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THE LAW RELATING TO MINORS
IN BRITISH INDIA.

THE LAW RELATING TO MINORS

AS ADMINISTERED IN THE PROVINCES SUBJECT TO
THE HIGH COURTS OF BRITISH INDIA.

TOGETHER WITH THE PRACTICE OF THE COURTS OF WARDS
IN BENGAL, BIHAR AND ORISSA, MADRAS, BOMBAY, AND
THE UNITED PROVINCES OF AGRA AND OUDH.

FIFTH EDITION

REVISED.

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LAW RELATING TO MINORS IN BRITISH INDIA.

CHAPTER I.

AGE OF MAJORITY AND DOMICILE.

A MINOR is a person who has not attained the age of majority according to the personal law to which he is subject. This age is arbitrarily fixed by the law of each country, and is chosen with reference to the time of life at which persons are ordinarily capable of the management of their own affairs. Minor.

Until the passing of the Indian Majority Act,¹ there was no uniform age of majority in British India. The age of majority of Hindus and Mahomedans was determined by the provisions of their respective laws, modified under certain circumstances by Acts of the Legislature; while the limit of the minority of European British subjects, and other inhabitants of India, was derived from other sources of law. Age of majority before Majority Act.

The Hindu law did not originally fix any specific age of majority. Hindu law. Manu says: ² "Let a Brahmin, having dwelt with a preceptor during the first quarter of a man's life, pass the second quarter of human life in his own house, when he has contracted a legal marriage." We find the following in the Narada Smriti: ³ "A child is comparable to an embryo up to his eighth year; a boy is called *pauganda* (youth) up to his sixteenth year. Afterwards he is of age and independent, in case his parents be dead; during their lifetime he is dependent even though he be grown old." Narada Smriti. The interpretation put upon this last text by the pundits was, that the sixteenth year is the

¹ IX of 1875.

² Chap. iv, para. I.

T. L.R.M.

³ Chap. iii, paras. 37, 38, Jolly's translation.

limit of minority for Hindus ; but opinions varied as to whether the limit was the first or the last day of the sixteenth year.¹

Bengal school.

The writers of the Bengal school of law accepted the first day of the sixteenth year, that is to say, the termination of the fifteenth year, as the limit of minority,² both for males and females.³ This interpretation was adopted by the English courts of law in Bengal.⁴

Mitakshara school.
Jain law.

The schools of law which are based on the Mitakshara, placed the age of majority at the expiration of the sixteenth year,⁵ which was also the limit of minority for persons subject to the Jain law.⁶

Mahomedan law.

Puberty is the test of majority according to Mahomedan law.⁷

The Koran.

In the Koran it is said :⁸ " Examine the orphans until they attain the age of marriage (or age of maturity) : but (*i.e.* and then) if you perceive they are able to manage their affairs well, deliver their substance unto them ; and waste it not extravagantly, or hastily, because they grow up (*i.e.* because they will shortly be of age) to receive what belongs to them."

In addition to the *bulugh*, or age of puberty, they must have attained the *rashad*, or true path,—*i.e.* the knowledge to judge good from bad, to understand religious matters, and

¹ See remarks in note to *Lachman Dass v. Rupchand* (1831), 5 Ben. Sel. Rep., 115, 2nd Edn., 136.

² *Lachman Dass v. Rupchand* (1831), 5 Ben. Sel. Rep., 115, 2nd Edn., 136. See Annotation of Srikrishna to the Dayabhaga, chap. iii, verse 17 ; Macnaghten's Hindu Law, vol. i (Edn. 1829), p. 103.

³ Macnaghten's Hindu Law, vol. ii (Edn. 1828), pp. 219, 220.

⁴ *Cally Churn Mullick v. Bhuggobutty Churn Mullick* (1872), 10 B. L. R., 231 ; 19 W. R. C. R., 110 ; *Monsoor Ali v. Ramdyal* (1865), 3 W. R. C. R., 50 ; *Deobomoyee Dossce v. Juggessur Hati* (1864), 1 W. R. C. R., 75 ; *Luckheenarian Mujmodar v. Muddhosodun*, Ben. S. D. A., 1853, p. 505 ; *Shebsunker Dass v. Uluck Chunder Aych*, Ben. S. D. A., 1859, p. 885.

⁵ Strange's Hindu Law, vol. i, p.

72 ; vol. ii, pp. 76, 77, 80 ; Macnaghten's Hindu Law, vol. i, chap. vii (Edn. 1829), p. 103.

⁶ *Govindnath Roy (Maharajah) v. Gulal Chand* (1833), 5 Ben. Sel. Rep., 280 ; 2nd Edn., 322.

⁷ *Rumzaun Ally*, 4 Sev., 851 ; Bailie's Law of Sale, 2. In his speech on the Majority Bill, reported at p. 670 of the Supplement to the *Gazette of India* for April 25th, 1874, the Maharajah of Vizianagram quotes the opinion of Munshi Amcer Ali, whom he describes as an acknowledged and highly respectable Mahomedan authority, that the age regarding majority prescribed in the Mahomedan law has direct reference to young persons acquiring right for practising offices connected with religion.

⁸ Chap. iv, Sale's Translation.

to manage their property efficiently, before the property can be delivered over to them.¹

The Durr-ul-Mukhtar expressly lays down,² that the completion of the fifteenth year is the limit of minority, unless signs of puberty occur at an earlier age; and this authority is supported by the Jami-ur-Ramuz. Durr-ul-Mukhtar.

Haneefa fixed the age of majority for males at the completion of eighteen years, and for females at the completion of seventeen years, if they do not show signs of puberty at an earlier age. Haneefa's two disciples (Abu Yusuf and Muhammed) fixed the age of majority at the end of the fifteenth year for both males and females, and there is one report of Haneefa to the same effect.³ The opinions of Abu Yusuf and Muhammed on this subject may be taken as equal to, if not surpassing that of their master.⁴ Haneefa.
Abu Yusuf and Muhammed.

The author of the Hedaya⁵ may be also taken as supporting the opinion of the two disciples in preference to that of their master.⁶ Hedaya.

There, therefore, seems to be uncertainty as to the limit of minority under the Mahomedan law for males as well as for females; ⁷ but all writers concurred in fixing puberty as the test of majority, with the proviso that the earliest age of majority was twelve years in respect of a boy and nine years in respect of a girl, there being an irresistible presumption that before those ages there could be no puberty.

The result of the authorities seems to be that, among the Hanafis and the Shiahs, at the expiration of the fifteenth year, and among the Malikis at the completion of the eighteenth year,⁸ an irresistible presumption of puberty arises. Result of authorities.

¹ Durr-ul-Mukhtar. See Supplement to *Gazette of India*, April 25th, 1874, p. 670.

² See Tagore Law Lectures for 1872, by Shama Churn Sircar, p. 473.

³ See Hedaya, vol. iii, bk. xxxv, chap. ii, Hamilton's Translation, Edn. 1791, pp. 482 and 483.

⁴ See Morley's Digest, Introduction, pp. cclxii. and cclxiii.

⁵ Burhan-uddin Ali.

⁶ See Tagore Law Lectures for 1873, note to p. 474.

⁷ *Roshun Jahan (Ranee) v. Enact*

Hossein (Rajah Syud) (1866), 5 W. R. C. R., 4; *Muttoo v. Nasirulee Khan*, 2 Sel. Rep., S. D. A. N. W. P., 473.

⁸ See Macnaghten's Mahomedan Law, Precedents, chap. iv, case 17; Ameer Ali's Mahomedan Law, vol. ii (2nd Edn.), p. 467. Mr. Ameer Ali, at pp. 467, 468, states that the Mahomedan law recognized two ages of majority, the age of puberty and the age of discretion, there not being an absolute presumption as to the latter until the attainment of the eighteenth year.

Puberty of female.

There is authority that in the absence of evidence to the contrary, a Mahomedan girl who has attained the age of nine years is to be taken as having attained the age of puberty.¹

Statement of minor as to age.

The Mahomedan law required that the declaration of a boy or girl, who had passed the minimum age, should be taken as conclusive;² but it is submitted that the question will now, when it arises in a proceeding in a Court of law, be determined only by the rules contained in the Indian Evidence Act.³

Thus the Mahomedan law, and the Hindu law current in Bengal, pointed to the end of the fifteenth year as the time when persons are to be considered competent to manage their own affairs.⁴

European British subjects.

Before the passing of Act IX of 1875, the age of majority of European British subjects⁵ was regulated by the English law, which fixed the limit of minority at the end of the twenty-first year.⁶ The same limit applied to East Indians, Native Christians who had renounced the old law by which they were bound,⁷ Jews,⁸ and all persons other than Hindus and Mahomedans.

East Indians. Native Christians, Jews.

Illegitimate children.

The age of majority of the illegitimate children of native women by European British subjects or by other persons whose age of majority was determined by the English law, was determined by the Hindu, Mahomedan, or English law, according as they had been brought up as Hindus, Mahomedans, or Europeans.⁹

Ben. Reg. X of 1793.

The Hindu and Mahomedan laws current in Bengal with reference to the age of majority were recognized in Bengal by sec. 28 of Bengal Regulation

¹ See *Mulka Jehan Sahiba (Newab) v. Mahomed Ushkuree Khan* (1873), I. A., Sup. Vol. 192; 26 W. R. C. R., 26.

² Hedaya, vol. iii, bk. xxxv, chap. ii; Macnaghten's Mahomedan Law, Precedents, chap. vi, cases 17 and 18; *Shumsoonnissa v. Ashrafoonissa*, 2 Sev. 299.

³ I of 1872. See Wilson's Digest of Anglo-Muhammadan Law (4th Edn.), pp. 177, 178. As to the proof of minority, when in issue, see *post*, chap. xxix.

⁴ See the preamble to Bengal Regulation XXVI of 1793.

⁵ As to what is a European British subject, see *post*, p. 58, note 7.

⁶ *Rollo v. Smith* (1867), 1 B. L. R.

O. C., 10; *Sultan Chand v. Smyth* (1873), 12 B. L. R., 358; *Byjenaut Singh v. Reed* (1821), 2 Morley's Digest, 36; *Hearsey v. Girdharee Lal* (1871), 3 N.-W. P. H. C. Rep., 338.

⁷ See *Abraham v. Abraham* (1863), 9 M. I. A., 199; 1 W. R. P. C., 1; *Hogg v. Greenway* (1863), 2 Hyde, 3; Coryton, 97.

⁸ See *Musleah v. Musleah*, 1 Bouleau, 234.

⁹ See *Myna Boyce v. Ootaram* (1831), 8 M. I. A., 400; 2 W. R. P. C., 4, s.c. on remand (1864), 2 Mad. H. C., 196. As to the status of the illegitimate children of a Hindu father and a non-Hindu mother, see *Lingappa Goundan v. Esudasan* (1903), 27 Mad., 13.

X of 1793,¹ which declared that minority with respect to both Hindus and Mahomedans is limited to the expiration of the fifteenth year. That section was, however, rescinded by Bengal Regulation XXVI of the same year, by which² the minority of Hindu and Mahomedan proprietors of estates, paying revenue to Government, was declared to extend to the end of the eighteenth year. Ben. Reg. XXVI of 1793.

The next enactment, affecting the age of majority of Hindus and Mahomedans in Bengal, was Act XL of 1858, which provided for the care by the Civil Court of the persons and property of minors (not being European British subjects), who had not been brought under the superintendence of the Court of Wards. For the purposes of that Act the age of majority was fixed at eighteen years.³ Act XL of 1858 has been repealed.⁴ Act XL of 1858.

By the Bengal Court of Wards Act,⁵ which placed under the superintendence of the Court of Wards all minor proprietors of entire estates (other than proprietors who were subject to the jurisdiction as respects infants of a High Court), the word "minor" was defined⁶ as a person under the age of eighteen years.⁷ The Bengal Court of Wards.

Madras Regulation V of 1804, which constituted a Court of Wards⁸ Madras law. for the Madras Presidency, provided⁹ that "where minors may succeed to heritable property, they shall not, in any case, be competent to take charge of, or to administer their own affairs during the period of their minority, and for the better understanding thereof the duration of minority shall, without exception, continue until the completion of the eighteenth year of age."

Act XX of 1864 which was in force in the Bombay Presidency contained provisions similar to those of Act XL of 1858. Bombay law.

To add to the complications of the law as to the age of majority before the passing of Act IX of 1875, there were several other Acts fixing the age of majority for the special purposes of such Acts.¹⁰ Age of majority for special purposes.

In 1875 the Indian Majority Act (IX of 1875) was passed, as its preamble states, for the purpose of prolonging the period of nonage and attaining more uniformity and certainty respecting the age of majority in the case of persons domiciled in British India. Indian Majority Act.

¹ The Regulation which established the Court of Wards.

² Sec. 2. The unrepealed portions of Regulation XXVI of 1793, were repealed by Act XXIX of 1871, save as therein provided. For the decisions under this regulation, see Tagore Law Lectures, 1877, pp. 7 and 8.

³ Sec. 26.

⁴ Act VIII of 1890.

⁵ Act IV (B. C.) of 1870.

⁶ Sec. 2.

⁷ This Act was repealed by the Court of Wards Act, 1879 (Act IX (B. C.) of 1879), sec. 3 of which

defined a minor as a person who has not completed his age of twenty-one years. See *post*, p. 9.

⁸ That Regulation was repealed by Madras Act I of 1902, sec. 2.

⁹ Sec. 4.

¹⁰ See the Succession Act (X of 1865), sec. 3, applied to Hindus by The Hindu Wills Act (XXI of 1870), sec. 6; the Limitation Act (IX of 1871), sec. 3; the Government Savings Bank Act (V of 1873), sec. 3; Indian Christian Marriage Act (XV of 1872), sec. 3; the N.-W. P. Land Revenue Act (XIX of 1873), sec. 3 (12).

Extent of Act.

It extends to the whole of British India, and so far as regards subjects of His Majesty, to the dominions of Princes and States in India in alliance with His Majesty.¹

Majority of persons under Court of Wards or of whom guardian appointed by Court.

As amended by Act VIII of 1890, sec. 52, that Act provides² that every "minor of whose person or property or both a guardian, other than a guardian for a suit within the meaning of Chapter XXXI of the Code of Civil Procedure,³ has been or shall be appointed,⁴ or declared by any Court of Justice⁵ before the minor has attained the age of eighteen years,⁶ and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards⁷ before the minor has attained that age shall, notwithstanding anything contained in the Indian Succession Act (No. X of 1865), or in any other enactment, be deemed to have attained his majority when he shall have completed the age of twenty-one years and not before."

Express appointment necessary.

To effect an extension of the age of majority there must be an actual appointment or declaration of a guardian by a competent Court in accordance with the procedure provided by law. A grant of probate to a person, who has been appointed guardian by will, does not amount to an appointment of guardian by the Court, or affect the age of majority.⁸

The extension of the age of majority has also been treated as applying

¹ Sec. 1.

² Sec. 3.

³ This exception was introduced by sec. 443 of Act X of 1877. Before the passing of that Act "Guardian" in sec. 3 of the Indian Majority Act was held to include a guardian for the suit; *Suttya Ghosal v. Sutyannand Ghosal* (1876), 1 Calc., 388. Chap. xxxi of the Code of Civil Procedure corresponds with Order xxxii of the present Code (Act V of 1908).

⁴ In *Birjmohun Lal v. Rudraperkash Misser* (1889), 17 Calc., 944, it was held that a Collector appointed under sec. 12 of Act XL of 1858 is not a guardian within the meaning of sec. 3 of the Indian Majority Act, but in the case of *Rudraperkash Misser v. Bholanath Mookerjee* (1886), 12 Calc., 612, which was a case with regard to the same minor, the Collector was treated as a guardian appointed by the Court. This ques-

tion cannot arise under Act VIII of 1890, by which Act XL of 1858 was repealed.

⁵ As to the mode of appointing and declaring a guardian, see *post*, chaps. xi and xiv. When the order has been set aside the extension of the age of majority does not take effect; *Nagardas v. Anandrao* (1907), 31 Bom. 590; 9 Bom. L. R. 495.

⁶ The words "before the minor has attained the age of 18 years" were added by Act VIII of 1890, sec. 52, in accordance with the decision of the Bengal High Court on this point in the case of *Stephen v. Stephen* (1883), 9 Calc., 901; 13 C. L. R., 430.

⁷ This amendment disposes of the question which arose in *Periya Sami v. Seshadri Ayyangar* (1881), 3 Mad., 11.

⁸ *Jogesh Chunder Chakravarti v. Umataru* (1878), 2 C. L. R., 577.

in Lower Bengal to a member of the family of a ward of a Court of Wards, who has an immediate or reversionary interest in the property of the ward.¹

The appointment or declaration of a guardian operates to extend the age of majority as soon as the order is made.² Removal or death of guardian.

If a guardian be once appointed or declared, the disability of minority will continue until twenty-one, although the guardian may die, be removed, or for other reasons cease to act,³ and upon the same principle it would follow from the wording

¹ See Act IX (B. C.) of 1879, sec. 7; Court of Wards Manual, 1909, p. 13. It is submitted that the case of a member of the family of the ward does not come within sec. 3 of the Majority Act, but is within the definition of "minor" in Act IX (B. C.) of 1879, sec. 3, see *post*, p. 314, note 6.

² There was a conflict of decisions under Act XL of 1858 on this question. In *Stephen v. Stephen* (1883), on appeal, 1 L. R., 9 Calc., 901; 13 C. L. R., 430, the date of the issue of the certificate was held by Garth, C.J., and Cunningham, J., to operate as the date of the appointment of a guardian within the meaning of this section; but in the Court below (8 Calc., 714; 10 C. L. R., 533) Wilson, J., pointed out that the delay was caused by the parties, and that it might have been possible to date the certificate as of the date of the grant. In *Chuneemul Johary v. Brojonath Roy Chowdhry* (1882), 8 Calc., 967; 11 C. L. R., 315, Field and Macpherson, JJ., held that the making of the order and not the subsequent taking out of the certificate altered the age of majority. In *Girish Chunder Chowdhry v. Abdul Selam* (1886), 14 Calc., 55, Mitter and Grant, JJ., followed *Chuneemul Johary v. Brojonath Roy Chowdhry*, and differed from *Stephen v. Stephen*; but in *Nowbat Roy v. Kedarnath* (1886), 13 Calc., 219, Wilson and Porter, JJ., followed *Stephen v. Stephen*, in preference to *Chuneemul Johary v. Brojonath Roy Chowdhry*, and also agreed with *Sahainand v. Mungniram* (1886), 12 Calc., 542.

In *Harendra Narain Singh Chowdhry v. Moran* (1887), 15 Calc., 40 Prinsep and Beverley, JJ., came to a conclusion, which is not consistent with *Stephen v. Stephen*. In Bombay, Sargent, C.J., and Nana-bhai Haridas, J., in *Yeknath v. Warubai* (1888), 13 Bom., 285, agreed with *Stephen v. Stephen*, but held that the principle of that case did not apply to the appointment of a guardian of the person, as no certificate was necessary in that case. The decision of the Bengal High Court in *Sahainand v. Mungniram* was reversed by the Privy Council in *Mungniram v. Gursahainand* (1889), 17 Calc., 347, see p. 356; 16 L. A., 195, see p. 200, from which it seems that the order for a certificate would have been sufficient to increase the age of majority to twenty-one years, although the certificate had not actually issued. This question cannot arise in any case under the Guardians and Wards Act (VIII of 1890), as under that Act no certificate is necessary and therefore the moment the order is made, the age of majority is extended.

³ *Jagon Ram Marwari v. Mahadeo Prosad Sahu* (1909), 36 Calc., 768; 13 C. W. N., 643; *Rudraproakash Misser v. Bholanath Mukherjee* (1886), 12 Calc., 612; *Sadho Lal v. Murlidhar* (1907), 29 All. 672; *Khwahish Ali v. Surju Prasad Singh* (1881), 3 All., 598; *Gordhandas Jadowji v. Hari-valubhdas Bhaidas* (1896), 21 Bom., 281. *Contra*: *Patesri Partap Narain Singh v. Champa Lal*, N.-W. P. W. N., 1891, p. 118; see also *Yeknath v. Warubai* (1888), 13 Bom., 285.

of the section, as amended, that even should the jurisdiction of a Court of Wards over the minor's property cease, the disability of minority will continue until twenty-one.¹

Age of majority of other persons.

The Majority Act further provides² that "every other person³ domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before."

Exceptions.

Nothing in the Majority Act affects⁴—

(a) the capacity of any person to act in the following matters (namely) marriage, dower, divorce,⁵ and adoption;⁶

(b) the religion or religious rites and usages of any class of His Majesty's subjects in India;⁷ or

(c) the capacity of any person who, before this Act came into force, had attained majority⁸ under the law applicable to him.

This reservation refers only to the capacity to contract, and not to the capacity to sue, which is purely a question of procedure and regulated by the Civil Procedure Code.⁹ It is therefore necessary that a party to a suit with reference to his marriage, dower, divorce, or adoption, should, if he be a minor within the meaning of the Indian Majority Act, be represented by a next friend or guardian for the suit as the case may be.¹⁰

Age of majority for purpose of particular Acts.

The effect of the Indian Majority Act is not universal, as it does not affect the age of majority fixed for particular purposes by particular enactments.¹¹ It is difficult to say

¹ The section before it was amended by Act VIII of 1890, sec. 52, ran as follows:—

"And every minor under the jurisdiction of any Court of Wards." Before the amendment it was held in *Birjohun Lal v. Rudra Perakash Misser* (1889), 17 Calc., 944, that under sec. 3 of the Majority Act, the disability of minority only continues so long as the Court of Wards retains charge of a minor's property.

² Sec. 3.

³ *i.e.* every person other than those to whom the age is extended to twenty-one (*ante*, p. 6).

⁴ Sec. 2.

⁵ *Post*, pp. 238, 239.

⁶ *Post*, pp. 25, 26.

⁷ An attempt was apparently made in *Reade v. Krishna* (1886), 9 Mad., 391, to argue that the age at which

the custody by a guardian ceased was to be determined by the personal law of the person in question, but the Court did not accept this argument.

⁸ *i.e.* majority for all purposes and in all places in British India, *Rajcoomar Roy v. Alfuzuddin Ahmed* (1881), 8 C. L. R., 419.

⁹ *Pujikuth Ithayi Umah v. Kair-khirapokil Mamod* (1881), 3 Mad., 248. In *Sorabji Cawasji Polishwala v. Buchoobai* (1894), 18 Bom., 366, it was held that in suits under sec. 30 of the Parsi Marriage Act (XV of 1865), parties under twenty-one years of age must be treated as minors, and represented by a next friend or guardian. The above Madras case was not referred to.

¹⁰ *Post*, chap. xxv.

¹¹ See *Rainey v. Nobocomar Mookerjee* (1879), 5 C. L. R., 543.

what effect can be given to the words "notwithstanding anything contained in the Indian Succession Act (No. X of 1865) or in any other enactment."¹ Those words cannot have been intended to alter the definition of "minor" in all enactments prior to the Indian Majority Act,² and even if such was the intention of the Legislature, definitions in Acts passed subsequently to the Indian Majority Act must have full force.

The Court of Wards Act now in force in Bengal³ defines⁴ a "minor" Bengal Court of Wards Act. as "a person who has not completed his age of twenty-one years;" so it would follow that the Court of Wards could exercise the powers given to it by that Act over persons who had attained the age of eighteen years, and thus could, for the purposes of the Act, reduce them to pupillage.⁵ Apart from the purposes of the Act, their capacity would be regulated by the Indian Majority Act, but in this case the dual age of majority would cause little inconvenience, as the ward is incapable of charging his property,⁶ and except with the leave of the Court a contract made by him cannot be enforced.⁷

In computing the age of any person, the day on which he was born must be included as a whole day, and he is deemed to have attained majority, if he be under the jurisdiction of the Court of Wards, or of a guardian of his person or property has been appointed by a Court of Justice at the beginning of the twenty-first anniversary of that day, and if he be not under the Court of Wards, and no guardian has been appointed of his person or property by a Court of justice, at the beginning of the eighteenth anniversary of that day.⁸

¹ Sec. 3, *ante*, p. 6.

² In *Rainey v. Nobocomar Mookerjee* (1879), 5 C. L. R., 543, a Full Bench of the Bengal High Court held that in spite of the Indian Majority Act the age for purposes of limitation was eighteen as fixed by the then Limitation Act (IX of 1871). The present Limitation Act (IX of 1908) does not define "minor," so now for purposes of limitation the age is as fixed by the Majority Act. In *Sarat Chundra Chakarabati v. Forman* (1889), 12 All., 213, it was held that under sec. 3 of the Majority Act a person under the age of eighteen is a minor within the meaning of Act IX of 1861. For instances of Acts passed before the Majority Act in which a special age was fixed, see *ante*, p. 5, note 10.

³ Act IX (B. C.) of 1879.

⁴ Sec. 3.

⁵ This is not possible under the Acts in force in Madras, Bombay, and the United Provinces of Agra and Oude. See Act I (M. C.) of 1902, sec. 4; Act I (Bom. C.) of 1905, sec. 2 (d); Act IV (U. P. C.) of 1912, sec. 3 (4).

There may be a question whether the effect of Act VIII of 1890, sec. 52 (*ante*, p. 6), does not prevent the Court of Wards taking charge of the person or property of a person over eighteen years of age.

⁶ See Act IX (B. C.) of 1879, sec. 60; *Balkrishna (Rai) v. Masuma Bibi (Mussumat)* (1882), 9 I. A., 182; 5 All., 142; *Collector of Benares v. Sheoprasad* (1883), 5 All., 487.

⁷ Act IV of 1892, sec. 13.

⁸ Act IX of 1875, sec. 4.

This is different from the English law, which in this respect was in force in India before the passing of the Indian Majority Act. By that law the last year of minority is looked upon as completed on the first instant of the day before the birthday, which closes that year.¹

Persons not domiciled in British India.

The provision of the Indian Majority Act, which fixed the age of majority at eighteen, only applies to persons domiciled within the territories to which it extends. The age of majority of persons who are not so domiciled will, in respect of their capacity in British India, be determined by the law of their domicile.²

Domicile of minor, English law.

According to the English law the domicile of a legitimate child follows the domicile of his father, and after the death of the father that of his mother, except on her re-marriage. The domicile of an illegitimate child follows the domicile of the mother.³

Indian law: Legitimate child.

By the Indian Succession Act⁴ the domicile of origin of every person of legitimate birth is in the country in which, at the time of his birth, his father was domiciled, or if he is a posthumous child, in which his father was domiciled at the time of the father's death.

Illegitimate child.

The domicile of origin of an illegitimate child is in the country in which, at the time of his birth, his mother was domiciled.⁵

Continuance of domicile of origin. Change of domicile.

The domicile of origin prevails until a new domicile has been acquired.⁶ The domicile of a minor follows the domicile of the parent from whom he derived his domicile of origin.⁷ The domicile of a minor does not change with that of his parent, if the minor is married or holds any office or employment in the service of His Majesty, or has set up, with the consent of the parent, in any distinct business.⁷

Minor wife.

By marriage a woman acquires the domicile of her husband, if she had not the same domicile before.⁸ The wife's domicile during the marriage follows the domicile of her husband, except they be separated by the sentence of a competent Court, or the husband be undergoing a sentence of transportation.⁹

Except as above, a person cannot, during minority, acquire a new domicile.¹⁰

National status of minor children where parent becomes alien.

Where the father being a British subject, or the mother being a British subject and a widow becomes an alien in pursuance of the Naturalization Act, 1870,¹¹ the minor children also cease to be British subjects. Similarly, when the parent resumes the position of a British subject the children also become British subjects.¹²

¹ See Simpson on Infants, 3rd Edn., 3; Macpherson on Infants, 447.

² *Rohilkund and Kumaon Bank v. Row* (1884), 7 All., 490; *Kashiba v. Shripat Narshiv* (1894), 19 Bom., 697. *Contrâ: Hearsey v. Girdharee Lal* (1871), 3 N.-W. P. H. C. R., 338. See Act IX of 1872, sec. 11.

³ Dicey on Domicil, pt. i., ch. 1, rule 9, sub-rule 1. See *In re Beaumont*, [1893] 3 Ch., 490.

⁴ Act X of 1865 (Succession), sec. 7.

⁵ *Ibid.*, sec. 8.

⁶ *Ibid.*, sec. 9.

⁷ *Ibid.*, sec. 14.

⁸ *Ibid.*, sec. 15.

⁹ Act X of 1865, sec. 16. See *Kashiba v. Shripat Narshiv* (1894), 19 Bom., 697.

¹⁰ Act X of 1865 (Succession), sec. 17.

¹¹ 33 & 34 Viet., cap. 14.

¹² *Ibid.*, sec. 10.



CHAPTER II.

CONTRACTS AND DISPOSAL OF PROPERTY.

AN old writer observes¹ with respect to the incapacity of minors, "The law protects their persons, preserves their rights and estates, excuseth their laches, and assists them in their pleadings; the judges are their counsellors, the jury are their servants, and the law is their guardian."

When, however, a minor is guilty of actual fraud, as by a misrepresentation of his age or otherwise, he will not be allowed to take advantage of his own fraud,² and may be compelled to make specific restitution, when that is possible, of anything he has obtained by deceit.³

When a minor has by a fraudulent representation as to his age or as to other matters induced another person to believe such representation, and to act upon such belief, he is, in cases where it is not sought to render him liable under a contract, estopped from taking advantage of his nonage; and, if the Court cannot restore the parties to their original footing, he will be as much bound as an adult.⁴

It is, it is submitted, quite clear that, if the minor has in good faith made a mistake as to his age, he is not bound by an estoppel.⁵

¹ The Infant's Lawyer, Lond., 1712. Sir Thomas Strange says that minors "in general will not be bound but by necessary acts, or such as are evidently for their benefit, the jealousy in their favour of the Hindu corresponding with that of the English law" (Hindu Law, vol. i. 203).

² *Saral Chand Mitter v. Mohun Bibi* (1898), 25 Calc., 371, at p. 392; 2 C. W. N., 201, at p. 203; *Ram Ratun Singh v. Shew Nandan Singh* (1901), 29 Calc., 126; 6 C. W. N. 132.

³ *Dhanmull v. Ram Chunder Ghose* (1890), 24 Calc., 265, at p. 271; 1 C. W. N., 270, at p. 274; *Jagar Nath Singh v. Lalla Prasad* (1908), 31 All., 21.

⁴ See *Ram Ratun Singh v. Shew Nandan Singh* (1901), 29 Calc., 126; 6 C. W. N., 132; *In re Hansraj Malji* (1883), 7 Bom., 411. Act I of 1872, sec. 115.

⁵ See *Nathubhai v. Mulchand* (1902), 3 Bom. L. R., 535.

The question stands upon a different footing when it is sought to render a minor liable on the ground that a representation as to his age made by him has estopped him from relying on his incapacity to contract. The Indian Contract Act renders all contracts made by minors void,¹ and an estoppel cannot fix upon a minor a contractual liability from which the terms of the Indian Contract Act exempt him.² Without necessarily fixing contractual responsibility on the minor, it would in some cases be possible to indemnify the person with whom he is dealing from loss,³ by requiring the minor to restore such benefits other than money as he may have obtained in consequence of the representation.⁴

As to an estoppel caused by the action of a minor after he has attained majority, see *Fazulbhoy Jaffer v. Credit Bank of India* (1914), 39 Bom., 331; 16 Bom. L. R., 730.

If the minor be himself seeking relief from the Court, it might well be refused, if the grant of it be contrary to equity and good conscience.⁵

Where the person dealing with the minor has not been

¹ *Post*, p. 13.

² See *Leslie v. Shiell*, [1914] 3 K. B., 207; *Vaikuntarama Pillai v. Authimoolam Chettiar* (1914), 38 Mad., 1071; *Brohmo Dutt v. Dharmo Das Ghose* (1898), 26 Calc., 381; 3 C. W. N., 468. On appeal in the latter case (*Mohuri Bibee v. Dhurmodas Ghose* (1903), 30 I. A., 114, at p. 122; 30 Calc., 539, at p. 545; 7 C. W. N., 441, at p. 446; 5 Bom. L. R., 421), the Judicial Committee declined to express an opinion on the question. See *Dhanmull v. Ram Chunder Ghose* (1890), 24 Calc., 265; 1 C. W. N., 270; which was doubted in *Saral Chand Mitter v. Mohun Bibi* (1898), 25 Calc., 371; 2 C. W. N., 201. *Contrâ*: *Ganesh Lala v. Bapu* (1895), 21 Bom., 198. In *Surendra Nath Roy v. Krishna Sakhi Dasi* (1911), 15 C. W. N., 239, it was held that when a person between 18 and 21 years of age executes a conveyance with the knowledge that his minority has been extended by reason of an order made under sec. 7 of the Guardians and Wards Act, (*ante*, p. 6), in favour of vendors

who are not aware of that fact, he is estopped from taking advantage of his minority.

³ In *Saral Chand Mitter v. Mohun Bibi* (1898), 25 Calc., 371; 2 C. W. N., 201, a sum of money was advanced to a minor on a mortgage of house property on the representation that he was of age. The mortgagee was held entitled to a mortgage decree, but having regard to the decision in *Mohuri Bibee v. Dhurmodas Ghose* (1903), 30 I. A., 114; 30 Calc., 539; 7 C. W. N., 441; 5 Bom. L. R., 421, that decision could not apparently now be followed.

⁴ See *Leslie v. Shiell*, [1914] 3 K. B., 207; *Stocks v. Wilson*, [1913] 2 K. B., 235; *Sinclair v. Broughton*, [1914] A. C. 398; *Dhanmull v. Ram Chunder Ghose* (1890), 24 Calc., 265, at p. 271; 1 C. W. N., 270, at p. 274.

⁵ See *Ram Ratan Singh v. Shew Nandan Singh* (1901), 29 Calc., 126; 6 C. W. N., 132; *Ganesh Lala v. Bapu* (1895), 21 Bom., 198; *Jagar Nath Singh v. Latta Prasad* (1908), 31 All., 21.

deceived by the representation, no question of estoppel can arise.¹

A contract² made by a minor is void,³ whether the person contracting with him is aware of his minority or not.⁴

Before the passing of the Indian Contract Act,⁵ the High Courts, in suits on contracts, administered the Hindu, Mahomedan, or English laws according to the nationality of the defendant. The Mofussil Civil Courts, in cases to which the Hindu and Mahomedan laws were not applicable, were directed to proceed according to justice, equity, and good conscience.⁶

With respect to the power of minors to contract, the Hindu, Mahomedan, and English laws, as administered by the Courts in India, differed very little from each other.

Under the Hindu law, a minor seems to have had no power to contract under any circumstances;⁷ but the Courts treated the deed or contract of a minor Hindu as not void,⁸ but only as voidable if against his interest.

The Mahomedan law⁹ and the English law, as administered in India, treated contracts made by minors in the same way. Under those laws the general rule was, that contracts made by a minor were not binding on him, but that he might take advantage of such contracts and sue on them if they were for his benefit. Further, if on coming of age he should have ratified a contract, it would have been binding upon him.

¹ *Mohuri Bibee v. Dhurmodas Ghose* (1903), 30 I. A., 114, at p. 122; 30 Cal., 539, at p. 544; 7 C. W. N., 441, at p. 446; 5 Bom. L. R., 421.

² As to contracts of marriage, see *ante*, p. 8, and *post*, chap. xxiii.

³ Indian Contract Act (IX of 1872), ss. 2, 10, 11; *Mohuri Bibee v. Dhurmodas Ghose* (1903), 30 I. A., 114; 30 Cal., 539; 7 C. W. N., 441; 5 Bom. L. R., 421. See *Dattaram Govindbhai Guzar v. Vinayak Balkrishna Agashe* (1903), 28 Bom., 181; 5 Bom. L. R., 916; *Kamta Prasād v. Sheo Gopal*, (1904), 26 All., 342.

⁴ *Barnes v. Toye* (1884), 13 Q. B. D., 410, at p. 414

⁵ IX of 1872.

⁶ As to the law administered by the Courts in India, see the *Secretary of State v. Administrator-General of Bengal* (1868), 1 B. L. R., O. C., 87; *Waghela Rajsanji v. Masudin* (1887), 14 I. A., 89, at p. 96; 11 Bom., 557, at p. 561; *In the matter of Saithri* (1891), 16 Bom., 307, at p. 323. *Varden Seth Sam v. Euckpathy Royjee* (1862), 9 M. I. A., 307; *Molico*,

March & Co., v. Court of Wards (1872), I. A., Sup. Vol., 86; 10 B. L. R., 312; 18 W. R. C. R., 384; and see *post*, p. 58, note 5.

⁷ 1 Strange's Hindu Law, 271; Manu, chap. viii, 163; Vyavastha Darpana, 2nd Edn., p. 613; *Kallupnath Singh v. Kumlaput Jah* (1829), 4 Ben. Sel. Rep., 339, 2nd Edn., 432; *Pudawutee v. Kishoonmohun Banoorjeeah*, Ben. S. D. A., 1847, p. 25; *Yerlagudda Ramasawmy v. Guddum Lukshmanna*, Mad. S. D. A., 1849, p. 6.

⁸ Macpherson on Contracts, 2nd Edn., p. 21. See *O'Donnell v. Buddinath*, Morton, 84; *Boiddonath Dey v. Ramkishore Dey* (1870), 13 W. R. C. R., 166; 10 B. L. R., 326, note; *Doorgachurn Shaha v. Ram Narain Dass* (1870), 13 W. R. C. R., 172; 10 B. L. R., 327, note; *Hari Ram v. Jitun Ram* (1869), 3 B. L. R. A. C., 426; 12 W. R. C. R., 378; *Rennie v. Gunganarain Chowdhry* (1865), 3 W. R. C. R., 10.

⁹ Macpherson on Contracts, p. 20; and Macnaghten's Principles of Mahomedan Law, chap. iii, para. 11; chap. viii, para. 12.

The Indian Contract Act,¹ which applies to all contracts of whatever nationality the contracting parties may be,² contains the following³ :—

“All agreements are contracts, if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.”

Indian Contract Act.

The same Act⁴ declares that “every person is competent to contract who is of the age of majority according to the law to which he is subject,⁵ and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.”

The interpretation clause⁶ of the Indian Contract Act gives the following definitions :—

“(g) An agreement not enforceable by law is said to be void :

“(h) An agreement enforceable by law is a contract :

“(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract.”

As a contract made by a minor is void,⁷ no effect can be given to it by the Court at the instance of either party. Thus a minor cannot take advantage of a contract, even though it be for his benefit, and cannot apparently recover money which has been lent by him, or is due to him in any way under a contract made by him.

Where there is a fresh consideration for a ratification after majority the late minor is liable.⁸

Surety for minor.

Although a minor may not be himself liable on a contract, there is no reason why his surety should not be liable.⁹ Similarly, an adult can be bound by a promise entered into by him jointly with a minor.¹⁰

Contract of agency.

A minor cannot appoint or employ an agent¹¹ or attorney,¹² nor can he authorize another person to do what he cannot do himself.¹³ The acts, admissions, or statements of an agent or attorney can be repudiated by the minor, and would not bind

¹ Act IX of 1872.

² *Madhub Chunder Poramanick v. Rajcoomar Doss* (1874), 14 B. L. R., 76; 22 W. R. C. R., 370.

³ Sec. 10.

⁴ Sec. 11.

⁵ See *ante*, chap. i; and *Mammi, Mal v. Jagannath*, N.-W. P. W. N., 1887, p. 71.

⁶ Sec. 2.

⁷ *Mohuri Bibee v. Dhurmodas Ghose* (1903), 30 I. A., 114; 30 Calc., 539; 7 C. W. N., 441; 5 Bom. L. R., 421; *Kamta Prasad v. Sheo Gopal* (1904), 26 All., 342.

⁸ *Kundan Bibi (Musst) v. Sree Narayan* (1906), 11 C. W. N., 135.

⁹ *Kashiba v. Shripat Narshiv* (1894), 19 Bom., 697. See *Kallupnath Singh v. Kumlaput Jah* (1829), 4 Ben. Sel. Rep., 339, 2nd Edn., 432.

¹⁰ See Act IX of 1872, sec. 43; *Jamna Bai v. Vasanta Rao*, P. C., 21st March, 1916.

¹¹ Act IX of 1872, sec. 183.

¹² *Radhanath Bose v. Suttoprosonno Ghose* (1867), 2 Ind. Jur. N. S., 269.

¹³ *Bykuntal Roy Chowdhry v. Pogose* (1866), 5 W. R. C. R., 2.

him, at any rate, when they are not ratified or accepted by him after he attains his majority.¹

A minor may be appointed an agent, but he is not responsible to his principal for his acts in that behalf.² The principal is, however, bound by the acts of his minor agent to the same extent as if that agent had attained the age of majority, and was of full capacity.³

A minor managing member of a joint family has as much power to bind his co-parceners as an adult.⁴

Minor
managing
member of
joint family.
Shares in
limited com-
panies.

A contract to buy or to sell shares in limited companies is on the same footing as other contracts, and moreover the company can decline to recognize a minor, buying shares, as a shareholder.⁵

When a minor had intentionally permitted the company to believe him to be a shareholder and in that belief to pay him dividends since he attained majority, he was held to have been estopped by his conduct from denying as between himself and the company that he was a shareholder.⁶

A minor who inherits shares is liable in respect of them to the extent, at any rate, of the property inherited by him from the person from whom he derives title to the shares.

Although he may afterwards repudiate it the signature of a minor to the memorandum of association of a company is the signature of a person within the meaning of sec. 9 of the Indian Companies Act.⁷

There are certain exceptions to the rule that a minor is not bound by contracts entered into by him.

A person who supplies a minor, or any one whom he is legally bound to support,⁸ with necessaries suited to his

Liability for
necessaries.

¹ As to ratification of acts of guardians and other persons acting on behalf of minors, see *post*, chap. xxi.

² Act IX of 1872, sec. 184. He may be liable to be punished for criminal breach of trust, Act XLV of 1860, sec. 409, see *post*, chap. vi.

³ Act IX of 1872, sec. 184; *Madan Gopal v. Hindu Biscuit Co.* (1902), 4 Bom. L. R., 627.

⁴ This is doubted in *Joharmal v. Chetram* (1914), 39 Bom., 715, at p. 721; 17 Bom. L. R., 293, at p. 298. The fact that a minor can be a managing member of an undivided Hindu family is impliedly recognized by Act VIII of 1890, sec. 21, *post*, p. 48.

⁵ See *In re Asiatic Banking Corporation* (1870), L. R., 5 Ch., 298. As to the liability of an adult who takes shares in the name of a minor, see Buckley on the Companies Acts, 9th Edn., p. 66.

⁶ *Fazulbhoj Jaffer v. Credit Bank of India* (1914), 39 Bom., 331; 16 Bom. L. R., 730.

⁷ VII of 1913. *In re Laxon*, [1892] 3 Ch., 555.

⁸ Such as his wife and children, see Ill. (b) to sec. 68, Act IX of 1872. This does not include members of his family, to support whom the minor is only under a moral, and not under a legal, obligation.

condition in life is entitled to be reimbursed from the property of the minor,¹ whether such necessities were supplied at the instance of the minor, or at that of his guardian.²

Necessaries, suited to a minor's condition in life include such things as are reasonably required for the nourishment, clothing, lodging, education, health, and decent behaviour and appearance of the minor according to his station, degree and fortune.³

There is nothing to prevent a minor indulging in luxury, if he has the money to pay, and pays for it. But the question is whether it is so necessary for the purpose of maintaining himself in his station that he should have the particular articles, as to bring them within the exception under which a minor may pledge his credit for them as necessities.⁴

What are
necessaries.

The surrounding circumstances of each particular case furnish the only means for the solution of the question whether or not particular articles are "necessaries." The term "necessaries" primarily implies only suitable food, drink, clothing, lodging, instruction, and education for the minor in accordance with his position in life and his fortune, and articles purely of ornament and luxury would not be included in the term. But articles may be necessities suitable to the degree in life and condition of the minor, even though of an ornamental or luxurious character, where the minor's fortune or prospects would justify their being so considered.⁵

In some cases special circumstances might bring under the term "necessaries" articles which generally could not be considered as such. For instance, where a doctor has ordered horse exercise for a minor, the hire or even the purchase of a horse may be necessary.⁶ Presents to be given by the minor may in some cases be considered necessities, as for instance

¹ Act IX of 1872, sec. 68.

² *Ranmalsingji (Maharana Shri) v. Vadilal Vakhatchand* (1894), 20 Bom., 61; *Juggessur Sircar v. Nilambur Biswas* (1865), 3 W. R. C. R., 217.

³ See judgment of Bramwell, B., in *Ryder v. Wombwell* (1868), L. R. 3 Ex., 90, on appeal (1868), L. R., 4 Ex., 32. As to necessary instruction see *Walter v. Everard*, [1891] 2 Q. B., 369.

⁴ *Ryder v. Wombwell* (1868), L. R., 4 Ex., 32. As to what articles have

been held in England to be necessities, see Macpherson on Infants, pp. 499-501; and Simpson on Infants, 3rd Edn., pp. 76-78.

⁵ See *Jagon Ram Marwari v. Mahadeo Prosad Sahu* (1909), 36 Calc., 768; 13 C. W. N., 643. If they are for mere ornaments, they cannot be necessities. If they are for real use, they may be such (as, for instance, a watch-chain): *Peters v. Fleming* (1840), 6 M. & W., 46.

⁶ *Hart v. Prater*, 1 Jur., 623.

where the minor is in a good position and buys the articles for the purpose of giving them to his intended bride.¹

Necessary legal expenses incurred either by the minor or on his behalf can be recovered from his estate² in a suit against him.

It has been held that money paid to release a minor from arrest,³ or to save him from ejection for non-payment of rent,⁴ can be recovered as necessaries.

In some cases expenditure incurred obviously for the benefit of the minor, although not included in the ordinary use of the term "necessaries," would bind the minor's estate as being for necessaries within the meaning of the section. For instance, the reasonable marriage expenses of the minor,⁵ or of his sister,⁶ the funeral ceremonies of the wife, husband, or children of the minor,⁷ and the performance of the *shrads* of the ancestors of the minor,⁸ or of such religious ceremonies as the minor, if he had been an adult, would be morally bound to perform, such as apparently a pilgrimage undertaken in discharge of an urgent spiritual duty, which it was obligatory on the minor to perform.⁹

Although the Indian Contract Act¹⁰ renders the estate of a minor husband liable for necessaries supplied to his wife, it does not contemplate any possibility of the estate of a minor wife being liable for necessaries supplied to her husband. A wife is not legally bound to support her husband; but the

Necessaries supplied to husband of female minor.

¹ *Jenner v. Walker*, (1868), 19 L. T. N. S., 398.

² *Sham Charan Mal v. Chowdhry Debya Singh Pakraj* (1894), 21 Calc., 872; *Watkins v. Dhunnoo* (1881), 7 Calc., 140; 8 C. L. R., 43, *post*, p. 280, note 5; *Helps v. Clayton*, 10 Jur. N. S., 1184; *Collins v. Brook* (1860), 5 H. & N., 700, at p. 708; *Kumar Krishna Dutt v. Hari Narayan Ganguli* (1915), 20 C. W. N., 537. See *Venkata Vijaya Gopalraju v. Timmaya Pantulu* (1899), 22 Mad., 314; *Kameswara Sastri v. Veeracharlu* (1910), 34 Mad., 422; and *Sundrabai v. Shivnarayana* (1907), 32 Bom., 81; 9 Bom. L. R., 1366, dissenting from *Govindarazulu Navasimham v. Devarabholla Venkatanarasayya* (1903), 27 Mad., 206.

³ *Clarke v. Leslie* (1803), 5 Es-
T. L.R.M.

pinasse, 28.

⁴ *Ex parte McKey* (1807), 1 Ball. & Beatty, 405.

⁵ *Makundi v. Sarabsukh* (1884), 6 All., 417, at p. 421; *Juggessur Sircar v. Nilambur Biswas* (1865), 3 W. R. C. R., 217.

⁶ *Nandan Prasad v. Ajudhia Prasad* (1910), 32 All., 325.

⁷ *Chapple v. Cooper* (1844), 13 M. & W., 252. The section contemplates the necessities of the minor's person rather than those of his estate.

⁸ See *Gunput Lall (Lalla) v. Toorun Koonwur (Mussamut)* (1871), 16 W. R. C. R., 52.

⁹ See *Ranmalingji (Maharana Shri) v. Vadital Vakhatchand* (1894), 20 Bom., 61, at p. 73.

¹⁰ IX of 1872, sec. 68.

English rule of law, that the interest of a personal connection is sometimes regarded in law as that of the individual himself,¹ might, even in India, render the estate of a minor wife liable for necessities supplied to her husband, where her husband has no means of support.²

Quantity.

Things, which in a small and reasonably sufficient quantity are necessities, cease to be such, when supplied in a quantity over and above what is sufficient, and they equally cease to be such whether they are supplied by one tradesman only, or by a number of tradesmen. The fact that a minor is already sufficiently supplied with goods of a similar description is an answer to a suit, and it is immaterial whether the plaintiff did or did not know of the existing supply.³

Duty of tradesman dealing with minor.

