestricted both as to land and personalty acquired. In the Judgment* of the High Court of Madras, wherein it has been ruled that a Hindoo's testamentary power is co-extensive with his independent right of alienation *inter vivos*, the extent to which the latter right can be exercised by a Hindoo has not been determined, though, incidentally, an allusion is made therein to a case, wherein bequests of self-acquired property generally were upheld. In 1863, a Bill was introduced before the Council of Fort St. George to legalize Wills among Hindoos, and also to confer on a Hindoo father the same authority over self acquired land which he has over self-acquired personalty. The Government did me the honor to send me certain questions in connection with the Bill. In the answers made by me (a printed copy of which I herewith respectfully beg to submit), I have, as far as my experience enabled me to do, tried to explain the peculiar position of Hindoos, the necessity of their possessing power of alienation over self-acquired property, and the extent to which it is desirable that such power should be permitted to be exercised by them. I am strongly inclined to think that some such law as was then proposed to be enacted is necessary to be passed before extending the Testamentary Act to Hindoos, especially as the limits of the testamentary power to be exercised by Hindoos are made dependent on the extent to which they are justified in the exercise of the independent right of gift, or other disposal by act *inter vivos*. It is true that the Secretary to the Government of India, at the conclusion of his letter, clearly states

* Vallinayagum Pillay *versus* Pachche and others. Madras High Court Reports, Vol. I, p. 326.

that, by proposing to extend the Testamentary Act, it is not intended to increase in any respect the testamentary power possessed by them. But still, in my humble opinion, the provisions contained in the Act for the limitation of the exercise of testamentary power are so closely connected with the extent to which such rights are to be exercised, that, unless the former is clearly defined beforehand, it would be difficult to bring the Act into practical application in the case of Hindoos, without considerable misapprehension, confusion, and uncertainty.

13. To revert now to the point, Section 105 bears some resemblance to the English Law contained in 9 G. II, C. 36, by which it was provided that no lands or tenements, or money to be *laid out therein*, shall be given for, or charged with, any charitable use whatever, unless, by deed indented, executed in the presence of two witnesses twelve calendar months before the death of the owner, and enrolled in the Court of Chancery within six months after its execution, and unless such gift be made to take effect *immediately* without the power of revocation. Several exceptions were, however, subsequently found necessary to be made to the Statute. Devises to the two Universities (Cambridge and Oxford) and to the Colleges of Eton, Winchester, and Westminster, were excepted out of the Statute; and by 5 G. IV, C. 39, Section 3, to the British Museum. Lord Hardwicke was of opinion that persons were at liberty to leave *by Will* a sum of money, or other *personal* property, to works of charity, provided it is not directed to be invested *in land*. And, by 43 G. III, C. 107, every person was declared to be at liberty, by Deed or Will, to give real or personal property for the augmentation of Queen Anne's bounty. Another Act in the same year allowed devises by Deed enrolled, or Will executed, *three* calendar months before the death of the Testator, of real or personal property, to the amount of £500, for the repair of any Church or Parsonage-house.

14. Under all the circumstances above set forth, I respectfully beg to submit that it is not, in my opinion, necessary that Section 105 of the Testamentary Act should be extended to Natives.

15. Part XXVIII of the Act relates to *donatio mortis causa*, and not to a testamentary disposition. I believe, therefore, that it is not proposed to extend this to Natives.

Part XXVIII.

16. The several provisions* of the Act which treat of grant of Probate and Letters of Administration, of limited grants, of the practice in granting and revoking Probates and Letters of Administration, of Executors of their own wrong, and of the powers and duties of an Executor or Administrator, seem to me highly beneficial to Natives. Their extension would, no doubt, be a boon to them. Referring to Section 282 alone, I have, however, one word to say:—This section enacts that no creditor of a deceased Testator is to have a right of priority over another, by reason that his debt is secured by an Instrument under Seal or *on any other account*, and that 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. I, however, think that, in extending this section to Natives, order of priority in debts as to title to liquidation should be permitted, and that it should stand thus:—1st, debts secured by mortgages with possession; 2nd, debts secured by mortgages without possession; 3rd, debts secured by judgments or decrees; 4th, debts secured by Bonds; and 5th, simple debts without Bonds. I say this, because, otherwise, there is every reason to apprehend, with reference to the character of the Natives, that means will be devised to defeat the rights of *bona fide* mortgagees and vigilant creditors, by setting up false debts on simple Bonds and oral contracts.

* Parts XXIX to XXXIV.

17. Part XXV of the Act treats of the Executor's assent to a legacy. I believe the assent referred to in this part is one which cannot be refused by the Executor or Administrator, except so far as this, that he is not bound to admit that there is any property due to the legatee till the debts of the deceased are first paid. If so, I see no objection to its being extended to Natives.

Part XXXV.

18. Part XL of the Act speaks of the liability of an Executor or Administrator for Devastation. This part, above all, is, in my opinion, very necessary to be extended to Native Executors or Administrators.

Part XL.

19. Having thus endeavoured, as far as my experience of the character of the Natives and my limited knowledge of law enabled me to do, to meet the requirements of the reference under reply, I beg to observe, in conclusion, that novel and theoretical as the system is in its application to India, it is beyond the scope of my judgment to compass it at present satisfactorily in all its bearings and incidents. Experience alone must, I think, *correctly* suggest how far the Act requires modification in its extension to Natives. The opinions, therefore, I have now ventured to submit I have done with diffidence, and I respectfully solicit the forbearance and indulgence of the Government for any error or defect they may be found to contain, notwithstanding my utmost care.

20. The communication under reply was received by me on the 27th ultimo, when I was about to leave Coimbatore for this district. I, therefore, respectfully request that the Government will kindly excuse the delay caused in the submission of the reply.

Questions and Answers in connection with the Bill introduced in 1863 for legalizing Wills among Hindoos, &c.

Question 1.—According to the provisions of the Hindoo Law, as current in the Madras Presidency, the holders of property are, in certain cases, competent to give it away by deed during their life-time. For instance, a man without male issue, divided from his coparceners, can, after making a sufficient provision for the maintenance of his family out of his estate, alienate the rest of it, if he chooses to do so, by deed during his life-time. So a coparcener, without male issue, can, after making a like provision for the maintenance of his family, alienate his individual acquisitions, or his share* of common family property, to any one he likes by deed during his life-time. A widow may, during her life-time, alienate her *Sandagaka* of her own will, and she may also give away her husband's property for religious and charitable purposes. But, for other purposes, she may do so only with the consent of the next heirs. In all these cases, it is necessary that the gift or alienation should, according to the *Shastras*, be followed by immediate possession, without which such gift or alienation would be invalid. On the other hand, any arrangement they might make regarding their property to take effect after their death cannot be enforced by Courts of Law, because the Hindoo Law does not recognize such a transaction. According to that Law, either they must transfer possession during their life-time, or allow their property to descend according to the rules of inheritance.

A Will is an instrument which is to take effect after the death of a party making it. Conflicting decisions have been passed by the Courts regarding the validity of Hindoo Wills. At one time it was upheld, at another it was set aside.

A Bill is now introduced before the Council of the Governor of Fort Saint George to legalize Wills among Hindoos, or, in other words, to sanction any arrangement which the holder of property may make to take effect after his or her death, in those cases only where, during his or her life-time, he or she may dispose of it by gift under a deed.

What is your opinion of this provision of the Bill (Section 2)? Do you or do you not agree to the principle thereof? Assign your reasons for the opinion which you may give.

Answer.

I am for empowering a Hindoo to devise by Will what he could dispose of by gift during his life-time. I consider that, in a country improving in civilization as the province of Madras, it is highly desirable, with reference to the tendency of the times, that a Hindoo should be vested

* This seems to be opposed to the principles contained in Sir Thomas Strange's Hindoo Law, Volume I, page 261, paragraph 3, to the text of Vrihaspati, as cited in Mitacshara on Inheritance, Chapter I, Section I, paragraph 30, and to the rulings† of the Court of Sudder Udalut in Special Appeal Suits Nos. 123, 167, 181, and 183 of 1859. In all these, alienation by an undivided member of common family property is declared invalid, even to the extent of the alienor's share, unless made under emergent circumstances. A contrary doctrine seems, however, to be maintained by Jagannatha in Colebrook's Digest, Volume II, pages 98 to 105, but the inconsistency of this doctrine with the opinion of Viganeswarayana, a work of paramount authority in the School of Madras, has been pointed out by Mr. Colebrook in his letter, dated the 18th May 1812, published in Sir Thomas Strange's Hindoo Law, Volume II, page 433.