The rule of law, that a minor can be sued on a contract for necessities only, is always construed for the benefit of the minor and not for that of the tradesman.⁴ It is the duty of a tradesman dealing on credit with a minor to stand on his guard, and make every possible inquiry. Even then he supplies

¹ See Broom's Legal Maxims, 7th Edn., p. 393.

² In *Chapple v. Cooper* (1844), 13 M. & W., 252, at pp. 259, 260; Alderson, B., said: "Now the law permits an infant to make a valid contract of marriage, and all necessities furnished to those with whom he becomes one person by or through the contract of marriage are, in point of law, necessities to the infant himself. Now there are many authorities which lay it down that decent Christian burial is a part of a man's own rights; and we think it is no great extension of the rule to say that it may be classed as a personal advantage, and reasonably necessary to him. His property, if he leaves any, is liable to be appropriated by his administrator to the performance of this proper ceremonial. If then this be so, the decent Christian burial of his wife and lawful children, who are the *personæ conjunctæ* with him, is also a personal advantage, and reasonably necessary to him, and then the rule of law applies that he may make a binding contract for it. This seems to us to be a proper and

legitimate consequence from the proposition that the law allows an infant to make a valid contract of marriage. If this be correct, then an infant husband or parent may contract for the burial of his wife or lawful children, and then the question arises whether an infant widow is in a similar situation * * *. We do not see why the contract for the burial of the husband should not be the same as a contract by the widow for her own personal benefit."

³ *Barnes v. Toye* (1884), 13 Q. B. D., 410; *Johnstone v. Marks* (1887), 19 Q. B. D., 509.

⁴ Bramwell, B., said in *Ryder v. Wombwell* (1868), L. R., 3 Ex., 90, at p. 98: "It is not a law for the indemnity and defence of the infant who is sued merely, it is a law to deter people from trusting infants, and to save the latter from the consequences of the improvidence and inexperience natural to their age; an improvidence which would lead them into loss, though all their dealings were with honest people; an inexperience which causes them to be no match with rogues."

the goods at his own risk, as it is for him to consider what things, and what amount of such things, the minor is actually in need of for the purpose of keeping up his position in life.¹

It has been held that a minor is equally liable for necessities supplied to him, whether or not he has an allowance or income, from which he might have purchased such necessities.²

Money supplied to a minor for the purpose of buying necessities, and actually expended by him for that purpose, is recoverable in the same way as the cost of necessities supplied.³ Money supplied for necessities.

The 68th section of the Indian Contract Act imposes a liability upon the minor's estate entirely independent of any contract by the minor; and it, therefore, follows that a person who obtains from a minor a bond, account stated, or bill of exchange⁴ in relation to necessities supplied, is not placed thereby in any better position.

As to marriage settlements, see Act X of 1865 (Succession Act), sec. 45, *Marriage settlement*, *post*, pp. 244, 245.

With respect to contracts of partnership entered into by minors, the Indian Contract Act⁵ provides as follows:— Contract of partnership.

“Section 247.—A person who is under the age of majority, according to the law to which he is subject, may be admitted to the benefits of partnership,⁶ but cannot be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm is liable for the obligations of the firm.

“Section 248.—A person who has been admitted to the benefits of partnership under the age of majority, becomes on attaining that age, liable for all obligations incurred by the partnership since he was so admitted, unless he gives

¹ See *Story v. Pery* (1831), 4 C. & P., 526; *Brayshaw v. Eaton* (1839), 7 Scott, 183, at p. 185.

² *Burghast v. Hall* (1839), 4 M. & W., 727; *Peters v. Fleming* (1840), 6 M. & W., 42.

³ See *Marlow v. Pilfeild* (1719), 1 Peere Williams, 558; *Ranmalsingji (Maharana Shri) v. Vadijal Vakhatchund* (1894), 20 Bom., 61, at p. 70.

⁴ *In re Soltykoff*, [1891] 1 Q. B., 413; Act XXVI of 1881, sec. 26, *post*, p. 20.

⁵ Act IX of 1872. As to the liability of minors on whose behalf

their guardians are carrying on ancestral trades, see *post*, p. 174.

⁶ A minor can only become a partner by a consentient act on the part of himself and his partners, even where the business carried on by the partnership belonged to a joint family, of which he was a co-partner: *Lutchmanen Chetty v. Siva Prokasa Modeliar* (1899), 26 Cal., 349, at p. 354; 3 C. W. N., 190, at pp. 192, 193; *Makhun Lall Dutt v. Ram Lall Shaw* (1898), 3 C. W. N., 134, at p. 139; *Anant Ram v. Channu Lal* (1903), 25 All., 378.

public notice, within a reasonable time, of his repudiation of the partnership.”¹

The Act does not require private notices to the creditors of the firm, and, moreover, does not specify in what way public notice is to be given. Presumably, the proper notice would be by advertisements in the gazettes or newspapers of the place where the business is carried on. Where there are no gazettes or newspapers at that place, it is very difficult to say what kind of public notice ought to be given. Probably a notice by beat of drum, or in such other way as advertisements are generally made would be sufficient. In any case the most effectual public notice that can be reasonably given is requisite.²

Work done and money paid.

Non-gratuitous act.

A minor can recover for work and labour done by him and for money paid by him, and money had and received for his use.³ He can also recover compensation for a non-gratuitous act done by him from the person enjoying the benefit of such act,⁴ as for instance he can recover wages or payment for piece-work, or work as a servant.⁵

Negotiable instruments.

A minor may draw, indorse, deliver, and negotiate promissory notes, bills of exchange, and cheques, so as to bind all parties except himself.⁶

Deposit in Savings Bank.

Any deposit made by or on behalf of a minor in a Government Savings Bank, may be paid to him personally, if he made the deposit, or to his guardian for his use, if the deposit was made by any person other than the minor, together with the interest accrued thereon. The receipt of any minor or guardian for money paid to him under this provision is a sufficient discharge therefor.⁷

Contracts of apprenticeship.

A minor may enter into a contract of apprenticeship, but he cannot be sued thereon.⁸

As to contracts of apprenticeship, see *post*, pp. 133 to 137.

¹ As to the law on this subject before the passing of the Indian Contract Act, see *Prosunno Koomar Bural v. Sajudoor Ruhman*, Ben. S. D. A., 1835, p. 525.

² See *Chundee Churn Dutt v. Eduljee Kowasjee Bijnee* (1882), 8 Cal., 678.

³ Simpson on the Law of Infants,

3rd Edn., p. 102.

⁴ Act IX of 1872, sec. 70.

⁵ See Act XV of 1882, sec. 32.

⁶ Act XXVI of 1881, sec. 26.

⁷ Act V of 1873, sec. 10; see *Gazette of India*, 12th December, 1874, p. 602.

⁸ *Pollard v. Rouse* (1910), 33 Mad., 288.

Any person of the age of sixteen years or upwards may¹ enter into a contract to labour for hire in Lakhimpur, Sibsagar, Naugong, Darrang, Kamrup, Goalpara, Kachar, Sylhet, and the Sonthal Pergannahs² otherwise than as a domestic servant : Labour contract.

Provided that no woman can bind herself by a labour contract if her husband or lawful guardian (if any) objects.

The Madras Labour Act, 1903,³ provides⁴ that "notwithstanding anything to the contrary in the Indian Contract Act, 1872, it shall be competent for any person of the age of sixteen years and upwards to enter into a labour contract, provided that no labour contract entered into by a woman without the consent of her husband or guardian (if any) shall be enforceable under this Act if such husband or guardian objects to its enforcement."

The Indian Factories Act, 1911,⁵ contains provisions for the protection of children under fourteen years of age⁶ working in factories,⁷ and provides for the inspection of factories, and for the examination of persons desirous of being employed, for the purpose of ascertaining their age.⁸ Employment of children in factories.
Inspection of factories.

Act XII of 1911 contains the following :—

"Section 23.—With respect to the employment of children in factories the following provisions shall apply :— Employment of children.

"(a) no child shall be employed in any factory unless he is in possession of a certificate granted under sec. 7 or sec. 8 showing, that he is not less than nine years of age, and is fit for employment in a factory, and while at work carries either the certificate itself or a token giving reference to such certificate ;

"(b) no child shall be employed in any factory before half-past five o'clock in the morning, or after seven o'clock in the evening ;

"(c) no child shall be employed in any factory for more than seven hours in any one day."

"Section 25.—No person shall employ, or permit to be employed, in any factory any ** child whom he knows or has reason to believe, to have already been employed on the same day in any other factory.

"Section 26.—The manager of a factory shall fix specified hours for the

¹ Act VI of 1901, sec. 9. This Act applies to Bengal, Assam, the United Provinces, the Central Provinces, and the district of Ganjam in the Province of Madras.

² Reg. III of 1872, sec. 3, as amended by Reg. III of 1886.

³ Act I (M. C.) of 1903.

⁴ Sec. 8.

⁵ Act XII of 1911.

⁶ Sec. 2.

⁷ A "factory" is defined as any premises wherein, or within the precincts of which steam, water or other mechanical power or electrical power is used in aid of any process for, or incidental to, making, altering, repairing, ornamenting, finishing or otherwise adapting for use, transport, or sale, any article, or part of an article.

⁸ Secs. 4-8.

employment of each ** child employed in such factory, and no ** child shall be employed except during such hours."

Prohibition of employment of child in certain dangerous work.

"Section 19.—No ** child shall be allowed to clean any part of the mill-gearing or machinery of a factory while the same is in motion by the action of steam, water or other mechanical power, or electrical power, as the case may be, or to work between the fixed and traversing parts of any self-acting machine while such machine is in motion by the action of any power above described.

"Section 20.—No ** child shall be employed in the part of a factory for pressing cotton in which a cotton-opener is at work :

" Provided that, if the feed-end of a cotton-opener is in a room separated from the delivery-end by a partition extending from the floor to the roof, ** children may be employed in the room in which the feed-end is situated."

As to the penalties for breach of these rules, see Act XII of 1911, Chap. VIII. There is also a provision for a register of children.¹

Presumption as to employment.

If a child over the age of six years is found inside any room or part of a factory in which room or part children are employed, and in which any manufacturing process or work incidental to any manufacturing process is being carried on, he shall, until the contrary be proved, be deemed to be employed in the factory.²

By sec. 3, the Act does not apply to—(a) any mine subject to the operation of the Indian Mines Act (VIII of 1901); or (b) any electrical generating or transforming station; or (c) any indigo factory; or (d) any factory situated on and used solely for the purposes of a tea or coffee plantation; or (e) any factory wherein on no day in the year are more than forty-nine persons simultaneously employed: Provided that the Local Government may, subject to the control of the Governor-General in Council, apply to any factory or class of factories wherein any specified number of persons, not being less than twenty are on any day simultaneously employed, all or any of the provisions of the Act.

Recognizance.

Apparently a minor of sufficient intelligence may be required to execute a bond binding himself to be in attendance when called upon at the Court of Session or High Court, to prosecute or to give evidence, as the case may be.³

Contracts of marriage.

The capacity of minors to enter into marriage contracts is discussed in a subsequent chapter.⁴

Specific performance of agreements.

As an agreement by a minor is void,⁵ a minor can neither sue nor be sued for specific performance of an agreement entered into by him.⁶

As to specific performance of agreements entered into by guardians or managers for infants, see *post*, p. 167.

¹ Sec. 35.

² Sec. 46.

³ See Act V of 1898 (Criminal Procedure Code), sec. 217. Cf. sec. 118 of the same Act.

⁴ Chap. xxiii.

⁵ *Ante*, p. 13.

⁶ See Act I of 1877 (Specific Relief), sec. 4, para. (a): *Jugal Kishori Chowdhurani v. Anunda Lal Chowdhuri* (1895), 22 Calc., 545, at p. 550.

A minor cannot petition for the benefit of the Insolvency law,¹ and he cannot be adjudicated an insolvent,² even if he be a partner to an insolvent firm.³ Minor insolvent.

It is submitted that in respect of debts, for which he or his estate is liable, such as debts for necessities,⁴ damages for wrongful acts committed by him,⁵ and judgment debts, a minor should not be precluded from obtaining the relief which the insolvency law gives to adults, and that a creditor, who is such on account of debts which bind the minor, should be able to take advantage of the insolvency law.

The English authorities, upon which the Indian decisions are founded, are based upon the freedom of the minor from liability for the debt.

A minor is not liable for an act of insolvency committed by a guardian on his behalf.

The goods and chattels of a minor which are in the possession, order, or disposition of an insolvent do not, as in the case of those belonging to adults,⁶ become vested in the Assignee.⁷ Goods of minor in order and disposition of insolvent.

Transfers of property,⁸ whether moveable or immovable, by minors, and whether by way of sale, mortgage, lease, or gift,⁹ even though actually completed by transfer of possession, are on the same footing as other contracts entered into by minors,¹⁰ and are therefore void.¹¹ A minor may pay money for property purchased by him.¹² Transfer of property.

¹ *In re Hansraj Malji* (1883), 7 Bom., 411.

² *In re Nobodeep Chunder Shaw* (1886), 13 Calc., 68. This decision and the case in note 1 above were under 11 & 12 Vict., cap. 21. The Provincial Insolvency Act, 1907 (III of 1907), and the Presidency Towns Insolvency Act, 1909 (III of 1909), have not altered the law. See *Ex p. Jones* (1881), 18 Ch. D., 109; *Lovell and Christmas v. Beauchamp*, [1894] A. C., 611.

³ *Sanyasi Charan Mandal v. Asutosh Ghose* (1914), 42 Calc., 225.

⁴ *Ante*, pp. 15 to 19.

⁵ *Post*, p. 40.

⁶ Acts III of 1907, sec. 16; III of 1909, sec. 52.

⁷ *In re Mills Trusts*, [1895] 2 Ch., 564.

⁸ A transfer of property is defined by the Transfer of Property Act (IV of 1882, sec. 5), as an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself or

one or more other living persons.

⁹ As to gift, see *Gulab (Bai) v. Thakorelal* (1912), 36 Bom., 622; 14 Bom. L. R., 748.

¹⁰ Transfer of Property Act (IV of 1882), sec. 7, extended to the Bombay Presidency since the 1st January, 1893.

¹¹ *Mokuri Bibee v. Dhurmodas Ghose* (1903), 30 I. A., 114; 30 Calc., 539; 7 C. W. N., 441; 5 Bom. L. R., 421; *Dattaram Govindbai Guzar v. Vinayak Balkrishna Agashe* (1903), 28 Bom., 181; 5 Bom. L. R., 916; *Kanta Prosad v. Sheo Gopal* (1904), 36 All., 342; *Shiam Lal v. Ram Piari* (1909), 32 All., 25; *Maharaj Singh v. Balwant Singh* (1906), 28 All., 508, affirmed by *P. C. Balwant Singh (Raja) v. Clancy* (1912), 39 I. A., 109; 34 All., 296; 16 C. W. N., 577; 14 Bom. L. R., 422. *Contrâ*: *Madan Mohan v. Rangil Lal* (1907), 30 All., 63; *Vaikuntarama Pillai v. Authimoolam Chettiar* (1914), 38 Mad., 1071.

¹² *Kundan Bibi (Mussammatt) v. Sree Narayan* (1900), 11 C. W. N., 135.

As to the avoidance of a transfer by a minor, who has received benefits thereunder, see *post*, pp. 203, 204.

There is nothing to prevent a minor making a small gift, such as would be usual in the case of persons of his position.

Gifts for religious purposes.

The section of the Transfer of Property Act,¹ which contains the above provision, is in a chapter² which does not affect any rule of Hindu, Mahomedan, or Buddhist law.³

The Mahomedan law does not permit a minor to alienate his property for religious purposes,⁴ and the Hindu law considers him incompetent to make any transfer of his property.⁵ Whether such act is void or only voidable has not been decided.⁶

Contracts and transfers by persons who have recently attained majority.

The protection which the law affords to minors in respect of contracts entered into by them is in some cases extended to persons who have recently attained the age of majority. When such persons are disposing of their property to the advantage of others, it must be shewn that they are fully aware of the nature and effects of the transaction.⁷

Unconscionable bargains with persons who have recently attained majority.

Where an unconscionable bargain is made with a young man who has just attained the age of majority, the Court will set aside the transaction.

In a case,⁸ where a young man who was possessed of property, and who had attained his majority one year and one or two months before the transaction, borrowed a sum of money from a professional money-lender, and agreed by his bond to repay the principal with interest at 36 per cent. per annum, the High Court of Bengal held, that the money-lender was only entitled to a decree for the amount actually advanced by him, with interest at 6 per cent.

With reference to the protection thus afforded by the Court, Lord Selborne, in the case of *Aylesford v. Morris*,⁹ said: "It is sufficient for the application of the principle, if the parties meet under such circumstances as, in the particular transaction, to give the stronger party dominion over the weaker; and such power and influence are generally possessed, in every transaction of this kind, by those who trade upon the follies and vices of unprotected youth, inexperience, and moral imbecility.

"In the cases of catching bargains with expectant heirs, one peculiar feature has been almost universally present; indeed, its presence was considered by Lord Brougham to be an indispensable condition of equitable

¹ Act IV of 1882, sec. 7.

² Chap. ii.

³ Sec. 2 (d).

⁴ Ameer Ali's Lectures on Mahomedan Law, p. 192.

⁵ *Ante*, p. 13.

⁶ See *Fatma Bibi v. Advocate-General of Bombay* (1881), 6 Bom., 42.

⁷ See *Grosvenor v. Sherratt* (1860), 28 Beav., 659. As to transactions

between such persons and their guardians, see *post*, pp. 121 to 123.

⁸ *Mothoormohun Roy v. Soorendro Narain Deb* (1875), 1 Calc., 108, at pp. 120-122. See *Azimuddin Khan v. Zia-ul-Nissa* (1882), 6 Bom., 309; *Moti Gulabchand v. Mahomed Mehdi Tharia Topan* (1895), 20 Bom., 367.

⁹ (1873), L. R. 8 Ch. 484, at p. 491.

relief, though Lord St. Leonards, with good reason, dissents from that opinion. The victim comes to the snare (for this system of dealing does set snares, not, perhaps, for one prodigal more than another, but for prodigals generally as a class) excluded, and known to be excluded, by the very motives and circumstances which attract him, from the help and advice of his natural guardians and protectors, and from that professional aid which would be accessible to him, if he did not feel compelled to secrecy. He comes in the dark, and in fetters without either the will or the power to take care of himself and with nobody else to take care of him. Great judges have said that there is a principle of public policy in restraining this."

When a document, purporting to be executed by a person who appears to be a minor, is presented for registration, it is the duty of the registering officer to refuse to register it,¹ so far as that person is concerned.²

Registration of document executed by minor.

There is a similar duty cast upon the Registrar of Mutations appointed under the Land Records Maintenance Act.³

Registration of transfers of tenant right.

The mere fact that an executant is a minor does not, in the absence of fraud, vitiate the registration.⁴

Except that a Mahomedan governed by the Shia law, who is ten years of age, and is capable of discernment, can make a will for proper purposes,⁵ no minor can dispose of his property by will.⁶

Wills of minors.

A minor⁷ who has arrived at the age of discretion, can, under the Hindu law, make a valid adoption or give a valid permission to adopt.⁸

Adoption by minor.

¹ Act XVI of 1908 (Registration), sec. 35. The object of this section is that if the registering officer refuses to register on the ground of minority, the question of minority may at once be brought before a civil court and there determined; *Chuneemull Johary v. Brojonath Roy Chowdhry* (1882), 8 Calc., 967.

² *Muhammed Ewaz v. Birjlall* (1877), 4 I. A., 166; 1 All., 465.

³ Act III (B. C.) of 1895, sec. 14.

⁴ *Sham Charan Mal v. Chowdhry Debya Singh Pahraj* (1894), 21 Calc., 872.

⁵ Baillie's Mahomedan Law, part ii, p. 232; Ameer Ali's Lectures on Mahomedan Law, pp. 453, 454.

⁶ Act X of 1865, sec. 46, applied to certain Hindus by Act XXI of 1870, sec. 2; *Hardwari Lal v. Gomi* (1911), 33 All., 525; *Gulab (Bai) v. Thakorelal*

(1912), 36 Bom., 622; 14 Bom. L. R., 748; *Krishnamacharian v. Krishnamacharian* (1913), 38 Mad., 166; Ameer Ali's Lectures on Mahomedan law, pp. 453, 454; Macnaghten's Hindu Law, ii, 219 note. As to the power of minor fathers to appoint guardians by will, see *post*, p. 62.

⁷ *i.e.* a minor according to Hindu Law, *ante*, pp. 1 and 2. The Indian Majority Act (IX of 1875) does not apply to matters of adoption.

⁸ *Jumoona Dassya Chowdhrani v. Bamasoondari Chowdhrani* (1876), 3 I. A., 72; 1 Calc., 289; 25 W. R. C. R., 235; *Rajendranarain Lahoree v. Saroda Soonduree Dabee* (1871), 15 W. R. C. R., 548; *Vandhravan Jekisan (Patel) v. Manilal Chunilal (Patel)*, (1890), 15 Bom., 565. See G. C. Sircar's Law of Adoption, pp. 207 *et seq.*; Trevelyan's Hindu Law,

The fact of a widow's minority affords no objection to an adoption otherwise validly effected by her.¹

Family settle-
ment in
Bengal.

A minor cannot apply to Government for permission to make a settlement of his estate under the Bengal Settled Estates Act, 1904,² but if he be a member of a joint Hindu family or co-sharer, and an application for a settlement of the joint property be made in accordance with that Act, the Court can recognize the assent of the guardians of his property,³ or (when a guardian of his property cannot lawfully be appointed) the guardian of his person, appointed or declared under the Guardians and Wards Act, 1890, or any other law for the time being in force, and approved by an order in writing under the seal of the Court which appointed or declared the guardian.⁴

In the United Provinces a minor cannot apply under the Oudh Settled Estates Act II (N.-W. P.) of 1900.

pp. 102-104. If the power be in writing the law requires it to be registered (Act XVI of 1908), s. 17, but the Registrar cannot register a document executed by a minor (*Ibid.*, sec. 35). As to the restriction of his powers by the person through whom the minor receives property, see *Hurrosoondery v. Kistonath Roy*, 1 Fulton, 393. As to adoption by wards of the Bengal Court of Wards, see Act IX (B. C.) of 1879, sec. 61, *post*, p. 356; by wards of the Madras Court of Wards, see

Act I (M. C.) of 1902, sec. 34, *post*, p. 375, by wards of the United Provinces, see Act IV (U. P.) of 1912, sec. 37, *post*, pp. 405, 406.

¹ *Mondakinee Dasi v. Adinath Dey* (1890), 18 Calc., 69; *Hardhun Rai v. Biswanath Rai* (1815), 2 W. Macn., 180.

² Act III (B. C.) of 1904, sec. 3.

³ A natural guardian has no such power, apparently.

⁴ Act III (B. C.) of 1904, sec. 5 (2).



CHAPTER III.

ACQUISITION OF PROPERTY, BY TRANSFER, GIFT, INHERITANCE, OR WILL.

It has been held that a mortgage to a minor is void,¹ but it is submitted that a transfer to a minor whether by way of sale or mortgage,² will be upheld, if for his benefit.³ Transfer to minor.

There is nothing in the Transfer of Property Act (IV of 1882) to nullify a transfer of property to a minor.⁴

A lease would be on a different footing as a minor would not be liable for the rent.⁵

A minor may be able to take advantage of an arrangement, although he may not be a party to it.⁶

A minor can accept a gift,⁷ but his acceptance is voidable. Gift to minor.

Under Mahomedan law there can be no valid gift without an actual change of possession; ⁸ but, in the case of a gift to a minor, possession by the guardian, or by a trustee on behalf of the minor, or by a person acting as such,⁹ is sufficient.¹⁰ Possession by a minor who has arrived at years of Mahomedan law.

¹ *Navakotti Narayana Chetty v. Logalinga Chetty* (1909), 33 Mad., 312, differed from in *Narain Das v. Dhania (Musammal)* (1915), 38 All., 154. It was held in *Meghan Dube v. Pran Singh* (1907), 30 All., 63, that a mortgage to a joint family in the name of a minor is not necessarily void.

² *Behari Lal v. Beni Lal* (1881), 3 All., 408. A minor who lends money on a mortgage is in a worse position than an adult, as in regard to recent decisions (*ante*, p. 13, note 3), he cannot enforce the agreement to repay the money, and would, therefore, in case of sale, be unable to recover any sum which might be due in excess of the proceeds of the sale. It would, therefore, in many cases be unsafe for a minor, or those acting for him, to lend his money even on a mortgage security.

³ *Ulfat Rai v. Gauri Shankar* (1911), 33 All., 657; *Mania Konan v. Perumal Konan* (1911), 37 Mad., 390; *Narain Das v. Dhania (Musammal)* (1915), 38 All., 154. In *Walidad Khan v. Janak Singh* (1913), 35 All., 370,

where minor purchasers were ousted in a suit by third parties, they were held entitled to recover their purchase money from the vendors. *Munni Kunwar v. Madan Gopal* (1915), 38 All., 62.

⁴ *Ulfat Rai v. Gauri Shankar* (1911), 33 All., 657.

⁵ *Ante*, p. 13.

⁶ *Kwaja Muhammad Khan (Nawab) v. Husaini Begum (Nawab)* (1910), 37 I. A., 152; 32 All., 410; 14 C. W. N., 865; 12 Bom., L. R. 638.

⁷ See *Navakotti Narayana Chetty v. Logalinga Chetty* (1909), 33 Mad., 312, at p. 314. Cf. Act IV of 1882 (Transfer of Property), s. 127.

⁸ Macnaghten's Mahomedan Law, Principles, chap. v, princ. 1.

⁹ *Banoo Beebee (Mussummaul) v. Fukherooddeen Hosein* (1816), 2 Ben. Sel. Rep., 180, 2nd Edn., 230.

¹⁰ *Mohinuddin v. Manchershah* (1882), 6 Bom., 650; *Wajeed Ali v. Abdool Ali*, W. R., 1864, C. R., 121; Macnaghten's Mahomedan Law, Precedents, chap. iv, cases 19, 20, and 21.

discretion will also validate the gift.¹ When the guardian is himself the donor no formal delivery or change of possession is necessary, provided that it appear that there is on his part a real and *bonâ fide* intention to make a gift to the minor.²

Hindu law. Under the Hindu Law a gift to a minor is valid, provided that on his coming of age he exercises ownership over the subject of the gift.³

Possession can be taken by a guardian on behalf of a minor.⁴

Gift burdened by obligation. A minor donee, who accepts property burdened by any obligation, is not bound by his acceptance; but if, after attaining majority, and being aware of the obligation, he retains the property given, he becomes so bound.⁵

May take by devise or bequest. Minors (including infants in the womb) are not incapacitated from taking by devise or bequest.

Acceptance will be presumed unless such presumption will work injury to the devisee or legatee.⁶ But where a minor has to be put to his election to take under or against a will, the election must be postponed until the minority ceases, or until the election be made by some competent authority.⁷

Inheritance. A minor can also take by succession, or inheritance.

Bound by acts of predecessor in title. A minor heir or legatee is bound by a contract or by conditions annexed to the property to which he succeeds, or which have been imposed thereon by the person from whom he takes, unless they be such as cannot have been intended to apply to a minor.⁸

As in the case of an adult, a minor is bound by the acts of the person to whose property he succeeds, either as heir, legatee, or donee.⁹

Gift or legacy or share of assets may be paid to Official Trustee. If any minor is entitled to a gift, legacy or share of the assets of a deceased person, the person by whom such gift was made or the executor or administrator by whom such legacy, or share is payable or transferable, or any trustee of such gift, legacy, or share, may transfer the same by an instrument

¹ Baillie's Mahomedan Law, Part I, p. 531.

² *Ameeroonissa Khatoon v. Abadonissa Khatoon* (1875), 2 I. A., 87; 15 B. L. R., 67; 23 W. R. C. R., 208; *Gyazoodeen Hyder (Syud) v. Fatima Begum (Musst)* (1866), 1 Agra H. C. Rep., 238; Macnaghten's Mahomedan Law, Principles, chap. v, prins. 9 and 10.

³ Macnaghten's Hindu Law, vol. ii, chap. viii, case 36, pp. 243, 244.

⁴ See *Joitaram v. Ramkrishna* (1902), 27 Bom., 31; 4 Bom. L. R., 754.

⁵ Act IV of 1882 (Transfer of Property), sec. 127; *Subramania Ayyar v. Sitha Lakshmi* (1896), 20 Mad., 147.

⁶ Jarman on Wills, 6th Edn., p. 97.

⁷ Act X of 1865 (Succession), sec. 177. "Competent authority" is not defined. It might mean a Court acting under the Guardians and Wards Act (VIII of 1890), sec. 43, *post*, p. 149.

⁸ Simpson on Infants, 3rd Edn., pp. 68-70.

⁹ *Ibid.*, p. 70.

in writing to the Official Trustee by that name or any other sufficient description with his consent. Provided that such consent be recited in the instrument, and such instrument be duly executed by the Official Trustee.¹

Any money or property transferred to the Official Trustee under the above provision vests in him and shall be subject to the same provisions as are contained in the Official Trustees Act, 1913 (Act II of 1913) as to other property vested in such Official Trustee.²

Where, by the terms of a bequest, the legatee is entitled to the immediate payment or possession of the money or thing bequeathed, but is a minor, and there is no direction in the will to pay it to any person on his behalf, the executor or administrator shall pay or deliver the same into the Court of the District Judge,³ by whom, or by whose District Delegate, the probate was, or letters of administration with the will annexed were granted, to the account of the legatee, unless the legatee be a ward of the Court of Wards; and if the legatee be a ward of the Court of Wards, the legacy shall be paid into that Court to his account. Such payment into the Court of the District Judge, or into the Court of Wards, as the case may be, is a sufficient discharge for the money so paid. Such money when paid in shall be invested in the purchase of Government securities, which, with the interest thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit as the Judge or the Court of Wards, as the case may be, may direct.⁴

Payment of legacy into Court.

Whenever a person dies leaving property, moveable or immoveable, and the person entitled by succession to such property is a minor, any agent, relative, or near friend, or the Court of Wards in cases within their cognizance, may, either after actual possession has been taken by another person, or

Wrongful possession of property to which minor entitled to succeed.

¹ Act II of 1913 (Official Trustees), sec. 12 (1). The previous Act (XVII of 1864, s. 32) required an order by the High Court. That is not now necessary.

² Act II of 1913, s. 12 (2).

³ Act X of 1865 (Succession), sec. 2, and Act V of 1881 (Probate and Administration), sec. 3, define a "District Judge" as the judge of a principal Civil Court of Original Jurisdiction.

⁴ Act X of 1865 (Succession), sec. 308; Act V of 1881 (Probate and

Administration), sec. 127; Act VI of 1881 (District Delegates), sec. 8. In the case of a legacy, to the immediate payment of which the legatee is entitled, this provision apparently conflicts with the power to pay the money to the Official Trustee (*ante*, p. 28), but in practice there would be no such conflict, as, if the money had been paid to the Official Trustee, the Court would not insist on the executor or administrator paying it into Court.

when forcible means of seizing possession are apprehended, apply to the Judge of the Court of the District, where any part of the property is found, or situate, for relief.¹

The Judge, on being satisfied by evidence that there are strong reasons for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the minor is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a regular suit, and that the application is made *bonâ fide*,² shall cite the party complained of and give notice of vacant or disturbed possession by publication, and after the expiration of a reasonable time, shall determine summarily the right to possession (subject to a regular suit by either party),³ and shall deliver possession accordingly.⁴

Appointment
of Curator.

The Judge is further empowered to appoint one or more curators to have the custody of such property during the pendency of such summary suit,⁵ provided that when a Public Curator has been appointed for his district the Judge is bound to nominate the Public Curator, curator of such property.⁶

Administra-
tor-General
ordered to
take out letters
of administra-
tion.

The Administrator-General's Act gives to a High Court at a Presidency Town power to direct the Administrator-General to apply for letters of administration of the effects of any person, who dies leaving assets within the local limits of its ordinary original civil jurisdiction, when the Court is satisfied that danger is to be apprehended of the misappropriation, deterioration, or waste of such assets unless letters of administration are granted.⁷

The application to the Court for such direction may be made by a friend of a minor interested in such assets, either as creditor, legatee, next-of-kin, or otherwise.

The High Courts have also power,⁸ in cases where such danger is apprehended, to authorize and enjoin the Administrator-General to collect and take possession of such assets, and to hold or deposit and invest the same until the right of succession or administration is ascertained.

As to the grant of letters of administration, and succession certificates in cases where the minor, if an adult, would have been entitled to probate, letters of administration, or a succession certificate, see *post*, pp. 34-36.

¹ Act XIX of 1841 (Curators), secs. 1 and 2. There is nothing in this Act to expressly limit the territorial extent of its operation, but the provisions of the Act show that it was not intended to apply to Presidency Towns.

² Act XIX of 1841 (Curators), secs. 3 and 4.

³ *Ibid.*, secs. 4 and 17.

⁴ *Ibid.*, sec. 4. See *Bhimappa v. Khanappa* (1909), 34 Bom., 115; 11 Bom. L. R., 1308.

⁵ *Ibid.*, sec. 5. As to the powers and duties of such curators, see that Act. The Judge cannot make an order under this section, unless the conditions, which justify his citing the party complained of, exist; *Papamma v. Collector of Godavari* (1889), 12 Mad., 341.

⁶ Act XIX of 1841 (Curators), sec. 19.

⁷ Act III of 1913 (Administrator-General), sec. 10.

⁸ *Ibid.*, sec. 11.

CHAPTER IV.

OFFICES OF PUBLIC AND PRIVATE TRUST.

As minors are incapable of managing their own affairs it follows that they are incapable of managing those of others, and that they cannot hold offices of public or private trust.

The following are instances of this principle :—

A person under the age of twenty-one years cannot, if objected to, Juror. serve as a juror.¹

The members of the Corporation of Calcutta must be men who have attained the age of twenty-one years,² and no one under that age can be enrolled on the municipal election roll as a voter.³ Calcutta Municipality.

Similar qualifications are required for commissioners and voters in mofussil municipalities in Bengal,⁴ and for members of Local Boards in Bengal and persons entitled to vote at the election of such members.⁵ Mofussil municipalities in Bengal. Bengal Local Boards.

A minor is not eligible for appointment to a Village Office under the Madras Proprietary Estates Village Service Act,⁶ or under the Madras Hereditary Village Offices Act.⁷ Madras village service.

For the Madras Municipality a candidate must have completed his twenty-fifth,⁸ and a voter his twenty-first year.⁹ Madras Municipality.

In the case of Madras District Municipalities, candidates must be over twenty-five years of age.¹⁰ Madras District Municipalities.

In the United Provinces the qualifications of members of Local Boards and Municipalities¹¹ are left to the Local Government. U. P. Local Boards and Municipalities.

In Bombay no person under twenty-one years of age may be a member, or vote for a member, of a Local Board,¹² or of a District Municipality,¹³ or of the Municipality of Bombay.¹⁴ Bombay Local Boards and District Municipalities.

¹ Act V of 1898, sec. 278 (b).

² Act III (B. C.) of 1899, sec. 38.

³ *Ibid.*, secs. 37 (2).

⁴ Act III (B. C.) of 1884, secs. 14 and 15, Rules 2 and 15 of rules of 14th August, 1889.

⁵ Act III (B. C.) of 1885, secs. 9 and 13.

⁶ Act II (M. C.) of 1894, sec. 10. As to the appointment of a person in place of the minor, see secs. 10 (3) and 13.

⁷ Act III (M. C.) of 1895, secs. 10

and 11, which see as to the filling up of the vacancy.

⁸ Act III (M. C.) of 1904, sec. 33.

⁹ *Ibid.*, sec. 32.

¹⁰ Act III (M. C.) of 1897, sec. 11.

¹¹ Act XIV of 1883, sec. 6.

¹² Act XV of 1883, sec. 10.

¹³ Act I (Bo. C.) of 1884, secs. 11 and 19.

¹⁴ Act III (Bo. C.) of 1901, secs. 15 and 21.

¹⁵ Act III (Bo. C.) of 1888, secs. 11 and 14.

Hereditary
offices in
Bombay.

In the Bombay Presidency the Collector must refuse to accept the service of any representative wátándár or of any person nominated by a representative wátándár to be his deputy, if such representative wátándár or person is under eighteen years of age,¹ in which case his guardian can act for him.²

There is a similar provision in respect of matádárs.³

Attorney.

No person can be admitted as an attorney until he is twenty-one years of age.⁴

Sajjadanashin
and mutwali.

A minor⁵ cannot be appointed a sajjadanashin of a shrine or apparently a mutwali; but if the person, upon whom the office of mutwali devolves in consequence of a provision on the waqfnama, is a minor, the Court can appoint some one to perform his duties during his minority.⁶

As to the powers of the Madras Court of Wards in regard to religious endowments of which a ward is hereditary trustee or manager, see Madras Act I of 1902, sec. 63, *post*, pp. 386, 387.

Minor trustee.

A minor may be appointed a trustee; but he cannot exercise any power which requires the application of prudence or discretion,⁷ unless the document which creates the trust authorizes the exercise of the power during minority.⁸

He is not civilly liable for a breach of trust⁹ in respect of moneys received by him as an executor or trustee.¹⁰

Under the Indian Trusts Act,¹¹ sec. 60, a beneficiary may insist upon the appointment of an adult trustee.

Appointment
of new trustee.

By virtue of the Indian Trustee Act,¹² in cases to which the English law is applicable,¹³ a High Court may, within the

¹ Act III (Bo. C.) of 1874, sec. 45, as amended by Act V (Bo. C.) of 1886, sec. 9.

² Act III (Bo. C.) of 1874, sec. 37.

³ Act VI (Bo. C.) of 1887, secs. 23 and 30.

⁴ Belchambers's Practice, 456.

⁵ *i.e.* according to Mahomedan law, *ante*, pp. 2-4. See *Niamat Ali v. Ali Reza* (1914), 37 All., 86.

⁶ *Piran v. Abdool Karim* (1891), 19 Calc., 203, at pp. 219, 220; *Ameer Ali's Mahomedan Law*, vol. i, p. 350.

⁷ Simpson on Infants, 3rd Edn., p. 94; *King v. Bellord* (1863), 1 Hemming and Miller, 343. See Act II of 1882, sec. 10.

⁸ See *Cardross's Settlement* (1878), 7 Ch. D., 728.

⁹ He may be liable for an offence

against the criminal law, *post*, pp. 40, 41.

¹⁰ *Stott v. Meanock* (1862), 31 L. J., Eq. 746.

¹¹ Act II of 1882, which extends to the Madras Presidency, the United Provinces, the Punjab, the Central Provinces, Coorg and Assam, and may be extended to any other part of British India by a Local Government.

¹² Act XXVII of 1866.

¹³ *In re Kahandas Narrandas* (1881), 5 Bom., 154, West, J., held that the Indian Trustee Act (XXVII of 1866) applies to a Hindu trust, and there has been a decision to the same effect in Calcutta, *In the matter of Nilmoney Dey Sarkar* (1904), 32 Calc., 143, 9 C. W. N., 79.

local limits of its extraordinary original civil jurisdiction¹ by an order on a petition² appoint new trustees in place of minor trustees,³ and direct that any immoveable property subject to the trust shall vest in the new trustees. Such appointment may be made without prejudice to an application by the minor to be restored to the trusteeship on attaining majority.⁴ In other cases, such appointment may be made in a suit.⁵

The Indian Trustee Act⁶ also contains the following provisions with respect to minor trustees in cases to which the English law is applicable:—⁷

“Section 8.—Whenever any minor shall hold any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order vesting such property in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the minor trustee or mortgagee had attained his majority and had duly executed a conveyance of the property in the same manner for the same estate.

High Court may convey estates of minor trustees and mortgagees.

“Section 9.—Where any minor shall be entitled to any contingent right in any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the minor had attained his majority, and had duly executed a deed so releasing or disposing of the contingent right.

Contingent rights of minor trustees and mortgagees.

“Section 20.—In every case where the High Court shall, under the provisions of this Act, be enabled to make an order having the effect of a conveyance of any immoveable property, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the High Court, should it be deemed more convenient, to make an order appointing a person to convey such property, or release or dispose of such contingent right, and the conveyance or release or disposition of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect, in conveying the property, or releasing or disposing of the contingent right, as an order of the High Court would in the particular case have had under the provisions of this Act.

Power to appoint a person to convey.

“In every case where the High Court shall, under the provisions of this Act, be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of any Company or Society established or to be established, it shall also be lawful for the High Court, if it be deemed more convenient, to make an order directing the Secretary or any Officer of such Company or Society at once to transfer or join in transferring the stock to the person or persons to be named in the order, and this Act shall be a full and complete indemnity and discharge

¹ Act XXVII of 1866, sec. 3.

² *Ibid.*, sec. 40.

³ *Ibid.*, sec. 35.

⁴ *In re Shelmerding* (1864), 33 L. J., Eq. 474.

⁵ See Act II of 1882, sec. 60.

⁶ XXVII of 1866.

⁷ Sec. 3; see *ante*, p. 32, note 13.

⁸ Sec. 17 contains a similar provision with respect to an unborn person or a class of unborn persons.

to all Companies or Societies and their officers and servants for all acts done or permitted to be done pursuant thereto.

Power to make an order for the transfer or receipt of dividends of stock, &c., in name of minor trustee.

“Section 30.—When any minor shall be solely entitled to any stock or Government securities upon any trust, it shall be lawful for the High Court to make an order vesting in any person or persons the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof. When any minor shall be entitled jointly with any other person or persons to any stock or Government securities upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, either in the person or persons jointly entitled with the minor, or in him or them together with any other person or persons the said Court may appoint.

Money payable to minor in discharge of property conveyed under this Act.

“Section 46.—Where any minor * * * shall be entitled to any money payable in discharge of any immoveable property, stock, Government securities, or thing in action conveyed or transferred under this Act, it shall be lawful for the person by whom such money is payable to pay the same into the High Court, in trust in any cause then depending concerning such money, or if there shall be no such cause, to the credit of such minor * * * subject to the order or disposition of the said Court; and it shall be lawful for the said Court, upon petition in a summary way, to order any money so paid to be invested in Government securities, and to order payment or distribution thereof, or payment of the dividends or interest thereof, as to the said Court shall seem reasonable.”

Applications how to be made.

Applications under the Indian Trustee Act must be by petition supported by affidavits or other evidence.¹

Costs of applications.

Full powers as to the costs of applications are given to the High Court by this Act.²

Minor cannot take out letters of administration or probate.

Letters of administration to the estate,³ or probate of the will⁴ of a deceased person, cannot be granted to a minor.⁵

Letters of administration when minor sole executor or residuary legatee.

The Indian Succession Act,⁶ which applies to the wills of all persons other than Hindus, Mahomedans, and Buddhists,⁷ contains the following:—

“Section 215.—When a minor is sole executor or sole residuary legatee, letters of administration, with the will annexed, may be granted to the legal guardian⁸ of such minor or to such other person as the Court shall think fit until the minor shall have completed the age of eighteen years, at which period, and not before, probate of the will may be granted to him.

¹ Act XXVII of 1866, sec. 40.

² *Ibid.*, secs. 42 and 49.

³ Act X of 1865, sec. 189; Act V of 1881, sec. 13.

⁴ Act X of 1865, sec. 183; Act V of 1881, sec. 8.

⁵ *Post*, p. 35, note 1.

⁶ Act X of 1865.

⁷ Sec. 331.

⁸ This would include a guardian appointed by a Civil Court, or by a Court of Wards, or a natural or testamentary guardian.

“Section 216.—When there are two or more minor executors and no executor who has attained majority, or two or more residuary legatees and no residuary legatee who has attained majority, the grant shall be limited until one of them shall have completed the age of eighteen years.”¹

The Probate and Administration Act,² which applies to Hindus, Mahomedans, Buddhists, and persons exempted under sec. 332 of the Indian Succession Act by the Governor-General in Council,³ contains the following similar provisions:—

“Section 31.—When a minor⁴ is sole executor or sole residuary legatee, letters of administration with the will annexed may be granted to the legal guardian⁵ of such minor, or to such other person as the Court shall think fit, until the minor has attained his majority, at which period, and not before, probate of the will shall be granted to him.

“Section 32.—When there are two or more minor executors and no executor who has attained majority, or two or more residuary legatees and no residuary legatee who has attained majority, the grant shall be limited until one of them has attained his majority.

“Section 33.—If a sole executor or a sole universal or residuary legatee, or a person who would be solely entitled to the estate of the intestate according to the rule for the distribution of intestate's estates, applicable in the case of the deceased, be a minor * * *, letters of administration with or without the will annexed, as the case may be, shall be granted to the person to whom the care of his estate has been committed by competent authority, or if there be no

Administra-
tion for use
and benefit of
minor.

¹ Although the age of eighteen is here specified, the effect of the Indian Majority Act, sec. 3 (*ante*, p. 6), will apparently be to prevent probate being granted to a person who under that Act does not attain majority until twenty-one. Probate or letters of administration could not be granted to persons who are in the charge of others, are incapable of contracting, and are otherwise under disability.

² Act V of 1881.

³ Native Christians of the province of Coorg have been so exempted.—*Gazette of India*, July 25th, 1868, p. 1094. So have the Jews of

Aden, see Bom. R. & O., vol. i. and the members of the races known as Khasias and Syntengs, see Assam R. & O.

⁴ *i.e.* any person subject to the Indian Majority Act, 1875 (*ante*, p. 6), who has not attained his majority within the meaning of that Act, and any other person who has not completed his age of eighteen years, Act V of 1881, sec. 3. The expression “other person” in that section includes a person not domiciled in British India, *In the goods of Sewnarain Mohata* (1894), 21 Calc., 911.

⁵ See *ante*, p. 34, note 8.

such person, to such other person as the Court thinks fit to appoint, for the use and benefit of the minor * * *, until he attains majority." * * * 1

Power of administrator during minority.

An administrator during minority has all the powers of an ordinary administrator, and the minority is the only limit to his authority.²

Practice of High Courts.

The High Courts grant letters of administration to the guardians of minor heirs, *pendente minore aetate*, for the use and benefit of the minors, but only in cases where such grant is necessary.³

Renunciation of probate.

A guardian is not obliged to apply for administration on behalf of his ward. He may on his ward's behalf renounce probate or administration.⁴

Succession certificate.

It is unsettled whether a certificate under the Succession Certificate Act⁵ can be granted to a minor.⁶

It has been held⁷ that a certificate of succession may be granted to a minor through his next friend. It is submitted that this course is not allowable by law. The Court could not fix upon the minor the responsibility annexed to the holding of a certificate, and the fact that he had applied through a next friend would not shift such responsibility upon the next friend.

The guardian of a minor can, as such, apply for such certificate in respect of property inherited by his ward.⁸

Certificate of heirship in Bombay.

A minor cannot obtain a certificate of heirship under Bombay Regulation VIII of 1827,⁹ but under that Regulation the District Court can appoint an administrator when the heir or executor is a minor.¹⁰

¹ It was held *In the goods of Nirojini Debi* (1907), 34 Calc., 706; 1 C. W. N., 697; that administration can only be granted to a person who had been appointed guardian. This view has no regard to the last portion of the section.

² *Cope v. Cope* (1880), 16 Ch. D., 49.

³ *In the goods of Hurry Das Bonnerjee* (1878), 4 Calc., 87. See Coote's Common Form Practice, 8th Edn., p. 135.

⁴ Coote's Common Form Practice, 8th Edn., p. 218.

⁵ Act VII of 1889.

⁶ There is no special prohibition in the Act, but the Court could not

give to a minor, whose property is the subject of tutelage, a right to collect debts.

⁷ *Ram Kuar v. Sardar Singh* (1898), 20 All., 352; *Krishnama Charlu v. Venkamma* (1912), 36 Mad., 214. For a case under Act XXVII of 1860, see *Kalicoomar Chatterjee v. Tara Prosunno Mookerjee* (1879), 5 C. L. R., 517.

⁸ *Ex parte Mahadev Gangadhar Deshpande* (1904), 28 Bom., 344; 6 Bom. L. R., 281. See *Gulabschand Gannaji v. Moti Chattraji* (1900), 25 Bom., 523; 3 Bom. L. R., 795.

⁹ *Baiba (Bai) v. Deguba (Bai)* (1882), 6 Bom., 728.

¹⁰ Sec. 9.

CHAPTER V.

TESTIMONY OF MINORS.

A MINOR, when of sufficient understanding, is competent to give evidence in a Court of Justice.¹ Minor may be a witness.

The Indian Evidence Act² provides that "All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

This is in accordance with the English law which regulates the competency of children to give evidence by the degree of understanding which they appear to possess, and not by their age.³

When a child is tendered as a witness in a Court of Justice, it is more prudent for the Judge, before allowing an oath or a solemn affirmation to be administered, to examine the child as to his mental capacity and understanding with special reference to his capacity to give a rational account of what he has seen, heard, or done on a particular occasion. Duty of Judge, when child tendered as witness.

The Judge is not obliged to examine the child.⁴

It is also not unusual, but it is not necessary, to examine

¹ "Independently of the sanction of an oath, the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons; what is wanted in the perfection of the intellectual faculties is sometimes more than compensated by the absence of motives to deceive."—Phillips on the Law of Evidence, 10th Edn., p. 11.

² I of 1872, sec. 118.