† *Vide* page 270 of the printed Reports for 1860, and pages 67, 69 and 17 of the printed Reports for 1866.

with the right of disposing of his property by testament. True, the Hindoo Law knows no such instrument as a Will, and hence, its recognition among the Hindoos may be argued as allowing them to exercise a power unknown to their own law; but it may not be amiss to ask, why, in spite of the strict rule of inheritance at present prevailing, testamentary power should not be allowed to grow up in India, just for the same reasons for which it was originally introduced and subsequently fostered in England? The utility of the system is too obvious to require any enlarged comment. The proneness of the children or heirs at law to become disobedient and headstrong from their conviction of their parent's inability to exclude them by Will, and the extreme hardship with which many provident Hindoo fathers feel themselves precluded by the letter of their own law from dividing or charging their estates, as the exigencies of their families require, furnish us with daily instances as to the absolute necessity of a law being introduced legalizing Wills among Hindoos.

2. If a Hindoo *can* give away any portion of his property to any one he likes during his life-time, I see no reason why he cannot make such an alienation to take effect as well after his demise as when he is alive. It is a *right* which he has by *law*, and he exercises it when yet alive. It, therefore, makes no difference, in my opinion, whether the alienation takes effect prior or subsequent to his death. As far as my experience enables me to say, the evil consequences attending the non-recognition of Wills among Hindoos are, on some occasions, alarming. The instance of Hindoos having male issue, suffering from want of power to devise by Will even their self-acquired immoveable property, may be here cited; but, by doing so, I fear, I shall be going beyond the question,* as it restricts my consideration simply to the point whether a Hindoo can dispose of by Will what he can give away by deed during his life-time; and no Hindoo, having male issue, is competent, under the existing law, to give away by deed, during his life-time, the immoveable property in his possession, whether ancestral or self-acquired, without the concurrence of his sons. I shall, therefore, reserve the subject for the third question, where, I think, it may be appropriately treated. In contemplating now the cases of Hindoos *without male issue*, I shall first allude to a sonless Hindoo divided from his coparceners, contemplated in the first instance of the Question. Such a Hindoo, in default of wife, daughter, or mother, generally seeks, at his advanced age, the support of any of his near female relations, such as sister, maternal aunt, or sister-in-law, and secures the services of such a relation in consideration of his assigning to her—the assignment to take effect subsequent to his death—the only landed† property he possesses as the means of his subsistence. The female relative, partly from motives of affection or compassion towards the old man, and chiefly in anticipation of the benefits to be derived after his death, undertakes his support, which, in some instances, extends over a considerable period, involving also an indefatigable attendance on the lingering and bed-ridden patient, but finds at length, subsequent to his demise, that the property left by him, and of which she becomes the next immediate occupant, in consequence of her having been near him on his death-bed, is torn away from her, through the intervention of the Law of Inheritance, which, discarding her, in consequence of her not being in the line of heirs, favors a remote collateral of the deceased, who had never done a particle of service to the deceased, and was, perhaps, even his enemy all his life-time. Likewise, a Hindoo having a young wife and mother, and dying before the consummation of his marriage, leaves his afflicted mother, who continued to be in sole charge of the whole family affairs till the moment of his death, at once at the mercy of the relations of his young Widow, who has not yet even visited‡ her lord's manor. These relations, on behalf of the little girl, to whom, as the widow, the Law of Inheritance unfortunately gives preference over the mother of the deceased, take charge of the whole estate of the deceased, and, in attempting eventually to appropriate such property to their own use and to the detriment of the young widow's own interests, make the poor old mother also hang upon them for her subsistence. What must be the feelings of the decrepit mother at such a change in her circumstances added to her bereavement?

3. The case of an *undivided* coparcener (given in the second instance of the Question) dying without male issue, and without power of devising his property by Will, is not the less lamentable. Although such a coparcener may be the senior member of the family, and whatever may be the extent of his self-acquisition or of his contribution in the augmentation of the family estate, yet he, when dying, leaves his beloved wife, who had, up to the moment of his death, been the mistress of the family, with a young or widowed daughter, if any, entirely dependent upon the bounty of his junior brother, or more practically upon that of such a brother's wife, who generally takes advantage of the opportunity to give vent to the passion with which she brooked the restraint that had been held over her by the unfortunate senior mistress during the life-time of the deceased, and scruples not to treat her with painful contempt.

* Question 1.

† Here it is to be stated, once for all, that Hindoos, being more an agricultural than a commercial class of people, are generally fond of investing their accumulations in lands.

‡ The ceremony "Grahappravesam" is necessary to be performed before a young wife could be allowed to go to her husband's house, prior to the consummation of marriage.

4. It is unnecessary for me to add what must be the beneficial consequences, if, in all the cases above enumerated, the dying man is vested with power to hand down by Will what he could have given by deed during his life-time.

5. That the tendency of Hindoos is not against making Wills would appear from the practice* that has long crept into their class of indulging in the liberty of Wills, notwithstanding that their language has not even a name for it.

Vide Sir Thomas Strange's Hindoo Law, Volume II, Chapter XI, pages 417, 419, 421, 428 and 459.

6. For all the foregoing reasons, I consider that a relaxation in the strict rule of Inheritance among Hindoos is highly desirable, and calculated to promote civilization and the welfare of the country.

7. That a gift to take effect at a future period—for instance, on the death of the donor—is a thing not altogether ignored by Hindoo Law is deducible from the following text of Catyayana, as contained in Colebrooke's Digest, Volume III, page 388, Section 369:—

"After delivering what is due as a friendly gift *promised by the father*, let the remainder be divided among the heirs." *Vide* also Elberling, Section 261.

8. One might apprehend that a Hindoo, by being allowed the liberty of disposing of his property by Will, may take undue advantage of such liberty, and become capricious or arbitrary in his disposal of the property. But this is sufficiently guarded against by restricting the liberty of Will only to those cases wherein a Hindoo may, during life-time, exercise the power of gift without prejudice to his family.

Question 2.—The Bill (Section 3) also provides that all conditions and limitations which a Testator may impose on the tenure, enjoyment, or devolution of the property bequeathed by him or her, shall be binding on all parties taking or holding under or benefited by the Will. According to this provision, supposing a party competent to make a Will shall declare that the property conveyed under it shall be held according to the rule of primogeniture, or that it shall not be alienated nor be divided, etc., such declaration shall be binding on all future proprietors holding under or through the Will. It is suggested that this Section be omitted, as being opposed not only to recent legislation in England, but also to sound policy and the cause of progress and civilization, inasmuch as the tendency of advancement is to put an end to property being tied up in perpetuity, and to render it as freely transferable as possible from hand to hand.

What is your opinion of this provision? Do you think that this will conduce to the good of the people or not? Give your reasons.

Answer.

I am not altogether for omitting Section 3 of the Bill, as conditions and limitations, which a Testator may impose on the tenure, enjoyment, or devolution of the property bequeathed by him, may often be of a reasonable character. For instance, where a bequeathment is made for a charitable purpose, as the maintenance of a particular School, and the Testator declares that the endowment shall be applied to the benefit of such a School, so long as that School is in existence, and then revert to his own family, I think this is a condition which no legislative body will scruple to approve. In the same manner, where a Testator makes a bequest in favour of his widowed daughter otherwise unsupported, and declares that, subsequent to the demise of such a daughter, the property, instead of descending to the daughter's heirs, shall revert to his own family, I think, a condition of this sort is not the less equitable.

2. Hence, I would suggest that such of the conditions, limitations, and restrictions, which a Testator may attach to, or impose upon, the tenure, enjoyment, or devolution of the property conveyed by him by Will, may be enforced as to secure eventually to the family of the Testator a reversionary interest in such property, and that Section 3 of the Bill may accordingly be modified as follows:—

"No condition, limitation, or restriction, which a Testator may attach to, or impose upon, the tenure, enjoyment, or devolution of the property conveyed by him by Will, as provided for in the preceding Section, shall be binding on any party holding under such Will, or under the parties benefited thereby; unless the condition, limitation, or restriction be of such a nature as to secure to the family of the Testator a reversionary interest in the property bequeathed."