³ Macpherson on Infants, p. 452. Under the Mahomedan law minors were incompetent to give evidence. Macnaghten's Principles of Mahomedan Law, chap. xii, princ. 10. The Hindu law only permitted minors

to be witnesses on failure of witnesses duly qualified, or in cases of adultery, theft, affray, and "criminal business." Vyavahara Mayukha, chap. ii, sec. 2, para. 8. Under Act II of 1855 (sec. 14), which was repealed by Act I of 1872, children under seven years of age, who appeared incapable of receiving just impressions of the facts respecting which they were examined or of relating them truly, were incompetent to testify; but all children over seven years of age were, irrespective of their understanding, competent to testify.

⁴ *Nafar Sheikh v. King-Emperor* (1913), 18 C. W. N., 147.

him as to his knowledge of the penalties attaching to the infraction of an oath or of a solemn affirmation.¹

Trial by jury. In the case of a trial by jury, the question whether the child's evidence should be admitted, is not one for the jury, but for the Judge alone,² although where the Judge has allowed the child to be sworn or affirmed, and the child has given its testimony, the jury may, and should, in weighing that testimony, take into consideration the youth or incapacity of the witness.³

Trial by Judge or magistrate. In cases of trial by a Judge, whether in a civil or in a criminal proceeding, or by a magistrate, the Judge, or magistrate, should, in weighing the evidence of children, take into consideration their youth and incapacity.⁴

Absence of oath or affirmation. The statement of a child cannot be taken in Court unless he be sworn or affirmed,⁵ but if the Court has accidentally or

¹ *Queen - Empress v. Lal Sahai* (1888), 11 All., 183. As to the English practice, Mr. Phillips, in his work on the Law of Evidence (10th Edn., p. 11), says this :—

“It may be observed, the preliminary enquiry usually made for ascertaining their competency, is not always of the most satisfactory nature; and sometimes is of such a description, that merely by a slight practising of the memory, a child might thus be made to appear competent, and qualified as a witness. The enquiry is commonly confined to the ascertaining of the fact, whether the child has a conception of Divine punishment being a consequence of falsehood; it seldom extends so far as to ascertain the child's notions of the nature of an oath, and scarcely ever relates to the legal punishment for perjury. It has been held, however, that the effect of the oath on the conscience of a child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath, which have been communicated with reference to the trial.” *R. v. Williams* (1836), 7 C. & P., 320.

² Act V of 1898, sec. 298 (c). *Queen v. Hosseinee* (1867), 8 W. R. Cr. R., 60.

³ *Queen v. Hosseinee* (1867), 8 W. R. Cr. R., 60.

⁴ Mr. Phillips, in his work on the Law of Evidence (10th Edn., p. 11), says :—“With regard to the weight and effect of the testimony of children, Sir W. Blackstone observes that where the evidence of children is admitted, it is much to be wished, in order to render the evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that a conviction should not be grounded on the unsupported accusation of an infant under years of discretion. In many cases undoubtedly, the statements of children are to be received with great caution. But it is clear a prisoner may be legally convicted upon such evidence alone, and unsupported; and whether the account of a child requires to be corroborated in any part or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the evidence of the child has been given.”—(Commentaries, vol. iv.)

⁵ Act X of 1873, sec. 5; *Queen - Empress v. Lal Sahai* (1888), 11 All., 183; *Queen v. Anunto Chuckerbutty* (1874), 22 W. R. Cr. R., 1; 14 B. L. R., 295, note; *Queen v. Itwarya* (1874), 22 W. R. Cr. R., 14; *Nafar Sheikh v. King-Emperor* (1913), 18 C. W. N., 147.

intentionally omitted to cause him to be sworn or affirmed, such omission will not of itself invalidate the proceedings or render the deposition useless.¹

Statements made by children in cases coming under sec. 32 of the Indian Evidence Act,² or in any other cases where statements made by adults are admissible in evidence, should be accompanied by evidence of the intelligence of the child.³

When the child is unfit to be sworn, it follows that any account which he may have given to others of the transaction ought not to be admitted; ³ but where the conduct of a child in reference to any fact in issue in, or relevant to, any suit or proceeding or the conduct of a child, an offence against whom is the subject of any proceeding, is relevant, the child's statement accompanying and explaining his acts may be evidence.⁴

In every case where a child's statement is admissible in evidence, great caution must be used in acting upon it, as, apart from the want of the safeguard of cross-examination, it may be often difficult to ascertain whether the child has been tutored and whether he is of sufficient intelligence.

¹ Act X of 1873, sec. 13; *Queen v. Sewa Bhogta* (1874), 14 B. L. R., 294; 23 W. R. Cr. R., 12; *Queen v. Itwarya* (1874), 22 W. R. Cr. R., 14; *Queen-Empress v. Shava* (1891), 16 Bom., 359; *Emperor v. Dhani Ram* (1915), 38 All., 49. *Contrâ*: *Queen-Empress v. Maru* (1888), 10 All., 207; *Queen v. Anunto Chuckerbutty* (1874), 22 W. R. Cr. R., 1; 14 B. L. R., 295, note. See *Queen-Empress v. Viraperumal* (1892), 16 Mad., 105.

² I of 1872. As to admissions in suits, see *post*, pp. 271, 272.

³ See Macpherson on Infants, p. 453. It also follows that statements made by children would be inadmissible unless they fulfil the conditions which render statements made by adults evidence.

⁴ As for instance where a female infant has been ravished, and has made a complaint relating to the crime, the circumstances under which and the terms in which the complaint was made would be relevant. (Illustration (j) to sec. 8 of Act I of 1872.)

CHAPTER VI.

WRONGS AND CRIMINAL OFFENCES BY MINORS.

Liability of minors for wrongs.

A MINOR, like an adult, is liable to be sued for damages in respect of all actionable wrongs, independent of contract,¹ committed by him.²

As to wrongful acts committed by his guardian, see *post*, p. 187.

He can be restrained by injunction, in cases where, if he had been an adult, he would have been so restrained.³

Responsibility for crime.

The liability of a minor to punishment for offences committed by him against the criminal law varies according to his age.

Minors under seven.

Up to the age of seven years a minor is absolutely free from all responsibility to the criminal law, and nothing done by him while under that age renders him liable to the penalties imposed by that law.⁴

Minors more than seven and less than twelve.

Between the ages of seven and twelve the responsibility of a minor depends upon the maturity of his judgment. The eighty-third section of the Indian Penal Code⁵ is as follows :—

“ Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained

¹ As to liability on contract, see *ante*, chap. ii.

² *Defries v. Davis* (1835), 1 Bing. N. C., 692; *Bristow v. Eastman* (1794), 1 Esp. N. P. C., 172; *Luchman Dass v. Narayan* (1871), 3 N.-W. P. H. C. Rep., 191; *Bomanji v. Mahomed Ali* (1905), 7 Bom. L. R., 713.

³ *Chubb v. Griffith* (1865), 35 Beav., 127.

⁴ Act XLV. of 1860, sec. 82. This applies as much to offences under other Acts as to those made punishable by the Penal Code; see *Ibid.*, sec. 40.

⁵ Act XLV of 1860.

sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion." ¹

"The consequences of his conduct" has been held not to mean the penal consequences of his offence, but to mean the natural consequences which flow from his act. ² The words of the section are, however, wide enough to include a knowledge that the committal of the act is an offence punished by the criminal law, or rather that the act is wrong.

The manner of committing the offence, or the intelligence shown by the offender in concealing all trace of the crime, will often justify a child being held criminally responsible for an offence. The defence set up by the child and his demeanour at the trial will often also be material. ³

Although a child may on account of the immaturity of his understanding be free from criminal responsibility, those who abet him in the commission of an offence are liable to conviction, ⁴ and a receiver may be convicted although the thief be discharged on account of his youth and incapacity. ⁵

Abetment of
offence by
minor.
Receiver.

After he has attained the age of twelve years, a minor is liable to the penalties of the criminal law to the same extent as an adult; but in determining an appropriate punishment, the Court may take into consideration the youth or incapacity of the offender.

Minor over
twelve years.
of age.

Any male offender under sixteen years of age who abets, commits, or attempts to commit any offence punishable under the Indian Penal Code except offences against the State, and offences punishable under secs. 153A and 505 of that Code and offences punishable with death or any offence punishable under any other law with imprisonment, which the Governor-General in Council may, by notification in the *Gazette of India*, specify in their behalf, may be punished with whipping ⁶ in lieu of any other punishment to which he may, for such offence, abetment or attempt be liable under that Code. ⁷

Whipping.

¹ The burden of proving insufficient maturity of understanding is apparently upon the defence, Act I of 1872, sec. 105; *Queen v. Lakhini Agradini* (1874), 22 W. R. Cr. R., 27. *Contrâ*: Morgan and Macpherson's edition of the Indian Penal Code, p. 60. The English law places the burden upon the prosecution; Archbold's *Pleading and Evidence in Criminal Cases*, 24th Edn., p. 9. Broom's *Legal Maxims*, 7th Edn., pp. 256, 257.

² *Queen v. Lakhini Agradini* (1874), 22 W. R. Cr. R., 27.

³ *Queen v. Aimana* (1864), 1 W. R. Cr. R., 43.

⁴ See Act XLV of 1860, sec. 108, Expl. 3.

⁵ *Queen v. Krishna* (1883), 6 Mad., 373.

⁶ See Act V of 1898, secs. 392 and 393, as amended by Act IV of 1909 (Whipping), sec. 7.

⁷ Act IV of 1909 (Whipping), sec. 5.

As to the Powers of Courts to direct youthful offenders to be sent to Reformatory Schools, and as to the management of such schools, and as to discharge from such schools, see the Reformatory Schools Act, 1897,¹ which applies to the whole of British India, except the Punjab and Coorg.²

Youthful offender where Reformatory Schools Act not in force.

In places where the Reformatory Schools Act, 1897,³ is not for the time being in force,⁴ when any person under the age of fifteen years is sentenced by any Criminal Court to imprisonment for any offence, the Court may direct that such person, instead of being imprisoned in a Criminal Jail, shall be confined in any Reformatory established by the Local Government as a fit place for confinement, in which there are means of suitable discipline, and of training in some branches of useful industry, or is kept by a person willing to obey such rules as the Local Government prescribes with regard to the discipline and training of persons confined therein.⁵ All persons so confined shall be subject to the rules so prescribed.⁶

Children of Criminal tribes.

Under the Criminal Tribes Act, 1911 (III of 1911), sec. 17, the Local Government may establish industrial, agricultural or reformatory schools for children of members of criminal tribes, under the age of eighteen and above the age of six years, and may separate and remove such children from their parents or guardians, and place them in such schools.

Security to keep the peace.

When a minor is required to give security to keep the peace or to maintain good behaviour, the bond can be executed by his sureties only.⁷

Nuisance. Danger to public. Dispute as to immoveable property.

There is nothing to prevent an order being made under chaps. x, xi, and xii of the Criminal Procedure Code⁸ against a minor of sufficient understanding, but the magistrate cannot make such an order as will hold a minor responsible for the acts of other persons.⁹

Acts endangering safety of persons travelling by railway.

If a minor under the age of twelve years is with respect to any railway guilty of, (a) maliciously wrecking or attempting to wreck a train, (b) maliciously hurting or attempting to hurt persons travelling by railway, (c) endangering safety of persons travelling by railway by any unlawful act or wilful omission or neglect or by any rash or negligent act or omission, he is to be deemed, notwithstanding anything in sec. 82 or sec. 83 of the Indian Penal Code,¹⁰ to have committed an offence, and the Court convicting him, may if it thinks fit, direct that the minor, if a male, shall be punished with whipping, or may

¹ Act VIII of 1897.

² *Ibid.*, sec. 1 (3).

³ Act VIII of 1897.

⁴ Act V of 1898, sec. 399 (3).

⁵ *Ibid.*, sec. 399 (1).

⁶ *Ibid.*, sec. 399 (2).

⁷ *Ibid.*, sec. 118.

⁸ Act V of 1898.

⁹ *Golam Mahamad v. Bhuban Mohan Moitra* (1897), 2 C. W. N., 422.

¹⁰ *Ante*, pp. 40, 41.

require the father, or guardian ¹ of the minor, to execute within such time as the Court may fix a bond binding himself in such penalty as the Court directs to prevent the minor from being again guilty of any of those acts or omissions.²

The amount of the bond, if forfeited, is recoverable by the Court as if it were a fine imposed by itself.

If a father or guardian fails to execute such bond within the time fixed by Court, he shall be punished with a fine which may extend to fifty rupees.²

¹ *i.e.* a person having, not unlawfully, the custody of the minor.

² Act IX of 1890, sec. 130.

CHAPTER VII.

WRONGS AND CRIMES AGAINST MINORS.

Wrongs. LIKE an adult, a minor can recover compensation for actionable wrongs from which he has suffered.¹

Criminal offences. He is also entitled to the same relief as an adult in the Criminal Courts against persons committing offences with regard to his person or property.²

The criminal law contains certain special provisions with respect to the persons of minors.

Intercourse with female under twelve. Sexual intercourse with a female under twelve years of age, whether with or without her consent, and whether by a husband or other person, is punishable as rape.³

When the minor is above that age, the husband has no absolute right to enjoy her person without regard to the question of her safety, and may be punished, if, knowing she is not apt for intercourse, he injures her. The nature of the offence, if any, depends upon the circumstances of the case.⁴

¹ *Modhoo Soodun v. Kaemoollah Biswas* (1868), 9 W. R. Cr. R., 327. As to suits by minors, see *post*, chap. xxv. As to the right of a parent to sue for compensation for the death of, or injury to, his child, see *post*, p. 137.

² See *post*, p. 253. As to the prosecution and the compounding of an offence by a guardian, see *post*, p. 130.

³ Act XLV of 1860, sec. 375, as amended by Act X of 1891, sec. 1. No Magistrate except a Chief Presidency Magistrate or District Magistrate can take cognizance of the offence of rape by a husband, or commit a man for trial for such offence. If a Chief Presidency Magistrate or District Magistrate deems it necessary to direct an investigation by a Police officer with respect to such offence, no Police officer of a rank below that of Police Inspector shall be employed either

to make, or to take part in, the investigation, Act V of 1898, sec. 561. This offence is not cognizable by the Police, so a Police officer cannot investigate it without an order of a Magistrate having power to try the case or commit it for trial, Act V of 1898, sec. 155 (2).

⁴ *Empress v. Huree Mohun Mythee* (1890), 18 Calc., 49. A Court has no power to require a female to be examined for the purpose of determining whether she is of age or fit for sexual intercourse; *Queen-Empress v. Guru Charan Dusadh*, unreported, Calcutta High Court; but in 1847 a Judge of the Madras Supreme Court ordered an inspection for the purpose of ascertaining the age of a girl; *In re Mooniatta*, Madras Native Herald for 1847, p. 193; Norton's Leading Cases, vol. i, p. 114.

Whoever takes or entices any minor,¹ under fourteen years of age if a male, or under sixteen years of age if a female,² out of the keeping of the lawful guardian³ of such minor or of any person lawfully entrusted with the care or custody of such minor,⁴ without the consent of such guardian or other person, is said to kidnap such minor,⁵ and is punishable therefor,⁶ whether he is aware or not that the minor had a guardian,⁷ and whether or not he has reason to suppose that the minor had reached the above age.⁸ This does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.⁹

Kidnapping is an offence independently of the consent of the minor,¹⁰ and independently of the knowledge of the offender as to the age of the minor.¹¹ To constitute the offence it is not necessary that the kidnapping should have been by force or fraud,¹² or that there should have been any criminal intention.¹³

Consent of minor immaterial.

¹ As to when the offence is complete, see *Nemai Chatteraj v. The Empress* (1900), 27 Calc., 1041; 4 C. W. N., 645; *Rakhal Nikari v. Queen-Empress* (1897), 2 C. W. N., 81; *Queen-Empress v. Ram Dei* (1896), 18 All., 350; *Reg. v. Samia Kaundan* (1876), 1 Mad., 173.

² The age of majority according to the personal law of the child is immaterial: *In re Mathu Ibrahim* (1913), 37 Mad., 567.

³ i.e. a natural guardian (*post*, chap. viii), a testamentary guardian (*post*, chap. ix), or a guardian appointed by a Civil Court (*post*, chaps. xi and xiv) or by a Court of Wards (*post*, p. 335, and chap. xxxvi). A father may be convicted of kidnapping from the husband; *In the matter of Dhuronidhur Ghose* (1889), 17 Calc., 298, or a mother from the father; *In the matter of Prankishna Surma* (1882), 8 Calc., 969; s.c. *Parameshwari Surma v. Empress*, 11 C. L. R., 6.

⁴ i.e. having by law the right to the custody, or having such custody with the lawful permission of the person so entitled. see *Queen v. Buldeo* (1870), 2 N.-W. P. H. C. R., 286; see *Jagannatha Rao v. Kamaraju*

(1900), 24 Mad., 284. A person, to whom the mother of an illegitimate child entrusted the child on her death-bed, is within this expression; *Empress v. Pemantle* (1882), 8 Calc., 971.

⁵ Act XLV of 1860, sec. 361.

⁶ *Ibid.*, secs. 363 and 369. A higher punishment is given by sec. 369, when the kidnapping is with the intention of taking dishonestly any moveable property from the person of the child.

⁷ *Empress v. Umsatl Baksh* (1878), 3 Bom., 178.

⁸ See Mayne's Criminal Law of India, 4th ed. II, 564.

⁹ Act XLV of 1860, sec. 361.

¹⁰ *Queen v. Amgad Bugeah* (1865), 2 W. R. Cr. R., 61; *Queen v. Koordan Sing* (1865), 3 W. R. Cr. R., 15.

¹¹ *R. v. Prince* (1875), L. R. 2 C. C., 154.

¹² *Queen v. Amgad Bugeah* (1865), 2 W. R. Cr. R., 61; *Queen v. Modhoo Paul*, 3 W. R. Cr. R., 9; *Queen v. Koordan Sing* (1865), 3 W. R. Cr. R., 15; *Queen v. Gooroodoss Rajbunsee* (1865), 4 W. R. Cr. R., 7.

¹³ *In the matter of Dhuronidhur Ghose* (1889), 17 Calc., 289; *In the matter of Prankrishna Surma* (1882), 8 Calc., 969; s.c. *Parameshwari*

Abetment.

The offence of kidnapping may be abetted at any time while the process of taking the minor out of the keeping of his lawful guardian continues.¹

Selling or buying minor for purposes of prostitution.

The criminal law² also punishes persons who sell, let to hire or otherwise dispose of,³ or who buy, hire or otherwise obtain possession of any minor under the age of sixteen years, with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose,⁴ or knowing it to be likely that such minor will be employed or used for any such purpose.⁵

Exposure and abandonment of child.

Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, exposes

Surma v. Empress, 11 C. L. R., 6. The intention is material in case of a charge under sec. 369, I. P. C., *ante*, p. 45, note 6.

¹ See *Reg. v. Samia Kaundan* (1876), 1 Mad., 173; *Nemai Chatteraj v. The Empress* (1900), 27 Calc., 1041; 4 C. W. N., 645; *Rakhal Nikari v. Queen-Empress* (1897), 2 C. W. N., 81; *Queen-Empress v. Ram Dei* (1896), 18 All., 350.

² Act XLV of 1860, secs. 372 and 373.

³ Disposal need not be tantamount to a transfer of possession or control over the minor's person; *Reg. v. Arunachellam* (1876), 1 Mad., 164; *Queen-Empress v. Basava* (1891), 15 Mad., 75. In the latter case the accused dedicated his minor daughter as a Basivi by a form of marriage to an idol. A Basivi is incapable of contracting a lawful marriage, and ordinarily practises promiscuous intercourse. It was held that he was rightly convicted. See also *Ex parte Padmavati* (1870), 5 Mad. H. C., 415; *Reg. v. Jaili Bhavin* (1869), 6 Bom. H. C., Cr. C., 60; *Srinivasa v. Annasami* (1892), 15 Mad., 323; *Queen-Empress v. Ramanna* (1889), 12 Mad., 273 (a case of an adoption by a dancing girl for the purpose of prostitution).

⁴ See *Queen v. Bhutia* (1875), 7 N.-W. P. H. C., 295; *Reg. v. Jaili Bhavin* (1869), 6 Bom. H. C., Cr. C., 60; *Queen v. Nourjan* (1870), 6

B. L. R., App., 34. In *Queen-Empress v. Ramanna* (1889), 12 Mad., 273, Muttusami Ayyar, J., said: "It would be no offence if the intention was that the girl should be brought up as a daughter, and that when she attains her age she should be allowed to select either to marry or to follow the profession of her prostitute mother." These observations would have to be considered with reference to the known practices of dancing girls. Knowledge that the child will be brought up as a prostitute at an indefinite, and possibly remote, period, is sufficient to justify a conviction; *Deputy Legal Remembrancer v. Karuna* (1894), 22 Calc., 164; *Queen-Empress v. Chanda* (1895), 18 All., 24. Disposing of a girl for the purpose of a marriage, which might be objectionable under Hindu Law, does not amount to an offence; *Empress v. Srilal* (1880), 2 All., 694. It has been held that these sections contemplate a case of letting or hiring or other similar transaction by which the possession of a girl is obtained with the intention of employing her habitually for the purpose of indiscriminate sexual intercourse; *Queen-Empress v. Sukee Raur* (1893), 21 Calc., 97, following *Reg. v. Ally* (1870), 5 Mad. H. C., 473.

⁵ As to when the offence is complete, see *Emperor v. Bhimde Pandu Deoli* (1905), 7 Bom. L. R., 562.

or leaves it in any place,¹ with the intention of wholly abandoning it, is liable to be punished with imprisonment of either description for a term which may extend to seven years, or with fine or with both.²

This does not prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child should die in consequence of the exposure.³

A parent, or other guardian who, although able to do so, omits to supply a child incapable of taking care of itself with sufficient food may be liable to the criminal law for the death of the child.⁴ Neglect to maintain.

Whoever by secretly burying or otherwise disposing of the dead body of a child, whether such child die before or after or during its birth, intentionally conceals the birth of such child, is liable to be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.⁵ Concealment of birth.

As to causing miscarriage and injuries to unborn children, see Act XLV of 1860, secs. 312 to 316. Causing miscarriage.

As to offences under the Indian Factories Act, see *ante*, pp. 21, 22.

As to complaints by apprentices against their masters, see Act XIX of 1850, secs. 13 and 14, *post*, p. 135. Indian Factories Act.
Apprentices.

Under the Calcutta Police Act,⁶ whoever takes from any child, apparently under the age of fourteen years, any article whatsoever as a pawn, pledge or security for any sum of money lent or advanced to such child, or, without the knowledge and consent of the owner of the article buys from any child any article whatsoever, shall be liable, on summary conviction before a magistrate, to a penalty not exceeding one hundred rupees. Taking pledge from child under fourteen.

There are similar provisions in the Acts relating to the Bombay Town Police,⁷ and the Madras City Police.⁸

¹ See *Queen-Empress v. Mirchia* (1896), 18 All., 364, where it was held by the majority of the Court that a mother leaving her child with a blind woman with the intention of not returning did not commit an offence under this section.

² Act XLV of 1860, sec. 317.

³ *Ibid.*, sec. 317. If the circumstances show a case of culpable homicide, the mother cannot be con-

victed under this section; *Empress v. Banni* (1879), 2 All., 349.

⁴ *Queen v. Gunga Sing* (1873), 5 N.-W. P. H. C. Rep., 44. See Act XLV of 1860, sec. 32. As to the maintenance of minors, see *post*, chap. xxii.

⁵ Act XLV of 1860, sec. 318.

⁶ Act IV (B. C.) of 1866, sec. 54.

⁷ Act IV (Bo. C.) of 1902, sec. 117.

⁸ Act III (Mad. C.) of 1888, sec. 66.

CHAPTER VIII.

NATURAL RIGHT OF GUARDIANSHIP.

Guardians.

THE incapacity of minors necessarily requires that the law should provide for the care of their persons and property by adult persons willing and able to look after the interests of minors committed to their charge. The persons having the care of the persons and the custody of the estates of minors are termed their *guardians*.¹

Guardianship is a right, a duty and a trust.

Who cannot be guardians.

A minor is incompetent to act as guardian of any minor except his own wife or child, or, where he is the managing member of an undivided Hindu family, the wife or child of another member of the family.²

Idiots, and insane persons, are also incompetent to act as guardians of minors.

Kinds of guardians.

Guardians are either—

(1) Natural guardians ;

(2) Testamentary guardians ;³

(3) Guardians appointed by a Civil Court or by a Court of Wards.⁴

Recognition of natural guardians.

Although the rights of natural and testamentary guardians cease on the appointment of a guardian by a Civil Court⁵ or by a Court of Wards,⁶ the Courts in the absence of such appointment recognize such rights and in making an appointment take those rights into consideration.⁷

¹ Act VIII of 1890, sec. 4 (2). As to the termination of guardianship, see Act VIII of 1890, sec. 41, *post*, pp. 138, 179.

² Act VIII of 1890, sec. 21.

³ *Post*, chap. ix.

⁴ As to the appointment of guardians by District Courts, see *post*, chap. xi ; and as to the appointment by High Courts, see *post*, chap. xiv ;

and as to the appointment by Courts of Wards, see *post*, pp. 335, 369, 385, 399, 411, 428, 433, and chap. xxxvi.

⁵ Act VIII of 1890, sec. 7 (2), *post*, p. 86.

⁶ *Ibid.*, sec. 41, *post*, pp. 138, 179, 302.

⁷ See Act VIII of 1890, sec. 17 (1), *post*, pp. 89, 90. In the Courts of the Punjab (Act IV of 1872, sec. 5, as

By the Hindu Law, the ruling power is in every instance, Hindu law. whether the natural guardian be living or dead, recognized to be the supreme guardian of the property of all minors, whether male or female.¹ The ruling power is now represented by the Courts of Law.²

The Hindu Law does not seem to prescribe any positive rules with respect to the right of guardianship; but by practice and custom the rights of certain relations of a Hindu minor have now almost acquired the force of law.

For instance, the rights of the father, and of the mother after the death of the father, have been so long and universally acknowledged as to be now indisputable.

A Hindu father, in preference to the mother,³ is recognized Right of father. as the legal guardian of all his male, and of his female unmarried minor children.⁴ The adoptive father acquires the same right, even as against the natural father.⁵

“Guardianship is in the nature of a sacred trust, and” a father “cannot therefore substitute another person to be guardian in his place.”⁶

This applies also to Mahomedan or other fathers.

As to delegation of authority to a schoolmaster or other person, see *post*, p. 132.

amended by Act XII of 1878), of the Central Provinces (Act XX of 1875, sec. 5), Ajmere and Merwara (Reg. III of 1877, sec. 4), guardianship is one of the matters in which the personal law is expressly required to be administered. Although other Courts recognize and administer the Hindu law on this subject, they are not required to do so by the Legislature, except perhaps by the rule requiring the application of justice, equity, and good conscience. See Act XII of 1887, sec. 37 (2); Act III of 1873, sec. 16; Bom. Reg. IV of 1827.

¹ Macnaghten's Hindu Law, vol. i, chap. vii, Edn. 1829, p. 104; Colebrooke's Digest, Edn. 1801, p. 542, vol. iii, chap. viii, secs. 449, 450; Manu, chap. viii, verse 27.

² *Ram Bunsee Koonwaree (Maharane) v. Soobh Koonwaree (Maharane)* (1867), 7 W. R. C. R., 321, at p. 325; 2 Ind. Jur. N. S., 193.

³ *In the matter of Prinkrishna Surma* (1882), 8 Calc., 969; s.c. *Parame-*

shwari Surma v. Empress, 11 C. L. R., 6.

⁴ Macnaghten's Hindu Law, vol. i, Edn. 1829, chap. vii, p. 103; *In the matter of Himnauth Bose* (1862), 1 Hyde, 111; *Mokoond Lal Singh v. Nobodip Chunder Singha* (1898), 25 Calc. 881, at p. 884; 2 C. W. N., 397, at p. 381; see Act VIII of 1890, sec. 19, *post*, p. 88.

⁵ *Sree Narain Mitter v. Kishensoondery Dasseé (Sreemutty)* (1893), I. A., Sup. Vol., 149, at p. 163; 11 B. L. R., 171, at p. 191, s.c. *sub nomine Nagendro Chundro Mitro v. Kishensoondery Dossee (Sreemutty)*, 19 W. R. C. R., 133, at p. 139; *Laksmibhai v. Shridar Vasudev Takle* (1878), 3 Bom., 1. The natural father may be appointed guardian on the death of the adoptive parents, see *Gangaprasad Bhattacharjee v. Harakanta Chowdhuri* (1910), 15 C. W. N., 558.

⁶ *Besant v. Narayaniah* (1914), 41 I. A., 314, at p. 320; 38 Mad., 807, at p. 819; 18 C. W. N., 1089, at p. 1117; 16 Bom. L. R., 625, at p. 633.

Right of
mother.

On the death of the father, or in his absence,¹ or in case of his having lost the right of guardianship,² and in the absence of a valid appointment by him,³ the natural or adoptive mother, as the case may be, is entitled to the guardianship of her minor children.⁴

It has been held that under the Mithila law, the mother is entitled to the guardianship even during the lifetime of the father.⁵

If the minor is a member of a joint Hindu family, the *karta* of the family would be entitled to the management of the joint property;⁶ but if the family be a divided one, the mother is, failing the father, entitled to the custody of the minor's property;⁷ and even if the family were joint, she would apparently be so entitled, so far as the minor's separate property, if any, is concerned. Where the mother is manager of her minor child's property, her position necessarily requires her to seek the advice of her husband's relations,⁸ and she would often strengthen her position by her so doing, but the law cannot compel her to seek, or to act under, their advice, if she wishes to take the whole responsibility upon herself.

Right of other
relations.

In the absence of a father and mother, no relation, except perhaps a brother or ancestor, has under Hindu law an absolute right to the guardianship or custody of a minor.⁹

The Hindu law suggested a succession to the right of guardianship after the father and mother.¹⁰ This succession

¹ See *Modhoosoodun Mookerjee v. Jadub Chunder Banerjee* (1865), 3 W. R. C. R., 194.

² *Post*, chap. x.

³ See *post*, chap. xi.

⁴ *Kaulesra v. Jorai Kasaundan* (1905), 28 All., 233; *Mahableshvar Krishnappa v. Ramchandra Mangesh* (1913), 38 Bom., 97; 15 Bom. L. R., 882; *Doorga Lal Jha (Soobah) v. Neelanund Singh (Rajah)* (1867), 7 W. R. C. R., 73, at p. 75; *Ram Dhun Doss v. Ram Ruttun Dutt* (1868), 10 W. R. C. R., 425, at p. 426; *S. Namasevayam Pillay v. Annammai Ummal* (1869), 4 Mad. H. C., 339, at p. 343; *Kooldeep Narain v. Rajbunsee Kowur* (1847), 7 Ben. Sel. Rep., 395; 2nd Edn., p. 467; Macnaghten's Hindu Law, Edn. 1829, vol. i, chap. vii, p. 103; and vol. ii, chap. vii, case iv, p. 205.

⁵ *Jussoda Kooer v. Nettya Lall Lallah* (1879), 5 Cal., 43. There does not seem to be any other authority to the same effect. In *Doorga Lal Jha (Soobah) v. Neelanund Singh* (1867), 7 W. R. C. R., 74, where the

parties were governed by the Mithila School, a testamentary guardian, who was appointed by the father, was preferred to the mother.

⁶ *Ram Charan v. Mihin Lal* (1914), 36 All., 158; see *post*, pp. 95, 96, 153.

⁷ Sir E. H. East's Notes, Morley's Digest, vol. ii, p. 50; West and Bühler, 2nd Edn., p. 88. In *Motee Singh v. Doolath Singh*, N.-W. P. S. D. A., 13th April, 1844, it was held that an elder brother, if not separated, could act as guardian.

⁸ Macnaghten's Hindu Law, Edn. 1829, vol. i, chap. vii, p. 103; and see Sir E. H. East's Notes, Morley's Digest, vol. ii, p. 50.

⁹ *Kristo Kissor Neoghy v. Kadermoye Dossee* (1878), 2 C. L. R., 583; see *Bhikuo Koer (Musst.) v. Chamela Koer (Musst.)* (1897), 2 C. W. N., 191; *Thayammal v. Kuppanna Koundan* (1914), 38 Mad., 1125. The Legislature has to some extent adopted this view: see Act VIII of 1890, sec. 19, *post*, p. 88.

¹⁰ Macnaghten's Hindu Law, Edn. 1829, vol. i, chap. vii, pp. 103 and 104.

will, at any rate, guide the Court in the choice of a guardian.¹

According to that law, on the death of the mother, or in the event of her having become a recluse or becoming otherwise disqualified from acting as the guardian of her children,² the elder brother,³ or in default of him the elder half-brother,⁴ was preferred for the guardianship both of the person and property of a minor, although their right might not be so absolute as that of a father or a mother.⁵ After these, the paternal relations generally were preferred; and failing such relatives, the office devolved on the maternal kinsmen according to their degree of proximity.⁶

Elder brother.

Elder half-brother.

Paternal relations.

Maternal relations.

Where the mother is dead the stepmother of the minor is not entitled to be guardian, at any rate in preference to the paternal relations. Stepmother.

In 1821 it was held by the Bombay Sudder Court, in the case of *Lukmee v. Umur Chund Deo Chund*,⁷ that the stepmother, in preference to the paternal uncle, was the legal guardian of a minor; and there is a similar decision by a single judge of the Sudder Court of the North-Western Provinces;⁸ but a Division Bench of the Bengal High Court held⁹ that the paternal

¹ See *Re Gulbai* (1907), 32 Bom., 50; 9 Bom., L. R., 923; *Kristo Kissor Neoghy v. Kadermoye Dossee* (1878), 2 C. L. R., 583.

² *Muhtaboo (Musst.) v. Gunesh Lal*, Ben. S. D. A., 1854, p. 329; *In the matter of Ishwur Chunder Surma*, Ben. S. D. A., 1850, p. 471.

³ Macnaghten's Hindu Law, Edn. 1829, vol. i, chap. vii, p. 103; *In the matter of Ishwur Chunder Surma*, Ben. S. D. A., 1850, p. 471.

⁴ *Muhtaboo (Musst.) v. Gunesh Lal*, Ben. S. D. A., 1854, p. 329. On coming of age the whole brother is entitled to supersede the half-brother; *Dabee Singh v. Bujroo Singh*, 5 N.-W. P. S. D. A., 336.

⁵ See *ante*, p. 50.

⁶ Macnaghten's Hindu Law, Edn. 1829, vol. i, chap. vii, p. 104; see *Re Gulbai* (1907), 32 Bom., 50; 9 Bom., L. R., 923.

⁷ Bom. Sud. Ct. Rep., 144.

⁸ *Nunkoolal v. Shoodra*, Decisions for 1847, p. 115.

⁹ *Ram Bunsee Koonwaree (Maharancee) v. Soobh Koonwaree (Maharancee)* (1867), 7 W. R. C. R., 321; 2 In. Jur. N. S., 193. The only authority for the decision of the Bombay Court seems to be the statement in the Institutes of Manu, chap. ix, verse 183: "Thus, if among all the wives of the

same husband one bring forth a male child, Manu has declared them all, by means of that son, to be mothers of male issue." As to this Macpherson, J., in delivering the judgment of the Bengal High Court, says: "This verse, however, does not, in our opinion, justify the conclusion arrived at by the shastrees and the Court (*i.e.* the Bombay Sudder Court). It may be that the existence of a son by one wife may, according to Hindu law, put all the wives of the son's father in the position of mothers in a religious point of view, and as regards their future state; but it by no means necessarily follows that all the wives are, therefore, in the same position towards the child as its actual mother. Manu does not say that the stepmother is to stand in all things in the same position towards the son as his mother, and if it be clear and settled law that she does not do so in some respects, we fail to see anything in the verse referred to which leads directly or indirectly to the inference that she stands in that position as regards guardianship. That she does not stand as a mother for all purposes is unquestionable. For under no circumstances can she inherit from her stepson—see *Jotee*

grandmother has a right to the guardianship of a Hindu minor in preference to the stepmother.

Illegitimate
child.

A Hindu father has not, as against the mother, any right to the guardianship of his illegitimate offspring.¹ The mother would ordinarily be entitled to the custody.²

Guardianship,
of minor wife.

After marriage the right of guardianship of the person and property of a female minor devolves upon her husband,³ if not unfit,⁴ even though he be himself a minor.⁵

The husband has the right to demand that his wife shall reside in the same house as himself, unless it be the universal custom of the community to which the parties belong,⁶ or there be special circumstances such as absolve the wife from the obligation of living with her husband and her parents or guardians from the duty of surrendering her to her husband.⁷ The minority of the wife does not of itself constitute such special circumstances, and this right of the husband is independent of the question

Lall (Lalla) v. Doranee Kooer (Musst.) (1864), W. R., F. B. R., 173. If the text of Manu does not make the stepmother a mother so that she may inherit, we cannot see what there is in the text which makes her a mother so as to make her the legal guardian." And in the same judgment Macpherson, J., further says: "It appears to us that the paternal grandmother is a relative of the minor's more fitting as a rule to be selected as guardian than is the stepmother, because we are of opinion that her appointment as guardian is the more likely to be for the minor's interests, and is the appointment most in accordance with the general principles of Hindu law. When we find that under no circumstances can a stepmother inherit from her stepson, and that on partition the stepmother does not get a share, because she is not included in the term 'mother' (*Dayabhaga*, chap. iii, sec. 2, cls. 29, 30); and when we find that the grandmother can inherit from her grandson (a point as to which there can be no dispute, and on which it is, therefore, unnecessary to refer to authorities), we cannot but come to the conclusion that, according to Hindu law, the connection between the paternal grandmother and her grandchild is to be deemed closer than the connection between the child and its stepmother. Blood

relationship, especially on the father's side, is usually preferred by Hindu law. In the case of the paternal grandmother, we have that relationship; in the case of the stepmother, we have it not."

¹ *King v. Nagapen* (1814), 2 Madras Notes of Cases, 91; *In the matter of Saithri* (1891), 16 Bom., 307, at p. 317.

² *Venkamma v. Savitramma* (1888), 12 Mad., 67, at p. 68.

³ Macnaghten's Hindu Law, Edn. 1829, vol. i, chap. vii, p. 104; Colebrooke's Digest, bk. iv, chap. i, cls. 4, 5, and 12; *In the matter of Dhurondhar Ghose* (1889), 17 Calc., 298.

⁴ Act VIII of 1890, s. 41 (*d*).

⁵ *Ibid.*, s. 21.

⁶ *Suntosh Ram Doss v. Gera Pattuck* (1875), 23 W. R. C. R., 22. It was held in *Aramuga Mudali v. Viraraghava Mudali* (1900), 24 Mad., 255, that by the general custom prevailing among the Hindu community in the Madras Presidency, a husband is not entitled to the actual custody of his wife until she attains maturity, unless such custody should be necessary in the interests of the girl.

⁷ As, for instance, a customary requirement of the performance of what is called the second marriage ceremony (*garbadhan*); *Bool Chand Kolla v. Janokee (Mussamut)* (1876), 25 W. R. C. R., 386; s.c. 24 W. R. C. R., 228; *Steele*, 29, 165.

whether she is physically fit to perform the duties of a wife.¹ In giving up a very young girl to her husband a Court might require him to undertake that she would be placed by him under the care of some female member of his family.²

After the husband's death, the guardianship of his minor widow, and the management of her property, devolve upon the husband's heirs, *i.e.* upon those who are entitled to inherit his estate after her death,³ in preference even to her own father.⁴ After death of husband.

On failure of her husband's heirs the widow's paternal relations are her guardians, and failing them her maternal kindred.⁵

In the case of a person domiciled in the Presidency of Madras following the Marumakkatayam or the Aliyasantana law of inheritance, when a man's wife and children are minors maintained by him or his *tarwad*, he is, subject to the provisions of the Guardians and Wards Act, 1890,⁶ the guardian of his wife when she is over fourteen years of age and of his children, provided that such guardianship shall not extend to the right and interest of his wife or children in the property of the *tarwad* to which his wife and children belong.⁷ Malabar and Canara.

The *karnavan* of the *tarwad*, *i.e.* the head of the community, is the guardian of a minor's share of the common property, and would also apparently be guardian of the person in a case where the father is dead or disqualified.⁸

According to the Mahomedan law, the natural guardians of minors are either *near* or *remote*. Fathers, their executors, paternal grandfathers, their executors, and the executors of such executors, constitute the *near guardians*. All other guardians are *remote guardians*.⁹ Mahomedan law.

¹ *Kateeram Dokanee v. Gendhence* (1875), 23 W. R. C. R., 178; *Surjyamonni Dasi v. Kalikanta Das* (1900), 28 Calc., 37, at p. 45; 5. C. W. N., 195, at p. 201.

² *Kateeram Dokanee v. Gendhence* (1875), 23 W. R. C. R., 178.

³ Macnaghten's Hindu Law, Edn. 1829, vol. i, chap. vii, p. 104; vol. ii, chap. vii, cases 1 and 3; *Khetter Monce Dasse v. Kishen Mohun Mitter* (1863), 2 Hay, 196; Marshall, 313; *Khudiram Mookerjee v. Bonwariloll Roy* (1889), 16 Calc., 584; *Kesar (Bai) v. Ganga (Bai)* (1871), 8 Bom. H. C. R., A. C. J., 31. See West and Bühler, 2nd Edn., pp. 129, 134, 245,

and 556; Dayabhaga, chap. xi, sec. 1, para. 64; *Tota Ram v. Ram Charan* (1910), 33 All., 222.

⁴ Macnaghten's Hindu Law, Edn. 1829, vol. ii, chap. vii, case 3, p. 204.

⁵ *Ibid.*, vol. i, chap. vii, p. 104.

⁶ *Post*, chap. xi.

⁷ Act IV (M. C.) of 1896, sec. 18.

⁸ See *Thathu Baputty v. Chakayath Chathu* (1873), 7 Mad. H. C. R., 179.

⁹ Macnaghten's Mahomedan Law, Principles, chap. viii, 4th Edn., p. 62. By Shiah law, the grandfather is preferred to the father's executor; Ameer Ali's Mahomedan Law, vol. ii, 2nd Edn., p. 473; Baillie's Digest, part ii, p. 251.

Guardianship
of property.

Near guardians alone are entitled to the management of the property of a Mahomedan minor.¹

Failing them and failing testamentary guardians,² the custody and care of the minor's property does not devolve upon the *remote guardians*, but it devolves upon the ruling authority,³ or its representative the judge, whose duty it is to appoint a guardian.⁴ *Remote guardians* are under no circumstances entitled to the management.⁵

Guardianship
of person.
Sunnis.

According to the Hanâfi doctrine, the mother is entitled to the custody of her children during the period of *hizanut*, i.e. she is entitled to the custody of her son until he attains the age of seven years,⁶ and of her daughter, even as against the husband⁷ of such daughter, until puberty.⁸

According to the Mâlikîs, Shâfeîs, and Hanbalîs, the custody of a daughter remains with the mother until marriage.⁹

"The Shâfeîs and the Hanbalîs allow the boy, at the age of seven, the choice of living with either of his parents."¹⁰

Right not lost
by separation.

The mother, if of good character, retains her right after

¹ *Bhutnath Dey v. Ahmed Hosain* (1885), 11 Calc., 417; *Sita Ram v. Amir Begum* (1886), 8 All., 324, at p. 338; Tagore Law Lectures, 1873, p. 477; Macnaghten's Mahomedan Law, Principles, 5th Edn., p. 304. As to their powers, see *post*, chap. xvii.

² *Post*, p. 62.

³ Macnaghten's Principles of Mahomedan Law, chap. viii, para. 6; Baillie's Digest, part i, p. 319; *Bukshan (Mussamat) v. Maldai Kooeri (Mussamat)* (1869), 3 B. L. R., 423; s.c. *Bukshun v. Doolhin*, 12 W. R. C. R., 337; *Ruttun v. Dhoomee Khan* (1868), 3 Agra H. C. R., 21; *Alim-ullah Khan v. Abadi Begam* (1906), 29 All., 11.

⁴ See Tagore Law Lectures for 1873, p. 478; Macnaghten's Mahomedan Law, Precedents, chap. vii, case i.

⁵ As to alienations by them, see *post*, p. 164. There is nothing to prevent a remote guardian bringing a suit as next friend of his ward; *Abdul Bari v. Rash Behari Pal* (1880), 6 C. L. R., 413.

⁶ *Ameeroonissa* (1869), 11 W. R. C. R., 297; *In the matter of Tayheb*

Ally (1864), 2 Hyde, 633; *Alimodeed Moallem Sheikh v. Syfoora Bibee (Musst.)* (1866), 6 W. R. M. R., 125; *Futteh Ali Shah (Shahzada) v. Mohamed Mukeem Ooddeen (Shahzada)*, W. R., 1864, C. R., 131; *Alim-ullah Khan v. Abadi Begam* (1906), 29 All., 11. See Hedaya, vol. i, bk. iv, chap. xiv.

⁷ *Nur Kadir v. Zuleikha Bibi* (1885), 11 Calc., 649; *In the matter of Khatija Bibi* (1870), 5 B. L. R., 557; *Korban v. King-Emperor* (1904), 32 Cal., 444. See, however, *In re Mahin Bibi* (1874), 13 B. L. R., 160.

⁸ Macnaghten's Mahomedan Law, Principles, chap. viii, princ. 8; Precedents, chap. vi, case 18; *In the matter of Khatija Bibi* (1870), 5 B. L. R., 557; *Abdul v. Usman Khan*, Bom. P. J., 1881, 335; *Beedhun Bibee v. Fuzuloollah* (1873), 20 W. R. C. R., 411; *Mohomuddy Begum v. Oomdu-tonissa (Mussamat)* (1870), 13 W. R. C. R., 454; see *Hamid Ali v. Imtiazan* (1878), 2 All., 71.

⁹ Ameer Ali's Mahomedan Law, vol. ii, 2nd Edn., p. 248.

¹⁰ *Ibid.*, p. 249.

separation from her husband,¹ even although she may have been divorced from him.²

Failing the mother, the mother's mother how high soever Grandmother. (that is to say, the maternal grandmother,³ great grandmother, and so forth), and failing her, the father's mother how high soever,⁴ is entitled to the custody.

Failing the mother and grandmothers, the right of custody Sisters. of the minor devolves upon the sisters, namely, first on the full sister, then on the uterine half-sister, and then on the half-sister by the father's side. Then follow the daughters of the Daughters of sisters. sisters in the order in which their mothers were entitled.

According to one tradition the maternal aunt is preferable to a half-sister by the father's side; but this tradition has not apparently been supported by practice.

After the sisters and their daughters come the maternal Aunts. aunts, and failing them the paternal aunts.⁵

The same distinction also prevails among the aunts as among the sisters—that is, she who is doubly related has a preference to her who is singly related; thus the maternal aunt, who is full sister to the mother, precedes a half-sister of the mother, maternal or paternal; and in the same manner, a maternal sister of the mother precedes a paternal sister; and so also of the paternal aunts.⁶

All these persons are entitled to the custody of the minor Period of custody. for the same period as the mother is so entitled.⁷

As the right of the mother and other female relations to the custody of a girl, continues until what is majority according to Mahomedan law, namely, puberty,⁸ there may be a question whether the Indian Majority Act⁹ has not extended by implication the rights of the mother,¹⁰ but having regard to the reason for the change of custody at that period, namely, the Effect of Indian Majority Act on rights of female relations.

¹ Tagore Lectures for 1872, p. 485. Hedaya, vol. i, bk. iv, chap. xiv.

² *Hamid Ali v. Imtiazan* (1878), 2 All., 71; Macnaghten's Mahomedan Law, Appendix, Title "Infant 8," Edn. 1870, p. 446.

³ *Bhoocha v. Elahi Bux* (1885), 11 Calc., 574. See *Fuseehun v. Kajo* (1883), 10 Calc., 15.

⁴ See note at p. 486 of Tagore Law Lectures, 1873; Hedaya, vol. i, bk.

iv, chap. xiv; and Baillie's Digest, part i, pp. 431, 432.

⁵ Tagore Law Lectures, 1873, p. 486; Baillie's Digest, part i; pp. 431, 432.

⁶ Hedaya, vol. i, bk. v, chap. xiv.

⁷ *Ante*, p. 54.

⁸ *Ante*, p. 2.

⁹ Act IX of 1875, sec. 3, *ante*, p. 6.

¹⁰ See *Reade v. Krishna* (1886), 9 Mad., 391.

necessity for the supervision of the conduct of a girl, who has arrived at maturity,¹ it would probably be held that the custody would be with the male relations between puberty and majority.

Custody after period of *hizanut* or in default of female relations.

After the termination of the period of *hizanut*, or during that period, if there be no female relation of the minor capable of being entrusted with the custody, the right of custody devolves upon the agnate male relations² for the purpose of education and marriage, and continues until the attainment of majority. This right is determined according to the proximity of the claims of the relatives to inherit the estate of the minor.

Custody of boy.

Of these relatives the father is the first entitled, then the male paternal ancestors in the male line;³ then the full brother, then the half-brother by the father, then the son of the full brother, then the son of the half-brother by the father, then the full paternal uncle, then the half-paternal uncle on the father's side, and then the sons of paternal uncles in the same order.⁴ A girl, however, according to Mahomedan law, ought not to be entrusted to the care of any male person unless he be within the prohibited degrees of relationship, which include all the male persons enumerated above as entitled to the custody of a boy, with the exception of the sons of the paternal uncles, to whom the custody of females may not be entrusted.⁵

Custody of girl.