Question 3.—For reasons contained in paragraphs 2 and 3 of the Statement of Objects and Reasons appended to the Bill, it is proposed (Section 5) to give to a Hindoo father the same authority over self-acquired land which he has over self-acquired personality. According to the Hindoo Law as current in Bengal, that is, according to the Ganda School, a Hindoo father has unfettered dominion over such property.

What is your opinion of this part of the Bill? Are you in favor of this provision, or are you against it? State your reasons for your opinion.

Answer.

The subject involved in this Question is one of very great importance, there being few, even in the humbler classes of Hindoos, whom it does not concern. I shall therefore consider the subject in the following order:—

I. The absolute necessity of a Hindoo possessing the power of alienation over his self-acquired property.

II. The authorities bearing on the point.

III. The provisions of Law against unrestricted alienation of the *avoole* property.

IV. The desirability of imposing certain restrictions on such a power of alienation.

V. The extent of restriction, as regards self-acquired moveable and immoveable property generally.

VI. The peculiar restriction necessary to be imposed on self-acquired immoveable property especially.

I. The absolute necessity of a Hindoo possessing the power of alienation over his self-acquired property.

2. Whatever a man acquires by self-exertions is called the acquirer's "property." I think it is a contradiction in the term itself if the acquirer be not vested with power of alienation over such property. Moreover, under the present state of Hindoo Society, I think it is highly desirable that a Hindoo should possess the power of alienation, independently of his son, over at least a portion of such of the immoveable property in his possession as is self-acquired. The want of such a power in the father leads to evil consequences, not only when the son is undutiful towards him, but also, when he is docile to him.

3. To illustrate the first case: and industrious Hindoo father, who, with rare self-exertions, makes acquisition of landed property with the hope of reaping the benefits thereof at his advanced age, finds it, to his great disappointment, placed at last entirely beyond his control by the obstinate conduct of his son, at a time when he has to avail himself the more of its benefits, owing to the decayed state of his own constitution. He is thus left unreservedly at the mercy of his undutiful son, to prompt whom to a reverence towards his father, there is neither the fear of disinheriton at his hands in case of insubordinacy, nor the hope of accumulation of his riches by the additional industry of the old man. To this may be added also the disregard with which, to the great hurt of his feelings, the aged Hindoo is treated by his other relations, in consequence of his inability to confer any benefits on them (I mean temporal benefits), in case they should undertake to protect him against the will of the son.

4. Here, it may not be superfluous to notice a case where the son is docile to his father, and yet mischievous consequences ensue by absence of power in the father to alienate his self-acquired property of his own authority.

5. A Hindoo father having male issue sells a portion of his immoveable property for necessary purposes of the family. Although the son may have consented to the sale, yet his signature is not usually obtained to the Deed of Sale passed on such an occasion. The father considers it derogatory to his honor to call upon his son to sign the Deed with him, and the purchaser is generally content with the signature of the father alone to the Deed. In such a case, where the father subsequently thinks of depriving the purchaser of the property so sold by him, either from a chance presenting itself of the land fetching a higher price, or from some ill-feeling taking root between him and the purchaser, he sets up his own son to sue for the cancelment of the sale, on the plea that it was not made by his father with his concurrence, and as such that it is invalid under the Hindoo Law. The father as a defendant in the suit supports his son's allegations, or allows the suit to be tried *exparte* as regards him. Such a dishonest attempt on his part to defraud the purchaser meets with countenance, especially as the Deed of Sale passed by him does not bear his son's signature, in proof of the latter also having assented to the sale. The consequence is that the *bona fide* sale made by him is unjustly set at naught, and the purchaser left in jeopardy.

6. It might, however, be argued here that, by the clog on alienation by a father of his self-acquired property being removed, he might effect an unequal distribution of such property among his sons, thus evading by the easy expedient of calling it a "gift" or "bequeathment," instead of a "partition," the provisions of Hindoo Law (Strange's Manual, Section 247) which enjoin him to allot his sons *equal* shares, even in his self-acquired property. But this objection may be easily met by considering that it is not but justice to a son who behaves himself more subserviently to his father than the rest, that he should receive from him a proportionately greater benefit. The Mahomedan Law prohibits bequest in favour of a person, who, at the time of the Testator's death, is one of his heirs. But this principle, in my opinion, is founded* on no sound policy

* Elberling, Section 310.

II. The authorities bearing on the point, i.e., the power of alienation by a Hindoo of his self-acquired property.

7. Having thus given my reasons why a Hindoo father should be held competent, without the consent of his male issue to alienate by sale, gift, or otherwise, during his life-time, or to dispose of, by Will, his individual acquisitions, both moveable and immoveable, I here beg to observe that authorities are not wanting in Hindoo Law to justify such an alienation.

8. Mitacshara on Inheritance (Chap. I, Section V, paras. 9 and 10) provides as follows:—

"So likewise, the grandson has a right of prohibition if his unseparated father is making a donation or a sale of effects inherited from the grand-father, but *he has no right of interference if the effects were acquired by the father*. On the contrary, he must acquiesce, because he is dependent.

"Consequently, the difference is this: Although he have a right by birth in his father's and in his grand-father's property, still, since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property."

* Strange's Manual, page 3, paragraph 2.

9. Again, in Smruti Chandrika, a work * of prevailing authority of the Madras School, next to Mitacshara, it is declared as follows:—

† This is my own translation of the Sanscrit passage.

† "It is stated that a son possesses a right by birth in his father's and in his grand-father's property. How, in such a case, arose a difference in the extent of the son's power over the property according as it was the grand-father's or father's? The reply to this question is that, in the former, namely the grand-father's property, the right of both the son and father is equal; whereas in the latter, namely the father's property, the father alone possesses independent power over it, provided he labours under no personal disqualification. Hence occurred the stated difference in the proprietary right (of the son)."

10. That the son's power over his father's property during the life-time of the father is under the provisions of Hindoo Law as current in Madras, less than that he possesses over his grand-father's property, may further be seen from the following two circumstances:—

Firstly.—In the case of a grand-father's property, a grand-son may, at his will, and irrespective of all circumstances, compel his father to divide it with him (Mitacshara on Inheritance, Chap. I, Sec. 5, para. 8; and Strange's Manual of Hindoo Law, page 42, Sec. 238). Whereas, in the case of a father's self-acquisition, the son possesses no similar power; the text of "Yanjnyawalcya" "when the father makes a partition, etc.," cited in Mitacshara, Chap. I, Section 2, para. 1—which text is declared by Sec. 5, para. 7, of the same Chap. to relate to property acquired by the father himself—leaving it to *the pleasure* of the father to make a partition of such property with his son.

Secondly.—In the case of a grand-father's property, the grand-son has a right of prohibition, if his father is making an alienation of it. Whereas, if the effects were the self-acquisition of the father, the son possesses no such right of prohibition—Mitacshara, Chap. I, Sec. 5, para. 9.

‡ Paras. 2 to 6.
§ Paras. 7 to 10.

11. Thus, reason ‡ and law § are both in favor of a father making alienation of his individual acquisitions, without the consent of his male issue. But Section 5 of the Bill under consideration gives to the father an unreserved, or, in other words, unfettered dominion over such property. To this, I have objections.

III. The provisions of law against unrestricted alienation of the whole property.

12. Under the wording of the Section in question, a Hindoo father may give away his *whole* individual acquisitions, as well immoveable as moveable, and where such acquisitions may form the *only* or chief property of the family, the alienation, I fear, would amount to "an in officious" disposition.

13. A disposition of this nature is prohibited both by the English and the Hindoo Law.

Blackstone.—Suggesting that the parent had lost the use of his reason when he made the inofficious testament.

Ibid. Volume I, page 450 (Sir Thomas Strange's Hindoo Law, Volume I, page 255)—"If had not been amiss if he (father) had not been *bound* to leave them (children) at the least a necessary subsistence."

Paley—"Let not a father hope to excuse an inofficious disposition of his fortune, by alleging that every man may do what he will with his own."

Colebrooke's Digest, Volume 2, page 112, Section XI—Menu—

"The ample support of those who are entitled to maintenance is rewarded with bliss in heaven; but hell is the portion of that man whose family is afflicted with pain by his neglect therefore, let him maintain his family with the utmost care."

Sir Thomas Strange's Hindoo Law, Volume I, pages 18 and 19—

"The restriction, as it respects the maintenance of a man's family, is against the alienation of the *whole* of his estate. The attempt is treated as a symptom of insanity, and void upon that ground."

14. Thus, the authorities are all very strong against a father disposing of his property, whether self-acquired or not, by will or gift, without making sufficient provision for the family.

IV. The desirability of imposing certain restrictions on such a power of alienation.

15. It is, however, stated in the Statement of Objects and Reasons appended to the Bill that, so far as the support of sons is concerned, we may fairly expect that a father will do his duty towards them: that no law is therefore necessary to enforce this duty; and that, on the other hand, a father otherwise disposed can evade the law by not investing his earnings in land. In conclusion, it states that it is seldom that a father would go the length of leaving his son in destitution.

16. These reasonings might, perhaps, well apply to the Town of Madras, but in the provinces the case is different. There, a father does not generally evade the law by not investing his earnings in land. On the contrary, the chief, or perhaps the first, acquisition he makes is land, and this, in many instances, he does before he becomes a father, or before his son or sons attain majority. As the sons grow up, want of concord not unfrequently creeps in, and takes deep root between them and the father. The cause of this unpleasant affair is to be traced to one or the other of the following circumstances, several of which will be found to be peculiar among Hindoos:—

I. Where the father marries a second wife on the demise of the first, and, through the influence of such a wife, manifests indifference towards the sons of the first wife, or their wives or children.

II. Where a Hindoo adopts a son, and such son becomes inclined to support the family of his natural father, against the will of his adoptive father, or proves otherwise insubordinate to his adoptive father.

III. Where a father, either himself or through the influence of his wife, shows indulgence or liberality towards his daughter, against the will of his son.

IV. Where a father or son pursues a lavish conduct and wastes property.

V. Where either the father or the son becomes addicted to vicious and immoral habits.

VI. Where both the father and son could not agree together in the management of household affairs.

VII. Where the wife of a son exercises some influence over her husband, and is also bent upon assisting the family in which she was born with the provisions belonging to her husband's family.

VIII. Where one or more of the sons beget many children, and the father attempts to make handsome disbursements from the family property, on the initiation or marriage of such children, and is opposed in his such attempt by his other sons, who are either issueless or of limited issue.

IX. Where one or more of the sons become by nature obstinate or insubordinate towards their father, and the rest are subservient to him.

X. Where the father becomes exceedingly superstitious, or becomes a tool in the hands of some artful Priest or Brahmin.

17. Actions that are daily brought in Courts by sons to compel their fathers to divide the family property with them afford proofs of the above facts. On the other hand, the ill-feeling of the father towards one or more of his sons becomes sometimes so strong that he even devises means dishonestly to disinherit * such son or sons, leaving all that he possesses to the rest of his sons, daughter, or even a stranger. Only a few days ago, I had to deal with a case in which a father, out of spite towards his son, alienated the two valies of land acquired by him, and which constituted the only property of the family in favor of a stranger, under the false pretence of having borrowed money from him on mortgage thereof, and executed a Razeenamah in Court to that effect. The Razeenamah, of course, was eventually cancelled at the instance of the son.

* *Vide* cases quoted in Strange's Hindoo Law, Vol. I, pages 263 and 264.

18. Sir Thomas Strange, in page 257 of the first Volume of his Hindoo law, supposes the case of a Will by a Hindoo, setting aside all the heirs and every other claimant on the property of the Testator, in favor of some artful Brahmin, possessing and exercising an influence over him, in his dying moments, sufficient to induce him to *sign* such an instrument, and yet not sufficient to warrant the Court in rejecting it.

19. In his letter to H. Colebrooke, Esq., dated 12th October 1812 (published in Second Volume of Hindoo Law, pages 452 and 453), the experienced and able Justice Sir Thomas Strange observes as follows:—"One thing I observe in all the Wills made by Hindoos of Madras, that a

II. The authorities bearing on the point, i.e., the power of alienation by a Hindoo of his self-acquired property.

7. Having thus given my reasons why a Hindoo father should be held competent, without the consent of his male issue to alienate by sale, gift, or otherwise, during his life-time, or to dispose of, by Will, his individual acquisitions, both moveable and immoveable, I here beg to observe that authorities are not wanting in Hindoo Law to justify such an alienation.

8. Mitacshara on Inheritance (Chap. I, Section V, paras. 9 and 10) provides as follows:—

"So likewise, the grandson has a right of prohibition if his unseparated father is making a donation or a sale of effects inherited from the grand-father, but *he has no right of interference if the effects were acquired by the father.* On the contrary, he must acquiesce, because he is dependent.

"Consequently, the difference is this: Although he have a right by birth in his father's and in his grand-father's property, still, since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property."

9. Again, in Smruti Chandrika, a work * of prevailing authority of the Madras School, next to Mitacshara, it is declared as follows:—

* Strange's Manual, page 3, paragraph 2.

† This is my own translation of the Sanscrit passage.

† "It is stated that a son possesses a right by birth in his father's and in his grand-father's property. How, in such a case, arose a difference in the extent of the son's power over the property according as it was the grand-father's or father's? The reply to this question is that, in the former, namely the grand-father's property, the right of both the son and father is equal; whereas in the latter, namely the father's property, the father alone possesses independent power over it, provided he labours under no personal disqualification. Hence occurred the stated difference in the proprietary right (of the son)."

10. That the son's power over his father's property during the life-time of the father is under the provisions of Hindoo Law as current in Madras, less than that he possesses over his grand-father's property, may further be seen from the following two circumstances:—

Firstly.—In the case of a grand-father's property, a grand-son may, at his will, and irrespective of all circumstances, compel his father to divide it with him (Mitacshara on Inheritance, Chap. I, Sec. 5, para. 8; and Strange's Manual of Hindoo Law, page 42, Sec. 238). Whereas, in the case of a father's self-acquisition, the son possesses no similar power; the text of "Yanjnyawalcya" "when the father makes a partition, etc.," cited in Mitacshara, Chap. I, Section 2, para. 1—which text is declared by Sec. 5, para. 7, of the same Chap. to relate to property acquired by the father himself—leaving it to *the pleasure* of the father to make a partition of such property with his son.

Secondly.—In the case of a grand-father's property, the grand-son has a right of prohibition, if his father is making an alienation of it. Whereas, if the effects were the self-acquisition of the father, the son possesses no such right of prohibition—Mitacshara, Chap. I, Sec. 5, para. 9.

‡ Paras. 2 to 6.
§ Paras. 7 to 10.

11. Thus, reason ‡ and law § are both in favor of a father making alienation of his individual acquisitions, without the consent of his male issue. But Section 5 of the Bill under consideration gives to the father an unreserved, or, in other words, unfettered dominion over such property. To this, I have objections.

III. The provisions of Law against unrestricted alienation of the whole property.

12. Under the wording of the Section in question, a Hindoo father may give away his *whole* individual acquisitions, as well immoveable as moveable, and where such acquisitions may form the *only* or chief property of the family, the alienation, I fear, would amount to "an in officious" disposition.

13. A disposition of this nature is prohibited both by the English and the Hindoo Law.

Blackstone.—Suggesting that the parent had lost the use of his reason when he made the inofficious testament.

Ibid. Volume I, page 450 (Sir Thomas Strange's Hindoo Law, Volume I, page 255)—"It had not been amiss if he (father) had not been *bound* to leave them (children) at the least a necessary subsistence."

Paley—"Let not a father hope to excuse an inofficious disposition of his fortune, by alleging that every man may do what he will with his own."

Colebrooke's Digest, Volume 2, page 112, Section XI—Menu—

"The ample support of those who are entitled to maintenance is rewarded with bliss in heaven; but hell is the portion of that man whose family is afflicted with pain by his neglect therefore, let him maintain his family with the utmost care."

Sir Thomas Strange's Hindoo Law, Volume I, pages 18 and 19—

"The restriction, as it respects the maintenance of a man's family, is against the alienation of the *whole* of his estate. The attempt is treated as a symptom of insanity, and void upon that ground."

14. Thus, the authorities are all very strong against a father disposing of his property, whether self-acquired or not, by will or gift, without making sufficient provision for the family.

15. It is, however, stated in the Statement of Objects and Reasons appended to the Bill that, so far as the support of sons is concerned, we may fairly expect that a father will do his duty towards them; that no law is therefore necessary to enforce this duty; and that, on the other hand, a father otherwise disposed can evade the law by not investing his earnings in land. In conclusion, it states that it is seldom that a father would go the length of leaving his son in destitution.