Shiahs.

According to the Shiahs, the mother is entitled to the custody of her male child until he is two years old,⁶ and of her female child until she is seven years old.⁷

¹ See Hedaya, vol. i, bk. iv, chap. xiv.

² Tagore Lectures, 1873, p. 488; Macnaghten's Mahomedan Law, Principles, chap. viii, princ. 10; Baillie's Digest, part i, p. 434. See *Fuseehun v. Kajo* (1883), 10 Calc., 15; *Bhoocha v. Elahi Bux* (1885), 11 Cal., 474; *Ruttun v. Dhoomee Khan* (1868), 3 Agra H. C. R., 21. A sister's husband has no right: *Asgar Ali v. Amina Begum* (1914), 36 All., 1914.

³ Hedaya, vol. i, bk. iv, chap. xiv, p. 389; *Idu v. Amiran* (1886), 8 All., 322. As to the rights of the father, see Act VIII of 1890, sec. 19, *post*, p. 38.

⁴ Tagore Lectures, 1873, p. 488.

⁵ In *the matter of Hurunnessa Bibce* (*Musst.*) (1913), 18 C. W. N., 853; Tagore Lectures, 1873, p. 488; Baillie's Digest, part i, p. 433.

⁶ Baillie's Digest, part ii, p. 95.

⁷ In *the matter of Hosseini Begum* (1881), 7 Calc., 434; *Lardli Begum v. Mahomed Amir Khan* (1887), 14 Calc., 615; *Raj Begum* (*Musst.*) v. *Reza Hossein* (1865), 2 W. R. C. R., 76; see *Mohummuddy (Begum) v. Oomduoonissa (Mussamut)* (1870), 13 W. R. C. R., 454; and *Fuseehun v. Kajo* (1883), 10 Calc., 15. As to the loss of the mother's right, see *post*, p. 71.

The father then becomes entitled,¹ but failing him the mother's right returns. When both parents are dead, the father's father becomes entitled to the custody, and after him apparently the male relations become entitled in the same order as they are entitled to inheritance.²

The Mahomedan law does not recognize the right of a putative father to the guardianship of the person or property of his illegitimate child.³ Illegitimate children.

The right of a mother to the custody of her illegitimate children is co-extensive with, if not greater than, her right to the custody of her legitimate children.⁴

Inasmuch as the father and his relations are not recognized as guardians, the mother would probably be held entitled to the guardianship of their persons, if not also of their property, until they arrive at majority.

Failing the mother, it would appear that no relation is entitled as a matter of right to the guardianship of either the persons or the property of Mahomedan minors of illegitimate birth. It would be for the Court to determine what custody would be for the interest of the minor.

Under the Mahomedan law, a husband has not an absolute right to the custody of his minor wife. Even after the marriage, the mother, or other guardian, is entitled to retain the infant wife until she has attained puberty and is fit to bear the embraces of a husband.⁵ After that period has arrived he is entitled to have her made over to him, provided that he has paid the dower due to her,⁶ and that she has not exercised the option of puberty.⁷ Right of husband.

Even before she has attained puberty the law does not consider the

¹ *Salim-un-nissa v. Saudat Husain* (1914), 36 All., 466.

² Baillie's Digest, part ii, p. 95.

³ *Shahjehan v. Munro*, 5 S. D. A. N.-W. P., 39; 1 Sel. Repts. S. D. A. N.-W. P., 16. The father would be entitled in the case where he has acknowledged the paternity under circumstances which affiliate the child according to Mahomedan law.

⁴ Baillie's Digest, part i, p. 433, note; *Shahjehan v. Munro*, 5 S. D. A. N.-W. P., 39; 1 Sel. Repts. S. D. A. N.-W. P., 16. This applies to the illegitimate offspring of a Mahome-

dan mother and a European father; *Ibid.*

⁵ *Korban v. King-Emperor* (1904), 32 Calc., 444; *Nur Kadir v. Zuleika Bibi* (1885), 11 Calc., 649; *In the matter of Khatija Bibi* (1870), 5 B. L. R., 557; *In the matter of Mahin Bibi* (1874), 13 B. L. R., 160; Macnaghten's Mahomedan Law, Precedents, chap. vi, case 16, p. 265; *Wazeer Ali v. Kaim Ali* (1873), 5 N.-W. P. H. C. R., 196.

⁶ Baillie's Digest, part i, pp. 54, 125, and 126.

⁷ See *post*, p. 237.

custody of a wife by her husband as an unlawful custody,¹ at any rate where the marriage is an irrevocable one.² On the other hand, the husband is not obliged to maintain his wife when she is too young for matrimonial intercourse;³ and his right to the custody of his wife is, in every case, dependent upon her being maintained by him.

Persons other than Hindus and Mahomedans.

Before the passing of the Guardians and Wards Act,⁴ rights of guardianship of all persons to whom the Hindu and Mahomedan laws were inapplicable, were determined in the main by the English law,⁵ and except so far as that Act applies they must be still so determined.

Sec. 17 of the Guardians and Wards Act⁶ provides that—

“As between parents who are European British subjects⁷

European British subjects, guardianship of person.

¹ *In the matter of Mahin Bibi* (1874), 13 B. L. R., 160. There is a question whether Act VIII of 1890, sec. 19 (*post*, p. 88), has not by implication given to a Mahomedan husband a right to the custody of his minor wife even though she may not have attained puberty. The Court would, however, having regard to Mahomedan law, probably treat a husband as unfit to be guardian of the person of his immature wife.

² See *post*, p. 237.

³ Baillie's Digest, part i, p. 437; Heyada, vol. i, bk. iv, chap. xv. See *Kolashun Bibee v. Didar Buksh* (*Sheikh*) (1875), 24 W. R. Cr. R., 44.

⁴ Act VIII of 1890.

⁵ The High Courts in the exercise of their ordinary original civil jurisdiction administer the common law and statute law of England which existed at the date of the establishment of the Mayor's Courts, and are applicable to India, as modified by the statutes relating to India, and the Acts of the Indian Legislatures (see Morley's Digest, Introduction, p. xxii). The Civil Courts in the districts, in cases for which there is no statutory law, or law having the force of statutes, applicable, except in questions regarding succession, inheritance, marriage, adoption, caste, or religious institutions, must proceed according to justice, equity, and good conscience (see Act XII of 1887, sec. 37; Act III of 1873, sec. 16; Bom. Reg. IV of 1827, sec. 26),

i.e. they must administer such principles of English law and equity as are applicable to Indian society and circumstances; *In the matter of Saithri* (1891), 16 Bom., 307, at p. 323; *Waghela Rajsanji v. Masludin*, (*Sheikh*) (1887), 11 Bom., 551, at p. 561; 14 I. A., 89, at p. 96; *Mollwo March & Co. v. Court of Wards* (1872), I. A., Supp. Vol., 86; 10 B. L. R., 312. As to Parsees, see *The Queen v. Bezonji* (1843), Perry's Oriental cases, 97.

⁶ VIII of 1890.

⁷ By sec. 4 of the Act “European British subject” means a European British subject as defined by the Code of Criminal Procedure, 1882, and includes any Christian of European descent. “European British subject,” as defined by sec. 4 of the Code of Criminal Procedure (Act V of 1898), is as follows:—

(1) “Any subject of Her Majesty born, naturalised, or domiciled in the United Kingdom of Great Britain and Ireland, or in any of the European, American, or Australian Colonies or Possessions of Her Majesty, or in the Colony of New Zealand, or in the Colony of the Cape of Good Hope or Natal:

(2) “Any child or grandchild of any such person by legitimate descent.”

As far as the writer is aware, the words “any Christian of European descent,” have not yet received a judicial interpretation, but they would probably be taken to include all Christians who could trace their

adversely claiming the guardianship of the person, neither parent is entitled to it as a right, but, other things being equal, if the minor is a male of tender years¹ or a female, the minor should be given to the mother, and if the minor is a male of an age to require education and preparation for labour and business, then to the father.”

That section only applies to cases where the Court is appointing a guardian.

The father would, in case of the death or incapacity of the mother, be preferred as guardian of his male children of tender years, and of his female minor children. Similarly in case of the death or incapacity of the father, the mother would be preferred as guardian of older male children.²

Apart from any question as to who is to be preferred in the appointment of a guardian of a European British subject, the legal power over minors, other than Hindus and Mahomedans, belongs to the father, and only after his death does the mother acquire any rights.³

descent, however far back, from a European; see *Rollo v. Smith* (1867), 1 B. L. R., O. C., 10; *Byjenant Singh v. Reed* (1821), 2 Morley's Digest, 36. *Rollo v. Smith* was doubted but not actually dissented from by the referring Bench in *Rainey v. Nobocommar Mookerjee* (1879), 5 C. L. R., 543. See *Archer v. Watkins* (1872), 8 B. L. R., 372, and cases, *ante*, p. 4, note 6.

¹ “Tender years” must be construed with reference to the subsequent provision as to when a boy should be made over to his father. It is not possible to fix any definite age at which a boy requires education, and preparation for labour and business, but it might not be unreasonable to consider that this age would generally be arrived at about the completion of the seventh year. The Custody of Infants Act (2 & 3 Vict., c. 54) permitted the Court of Chancery to give the mother the custody of her infant children under seven years of age. See also *In re Taylor* (1876), 4 Ch. D., 157. Seven is the age fixed by the Indian Legislature, as ordinarily the age when a child's

maturity of understanding would prevent him committing crimes (Act XLV of 1860, sec. 83, *ante*, p. 40), and seven years is the age of nurture according to English law; see *Ex parte Knee* (1804), 1 B. & P. N. R., 148; *Empress v. Pemantle* (1882), 8 Calc., 971.

² See *Villareal v. Mellish* (1737), 2 Swanst., 533; s.c. *Mellish and De Costa*, 2 Atk., 14; *Roach v. Garvan* (1748), 1 Ves. Sen. 158.

³ *In the matter of Holmes* (1862), 1 Hyde, 99. The father is entitled to this right absolutely even against the mother, and the father is not obliged to permit the mother to have access to the children (see *Ball v. Ball* (1827), 2 Sim., 35); but, where he has agreed to give such access to the mother, he will be compelled to allow and make proper provision for such access (*ex parte Lytton*, quoted at 5 East. 222), and where the father is seeking relief from the Court, he may be put upon terms to allow his wife from time to time to see her children (*In the matter of Holmes* (1862), 1 Hyde, 99).

The Indian Legislature has not given to the mother rights similar to those now possessed by mothers in England,¹ but where it is desirable that a child should be placed under the guardianship of the mother, the best course is to take proceedings for the appointment of a guardian.²

Where the summary powers of the Court are invoked,³ the Court will not support the rights of the father against the interests of the child.

Guardianship
of property.

Father.

Although under English law, the father has not a right to the complete control of the property of his minor children, the Courts in this country would treat the father as being the person most likely to guard the interests of his children and would maintain his custody of their property,⁴ but his powers to deal with it are not equal to those possessed by Hindus and Mahomedans.⁵

Mother.

Failing the father, the mother's custody of her children's property would be treated as not unlawful.

Rights of other
relations.

Failing the father and mother, and their appointees,⁶ no person, however nearly related, is of right entitled to the custody of minors, who are neither Hindus nor Mahomedans, or to the guardianship of their property.

The Court would not, however, unless the interests of the minor demanded it, summarily interfere with a possession not improperly obtained,⁷ and in the appointment of a guardian will look amongst other things to nearness of kin.⁸

Husband.

A husband is the natural guardian of his minor wife⁹ according to the English law, which would be, in this respect, administered in the case of those who are not Hindus or Mahomedans.

Neither the father nor the mother has any absolute legal right to the custody of their illegitimate child.¹⁰ The Court

¹ See 2 & 3 Vict., c. 54; 36 & 37 Vict., c. 12; 49 & 50 Vict., c. 27.

² *Post*, chaps. xi. and xiv.

³ *Post*, chap. xx.

⁴ "If an estate be left to an infant, the father is by common law the guardian, and must account to his child for the profit." Kerr's Blackstone, vol. I, p. 487. As to the payment of a legacy given to a minor, see *ante*, pp. 28, 29.

⁵ See *post*, chap. xvii.

⁶ See Act VIII of 1890, sec. 5, *post*, pp. 64, 65.

⁷ See *post*, pp. 193, 194.

⁸ Act VIII of 1890, sec. 17 (2), *post*, p. 90.

⁹ See Act VIII of 1890, sec. 19.

¹⁰ Macpherson on Infants, p. 67. See *per* Lords Herschell and Field in *Barnardo v. McHugh*, [1891] A. C., 388.

would, however, in the interests of the child ordinarily prefer the mother,¹ at any rate during the period of nurture,² and will primarily consider her wishes as to the custody of the child;³ but it must in each case be guided by a consideration of what is best in the interests of the child.

After the mother, the Court will prefer the putative father to the mother's relatives.⁴

The portion⁵ of sec. 17 of the Guardians and Wards Act, which deals with contests between parents, who are European British subjects, does not apply to the case of illegitimate children.⁶

The right of guardianship of children the result of intercourse between persons governed by different laws, is determined by the Hindu law, the Mahomedan law, or the law applicable to other persons, according as they have been brought up as Hindus, Mahomedans, or otherwise.⁷

¹ *Queen v. Nash* (1883), 10 Q. B. D., 454; *Barnardo v. McHugh*, [1891] A. C., 388; *Bomwetsch v. Bomwetsch* (1908), 35 Cal., 381.

² *Empress v. Pemanlle* (1882), 8 Cal., 971; see *Shahjehan v. Munro*, 5 S. D. A. N.-W. P., 39; s.c. 1 Sel. Rep., S. D. A. N.-W. P., 16; *Queen v. Fletcher* (1849), Perry's Oriental Cases, 109; *Ex parte Intiazoonissa Begum* (1814), 2 Madras Notes of Cases, 107.

³ *Rex v. New* (1904), 30 T. L. R., 583, C. A.

⁴ *Re Kerr*, 12 L. R. Ir., 642; *Queen v. Nash* (1883), 10 Q. B. D., 454.

⁵ Sec. 17 (4), *ante*, pp. 58, 59.

⁶ The word "parents" would, unless there be anything in the context to the contrary, which there is not in this section, apply only in the cases of children born in wedlock. The English law regards an illegitimate child as nobody's child (see Macpherson on Infants, p. 67).

⁷ See *Myna Boyce v. Ootaram* (1861), 8 M. I. A., 400; s.c. on remand (1864), 2 Mad. H. C., 196; *Lingappa Goundan v. Esudasan* (1903), 27 Mad., 13; *Tara Chand v. Reeb, Ram* (1866), 3 Mad. H. C., 50, at p. 53.

CHAPTER IX.

APPOINTMENT OF TESTAMENTARY GUARDIANS.

Nomination of guardian by father. BY the several systems of law administered in British India a father is entitled to appoint guardians of his minor children by his will.

Hindus. An adult ¹ Hindu father can, by word or writing, nominate a guardian for his children, such nomination to take effect after his death and not before.² He is unrestricted in the choice of such guardian, and he may exclude even the mother from the guardianship.³

Mahomedan law. Under Mahomedan law not only can a father ⁴ appoint by will a guardian of the property of his minor children,⁵ but, as we have seen,⁶ apart from any such specific appointment, the executor of a father's will is entitled to the custody of the property of his minor children.

Guardianship of property. Guardianship of person. The father cannot by will interfere with the rights, which the mother or other female relations can during his lifetime assert against him; ⁷ but he can by will appoint a guardian, who can exercise rights similar to those enjoyed by himself.⁸

¹ By not incorporating sec. 47 of the Indian Succession Act (X of 1865) in the Hindu Wills Act (XXI of 1870), the Legislature has apparently indicated its opinion that the privilege enjoyed by adult Hindu fathers should not be extended to fathers who are themselves minors.

² See *ante*, p. 49.

³ *Pirthee Lal Jha (Soobah) v. Doorga Lal Jha (Soobah)* (1867), 7 W. R. C. R., 74, at p. 75. See *Badhimal Manji v. Morarji Premji* (1907), 31 Bom., 415; 9 Bom. L. R., 553; s.c. in Court below (1906), 8 Bom. L. R., 522; cf. Act XV of 1856, sec. 5, *post*, p. 72.

⁴ A Mahomedan minor cannot

make a will under the Sunni law, Baillie's Digest, part i, p. 669; under the Shiah law he can do so, *ante*, p. 25.

⁵ Ameer Ali's Mahomedan Law, vol. ii, 2nd Edn., p. 473; Macnaghten's Mahomedan Law, Principles, chap. viii, princ. 4; *Alimodeed Moallem (Sheikh) v. Syfoora Bibee (Musst.)*, (1866), 6 W. R. M. R., 125.

⁶ *Ante*, pp. 53, 54.

⁷ *Ante*, pp. 54, 55.

⁸ See Wilson's Anglo-Mahomedan Law, 3rd Edn., p. 186; Baillie's Digest, vol. i, p. 665; Ameer Ali's Mahomedan Law, vol. ii, 2nd Edn., pp. 472, 473.

It does not appear that, apart from a specific appointment as guardian, the father's executor can act as guardian of the persons of the children and so far as Shias are concerned, there is authority that he has no such power as against the mother.¹

There is nothing to prevent a Mahomedan father appointing the mother guardian of the person or property of his minor children.² Appointment of mother.

The capacity of Hindu and Mahomedan fathers to appoint by their wills guardians for their children after their deaths, has been recognized by the Legislature since the date of the Permanent Settlement.³ Power recognized by Government. Ben. Reg. V. of 1799.

Act XL of 1858, in enacting a procedure for the appointment by the Court of a guardian to the persons and estates of minors in Bengal, required the Court to grant a certificate of administration of the property of the minor to any person entitled under a will or deed to have charge of such property, and only permitted a guardian of the person to be appointed in the case of the father not having appointed a guardian.⁴ Act XL of 1858.

The law in Bombay was similar.⁵

The Hindu Wills Act,⁷ which applies to the wills of Hindus, Jains, Sikhs, and Buddhists in some parts of British India, did not alter the testamentary powers of Hindus to appoint guardians for their children. The Hindu Wills Act.

Lastly, the Guardians and Wards Act provides⁸ that in the case of a minor, who is not an European British subject, nothing in that Act "shall be construed to take away or derogate from any power to appoint a guardian of his person or property or both which is valid by the law to which the minor is subject."⁹ Guardians and Wards Act.

So far as persons who were not governed by Hindu or Mahomedan law were concerned, the Indian Succession Act,⁹ which applies to wills made by persons other than Hindus, Persons other than Hindus and Mahomedans.

¹ Baillie's Digest, part ii, p. 95.

² Macnaghten's Mahomedan Law, Precedents, chap. vii, cases 4 and 6, and Appendix, title, "Guardian I."

³ See Markby's Lectures on Indian Law, Lecture V, p. 76; Ben. Reg. V of 1799; Ben. Reg. I of 1800; Mad. Reg. V of 1804, secs. 18 and 19; Act XIX of 1873, sec. 199; and VIII of 1890, sec. 6.

⁴ Sec. 7. *Puroma Soonduree Dossee v. Tara Soonduree Dossee* (1868), 9 W. R. C. R., 342; *Roodur Chunder Roy v. Bhoobunmohun Acharjee*, Ben. S. D. A., 1860, p. 350; *Bhoobun Mohinee Debee v. Poorno Chunder Banerjee* (1872), 17 W. R. C. R., 99. Under Act IV (B. C.) of 1870, sec. 31, the Court of Wards, in appointing a

guardian, had to prefer a testamentary guardian, unless he be disqualified or unfit. The present law is different, see Act IX (B. C.) of 1879, sec. 20; but the position of a testamentary guardian is to some extent still recognized, see secs. 44 and 45, *post*, pp. 348, 349.

⁵ Sec. 7.

⁶ Act XX of 1864, sec. 8.

⁷ XXI of 1870.

⁸ VIII of 1890, sec. 6. Read with sec. 5, sec. 6 shows that it was intended to include the case of a testamentary appointment; see also sec. 7, *post*, p. 89. The Court may remove a testamentary guardian, see sec. 39, *post*, pp. 101, 102.

⁹ Act X of 1865, sec. 47.

Mahomedans, Buddhists,¹ Sikhs and Jains, permits a father, whatever his age may be, to appoint a guardian or guardians for his children by will during minority.

Act XXV of 1838, which applied to wills made between the 1st of February, 1839,² and the 1st of January, 1866, deprived³ minor fathers of the power of appointing guardians to their children by will.

Appointment
by mother.

Except in the case of European British subjects, the mother has no power to appoint a guardian,⁴ but the Court, in appointing a guardian after her death, may consider an appointment by her, such appointment being, at the least, an expression of her wish.⁵

European
British
subjects.

The testamentary appointment of guardians of European British subjects⁶ is dealt with in the Guardians and Wards Act,⁷ sec. 5 of which is as follows:—

“(1) Where a minor is an European British subject, a guardian or guardians of his person or property, or both, may be appointed by will or other instrument to take effect on the death of the person appointing: (a) by the father of the minor; or (b) if the father is dead or incapable of acting, by the mother.⁸

“(2) Where guardians have been appointed under sub-sec. (1) by both parents, they shall act jointly.”

Removal of
testamentary
guardian.

Not only must a Court recognize such appointment, but the appointee can only be deprived of the guardianship for the causes which would justify the removal of a guardian appointed by the Court.⁹

Appointment
of mother by
Court to act
with testa-
mentary
guardian.

The same Act further provides¹⁰ that “on the death of a father, being an European British subject, who has, by will or other instrument to take effect on his death, appointed a guardian of his minor child, the Court may appoint the mother to be guardian of the child jointly with the guardian appointed by the father.”

The result of this is that, although during the father's lifetime the mother is to be preferred to the father as guardian of her male children of tender years and of her female children,¹¹ the father's appointee is, in the

¹ Sec. 331.

² Sec. 31.

³ Sec. 5.

⁴ *Venkayya Garu v. Venkata Narasinhulu* (1897), 21 Mad., 401.

⁵ See *In re Kaye* (1866), L. R., 1 Ch., 387. See Act VIII of 1890, sec. 17 (2), *post*, pp. 90, 91.

⁶ See *ante*, p. 58, note 7.

⁷ VIII of 1890.

⁸ Where after the death of the mother, who has appointed under

these circumstances, the father becomes capable of acting, the Court may appoint him sole guardian or joint guardian to act with the guardian appointed by the mother; Act VIII of 1890, sec. 15 (3).

⁹ Act VIII of 1890, sec. 39, *post*, pp. 101, 102.

¹⁰ Sec. 15 (2).

¹¹ Act VIII of 1890, sec. 17, *ante* pp. 58, 59.

absence of an appointment by the Court during the father's lifetime, entitled after his death to the guardianship, or at the least the mother is required to share it with him.

Parents cannot appoint guardians to their illegitimate children,¹ whatever may be their race, but the Court, when appointing a guardian, will take into consideration an appointment by the mother, or other expression of her wishes, and will even consider an appointment by the putative father of an illegitimate child.²

Probate establishes the authority of a testamentary appointment;³ but a will containing the appointment of a guardian can, if proved by evidence, be used as proof of such appointment, although no probate of it may have been granted.⁴

As to the mode of dealing with a dispute as to the appointment, see *post*, pp. 89, 90.

A guardian may, in all cases where a testamentary appointment is permissible,⁵ be appointed by a deed to take effect upon the death of the person making the appointment; but such appointment is in its nature testamentary,⁶ and may be revoked by a subsequent will.

No particular form of instrument appointing a guardian is necessary. Although a will may not have been executed with all the formalities required by law, the Court may, except perhaps in the case of a will to which the Indian Succession Act,⁷ is applicable, act upon an appointment of guardian made therein, provided it appear that such appointment expresses the wishes of the testator.⁸

There is nothing to prevent a father limiting the appointment to a portion only of the minor's property, and he can appoint as many guardians as he wishes.

A father can appoint guardians of property, which has devolved upon his children otherwise than through him, but,

¹ See *Ward v. St. Paul* (1779), 2 Brown's Chancery Cases, 583; *Ex parte Glover*, 4 Dowl. P. C., 291.

² *Ward v. St. Paul* (1779), 2 Brown's Chancery Cases, 583. See Act VIII of 1890, sec. 17 (2).

³ *Jogesh Chunder Chakravarti v. Umataru Debya* (1878), 2 C. L. R., 577.

⁴ *Alukhan Badlukhan (Pathan) v. Panibai (Bai)* (1894), 19 Bom., 832.

⁵ As to European British subjects, see *ante*, p. 64.

⁶ See 12 Car. II, c. 24, sec. 8; *Ex parte Ilchester* (1803), 7 Ves., 348. In the case of persons other than Hindus and Mahomedans a minor father can apparently appoint a guardian by deed. At any rate his wishes, however expressed, would be regarded by the Court in appointing a guardian; Act VIII of 1890, sec. 17 (2).

⁷ X of 1865; see sec. 47.

⁸ See *Hall v. Storer* (1835), 1 Young and Collyer, Ex. 556.

should the instrument which creates the minor's interest appoint a person to have charge of the property thereby bequeathed or given during the minority of the child, the father cannot interfere with such appointment by himself appointing a guardian. Any donor by will or deed may appoint a trustee or manager of the property during the minority of the donee; but he cannot impose any conditions or restrictions upon the management of property which the minor may have acquired otherwise than by such will or deed.

Form of appointment.

It is not necessary that any special form of words should be used in appointing a guardian. The expression of the intention is alone requisite.¹

Who can be appointed.

Individuals only can be appointed guardians.

Where the testator appointed a trading partnership as a firm, and not as individuals, guardians of his children, the Court of Chancery refused to recognize the appointment.² A father cannot appoint a company, an institution, or a Court³ to be guardian of his children.

Delegation of powers.

A testamentary guardian, although he takes precedence of other guardians, and is placed *in loco patris*, having the same powers as the parent over the minor,⁴ cannot, except so far as it may be necessary to entrust his ward to a tutor or schoolmaster, delegate his trust to another,⁵ either during his lifetime or by will, and the trust does not pass to his executors or administrators.⁶

¹ Simpson on Infants, 3rd Edn., p. 191. The expressions, "I expect my father will take care to see my child educated in the Protestant religion" (*Teynham v. Lennard* (1724), 4 B. P. C., 302)—"I desire that my son may be under the care and direction of A. B." (*Bridges v. Hales* (1729), Mos., 108)—"I request Miss M., if she shall be alive at my decease, to take upon herself the management and care of the house and of my children" (*Miller v. Harris* (1845), 14 Sim., 540)—have each been held to be sufficient to effect a valid appointment; and in another case (*Mendes v. Mendes* (1747), 1 Ves. Sen., 89), Hardwicke, L.C., considered that the words, "I direct that my wife shall have the education and maintenance of my children," might amount to a devise of the guardianship. A direction to

executors to manage property during the minority of the legatee constitutes them guardians of the property: *In the matter of Srish Chunder Singh* (1893), 21 Calc., 206, at p. 212.

² *De Mazar v. Pybus* (1799), 4 Ves. Jun., 644.

³ See *Rowshun Jehan v. Collector of Purneah* (1870), 14 W. R. C. R., 295; *Ganjessar Koer v. Collector of Patna* (1898), 25 Calc., 795; 2 C. W. N., 349.

⁴ *Eyre v. Shaftesbury* (1722), 2 Peere Wms., 103.

⁵ *Villareal v. Mellish* (1819), 2 Swanst., 536; s.c. *Mellish and De Costa*, 2 Atk., 14.

⁶ See Forsyth on the Custody of Infants, p. 111, and cases cited in note (n) to that page. As to Mahomedans, see *ante*, pp. 53, 54.

A testamentary guardian is entitled to act, until he is removed by the Court, or a Court of Wards assumes superintendence, or the ward ceases to be a minor.¹ In the case of a female ward, his powers as guardian of her person cease on her marrying a husband who is not unfit to be guardian of her person.²

Right of
testamentary
guardians.

¹ Act VIII of 1890, secs. 39 and 41, *post*, pp. 101, 102, 138, 179.

² Act VIII of 1890, sec. 41, *post*, p. 138.

CHAPTER X.

LOSS OF RIGHT OF GUARDIANSHIP.

ALTHOUGH the powers of a guardian only cease in the events set forth in Act VIII of 1890, sec. 41,¹ the Courts will not confirm,² or give effect to,³ the rights of natural and testamentary guardians where those rights have been lost by misconduct or unfitness for the trust.

Loss of right
by father.

Mr. Story, in his work on Equity Jurisprudence,⁴ observes, that "although in general parents are entrusted with the custody and the education of their children, yet this is done upon the natural presumption that the children will be properly taken care of, and will be brought up with a due education in literature and morals and religion, and that they will be treated with kindness and affection. But, whenever this presumption is removed; whenever (for example) it is found that a father is guilty of gross ill-treatment or cruelty towards his infant children; or that he is in constant habits of drunkenness and blasphemy or low and gross debauchery, or that he professes atheistical or irreligious principles; or that his domestic associations are such as tend to the corruption and contamination of his children, or that he otherwise acts in a manner injurious to the morals or interests of his children; in every such case the Court of Chancery will interfere and deprive him of the custody of his children, and appoint a suitable person to act as guardian and take care of them and to superintend their education."⁵

¹ (a) By his death, removal or discharge:

(b) by the Court of Wards assuming superintendence:

(c) by the ward ceasing to be a minor:

(d) in the case of the guardianship of the person of a female ward, by her marriage to a husband who is not unfit to be guardian of her person, see *post*, p. 138.

² As, for instance, where an application is made for the appointment of a guardian.

³ As, for instance, where the guardian is invoking the aid of the summary power of the Court (see *post*, chap. xx).

⁴ Sec. 1341.

⁵ See Act VIII of 1890, sec. 19 (b), *post*, p. 88. *Wellesley v. Beaufort* (1827), 2 Russ., 1; s.c. on appeal, *Wellesley v. Wellesley* (1828), 2 Bli. N. S., 124; *Mytton v. Holyoake*, Macpherson on Infants, p. 149; *Anonymous* (1851), 2 Sim., N. S., 54; *Swift v. Swift* (1865), 34 Beav., 266; 34 L. J. Ch., 209; *De Manneville v. De Manneville* (1804), 10 Ves., 52; *Re Fynn* (1848), 2 D. G. & S., 457. A

But before the Court can interfere there must be a distinct danger of the child being injured, or contaminated by remaining in the custody of the father. The Court will draw a distinction between harshness and cruelty, and will interfere in the latter case only. Occasional acts of severity are insufficient to justify interference. There must be a persistent and continuous course of ill-treatment.¹ The fact that the father is living in adultery would also be insufficient, where he is careful not to bring his children into any contact with his mistress.² In determining any question of this kind attention must be paid to the habits and customs of the people and the position of the parties.³

The Court will not interfere with the rights of the father on account of his religious principles,⁴ nor does he by changing his religion lose his right to the custody of his children.⁵ Religious principles of father.

It has been held in England that the absence of all religious principles is a good ground for interference, and where the father's religious principles are such as to justify in his mind and to cause him to represent to others as moral and worthy of recommendation, conduct which other persons would consider immoral, or when the father by his opinions and conduct demonstrates that he must and does deem it a matter of duty, which his principles impose upon him, to recommend to his children that conduct in

conviction for theft is not a ground for refusing to give the custody to the father, *A. C. v. B. C.* (1903), 5 F. 10 Ct. of Sess.

¹ *Curtis v. Curtis*, 5 Jur. N. S., 1147. If a father fails to stand forward to protect his children's just rights, or connives at their being deprived of the same, their mother, by Hindu law, can act as their guardian: *Gunga (Bace) v. Dhurumdass Nurseedass*, Bellasis, 16.

² *R. v. Greenhill* (1836), 4 A. & E., 624; *Ball v. Ball* (1827), 2 Sim., 35.

³ See *Gummalapudi Kalidas v. Attaluri Subbamma* (1883), 7 Mad., 29. In that case a Hindu goldsmith kept a concubine and had a family by her, and then married and had legitimate issue, but continued to keep the concubine in his house. It was held that this circumstance alone did not justify a Court in refusing him the custody of his legitimate children.

⁴ *Curtis v. Curtis*, 5 Jur. N. S., 1147; see *post*, p. 222.

⁵ See Act XXI of 1850. Sir R. Wilson, in his Digest of Angle-Mahomedan law, contends that Act XXI of 1850 has no application on the ground that guardianship is a duty,

and not a right, within the meaning of the Act. The Indian Courts have always considered questions of guardianship as questions of a right, although there are duties attached to such rights. *Muchoo v. Arzoon Sahoo* (1866), 5 W. R. C. R., 235, is a distinct authority for the application of the Act (see also *Kanahi Ram v. Biddya Ram* (1878), 1 All., 549); and in a recent case (*In the matter of Gul Mahomed*), the Punjab Chief Court has held that the right of guardianship is a right within the meaning of the Act; *Kaulesra v. Jorai Kasaundan* (1905), 28 All., 233. *In the matter of Mahin Bibi* (1874), 13 B. L. R., 160, which is quoted by Sir R. Wilson as an authority on the point, does not deal with the Act. The question in that case was as to the validity of a marriage, a different question. See *Queen v. Bezonji*, Perry's Oriental Cases (1843), 91; *Shamsing v. Santabai* (1901), 25 Bom., 551, at p. 555; 3 Bom. L. R., 89; *Puttabai v. Mahadu* (1908), 33 Bom., 107; 10 Bom. L. R., 1134. As to the effects of his change of religion upon the religious education of his children, see *post*, p. 225.

some of the most important relations of life as moral and virtuous, which the law considers as immoral and vicious, then the Court would interfere.¹ Speculative religious opinions are not any ground for interference, unless they are such as the law consider dangerous to society.²

It is, however, difficult to say to what extent the Courts of this country would interfere in cases where the father's religious opinions are such as would, if he had lived in England, have justified his removal by the Court of Chancery. Probably the Court would in an extreme case consider itself bound to interfere; but it would have to make such allowance as the customs, habits, and opinions of the inhabitants of this country might require to be made.

A father may also lose his right to the guardianship of his children, and to the control of their education, where he has permitted another person to maintain and educate them, and it would be detrimental to the interests of the children to alter the manner of their maintenance or the course of their secular or religious education. The Court will not, when he has acquiesced for some time, permit him arbitrarily or capriciously to alter the mode of their maintenance and education, or to take them from the custody in which he has allowed them to remain.³

¹ *Shelley v. Westbrooke* (1821), Jac., 266, n.; *Thomas v. Roberts* (1850), 3 D. G. & S., 758.

² See *Lyons v. Blenkin* (1821), Jac., 245, at p. 256; *Curtis v. Curtis*, 5 Jur. N. S., 1147.

³ *Besant v. Narayaniah* (1914), 41 I. A. 314, at p. 321; 38 Mad., 807, at p. 819; 18 C. W. N., 1089, at p. 1117; 16 Bom. L. R., 625, at p. 633; *Mokoond Lal Singh v. Nobodip Chunder Singha* (1898), 25 Calc., 881; 2 C. W. N., 379; *In the matter of Joshy Assam* (1895), 23 Calc., 290. See *Modhoosoodun Mookerjee v. Jadub Chunder Banerjee* (1865), 3 W. R. C. R., 194, where it was held that a Koolin Brahmin, who only occasionally visited his wife, the mother of the child, was not such a natural guardian as the mother; *In the matter of Salthri* (1891), 16 Bom., 307, which was a case of waiver by a mother, see *post*, p. 71. In *Ex parte Hopkins* (1732), 3 Peere Wms., 154, Lord Chancellor King said:—"The father is entitled to the custody of his own children during their infancy, not only as guardian by nurture, but by nature, and it cannot be conceived that because another

thinks fit to give a legacy, though never so great, to my daughters, therefore I am by that means to be deprived of a right which naturally belongs to me—that of being their guardian." But if the father has once permitted to his children the advantages of a special fund provided for their education and support, he cannot afterwards prevent their receiving the benefits of that fund; see *Lyons v. Blenkin* (1821), Jac., 245. In one case (*Colston v. Morris* (1819), Jac., 257, n.), where a sum of money was left to a minor with a direction that his education should be committed to trustees, and a legacy was also left to the father on condition of his not interfering in it, and the father had accepted the legacy, the father was required to enter into an undertaking not to interfere with the education. If he had not accepted the legacy, the Court could not have forced him to accept its conditions. In *In re Agar Ellis* (1883), 24 Ch. D., 317, at p. 333, Cotton, L.J., said:—"The father, although, not unfitted to discharge the duties of a father, may have acted in such a way as to

Under the Hindu law a father or other guardian might lose his rights by permanently emigrating, becoming a recluse, or entering a religious order.¹

As in the case of a father,² a mother, or other guardian,³ would lose all right of guardianship by misconduct,⁴ or waiver.⁵ The immoral character of a mother would in most cases be a source of danger at any rate to her female children.⁶

An agreement by the father to give up entirely the custody and control of his children to their mother is against the policy of the law,⁷ unless the father be by such agreement doing only what the law would compel him to do,⁸ as where he has been guilty of gross misconduct, or there is danger of moral contamination to the child if it remains with him; or where he has permitted the mother or some other person to educate, and have the custody of, the child without himself interfering with its education.

The father can at any time rescind an agreement made with persons other than the mother to give up to them the custody of his child, provided that it has not been so acted upon that a revocation of it would injuriously affect the child.⁹

preclude himself in a particular instance from insisting on rights he would otherwise have; as when a father has allowed, in consequence of money being left to a child, the child to live with a relative, and be brought up in a way not suited to its former station in life or to the means of the father. Then the Court says, 'You have allowed that to be done, and to alter that would be such an injury to the child that you have precluded yourself from exercising your power as a father in that particular respect,' and then the Court interferes to prevent the father from having the custody of the child, not because he is immoral or has forfeited all his rights, but because in that particular instance he has so acted as to preclude himself from insisting upon what otherwise would be his right."

¹ By becoming a hermit or entering into a religious order, a Hindu becomes dead in law; see Strange's Hindu Law, vol. i, 185; Sutherland's Synopsis of the Law of Adoption,

Head Second.

² *Ante*, pp. 68-70.

³ *Abasi v. Dunne* (1878), 1 All., 598; Baillie's Digest, part i, p. 434.

⁴ *Venkamma v. Savitramma* (1888), 12 Mad., 69; *Skinner v. Orde* (1871), 14 M. I. A., 309; 10 B. L. R., 125; 17 W. R. C. R., 77; *Abasi v. Dunne* (1878), 1 All., 598; Baillie's Digest, part i, pp. 341 and 342.

⁵ *In the matter of Saithri* (1891), 16 Bom., 307.

⁶ See *Venkamma v. Savitramma* (1888), 12 Mad., 69; *In re G.*, [1899] 1 Ch., 719; 68 L. J. Ch., 374; 80 L. T., 470.

⁷ See *Hope v. Hope* (1857), 8 D. M. & G., 731; *St. John v. St. John* (1805), 11 Ves. Jun., 531.

⁸ *Swift v. Swift* (1865), 34 Beav., 266; 34 L. J. Ch., 209.

⁹ *Besant v. Narayaniah* (1914), 41 I. A., 314; 38 Mad., 807; 18 C. W. N., 1089; 16 Bom. L. R., 625; *Hill v. Gomme* (1839), 1 Beav., 540; on appeal (1839), 5 M. & C., 250; See *In re O'Hara* (1900), 2 Ir. R., 232, C. A.

Loss of right by other guardians.

Agreement to give up custody.

It is his duty to rescind such agreement where it is for the benefit of the child that he should do so.¹

An arrangement by the mother of an illegitimate child would have the same effect.²

This principle might be applied to any natural guardian of a minor, but the question in each case would be whether it be in the interests of the minor that the agreement should be enforced.

Remarried
Hindu widows.

Hindu widows do not on remarriage *ipso facto* lose their right of guardianship of their children,³ but, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the husband the guardian of his children, the father, or paternal grandfather, or the mother or paternal grandmother, or any male relative, of the husband can apply to the highest Court having original jurisdiction in civil cases in the place where the husband was domiciled at the time of his death for the appointment of a guardian,⁴ and the Court may, if it should think fit, appoint such guardian, who, when appointed, shall be entitled to have the care and custody of such children during their minority in the place of their mother, and in making such appointment the Court must be guided, as far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother.⁵

When the children have not property of their own sufficient

¹ See *Pollard v. Rouse* (1910), 33 Mad., 288.

² See *Kerrigan v. Hall* (1902), 4 F. 10 Ct. of Sess.; *Humphrys v. Polak*, [1901] 2 K. B., 395; 70 L. J. K. B., 752; 85 L. T., 103; 49 W. R., 612.

³ *Gunga Pershad Sahu v. Jhalo* (1911), 38 Calc., 862; 15 C. W. N., 579 (cf. *Putlabai v. Mahadu* (1908), 33 Bom., 107; 10 Bom. L. R., 1134). Act XV of 1856, sec. 5. This Act has been declared to be in force throughout British India, except as regards the Scheduled Districts (Act XV of 1874, sec. 3), and in the Santhal Pergunnahs (Reg. III of 1872, sec. 3, as amended by Reg. III of 1886). As to the Scheduled Districts to which it has been applied, see General Acts, 1854-66, Edn. 1887, p. 107.

⁴ Act XV of 1856, sec. 3. The application may be made under that Act, or under the Guardians and Wards Act (VIII of 1890). In the latter case the conditions necessary for an application under Act VIII of 1890 would apply (*post*, pp. 76, 77). Act XV of 1856 has no application to women who, by the rules of their caste, are capable of contracting a second valid marriage. In *Kishen v. Enayet Hossain*, S. D. A. N. N.-W. P., 25th June, 1861, it was held that a woman of the Aheer caste does not by remarriage forfeit her rights to act as guardian of her son by her first marriage.

⁵ Act XV of 1856, sec. 3. See *Khushali v. Rani* (1882), 4 All., 195.

for their support and proper education whilst minors, the appointment can only be made with the consent of the mother, unless the proposed guardian gives security for the support and proper education of the children whilst minors.¹

Under the Hindu law loss of caste involved a loss of the right of guardianship of the person and property of minors;² but since the passing of Act XXI of 1850 such right of guardianship ceased to be affected by a change of religion or loss of caste.³

Where, however, the appointment of a guardian is made by a Court, the fact that the person proposed is out of caste would be a matter for consideration.

Certain religious ceremonies which it is the duty of the guardian of a Hindu minor to perform on behalf of his ward, cannot be performed by a guardian who is out of caste, or who has changed his religion. In that case they must be performed by the person next entitled to the guardianship of the minor, and it is the duty of the guardian to make over to such person out of the estate of the minor the requisite funds to pay the expenses of those ceremonies.

After becoming a widow, a mother, according to Mahomedan law, retains her right to the custody of her infant children. Her right, and that of any other female guardian, ceases on marriage with a stranger, *i.e.* a person outside the prohibited degrees of relationship.

The right will revert on the new marriage being dissolved by death or otherwise.⁴

Under the same law, where a mother or other person entitled to the custody neglects to support the child, her right to the custody ceases,⁵ and devolves upon the person next entitled to such right.

Under the English law the remarriage of the mother is not necessarily a ground for removing her from the guardianship.⁶

¹ Act XV of 1856, sec. 3.

² See *Fuggoo v. Ranah* (1865), 4 W. R. M. A., 3.

³ *Kanahi Ram v. Biddyaram* (1878), 1 All., 549; *Kaulesra v. Jorai Kasaundan* (1905), 28 All., 233. See *ante*, p. 69, note 5.

⁴ *Beedhun Bebee v. Fuzuloollah* (1873), 20 W. R. C. R., 411; *Fuseehun v. Kajo* (1883), 10 Calc., 15; Baillie's Digest, part i, 432; part ii,

p. 96; Macnaghten's Principles of Mahomedan Law, chap. viii, princ. 9; Hedaya, vol. i, bk. iv, chap. xiv.

⁵ See *Ameeroonissa* (1869), 11 W. R. C. R., 297; Tagore Law Lectures, 1873, p. 486; Hedaya, vol. iv, bk. xlv, sec. 7.

⁶ *In re X, X v. Y* [1899], 1 Ch., 526; 68 L. J., 265; 80 L. T., 311; 47 W. R., 345.

Change of religion by guardian.

A change of religion by the guardian does not disqualify him,¹ but in the case of a guardian other than the father, the Court might consider a person who had changed his religion to one other than that professed by the father of the children, and who would therefore be unlikely to do his duty with reference to the religious education of his wards, unfit to be appointed guardian.²

In spite of the provisions of Act XXI of 1850, there is nothing to prevent a testator from providing that the person whom he is appointing guardian shall be disqualified or excluded from office on changing his religion.³

Testamentary guardian.

A testamentary guardian can only be removed or disregarded under the circumstances which justify the removal of a guardian appointed by the Court.⁴

As to the removal of children of members of criminal tribes from their parents or guardians, see Act III of 1911, sec. 17, *ante*, p. 42.

¹ Act XXI of 1850. *Muchoo v. Arzoon Sahoo* (1866), 5 W. R. C. R., 235; *Dwijapada Karmakar v. Baileau* (1915), 20 C. W. N., 608. See *ante*, p. 69, note 5.

² See Act VIII of 1890, sec. 39, *post*, pp. 101, 102. In appointing a guardian the Court must take the religion of the minor into consideration (Act VIII of 1890, sec. 17 (2), *post*, p. 90), and would therefore rarely appoint a guardian who professed a religion different from that

of the minor. It was held *In re Grey* (1902), 2 Ir. Rep., 684, K. B. D., that a mother who after the father's death became a Roman Catholic, and would have brought up her children as such, was not entitled to the custody.

³ See *Anund Coomar Gangooly v. Rakhai Chunder Roy* (1867), 8 W. R. C. R., 278.

⁴ Act VIII of 1890, sec. 7 (3), *post*, p. 86, and sec. 39, *post*, pp. 101, 102.

CHAPTER XI.

APPOINTMENT OF GUARDIANS BY CIVIL COURTS.

CERTAIN Civil Courts have power to declare and to appoint guardians of the persons and property of minors, who are not under the superintendence of Courts of Wards, and thereby to supersede the rights of natural and testamentary guardians.¹ Power of Courts.

A question as to a right of guardianship cannot be determined by arbitration,² or by agreement.³

Soon after the establishment of the Court of Wards in Bengal, it was found necessary to give to the Civil Courts powers to nominate guardians of minors, over whom that Court possessed no power.

The first step in this direction was the enactment of Bengal Regulation I of 1800, which authorized Zillah Judges, where there were no testamentary guardians, to nominate guardians to disqualified landholders not subject to the authority of the Court of Wards. This Regulation, with others relating to the same subject, was repealed by Act XL of 1858, which provided a machinery for the appointment of managers of the estates and guardians of the persons of minors (not being European British subjects)⁵ residing in Bengal outside the limits of the original civil jurisdiction of the High Court. Ben. Reg. I of 1800.
Law in Bengal.

Similar provision was made in the Madras Presidency by Madras Regulations V of 1804, sec. 20, and X of 1831, sec. 3, and in Bombay by Bombay Act XX of 1864, which was in terms similar to Act XL of 1858.

Acts XL of 1858 and XX of 1864, and the above sections of the Madras Regulations, were all repealed by the Guardians and Wards Act, 1890.

The Guardians and Wards Act, 1890,⁶ which applies to the whole of British India,⁷ and came into force on the 1st of July, 1890, contains the present law on the subject. Guardians and Wards Act, 1890.

That Act supplies a procedure similar in many respects to that which was adopted by the High Courts in appointing guardians of minors. It

¹ *Post*, pp. 104, 151. Except they are unfit to be guardians, the Court cannot supersede the rights of fathers and testamentary guardians, Act VIII of 1890, sec. 7 (3), *post*, p. 89, sec. 19, *post*, p. 88, and sec. 39, *post*, pp. 101, 102.

² *Mahadeo Prasad v. Bindeshri Prasad* (1908), 30 All., 137.

³ *Rakshmani v. Mohamlal* (1902),

⁴ Bom. L. R., 963.

⁴ Act XL of 1858, sec. 1.

⁵ See *Callychurn Mullick v. Bhugobuttychurn Mullick* (1872), 10 B. L. R., 231.

⁶ Act VIII of 1890, sec. 2 (1).

⁷ Including the Scheduled Districts: *Chakrapani v. Varahalamma* (1894), 18 Mad., 227.

has also brought the law on this subject more into line with the law as administered in England. The object of Acts XL of 1858 and XX of 1864, was not to supersede the rights of those who were entitled either naturally or by appointment to the guardianship of a minor's person or estate, but to place those persons under the control and subject to the supervision of the Civil Courts.

The Guardians and Wards Act protects¹ the rights of fathers, husbands, testamentary appointees, and in the case of European British subjects mothers also;² but except that their natural rights may give them advantages in a competition for the appointment of a guardian,³ the Courts can disregard the rights of other relations. The Courts now have to consider solely the interests of the minors.⁴

Saving of proceeding, etc., under repealed enactments.

All proceedings had, certificates granted, allowances assigned, obligations imposed, and applications, appointments, orders and rules made, under any of the repealed enactments, are, so far as may be, to be deemed to have been respectively had, granted, assigned, imposed, and made under Act VIII of 1890, and any enactment or document referring to any of the repealed enactments is, so far as may be, to be construed to refer to the repealing enactment or to the corresponding portion thereof.⁵

Saving of jurisdiction of Courts of Wards and High Courts. Persons entitled to apply for orders.

The Guardians and Wards Act has no effect upon the jurisdiction or authority of the Courts of Wards, nor does it take away any power possessed by the High Courts.⁶

The persons entitled to apply for an order for the appointment of a guardian or for the declaration of a person to be a guardian, are—⁷

(a) the person desirous of being, or claiming to be,⁸ the guardian of the minor, or

(b) any relative or friend of the minor, or

(c) the Collector of the District or other local area within which the minor ordinarily resides or in which he has property,⁹ or

(d) the Collector having authority with respect to the class to which the minor belongs.

¹ Secs. 19 and 7 (3).

² Sec. 17 (4).

³ See sec. 17 (2).

⁴ Sec. 17, *post*, p. 90.

⁵ Act VIII of 1890, sec. 2; see sec. 51, *post*, p. 111. The Act has no operation upon persons who ceased to be guardians before the passing of the Act: *Vallabdas Hirachand v. Krishnabai* (1892), 17 Bom., 566.

⁶ Act VIII of 1890, sec. 3. As to

the powers of the High Courts to appoint guardians, see *post*, chap. xiv.

⁷ Act VIII of 1890, sec. 8.

⁸ *i.e.* as natural or testamentary guardian.

⁹ Of any kind. There is no objection to the Deputy Commissioner of the Sonthal Pergunnahs making the application even though the application be to himself as District Judge, *Keshobati Kumari v. Satya Narain*

An appointment can only be made on a substantive application.¹

An order made upon an application which is involuntary has no effect.²

The expression "Collector" (Act VIII of 1890) means the chief officer in charge of the revenue administration of a district, and includes any officer whom the Local Government,³ by notification in the official Gazette may, by name or in virtue of his office, appoint to be a collector in any local area, or with respect to any class of persons, for all or any of the purposes of the Act.⁴

On the discharge of a guardian appointed or declared by the Court, or on his ceasing, under the law to which the ward is subject, to be entitled to act, or upon the death or removal of such guardian or of a testamentary guardian, the Court can appoint a guardian of its own motion.⁵

The Act does not compel any one to apply for the appointment of a guardian. It merely permits an application to be made,⁶ and unless there be no guardian or the natural or testamentary guardian be unfit, or it be otherwise necessary for the minor's welfare that a guardian should be appointed by the Court, an application is unnecessary. A person unnecessarily applying may render himself liable for costs.⁷

Application only to be made when necessary.

An application for the appointment of a guardian can be made at any time up to the attainment of majority by the minor,⁸ and no lapse of time can of itself be any objection to

When application can be made.

Singh (1907), 34 Calc., 569. In Bengal, the sanction of the Commissioner in cases of estates with current rent and cess demand of Rs. 100,000 or less and of the Board of Revenue in other cases must be obtained to any application which the Collector may desire to make under sec. 8 (c) or (d). Such sanction can only be given after reports have been submitted by the Collector and Commissioner in accordance with Rules 73 and 74, Part I of the Court of Wards Rules. If the application is for the purpose of having a private person appointed guardian, the Board's sanction will not be required. Court of Wards, Rules, Part II, rule 7.

Rule 383 of the High Court, N.-W. P., provides that when the Court does not allow out of the estate the costs of an application made by the Collector of the district under this section, the Court shall record the special circumstances in consequence of which it has not allowed such costs out of the estate.

¹ *Jaiwanti Kumri v. Gojadhari Upadhyaya* (1911), 38 Calc., 785; 15

C. W. N., 676.

² *Sahodra Koer v. Dhajadhari Gosain* (1911), 16 C. W. N., 447; *Sahodra Koer v. Ramadin Chowdhry* (1911), 16 C. W. N., 444.

³ In Sind this means the Commissioner, G. N. No. 5493, dated 13th August, 1903.

⁴ Act VIII of 1890, s. 4 (6). The Talukdari Settlement officer is a Collector with respect to minors of the class of Talukdars within the districts of Ahmedabad, Kaina, and Broach, to whom clause (a) of sub-sec. (1) of sec. 2 of the Gujarat Talukdars Act, 1888 (VI (Bo. C.) of 1888) applies for all the purposes of the Guardians and Wards Act (VIII of 1890), G. N., 4367, dated 11th June, 1895.

⁵ Act VIII of 1890, sec. 42, *post*, pp. 104, 105.

⁶ See *Sham Kuar v. Mohanunda Sahoy* (1891), 19 Calc., 301, at p. 308.

⁷ Act VIII of 1890, sec. 49.

⁸ *i.e.* in the cases of a person domiciled in British India before he attains the age of eighteen years, see *ante*, p. 8.

the making of an order,¹ as, if it were so, the minor might suffer through the negligence of those whose duty it is to protect him.

The fact that a previous application was dismissed for default does not prevent a subsequent application.²

To what Court application to be made.

If the application is with respect to the guardianship of the person of the minor, it must be made to the District Court³ having jurisdiction in the place where the minor ordinarily resides.⁴

If the application is with respect to the guardianship of the property of the minor, it must⁵ be made either to the District Court having jurisdiction in the place where the minor ordinarily resides,⁶ or to a District Court having jurisdiction in a place where he has property.⁷

The place of domicile of the minor is immaterial.⁸

If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily

¹ See *Puroma Soonduree Dossee v. Tara Soonduree Dossee* (1868), 9 W. R. C. R., 342. An application for an order, which if successful would in effect prolong the minority of a minor from eighteen to twenty-one, should not be granted when the alleged minor is on the point of attaining the age of eighteen, unless under particular circumstances, such as weakness of intelligence, or absolute necessity for the purpose of preserving property: see *Muhamdee v. Nazirun* (1880), 6 Calc., 19; 6 C. L. R., 210.

² *Ahmad Ali v. Raisunnessa (Musst.)* (1913), 17 C. W. N. 421.

³ This means the principal Civil Court of Original Jurisdiction, and includes a High Court in the exercise of its Ordinary Original Civil Jurisdiction, Act VIII of 1890, sec. 4 (4). The powers to invest Subordinate Courts with jurisdiction in the appointment of guardians have been taken away by the Guardians and Wards Act, which has repealed the Acts which gave such powers.

⁴ Act VIII of 1890, sec. 9 (1). *Besant*

v. Narayaniah (1914), 41 I. A., 314; 38 Mad., 807; 18 C. W. N., 1089; 16 Bom. L. R., 625. Should it happen that the minor has more than one residence and does not reside in one more than in another, then the application can be made to the Court of the district in which either of such residences is situate; but it is more convenient and proper that the application should be made to the Court of the district in which is situate that one of these residences which the minor is actually inhabiting at the time of the application, as it will be then easier for the Court to exercise its duty of appointing a guardian of the minor's person.

⁵ Act VIII of 1890, sec. 9 (2).

⁶ See above, note 4.

⁷ *i.e.* property of which a guardian can be appointed under the Act (see *post*, pp. 95, 96). An order made by a District Court having jurisdiction would apply also to property of the minor outside the limits of the jurisdiction of the Court.

⁸ *Ward v. Velchand Umedchand* (1909), 34 Bom., 121; 11 Bom. L. R., 1137.

resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.¹ Such order is appealable to the High Court.²

A guardian of the person of a minor residing out of British India cannot be appointed, although it may be sometimes necessary to appoint a guardian of his property in British India.³ Minor out of British India.

If the application is not made by the Collector, it must be ⁴ Form of application. by petition signed and verified in manner prescribed by the Code of Civil Procedure for the signing and verification of a plaint,⁵ and stating, so far as can be ascertained,—

- (a) the name, sex, religion, date of birth, and ordinary residence of the minor ;
- (b) where the minor is a female, whether she is married, and, if so, the name and age of her husband ;
- (c) the nature, situation, and approximate value of the property,⁶ if any,⁷ of the minor ;

¹ Act VIII of 1890, sec. 9 (3).

² *Ibid.*, sec. 47.

³ Acts XL of 1858 and XX of 1864 (*ante*, p. 75) had no application to minors who were not resident within the Presidencies of Bengal and Bombay respectively: see *Maganbhai Purshotamdas v. Vithoba* (1870), 7 Bom. H. C. A. C. J., 7.

⁴ Act VIII of 1890, sec. 10.

⁵ The following are the provisions of the Code of Civil Procedure (Act V of 1908) which deal with this subject :—

Order vi, rule 14. "Every pleading shall be signed by the party and his pleader (if any): Provided that where a party pleading is by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

Rule 15 (1). "Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

(2) "The person verifying shall

specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) "The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed."

⁶ *i.e.* the whole of the property of the minor of whatever description and wheresoever situate. The application for the appointment of a guardian should refer merely to the property to which the minor is entitled, or of which the applicant claims charge. It has nothing to do with the estate of any deceased person through whom the minor succeeds to any property (*Koosoomkaminee Debee v. Chunder Kant Mookerjee* (1875), 23 W. R. C. R., 346), as the appointment of a guardian is entirely distinct from a certificate to collect the debts of such deceased person: see *Raesunnissa Begum v. Khujoorunnissa (Ranee)* (1868), 10 W. R. C. R., 462.

⁷ These words "if any" show that the Court can exercise its jurisdiction under the Act and appoint a guardian of the person of a minor

- (d) the name and residence of the person having the custody or possession of the person or property of the minor ;
- (e) what near relations the minor has, and where they reside ;
- (f) whether a guardian of the person or property, or both, of the minor has been appointed by any person entitled or claiming to be entitled by the law to which the minor is subject to make such an appointment ;
- (g) whether an application has at any time been made to the Court or to any other Court with respect to the guardianship of the person or property, or both, of the minor, and, if so, when, to what Court, and with what result ;
- (h) whether the application is for the appointment or declaration of a guardian of the person of the minor, or of his property, or of both ;
- (i) where the application is to appoint a guardian, the qualifications of the proposed guardian ;
- (j) where the application is to declare a person to be a guardian, the grounds on which that person claims ;
- (k) the causes which have led to the making of the application ; and
- (l) such other particulars, if any, as may be prescribed or as the nature of the application renders it necessary to state.

If the application is made by the Collector, it must be by letter addressed to the Court and forwarded by post or in such other manner as may be found convenient, and must state as far as possible the above particulars.

The application must be accompanied by a declaration of the willingness of the proposed guardian to act and the declaration must be signed by him and attested by at least two witnesses.¹

in cases where the minor is possessed of no property. Under Act XL of 1858, a guardian of the person could only be appointed in the case of a certificate to manage the minor's property being granted (see secs. 7 and 11. See also Act XX of 1864). The older English cases showed that

the Court of Chancery could not exercise its jurisdiction except there be property. See, however, *Barnardo v. McHugh*, [1891] A. C., 388, and *In re McGrath*, [1893] 1 Ch., 143.

¹ See Act VIII of 1890, sec. 17 (5), *post*, p. 93. In Bengal the declaration must be at the foot of the

The following Rule applies to applications in the High Court of Bengal for the appointment of a guardian ¹ :—

(Rules 432-436 of the Madras High Court are in similar terms.)

“(a) All proceedings under the Guardians and Wards Act, 1890, in these Rules called ‘the said Act,’ shall be entitled in the matter of the minor.

“(b) An application for the appointment of a guardian or for a declaration that a person is the guardian of a minor, shall be by original petition. Applications to High Court of Bengal.

“(c) The application shall, in addition to the particulars required by section 10 of the said Act, state whether the minor is entitled to any property absolutely, or subject to the rights or interests of any other person, and whether any property is subject to any, and what incumbrances; and shall specify all persons of the same degree of relationship as, or of nearer degree than, the proposed guardian, and where a female is proposed as guardian, the nearest male relation of the minor.

“(d) Where the father of the minor is living, and is not proposed as guardian, the application shall also state any facts relied on as showing that he is unfit to act as guardian of the minor, or that he consents to the application.

“(e) Where it is proposed to deal with any property of the minor in manner mentioned in section 29 of the said Act, the grounds of the application, and the relief prayed, shall be stated shortly in the original petition, and it shall not be necessary to present a separate petition or application.

“(f) The declaration of the willingness of the proposed guardian to act may be written at the foot of, or annexed to, or exhibited with, the petition.”

In Bengal ² and in the United Provinces, ³ when the petition states that the property of the minor consists of land or any interest in land, a copy of the petition must be sent free of charge to the Collector of the district in which such property or any part of it is situate. Copy of petition to be sent to Collector in Bengal and United Provinces.

If the Court is satisfied that there is ground for proceeding on the application, it shall fix a day for the hearing thereof, and cause notice of the application and of the date fixed for the hearing ⁴— Procedure on admission of application.

(a) to be served in the manner directed in the Code of Civil Procedure ⁵ on—

(i) the parents of the minor if they are residing in British India,

application, and must be in the following form: “I, the guardian proposed in the above application, do hereby declare that I am willing to act as such.” High Court Rule of 4th December, 1891.

¹ Rule 646, dated 1st September, 1905.

² Rule of High Court, Bengal, No. 1, dated 1st February, 1898, *Calcutta Gazette*, 9th February, 1898.

³ Rules of High Court, N.-W. P., rule 383.

⁴ Act VIII of 1890, sec. 11 (1). The procedure prescribed in this section

must be strictly followed, and no guardian can be appointed without the day being fixed and the notices being served: *cf. Jugodumba Koer (Musst.) v. Mircha Koer (Musst.)* (1872), 17 W. R. C. R., 269. For form of notice in Bengal, see High Court Rule of the 30th June, 1893, published in the *Calcutta Gazette* of the 21st June, 1893, part i, p. 572, and in the *Assam Gazette* of the 24th idem, part iii, p. 526.

⁵ Act V of 1908, sec. 28; order 5, rules 9-30.

- (ii) the person, if any, named in the petition or letter as having the custody or possession of the person or property of the minor,
 - (iii) the person proposed in the application or letter to be appointed or declared guardian, unless that person is himself the applicant, and
 - (iv) any other person to whom, in the opinion of the Court, special notice of the application should be given,¹ and
- (b) to be posted on some conspicuous part of the Court-house, and of the residence of the minor, and otherwise published in such manner as the Court, subject to any rules made by the High Court under this Act, thinks fit.

As the object of this provision is to bring the application to the notice of persons interested in opposing it, it would scarcely be necessary to follow it when all the persons interested are before the Court.²

In applications made to the High Court of Bengal, the following Rule³ applies :—

“ Notice of the application shall be issued and served in manner prescribed for summons to a defendant. The Court may also direct the petitioner to publish the notice in such newspaper or newspapers as it thinks fit, and *shall* direct such publication in any case in which the petitioner is not a relation of the minor.”

Service of
notice on
Collector.

The Local Government may, by general or special order, require that, when any part of the property described in a petition not made by the Collector⁴ is land of which a Court of Wards could assume the superintendence,⁵ the Court shall also cause a like notice to be served on the Collector in whose district the minor ordinarily resides, and on every Collector in whose district any portion of the land is situate, and the Collector may cause the notice to be published in any manner

¹ The Court should ascertain, as far as possible, which of the minor's relations would be likely to assert claims to the guardianship of his person or property, and which would be so far friendly to his interests, as to help the Court in the selection of a guardian, and should require notices to be served on such persons. It is in many cases the safest plan to serve the nearest relations with notice of

the application, but the matter is one for the Court to determine according to the circumstances of the case.

² See *Sundarmani Dei v. Gokulnand Chowdhury* (1912), 18 C. W. N., 160, at p. 162.

³ Rules of 1st September, 1905.

⁴ *Ante*, pp. 76, 77.

⁵ *Post*, chaps. xxxi, xxxiv, xxxv, and xxxvi.



he deems fit.¹ No charge can be made by the Court or the Collector for the service or publication of such notice.²

In the United Provinces on receipt of such notice the Collector should report the case to the Court of Wards, if he considers that the estate is suitable for management by that Court.³

On the death of the person applying to be appointed guardian the application will abate.⁴ Death of petitioner.

The Court may direct that the person, if any, having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper.⁵ Power to make interlocutory order for production of minor and interim protection of person and property.

The Court can make such order for the minor's protection before or after he is produced. This power extends to an injunction restraining the marriage of the minor.⁶

The Court also has power to appoint a receiver to take charge of and realize the minor's property pending the hearing of the application.⁷ Receiver.

In a very special case the Court might appoint a claimant to guardianship as receiver, but would not ordinarily do so.⁸

If the minor is a female who ought not to be compelled to appear in public, the direction for her production shall require her to be produced in accordance with the customs and manners of the country.⁹ Production and custody of female.

¹ Act VIII of 1890, sec. 11 (2). Such notification has been published at p. 668 of the *Calcutta Gazette* of the 8th July, 1891. In the United Provinces the Collector is required to report such notice for the Order of the Board of Revenue or Court of Wards; Court of Wards Manual, rules 4 and 7. The report is to contain the matters referred to, *post*, pp. 392, 393.

² Act VIII of 1890, sec. 11 (3).

³ Court of Wards Manual, 1914, rule 2.

⁴ *Gangabai v. Khashabai* (1899), 23 Bom., 719; 1 Bom. L. R., 363.

⁵ Act VIII of 1890, sec. 12 (1). This power is intended to be merely ancillary to the appointment of a guardian, and does not give summary powers in cases where no application for an appointment of a guardian is made. As to the summary powers

of the Courts in other cases, see *post*, chap. xx.

⁶ *Harendranath Chowdhury v. Brinda Rani Dassi* (1898), 2 C. W. N., 521.

⁷ Act V of 1908 (Civil Procedure), sec. 141; order 40, rules 1-3; see *In re Jamnabai (Bai)* (1911), 36 Bom., 20; 13 Bom. L. R., 487.

⁸ See *Kali Kumari v. Bachhan Singh* (1913), 17 C. W. N., 974.

⁹ Act VIII of 1890, sec. 12 (2). This is intended to refer to ladies whom the customs of the country do not permit to appear in public. The greatest care should be taken by the Courts in requiring the production of *purdanasheen* ladies, as besides that they have acquired from the customs of their country a prejudice against appearing in public, they have from passing their lives in seclusion become timid, and it is in many cases

The Court cannot place a female minor in the temporary custody of a person claiming to be her guardian on the ground of his being her husband, unless she is already in his custody with the consent of her parents, if any.¹

Charge of
property.

No person to whom the temporary custody and protection of the property of a minor is entrusted can dispossess, otherwise than by due course of law, any person in possession of any of the property.²

Penalty for
contumacy.

If a person having the custody of a minor fails to produce him or cause him to be produced in compliance with such direction, he is liable, by order of the Court,³ to fine not exceeding one hundred rupees, and in case of recusancy to further fine not exceeding ten rupees for each day⁴ after the first during which the default continues, and not exceeding five hundred rupees in the aggregate, and to detention in the civil jail, until he undertakes to produce the minor or cause him to be produced.⁵ If a person who has been released from jail on giving such undertaking fails to carry out the undertaking within the time allowed by the Court, the Court may

cruel to force them to appear in a Court of justice or before any public officer. There is a good deal of difference in these customs. Some ladies may be satisfied by being allowed to veil their countenances; others may be willing to appear in palanquins; while others would feel outraged by having to make any appearance before a Court or public officer, and might reasonably require the Judge, either himself to go, or to send a Commissioner, to interview them, and that with a door intervening, at their own residences. In their anxiety to avoid doing anything which may interfere with the customs of the country, Judges may occasionally be misled, and may give privileges to women, who by conduct or position are not entitled to them. This is, however, the safest error, and except when it is clear that a woman is entitled to no privilege a Judge should give a ready ear to any claim to such a privilege. See *Mohesh Chunder Addy v. Manick Lall Addy* (1899), 26 Calc., 650; 3 C. W. N., 751; *Chamatkar Mohiney Debi*

v. Mohes Chunder Banerjee (1892), 3 C. W. N., 750.

¹ Act VIII of 1890, sec. 12 (3) (a).

² *Ibid.*, sec. 12 (3) (b). See *In re Jamnabai (Bai)* (1911), 36 Bom., 20; 13 Bom. L. R., 487.

³ *i.e.* the Court which made the order.

⁴ This does not empower the Court to make a prospective order that the delinquent shall be fined a certain sum each day until production of the person of the minor. Each day's fine must be imposed after each day's offence. See *In the matter of Sagar Dutt* (1868), 1 B. L. R. Or. Cr., 41; *In the matter of Love* (1872), 9 B. L. R., App., 35; *In the matter of the Chairman of the Municipal Commissioners of the Suburbs of Calcutta v. Aneesooddeen Meah* (1873), 12 B. L. R., App., 2.

⁵ Act VIII of 1890, sec. 45. This does not apply to a guardian appointed by the Court: *Sahodra Koer v. Dhajadhari Gosain* (1911), 16 C. W. N., 447.

cause him to be rearrested and recommitted to the civil jail.¹ An order imposing a fine, or imprisonment, is appealable to the High Court.²

On the day fixed for the hearing of the application, or as soon afterwards as may be, the Court shall hear such evidence as may be adduced in support of, or in opposition to, the application.³

Procedure at hearing.

Although the District Judge may call for, and act upon a report by the Collector or a Subordinate Court,⁴ the District Judge must hear the evidence himself, and cannot direct a Subordinate Court to take it.⁵

The matter cannot be referred to arbitration.⁶

Besides the hearing of evidence the procedure before, at, and after the hearing of the application must, as far as may be applicable, be in accordance with the Code of Civil Procedure.⁷

The Act is silent as to what persons should be allowed to be heard in opposition to the application. This question must be determined in each case by the Court. It is in the interest of minors that any relative, who is *bonâ fide* contesting the application, should be heard.⁸

Who may appear on the application.

Neither an application nor an opposition to an application should be entertained unless it be made *bonâ fide*, and solely in the interests of the minor. The Court should not allow an application to be made with an indirect object, as, for instance, to obtain the Court's opinion with regard to a contested title to property, and should not entertain an opposition,

Only *bonâ fide* application or opposition should be entertained.

¹ Act VIII of 1890, sec. 45. In that case there seems no limit to the imprisonment. The Court would probably keep the person in jail until the minor is produced, or until the person confined satisfies the Court that the minor is not under his control.

² Act VIII of 1890, sec. 47.

³ *Ibid.*, sec. 13; *Jaiwanti Kumri v. Gajadhar Upadhyaya* (1911), 38 Cal., 783; 15 C. W. N., 676.

⁴ Act VIII of 1890, sec. 46, *post*, p. 107.

⁵ *Ganesh Vilhal Jade v. Kusabai* (1899), 23 Bom., 698; 1 Bom. L. R., 185; *Narayan Shridar Dharne v. Ramchandra Konddev Belhe* (1902), 26 Bom., 716; 4 Bom. L. R., 511.

⁶ *Mahadeo Prasad v. Bindeshri Prasad* (1908), 30 All., 137.

⁷ Act V of 1908 (Civil Procedure), sec. 141. This would include discovery before the hearing, proceedings in execution, etc. The proceeding is not intended to be a summary one: *Shahu (Sayad) v. Hapija Begam* (1892),

17 Bom., 560. Although it may have called for and obtained a report, the Court must give the parties an opportunity of being heard, and adducing evidence. A report does not absolve the Court from the duty of satisfying itself from evidence that the proposed guardian is fit and suitable: *Hyder Reza v. Collector of Parneah* (1874), 22 W. R. C. R., 490.

⁸ It was held under Act XL of 1858 in *Kistokishore Roy v. Issur Chunder Roy* (1871), 15 W. R. C. R., 155, that only persons themselves claiming to be appointed guardians have any *locus standi* to oppose an application for a certificate; but it is clearly the right, if not the duty, of all those interested in the minor's welfare to see that a proper person be appointed to administer his property or have charge of his person. An outsider, as, for instance, a creditor of the estate, has no right to appear: *Meltoon Bibee v. Gibbon* (1869), 12 W. R. C. R., 100.

which is for an indirect purpose, as, for instance, for that of disputing the minor's right to property.¹

Simultaneous proceedings in different Courts.

If proceedings for the appointment or declaration of a guardian of a minor are taken in more Courts than one, each of those Courts shall, on being apprised of the proceedings in the other Court or Courts, stay the proceedings before itself.

If the Courts are both or all subordinate to the same High Court, they shall report the case to the High Court,² and the High Court shall determine in which of the Courts the proceedings shall be had. In any other case the Courts shall report the case through the Local Government to the Governor-General in Council, and the Governor-General in Council shall determine in which of the Courts the proceedings shall be had.³

Power to make order as to guardianship.

Where the Court is satisfied that it is for the welfare of the minor that an order should be made appointing a guardian of his person or property, or both, or declaring a person to be such a guardian, the Court may make an order accordingly.⁴

The Court is not obliged to make an appointment, when it is in the interest of the minor that no appointment be made.⁵

The appointment of a guardian by the Court implies the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.⁶

Where a guardian has been appointed by will or other instrument,⁷ or appointed or declared by the Court, an order appointing or declaring another person to be guardian in

¹ See *Puroma Soonduree Dossee v. Tara Soonduree Dossee* (1868), 9 W. R. C. R., 342.

² This report is a ministerial Act, and not a judicial reference; *In the matter of Fakeruddin Mahomed Chowdhry* (1898), 26 Calc., 133; 3 C. W. N., 91.

³ Act VIII of 1890, sec. 14. This section does not apply to proceedings on the original side of a High Court; *In the matter of Fakeruddin Mahomed Chowdhry* (1898), 26 Calc., 133; 3 C. W. N., 91.

⁴ Act VIII of 1890, sec. 7 (1). The Court must satisfy itself as to the fitness of the guardian before making the

order (*Ram Dyal Gooye v. Amrillall Khamaroo* (1868), 9 W. R. C. R., 555), and must also satisfy itself that the application is made for the benefit of the minor, *Sarat Chandra Nandan v. Girindra Chandra Guin* (1910), 15 C. W. N., 457. See Act VIII of 1890, sec. 17, *post*, p. 91. If a suit be pending which will enable the Court to take upon itself the management of the property, it is unnecessary to appoint a guardian of the property: *Dan. Ch. Pr.*, 7th Edn., p. 914.

⁵ See *Ahmad Ali v. Raisunnessa (Musst.)* (1913), 17 C. W. N., 429.

⁶ Act VIII of 1890, sec. 7 (2).

⁷ *Ante*, chap. ix.

his stead cannot be made until the powers of the guardian appointed or declared have ceased.¹

• In Bengal whenever a Civil Court is satisfied that an order should be made, appointing a guardian of the person or property of a minor or both, and whenever a Civil Court removes the guardian of a minor,² if the property of such minor consists in whole or in part, of land or any interest in land, the Civil Court may³ apply to the Court of Wards⁴ to take charge of the person and property of such minor, but it is in the discretion of the Court of Wards to take charge of such person or property or to refuse to do so.⁵

Charge made over to Court of Wards in Bengal.

Immediately on receipt of such application the Collector must ascertain by any available means what is the extent and character of the property in question, and its financial position as regards income, debts, &c., and submit the application of the Civil Court to the Commissioner of the Division with his report.⁶

Collector to ascertain extent of estate.

If, on such summary inquiry as the Collector can make, it should appear that there is a fair reasonable probability of the property being managed with success, and extricated from any liabilities to which it may be subject, the Commissioner should recommend to the Court that they accept charge of the property; but if the property is so embarrassed that its extrication within a reasonable time seems hopeless, it is useless to accept the charge.⁷

Procedure when Collector reports favourably.

Whenever the Court of Wards accepts charge it shall issue orders to that effect under Bengal Act IX of 1879, which will then apply to estates thus made over by the Civil Court.⁸ As to the mode of dealing with the debts of the estate, see Bengal Act I of 1906, sec. 3, *post*, pp. 316 to 321.

The Court of Wards may at any time withdraw from the charge of any person and property taken at the instance of a Civil Court, and from the charge of any person or property, placed under the charge of the Collector by a Civil Court. Provided that it shall give notice of its intention to withdraw to the Civil Court concerned, and that such notice shall be given not less than two months before the Court of Wards shall so withdraw.⁹

Withdrawal from charge by Court of Wards.

If the law to which the minor is subject admits of his having

Appointment or declaration of several guardians.

¹ Act VIII of 1890, sec. 7 (3), *post*, p. 89. See sec. 39, *post*, pp. 101, 102, and sec. 41, *post*, pp. 138, 179.

² *Ibid.*, sec. 39, pp. 101, 102.

³ The Court is not compelled to make such application. It may do so, if it thinks fit: see *In the matter of Boovey* (1880), 4 Bom., 635.

⁴ Collectors may receive for transmission to the Commissioners, and to the Court of Wards, any such applications referring to the property or person of a minor who is resident, or any part of whose property is situated, within their respective districts. Court of Wards, rule 40.

⁵ Act IX (B. C.) of 1879, sec. 10, as amended by Act IV of 1892, sec. 6. When an application is made under this section, the Judge should send the application under cover to the Collector or Deputy Commissioner, as the case may be, for transmission to the Court of Wards. Civil Rules and Orders of High Court of Bengal, p. 58, rule 44.

⁶ Court of Wards Rules, rule 73.

⁷ Court of Wards Rules, rule 74.

⁸ See Act IX (B. C.) of 1879, secs. 5 and 35, *post*, pp. 313, 324.

⁹ Act IX (B. C.) of 1879, sec. 12.

two or more joint guardians of his person or property, or both, the Court may, if it thinks fit, appoint or declare them.¹

The Court cannot make separate appointments to run concurrently.²

On the death of a father, being an European British subject, who has, by will or other instrument to take effect on his death, appointed a guardian of his minor child, the Court may appoint the mother to be guardian of the child jointly with the guardian appointed by the father.³

On the death of a mother, being an European British subject, who, during the incapacity of the father of her minor child, has, by will or other instrument to take effect on her death, appointed a guardian of the child, the Court may, if the father becomes capable of acting, appoint him to be sole guardian of the child or guardian of the child jointly with the guardian appointed by the mother, as it thinks fit.⁴

Separate guardians may be appointed or declared of the person and of the property of a minor.⁵

If a minor has several properties, the Court may, if it thinks fit, appoint or declare a separate guardian for any one or more of the properties.⁶

The Court cannot⁷ appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards,⁸ or appoint or declare a guardian of the person—

(a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person,⁹ or,

¹ Act VIII of 1890, sec. 15 (1). As to survivorship, see sec. 38. Where several persons are jointly entitled under a will or deed to the guardianship they may be all appointed: see *Rajessuree Debia v. Jogendronath Roy* (1875), 23 W. R. C. R., 278, at p. 280.

² *Sham Manna v. Ramdyal Goochoo* (1864), 1 W. R., M. A., 3.

³ Act VIII of 1890, sec. 15 (2), see *ante*, p. 64.

⁴ Act VIII of 1890, sec. 15 (3).

⁵ *Ibid.*, sec. 15 (4).

⁶ *Ibid.*, sec. 15 (5), see *post*, p. 96. A guardian may be appointed of a portion only of the minor's property.

⁷ Act VIII of 1890, sec. 19.

⁸ If the property of the minor has not been taken under the superintendence of a Court of Wards, or has been discharged from such superintendence, the Civil Court may appoint a guardian of either the person or property of a minor whose estate is liable to be taken under the superintendence of the Court of Wards. The Court of Wards, except in Bombay (*post*, pp. 417, 418), on taking over the superintendence, may disregard the order of the Civil Court, *post*, pp. 302, 303, 391.

⁹ A Mahomedan husband, who under Mahomedan law (*ante*, p. 57) is not entitled to the custody of his minor wife, might be considered unfit.

Separate guardians.

Guardian not to be appointed by the Court in certain cases.

- (b) subject to the provisions of the Act with respect to European British subjects,¹ of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor,² or
- (c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.³

The Act does not show what circumstances should guide the Court in determining whether a father is unfit to be guardian; but it is submitted that the causes which involve a loss of the father's right,⁴ and also those which would justify the removal of a testamentary guardian or of a guardian appointed by the Court,⁵ would be grounds for excluding the father. The Court would also pass over a father who expressed his willingness that another person should be appointed guardian by the Court.⁶

In *Bindo v. Shamlal* (1906), 29 All., 210, the High Court set aside the appointment of a Hindu father as guardian of his daughter, aged 10 years, upon the grounds chiefly that the father had married again, and that under the circumstances the child was likely to be happier with her maternal grandmother, with whom she had been living since the age of five, than with her father. The decision, it is submitted, disregards the terms of sec. 19 of the Act.

It is to be noticed that the Act does not give the father any superior rights to the guardianship of the property of his children, and except that his nearness of kin must be considered,⁷ he is entitled to no preference in the competition for the guardianship of property.⁸

The Court cannot⁹ appoint another person guardian in the place of a guardian who has been appointed by will or

¹ Act VIII of 1890, sec. 17, *ante*, pp. 58, 59.

² *Besant v. Narayaniah* (1914), 41 I. A., 314; 38 Mad., 807; 18 C. W. N., 1089; 16 Bom. L. R., 625. See *ante*, chap. x, as to what is unfitness. A difficulty arises in the case of children the guardianship of whom is not entrusted by Mahomedan law to the father (*ante*, pp. 54, 55). Is it intended by this section to supersede the rights of the mother, and female relations? Probably not.

³ *Ante*, p. 88, note 8.

⁴ *Ante*, chap. x; *Mokoond Lal Singh v. Nobodip Chunder Singha* (1898), 25 Cal., 881; 2 C. W. N., 379.

⁵ See Act VIII of 1890, sec. 39, *post*, pp. 101, 102.

⁶ *Oomrao Doolhaen (Mussamut) v. Aga Meer (Syud)* (1869), 12 W. R. C. R., 119.

⁷ Act VIII of 1890, sec. 17 (2), *post*, pp. 91, 92.

⁸ See *Etwari (Mussamut) v. Ram Narayan Ram* (1870), 4 B. L. R., App., 71; 13 W. R. C. R., 230.

⁹ Act VIII of 1890, sec. 7. The Court is only restricted so far as property upon which a valid appointment operates is concerned. As to the appointment of testamentary guardians, see *ante*, chap. ix.

Unfitness of father.

Guardianship of property by father.

Where testamentary guardian or guardians appointed by Court.

other instrument,¹ or who has been appointed or declared by the Court, unless such guardian is dead or has been removed by the Court for any of the causes mentioned in sec. 39 of the Act,² or has been discharged by the Court at his own request.³

Dispute as to
testamentary
appointment.

Where questions arise as to the factum or construction of the instrument creating the appointment, the Court must accept the determination of any competent Court on the question.⁴ Should the question not have been determined, then the Court may have itself to determine the question for the purpose of the application,⁵ or in a case, to which the interests of the minor are not prejudiced by the delay, may await the decision of a Probate or other competent Court.⁶

Where there is only a question as to the construction of the document, the Court which hears the application must determine the question, unless it has been previously decided by a competent Court.⁷

In one case⁸ the Calcutta High Court held that the Judge was bound to take into consideration an unproved will of the husband of the minor. A husband cannot appoint a testamentary guardian of his wife, although his wishes may be considered.

Matters to be
considered by
the Court in
appointing
guardian.

In appointing or declaring the guardian of a minor, the Court shall, subject to the following provisions, be guided by what, consistently with the law to which the minor is subject,⁹

¹ A verbal appointment or the expression of the wishes of the parent otherwise than by will does not oust the jurisdiction of the Court. It is, however, to be considered: see Act VIII of 1890, sec. 17 (2), *post*, p. 91.

² *Post*, pp. 101, 102. See Act VIII of 1890, sec. 41.

³ See Act VIII of 1890, sec. 40.

⁴ As, for instance, probate of the will, Act I of 1872, secs. 40 and 41, *Jogesh Chunder Chakravarti v. Umatarā Debya* (1878), 2 C. L. R., 577. See *ante*, p. 65.

⁵ Such decision will not operate as *res judicata* in a probate proceeding under the same will: *Chinnasami v. Hariharabadra* (1893), 16 Mad., 380. It was held in *Shahu (Sayad) v. Hapija Begam* (1892), 17 Bom., 560, that when a person alleges that he has been appointed guardian of a minor under a will, no one else can be appointed guardian under sec. 7 (3) of Act VIII of 1890 until it is found after due investigation that there is no valid will. Should not the ordinary rule that the person who

alleges a fact must prove it, apply here? See Act I of 1872, secs. 101, 102, and 103.

⁶ This course may sometimes in the absence of urgency be the fairer to the parties, as the inquiry in the application for the appointment of a guardian is frequently more perfunctory than the hearing of a probate suit, and may indirectly prejudice the parties in the trial of more important questions.

⁷ Act I of 1872, secs. 40 and 41.

⁸ *Sarala Sundari Debi v. Hazari Dasi Debi* (1915), 42 Calc., 953; 19 C. W. N., 513.

⁹ The right of guardianship according to that law, and any matters which under the law to which the minor is subject would exclude a person, otherwise entitled, from the guardianship (see *ante*, chaps. viii and x), may be considered. The welfare of the minor is the main consideration, but his welfare must be considered from the standpoint of his race and religion; *In re Gulbai* (1908), 32 Bom., 50; 9 Bom. L. R., 923.

appears in the circumstances to be for the welfare¹ of the minor.²

• In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex,³ and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin⁴ to the minor, the wishes, if any, of a

¹ i.e. physical, moral, and religious welfare; *Pollard v. Rouse* (1910), 33 Mad., 288.

² Act VIII of 1890, sec. 17 (1). *Mokoond Lal Singh v. Nobodip Chunder Singha* (1898), 25 Calc., 881; 2 C. W. N., 379; *Bhikno Koer (Musst.) v. Chamela Koer (Musst.)* (1897), 2 C. W. N., 191; *Tota Ram v. Ram Charan* (1910), 33 All., 222; *Re Gulbai* (1907), 32 Bom., 50; 9 Bom. L. R., 923; *Sarat Chandra Nandan v. Girindra Chandra Guin* (1910), 15 C. W. N., 457. See ante, p. 48, note 7.

³ See post, p. 93.

⁴ *In re Gulbai* (1907), 32 Bom., 50; 9 Bom. L. R., 923, a paternal kinsman was preferred to a maternal kinsman. In *Kaulesra v. Jorai Kasaundhan* (1905), 28 All., 233, the right of the mother was upheld against the paternal grandfather. So far as the management of the property is concerned, the character and capacity of the guardian is a matter of greater importance than propinquity of relationship; but, in the event of the guardians proposed being of equal fitness, nearness of kin is the matter of next importance: see *Sohna v. Khalak Singh* (1889), 13 All., 78; *Imam Buksh v. Thacko Bibee* (1883), 9 Calc., 599; *Akima Bibee v. Azeem Sarung* (1868), 9 W. R. C. R., 334; *Khodeemonee Dossee Ghossanee v. Kylash Chunder Ghose* (1865), 4 W. R. M. A., 22; *Aman Khan v. Hoseena Khatoon (Mussamut)* (1868), 9 W. R. C. R., 548; *Fuggoo Daye v. Ranah Daye* (1865), 4 W. R. M. A., 3; *Mahomed Saleh v. The Government*, W. R. 1864, M. R., 26. These cases were all decided under Act XL of 1858. Nearness of kin is of greater importance in appointing a guardian

of the person than in appointing a guardian of the property. Each case must be governed by its own circumstances, and much is left to the discretion of the Judge; but the Judge cannot, on bare suspicion, assume that a relative proposed as guardian will defraud a minor (*Mahomed Saleh v. Government*, W. R., 1864, M. R., 26); and the mere fact of a near relative being a female (*Kolonas*, Ben. S. D. A., 1860, 369), or even a *pardahnashin*, does not disentitle her; *Kurrupool Kooer (Mussamut) v. Collector of Shahabad* (1873), 20 W. R. C. R., 432; *Jaiwanti Kumri v. Gajadhar Upadhya* (1911), 38 Calc., 783; 15 C. W. N., 676; although such fact might be taken into consideration: see *Aman Khan v. Hoseena Khatoon (Mussamut)* (1868), 9 W. R. C. R., 548. In every case the Court must consider the well-being of the minor, and of his estate; and in appointing a guardian of his person, must look to his moral, bodily, and intellectual welfare. In one case (*Jugodamba Koer (Musst.) v. Mircha Koer (Musst.)* (1872), 17 W. R. C. R., 269), where two near relatives were fighting to get hold of the property, and the probability was that the minor would suffer if the property remained in the hands of either, the Court was held to be right in declaring that neither was a fit person. In appointing a guardian of the minor's property care must be taken to avoid appointing a person who has an interest adverse to that of the minor. "Nearness of kin" does not necessarily refer only to the natural guardian of the minor and the persons entitled to succeed to his property; see *Tota Ram v. Ram Charan* (1910), 33 All., 222.

deceased parent,¹ and any existing or previous relations of the proposed guardian with the minor or his property.²

The fact of being a *purdahnashin*, is not necessarily a disqualification for guardianship of a minor's person or property.³

If the minor is old enough to form an intelligent preference, the Court may consider that preference;⁴ and may

¹ However expressed. In writing or by word of mouth or by conduct.

² Act VIII of 1890, sec. 17 (2).

³ See *Jaiwanti Kumri v. Gajadhar Upadhyaya* (1911), 38 Calc., 783; 15 C. W. N., 676; *Fulkumari Bibee v. Budh Singh Dhudhuria* (1914), 18 C. W. N., 1198; *Sundarmani Dei v. Gokulanand Chowdhury* (1912), 18 C. W. N., 160.

⁴ Act VIII of 1890, sec. 17 (3). See *Pollard v. Rouse* (1910), 33 Mad., 288. There have been in England and in India a great many cases in which the question whether any and what effect should be given to a minor's own wishes has been discussed. Those cases have generally arisen in the exercise of the summary powers possessed by the Courts, but for present purposes that circumstance gives rise to no distinction. In the Indian cases the contest has generally been between parents and Christian Missionaries, and the Courts in India have expressed varying opinions on the question. In Bengal, Wells, J., in *the matter of Himnauth Bose* (1862), 1 Hyde, III, declined to give any effect to the wishes of a Hindu lad of the age of between fifteen and sixteen years as against the rights of his father. This is a doubtful case, as the boy had completed his fifteenth year, and therefore had attained the age of majority according to the Bengal school of Hindu law to which he was subject (*ante*, p. 2) (see *Queen v. Vaughan* (1870), 5 B. L. R., 418). In a Bombay case Sir Joseph Arnould declined to follow Wells, J.'s decision (Mayne's Commentaries on the Indian Penal Code, Notes to sec. 361). The Bombay Supreme Court declined to allow a Hindu lad of the age of twelve to exercise any discretion in *Queen v.*

Nesbitt (1843), Perry's Oriental Cases, 103 (see also *Queen v. Fletcher* (1849), Perry's Oriental Cases, 109), but in the Calcutta case cited in Perry's Oriental Cases, p. 107, note, a boy about fourteen years of age was allowed to exercise his discretion, and in Madras a girl of the age of fourteen was allowed to exercise her discretion, and against the wish of her father was allowed to remain with her lover: *King v. Urilla* (1814), 2 Strange's Notes of Cases, 88. See also *In the matter of Saithri* (1891), 16 Bom., 307; *Sundarmani Dei v. Gokulanand Chowdhury* (1912), 18 C. W. N., 160; *Fulkumari Bibee v. Budh Singh Dhudhuria* (1914), 18 C. W. N., 1198. In *Reade v. Krishna* (1886), 9 Mad., 391, the Court held in a suit that it would give no effect to the views of the minor, though it might have done so in a summary proceeding. See also *In the matter of Culloornarain Swamy*, Mayne's Indian Penal Code, Note to sec. 361. In two Allahabad cases, *Saratchandra Chakarbarti v. Forman* (1889), 12 All., 213; and *Jwala v. Pirbhu* (1891), 14 All., 35, effect was given to the wishes of a minor. In the former case the boy was over sixteen years of age; in the latter, he was aged about fifteen or sixteen years. In England, both in *habeas corpus* proceedings and in the appointment of guardians, the wishes of a minor of sufficient age and intelligence to exercise a choice are consulted. The Indian authorities are not now of importance, as the question is set at rest by sec. 17 (3) of Act VIII of 1890. By that section, the age of the minor, and not the intelligence, is the matter of primary consideration. This is the English law: *Queen v. Howes* (1860), 2 El. & El., 332; 30 L. J. M. C., 47;

examine the minor for the purpose of ascertaining such preference.¹

As between parents who are European British subjects adversely claiming the guardianship of the person, neither parent is entitled to it as of right, but, other things being equal, if the minor is a male of tender years or a female, the minor should be given to the mother, and if the minor is a male of an age to require education and preparation for labour and business, then to the father.²

The Court cannot appoint or declare any person to be a guardian against his will.³

There is nothing in the law to prevent a male being appointed guardian of the person of a female. The Court in determining who is to be appointed guardian of a female must consider whether, in the particular case, a female is not the more suitable guardian.⁴

As ceasing to reside within the local limits of the jurisdiction of the Court is a ground for removing a guardian,⁵ it follows

17 Jur. N. S., 22; s.c. *sub nomine*, *Ex parte Barford*, 8 Cox, C. C., 405; 3 L. T., 467; 9 W. R., 99. The next question is at what age the Court should listen to the wishes of a minor. The Guardian and Wards Act has fixed none, but by applying to India principles which have guided English Courts, the Courts would not, it is submitted, pay the same attention to the wishes of a male minor under sixteen, or of a female minor under fourteen, as it would to the wishes of a minor above those ages respectively. The Indian Penal Code (Act XLV of 1860, sec. 361) has, it is submitted, taken away from minors under those ages any liberty of choice with regard to the custody of their persons. See *In the matter of Saithri* (1891), 16 Bom., at p. 316; *Pollard v. Rouse*, 33 Mad., 288; *Queen v. Howes* (1860), 2 El. & El., 332; 30 L. J. M. C., 47; 7 Jur. N. S., 22; s.c. *sub nomine*, *Ex parte Barford*, 8 Cox C. C., 405; 3 L. T., 467; 9 W. R., 99; *Mallinson v. Mallinson* (1866), L. R., 1 P. & D., 221; 35 L. J. P. & M., 84; 14 L. T. N. S., 636; 14 W. R., 973; *In re Agar Ellis* (1883), 24 Ch. D., 317; at p. 326; 53 L. J. Ch., 10; 50 L. T.,

161; 32 W. R., 1; *In re Andrews* (1873), L. R., 8 Q. B., 153; 42 L. J. Q. B., 99 (*sub nomine*, *Re Edwards*); 28 L. T., 453; 21 W. R., 480. The wishes of the child would be more likely to be considered in a case when the father is dead than when he is alive and seeking the custody.

¹ *Besant v. Narayaniah* (1914), 41 L. A. 314; 38 Mad., 807; 18 C. W. N., 1089; 16 Bom. L. R., 625; *Fulku-mari Bibee v. Budh Singh Dhudhuria* (1914), 18 C. W. N., 1198.

² Act VIII of 1890, sec. 17 (4). See *ante*, pp. 58, 59.

³ Act VIII of 1890, sec. 17 (5). See *Babaji v. Maruti* (1874), 5 Bom., 310; 11 Bom. H. C. Rep., 182; *Jadow Mulji v. Chhagan Raichand* (1881), 5 Bom., 306.

⁴ See Act VIII of 1890, sec. 17 (2), *ante*, pp. 91, 92. It was held under Act XL of 1858, sec. 27 (see also Act XX of 1864, sec. 3), that no person other than a female could be appointed guardian of the person of a female: *Fusechun v. Kajo* (1883), 10 Calc., 15. See, however, *Bhoocha v. Elahi Bux* (1885), 11 Calc., 574.

⁵ Act VIII of 1890, sec. 39, *post*, pp. 101, 102.

Custody of female.

Person appointed must be resident in jurisdiction.

that the Court will not appoint as guardian a person residing outside of such limits;¹ but a person resident within the jurisdiction may be appointed guardian *pro tanto* to receive and remit the money allowed for the minor's maintenance.²

Recognition of foreign guardian.

In appointing a guardian of a minor, who happens to be in British India, but is the subject of a foreign State, the Court will take into consideration the laws of that State, and may, although it is not obliged to do so, recognize the rights of a guardian legally appointed by the law of that State.³

Can only appoint individuals.

The Court can only appoint individuals as guardians. It cannot appoint the members of a firm as such,⁴ nor can it appoint a company or an institution or a Court⁵ as guardians.

Disqualifications for guardianship.

Persons who are incompetent to act as guardians⁶ cannot be appointed as such by the Court. Similarly those persons who, by improper conduct or otherwise, have lost their rights as natural guardians,⁷ or whose conduct is such that, if they had been appointed, the Court would have removed them,⁸ ought not to be appointed.

Officer of Court appointed guardian.

Where there is no relative or friend suitable for the trust, and willing to undertake it, the Court can appoint one of its officers to be guardian of a minor's property.⁹

The officer should, it is submitted, be appointed by name, and not by office.¹⁰

The Court can only make an appointment on a substantive application under sec. 8 (*ante*, p. 76).¹¹

Appointment or declaration of Collector in virtue of office.

When a Collector¹² is appointed or declared by the Court in virtue of his office to be guardian of the person or property, or both, of a minor, the order appointing or declaring him shall be deemed to authorize and require³ the person for the

¹ *Asghar Ali v. Amina Begam* (1914), 36 All., 280.