IV. The desirability of imposing certain restrictions on such a power of alienation.

16. These reasonings might, perhaps, well apply to the Town of Madras, but in the provinces the case is different. There, a father does not generally evade the law by not investing his earnings in land. On the contrary, the chief, or perhaps the first, acquisition he makes is land, and this, in many instances, he does before he becomes a father, or before his son or sons attain majority. As the sons grow up, want of concord not unfrequently creeps in, and takes deep root between them and the father. The cause of this unpleasant affair is to be traced to one or the other of the following circumstances, several of which will be found to be peculiar among Hindoos:—

I. Where the father marries a second wife on the demise of the first, and, through the influence of such a wife, manifests indifference towards the sons of the first wife, or their wives or children.

II. Where a Hindoo adopts a son, and such son becomes inclined to support the family of his natural father, against the will of his adoptive father, or proves otherwise insubordinate to his adoptive father.

III. Where a father, either himself or through the influence of his wife, shows indulgence or liberality towards his daughter, against the will of his son.

IV. Where a father or son pursues a lavish conduct and wastes property.

V. Where either the father or the son becomes addicted to vicious and immoral habits.

VI. Where both the father and son could not agree together in the management of household affairs.

VII. Where the wife of a son exercises some influence over her husband, and is also bent upon assisting the family in which she was born with the provisions belonging to her husband's family.

VIII. Where one or more of the sons beget many children, and the father attempts to make handsome disbursements from the family property, on the initiation or marriage of such children, and is opposed in his such attempt by his other sons, who are either issueless or of limited issue.

IX. Where one or more of the sons become by nature obstinate or insubordinate towards their father, and the rest are subservient to him.

X. Where the father becomes exceedingly superstitious, or becomes a tool in the hands of some artful Priest or Brahmin.

17. Actions that are daily brought in Courts by sons to compel their fathers to divide the family property with them afford proofs of the above facts. On the other hand, the ill-feeling of the father towards one or more of his sons becomes sometimes so strong that he even devises means dishonestly to disinherit * such son or sons, leaving all that he possesses to the rest of his sons, daughter, or even a stranger. Only a few days ago, I had to deal with a case in which a father, out of spite towards his son, alienated the two vallies of land acquired by him, and which constituted the only property of the family in favor of a stranger, under the false pretence of having borrowed money from him on mortgage thereof, and executed a Razeenamah in Court to that effect. The Razeenamah, of course, was eventually cancelled at the instance of the son.

* *Vide* cases quoted in Strange's Hindoo Law, Vol. I, pages 263 and 264.

18. Sir Thomas Strange, in page 257 of the first Volume of his Hindoo law, supposes the case of a Will by a Hindoo, setting aside all the heirs and every other claimant on the property of the Testator, in favor of some artful Brahmin, possessing and exercising an influence over him, in his dying moments, sufficient to induce him to *sign* such an instrument, and yet not sufficient to warrant the Court in rejecting it.

19. In his letter to H. Colebrooke, Esq., dated 12th October 1812 (published in Second Volume of Hindoo Law, pages 452 and 453), the experienced and able Justice Sir Thomas Strange observes as follows:—"One thing I observe in all the Wills made by Hindoos of Madras, that a

great proportion of the property is bequeathed to superstitious uses; the proportion is commonly in the ratio of the inequity with which it has been acquired, or of the sensuality or corruption to which it has been devoted.

20. To avoid all the contingencies and to prevent Section 5 of the Bill from proving a dangerous weapon in the hands of a vicious father, I beg to make the following two suggestions:

V. The extent of restriction as regards self-acquired moveable and immoveable property generally.

Firstly.—That a restriction be imposed against a father alienating his individual acquisitions, whether moveable or immoveable, *without making a sufficient provision for the maintenance of his son or sons and the other members of his family.* This, of course, is not to be restricted to bare food and raiment, but is to be adequate to the situation and circumstances of the party or parties to be maintained.

VI. The peculiar restriction necessary to be imposed on self-acquired immoveable property especially.

Secondly.—As respects self-acquired immoveable property especially, where this constitutes the only or chief property of the family, that a Hindoo may not, for the present, take liberty with it beyond one-third portion.

21. The latter suggestion I make, not only for the general reasons above shown at length, but also because, in respect of property, among Hindoos, land takes the lead in point of importance, and any sudden and sweeping change in the rule against its alienation which had hitherto been rigidly observed and enforced, is, I fear, likely to excite alarm in them. A gradual change, on the other hand, carries with it a salutary effect, and, in the meantime, it may be seen how the new law operates among the Hindoo subjects, whether beneficially or otherwise. In England, till modern times, a man was not at liberty to dispose of more than one-third of his moveables from his wife and children, and, in general, no Will was permitted of *lands* till the reign of Henry VIII, and then only of a certain portion, for, it was not till after the Restoration that the power of devising real property, became so universal in England as at present.

22. The restriction to one-third portion is further consonant to Mahomedan Law.

23. For all the foregoing reasons, I propose that Section 5 of the Bill under consideration be made to appear in the following modified form:—

"It shall be competent to a Hindoo father, after making a sufficient provision for the maintenance of his male issue and the other members of his family, to alienate, without the concurrence of his male issue, by sale, gift, or otherwise, during his life-time, or to dispose of by Will—to take effect after his death—his individual acquisitions, as well immoveable as moveable, any provisions of the Hindoo Law prevailing in this Presidency notwithstanding. Provided, however, where the family property consists only or chiefly of lands acquired by the father, the alienation shall not be held valid beyond one-third portion of such property."

Question 4.—In the last place, the Bill provides (Section 6), for reasons set forth in paragraph 4 of the Statement of Objects and Reasons, that any acquisition made without the *direct* aid or instrumentality of family funds shall be reckoned the individual acquisition of the acquirer, and that no gains, earnings, or salary accruing from any art, profession, occupation or office, shall be considered to be joint family property merely because family funds were spent in the education of the acquirer thereof.

What is your opinion of this provision of the Bill? Are you for or against it; and, in either case, why?

Answer.

I am for the Bill in respect of this Question. The justness of the proposition that every man should enjoy what he has acquired by his sole agency, without employing for the purpose what belongs in common to the family, is too plain to require demonstration by argument. Moreover, the provision in question affords, I think, a salutary check against a drone in an undivided family, making no exertion for gain, and yet aspiring to a share in the product of the labor of his industrious coparcener. The word "direct," made use of in Section 6, before "use of family funds," renders the justness of the provision more clear, for it distinctly excludes all cases in which a man by the subtlety of the law as at present existing, might lay claim to the individual acquisition of his coparcener on the ground of the acquirer having derived from the family funds assistances *collateral*, if not *direct*, to the gains. In conclusion, I view the provision in question as a powerful stimulus to labor and industry. Neither is the latter part of the Section * (which provides against gains, earnings or salary being considered to be the joint family property, merely because family funds were spent in the education of the acquirer thereof) the less reasonable. A moment's consideration will convince the thinking mind that it is more the personal genius of a learner, that the pecuniary assistance he derives from the family, that secures to him a sound and useful learning. To the *general* application of the rule, as contained in the above section, ingenuity may, however, suggest some particular exception, as by contemplating the case of a man possessing moderate

* Section 6.

means, and yet spending a considerable portion thereof in the education of his undivided brother with the hope of ultimately participating in the gains resulting from such education. But if the particular exigencies of each individual were thus to be consulted the rule, it need hardly be said, would become difficult of practical application, for it would then be necessary to consider what is the limit to be imposed on the amount of expenditure to be incurred by a family, on account of the education of a member thereof, eventually to reckon the acquisition of such a member joint or individual. But this limit will vary according to the circumstances in life of each family, the means of education available in each instance, and the notion of each individual as to the moderateness or otherwise of the expenditure incurred. And, if so, where is the line to be drawn?

2. Moreover, cases of an exceptionable character, as that above alluded to, viz., that of a man consuming a great portion of the family estate on account of the education of his coparcener, are, I conceive, of rare occurrence, and a rule, based on the broad principle of securing the largest amount of happiness in the largest number of cases, cannot be violated, however the undeviating observance thereof might work injury in particular instances

Tanjore,
Additional Principal Sudder Ameen's Court, 29*th September* 1863.

(Signed) T. Kristnasawmy,
Offg. Additional Principal Sudder Ameen.

No. 70. From the Honorable Lutchmenarasu Chetty, Member of the Legislative Council, Madras, to the Acting Secretary to Government, Fort Saint George; dated Madras, 29th November 1865.