² *Coverdale v. Greenway* (1830), Bignell, 11.

³ *Nugent v. Vetzera* (1866), L. R., 2 Eq., 704; 35 L. J. Ch., 777; 14 W. R., 960; *Maganbhai Purshotam Das v. Vithoba* (1870), 7 Bom. H. C. R. A. C., 7; *Story's Conflict of Laws*, §§ 504 and 504a.

⁴ See *De Mazar v. Pybus* (1799), 4 Ves. Jun., 644.

⁵ *Rowshun Jehan v. Collector of Purneah* (1870), 14 W. R. C. R., 295; see *ante*, p. 66.

⁶ *Ante*, p. 48.

⁷ *Ante*, chap. x.

⁸ See Act VIII of 1890, sec. 39,

post, pp. 101, 102.

⁹ When the Receiver of the High Court of Bengal is appointed guardian, he must pass his accounts half yearly; Belchambers's Rules and Orders, rule 19.

¹⁰ See Bombay G. R., dated 11th June, 1895.

¹¹ *Jaiwanti Kumri v. Gajadhar Upadhya* (1911), 38 Cal., 783; 15 C. W. N., 676.

¹² For definition of Collector, see *ante*, p. 77.

¹³ This does not compel the Collector to act against his will, see Bombay Court of Wards Manual, 1914, p. 109, and sec. 17 (5), *ante*, p. 93.

time being holding the office to act as guardian of the minor with respect to his person or property, or both, as the case may be.¹

In Bengal and in the United Provinces when a Collector is appointed guardian he must² submit through the Commissioner a copy of the Civil Court's order together with a complete report and scheme for the proposed management of the property.³

Duty of Collector in Bengal and United Provinces on appointment.

In Bombay, where any officer of Government is appointed or declared to be guardian of the property, or of the person and property of a minor, he shall intimate that fact to the Court of Wards, and the Court of Wards may thereupon, with the previous sanction of the Governor in Council, assume the superintendence of the property, or of the person and property of such minor.⁴

Duty of officer in Bombay.

In the United Provinces a district officer so appointed is subject to the control of the Board of Revenue. He cannot apply to be appointed guardian of a minor proprietor nor consent to such appointment.⁵

United Provinces.

"A guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family, * * * on the plain ground that the interest of a member of such a family is not individual property at all, and that therefore a guardian, if appointed, would have nothing to do with the family property."⁶ These observations of the Judicial Committee would apparently apply also to the appointment of a guardian by a High Court.⁷

Guardianship of share in joint family property.

¹ Act VIII of 1890, sec. 18. In Bombay no Subordinate Judge or Court of Small Causes could receive or register a suit in which the Collector as guardian is a party: Act XIV of 1869, sec. 32; *Narsingrav Ramchandra v. Luxumanrav* (1876), 1 Bom., 318. Such prohibition does not now exist; Act V (Bo. C.) of 1914, sec. 2.

² Court of Wards' Rules, Bengal, rule 8. *Ibid.*, United Provinces, rules 7-9.

³ As required by rules 120 and 122 of the Court of Wards' Rules, *post*, p. 326.

⁴ Act I (Bo. C.) of 1905, sec. 6.

⁵ Court of Wards Manual, 1914, rule 2.

⁶ *Gharib-ul-lah v. Khalak Singh* (1903), 30 I. A., 165, at p. 170; 25 All., 407, at p. 416; 7 C. W. N., 681, at p. 687; 5 Bom. L. R., 478; *Bindaji Laxuman Tripitkar v. Mathurabai* (1905), 30 Bom., 152; 7 Bom.

L. R., 809; see *Bandhu Prasad v. Dhiraji Kuar* (1898), 20 All., 400. *Virupakshappa v. Nilganga* (1894), 19 Bom., 309; *Sham Kuar v. Mohanunda Sahoy* (1891), 19 Calc., 301; *Jhabbu Singh v. Ganga Bishan* (1895), 17 All., 529. In *Doorga Persad v. Kesho Persad Singh* (1882), 9 I. A., 27; 8 Calc., 656, it was taken for granted that a certificate under Act XL of 1858 could be given to a co-sharer. Cf. Act IV of 1892, sec. 2, *post*, p. 314, Act I (M. C.) of 1902, sec. 17, *post*, p. 364.

⁷ In *In re Manilal Hurgovan* (1900), 25 Bom., 353; 3 Bom. L. R., 411; the High Court of Bombay, under its general jurisdiction (*post*, chap. xiv.), and apart from the Guardians and Wards Act, appointed a guardian of the interest of a minor in property held by a family governed by the Mitakshara school of Hindu law. In doing so the Court said (at p. 357), "But in coming to this conclusion

No guardian can be appointed of the property of a minor governed by the Aliyasanthana law, where there are adult members of such family.¹

This principle does not apply when all the coparceners are minors and a guardian of the property is appointed of the whole number, but the order should reserve liberty to any minor on attaining majority to apply for removal of the guardian or restriction of his power.² On such event happening the powers of the appointed guardian cease.³

Where the minor has separate property there would be no objection to the appointment of a guardian,⁴ even if he be a member of a Mitakshara joint family, and in any case a guardian of his person can be appointed.⁵

The proper remedy for those who, with a view to the minor's welfare, wish to secure for him the full fruition of his rights in the joint family property is to apply to the other members of the family for a partition,⁶ and, if that application fails, to proceed by way of suit.⁷

There is not the same objection to the appointment of a guardian of the share of a minor in property held by a joint family governed by the Dayabhaga school of Hindu law, but in such case care should be taken to avoid the introduction of strangers into the affairs of the joint family.

An appeal lies to the High Court from an order made by a District Court appointing or declaring or refusing to appoint or declare a guardian.⁸

Such appeal abates on the death of the person claiming to be guardian.⁹

In making an order for the appointment of a guardian, the Court has no power to determine any question with

Appeal from orders under sec. 7.

Questions of title to property.

we desire to add that it is a power to be exercised with the greatest caution. We make the appointment in this case because the person applying to be appointed the guardian is also the manager of the family to which the minor belongs, and thus we do not introduce into the family any element of possible disturbance. I can hardly imagine a case in which it would be right to grant such an appointment unless the applicant were the manager, and it is expressly upon this ground that we make the appointment in this case." See also *Jairam Luxmon* (1892), 16 Bom., 634; *Jagannath Ramji* (1893), 19 Bom., 96.

¹ *Kajikar Lakshmi v. Maru Devi* (1908), 32 Mad., 139.

² *Bindaji Lazuman Triputikar v. Mathurabai* (1905), 30 Bom., 152; 7 Bom. L. R., 809.

³ *Ramchandra v. Krishnaroo* (1908), 32 Bom., 259; 10 Bom. L. R., 279.

⁴ See *Bandhu Prasad v. Dhiraji Kuar* (1898), 20 All., 400.

⁵ *Virupakshappa v. Nilgangava* (1894), 19 Bom., 303.

⁶ *Post*, p. 177.

⁷ *Post*, pp. 126, 127.

⁸ Act VIII of 1890, sec. 47.

⁹ *Gangabai v. Khashabai* (1899), 23 Bom., 719; 1 Bom. L. R., 363.

reference to the title of the minor, or of any other person to any property,¹ and the Court should avoid expressing any opinion on the subject, as it might thereby be prejudging questions in which persons not parties to the application are interested.

An order appointing a guardian has no effect upon the rights of other persons in property held by the minor,² nor does it confer upon the guardian any rights except over property to the possession of which the minor is entitled.³ For instance, a guardian would have no rights over property to which the minor became entitled by a will, so long as the property was vested in the executor.⁴ The appointment merely constitutes him, for certain purposes, a trustee for the minor, and gives him certain powers over the minor's person and property.

Effect of order on property.

Where it is necessary, the order appointing a guardian may specify the property entrusted to his charge, but, except in exceptional cases, it is undesirable to do so.⁵

Specification of property in order.

In making the order the Court can restrict the powers of a guardian of either the person or property, but it cannot therein enlarge the powers given to him by law.

If the Court appoints or declares a guardian for any property situate beyond the local limits of its jurisdiction, the Court having jurisdiction in the place where the property is situate shall, on production of a certified copy of the order appointing or declaring the guardian, accept him as duly appointed or declared, and give effect to the order.⁶ Where a guardian has been appointed by a competent Court, no other District Court can appoint a guardian.

Appointment or declaration of guardian for property beyond jurisdiction of the Court.

A guardian appointed or declared by the Court is entitled

Remuneration of guardian.

¹ *Brahmo Moyee Chowdrain v. Chittur Monee Chowdrain* (1867), 8 W. R. C. R., 25; *Gurappa v. Tayawa* (1916), 18 Bom. L. R., 343.

² See *Gurupadaya v. Putapa* (1884), 8 Bom., 599.

³ See *Raesunnissa Begum v. Khujoorunnissa (Ranee)* (1868), 10 W. R. C. R., 462.

⁴ *Gangaprasad Bhattacharjee v. Hara Kanta Choudhuri* (1910), 15 C. W. N., 558.

⁵ It was held under Act XL of 1858 that the certificate must not specify the property in respect of which it is granted: *Feda Hossein v. Khajoorunnissa (Ranee)* (1868), 9 W. R. C. R., 459; see also *Sheo Prsunno Chobey v. Gopal Surn* (1871), 15 W. R. C. R., 529; and *Collector*

of Tirhoot v. Deonundan Singh (Rajcoomar) (1868), 10 W. R. C. R., 218; but now in the case where the whole of the property is not given in charge of a single guardian (see Act VIII of 1890, sec. 15 (5)), *ante*, p. 88, and in some other special cases, it may become necessary to specify the property. Where the property is specified, care should be taken, if possible, to avoid inviting litigation by describing as belonging to the minor property claimed by others. Where property is claimed on behalf of more than one minor, it would be more than usually undesirable to specify the property, as the Court should not appoint rival administrators of the same property.

⁶ Act VIII of 1890, sec. 16.

to such allowance, if any, as the Court thinks fit for his care and pains in the execution of his duties.¹

Fees to
Government.

When an officer of the Government, as such officer, is so appointed or declared to be guardian, such fees shall be paid to the Government out of the property of the ward as the Local Government, by general or special order, directs.²

Where a guardian of the property of a ward has been appointed or declared by the Court and such guardian is not the Collector, he shall³—

Bond by
guardian.

(a) if so required by the Court, give a bond, as nearly as may be in the prescribed form, to the Judge of the Court to enure for the benefit of the Judge for the time being, with or without sureties,⁴ as may be prescribed, engaging duly to account for what he may receive in respect of the property of the ward ;⁵

Statement of
assets and
liabilities.

(b) if so required by the Court, deliver to the Court, within six months from the date of his appointment or declaration by the Court or within such other time as the Court directs, a statement of the immovable property belonging to the ward, of the money and other movable property which he has received on behalf of the ward up to the date of delivering the statement, and of the debts due on that date to or from the ward ;

Accounts.

(c) if so required by the Court, exhibit his accounts in the Court at such times and in such form as the Court from time to time directs ;

Payment of
balance.

(d) if so required by the Court, pay into the Court at such time as the Court directs the balance due from him

¹ Act VIII of 1890, sec. 22 (1). An order refusing remuneration is not appealable: *Gangadhar B. Mule v. Shivlingrao Jagdevrao* (1899), 24 Bom., 95 ; 1 Bom. L. R., 547.

² Act VIII of 1890, sec. 22 (2). At p. 668 of the *Calcutta Gazette* of the 8th July, 1891, it is notified that in this case the same fees shall be payable to the Government as are chargeable to estates managed by the Court of Wards, namely, the general management rate, the treasury rate, the audit fees, and the Legal Remembrancer's fee.

³ Act VIII of 1890, sec. 34. As

to the penalty for breach of these obligations, see sec. 45, *post*, p. 99.

⁴ Except it be for the interest of the minor, a surety cannot be discharged. He may be able to apply to the Court for protection against the guardian: *Somi (Bai) v. Chokshi Ishvardas Mangaldas* (1894), 19 Bom., 245.

⁵ As to the remedy on the bond, see Act VIII of 1890, secs. 35 and 36, *post*, p. 182. As to the liability of a surety, see *Sarat Chandra Roy Chowdhury v. Rajoni Mohan Roy* (1908), 12 C. W. N., 481.

on those accounts, or so much thereof as the Court directs.

* As to a suit against a guardian for an account, see *post*, pp. 182, 183.

The following rules¹ apply to appointments of guardians by the High Court of Bengal on its original side:—

“Unless the Court otherwise orders, a person appointed, or declared to be, guardian of the property of the minor, shall give security, in the bond of himself and two or more sureties, for the amount or value of the movable property, and of the annual rents, profits, or other income of the movable and immovable property, to be received or accounted for by the guardian; and shall furnish the statement of the property and debts mentioned in sub-section (b) of section 34 of the Guardians and Wards Act, and shall pass his accounts once in every year.

“If the Court think fit to appoint a guardian without giving security unless otherwise ordered, the order shall direct that an undertaking shall be given by the guardian to furnish the statement above mentioned, and to keep a full and correct account of all monies and property of the minor, received or expended by the guardian on his behalf, and to file and prove the same in Court, whenever so required.”

Rule 438 of the Madras High Court is in similar terms, except that the guardian is required to give security for twice the amount of the property.

These summary powers cease as soon as the minority of the ward ceases,² but a suit can be brought on the bond, after they have ceased.³

As to the powers of the Court to provide for the maintenance and education of the minor, see *post*, Chap. XXII.

If he fails to deliver the required statement within the time allowed, or to exhibit the required accounts, or to pay into the Court the balance due from him on those accounts in compliance with a requisition, such guardian is liable, by order of the Court,⁴ to fine not exceeding one hundred rupees, and in case of recusancy to further fine not exceeding ten rupees for each day⁵ after the first during which the default continues, and not exceeding five hundred rupees in the aggregate, and to detention in the civil jail until he undertakes to deliver the statement or to exhibit the accounts, or to pay the balance, as the case may be.⁶ If a person who has been released from detention on giving such undertaking fails to carry out the undertaking within the time allowed by the Court, the Court may cause him to be arrested and recommitted to the civil

Penalty for neglect of obligation.

¹ Rules of 1st September, 1905. See also Bombay rules.

(1905), 30 Bom., 164; 7 Bom. L. R., 803.

² *Nabu Bepari v. Mghomed (Sheikh)* (1900), 5 C. W. N., 207.

⁴ *i.e.* the Court which made the order.

⁵ See *ante*, p. 84, note 4.

³ *Ganpat Tatia Maimkar v. Anna*

⁶ Act VIII of 1890, sec. 45.

jail.¹ An order imposing a fine or imprisonment is appealable to the High Court.²

Children of
remarried
Hindu
widows.

Suit for ap-
pointment of
guardian.

Ward of Court.

As to the appointment of guardians of children of remarried Hindu widows, see Act XV of 1856, sec. 3, *ante*, pp. 72, 73.³

There being a special procedure for the appointment of a guardian a suit for that purpose does not lie.⁴

A suit relating to the person or estate of an infant, and for his benefit, has the effect of making him a ward of Court and no act can be done affecting his property unless under the express or implied direction of the Court in which such suit is pending.⁵

The Indian
Divorce Act.

The Indian Divorce Act⁶ gives to the Court, trying a suit instituted under that Act, power before decree, in its decree, or after decree, upon application by petition to provide for the custody, maintenance, and education of minor children,⁷ the marriage of whose parents is the subject of the suit and to direct proceedings to be taken for placing such children under the protection of the Court. The Court has the fullest discretion,⁸ but where the father is found to be in fault, the Court ordinarily interferes with his legal right, and gives the custody to the mother if she be free from blame.⁹ The benefit of the children is the matter to be considered. In making an order, the Court can permit the parent, to whom the custody is not given, to have periodical access to the children.¹⁰

¹ Act VIII of 1890, sec. 45; see *ante*, p. 84.

² Act VIII of 1890, sec. 47.

³ Although the power to apply under that Act has not been taken away, there is nothing to prevent an application under Act VIII of 1890 for the appointment of a guardian of the children of a remarried Hindu widow. In appointing a guardian, a Court would probably follow the special rules laid down in sec. 3 of Act XV of 1856, *ante*, pp. 72, 73.

⁴ *Besant v. Narayaniah* (1914), 41 L. A., 314; 38 Mad., 807; 18 C. W. N., 1089; 16 Bom. L. R., 625; *Sham Lal v. Bindo* (1904), 26 All., 594.

⁵ *Doraswami Pillai v. Thungasami Pillai* (1903), 27 Mad., 577; see *post*, pp. 117, 118, 248.

⁶ Act IV of 1869, secs. 41-44. As to the practice in applications for custody under the Indian Divorce Act, see *Ledlie v. Ledlie* (1891), 18

Calc., 473.

⁷ "Minor children" means, in the case of sons of native fathers, boys who have not completed the age of sixteen years, and in the case of daughters of native fathers, girls who have not completed the age of thirteen years. In other cases it means unmarried children who have not completed the age of eighteen years, see sec. 5 of the Act. See *Thomasset v. Thomasset*, [1894] P. D., 295; *Webster v. Webster* (1861), 31 L. J. P. M. & A., 184.

⁸ See *per Cairns, L.C.*, in *Symington v. Symington* (1875), L. R. 2 H. L. Sc. App., 415, at p. 420; *Handley v. Handley*, [1891] P. D., 124.

⁹ *Macleod v. Macleod* (1871), 6 B. L. R., 318.

¹⁰ See *Thompson v. Thompson* (1861), 21 L. J. P. M. & A., 213; 2 Sw. & Tr. 402; *D'Alton v. D'Alton* (1878), 4 P. D., 87.

CHAPTER XII.

REMOVAL AND DISCHARGE OF GUARDIANS BY CIVIL COURT.

THE District Court¹ may,² on the application of any person interested,³ or of its own motion, remove a guardian appointed or declared⁴ by the Court, or a guardian appointed by will or other instrument,⁵ for any of the following causes, namely:—

- (a) for abuse of trust ;⁶
- (b) for continued failure to perform the duties⁷ of his trust ;
- (c) for incapacity to perform the duties of his trust ;⁸

¹ See Act VIII of 1890, sec. 4 (4) and (5), *ante*, p. 78, note 3.

² Act VIII of 1890, sec. 39.

³ This expression would not permit an application by a person seeking to remove a guardian for his own purposes, and against the interests of the ward.

⁴ *Manubai v. Sakhubai* (1908), 11 Bom. L. R., 348.

⁵ This does not include a guardian appointed by a decree, it means instruments *ejusdem generis* with a will; *Harkor (Bai) v. Shangar (Bai)* (1893), 18 Bom., 375.

⁶ The following are instances: Releasing without adequate consideration a mortgage in the minor's favour, and lending the minor's money without security; *Tusneef Hossein v. Sookhoo (Bibee)* (1870), 14 W. R. C. R., 453; withdrawing without any sufficient cause or justification, and without legal advice, an appeal made to set aside a sale of the minor's estate, and at the same time dealing with the auction-purchaser, and obtaining a putnee of that very property in the name of his own wife;

Pitamber Dey Mozoomdar v. Ishan Chunder Dutt Biswas (1872), 18 W. R. C. R., 169; gross negligence, if not fraud, in wasting the property of the minor by allowing portions to be sold for arrears and debts of very small amounts, when there was an ample fund in hand to have prevented the sales; *Goonomonee Dossee v. Bhabo Soonduree Dossee* (1872), 18 W. R. C. R., 258. Such breaches of duty as would involve the loss of the right of guardianship in the case of a natural guardian (see *ante*, chap. x) would also justify the removal of a guardian appointed by the Court.

⁷ As to what are the duties of a guardian, see *post*, chap. xv.

⁸ This would include not only physical and mental, but also moral incapacity: see *ante*, chap. x. A guardian confined in jail would be incapable of performing the duties of his trust. Where two guardians quarrel and do not act together for the interests of the minor, they, or one of them, can be removed; see *Nistarinee Debia v. Collector of 24-Pergunnahs* (1875), 23 W. R. C. R., 330.

- (d) for ill-treatment, or neglect to take proper care of his ward ;
- (e) for contumacious disregard of any provision of Act VIII of 1890 or of any order of the Court ;¹
- (f) for conviction of an offence implying, in the opinion of the Court, a defect of character which unfits him to be the guardian of his ward ;
- (g) for having an interest adverse to the faithful performance of his duties ;
- (h) for ceasing to reside within the local limits of the jurisdiction of the Court ;
- (i) in the case of a guardian of the property, for bankruptcy or insolvency ;
- (j) by reason of the guardianship of the guardian ceasing or being liable to cease, under the law to which the minor is subject :²

Provided that a guardian appointed by will or other instrument, whether he has been declared under Act VIII of 1890 or not, shall not be removed—

- (a) for the cause mentioned in clause (g) unless the adverse interest accrued after the death of the person who appointed him, or it is shown that that person made and maintained the appointment in ignorance of the existence of the adverse interest, or
- (b) for the cause mentioned in clause (h) unless such guardian has taken up such a residence as, in the opinion of the Court, renders it impracticable for him to discharge the functions of guardian.

Removal on above grounds alone.

A guardian appointed or declared by the Court or a testamentary guardian can only be removed on the above grounds.³ He cannot be removed on the ground that another person would better perform the duties

¹ The fact that a guardian has executed a bond without the previous sanction of the Court, is not, if he acted in good faith, and without any intention of injuring the interests of the minor, a ground for removing him, though it would be otherwise where he has acted in bad faith: *Brijendro Narain Roy v. Bussunt Coomar Ghose* (1870), 13 W. R. C. R., 300; s.c. *In the matter of Bus-*

suntocoomar Ghose, 15 B. L. R., note to p. 351.

² This would apparently entitle the Court to remove a testamentary guardian for any of the reasons for which a natural guardian would lose his right (*ante*, chap. v). As to joint families, see *ante*, pp. 95, 96.

³ *Inder Narain Singh v. Adlam* (1902), 8 C. W. N., 37; *Rindabai v. Girdharlal* (1902), 4 Bom. L. R., 799.

of a guardian,¹ or on the ground that on further consideration the Court would not have appointed him,² or on the mere ground of old age.³ The causes for his removal would ordinarily only be acted upon when they have arisen subsequently to the order of appointment; but where new and important evidence, which, after the exercise of due diligence, was not within the knowledge of the person opposing the appointment or could not be produced by him at the time of the order, has been discovered, or there be any other sufficient reason, an application may be made for a review of the order.⁴

Except in the case of an appointment of guardian by the father or by the mother (where the law permits it),⁵ the Court has no power under the Guardians and Wards Act to remove persons whose rights to the charge of the property are created by the instrument under which the minor takes the property.⁶ They are removable only under the circumstances which justify the removal of ordinary trustees.

Trustees cannot be removed under the Act.

An order for the removal of a guardian can only be made after a judicial inquiry,⁷ held on due notice to the person sought to be removed and after such person has had an opportunity of being heard and calling evidence on his behalf. The order must be based upon legal evidence⁸ of the facts which would justify the removal of the guardian.

Judicial inquiry before order made.

It is not necessary that the accounts of the guardian should be taken in a suit under sec. 35 or sec. 36 of the Guardians and Wards Act⁹ before an application is made to the Court for his removal,¹⁰ although it may happen that the charges made against him cannot be disposed of without the accounts being investigated. In some cases, where the charges against the guardian involve the taking of complicated accounts, it may be convenient to allow, or require, the application to stand over until the determination of a suit.¹¹

Taking of accounts before removal unnecessary.

Pending the hearing of the application for removal, it is Temporary injunction and receiver.

¹ See *Mudhoosoodun Singh v. Collector of Midnapore* (1863), Marsh., 244; 2 Hay, 113.

² *Deorani Koer v. Parusman Narain* (1883), 12 C. L. R., 546.

³ *Rindabai v. Girdharlal* (1902), 4 Bom. L. R., 799.

⁴ Civil Procedure Code (Act V of 1908), secs. 114, 141; order 47, rule 1.

⁵ *Ante*, chap. ix.

⁶ Cf. *Gangaprasad Bhattacharjee v. Hara Kanta Choudhuri* (1910), 15 C. W. N., 358.

⁷ *Sakhawat Ally v. Noorjehan*

(1884), 10 Calc., 429.

⁸ This would include a report made under Act VIII of 1890, sec. 46, see *ante*, p. 85, *post*, p. 107.

⁹ VIII of 1890, *post*, p. 182.

¹⁰ See *In the matter of Shurwar Hossein Khan (Khaja)* (1867), B. L. R. F. B. R., 721; s.c. *Naunee Begum v. Surwar Hossein Khojah*, 7 W. R. C. R., 523; 2 Ind. Jur. N. S., 200.

¹¹ This of course should not be done if the interests of the minor are likely to be in the least prejudiced thereby.

submitted that the Court can in a proper case restrain the guardian from intermeddling with the property of his ward,¹ or may appoint a receiver to take charge of such property.²

Removal of natural guardians.

Sec. 39 of the Guardians and Wards Act³ has no application to natural guardians, as, except that no one can be appointed guardian of the person when the father or husband is not unfit,⁴ an order for their removal is unnecessary, and they can at any time be superseded on an order being made on an application for the appointment of a guardian. Where a natural guardian is abusing his trust or otherwise showing himself unfit to act as guardian, any friend of the minor may apply for the appointment of a guardian.⁵

Discharge of guardian.

If a guardian appointed or declared by the Court desires to resign his office, he may apply to the Court to be discharged.⁶ If the Court finds that there is sufficient reason for the application, it shall discharge him, and, if the guardian making the application is the Collector and the Local Government approves of his applying to be discharged, the Court shall in any case discharge him.⁷

Although a guardian is not entitled as of right to be discharged,⁸ the fact that he is unwilling to act may be a ground for removing him at the instance of a friend of the minor.⁹

Appointment of successor to guardian dead, discharged or removed.

When a guardian appointed or declared by the Court is discharged, or, under the law to which the ward is subject, ceases to be entitled to act, or when any such guardian or a guardian appointed by will or other instrument is removed or

¹ Civil Procedure Code (Act V of 1908), sec. 141; order 39, rule 1. See also Act VIII of 1890, sec. 43 (1). In *Abdul Rohiman Sahab v. Ganapathi Bhatta* (1900), 23 Mad., 517, the Madras High Court held that orders passed under secs. 492 and 503 of the Civil Procedure Code (Act XIV of 1882), as ancillary to an order removing a guardian, were passed without jurisdiction, but it is submitted that the terms of sec. 647 were sufficiently wide to justify the action of the District Judge in that case.

² Civil Procedure Code (Act V of

1908), sec. 141; order 40, rules 1-3.

³ Act VIII of 1890, *ante*, pp. 101, 102.

⁴ *Ibid.*, sec. 19, *ante*, p. 88.

⁵ *Ibid.*, sec. 8, *ante*, pp. 76, 77.

In case of necessity an order can be made for the temporary custody of the minor or his property. Act VIII of 1890, sec. 12, *ante*, p. 83.

⁶ Act VIII of 1890, sec. 40 (1).

⁷ *Ibid.*, sec. 40 (2).

⁸ See *Kalee Pershad Singh v. Poorno Debia* (1871), 15 W. R. C. R., 398.

⁹ Act VIII of 1890, sec. 39 (b) and (c), *ante*, p. 101.

dies, the Court, of its own motion or on an application,¹ may, if the ward is still a minor, appoint or declare another guardian of his person or property, or both, as the case may be.²

The same restrictions apply, and the same matters have to be considered, in the appointment of a guardian in the place of one dead, discharged, or removed, as in the case of an original appointment.³

A Civil Court in Bengal, which removes a guardian, can apply to the Court of Wards to take charge of the property of the minor when a part thereof consists of land or any interest in land.⁴

Charge by Court of Wards on removal of guardian.

As in the other cases, when the powers of a guardian cease, the Court may require a guardian, who has been removed or discharged, to deliver, as it directs, any property in his possession or control belonging to the ward, or any accounts in his possession or control relating to any past or present property of the ward.⁵

Order to make over property on removal or discharge.

When he has delivered the property or accounts as required by the Court, the Court may declare him to be discharged from his liabilities save as regards any fraud which may subsequently be discovered.⁶

¹ *Ante*, pp. 76, 77.

² Act VIII of 1890, sec. 42. The Court should at once appoint a new guardian. In the absence of such fresh appointment, the powers of a natural guardian would apparently revive; not so the rights of a testamentary guardian, as he must have been removed before the appointment can have been made.

³ *Ante*, pp. 90-93.

⁴ Act IX (B. C.) of 1879, sec. 10, as amended by Act IV of 1892, sec. 6, *ante*, p. 87. The Collector may receive the application for transmission to the Commissioner and Court of Wards, Court of Wards rules, rule 40. On the Court of Wards accepting charge the provisions of Act IX (B. C.) of 1879 apply, *ante*, p. 87, see *post*, chaps. xxxi, xxxii, xxxiii. See Act I (B. C.) of 1906, sec. 3, *post*, pp. 316-321.

⁵ Act VIII of 1890, sec. 41 (3), *post*, p. 183. An order under this section operates as a proceeding in execution of the order of removal within the meaning of art. 164 of the 1st Schedule of the Limitation Act (IX of 1908): see *Sunraj Kuari v. Ambika Prasad Singh* (1883), 6 All., 144. As to the penalty for disobedience of an order under this section, see Act VIII of 1890, sec. 45 (1) (c), *post*, p. 184.

⁶ Act VIII of 1890, sec. 41 (4), *post*, p. 183. Under Acts XL of 1858, sec. 23, and XX of 1864, sec. 23, the Court could only discharge the guardian on his accounting to his successor for all moneys received, and disbursed by him, and making over the property in his hands: see *Kalee Pershad Singh v. Poorno Debia* (1871), 15 W. R. C. R., 398.

Appeal.

There is an appeal to the High Court from an order removing a guardian ¹ and from an order refusing to discharge a guardian.²

Other remedies besides removal.

As to the remedies which, in addition to the removal of the guardian, are open to a minor, or those who represent him, against a guardian appointed by the Court or by a deed or will, see *post*, chap. xix.

¹ Act VIII of 1890, sec. 47 (g). There is no appeal when the Court refuses to remove the guardian: *Mohima Chunder Biswas v. Tarini Sunker Ghose* (1892), 19 Calc., 487; *Pakhwanti Dai v. Indra Narain Singh* (1895), 23 Calc., 201; *In re Harkha (Bai)* (1895), 20 Bom., 667; *Imtiaz-un-nissa v. Anwar-ul-lah*

(1898), 20 All., 433; *Pran Bandhu Singh v. Brahmamayi Dasya* (1897), 1 C. W. N., 693. As to appeals in proceedings under Act VIII of 1890, see *post*, p. 108.

² Act VIII of 1890, sec. 47 (h). There is no appeal from an order discharging a guardian.

CHAPTER XIII.

REFERENCES, APPEALS, COSTS, ETC., IN PROCEEDINGS UNDER GUARDIANS AND WARDS ACT.

THE Court may¹ call upon the Collector,² or upon any Court subordinate to the Court, for a report on any matter arising in any proceeding under the Guardians and Wards Act, and treat the report as evidence. Reports by
Collector and
Subordinate
Courts.

For the purpose of preparing the report the Collector or the Judge of the subordinate Court, as the case may be, shall make such inquiry as he deems necessary, and may for the purposes of the inquiry exercise any power of compelling the attendance of a witness to give evidence or produce a document which is conferred on a Court by the Code of Civil Procedure.³

¹ Act VIII of 1890, sec. 46 (1). Although it may have received a report the Court is bound (see sec. 13, *ante*, p. 85) to give the parties an opportunity of being heard, and of adducing relevant evidence (*Gangawa v. Sanna* (1902), 4 Bom. L. R., 800). While giving due weight to the opinion of the Collector or Court making the report, it is often necessary to see upon what material such report is based and to act upon it only where it is based on legal evidence, and where the parties have had an opportunity of placing their view of the matter before the Collector or Court making a report. A report is evidence, but not necessarily of a higher class than other evidence which may be produced. The fact that it has received a report does not absolve the Court from the duty of satisfying itself that the order ought to be made or refused, as the case may be: *Hyder Reza v. Collector of Purneah* (1874),

22 W. R. C. R., 490. See *Ganesh Vithal Jade v. Kusabai* (1899), 23 Bom., 698; 1 Bom. L. R., 185; *Narayan Shridar Dharne v. Ramchandra Konddev Belhe* (1902), 26 Bom., 716; 4 Bom. L. R., 511. It is generally desirable to require the party excepting to a report to formulate his objections, so that the Court can properly deal with the report by way of appeal. The Court has no power to act upon a report made by a ministerial officer or any person other than a Collector or Court subordinate to the Court, except in cases where a local investigation is necessary or accounts have to be adjusted (see Civil Procedure Code (Act V of 1908), order 26, rules 10, 11); *Subhag Singh v. Raghunandan Singh* (1914), 36 All., 282.

² As to definition of "Collector," see *ante*, p. 77.

³ Act VIII of 1890, sec. 46 (2).

Orders appeal-
able.

An appeal lies ¹ to the High Court ² from an order made by a District Court,—

- (a) under sec. 7, appointing or declaring or refusing to appoint or declare a guardian ; ³ or,
- (b) under sec. 9, sub-sec. (3), returning an application ; ⁴ or,
- (c) under sec. 25, making or refusing to make an order for the return of a ward to the custody of his guardian ; ⁵ or,
- (d) under sec. 26, refusing leave for the removal of a ward from the limits of the jurisdiction of the Court, or imposing conditions with respect thereto ; ⁶ or,
- (e) under sec. 28 or sec. 29, refusing permission to a guardian to do an act referred to in the section ⁷ ; or,
- (f) under sec. 32, defining, restricting, or extending the powers of a guardian ; ⁸ or,
- (g) under sec. 39, ⁹ removing a guardian ; or,
- (h) under sec. 40, refusing to discharge a guardian ; ¹⁰ or,
- (i) under sec. 43, regulating the conduct or proceedings of a guardian or settling a matter in difference between joint guardians, or enforcing the order ; ¹¹ or,
- (j) under sec. 44 ¹² or sec. 45, ¹³ imposing a penalty.

Persons en-
titled to
appeal.

Persons, who are properly parties to the proceedings, and are injuriously affected by any of the orders referred to, are entitled to appeal. ¹⁴

Appeal from
order on
original side of
High Court.

There is an appeal in the High Court itself from an order made by a single Judge under the Guardians and Wards Act provided such order be a judgment ¹⁵ within the meaning of

¹ Act VIII of 1890, sec. 47.

² As to appeals from orders made by the Governor's Agent in Ganjam and Vizagapatam, see *Chakrapani v. Varahamma* (1894), 18 Mad., 227.

³ *Ante*, p. 96.

⁴ *Ante*, pp. 78, 79.

⁵ *Post*, p. 191.

⁶ *Post*, p. 131.

⁷ *Post*, pp. 142, 143.

⁸ *Post*, p. 148.

⁹ *Ante*, pp. 101, 102.

¹⁰ *Ante*, p. 104.

¹¹ *Post*, pp. 149, 150.

¹² *Post*, p. 131.

¹³ *Ante*, p. 99.

¹⁴ See *Muhamdee v. Nazirun* (1880), 6 Calc., 19 ; 6 C. L. R., 210 ; *Meltoon Bibee v. Gibbon* (1869), 12 W. R. C. R., 100.

¹⁵ *i.e.* it must be a decision, whether final, or preliminary, or interlocutory, which affects the merits of the question between the parties by determining some right or liability : see *Kristokissor Neoghy v. Kadermoye Dossee* (1878), 2 C. L. R., 583 ; *In the matter of Narrondas Dhanji* (1898), 14 Bom., 555 ; *Mohabir Prosad Singh*

sec. 15 of the Letters Patent of 1865 of the High Courts of Bengal, Madras, and Bombay.

This² right of appeal is not limited to the cases mentioned in sec. 47 of the Guardians and Wards Act,¹ and it may be exercised by any person who was properly a party to the proceedings and who is injuriously affected by the order.

For sufficient³ cause,² the execution of any appealable order made under the Guardians and Wards Act may be stayed, Stay of execution pending appeal. pending appeal.³

As orders under the Guardians and Wards Act do not bear an appealable value, there is no further appeal to His Majesty in Council. Appeal to His Majesty in Council.⁴

Except so far as a right of appeal is given or an order is liable to be set aside under sec. 115⁵ of the Code of Civil Procedure, an order made under the Guardians and Wards Act is final, and cannot be contested by suit or otherwise.⁶ Finality of orders.

It can be set aside if it was obtained by fraud on the Court, e.g. by suppressing the fact that alleged minor had attained majority.⁷

v. Adhikari Kunwar (1894), 21 Calo., 473; *Justices of the Peace for Calcutta v. Oriental Gas Company* (1872), 8 B. L. R., 433; *Gobinda Lal Das v. Shiba Das Chatterjee* (1906), 33 Calo., 123; 10 C. W. N., 986.

¹ *Ante*, p. 108.

² It must be shown that there may be injury to the child or its property by the order being executed, and the Court may require to be satisfied that the appeal is a *bonâ fide* one and has a reasonable chance of success.

³ See order 41, rules 5, 6, of the Code of Civil Procedure (Act V of 1898).

⁴ See *Pearee Dayee (Mussamul) v. Hurbuns Kooer* (1870), 14 W. R. C. R., 299; and see High Court Letters Patent, 1865, cl. 39. Special leave to appeal can be given by the Privy Council, see *In the matter of Skinner* (1870), 13 M. I. A., 532.

⁵ Act V of 1908, sec. 115, is as follows:—

“The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies and if such subordinate Court appears—(a) to have exercised a jurisdiction not vested in it by

law, or (b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity the High Court may make such order in the case as it thinks fit.” See *Chakrapani v. Varahamma* (1894), 18 Mad., 227, where the High Court set aside an order made by the Agent to the Governor in the Vizagapatam District.

⁶ Act VIII of 1890, sec. 48. This would not exclude a right to apply for a review (see *ante*, p. 103), or to set aside an order on the ground of fraud, or a power to vary, alter or rescind an order; *Nagardas v. Anandras* (1907), 31 Bom., 590; 9 Bom. L. R., 595, and it does not preclude a fresh application (see *Nehalo v. Nawal* (1877), 1 All., 428), except where the matters in question in the subsequent application are the same as those determined in the earlier one. The section would not prevent a suit by the guardian contesting the ward's right to certain property: see *Rakhal Moni Dassi v. Adwya Prosad Roy* (1903), 30 Calo., 613; 7 C. W. N., 419.

⁷ *Rashmani Dassi v. Ganoda Sundari Dassi* (1914), 19 C. W. N., 84.

Costs.

The costs of any proceeding under the Guardians and Wards Act, including the costs of maintaining a guardian or other person in the civil jail, are, subject to any rules made by the High Court under that Act, in the discretion of the Court in which the proceeding is had.¹

Power of High Court to make rules.

The 50th section of the Guardians and Wards Act is as follows: "(1) In addition to any other power to make rules conferred expressly or impliedly by this Act, the High Court may from time to time make rules consistent with this Act—

- (a) as to the matters respecting which, and the time at which, reports should be called for from Collectors and subordinate Courts;
- (b) as to the allowances to be granted to, and the security to be required from, guardians, and the cases in which such allowances should be granted;
- (c) as to the procedure to be followed with respect to applications of guardians for permission to do acts referred to in secs. 28 and 29;
- (d) as to the circumstances in which such requisitions as are mentioned in cls. (a), (b), (c), and (d) of sec. 34 should be made;
- (e) as to the preservation of statements and accounts delivered and exhibited by guardians;
- (f) as to the inspection of those statements and accounts by persons interested;
- (g) as to the custody of money, and securities for money, belonging to wards;
- (h) as to the securities on which money belonging to wards may be invested;
- (i) as to the education of wards for whom guardians, not being Collectors, have been appointed or declared by the Court; and,

¹ Act VIII of 1890, sec. 49. Cf. Civil Procedure Code (Act V of 1908), sec. 35; order 20, rule 6 (3). Where the Court has made no order a suit will not lie for the costs of proceedings under the Act: see *Kabir v. Mahadu* (1877), 2 Bom., 360. The Court may either require the applicant or the opposing party to pay costs. In

some cases it may permit costs to be paid out of the minor's estate. Except where the application or opposition is made for indirect motives it is ordinarily undesirable to make the parties pay costs personally, as thereby others might be deterred from maintaining the causes of minors.

(j) generally, for the guidance of the Courts in carrying out the purposes of this Act.

“(2) Rules under cls. (a) and (i) of sub-sec. (1) shall not have effect until they have been approved by the Local Government, nor shall any rule under this section have effect until it has been published in the official Gazette.”

Persons holding certificates or having been appointed guardians under earlier Acts were subject to the provisions of the Guardians and Wards Act, and of the rules made under it in the same way as if they had been appointed guardians under that Act.¹

Applicability
of Act to
guardians
already ap-
pointed by
Court.

¹ Act VIII of 1890, sec. 51. This Act came into force: *Vallabdas Hirachand v. Krishnabai* (1892), 17 Bom., 566.

CHAPTER XIV.

APPOINTMENT AND REMOVAL OF GUARDIANS BY HIGH COURTS.

Powers under
Guardians and
Wards Act.

As we have seen,¹ the High Courts of Bengal, Bombay, and Madras can exercise the powers given to District Courts by the Guardians and Wards Act,² and can appoint under that Act³ guardians of the persons or property of minors, who ordinarily reside within the limits of their ordinary Original Civil Jurisdiction, and in the case of minors not so residing, can appoint guardians of their property if they have any property within such limits.

Powers of
High Courts
under their
Charters.

The Guardians and Wards Act reserved the powers which the High Courts possessed apart from that Act.⁴

By its Charter of 1774, the Supreme Court of Bengal was empowered⁵ to appoint guardians and keepers for infants and their estates, according to the order and course observed in England.

Bengal.

By its Letters Patent of 1862⁶ and 1865⁷ the High Court of Bengal possesses the like power and authority with respect to the persons and estates of infants within the Bengal Division of the Presidency of Fort William, as was vested in the Supreme Court at the date of the establishment of the High Court.

¹ *Ante*, p. 78, note 3.

² Act VIII of 1890.

³ Sec. 9, *ante*, p. 78.

⁴ Act VIII of 1890, sec. 3. See *Jairam Luxman* (1892), 16 Bom., 634; *Jagannath Ramji* (1893), 19 Bom., 96; *Re Manilal Hurgovan* (1900), 25 Bom., 353; 3 Bom. L. R., 411. An applicant can, at his option, apply for the exercise of the powers conferred by the Guardians and Wards Act or of those conferred by the several Charters, or he can apply

in both jurisdictions. In practice, it can rarely make much difference under which jurisdiction he applies. A High Court cannot, by appointing a guardian under the powers given to it by its Charter, interfere with the powers of a guardian who has been appointed by a competent Court in the Province.

⁵ Cl. 25.

⁶ Cl. 16.

⁷ Cl. 17.

The High Court of Bombay possesses similar powers by the combined operation of cl. 17 of the amended Letters Patent of 1865, and of cl. 16 of the Letters Patent of 1862.¹

The High Court of Madras also possesses similar powers. Madras.

The 12th clause of the Charter of the High Court of Allahabad gives to that Court the same powers with respect to the persons and estates of minors within its jurisdiction as that which was exercised in Bengal by the High Court of Bengal. Allahabad.

Under these powers a High Court can appoint guardians of the persons of minors, being European British subjects,² who are resident within the Province over which it has appellate jurisdiction,³ and can appoint guardians of property situate or being within the limits of such Province, and belonging to minors who are European British subjects.⁴ To what minors powers applicable.

The High Courts of Bengal, Madras, and Bombay can appoint guardians of the persons of all minors resident within the limits of Calcutta, Madras, and Bombay, respectively,⁵ and can appoint guardians of property situate or being within such limits, which belongs to minors of any creed or race.

In addition to the special powers of appointing guardians, given to the High Courts by their Charters, the High Court of Bengal, Madras, and Bombay can, in exercise of their powers as Courts of Original Jurisdiction, provide for the maintenance of minors,⁶ the management and disposition of their property,⁷ and their marriage.⁸

The powers of the High Courts to appoint guardians of the persons of minors, do not depend upon the possession of property by such minors; Powers are independent of possession of property.

¹ See *In the matter of Saithri* (1891), 16 Bom., 307, at p. 322, and cases cited *ante*, p. 112, note 4.

² As to the meaning of "European British subjects," see *ante*, p. 58, note 7.

³ See *Shannon* (1870), 2 N.-W. P. H. C., 79; *In the matter of Srish Chunder Singh* (1893), 21 Calc., 206. Cf. *Javndha Kuar v. Court of Wards* (1881), 4 All., 159. There may perhaps be a question whether a High Court has not power to appoint a guardian of an infant domiciled within

the Province, wherever resident: see *In re Meakin* (1896), 21 Bom., 137.

⁴ *In re Meakin* (1896), 21 Bom., 137.

⁵ See *In the matter of Srish Chunder Singh* (1893), 21 Calc., 206.

⁶ *Post*, pp. 215 to 221.

⁷ *Post*, chap. xxiv.

⁸ See pp. 247, 248.

⁹ *Re Jagannath Ramji* (1893), 19 Bom., 96; *Barnardo v. McHugh*, [1891] A. C., 388; *In re McGrath*, [1893] 1 Ch., 143.

but where a minor is possessed of no property, the Court cannot frame a scheme for his maintenance or education.¹

Petition without suit.

The High Courts, acting under the powers contained in their Charters, can appoint guardians on petition without a suit being filed.²

Such petition without suit was not considered sufficient in the case of the minor's property being large, and there being difficulties in the administration of his property, or in the care of his person,³ or in the case of his legal guardians being guilty of misconduct, and it being desirable that they should be superseded or controlled.⁴ It is submitted that now the Court would rarely, if ever, require a suit to be filed, as an application under the Guardians and Wards Act⁵ can be made without a suit. The Court would not, therefore, permit such objection to stand in the way of a similar application for similar relief under another jurisdiction.

Petition in suit.
Suit.

An appointment can also be made on a petition in a pending suit in which the minor's property is being administered, and it can be made by a decree in a suit instituted for the purpose of the appointment.

Contents of petition.

The matters required by sec. 10 of the Guardians and Wards Act⁶ to be inserted in petitions under that Act are, as far as they relate to applications for the appointment of guardians, necessary to be stated in petitions presented to a High Court for the appointment of a guardian.⁷

Former practice as to inquiry.

The practice of the Supreme Court of Bengal was to require the master to report as to what person should be appointed guardian of the minor, and the master in his report was required to state the age of the minor, the nature and amount of his property, what relations he had by the father's or mother's side, the degree of relationship between the proposed guardian and the minor, and the grounds upon which he approved or disapproved of any person so applying. Now the appointment may be made by the Court on the petition without a reference, or the Court may make a

¹ *In re McGrath*, [1893] 1 Ch., 143.

² *In the matter of Bittan* (1877), 2 Calc., 357; *Jairam Luxmon* (1892), 16 Bom., 634; *Re Jagannath Ramji* (1893), 19 Bom., 97; *In re Manilal Hurgovan* (1900), 25 Bom., 353; 3 Bom. L. R., 411; *In re Meakin* (1896), 21 Bom., 137.

³ See *In the matter of Srish Chunder Singh* (1893), 21 Calc., 206.

⁴ Simpson on Infants, 3rd Edn., 207.

⁵ No suit lies for the appointment of a guardian by a District Court. See *ante*, p. 100.

⁶ *Ante*, pp. 79, 80.

⁷ Under the practice of the Supreme Court of Bengal, applying to the High Court of Bengal, the petition for the appointment of a guardian of the person or estate of a minor was required to state the age of the minor, the nature and amount of his property, what relations he has on the father's and mother's side, and the degree of relationship between the proposed guardian and the minor; Smoult and Ryan's Rules and Orders, p. 130.

reference to one of its officers, or to the Court itself, to inquire who is a proper person to be appointed guardian.¹

There is no rule as to the class of persons upon whom the petition should be served. A High Court would now ordinarily require the petition to be served in the manner and on the persons mentioned in sec. 11 of the Guardians and Wards Act.² Service of petition.

The rule of the Chancery Division is, that the summons, which answers in this respect to the petition to a High Court, should be served upon all the persons who stand within the same degree of relationship to the minor as the proposed guardians unless their acquiescence in the appointment of the proposed guardian be otherwise proved or service on them be dispensed with.³

In addition to evidence of the facts, which must be stated in the petition, evidence is required of the fitness of the proposed guardian, and his willingness to act should be proved by the production of his written consent.⁴ Evidence required.

A High Court can appoint a receiver to take charge of the property of a minor pending the hearing of an application for the appointment or discharge of a guardian.⁵ Receiver.

Except in a case which it could deal with under its summary powers,⁶ the Court cannot make an interlocutory order for the custody of the minor, as in the case of a petition under the Guardians and Wards Act.⁷

Provided there be some property within the limits of its original jurisdiction a High Court can, either under the Guardians and Wards Act,⁸ or under the powers which it possesses apart from that Act, appoint a guardian of all the property of the minor being within the Province over which that Court has jurisdiction. Jurisdiction over property within the Province.

Except in the case where for indirect motives, and not for the benefit of the minor, the application is made to a High Court, which of the High Guardianship of property within jurisdiction of more than one High Court.

¹ See *In the matter of Bittan* (1877), 2 Calc., 357.