I beg to acknowledge the receipt of your letter of the 21st September last, inviting my opinion on certain points having reference to the extension to Hindoos and Mahomedans of such parts of the Indian Succession Act, 1865, as relate to testamentary succession.

2. In reply, I have to state that as the validity of the Will of a Hindoo has been admitted by the Courts in all three Presidencies, it seems to me only right and proper that he should be provided with those securities for the due exercise of his testamentary power which are afforded by the Indian Succession Act. Of these securities he is now wholly destitute, and I would, therefore, extend to him such portions of the Act as bear upon the point. I refer to sections 50, 54 and 57, as well as to Part XI of the Act. As regards section 57, as a Hindoo is free to marry more than one wife, and as the legal claims of such wife are wholly different from those obtaining among Christians, I do not consider marriage a sufficient reason for looking upon a Will as revoked. This proviso, consequently, will have to be omitted from section 57, if it is to be extended to Hindoos. I do not believe that the Mahomedan community will have any objection to these parts of the Act being extended to them.

3. I regret, however, that I cannot consent to the extension to Hindoos of such parts of the Act as impose restraints on their power of testation. I confess that the non-existence of these restraints is much to be deplored, and I should gladly see them introduced, if circumstances permitted of this being done without exciting dread and suspicion. But I conceive that the mass of the community are not prepared for such a change as their introduction would involve. They would look upon it with alarm, as unduly interfering with their law and religion, and I, therefore, consider it highly inexpedient and impolitic to extend to Hindoos the parts of the Act referring to this matter, such as sections 101, 104 and 105. I have no means of ascertaining Mahomedan opinion on the points noticed in this paragraph.

4. I see no objection to the extension to Hindoos of sections 187 and 259, and I think it highly necessary that all the sections relating to Executors should be similarly extended.

5. It will be seen from the above that I am in favor of the extension to Hindoos of such parts of the Act as relate to the execution, revocation, interpretation and Probate of Wills, as well as to the character and powers of Executors, and that, for the reasons assigned, I am against the extension to them of those portions of it which limit and restrict the exercise of the testamentary power. The law, as regards

testamentary succession with respect to Hindoos, will thus, for the present at least, remain intact, while the power to make a Will will be efficiently secured, and the due carrying out of its provisions fully provided for.

6. I regret that illness, and press of business did not allow of my replying to you earlier.

No. 71. From V. RAMIENGAR, Assistant in the Currency Department, to the Acting Secretary to Government, Fort Saint George; dated Trichinopoly, 12th October 1865.

I have had the honor to receive your letter of the 21st ultimo, No. 1367, accompanied by a copy of one from the Government of India, relative to a proposal to extend to Hindoos and Mahomedans such parts of the Indian Succession Act (X of 1865) as relate to testamentary succession.

2. I observe that it is not proposed, and properly so, to increase in any respect the testamentary power possessed by Natives, no to give it to any who do not at present possess it, but only to provide rules calculated to ensure its being exercised beneficially to the community, and satisfactorily to the surving relatives of individual Testators. Such regulation of the power, now that the liberty of testation is an established fact, and is freely exercised by the more advanced portion of the Native Community, appears to me to be only a necessary consequence of the growth of the practice of making Wills, which has arisen out of our intercourse with the West. I am, therefore, of opinion that all those provisions of the Succession Act which relate to the execution, revocation, interpretation, and probate of Wills may be advantageously extended to the Hindoos. Those provisions are founded on the experience of England, and have been modified by the Commissioners who prepared the Succession Act, so as to suit the condition and circumstances of this country.

3. As regards the rules affecting the limitation of the testamentary power, the restraint imposed (section 101) on the creation of successive trusts in property appears wholesome. So, also, the provision (section 104) against accumulating trusts may, I think, be beneficially adopted; but I am not equally clear as to the expediency of the rule, as it now stands (section 105), against death-bed bequests to charitable uses, by persons having near relatives.

The Section referring to this subject runs as follows:—

"No man having a nephew or niece, or any nearer relative, shall have power "to bequeath any property to religious or charitable uses, except by a Will executed "not less than twelve months before his death, and deposited, within six months "from its execution, in some place provided by Law for the safe custody of the "Wills of living persons." And, among the charitable objects enumerated in the "illustration," are —

The relief of poor people;
The maintenance of sick Soldiers;
The erection and support of Hospitals;
The education and preferment of Orphans;
The support of Schools and Scholars; and
The making of Roads and Bridges.

All bequests, then, for such purposes, as I read the Section, are void, unless the Will is executed not less than twelve months before the death of the Testator, and deposited within six months from its execution; and this, even though the surviving relatives may have been sufficiently provided for, and only a portion of the property left for charitable objects

4. I do not perceive the propriety or expediency of such a restriction. In the first place, it is hardly equitable, and is opposed to natural justice, that a man should not have the power of disposing of his own self-acquisition in the manner he thinks most advantageous, the Hindoo Law of course asserting its power on behalf of surviving relatives as respects ancestral property. It is true that hard-earned and valuable property is sometimes willed away for worthless objects under the promptings of superstition; but, on the other hand, with the spread of education and enlightenment which is now taking place, educated natives may desire to leave a part of their

earnings for the promotion of public education; or a public-spirited individual may wish to apply some part of his accumulated fortune to objects of real benevolence or of general utility, and, I imagine that the policy of the Legislature should rather be to encourage than to oppose obstacles to such acts. It may be said that persons so disposed have only to make their Wills twelve months or earlier before their death, and deposit them for safe custody under the Registration Act. Suppose a man of sound mind, and, as he fancies, in sound bodily health, accordingly makes and duly deposits his Will, when his mind is not enfeebled by disease, or when he is in no fear of approaching death; but, as it often happens, he unexpectedly dies in a month afterwards, or in six or even ten months, and his bequests to charitable uses would be void, simply because he had not lived out the twelve months required by Law to intervene between the date of his Will and that of his death. Such deaths are by no means rare.

5. But it should be remembered that it is only perhaps when in the expectation of impending death, and of shortly having to appear at the bar of Heaven, that some men will think of atoning for past neglect or past faults, or of perpetuating their names, by leaving a portion of their wealth for objects of benevolence, or for purposes of public utility and importance; and to deny them, in such situations, the power of doing so, in respect of their self-acquired gains, appears neither just nor expedient.

6. I am satisfied that, as far as the Hindoos are concerned, the restriction imposed by the Section under consideration would operate, in practice, as a total prohibition of bequests of any kind to objects, however benevolent or useful. The idea of a Will and the idea of death are so intimately connected in most minds, that the generality of men cannot bring themselves to arrange for the posthumous disposition of their property, until actually impelled to it by the pressure of approaching danger. Such is the case with the great majority of the Hindoos at least, who, generally speaking, do not and will not make their Wills as long as they can possibly stave it off. They are swayed by a sort of superstitious fear, and consider the making of a Will an ominous affair – in fact, as the signing of their own death-warrant. Under such circumstances, the adoption of the 105th Section must amount to an absolute inhibition of all bequests except to near relatives. This seems to me to be going beyond the real necessities of the case. It is true that the interests of near surviving relatives should be cared for. By the Hindoo Law, all ancestral property is preserved to them; and, as regards self-acquired property, those interests may be safely left to be protected by the ties of natural affection, and by the self-interest of the parties themselves, who, if the Testator is really enfeebled in mind by disease or fear, are far from likely to expose him, in that condition, to the influence of designing Priests, to the prejudice of their own interests.

7. For these reasons, I would deprecate the adoption of Section 105.

8. But even admitting the necessity for imposing some restraint on the testamentary power in respect of bequests for charitable purposes, I fail to see why a Testator, after providing for his surviving relatives, should not be at liberty to dispose of the remainder of his property in the manner most agreeable to his own feelings and wishes. All bequests made upon illegal, immoral, or impossible conditions would, of course, be void—(See Sections 113 and 114).

No. 72. From A. P. STRENEVASSA, Principal Sudder Ameen of Tinnevelly, to the Chief Secretary to Government, Fort Saint George; dated Tinnevelly, 5th January 1866, No. 11.

In reply to the letter, No. 1367, of the late Acting Secretary Mr. Hudleston, dated the 21st September, and yours, No. 1766, dated the 14th ultimo, I have the honor to submit that the proposed extension to Hindoos and Mahomedans of such parts of the Indian Succession Act as relate to testamentary succession, is a measure, not only very beneficial to the community, but absolutely necessary. Power of testation, when properly exercised, is no doubt capable of producing much good, but the extension of that power to a proverbially litigious people, without any safeguard against its abuse, or against fraud, will certainly prove a prolific source of mischief.