² *Ante*, pp. 81, 82.

³ Daniell's Chancery Practice, 7th Edn., p. 914.

⁴ See *ante*, pp. 80, 93. Daniell's Chancery Practice, 7th Edn., p. 914.

⁵ See Civil Procedure Code (Act V

of 1908), sec. 141; order 40, rules 1-3; *In re Jamnabai (Bai)*, 36 Bom., 20; 13 Bom. L. R., 487.

⁶ *Post*, chap. xx.

⁷ VIII of 1890, sec. 12 (1), *ante*, p. 83.

⁸ *Ante*, pp. 78, note 7, 97.

Courts having jurisdiction would be the least able to exercise its jurisdiction to the advantage of the minor, it is submitted that an appointment by one High Court would be recognized by other High Courts at any rate to the extent of showing a *prima facie* right to the appointment.

Principles of appointment and removal.

In appointing and removing guardians the High Courts, while following, as far as possible, the principles contained in the Guardians and Wards Act (VIII of 1890),¹ although they are not bound thereby will follow the principles which guide the Chancery Division of the High Court of England so far as they are applicable to this country, *i.e.* paying due regard to the rights of parents, testamentary guardians and other persons who by the personal law, to which the minor is subject, are entitled to guardianship, the Court will appoint such persons as are by character, capacity, and relationship most fitted for the trust, and the Court will remove such guardians as have shown themselves unfit for the trust, or whom in the interests of their wards it is necessary or desirable to remove.²

There is no substantial difference between these principles, and those to be found in the Guardians and Wards Act.

In some cases the Court will, instead of removing the existing guardian, and appointing a person to act in his place, make orders regulating the conduct of the guardian,³ and this is the proper course where the conduct of the guardian, though in some sense blameworthy, has not been sufficiently bad to justify his removal from the trust.

Mitakshara joint family.

As to the appointment of a guardian of the interest of a minor in property held by a family governed by the Mitakshara school of Hindu law, see *ante*, p. 95.

Guardians and Wards Act.

The Guardians and Wards Act⁴ has defined the power of parents to appoint guardians in the case of European British subjects, and to this extent only does the Act expressly affect the appointment by guardians by High Courts acting otherwise than under the powers given to them by that Act.

¹ *In the matter of Srish Chunder Singh* (1893), 21 Calc., 206, at p. 211. (1861), 9 H. L. C., 440. See cases *ante*, p. 91, note 4.

² "The dominant matter for the consideration of the Court is the welfare of the child." *In re McGrath*, [1893] 1 Ch., 148; *Stuart v. Bate*

³ *Roach v. Garvan* (1748), 1 Ves. Sen., 157.

⁴ Act VIII of 1890, sec. 5, *ante*, pp. 64, 65, 88.

Although the welfare of the minor is the dominant matter for consideration, the Court would not appoint any one in the place of a testamentary guardian except under circumstances which would justify the removal of that guardian, nor would it interfere with the rights¹ of a natural guardian who is not unfit to be appointed guardian.

Recognition of rights of natural and testamentary guardians.

As the law gives the custody of the persons and property of minors to certain persons,² in the absence of an appointment by the Court, it may be presumed that ordinarily such persons are the best fitted for the trust, but where they have lost their right³ or have shown themselves unfit for the trust, they would not be appointed.⁴

The causes which justify the removal of a guardian appointed under the Guardians and Wards Act,⁵ would equally be grounds for removing a guardian appointed independently of that Act.

Removal of guardians.

There is an appeal from an order of a single Judge appointing or removing a guardian.⁶

Appeals.

A High Court may require a person appointed guardian of the estate of a minor to give security for the due performance of his trust;⁷ but security will rarely be required from the guardian of the person of a minor.

Security to be given by guardian.

It may also fix a salary for the guardian and may direct that it be paid out of the minor's estate.⁸

Salary of guardian.

It can also from time to time limit or extend the powers of the guardian and give directions for the care of the person or the management of the estate of the ward.⁹

Orders as to care of person and estate.

When a guardian of the person or estate of a minor has been appointed by a High Court, the minor is said to be a ward of Court, and as such is entitled to the particular care

Minor how constituted a ward of Court.

¹ See *In the matter of Sathri* (1891), 16 Bom., 301, at p. 334.

² *Ante*, chaps. viii and ix.

³ *Ante*, chap. x.

⁴ Any matter which would justify the removal of an appointed guardian would bar an appointment: see *ante*, p. 93.

⁵ Act VIII of 1890, sec. 39, *ante*, pp. 101, 102.

⁶ See *ante*, p. 108, note 15.

⁷ See Smoult and Ryan's Rules

and Orders, p. 130. Act VIII of 1890, sec. 34, *ante*, pp. 98, 99. As to the discharge of a surety, see *ante*, p. 98, note 4.

⁸ See Act VIII of 1890, sec. 22, *ante*, pp. 97, 98. There is no appeal from an order refusing remuneration: *Gangadhar B. Mule v. Shiklingrao Jagdevrao* (1899), 24 Bom., 95; 1 Bom. L. R., 547.

⁹ See *post*, chap. xxiv.

and protection of the Court. Properly speaking, a ward of the Court is a person who is under a guardian appointed by the Court; but whenever a suit is instituted in the Court relative to the person or property of a minor, although he is not under any guardian appointed by the Court, he is treated as a ward of the Court and as being under its special cognizance and protection.¹

An order for the maintenance of a minor would also, it seems, constitute the minor a ward of Court.² It would also probably be held that a payment into Court of money belonging to a minor under the provisions of sec. 46 of the Indian Trustee Act,³ would constitute such minor a ward of the High Court, into which such money has been paid.⁴

¹ *Karmali Rahimbhoy v. Rahimbhoy Habibbhoy* (1888), 13 Bom., 137, at pp. 145, 146; Story's Equity Jurisprudence, sec. 1352; *Pendleton v. Mackrory* (1790), 2 Dick., 736; *Gynn v. Gilbard* (1860), 1 Dr. & Sm., 356; *Stuart v. Bute* (1861), 9 H. L. C., 440. See also Macpherson on In-

fants, p. 103. As to wards of Courts other than High Courts, see *ante*, p. 100.

² *Re Graham* (1870), L. R., 10 Eq., 530.

³ XXVII of 1866, *ante*, p. 34.

⁴ See Simpson on Infants, 3rd Edn., p. 206.

CHAPTER XV.

DUTIES OF GUARDIANS.

THE duty of a guardian towards his ward, whether he be appointed by the Court, or be in any other way entitled to the trust, is to do all that lies in his power to further the interests of his ward and to preserve his property.¹

To use the words of the Bengal Court of Wards Act,² he must "manage the property committed to him diligently and faithfully for the benefit of the proprietor, and shall in every respect act to the best of his judgment for the ward's interest as if the property were his own."

A person having the custody of a minor or of his property, but not being legally entitled thereto owes to the minor a duty equal to that of a rightful guardian.

A guardian has all the responsibilities of a trustee,³ but is not exonerated by his ward's acquiescence in a breach of trust.⁴

He stands in a fiduciary relation to his ward, and except that he is entitled to such salary or remuneration as may be provided by the will or other instrument, if any, by which he was appointed, or which, if he be appointed by a Civil Court or by a Court of Wards,⁶ has been allotted to him in pursuance of a statutory power, he must not make any profit out of his office.⁷ Should he make such profit he may be required to restore it to his ward,⁸ with such damages as the ward may have suffered by his wrong-doing.

He is bound to abstain from entering into any arrangement which benefits him at the expense of the minor's estate;

¹ As to the duties of guardians specified in the Acts constituting Courts of Wards, see *post*, pp. 351, 370, 399.

² Act IX (B. C.) of 1879, sec. 40. See Act II of 1882, sec. 15.

³ *Matthews v. Brise* (1851), 14 Beav., 341; *Beaufort v. Berty* (1721), 1 Peere. Wms. 703. See Act VIII

of 1890, secs. 20 and 37.

⁴ *Wilkinson v. Parry* (1828), 4 Russ., 272.

⁵ *Ante*, pp. 97, 98.

⁶ *Post*, pp. 335, 369, 399, 428.

⁷ Act VIII of 1890, sec. 20.

⁸ See *Gokuldas v. Valibai* (1913), 15 Bom. L. R., 343.

General duty of guardian to ward.

Fiduciary relationship.

Must make no profit out of office.

Must obtain no benefit at expense of estate.

and if he enters into any such arrangement, it is incumbent on him, immediately after his ward comes of age, to obtain from him, not an accidental, but a distinct formal ratification.¹

Must not set up adverse title.

A guardian must not, for himself or another, set up or aid any title to the property of his ward, adverse to the interest of the ward.²

The possession of the ward's property by a guardian will be presumed to be on behalf of the ward.³

"Where any person, whether a father or stranger, enters upon the estate of an infant, and continues in possession, the Court will consider such person entering as a guardian to the infant."⁴

Accounts.

A guardian is bound to keep clear and accurate accounts,⁵ and at reasonable times to give to his ward or to persons properly interested on the ward's behalf, full and accurate information as to the amount and state of the property subject to his charge.⁶

Conflicting interests of guardian and ward.

When the interests of the guardian conflict in any way with those of his ward, the guardian is bound to see that the ward is provided with proper and independent advice and assistance.

Transactions between guardian and ward.

The Courts will watch, with the greatest jealousy, a transaction between a guardian and his ward, and before upholding it, will require the clearest proof of good faith and fairness, absence of influence, knowledge by the ward of the facts and of his rights, and benefit to the ward.⁷

¹ *Prosunno Coomar Ghuttuck v. Wooma Churn Mookerjee* (1873), 20 W. R. C. R., 274. As to ratification, see *post*, chap. xxi.

² See Act II of 1882 (Trusts), sec. 14. Cf. *Srinivasa Moorthy v. Venkata-varada Iyengar* (1911), 38 I. A., 129; 34 Mad., 257; 15 C. W. N., 741; 13 Bom. L. R., 520. In *Rakhal Moni Dassi v. Adwitya Prosad Roy* (1903), 30 Calc., 613; 7 C. W. N., 419, a widow who had been appointed guardian of a minor as her husband's adopted son was held entitled to dispute the adoption.

³ *Sriramulu Naidu v. Andalammal* (1906), 30 Mad., 145.

⁴ *Morgan v. Morgan* (1737), 1 Atk., 489, cited in *Vasudeo Atmaram Joshi v. Eknath Balkrishna Thite*

(1910), 35 Bom., 79, at p. 89.

⁵ See *Barnes v. Ross*, [1896] A. C., 625.

⁶ As to the accounts to be kept by a guardian appointed or declared by a District Court, see Act VIII of 1890, sec. 34, *ante*, p. 98. As to a guardian's liability to a suit for an account, see *post*, pp. 182-184. As to accounts by managers of Courts of Wards, see *post*, pp. 337, 371, 402.

⁷ Act VIII of 1890, sec. 20; Act I of 1872, sec. 111, *post*, p. 121. See *Hunter v. Atkins* (1834), 3 M. & K., 113, at p. 135, *post*, p. 121, note 5; *Lachman Dass v. Rup Chand* (1831), 5 Ben. Sel. Rep., 114; 2nd Edn., 136; *Ram Ghose (Baboo) v. Kalee Pershad Ghose* (1825), 4 Ben. Sel. Rep., 17; 2nd Edn., 22.

A transfer by gift or otherwise to a guardian, as to any other person, is void.¹

The Guardians and Wards Act² contains the following: Transactions between guardian and ward soon after attainment of majority.
 "The fiduciary relation of a guardian to his ward extends to, and affects purchases by, the guardian of the property of the ward, and by the ward of the property of the guardian, immediately or soon after the ward has ceased to be a minor, and generally all transactions between them while the influence of the guardian still lasts or is recent."

This applies even where the guardian takes no beneficial interest by the transaction.³

The 111th section of the Indian Evidence Act⁴ provides that "where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence." Illustration (b) to that section is as follows: "The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father."⁵ This rule is equally applicable whether a parent or any other person be guardian.

¹ *Ante*, p. 23. Cf. Vyavahara Mayukha, chap. ix., para. 6. As to repudiation of a gift or transfer by a minor, see *post*, chap. xxi.

² Act VIII of 1890, sec. 20 (2).

³ *Roop Laul v. Lakshmi Doss* (1905), 29 Mad., 1.

⁴ I of 1872. This rule has no application to those who are not in a fiduciary relation to the person who has recently attained majority: *Rajcoomar Roy v. Alfuzuddin Ahmed* (1881), 8 C. L. R., 419.

⁵ This section of the Evidence Act is merely an embodiment of the English rule of law, with reference to which Lord Brougham said in *Hunter v. Atkins* (1834), 3 M. & K., 113, at p. 135: "There are certain relations known to the law, as attorney, guardian, trustee. If a person standing in these relations to client,

ward, or *cestui-que-trust*, takes a gift or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, etc., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule rightly considered, is, that the person standing in such relation must, before he can take a gift or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage from his relation to the other party beyond what may be the natural and unavoidable consequence of kindness arising out of that relation."

Releases by
wards soon
after attaining
majority.

The Courts will look very jealously at releases executed by wards soon after attaining their majority in favour of their late guardians. Where such a release is in question, the burden of proving the good faith of the transaction is on the guardian, and it is for him to show that he has derived no benefit from the transaction, that he has placed his ward in full possession of all the facts and accounts relating to his property, and explained to him the full extent of his rights therein. The circumstances must show the fullest deliberation on the part of the ward, and perfect good faith on the part of the guardian.¹

In the case of *Gillon v. Milford*,² where a minor had given a release to his guardian soon after coming of age, Sir Thomas Strange said that the principles of equity which govern that species of case "are those which render it the duty of the Court, wherever a man appears to have been acting as guardian, or as trustee in the nature of guardian to a minor, to see, when he comes to give up his trust, that a fair account has been rendered, and that his release, if he have obtained one, has been fair. They operate in other relations besides that of guardian and ward; and, in their application, are always considered not as ordinary principles regulating rights, and as such liable to be modified by a variety of personal circumstances, but as principles of policy to be enforced for the sake of the public, as affording by their efficacy a salutary and important protection, where protection is peculiarly needed, and without the influence of which great imposition might be practised and incalculable injustice done. For this reason, their application does not depend upon detection of positive unfairness in the arrangement proposed to be impeached. If it confer an advantage upon the guardian, it may be one that he may have merited; but upon the principles of the Court, it may not be the less bound to set it aside. Neither does it depend upon its appearing whether the minor just come of age knew at the time in its full extent what it was that he was giving up, and was apprised of his option to withhold his consent. In ordinary cases a man will be bound by his release, if there appear to have been a consideration for it, and that, knowing at the time the extent of his rights, he was aware of the nature of the instrument he was about to execute. But I apprehend it is different between a guardian and ward, at the critical moment of settling the account, upon the latter coming of age. At law the relation may have ceased, the minor having become legally *sui juris*. But an influence for the most part on the side of the guardian still continuing, equity presumes its operation, and will not permit him at that moment, in the act of settling the account, to derive an important advantage for which he could not have stipulated; much less if it be more than doubtful whether the ward was informed at the time of the

¹ *Tooley Doss Ludha v. Premji* 281, at p. 287. See also *Ramkissen Tricumdass* (1888), 13 Bom., 61, at p. 66.

² (1808) 1 Madras Notes of Cases, p. 274.

extent to which he was entitled to call him to account, and whether he possessed advice to satisfy the Court that he was not misled in releasing him."¹

A transaction between a person who has just attained the age of majority and his guardian or another person standing *in loco parentis* to him, will be set aside even against a third person, if he takes a benefit, knowing the nature of the circumstances; but this would be otherwise, where there is no ground for imputing to him knowledge of undue influence.¹

Where the transaction between a guardian and his ward is of the nature of a family arrangement, as where an estate is resettled in a way advantageous for the family generally, though the ward gives up some of his rights, the Court will not set it aside unless it be clear that the ward had not a reasonable knowledge of what he was doing.

Transactions of this kind are looked upon with favour by the Court, and the Court will not, as in the case of ordinary releases, given by a ward to his guardian, or other transactions between them soon after the ward has attained majority, raise any presumption of undue influence.²

As to the effect of acquiescence and ratification on the wards' rights, see *post*, chap. xxi.

A guardian, who has acted as such, cannot arbitrarily resign his trust. A guardian is a trustee,³ and unless he has been appointed or declared by a Court, and has been discharged by that Court,⁴ he cannot be relieved from his trust until he has fully accounted for his dealings with the property of his ward, and until another person has duly taken his place.⁵

The duties of a guardian of a minor's person whether he be a natural or testamentary guardian, or has been appointed by the Court, are summed up by the Guardians and Wards Act⁶ as follows:—

“A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health, and

¹ *Archer v. Hudson* (1844), 7 Beav., 551.

² See Simpson on Infants, 3rd Edn., pp. 164, 379; *Hoblyn v. Hoblyn* (1889), 41 Ch. D., 200, and cases there referred to.

³ *Ante*, p. 119.

⁴ Act VIII of 1890, sec. 40, *ante*,

p. 104. As to his discharge from liability, see sec. 41 (4), *post*, p. 183.

⁵ See *Gourmonee (Mussamut) v. Bamasoonderee (Mussamut)*, 2 Sev. Reps., note to p. 747; Ben. S. D. A., 1860, p. 532.

⁶ Act VIII of 1890, sec. 24.

education, and such other matters as the law to which the ward is subject requires.”

This does not abrogate the Mahomedan law as to guardianship in marriage, *post*, pp. 234-236.¹

He must make proper provision for the maintenance, lodging, clothing, and education² of the ward, according to the position which he will occupy in life on his attainment of the age of majority.³

Marriage.

As to the duties of a guardian with reference to the marriage of his ward, see *post*, chap. xxiii.

Guardians under Courts of Wards.

Subject to such limitations as may be contained in the enactment under which he is appointed, and to such restrictions as may be imposed by the Court appointing him, a guardian under a Court of Wards has the same duties as any other guardian towards his ward.⁴

Information of birth of children.

As to the duties of parents and others to give information of the birth of children, see—

Bengal Act III of 1899, sec. 531; Madras Act III of 1904 (applying to the city of Madras), sec. 379; Madras Act IV of 1884 (applying to the District Municipalities of the Madras Presidency), secs. 247 and 248; Madras Act III of 1899 (applying to rural tracts); Bombay Act III of 1888, secs. 445 and 446.

As to the voluntary registration of births, see Act VI of 1886, as amended by Acts XVI of 1890, XII of 1891, and IX of 1911.

Vaccination.

The duties of parents and guardians as to the vaccination of children and the powers to direct vaccination are to be found in Bengal Act V of 1880, as amended by Bengal Acts II of 1887, II of 1890, and II of 1911; Madras Act IV of 1884 (applying to the District Municipalities of the Madras Presidency), secs. 132 to 141, as amended by Madras Act III of 1897, secs. 86 to 88; Madras Act V of 1884 (Madras Local Boards Act), secs. 102 to 115, as amended by Madras Act VI of 1900, secs. 89 to 94; Bombay Act I of 1877 (applying to the city of Bombay), secs. 7 to 13; Bombay Act I of 1892, applying to the Bombay Districts. See also Act XIII of 1880, which applies to (amongst other places) the United Provinces and Assam.

Duties of guardian of estate.

The Guardians and Wards Act declares⁵ that a guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own.

His duties can be well described in the terms used in the agreement which has to be executed by managers of estates under the Bengal Court of Wards.⁶ He must manage the

¹ *Monijan Bibi v. District Judge, Birbhum* (1914), 42 Cal., 351; 19 C. W. N., 290.

² As to the maintenance and education of minors, see *post*, chap. xxii.

³ As to the duty of the guardian

of the property to provide money for these purposes, see Act VIII of 1890, sec. 34 (e), *post*, p. 125.

⁴ *Post*, pp. 350, 351, 370, 399.

⁵ Act VIII of 1890, sec. 27.

⁶ Rules of Bengal Court of Wards, Appx. B.

estate diligently and faithfully for the minor proprietor, must use every means in his power to improve the same for the ward's benefit, and must act in every respect for the interest of such ward in like manner as if the estate were his own.

The guardian must scrupulously regard the interests of his ward in dealing with the estate. The Court will, when necessary, enforce the performance of this duty.¹

Where a guardian of the property of a minor has been appointed or declared by the Court and such guardian is not the Collector, he must apply for the maintenance, education, and advancement of the ward and of such persons as are dependent on him,² and for the celebration of ceremonies to which the ward or any of those persons may be a party, such portion of the income of the property of the ward as the Court from time to time directs, and, if the Court so directs, the whole or any part of that property.³

Maintenance, education, and advancement of ward.

Where a Collector is the guardian, he is bound to make proper provision for the reasonable wants of his ward.

In other cases, where the custody of the minor's property is not in the same hands as the custody of his person, it is the duty of the guardian of the property to supply to the guardian of the person money sufficient for the suitable maintenance, education, and advancement of the ward.

When the office devolves upon him, a guardian should acquaint himself, as soon as possible, with the nature and circumstances of the property of his ward, and should get in all money outstanding or invested on insufficient or hazardous security.

Guardian to acquaint himself with property. To get in out-standings.

It is often necessary that suits be brought, and other legal proceedings be taken, for the purpose of protecting, preserving, or recovering property belonging to minors.⁴

It is the duty of the guardian to bring, or cause to be brought, on behalf of his ward, all suits which are manifestly for his

Duty of guardian with respect to suits.

¹ *Lekhraj Roy (Baboo) v. Mahtab Chand (Baboo)* (1871), 14 Moo. I. A., 393, at pp. 398, 399; 10 B. L. R., 35, at p. 44; 17 W. R. C. R., 117, at p. 118.

² Besides those whom the minor is legally bound to support, *i.e.* his wife and children, this would include

such persons, as it would be, if he were an adult, his duty according to the customs of his family or the dictates of his religion to support.

³ Act VIII of 1890, sec. 34 (e).

⁴ As to the procedure in suits on behalf of minors, see *post*, chap. xxv.

benefit or for that of his estate; and it is also his duty to see that the interests of his ward are properly cared for, and that his ward is properly represented, in all suits, or other proceedings to which he is a party.

Caution in bringing them.

Care should be taken to avoid bringing unnecessary, or ill-advised suits, lest the minor be prejudiced thereby.¹ Where the interests of the minor will not be prejudiced by delay, it may in some cases be better to defer the suit, so that, on attaining majority, he can exercise his own discretion.

If the guardian omits to bring a necessary suit, it may be brought on behalf of the minor by any other next friend.²

When the property of the minor has been unlawfully alienated,³ where his rights are threatened, or where they have been actually assailed, it is generally proper to institute a suit on his behalf. Similarly, where he is entitled to recover money by way of damages or otherwise, it is ordinarily undesirable to postpone litigation.

Suit for partition of joint family property.

Where the minor is a member of a joint Hindu family, and his interests are likely to be prejudiced by the property remaining joint, as, for instance, where the co-parceners are wasting the property, or setting up rights adverse to the minor, or decline to provide for his maintenance, it is for his interest that a suit⁴ for a partition be brought,⁵ but if there be no such special circumstances, it is ordinarily not in the interest of the minor that such suit should be brought.⁶

¹ The exercise of this caution is also to the interest of the person proposing to institute a suit on behalf of a minor, as he may have to pay the costs of an unsuccessful suit: see Civil Procedure Code (Act V of 1908), sec. 35; order 32, rules 1, 4, *post*, p. 279.

² See *post*, chap. xxv.

³ See *Sheopershad Jha v. Gungaram Jha* (1866), 5 W. R. C. R., 221.

⁴ *i.e.* either a suit in a Civil Court, or a proceeding in a Revenue Court.

⁵ *Damoodur Misser v. Senabutty Misrain* (1882), 8 Calc., 537; 10 C. L. R., 401; *Mahadev Balvant v. Lakshman Balvant* (1894), 19 Bom., 99; *Thangam Pillai v. Suppa Pillai* (1888), 12 Mad., 401; *Kamakshi*

Ammul v. Chidambara Reddi (1866), 3 Mad. H. C., 94; *Alimelammal v. Arunacheellam Pillai* (1866), 3 Mad. H. C., 69; *Bhola Nath v. Ghasi Ram* (1907), 29 All., 373; *Lekhraj Kooer (Mussammul) v. Dyal Singh (Sirdar)* (1876), 25 W. R. C. R., 497. As to partition by arrangement, see *post*, p. 177.

⁶ *Bachoo Hurkissondas v. Mankorebai* (1907), 34 I. A., 107; 31 Bom., 373; 11 C. W. N., 769; 9 Bom. L. R., 646; *Damoodur Misser v. Senabutty Misrain* (1882), 8 Calc., 537; 10 C. L. R., 401; *Alimelammal v. Arunachellam Pillai* (1866), 3 Mad. H. C., 69; *Swamiyar Pillai v. Chokkalingam Pillai* (1862), 1 Mad. H. C., 105. If the suit be not for the benefit of

The same principle would apply to reviving on behalf of a minor a suit for partition instituted by his father,¹ provided it be clear that the omission to continue the suit does not prejudice the minor's rights to the property.

Where there has been a decision adverse to the minor, his guardian should prefer an appeal, if he be advised that there is a reasonable chance of success.

A guardian should also prosecute all other legal proceedings as may be necessary for the realization and preservation of his ward's estate.

For instance, when the ward's property has been sold for arrears of Government revenue or otherwise, or orders have been passed to its prejudice, the guardian should take all necessary steps for the purpose of setting aside the sale or order.²

A guardian must have regard to the interest of the inheritance, not the immediate income. Where a minor's estate is encumbered, or there are debts for which his estate would be liable, it is the duty of the guardian to endeavour to pay off such debts by strict economy out of the income of the estate. He should not sell or encumber the estate until he is forced to do so.³

The guardian is bound to exercise the discretion of a reasonable and prudent man with respect to the payment of debts. He is not bound to contest them whether they be well or ill-founded,⁴ nor is he necessarily accountable for sums paid by him in discharge of debts barred by limitation, where he has found those sums justly due, and is acting honestly.⁵

the minor, the Court will refuse to decree partition. In addition to the objections (*post*, p. 177) which there are to a partition of a minor's property, there is also the danger of the minor's property being wasted by the costs of the litigation, and this consideration may turn the scale, when the advantages and disadvantages of a suit are being weighed. A minor cannot resist partition at the instance of an adult.

¹ *Parvathi v. Manjayakarantha* (1870), 5 Mad. H. C. R., 193.

² Under the Bengal Survey Act (V (B. C.) of 1876) the omission to appeal from an order does not bar a suit, if the person suing was a minor at the time when such order was

passed (see sec. 62); but no similar indulgence is given to a minor in the case of a sale for arrears of revenue under Act XI of 1859, sec. 23.

³ See *Sutton v. Jones* (1809), 15 Ves. 584, at p. 588. As to when a guardian may charge or sell the estate of his ward, see *post*, chap. xvii.

⁴ *Lekhraj Roy (Baboo) v. Mahtab Chand (Baboo)* (1871), 14 M. L. A., 393, at p. 399; 10 B. L. R., 35, at p. 44; 17 W. R. C. R., 117, at p. 118; *Ajodhya Pershad Singh v. Sheo Pershad Sahu* (1900), 5 C. W. N., 58.

⁵ *Chowdhry Chuttarsal Singh v. Government* (1865), 3 W. R. C. R., 57; *Hurro Chunder Chowdhry v. Bungsee Mohun Doss* (1864), 1 W. R. M. A., 16.

In the Bombay Presidency there is an express enactment protecting members of joint Hindu families from personal liability for family debts incurred while they were unborn, or before they attained the age of twenty-one years. They are liable after that age for such debts to the extent of family property come to their hands and not duly applied by them.¹

After all necessary payments, he must accumulate or invest on sound security the income of the minor's property.²

Income-tax.

A guardian, or a manager under a Court of Wards, must, out of the income of his ward's property, pay the income-tax chargeable to the ward,³ and may for that purpose retain so much as is sufficient to pay the amount.⁴

He may also be required to furnish to the proper authorities the name of his ward and the particulars of such of his income as is liable to assessment.⁵

Land Registration.

As to the duty of a guardian in Bengal to register his name under the Land Registration Act (VII (B. C.) of 1876), see sec. 42 of that Act.

Ancestral trades.

As to his duty with reference to an ancestral trade in which his ward may be interested, see *post*, pp. 174, 175.

Duty to persons other than ward.

The duty of a guardian of the property of a minor towards persons other than his ward is similar to that of any other manager or occupier.

Offences against Salt laws.

In the Madras Presidency a guardian or manager must give immediate information to the officers of the Salt Agent, to the nearest Magistrate, or to the Collector, of any salt that may be made in or imported into the land of which he has charge under pain of a penalty of twenty-five per cent. on the value of salt proved to have been so made or imported with his knowledge or connivance, exclusively of the penalty of confiscation.⁶

Accounts on termination of guardianship.

The guardian must, on the termination of his guardianship, furnish to the guardian appointed in his place, to the ward, if he has attained majority, or to the ward's representative, if the ward be dead, a full account of his dealings with the ward's property and complete information as to the particulars of such property. He must also make over all account books, vouchers and other property of the ward in his hands.⁷

¹ Act VII (Bo. C.) of 1866, sec. 5.

² As to the guardian's powers of investment, see *post*, p. 170. As to the duty of a guardian, appointed or declared by the Court, with regard to the balance, see Act VIII of 1890, sec. 34, *ante*, p. 98.

³ Act II of 1886, secs. 20 and 22.

⁴ *Ibid.*, sec. 23.

⁵ *Ibid.*, secs. 42 and 43.

⁶ Mad. Reg. I of 1805, sec. 13.

⁷ See *Kaniz Fatima v. Sajjad Hosain* (1906), 34 Calc., 211. As to the mode of enforcing this duty, see *post*, pp. 182-185.

The guardian is entitled to have his accounts examined and adjusted, and, where the ward has attained majority, the guardian may, where there is nothing due from him, require an acknowledgment in writing to that effect, but he is not entitled to a release.¹

¹ Simpson on Infants, 3rd Edn., p. 373.

CHAPTER XVI.

RIGHTS AND POWERS OF GUARDIANS OF PERSON.

Right to custody.

THE guardian of a minor's person has, whether he be a natural guardian, or a testamentary guardian, or a guardian appointed by a Civil Court or by the Court of Wards, a right to the custody of the person of his ward,¹ subject to the powers of the Courts to interfere with that custody.

The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.²

The Penal Law protects the guardian's right to the custody of his male ward under fourteen years of age and of his female ward under sixteen years of age.³

Enforcement of right.

A guardian can enforce his right either by a suit, or by the summary proceedings available to him.⁴ He may use a reasonable amount of force to obtain or retain possession of his ward's person where such force does not amount to a breach of the peace.⁵

Use of force.

Interference with right of guardian appointed by High Court.

Interference with the right of a guardian appointed by a High Court would amount to contempt of the authority of that Court, and would be punishable as such.⁶

Prosecution and compounding offences.

A guardian is entitled to prosecute a person committing an offence against his ward, and on behalf of his ward to compound an offence which is capable of being compounded.⁷

Place of residence of ward.

The guardian is entitled to use his discretion with reference

¹ Act VIII of 1890, sec. 24.

² *Ibid.*, sec. 25 (3).

³ Act XLV of 1860, sec. 361, *ante*, p. 45.

⁴ *Post*, chap. xx.

⁵ See *Ex parte Hopkins* (1732), 3 Peere. Wms., 154; and Forsyth on the Custody of Infants, chap. v.

⁶ *Wellesley v. Beaufort* (1831), 2 R. & M., 639. In the case of appointments by District Courts such interference might also in some cases amount to a disobedience of the lawful authority of the Court, and be punishable as such.

⁷ Act V of 1898, sec. 345 (4).

to the place of residence of his ward, and may put proper restraint upon him, so as to prevent him consorting with persons whose society might be injurious to him.¹

A guardian of the person appointed or declared by a District Court, unless he is the Collector or is a guardian appointed by will or other instrument, cannot, without the leave of the Court by which he was appointed or declared, remove the ward from the limits of its jurisdiction except for such purposes as may be prescribed.²

Such leave may be special or general, and may be defined by the order granting it.³

An order refusing such leave, or imposing conditions in respect thereto, is appealable to the High Court.⁴

A guardian who, for the purpose or with the effect of preventing the Court from exercising its authority with respect to a ward, so removes the ward from the limits of the jurisdiction of the Court is liable, by order of the Court, to fine not exceeding one thousand rupees, or to imprisonment in the civil jail for a term which may extend to six months.⁵

Such order is appealable to the High Court.⁶

As we have seen, ceasing to reside within the local limits of the jurisdiction of the Court appointing a guardian is a ground for removing a guardian appointed by the Court,⁷ and ceasing to reside within the local limits of the jurisdiction of the District Court having jurisdiction in the place where the minor for the time being ordinarily resides may be a ground for removing a testamentary guardian.⁸

Should a natural guardian be about to remove his ward from his usual place of residence, and such removal be contrary to the interests of the minor, a friend of the minor might well apply to have a guardian appointed by the Court.⁹

A Court of Wards can determine the place of residence of its wards.

A parent or guardian who is himself entering into an agreement to emigrate, may, in the name and on behalf of a child under sixteen and over

¹ See *Fleming v. Pratt*, 1 L. J., K. B., o s., 195.

² Act VIII of 1890, sec. 26 (1).

³ *Ibid.*, sec. 26 (2).

⁴ *Ibid.*, sec. 47.

⁵ *Ibid.*, sec. 44.

⁶ *Ibid.*, sec. 47.

⁷ *Ibid.*, sec. 39 (k), *ante*, p. 102.

⁸ *Ante*, p. 102.

⁹ *Ante*, chap. xi.

ten years of age, enter into an agreement binding the child to emigrate with him.¹

A parent may also take with him his children, on whose behalf no such agreement has been entered into by him.²

A person emigrating under the provisions of the Assam Labour and Emigration Act, 1901, can also take his children with him.³

Constraint and correction of wards.

The father or other guardian is entitled to chastise the minor moderately, or to put constraint upon him for the purpose of correction.⁴

Delegation of authority to schoolmaster or another.

The father or other person entitled to the guardianship is entitled either to keep the child under his own control, or to place him in the charge of a proper person,⁵ and the father may "also delegate part of his parental authority during his life to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of constraint and correction, as may be necessary to answer the purposes for which he is employed."⁶

Such delegation is revocable at any time.⁷

A father on going to a foreign country may make over the custody of his children for the time being to another, and he does not thereby lose any portion of his rights with regard to them.⁸

Right to give adoption.

A Hindu father can give his son in adoption where there is no dissent by the mother, and even in case of such dissent, the weight of authority is in favour of the father's power to give his son in adoption.⁹

¹ Act XVII of 1908, sec. 36.

² See *Ibid.*, sec. 47 (1).

³ See Act VI of 1901, secs. 8, 35, 50, 51, 53, 85, 88.

⁴ Mayne's Criminal Law of India, 4th Edn., II, p. 127. See Menu, viii, 299. As to the chastisement of apprentices, see *post*, p. 135.

⁵ *Ex parte McClellan*, 1 Dowl. P. C., 81.

⁶ Blackstone's Commentaries by Stephens, vol. ii, 5th Edn., p. 30. Mayne's Criminal Law of India, 4th Edn., II, p. 127.

⁷ *Besant v. Narayaniah* (1914), 4 I. A., 314; 38 Mad., 807; 18 C. W. N., 1089; 16 Bom. L. R., 625; *Pollard v. Rouse* (1910), 33 Mad., 288.

⁸ See *Re Suttor* (1860), 2 F. & F., 267.

⁹ See *Narayanagami v. Kuppusami* (1887), 11 Mad., 42, at p. 47; Mayne's Hindu Law, 8th Edn., p. 167; Strange's Hindu Law, vol. i, p. 81; Dattaka Mimansa, sec. iv., paras. 10, 11, 13-15, 17 (see also i, paras. 15, 16); sec. vi, paras. 50, 51; Mitakshara, chap. i, sec. xi, para. 9. 3 Colebrooke's Digest, 244, 254, 257, 261. Viramirodaya, chap. ii, part ii, sec. 8 (G. C. Sircar's translation), p. 115; Dattaka Chandrika, i, 31, 32 Sutherland's Synopsis, note ix (p. 224); Vyavahara Mayuka (Mandlik's edition), p. 50; G. C. Sircar's Law of Adoption, pp. 274, 275.

A mother can during the father's lifetime, with his consent, but not otherwise, give her son in adoption.¹

On the death of the father, or on his being permanently absent from home, or on his entering a religious order, or losing his reason, or otherwise becoming incapable of giving his consent, a mother can give her son in adoption,² provided that the father has neither expressly nor impliedly prohibited her from so doing.

A guardian has power to bind his ward apprentice to a trade. Apprenticing of ward.

Act XIX of 1850, which contains the law on this subject applicable to British India, provides as follows:— Apprenticing of child between ten and eighteen years old.

“Section 1.—Any child above the age of ten, and under the age of eighteen years, may be bound apprentice by his or her father or guardian to learn any fit trade, craft, or employment, for such term as is set forth in the contract of apprenticeship, not exceeding seven years, so that it be not prolonged beyond the time when such child shall be of the full age of twenty-one years, or in the case of a female, beyond the time of her marriage.

“Section 2.—The age set forth in the contracts shall be evidence of the age of the child in all questions which arise as to the right of the master to the continuance of the service. Evidence of age in questions as to right of service.

“Section 3.—Any Magistrate or Justice of the Peace may act with all the powers of a guardian under this Act on behalf of any orphan or poor child abandoned by its parents, or of any child convicted before him or any other Magistrate, of vagrancy, or the commission of any petty offence. Powers of Magistrate or Justice acting for orphans, etc.

“Section 4.—An orphan or poor child, brought up by any public charity, may be bound apprentice by the governors, directors, or managers thereof, as his or her guardians for this purpose. Apprenticing of child brought up by public charity.

“Section 5.—Any such boy may be bound as an apprentice in the sea-service³ to any of Her Majesty's subjects, being the owner of any registered Apprenticing of such boy in sea-service.

¹ *Lallubhai Bapubhai v. Mankuvarbhai* (1876), 2 Bpm., 388, at pp. 404, 405.

² *Jogesh Chandra Banerjee v. Nrityakali Debi* (1903), 30 Calc., 965; s.c. *sub nomine, Jogesh Chunder Bandopadhyaya v. Jonabali Bepari*, 7 C. W. N., 871; *Rangubai v. Bhagirthibai* (1877), 2 Bom., 377, at p. 380; *Mhalsabai v. Vithoba Khandappa Gulve* (1862), 7 Bom. H. C., App. xxvi; *Putlabai v. Mahadu* (1908), 33 Bom., 107; 10 Bom. L. R., 1134; *Arnachellam Pillay v. Syasami Pillai*, 1 Mad. Dec. (S. D. A.), 154; In this case the kinsmen assented, but such consent was not considered

necessary in *Narayanasami v. Kuppusami* (1887), 11 Mad., 42, at p. 47, or in *Garulingaswami v. Ranalakshamma* (1894), 18 Mad., 53, at p. 58; *Mitakshara*, chap. 1, sec. xi, para. 9, see *Menu*, chap. ix., para 168.

³ It is the duty of shipping masters to give to all persons desirous of apprenticing boys to the sea-service, and duly authorized so to do by Act XIX of 1850, and also to masters and owners of ships requiring apprentices, such assistance as may be in their power for facilitating the making of such apprenticeships. Act I of 1859, sec. 4.

ship belonging to and trading from any port in the territories under the Government of India, which has been declared to be a registering port under Act X of 1841, to be employed in any such ship, the property of such person, commanded by a British subject, and, while so employed, to be taught the craft and duty of a seaman.

Agent of
master.

“*Section 7.*—The master or commander of any ship in which an apprentice bound to the sea-service shall be appointed to serve by the party to whom he is bound, shall be deemed the agent of such party for the purpose of this Act.

Form and
contents of
contract of
apprentice-
ship.

“*Section 8.*—Every contract of apprenticeship shall be in writing, according to the form given in Schedule A annexed to this Act, or to the like effect, which shall set forth the conditions agreed upon, particularly specifying the age of the apprentice, the term for which he is bound, and what he is to be taught.

Signatures to
contract.

“*Section 9.*—Every such contract shall be signed by the person to whom the apprentice is bound, and by the person by whom he is bound, and by the apprentice, when he is of the age of fourteen years or more, at the time of binding; but, when the apprentice is bound by the governors, directors, or managers of a public charity, the signature of two of them, or of their secretary or officer, shall be sufficient on behalf of the persons binding the apprentice.

Contract not
valid unless
executed as
prescribed and
deposited.

“*Section 10.*—No such contract shall be valid unless it be executed in the manner aforesaid, nor until it has been deposited in the office of the Chief Magistrate of the place or district where it has been executed, or, if the apprentice is bound to the sea-service, in the office of the person appointed under Act X of 1841 to make registry of ships at the port where the apprentice is to begin his service; and the person in whose office any such contract is deposited shall give to each of the parties a copy thereof, certified under his hand, which certified copies shall be received as evidence of the contract, without formal proof of the handwriting of the Magistrate or registering officer.

Copies to be
given to
parties.

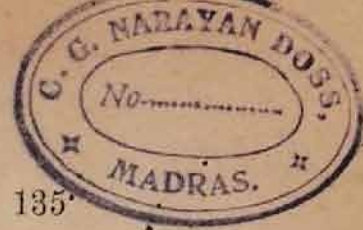
Alteration of
terms of ser-
vice and termi-
nation of
contract.

“*Section 11.*—The terms of service may be changed at any time during the apprenticeship, or the contract may be determined with the consent of both parties to the contract or their personal representatives, and with the consent of the apprentice, if he is above the age of fourteen years; provided that the changes agreed to or the termination of the contract shall be expressed in writing on the original contract, with the signature of the proper parties, according to section 9¹ of this Act; and the Magistrate or registering officer shall thereupon make under his hand corresponding endorsements on the office copies, which shall be brought to him at the same time for that purpose.

Assignment of
apprentice to
new master.

“*Section 12.*—The master of any apprentice bound under this Act may, with the consent of the person by whom he was bound, and with the consent of the apprentice, if he is above the age of fourteen years, assign such apprentice to any other person who is willing to take him for the residue of his apprenticeship, and subject to the conditions thereof; provided that such person shall, by endorsement under his own hand on the contract, declare his acceptance of such apprentice, and acknowledge himself bound by the agreements and covenants therein mentioned, to be

¹ Act XII of 1891, Sch. 2.



performed on the part of the master, and that the consent of the other parties aforesaid shall be expressed in writing on the same, and signed by them respectively; and every such assignment shall be certified on the office copies of the contract under the hand of the Magistrate or registering officer according to the form given in Schedule B annexed to this Act.

"Section 13.—Upon complaint made to any Magistrate in the said territories¹ by or on behalf of any apprentice bound under this Act, of refusal or neglect to provide for him, or to teach him according to the contract of apprenticeship, or of cruelty, or other ill-treatment by his master, or by the agent under whom he shall have been placed by his master, the Magistrate may summon the master or his agent, as the case may be, if he shall be within his jurisdiction, to appear before him at a reasonable time, to be stated on the summons, to answer the complaint;

Power of Magistrate in case of complaint by apprentice against master.

and at such time, whether the master or his agent be present or not (service of the summons being proved), may examine into the matter of the complaint; and, upon proof thereof, may cancel the contract of apprenticeship, and assess upon the offender, whether he shall be the master or his agent, a reasonable sum for behoof of the apprentice, not exceeding four times the amount of the premium paid upon the binding, or if no premium, or a less premium than Rs. 50 was paid, not exceeding Rs. 200;

and, if the offender shall not pay the sum so assessed, may levy the same by distress and sale of his goods and chattels; and if the offender shall not be the master, but his agent, by distress and sale of the goods and chattels of the master also.

"Section 14.—No contract of apprenticeship shall be cancelled, nor shall any master or his agent be liable to any criminal proceeding, on account of such moderate chastisement for misbehaviour, given to any apprentice by his master or the agent of his master, as may lawfully be given by a father to his child;² and the provision for enabling the contract of apprenticeship to be cancelled shall not bar any criminal proceeding against any master or his agent for an assault or other offence committed against his apprentice for which he would be liable to be punished, had it been against his child, whether or not any proceeding be taken for cancelling the contract of apprenticeship.

Power of master or his agent to chastise apprentice.

Liability of master or agent for assault, etc.

"Section 15.—Upon complaint made to any Magistrate by or on behalf of the master of any apprentice bound to him under this Act, of any ill-behaviour of such apprentice, or if such apprentice shall have absconded, the Magistrate may issue his warrant for apprehending such apprentice, and may hear and determine the complaint, and punish the offender by an order for keeping the offender, if a boy, in confinement in any debtor's prison or other suitable place, not being a criminal gaol, for any time not exceeding one month, of which one week may be in solitary confinement, during which time such allowance shall be made for his subsistence by the master or his agent as the Magistrate shall order; and, if the offender be a boy of not more than fourteen years of age, may order him to be privately whipped; or, if the offender be a girl, or in the case of any boy, the Magistrate deem any such punishment unfit, he may pass an order empowering the master of the apprentice or his agent to keep the offender in close confinement in his own house, or on board the vessel to which he

Power of Magistrate in case of complaint by master against apprentice.

¹ See sec. 5, *ante*, pp. 133, 134.

² *Ante*, p. 132.

belongs, upon bread and water, or such other plain food as may be given without injury to the health of the apprentice, for a period not exceeding one month.

Cancelment of contract for misconduct of apprentice.

“*Section 16.*—Upon complaint of wilful and repeated ill-behaviour on the part of the apprentice, and on the demand of the master, the Magistrate may order the contract of the apprenticeship to be cancelled, whether or not the charge is proved, but only with the consent of the apprentice and of his father or guardian, if the charge is not proved, and such cancelling shall be with or without refund of the whole or part of any premium that may have been paid to the master on binding such apprentice, as to the Magistrate seems fit on consideration of the case; and all sums so refunded shall be applied, under the direction of the Magistrate, for behoof of the apprentice.

Appropriation of sum recovered for apprentice on cancelment of contract.

“*Section 17.*—The Magistrate may order any sum received for behoof of the apprentice on cancelling the contract, to be either laid out in binding him to another master, or otherwise for his benefit, or to be paid to the person by whom any premium was paid when he was bound apprentice.

Limitation of complaint of master against apprentice; or apprentice against master.

“*Section 18.*—No Magistrate shall entertain a complaint on the part of a master against an apprentice under this Act, unless it be brought within one month after the cause of complaint arose; or, if the cause of complaint arose on board ship during a voyage, within one month after the arrival thereof at a port or place in the said territories; and no Magistrate shall entertain a complaint on the part of an apprentice against his master, or the agent of his master, under this Act, unless it be brought within three months after the cause of complaint arose; or, if the cause of complaint arose on board ship during a voyage, within three months after the arrival thereof at a port or place in the said territories.¹

Effect of death of master during apprenticeship.

“*Section 19.*—If the master of any apprentice shall die before the end of the apprenticeship, the contract of apprenticeship shall be thereby determined, and a proportionate part, corresponding to the unexpired portion of the term of any premium, which shall have been paid to such master on the binding of the apprentice to him, shall be returned by the executors or administrators out of the estate of the deceased to the person or persons who shall have paid the same; unless the executors or administrators of the deceased master shall continue the business in which such apprentice shall have been employed, and shall, within three months from the death of the late master, make offer in writing to keep the apprentice on the terms of the original contract; in which case the estate of the deceased shall be discharged from all liabilities on account of such premium.

Offer by representative of master to continue apprenticeship.

“*Section 20.*—If such offer to keep the apprentice shall be made as aforesaid, the same shall be fully expressed and certified by the executors or ² administrators on the original contract of apprenticeship, and also on the office copies thereof, by the Magistrate or registering officer; and the apprentice shall be bound to the executors or administrators so keeping him for the remaining term of his apprenticeship.

Offer to be certified on original contract copies.

Maintenance of apprentice whose master dies.

“*Section 21.*—Any apprentice bound under the Act, whose master shall die during the apprenticeship, shall be entitled to maintenance for three months, from and after the death of his master, out of the assets left by him; provided that during such three months such apprentice shall

¹ See sec. 5, *ante*, pp. 133, 134.

² Act XII of 1891, sch. 2.

continue to live with, and serve as an apprentice, the executors or administrators of such master, or such person as they shall appoint.

“Section 22.—The apprentice of any person against whom a commission of bankruptcy shall be issued, or who shall be adjudged to have committed an act of insolvency during the apprenticeship, shall be discharged from all obligation under the contract of apprenticeship; and, if any premium was paid on binding him as an apprentice, he or the person by whom he was bound shall be entitled to claim the amount thereof as a debt against the estate of the bankrupt or insolvent.

Effect of insolvency of master during apprenticeship.

“Section 23.—For the purpose of this Act all British subjects, wherever or of whatever parents born, as well as other persons in the territories under the Government of India, without the towns of Calcutta and Madras, and the town and island of Bombay, shall be amenable to the jurisdiction of the Courts and Magistrates of India.

Persons amenable to jurisdiction of Magistrate's Court.

“Section 24.—An appeal shall lie from any order passed by any Magistrate without the said towns and island to the Court of Session to which such Magistrate is subordinate, provided the appeal is made within one month from the date of the order.”

Appeal from orders of Mofussil Magistrates.