2. Various points connected with the subject have been so fully discussed in the letter from the Government of India, that there is nothing left for me to add.

No. 73. To the Secretary to the Government of India, Home Department, No. 1212, Judicial, dated Fort Saint George, 6th August 1866.

In acknowledging the receipt of your letter of the 22nd August last, No 1247, calling for the opinion of this Government on the expediency of extending to the Hindoos, Mahomedans, and Buddhists, or any and which of them, such parts of the Indian Succession Act, 1865, as relate to testamentary succession, I am directed to submit, for the consideration of His Excellency the Governor General in Council, the papers noted in the margin, containing the observations of those whom the Government have consulted on the subject, and to offer the following remarks.

From the Puisne Justice of the High Court.
„ Honorable Mr. Justice Holloway.
„ „ Innes.
„ „ Collett.
„ the Advocate General.
„ Kistnasawmy Iyer, Principal Sudder Ameen of Chittoor.
„ Honorable Latchmenarasu Chetty, Member of the Legislative Council.
„ V. Ramiengar, Assistant in the Currency Department.
„ A. P. Streenevassa, Principal Sudder Ameen of Tinnevelly.

2. It will be seen that all the authorities are agreed as to the advisability of applying to the Hindoos and Mahomedans such parts generally of the Indian Succession Act, as relate to the execution, revocation, interpretation, and probate of Wills. In this opinion the Governor in Council concurs. Where the testamentary power already exists, it seems, not merely desirable, but necessary, that the requisite securities for its due exercise, and for the prevention of fraud, should also exist. In this view, Parts VIII, IX, X and XI may, subject to the following remarks on particular Sections, be advantageously extended:—

Part X, Section 56.—This Section seems wholly inapplicable to Hindoos and Mahomedans, and should be omitted.

Part X, Section 57.—Marriage among Natives would not operate as a revocation of a prior will.

Part XI, Sections 78 and 79—Seem unsuitable to the condition of the Natives, and should be omitted.

Part XI, Section 86.—Appears unnecessary, as applied to Natives of this country.

Part XI, Section 88.—The 3rd and 4th Articles of this Section are stated to be repugnant to the doctrines of Mahomedan law.

Mr. Justice Innes' letter, paragraph 10.

3. Regarding the provisions of Part XII, opinion is divided. It is argued, on the one hand, that the restraints upon the testamentary power contained in this portion of the Act are wise and politic; that the grounds of public policy in their favor are strong; and that the power of making Wills, in the case of the Hindoos at least, being derived from English law, and being of very recent creation, the Legislature is entitled to subject the exercise of it to such restraints as it may deem fit to impose. On the other hand, it is urged, as respects the provisions against perpetuities, that, practically, the question does not often arise; that the strong tendency of English Lawyers is calculated to reduce the supposed evils of such devises within the narrowest limits, and that a provision against a problematical evil will be liable to misapprehension and mischievous misconstruction; that the provisions of the Mahomedan Law on the subject of bequests are in some points in conflict with those of the Succession Act, and are in other respects so full and ample as to render further legislation in the matter undesirable; that it would be exceedingly impolitic to impose upon the Mahomedans any fresh rules, which would have the effect of superseding any part of their existing Law, which they regard as of divine origin; that, with respect to bequests for superstitious uses, their law sufficiently secures the interests of near relatives by confining the testamentary power to one-third of an estate; that neither the Hindoos nor Mahomedans are prepared for such provisions as are embodied in Part XII, which are, in fact, in advance of the general state of Native Society, and that the mass of the people would look upon the restrictions with alarm as unduly interfering with their law and religion.

4. Looking to this difference of opinion, and to the decided expression of Native feeling on the subject, as contained in the communications of the Native Gentlemen who have been consulted, and considering also that the practice of making Wills among the Natives is of but very recent origin, and exists among only the more wealthy and intelligent few in the larger towns, the Governor in Council is not prepared to advise the extension, for the present, of Part XII of the Succession Act to either Hindoos or Mahomedans.

5. Parts XIII to XVII and Parts XIX to XXVIII contain rules of apparently general application, but some of them are such as would rarely come into operation as regards Hindoos and Mahomedans, while others are stated to be in conflict with the rules of Mahomedan Law. The parts in question might, therefore, the Governor in Council thinks, be omitted. Part XVIII might perhaps be extended as containing a wholesome provision.

6. Parts XXIX to XXXI relate to the grant of Probate and Letters of Administration. These it seems desirable to extend to Hindoos and Mahomedans, but there are certain points in connection with this portion of the subject requiring consideration. As pointed out by Mr. Justice Innes, under the Succession Act, as under the English Law, the testamentary power is unlimited as to the nature and amount of the property of the Testator; but by the Mahomedan Law it is limited, a Will not being valid beyond a third of the Estate of the Testator, except with the assent of the heirs given *after* the death of the Testator. So, also, by Hindoo Law, the testamentary power is limited, in some relations of life, as to the amount of property which a man may bequeath, and, in others, as to kind. While by the Succession Act, therefore, all that has to be done, on an application for Probate, is to determine whether the Will was actually executed by a person who was of sound mind and not a minor, and to grant Probate of the Will; in the case of Hindoo and Mahomedan Wills, there would have to be made the still further inquiry which is not contemplated by the Succession Act, whether, with reference to the nature and extent of the property bequeathed, the Will is valid. Unless this inquiry were made, the grant of Probate, which would vest in the Executor or Administrator the whole property of the deceased, or the whole bequeathed by him, would, it is urged, and the Government think with much truth, be a source of injury to those rightfully entitled to resist the Will. The Governor in Council concurs with Mr. Justice Innes, in thinking that the Judge should have the power of summarily determining such questions prior to the grant of Probate, leaving the final and conclusive determination of them, if further disputed, to a decree in a regular suit, and to take security from the person to whom Probate may be granted for the restitution or refund of property to which it may be eventually found that he is not entitled.

7. Again Part XXIX should, the Governor in Council thinks, be extended only so far as it affects *testacy*. The taking out Administration in all cases of intestacy should not be compulsory. As remarked by the Advocate General, this would be introducing too sweeping and violent a change. Under the present Law (Act XXVII of 1860), the representative of a deceased person may, and often does, recover debts due to the Estate, even in a Court of Law, without having taken out Probate, Administration, or Certificate. If the Court is satisfied that the debt is withheld "from fraudulent "or vexatious motives, and not from any reasonable doubt as to the party entitled," the production of Probate is not requisite.

Section 2, Act XXVII of 1860.

8. Another point to be noticed is that the 200th and following Sections, which are based on the preferable right of the widow in English Law to administer to her deceased husband's estate, are unsuited to Hindoos and Mahomedans. It will be necessary to provide in their case that persons may obtain Letters of Administration, in the order of their heirship, according to their respective laws, and that, where there are several heirs in the same degree, the Courts may grant the Letters to one or more of such.

9. Parts XXXII to XXXIV inclusive, and Part XL, regarding the powers, duties, and liabilities of Executors, should be extended. It seems hardly necessary to adopt Parts XXXV to XXXIX.

(Signed) A. J. ARBUTHNOT,
Chief Secretary

From
The Honorable L. H. Irvine
Judge of the Hight Court of
Judicature at Madras

To His Excellency
Sir William J. Newnham K.C.B.
Governor in Council
Fort St. George.

Honorable Sir,

I have received with a
request conveyed in the letter of the
Secretary to the Government of Madras
dated the 21st September, I have
the honour to offer any opinion on the
points referred to in the letter of the
Secretary to the Government of Madras
to the Government of Fort St. George
dated 22d August last.

2. I think that Chapter VIII and
Chapters X to XXVII of the Indian Succession
Act in so far as they relate to the execution,
revocation, interpretation and probate
of wills with exception of so far

sections might with advantage be extended to the Hindus of British India following the ordinary Hindu Law of property as distinguished from the Law called Aliya Santana and Marumakkatayam prevailing on the western Coast of Southern India.

3. I also think that with certain exceptions Chapters VIII and X relating to the execution and revocation of wills ~~and Chapter~~ XI containing simple rules relating to the construction of wills might be extended to Mahomedans.

4. The provisions of the Mahomedan Law on the subject of the Chapters XII to XXVII relating to bequests are in some points in conflict with the provisions of the Succession Act and are in other respects so full and ample as to render further legislation undesirable. It would be exceedingly impolitic to impose upon the Mahomedans such a body of law as would have the effect of superseding any part of their existing Law which they regard as of Divine origin.

5. I do not understand that it is proposed to extend Chapter XXVIII as to gifts made in contemplation of death to others than the classes to whom the Succession Act is at present applicable, but I think it might with some advantage be extended to Hindus. The rule of the Mahomedan Law appears to be that the gift does take effect notwithstanding recovery, and as there is this distinct provision in the Mahomedan Law it would be improper to interfere with it.

6. By the Succession Act as by the English Law the testamentary power is unlimited as to the nature and amount of the property of the Testator.

But by the Mahomedan Law it is provided, as well as by Hindu Law, that a third of the estate of the testator is exempt from the control of the testator, such control to be given after the death of the testator. By Hindu Law the testamentary power is limited to the acquisition of property for religious purposes which is exempt from the control of heirs. By Mahomedan Law the testamentary power is limited to the disposition of property for religious purposes which is exempt from the control of heirs. By Buddhist Law the testamentary power is limited to the disposition of property for religious purposes which is exempt from the control of heirs.

7. While by the Succession Act therefore

Judicial Department.

No. 1212

To

The Secretary to the Government
of India,
Home Department.

Sir,

In acknowledging the receipt of your letter of the 22nd August last, No. 1267, calling for the opinion of this Government on the expediency of extending to the Hindus, Mahomedans and Buddhists or any and which of them, such parts of the Indian Succession Act 1865 as relate to Testamentary Succession, I am directed to submit for the consideration of His Excellency the Governor General in Council the papers noted in the margin containing the observations

From the Puisne Justice of the High Court
" Hon'ble Justice Kemp.
" " Innes
" " Collett
" " The Advocate General
" Rev. Thomas Sykes M.A.
" Hon'ble Lutchmeenarain Chetty
Member of the Legislative Council
" Ramayyan Esq. Collector

A. P. Steenevyfa
P.C.S. to Secretary.

of those whom the Govt. have consulted on the subject, and to offer the following remarks.

2. It will be seen that all are agreed as to the advisability of applying to the Hindus and Muhammedans such parts generally of the Indian Succession Act, as relate to the execution, revocation, interpretation and probate of wills. In this opinion the Governor in Council concurs. Where the testamentary power already exists, it seems not merely desirable but necessary that the requisite securities for its due exercise and for the prevention of fraud, should also exist. In this view, Parts VIII, IX, X and XI may, subject to the following remarks on particular

particular sections, be advantageously extended.

Part X. Sec 56. This section seems wholly inapplicable to Hindus and Muhammedans, and should be omitted.

" Sec 57 Marriage among natives would not operate as a revocation of a prior will.

Part XI Sec 78 & 79. Seem inevitable in the condition of the natives and should be omitted.

" Sec 86. Appears unnecessary as applied to natives of this country.

" Sec 88. The 3d and 4th Articles of this section are stated to be repugnant to the doctrines of Muhammedan Law.

Hd. Justice Innes's letter Para 10.

3. Regarding the provisions of Part XII, opinion is divided. It is argued, on the one hand, that the restraints upon the testamentary power contained in

in this portion of the Act are mild and salutary, that the grounds of public policy in their favor are strong, and that the power of making wills in the case of the Hindus at least, being derived from English Law, and being of very recent creation, the Legislature is entitled to subject the exercise of it to such restraints as it may deem fit to impose. On the other hand, it is urged as respects the provisions against perpetuities that practically the question does not often arise; that the strong tendency of English Laws is calculated to reduce the supposed evils of such devises within the narrowest limits.

And

and that a provision against a problematical evil will be liable to mischievous misconstruction; that the provisions of the Mahomedan Law on the subject of bequests are in some points in conflict with those of the Succession Act, and are in other respects so full and ample as to render further legislation in the matter undesirable; that it would be exceedingly impolitic to impose upon the Mahomedans any fresh rules which would have the effect of superseding any part of their existing Law, which they regard as of divine origin; that with respect

respect to bequests for superstitious uses, their law sufficiently secures the interests of dear relatives by confining the testamentary power to 1/3 of an Estate, that neither the Hindus nor Mahomedans are prepared for such provisions as are enbodied in Part XII, which are in fact in advance of the general State of native society, and that the mass of the people would look upon the restrictions with alarm as unduly interfering with their law and religion.

11. Looking to the difference of opinion, and to the decided expression of native feeling on the subject, as contained in the communications of the native Gentlemen who have been consulted, and considering also that the practice of making wills among the natives is of but very recent origin, and exists among only the more wealthy and intelligent few in the larger Towns, the Governor in Council is not prepared to advise the extension for the present, of Part XII of the Succession Act to either Hindus or Mahomedans.

5. Parts XIII to XVII and Parts XIX to XXVIII contain rules of apparently general application, but some of them are such as would rarely

rarely come into operation as regards Hindus and Mahomedans, while others are stated to be in conflict with the Rules of Mahomedan Law. The Parts in question might therefore, the Governor in Council thinks, be omitted. Part XVIII might perhaps be extended as containing a wholesome provision.

6 Parts XXIX to XXXI relate to the grant of Probate and Letters of Administration. These it seems desirable to extend to Hindus and Mahomedans, but there are certain points in connection with this portion of the Subject requiring consideration. As pointed out by Mr. Justice Innes, under the Succession Act as under the English Law, the testamentary power is unlimited as to the nature and amount of the property of the testator; but by the Mahomedan Law it is limited, a will not being valid beyond a third of the Estate of the testator, except with the assent of the heirs given after the death of the testator. So also by Hindoo Law the testamentary power is limited, in some relations of life, as to the amount of property which a man may bequeath, and, in others, as to kind. While by the Succession Act, therefore, all that has to be done on an application for

for Probate, is to determine whether the will was actually executed by a person who was of sound mind and not a minor, and to grant Probate of the will, - in the case of Hindu and Brahomedan wills, there would have to be made the still further inquiry which is not contemplated by the Succession Act, whether, with reference to the nature and extent of the property bequeathed, the will is valid. Unless this inquiry were made, the grant of Probate, which would vest in the Executor or Administrator the whole property of the deceased, or the whole bequeathed by him, would,

if

could like Jodge Arnold with much truth

it so urged, be a source of injury to those right-fully entitled to resist the will. The Governor in Council concurs with Mr Justice Innes in thinking that the Judge should have the power of Summarily determining such questions prior to the grant of probate, leaving the final and conclusive determination of them, if further disputed, to a decree in a regular Suit, and to take Security from the person to whom probate may be granted for the restitution or refund of property to which it may be eventually found that he is not entitled.

7. Again Part XXIX should, the Governor

in

in Council thinks, be extended only so far as it affects testacy. The taking out administration in all cases of intestacy should not be compulsory. As remarked by the Advocate General, this would be introducing too sweeping and violent a change. Under the present law (Act 27 of 1860) the representative of a deceased person may and often does recover debts due to the Estate even in a Court of Law without having taken out Probate, Administration, or Certificate. If the Court is satisfied that the debt is withheld "from fraudulent or "vexatious motives and "not from any reasonable "doubt

Sec 2 Act XXVII of 1860.

"doubt as to the party "entitled" the production of probate is not requisite.

D. Another point to be noticed is that the 200th and following Sections which are based on the preferable right of the widow in English Law to administer to her deceased husband's Estate, are unsuited to Hindus and Mahomedans. It will be necessary to provide in their case that persons may obtain letters of administration in the order of their heirship according to their respective Laws, and that where there are several heirs in the same degree, the Courts may grant the letter to one or more of such.

Vide

9. Parts XXXII to XXXIV inclusive and Part XL regarding the powers, duties and liabilities of Executors should be extended. It seems hardly necessary to adopt Parts XXXV to XXXIX.

Fort St. George
6 August 1868

There are some remarks on Mr Norton & Mr Holloway's letters touching the Act for dividing the Calcutta Cases. However with Sir Barnes Peacock, they think that Act should be extended. It seems hardly necessary to adopt Parts XXXV to XXXIX.

30 Aug.

Inserted 30 Aug
Sent it

Judicial 1866. Depart.

N° 1212.

To

The Secy. to the Govt.

of India

Dated 6th August 1866

63673

Quality
(3)