A parent may sue for compensation for the loss sustained by him in consequence of the death of his child by what amounts to an actionable wrong.¹

Compensation for death of child.

When his child is injured the parent can sue the person who has committed the wrong for damages for loss of service.²

Compensation for injury to child.

A guardian, whether of the person or property, is entitled to be reimbursed, or, if the property be in his possession, to reimburse himself, all sums properly expended by him on behalf of his ward for the realization, preservation, or benefit of the property or the protection and support of the ward.³ Where the guardian of the person has not also charge of the property, the guardian of the property must pay to the guardian of the person all sums properly expended by him.

Guardian entitled to necessary expenses.

As to his right to remuneration, see *ante*, p. 119.

¹ Act XIII of 1855. *Narayan Jetha v. The Municipal Commissioner of Bombay* (1891), 16 Bom., 254.

² There must be some evidence of service, although very slight evidence would usually be sufficient. It might sometimes be implied from the relationship. See Addison on Torts, 8th Edn., pp. 849, 850. The only reported case in India of an action by a father for damages for the seduction of his daughter is, as far as I am aware, that of *Ramlal v. Tularam* (1881), 4 All., 97, in which

the Judges differed as to whether such a suit would lie in India. It is, of course, not always desirable to introduce any fictions of English law into India, but where the father has suffered an actual wrong by the loss of his daughter, there is no reason why he should not recover damages for abduction or seduction. See *Dulari v. Vallabdas Pragji* (1888), 13 Bom., 126.

³ As to his right to be reimbursed for necessaries supplied, see Act IX of 1872, sec. 68, *ante*, pp. 15-19.

Right of survivorship among joint guardians.

On the death of one of two or more joint guardians, the guardianship continues to the survivor or survivors until a further appointment is made by the Court.¹

Control of Collector.

As to the control of a Collector appointed or declared by the Court to be guardian, see *post*, p. 150.

Cessation of authority of guardian.

The powers of a guardian of the person cease—²

(a) by his death,³ removal,⁴ or discharge;⁵

(b) by the Court of Wards assuming superintendence of the person of the ward;

(c) by the ward ceasing to be a minor;⁶

(d) in the case of a female ward,⁷ by her marriage to a husband who is not unfit⁸ to be guardian of her person or, if the guardian was appointed or declared by the Court, by her marriage to a husband who is not, in the opinion of the Court, so unfit; or,

(e) in the case of a ward whose father was unfit to be guardian of the person of the ward, by the father ceasing to be so or, if the father was deemed by the Court to be so unfit, by his ceasing to be so in the opinion of the Court.

¹ Act VIII of 1890, sec. 38.

² *Ibid.*, sec. 41 (1).

³ The rights do not survive to his representative: *Gangabai v. Khashabai* (1899), 23 Bom., 719; 1 Bom. L. R., 363.

⁴ *Ante*, pp. 101-104.

⁵ *Ante*, p. 104.

⁶ *i.e.* on attaining majority according to the Indian Majority Act (*ante*, pp. 6 to 10), Act VIII of 1890, sec.

4 (1).

⁷ The marriage of a male ward does not terminate the guardianship.

⁸ The word "unfit" is indefinite. Sec. 19, to which it apparently refers, deals with unfitness in the opinion of the Court. It will be very difficult, in a case where the Court's opinion as to the unfitness has not been required, to determine whether a guardian's powers have ceased or not.

CHAPTER XVII.

RIGHTS AND POWERS OF GUARDIANS OF PROPERTY.

A GUARDIAN of a minor's property is entitled to have possession of such property on behalf of his ward.¹ Right to possession of property.

He cannot, except he be seeking to recover it from a former guardian or his representative,² obtain any summary remedy, but must proceed by way of suit in the name of his ward.³

The guardian represents the minor, and notices which must be served in order to affect the minor's property, as, for instance, notices of foreclosure, should be served on the guardian of the minor's estate, if there be one.⁴ If there be no legal guardian, it is generally best to effect service upon the minor, and also upon the person in whose custody he is. Notices to minors.

Where the property of the minor is under the Court of Wards, notices must be served upon the guardian appointed by that Court.⁵

Subject to the restrictions on the powers of testamentary guardians and of guardians of property appointed or declared by the Court,⁶ a guardian of property may do all acts which are reasonable and proper for the realization, protection, and benefit of the property.⁷ Powers of a guardian of the property.

The powers of a guardian are not co-extensive with those of a full owner.⁸ He is a trustee with powers of management

¹ As to the right of the guardian to possession of property to which his ward succeeds, see Mad. Reg. III of 1802, sec. 16, para. 3. A guardian has no rights over property of which the ward is only a trustee. As to minor trustees, see *ante*, pp. 32, 33.

² Act VIII of 1890, sec. 41 (3), *post*, p. 183.

³ See *Somakka v. Ramiah* (1911), 36 Mad., 39.

⁴ *Ras Muni Dibiah v. Pran Kishen Das* (1848), 4 M. I. A., 392; 7 W. R. P. C., 66; *Khettermonee Dasse v. Kishenmohun Mitter* (1863), Marsh., 313; 2 Hay, 196; see *Dabce Pershad*

v. Man Khan (1870), 2 N.-W. P. H. C. Rep., 444. As to service of summons and notices in suits, see *post*, p. 269.

⁵ *Mekaperuma v. Collector of Salem* (1889), 12 Mad., 445.

⁶ *Post*, pp. 142-144.

⁷ Act VIII of 1890, sec. 27.

⁸ The powers of the guardian would not in any way exceed those which the minor would possess, if of full age, as, for instance, he could not transfer property which is by law incapable of being transferred; see *Doolichand v. Birj Bookun Lall Awasti* (1880), 6 C. L. R., 528; 10 C. L. R., 61; Act IV of 1882, sec. 6.

occasionally enlarged by necessity. When he has been appointed by the Court under Act VIII of 1890, his powers are limited by that Act.¹

Where a guardian is also an executor or administrator of the property he possesses all the powers of an executor or administrator.²

Ward bound
by acts of
guardian.

A guardian has no power to do anything to the prejudice of his ward.

Thus he cannot consent to a person holding himself out as owner of the ward's property.³

Conditions of
validity of
acts of
guardian.

All acts of a guardian strictly within his powers, and done in good faith,⁴ and such as the ward might, if of age, prudently do for himself,⁵ bind the ward and his estate.

The ward is entitled to take advantage of an act of his guardian on his behalf.

For instance, he may sue on a promissory note delivered to his guardian on behalf of his estate.⁶

All transactions which guardians enter into on behalf of their wards must secure to the latter some demonstrable advantage, or avert some obvious mischief in order to obtain recognition from the Court.⁷ They must show the strictest good faith, and must be based on actual necessity and advantage, and not on calculations of possible benefit.⁸

Under Mahomedan law the acts of a guardian will only bind the ward when there is urgent necessity or clear benefit to the ward.⁹

The following remarks made by Sir William Markby in his Lectures on Indian Law¹⁰ are well worthy of observation by persons dealing with guardians :—

¹ See *Babu Ram v. Said-un-nissa* (1913), 35 All., 499.

² See *Ganapathi Aiyar v. Siramalai Goundan* (1912), 36 Mad., 575.

³ *Dambar Singh v. Jawitri Kunwar* (1907), 29 All., 292.

⁴ *Hurro Chunder Chowdhry v. Bungsee Mohun Doss* (1869), 1 W. R. M. A., 16. The concurrence of co-sharers is some evidence of the propriety of the act: *Gireewur Singh v. Muddun Lall Doss* (1871), 16 W. R. C. R., 252; *Issur Chunder Rai v. Ragub Indernarain*, Ben. S. D. A., 1860, pp. 349, 611.

⁵ *Temmakal v. Subbammal* (1864),

2 Mad. H. C., 47.

⁶ *Gurumurti v. Sivayya* (1897), 21 Mad., 391.

⁷ *Dharmaji Vaman v. Gurrav Shrinivas* (1873), 10 Bom. H. C., 311; *Amirbibi v. Abdul Latif* (1901) 3 Bom. L. R., 658.

⁸ *Bodhmul v. Gouree Sunkur* (1866), 6 W. R. C. R., 16; *Bodhmul (Lalla) v. Gouree Sunkur (Lalla)* (1865), 4 W. R. C. R., 71.

⁹ *Thottoli Kotilan Aliyamma v. Kunhammed* (1910), 34 Mad., 527; see *post*, pp. 163-165.

¹⁰ P. 81.

“ He who deals with the representative of another must know that it is the duty of the representative to act in all things to the best of his ability for the benefit of his principal, and if the circumstances be such that a reasonable man ought to suspect that the representative was not so acting, he is bound to abstain dealing further with the representative, until the suspicion is removed. No one is at liberty to deal with a representative whose conduct he doubts. The party dealing with the representative is not the judge of what is or is not for the benefit of the principal, but he must cease to act as soon as he has reason to believe that the representative is acting improperly. This is a general principle of the law of representation, and applies as much to the certificate-holder representing a minor as to any other representative.”

Dealings with guardians.

Fraud, practised by, upon, or in collusion with the guardian, will invalidate a sale, or any other dealing affecting the property of a minor, which is otherwise unimpeachable.¹

Fraud.

A minor will not be allowed to obtain any advantage from a fraud or wrong committed by his guardian for his benefit, although he may have been innocent and ignorant thereof. Similarly a ward is not in any way responsible for, or bound by,² a fraud or wrongful act,³ practised by his guardian.

Fraud or wrong by guardian.

Where there may be a question as to whether the guardian is acting for himself or for his ward, if the act be for the benefit of the minor, and there be any indication that the guardian was acting for him in the matter, it will be presumed to have been done on his behalf, and if it be within the powers of the guardian, it will bind the ward.⁴

Question as to whether guardian acting for himself or for ward.

When he collects debts to a portion of which the minor is entitled, it will be presumed that he collected them on behalf of his ward.⁵

The powers of testamentary guardians and guardians appointed or declared by a Court in some respects differ from the powers of guardians who are not clothed with such authority.

Powers of testamentary guardians and guardians appointed by Court.

¹ *Bunseedhur (Lalla) v. Bindeseree Dutt Singh (Kooncur)* (1866), 10 M. I. A., 454; 1 Ind. Jur. N. S., 165; *Brojo Kanto Das v. Tufaan Das* (1899), 4 C. W. N., 287 (an entry made fraudulently in a Record of Rights).

² *Pogose v. Delhi and London Bank* (1884), 10 Calc., 951.

³ *Sonu v. Dhondu* (1904), 28 Bom., 330; 6 Bom. L. R., 122.

⁴ *Watson v. Sham Lal Mitter* (1887), 14 I. A., 178; 15 Calc., 8;

Hemanginee Dossee v. Jogendro Narain Roy (1869), 12 W. R. C. R., 236; *Hunooman Pershad Pandey v. Babooee Munraj Koonweree (Mussumat)* (1857), 6 M. I. A., 393, at p. 412; 18 W. R. C. R., note to p. 81. See *Succaram Morarji Shetay v. Kalidas Kalianji* (1894), 18 Bom., 631; *Bachcha v. Gajadhar Lal* (1905), 28 All., 44.

⁵ *Vaidyanatha Aiyar v. Aiyasami Aiyar* (1908), 32 Mad., 191.

Powers of
testamentary
guardian.

Where a guardian has been appointed by will or other instrument, his power to mortgage or charge, or transfer by sale, gift, exchange, or otherwise, immovable property belonging to his ward, is subject to any restriction which may be imposed by the instrument,¹ unless he has been declared guardian under the Guardians and Wards Act,² and the Court which made the declaration permits him by an order in writing,³ notwithstanding the restriction, to dispose of⁴ any immovable property specified in the order in a manner permitted by the order.⁵

Care to be
exercised in
granting
permission.

As in the case of a guardian appointed by the Court,⁶ this permission should not be given except in the case of urgent necessity and for the clear benefit of the ward. It should only be given on the most careful inquiry, and on notice to such persons as would be likely to protect the interests of the ward as against his guardian.

No order should be made except upon the strictest evidence, tested by such materials as may be available to the Court, and after the Court has inquired into the circumstances of the case and determined whether as a matter of law and prudence it is right that any proposed sale or mortgage should take place.⁷

Conditions.

The Court may attach to the permission any reasonable conditions; such, for instance, as those mentioned in sec. 31 (3) of Act VIII of 1890.⁸

Appeal.

An order refusing permission is appealable to the High Court.⁹

An order granting permission is not so appealable. This is an additional reason for requiring the greatest care in the making of the order.

¹ In the absence of such restriction his powers over the property of every description are those of any other guardian not appointed by the Court. His powers may by the instrument be extended beyond the ordinary powers of a guardian, provided that such extension be not in excess of the powers of the person appointing the guardian. Although the Guardians and Wards Act recognizes the appointment of testamentary guardians, it does not extend their powers.

² Act VIII of 1890, *ante*, chap. xi.

³ This order may be made at the time of the declaration or at any time thereafter.

⁴ This includes a mortgage or

charge, or a transfer by sale, gift, exchange or otherwise, or a lease for a term extending beyond the date, on which the ward will cease to be a minor.

⁵ Act VIII of 1890, sec. 28.

⁶ *Post*, p. 144.

⁷ *Per* Garth, C.J., in *Sikher Chand v. Dulputty Singh* (1879), 5 Cal., 363, at p. 381; s.c., *sub nomine Rajah Lall v. Delputty Singh*, 5 C. L. R., 374, at p. 401, approved of *In the matter of Shrish Chunder Mookhopadhyaya* (1880), 6 Cal., 161. As to the contents of the petition, see *post*, pp. 143, 144.

⁸ *Post*, pp. 144, 145.

⁹ Act VIII of 1890, sec. 47.

Where a person other than a Collector,¹ or than a guardian appointed by will or other instrument,² has been appointed or declared by the Court to be guardian of the property of a ward,³ he cannot,⁴ without the previous permission of the Court,—

Limitation of powers of guardian of property appointed or declared by the Courts.

- (a) mortgage or charge, or transfer by sale, gift,⁵ exchange or otherwise, any part of the immovable property⁶ of his ward, or
- (b) lease any part of that property for a term exceeding five years or for any term extending more than one year beyond the date on which the ward will cease to be a minor.

Even if the land has been attached and the Court has under order 21, rule 83, of the Civil Procedure Code (V of 1908) given leave to sell, leave must be obtained under sec. 29 of the Guardians and Wards Act, 1890.⁷

When a guardian appointed by the Court has obtained such sanction, a contract made by him can be enforced.⁸

It follows that a guardian appointed by the Court can lease his ward's property for a term not exceeding five years, provided such term expires within the year after the ward attains majority.

Leases.

The petition for permission should contain all the materials reasonably required to enable the Court to decide the question.⁹

Contents of petition.

¹ Except in sec. 23 (*post*, p. 150), the Act is silent as to the powers of the Collector.

² See Act VIII of 1890, sec. 28, *ante*, p. 142.

³ Even although the order may not have been formally drawn up: see *Harendra Narain Singh Chowdhry v. Moran* (1887), 15 Cal., 40.

⁴ Act VIII of 1890, sec. 29. This and the other provisions of Act VIII of 1890 apply to guardians appointed by Civil Courts under the Acts repealed by the Guardians and Wards Act (Act VIII of 1890), sec. 51. As to the powers of a certificate-holder before Act VIII of 1890 was passed, see Act XL of 1858, sec. 18; Act XX of 1864, sec. 18. *Dattaram v. Gangaram* (1898), 23 Bom., 287; *Dattaram v. Vinayak* (1903), 28 Bom., 181; 5 Bom. L. R., 916.

⁵ The cases in which the Court would sanction a gift by a guardian

would rarely occur. There is no reported case on the subject. A post-nuptial settlement might be a proper case. A guardian cannot make a gift of any portion of the ward's property (*post*, p. 176). As to gifts of income of property under the superintendence of the Courts of Wards of Madras and the United Provinces, see *post*, pp. 373, 374, 404.

⁶ His powers over the movable property of his ward are the same as those of other guardians: see *Ranmal Singji (Maharana Shri) v. Vadilal Vakhatchand* (1894), 20 Bom., 61, at p. 71.

⁷ *Sarju v. District Judge of Benares* (1909), 31 All., 378.

⁸ *Babu Ram v. Said-un-nissa* (1913), 35 All., 499.

⁹ *In the matter of Shrish Chunder Mookhopadhya* (1880), 6 Calc., 161, at p. 162.

Rule 442 of the Madras High Court provides that the application shall state concisely the substance of the order prayed for, and shall be supported by the affidavit of some disinterested and independent person, stating what, in his opinion, is the value of the property proposed to be dealt with, and the best manner of disposing thereof in the interests of the minor, and also by the affidavit of some person acquainted with the circumstances of the minor, showing the necessity or advantage of the said disposition.

Care in making order.

The same care should be exercised in giving this permission as in the case of a permission to a testamentary guardian.¹ Permission to the guardian to do any of these acts cannot be granted by the Court except in case of necessity or for an evident advantage to the ward.²

Order permitting transfer, etc.

The order granting the permission must recite the necessity or advantage, as the case may be, describe the property with respect to which the act permitted is to be done, and specify such conditions, if any, as the Court may see fit to attach to the permission.³

Where the order gives sanction to mortgage it should specify the maximum rate of interest.⁴ Where it gives sanction to lease it should specify the term of the lease, and the rate of rent and the amount of the premium (if any). Where it gives sanction to sell it should specify the amount for which a sale should be allowed. These details should all be carefully investigated by the Court, and the Court should ascertain that the minor is obtaining the greatest possible advantage with regard to each of them out of the transaction.

The order must be recorded, dated, and signed by the Judge of the Court with his own hand, or, when from any cause he is prevented from recording the order with his own hand, must be taken down in writing from his dictation and be dated and signed by him.⁵

The Court may in its discretion attach to the permission the following among other conditions, namely :—

- (a) that a sale shall not be completed without the sanction of the Court ;
- (b) that a sale shall be made to the highest bidder by public auction, before the Court or some person specially appointed by the Court for that purpose, at a time and place to be specified by the Court, after such proclamation of the intended sale as the

¹ *Ante*, p. 142.

² Act VIII of 1890, sec. 31 (1).

³ *Ibid.*, sec. 31 (2).

⁴ *Thakur Prasad v. Gauripat Rai* (1908), 30 All., 188. Where no rate is

mentioned, it will be taken that a reasonable rate was sanctioned : *Ibid.* ; *Gungapershad Sahu v. Maharani Bibi* (1884), 12 L. A., 47 ; 11 Cal., 379.

⁵ Act VIII of 1890, sec. 31 (2).

Court, subject to any rules made under this Act by the High Court, directs ;

(c) that a lease shall not be made in consideration of a premium or shall be made for such term of years and subject to such rents and covenants as the Court directs ;

(d) that the whole or any part of the proceeds of the act permitted shall be paid into the Court by the guardian, to be disbursed therefrom or to be invested by the Court on prescribed securities or to be otherwise disposed of as the Court directs.¹

Before granting permission to a guardian the Court may cause notice of the application for the permission to be given to any relative or friend of the ward who should, in its opinion, receive notice thereof, and shall hear and record the statement of any person² who appears in opposition to the application.³

Rules 443 and 444 of the Madras High Court provide for the sale being by auction, and for the payment of the proceeds into Court, unless the Court should otherwise order.

An order refusing permission is appealable to the High Appeal Court.⁴

An innocent purchaser who takes under the order of the Court made, in the case of a testamentary guardian, or of a guardian appointed by the Court, is not bound to look behind that order.⁵

Duty of purchaser at sale under permission.

This is an additional reason for the exercise of the greatest care in making orders of this description.

Although no period is fixed within which an order for permission to transfer can be carried into effect, the order to have any effect must be acted upon within a reasonable time.⁶

¹ Act VIII of 1890, sec. 31 (3).

² The expression "any person" is not limited by the previous words "relative or friend": *Venugopal Bahadur (Rajah) v. Kadirveluswami Naicker* (1911), 35 Mad., 743.

³ Act VIII of 1890, sec. 31 (4): see *ante*, p. 142.

⁴ *Ibid.*, sec. 47. An order granting permission is not appealable, and cannot be contested by suit or otherwise: Act VIII of 1890, sec. 48. See *Bhiva v. Keshava* (1899), 1 Bom. L. R., 1. It is, therefore, the more

necessary to exercise caution in granting permission.

⁵ *Gungapershad Sahu v. Maharani Bibi* (1884), 12 I. A., 47, at p. 50; 11 Calc., 379, at pp. 383, 384; *Sikher Chund v. Dulputty Singh* (1879), 5 Calc., 363, at p. 381; s.c., *sub nomine Rajah Lall v. Delputty Singh*, 5 C. L. R., 374, at p. 401.

⁶ In *Shami Nath Sahi v. Lalji Chaube* (1913), 35 All., 150, the Court declined to give effect to a sale made in 1906, by virtue of permission given in 1901.

Setting aside order.

An order obtained by fraud can be set aside.¹

Guardian does not retain powers he had before appointment.

A guardian appointed by the Court derives his powers from the Act, and by his appointment loses such powers as he might before have possessed, but which the Act denies to guardians appointed under it.²

Therefore, a manager of a joint family governed by the Bengal school of law, who has been appointed guardian of minor members, cannot, without the sanction of the Court, even in case of necessity, sell or charge the property of his ward.³

Mitakshara family.

A guardian appointed by the Court under Act VIII of 1890 has not, as such, any power over the interest of his ward in property belonging to a joint family governed by the Mitakshara school of Hindu law.⁴ If he happens to be the manager of the family property he retains his powers as such manager.⁵

In matters in which the Act is silent a guardian appointed by the Court would apparently possess power similar to a guardian not so appointed.

Joint family.

A manager of a joint Hindu family, whether he be a guardian or not, may do all that is necessary for the material existence of the undivided family, or for the preservation of the family property.⁶

Voidability of transfers made without permission.

Where a testamentary guardian or a guardian appointed by the Court disposes of immovable property without being invested with the power so to do, such disposal may be avoided by any other person affected thereby, *e.g.*, by the ward or his assignee or by the transferee.⁷

¹ As to the law in this respect before the passing of Act VIII of 1890, see *Sikher Chund v. Dulputty Singh* (1879), 5 Calc., 363; *s.c.*, *sub nomine Rajah Lall v. Delputty Singh*, 5 C. L. R., 374.

² Cf. *Ganesha Row v. Tuljaram Row* (1913), 40 I. A., 132; 37 Mad., 295; 17 C. W. N., 765; 15 Bom. L. R., 626.

³ See *Shurrut Chunder v. Rajkissen Mookerjee* (1875), 15 B. L. R., 350; 24 W. R. C. R., 46. In *Tejpal v. Ganga* (1902), 25 All., 59, following *Girraj Bakhsh v. Hamid Ali (Kazi)* (1886), 9 All., 340 (a case under Act XL of 1858), it was held that there being no sanction, the guardian was relegated to the powers he would have had, if he had not been appointed by the Court. The High Court of Bengal took a different view in

Bhupendro Narayan Dutt v. Nemye Chand Mondul (1888), 15 Calc., 627, at p. 636, and *Shurrut Chunder v. Rajkissen Mookerjee* (1875), 14 B. L. R., 350; 24 W. R. C. R., 46. It is submitted that the express terms of Act VIII of 1890, sec. 29, make this question clear. See *Sinaya Pillai v. Munisami* (1899), 22 Mad., 289; *Anpurnabai v. Durgapa Mahalapa Naik* (1894), 30 Bom., 150.

⁴ *Ante*, pp. 95, 96.

⁵ *Gharib-ul-lah v. Khalak Singh* (1903), 30 I. A., 165, at p. 170; 25 All., 407, at p. 416; 7 C. W. N., 681, at p. 687; 5 Bom. L. R., 478; and cases cited *ante*, p. 95, note 6.

⁶ *Ramlal Thakursidas v. Lakmi-chand Muniram* (1861), 1 Bom., H. C. Rep., App. li.

⁷ Act VIII of 1890, sec. 30. As to what amounts to repudiation, see

The disposal may be avoided even if the purchaser, mortgagee, or lessee has acted *bonâ fide*, and paid a fair price for the property; but in such a case, where possession is ordered to be restored with mesne profits, it should be made contingent on repayment to the purchaser, mortgagee, or lessee of so much of the purchase-money as has been expended, for the benefit of the minor or his estate, with interest at a reasonable rate.¹

Although it is voidable a guardian may be compelled to register a transfer made without sanction.²

An unauthorized lease does not, if it be repudiated by the ward, operate even to the extent that a guardian can grant a lease without permission.³

Where a mortgage was a proper one, and has been enforced by a decree in a suit, in which the minor was properly represented, the irregularity as to the mortgage having been made without the permission of the Court will not prevail against a purchaser not a party to the suit and having no notice of the defect.⁴ Where a party to the suit is a purchaser, or where the purchaser has notice of circumstances which should put him upon enquiry, the decree will not protect such purchaser or his vendee,⁵ except in the case where the legality of the transfer has been questioned and determined.

Unauthorized transfer confirmed by decree.

Where the decree obtained has not been executed, the Court may restrain its execution until such steps (if any) as may be necessary are taken to set it aside, or may set it aside in properly constituted proceedings.⁶

The Court has no power to set aside summarily an

Avoidance of unauthorized transfer.

post, p. 202; *Dattaram v. Gangaram* (1898), 23 Bom., 287. It cannot be avoided by the guardian who made the transfer (see *Ram Doolary Kooer (Mussamul) v. Thacoor Roy* (1878), 2 C. L. R., 547), but it can be avoided either by the ward on attaining majority or during his minority by some other guardian on his behalf: *Sheo Pershad Jha v. Gungaram Jha* (1866), 5 W. R. C. R., 221. It cannot be enforced against the ward during his minority. A mortgage made by a certificate holder under Act XL of 1858 without sanction was void. Act VIII of 1890 has rendered transfers made before that Act came into force voidable only: *Hurro Prosad (Lala) v. Basaruth Ali* (1898), 25 Calc., 909.

¹ *Tejpal v. Ganga* (1902), 25 All., 59; *Sinaya Pillai v. Munisami Ayyan* (1899), 22 Mad., 289; *Girraj Bakhsh v. Hamid Ali (Kazi)* (1886), 9 All., 340; *Hem Chandra Sarkar v. Lalit*

Mohan Kar (1912), 16 C. W. N., 715. See *post*, pp. 204, 205.

² *Raj Lakhi Ghose v. Debendra Chundra Mojumdar* (1897), 24 Calc., 668; 1 C. W. N., 444. Act XVI of 1908 (Registration).

³ *Harendranarain Singh Chowdhry v. Moran* (1887), 15 Calc., 40. See *Mahomed Reza v. The Collector of Chittagong* (1871), 15 W. R. C. R., 116.

⁴ *Alfooonissa v. Goluck Chunder Sen* (1874), 15 B. L. R., note to p. 353; 22 W. R. C. R., 77, followed in *Tilkoer v. Anund Kishore (Roy)* (1882), 10 C. L. R., 547. As to the effect of decrees against minors, see *post*, chap. xxvii.

⁵ *Debi Dutt Sahoo v. Subodra* (1876), 2 Calc., 283; 25 W. R. C. R., 449; *Jungee Lall v. Shamlall Misser* (1873), 20 W. R. C. R., 120.

⁶ See *Buchraj Ram v. Ramkishan Singh* (1882), 11 C. L. R., 345. See *post*, chap. xxvii.

unsanctioned dealing with the minor's property. It can only be avoided in the same way as any other unauthorized act of the guardian.¹

As to applications for the settlement of family estates in Bengal under the Bengal Settled Estates Act, 1904, see *ante*, p. 26.

Variation of powers of guardian of property appointed or declared by the Court.

Where a guardian of the property of a ward has been appointed or declared by the Court, and such guardian is not the Collector, the Court may, from time to time, by order, define, restrict, or extend his powers with respect to the property of the ward in such manner and to such extent as it may consider to be for the advantage of the ward and consistent with the law to which the ward is subject.²

Appeal.

An appeal lies to the High Court from an order defining, restricting, or extending the powers of a guardian.³

Right of guardian to apply to the Court for opinion in management of property of ward.

A guardian appointed or declared by the Court may apply by petition to the Court which appointed or declared him for its opinion, advice, or direction on any present question respecting the management or administration of the property of his ward.⁴

If the Court considers the question to be proper for summary disposal, it shall cause a copy of the petition to be served on, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit.⁵

A guardian stating in good faith the facts in the petition, and acting upon the opinion, advice, or direction given by the Court, is deemed, so far as regards his own responsibility, to have performed his duty as guardian in the subject-matter of the application.⁶

Powers of High Courts over guardians appointed by them.

The High Courts can at any time regulate the conduct or proceedings of guardians appointed by them under the powers contained in their Charters,⁷ and may by order from time to time limit or increase the powers of such guardians.

Except by appointing guardians, the High Courts cannot summarily⁸

¹ *Mukrumunnissa v. Abdool Jubbar* (1872), 17 W. R. C. R., 171. See *post*, chap. xxi, as to ratification and avoidance of acts of guardians.

² Act VIII of 1890, sec. 32.

³ *Ibid.*, sec. 47 (6), but no appeal lies from an order of refusal.

⁴ *Ibid.*, sec. 33 (1).

⁵ Act VIII of 1890, sec. 33 (2).

⁶ *Ibid.*, sec. 33 (3).

⁷ *Ante*, chap. xiv.

⁸ A High Court would interfere in a properly framed suit against a guardian who is mismanaging his ward's estate.

interfere with the dealings of natural or testamentary guardians with the property entrusted to their care.¹

A guardian appointed by a High Court under the powers contained in its Letters Patent would apparently have no power to sell or charge the property of his ward without the sanction of the Court appointing him,² even although he may before his appointment have possessed such power.³

Powers of guardians appointed by High Courts.

He would be wise to apply to the Court to sanction any dealing with the property or expenditure beyond what is usual in the ordinary course of management.⁴

The powers of the District Courts and of the High Courts under the Guardians and Wards Act⁵ to regulate the conduct and proceedings of guardians are to be found in sec. 43 of that Act, which is as follows :—

“(1) The Court may, on the application of any person interested, or of its own motion, make an order regulating the conduct or proceedings of any guardian appointed or declared by the Court.

Orders for regulating conduct or proceedings of guardians and enforcement of those orders.

“(2) Where there are more guardians⁶ than one of a ward, and they are unable to agree upon a question affecting his welfare, any of them may apply to the Court for its direction, and the Court may make such order respecting the matter in difference as it thinks fit.

“(3) Except where it appears that the object of making an order under sub-sec. (1) or sub-sec. (2) would be defeated by the delay, the Court shall, before making the order, direct notice of the application therefor or of the intention of the Court to make it, as the case may be, to be given, in a case under sub-sec. (1), to the guardian, or, in a case under sub-sec. (2), to the guardian who has not made the application.

¹ As to their summary powers with regard to the person of a minor, see *post*, chap. xx.

² *Re Jagannath Ramji* (1893), 19 Bom., 96. For an instance of such sanction, see *Re Manilal Hurgovan* (1900), 25 Bom., 353; 3 Bom. L. R., 411. The Court in ordering a sale or charge will permit the minor's name to be used by the Registrar, or such other person as it directs or permits to sell.

³ See *ante*, p. 146, note 3.

⁴ As, for instance, where it is desirable to let the ward's property on lease, or where a large sum has to be spent for a marriage or other ceremony.

⁵ Act VIII of 1890.

⁶ This may possibly apply to all classes of guardians. A single guardian who has not been appointed or declared a guardian by the Court cannot apply to the Court for advice or directions.

"(4) In case of disobedience to an order made under sub-sec. (1) or sub-sec. (2), the order may be enforced in the same manner as an injunction granted under sec. 492 or sec. 493 of the Code of Civil Procedure,¹ in a case under sub-sec. (1), as if the ward were the plaintiff and the guardian were the defendant, or, in a case under sub-sec. (2), as if the guardian who made the application were the plaintiff and the other guardian were the defendant.²

"(5) Except in a case under sub-sec. (2), nothing in this section shall apply to a Collector who is, as such, a guardian."

Appeal.

An order under sec. 43, regulating the conduct or proceedings of a guardian or settling a matter in difference between joint guardians or enforcing the order, is appealable to the High Court.³

Powers of testamentary and Court appointed guardians apart from restriction.

A testamentary guardian, except so far as his powers may be restricted by the instrument which imposes the trust upon him, and a guardian appointed by the Court, except so far as his powers are restricted by sec. 29 of the Guardians and Wards Act,⁴ or by the Court appointing him, have all the powers of other guardians.

Control of Collector as guardian.

A Collector appointed or declared by the Court to be guardian is, in all matters connected with the guardianship of his ward, subject to the control of the Local Government or of such authority as that Government, by notification in the official Gazette, appoints in this behalf.⁵

Collector to follow rules of Court of Wards.

In Bengal⁶ and the United Provinces⁷ it has been notified that a Collector so appointed shall, in all matters connected with the guardianship of his wards, be subject to the control of the Board of Revenue as Court of Wards. The Board in Bengal has directed that all rules prescribed for the management of ward's estates⁸ be followed in the management of estates by a Collector under the Guardians and Wards Act, as far as they are applicable, and except as otherwise provided in the Act.⁹

In the Bombay Presidency the Collectors are in these matters subject

¹ This is now Act V of 1908, order 39, rules 1, 2.

² This does not apply where the order was made without jurisdiction as where the application for the appointment of a guardian was involuntary, *Sahodra Koor v. Dhajadhari Gosain* (1911), 16 C. W. N., 447.

³ Act VIII of 1890, sec. 47.

⁴ *Ante*, p. 143.

⁵ Act VIII of 1890, sec. 23.

⁶ *Calcutta Gazette* of the 8th July, 1881, p. 668. See *ante*, p. 76.

⁷ G. O. No. $\frac{1903}{1-26C}$, dated 12th April, 1901.

⁸ See chap. xxxii, *post*.

⁹ Court of Wards Rules, Part II, rule 5.

to the control of the Commissioner in Sind, and the Commissioners of the Northern, Central and Southern Divisions.¹

We now come to consider the powers of a guardian who owes his trust neither to an appointment by a Court nor to the will of a person entitled to make an appointment, to charge or dispose of property belonging to his ward.

Powers of natural guardian.

Where a guardian has been appointed by the Court, no one else—be he natural or testamentary guardian, or manager—has any power to deal with property which under the Guardians and Wards Act is vested in the guardian.²

Although the appointment of a guardian by the Court supersedes the powers of natural and testamentary guardians,³ the powers of a natural guardian in the absence of such appointment are unaffected by the restrictions which the Guardians and Wards Act⁴ places upon the powers of guardians appointed by the Court.⁵ The validity of his acts must be determined by the general principles which govern the relations of a minor to the manager of his estate,⁶ or, in the words of the Guardians and Wards Act,⁷ he may do all acts which are reasonable and proper for the realization, protection, or benefit of the property.

Unaffected by restriction in Guardians and Wards Act.

¹ G. N. No. 1246, dated 16th February, 1891. The Talukdari Settlement officer is subject to the control of the Commissioner of the Northern Division; G. N. No. 4367A, dated 11th June, 1895.

² *Arumugam Chetti v. Duraisinga Tevar* (1911), 37 Mad., 38. See *Nathu Piraji Marvadi v. Balwantrao* (1903), 27 Bom., 390; 5 Bom. L. R., 301.

³ *Ante*, p. 86.

⁴ Act VIII of 1890, sec. 29, *ante*, p. 143.

⁵ *Ramchunder Chuckerbutty v. Brojonath Mozumdar* (1879), 4 Calc., 929; 4 C. L. R., 247, the effect of which was to confirm the decision in *Soonder Narain v. Bennud Ram* (1878), 4 Calc., 76, and *Shooghury Koer v. Boshisht Narain Singh* (1867), 8 W. R. C. R., 331, and to overrule *Abhassi Begum v. Rajroop Koonwar (Moharancee)* (1878), 4 Calc., 33; 2 C. L. R., 249; *Tusneef Hossein v. Sookhoo (Bibee)* (1870), 14 W. R. C. R., 453; and *Khetternath Dass v.*

Ram Jadoo Bhattacharjee (1875), 24 W. R. C. R., 49. See also *Boodhmull (Lalla) v. Gowree Sunkur (Lalla)* (1865), 4 W. R. C. R., 71. There are similar decisions of the High Courts of Bombay and of the North-Western Provinces: *Honapa v. Mhalpai* (1890), 15 Bom., 259; *Manishankar Pranjivan v. Muli (Bai)* (1888), 12 Bom., 686; *Amrit (Bai) v. Manik (Bai)* (1875), 12 Bom. H. C. Rep., 79; *Shivji Husam v. Datu Marji Khoja* (1874), 12 Bom., H. C. Rep., 281; *Roshan Singh v. Har Kishan Singh* (1881), 3 All., 535; *Heit Singh v. Thakoor Singh* (1872), 4 N.-W. P. H. C. Rep., 57; *Seetul Pershad (Lalla) v. Chand Khan* (1870), 2 N.-W. P. H. C. Rep., 428. *Contra*, *Kesar (Bai) v. Ganga (Bai)* (1871), 8 Bom. H. C. Rep., A. C. J., 31.

⁶ Markby's Lectures on Indian Law, p. 81.

⁷ Act VII of 1890, sec. 27, *ante*, p. 139.

He has no power to act in a manner derogatory to the interests of the ward.

Thus he cannot consent to a person holding himself out as owner of the ward's property.¹

The powers of a *de facto* manager of a Hindu minor's property have been the subject of considerable discussion in the Courts of law of British India.

Hindu law as to sale or mortgage of minor's property.

The circumstances under which the manager of the estate of a Hindu minor is justified in selling or mortgaging his ward's property, whether movable or immovable,² were clearly defined by the Judicial Committee of the Privy Council in the leading case of *Hunoemān Persaud Panday v. Munraj Koonweree (Mussamut Babooce)*,³ the principles of which decision apply to all guardians of Hindu minors,⁴ other than those who are appointed by a Court of law, or whose powers are defined by the testamentary instrument appointing them.

Under Hindu law *de facto* manager has same power as *de jure* manager.

The first rule laid down in that case was that, under the Hindu law, the right of a *bonâ fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge, had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title.⁵

A sale, however, by a person who does not in any way represent the minor, or is acting adversely to him, may be avoided by the minor on that ground only.⁶ It has been held that acquiescence by a guardian in the act of a person who had no authority would, if within the powers of the guardian, bind the ward.⁷

¹ See *Abdullah Khan v. Bundi (Musammal)* (1911), 34 All., 22; *Dalibai v. Gopibai* (1902), 26 Bom., 433; 4 Bom. L. R., 105; *Dambar Singh v. Jawitri Kunwar* (1907), 29 All., 292; Transfer of Property Act (IV of 1882), sec. 41.

² *Rahmal Singji (Maharana Shri) v. Vadilal Vakhatchand* (1894), 20 Bom., 61.

³ (1856), 6 M. I. A., 393; 18 W. R. C. R., note to p. 81.

⁴ *Radha Kishore Mookerjee v. Mirtoonjoy Gow* (1867), 7 W. R. C. R., 23; *Dalpatsing v. Nanabhai* (1864),

2 Bom. H. C. Rep., 306; *Succaram Morarji Shetay v. Kalidas Kabanji* (1894), 18 Bom., 631; *Murari v. Tayana* (1895), 20 Bom., 286.

⁵ See also *Gunga Pershad v. Phool Singh* (1868), 10 W. R. C. R., 106; 10 B. L. R., note to p. 368.

⁶ See *Balwant Singh (Raja) v. Clancy* (1912), 39 I. A. 109; 34 All., 296; 16 C. W. N., 577; 14 Bom. L. R., 422; *Arumugam Chetti v. Duraisingha Tevar* (1911), 37 Mad., 38.

⁷ *Mahableshtar Krishnappa v. Ramchandra Mangesh* (1913), 38 Bom., 94; 15 Bom. L. R., 882.

The joint family system prevalent amongst Hindus seems to be one of the reasons for this distinction between the Hindu law and the other systems of law administered in British India. The *kurta* (manager) of an undivided family is in the position of guardian of the shares of the minor members of the family, and can bind their shares by sale or mortgage in case of necessity, although the minors may have other relations entitled to the guardianship of their estates.¹

Reasons for this distinction.

In one case,² where the father of the minors was alive, and had not consented to the sale of their property, the High Court upheld a sale by the brother of the minors on the authority of *Hunooman Persaud Panday's* case, and on the ground that the brother was *de facto* acting in the matter as the guardian of his brothers.

No distinction can be drawn between the power to charge and the power to sell. The need which would justify the exercise of the one power would justify the exercise of the other.³

Manager can either sell or charge.

With reference to the power of the manager or guardian of the estate of a minor heir, to charge such estate, the Privy Council, in *Hunooman Persaud Panday's* case,⁴ said: "The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But, of course, if that danger arises, or has arisen, from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender in this case, unless he is shown to have acted *malâ*

Power of manager under Hindu law to charge estate of minor.

¹ *Ram Charan v. Mihin Lal* (1914), L. R., note to p. 368.

36 All., 158. See *Gharib-ul-lah v. Khalak Singh* (1903), 30 I. A., 165; 25 All., 407; 7 C. W. N., 681; 5 Bom. L. R., 478.

³ *Mohanund Mondul v. Nafur Mondul* (1899), 26 Calc., 820; 3 C. W. N., 770.

⁴ (1856) 6 M. I. A., 393, at p. 423;

² *Gunga Pershad v. Phool Singh* (1856), 10 W. R. C. R., 106; 10 B. 18 W. R. C. R., note to p. 81.

vide, will not be affected, though it be shown that with better management the estate might have been kept free from debt."

Benefit apart
from necessity.

This would seem to show that the manager can charge or alienate the minor's estate on the ground of benefit in addition to that of necessity. There have been, since the decision of the Privy Council in *Hunooman Persaud Panday's* case, a very large number of decisions of the High Courts in India applying the principles laid down in that case, but, except the recent case of *Krishna Chandra Choudhury v. Ratan Ram Pal* (1915), 20 C. W. N. 645, so far as the writer is aware, there is not any case where the sale of a minor's property has been upheld except on the ground of its being justified by the necessities of the minor or of his estate.¹ Apart from necessity, it is not easy to say what is for the benefit of the minor's estate. It is clearly not intended that this power should authorize the guardian to sell or charge the inheritance for the purpose only of increasing the immediate income of the minor or of his estate,² or for developing the estate.³

What neces-
sity will
justify sale or
incumbrance.
For main-
tenance.

The next question is what necessity will, under the Hindu law, justify the sale or incumbrance of a minor's property. To preserve the minor and his family from want and to provide for their maintenance and support,⁴ or for the minor's necessary advancement in life to enable him to earn a livelihood, the guardian is justified in selling or charging the property; but

¹ Perhaps the right way of reading the *dictum* in *Hunooman Persaud Panday's* case is in the words of the Bengal Sudder Court in the case of *Gooropersaud Jena v. Muddunmohun Soor*, Ben. S. D. A. Rep., 1856, 980, which was decided shortly after *Hunooman Persaud Panday's* case, but without reference to that case, and probably before the Privy Council judgment could have reached Calcutta: "It is enough for us now to say that we hold that a mortgage entered into by the mother of a minor of a portion of the minor's property for the benefit of the minor, is valid under Hindu law, that benefit being the causing of, or creating, a necessity which has arisen." Further on, in the same judgment, the Court said: "The benefit of the minor as creating the necessity is the test by which the legality of the transaction must be tried; but setting authority aside, and looking only to the reason of the thing, it seems to us that the rule in such cases as that now before us is, that a party filling a fiduciary character like that of a guardian is

authorized to perform any act which is manifestly for the infant's benefit." In this case, however, the land was mortgaged to prevent a sale for arrears of Government revenue which amounted to a necessity, and therefore, the actual decision in the case is not of much assistance on this point.

² See *Radha Pershad Singh v. Talook Raj Kooer (Mussamut)* (1873), 20 W. R. C. R., 38; *Kaihur Singh v. Roop Singh* (1871), 3 N.-W. P. H. C. Rep., 4.

³ Cf. *Ganap v. Subbi* (1908), 32 Bom. 577; 10 Bom. L. R., 927. In *Ratnam v. Govindarajulu* (1877), 2 Mad., 339, the Court upheld a loan which was obtained by a father for the purpose of paying debts incurred for improvements. The father was justified in incurring the debt under Hindu law.

⁴ *Gunpullall (Lalla) v. Toorun Koonwar (Mussamut)* (1871), 16 W. R. C. R., 52; *Soorjoopershad v. Krishan Pertab (Rajah)* (1869), 1 N.-W. P. H. C. Rep., 46; *Makundi v. Sarabsukh* (1884), 6 All., 417.

it is not necessary to authorize a sale of the minor's property, that the family should be in absolute and urgent want of the necessaries of life at the very moment, or sufficient to take away the power, that they are subsisting at the time upon the charitable donations of their friends and relations, who may at any moment withdraw their help from them. Land is not to be sold at a moment's warning, but if the family have no certain resource for the future, and no actual means of providing for themselves the decent necessaries of life according to their condition, and no regular competent allowance, but only mere casual charity, this constitutes a reasonable necessity to warrant the sale of the property.¹

Where the minor has other means of subsistence, as where his father is alive and capable of supporting him, the minor's land cannot be sold for his maintenance,² except in the case where there is no means of compelling the father to maintain him.

It has been held³ that a Hindu widow who is compelled to sell the property of her sons in order to preserve them from want, should consult the relations of her children before selling the property; but that, in case of their refusing their consent, or in a case of emergency, as the subsistence of a child, the portion of a daughter, and a *sradh*, she can sell without their consent.

Sale by
mother.

This obligation upon the widow amounts to very little, and the consent or dissent of the relations does not alter her powers. She can only sell in cases of necessity, and then independently of the consent of the relations. In other cases, no amount of consent on the part of the relations would justify the widow in selling the property, but their consent may be some evidence of the *bona fides* of the transaction.⁴

The payment of the debts of the ancestor, through whom the minor acquired his property, provided they are such as to bind his estate,⁵ constitutes a sufficient legal necessity for sale

Payment of
debts of
ancestor.

¹ *Bissonath Dutt (Doe dem v. Door-gapersad Dey* (1815), East's notes, case 34; Morley's Dig., vol. ii, p. 49.

² *Kishen Lochan Bose v. Tarini Dasi* (1830), 5 Ben. Sel. Rep., 55; 2nd Edn., 66. As to the maintenance of minors, see *post*, chap. xxii.

³ *Bissonath Dutt (Doe dem) v. Door-*

gapersad Dey (1815), East's notes, case 34; Morley's Dig., vol. ii, p. 49.

⁴ See *Balvant Santaram v. Babaji* (1884), 8 Bom., 602, at p. 609.

⁵ Debts barred by limitation would not be sufficient: *Melgirappa v. Shivappa* (1869), 6 Bom. H. C. Rep., 270.

or mortgage,¹ although no suit may have been brought for the purpose of recovering them.²

Payment of debts of father under Mitakshara law.

In a case governed by the Mitakshara law, the guardian is justified in alienating family property for the purpose of satisfying a debt incurred by the father or grandfather of the ward otherwise than for illegal and immoral purposes.³

As to the power of a father governed by such law to alienate for the purpose of paying his own debts see Mayne's Hindu Law, chap. ix., and Trevelyan's Hindu Law, chap. viii.

Where the minor is a member of a joint family, the family property can be sold by the manager for necessity, e.g. for the preservation of the estate and the maintenance of the members of the family.⁴

Other instances of necessity sufficient to justify a sale or charge are—

Religious ceremonies.

(1) The performance of an indispensable religious duty,⁵ such as the initiatory ceremony of the minor,⁶ the funeral ceremonies⁷ or the *shradh* of the minor's father,⁸ or of his father's widow,⁹ or a debt incurred on that account.¹⁰

Maintenance.

(2) The maintenance of the minor and of the persons dependent upon him.¹¹

¹ See Macnaghten's Hindu Law, vol. ii, chap. xi, case 6; Act VII (Bo. C.) of 1866, sec. 5; *Gunput Lall (Lalla) v. Toorun Koonwar (Mussamut)* (1871), 16 W. R. C. R., 52; *Soorjoo Pershad v. Krishan Pertab (Rajah)* (1869), 1 N.-W. P. H. C. Rep., 46; *Goluck Chunder Pal v. Mahomed Rohim* (1868), 1 W. R. C. R., 316.

² *Kailur Singh v. Roop Singh* (1871), 3 N.-W. P. H. C. Rep., 4.

³ See *Luchmun Dass v. Giridhur Chowdhry* (1888), 5 Calc., 855; 6 C. L. R., 473; *Gunga Prosad v. Ajudhia Pershad* (1881), 8 Calc., 131; s.c., *Gunga Pershad v. Sheodyal Singh*, 9 C. L. R., 417, and cases cited in Mayne's Hindu Law, chap. ix, and Trevelyan's Hindu Law, chap. viii.

⁴ See Mayne's Hindu Law, chap. x; Trevelyan's Hindu Law, chap. vii.

⁵ *Saravana Tevan v. Muttayi Ammal* (1871), 6 Mad. H. C. Rep., 371, at p. 379.

⁶ Macnaghten's Hindu Law, vol. ii, chap. xi, case 6, p. 296 (1818).

⁷ *Nathuram v. Shoma Chhagan* (1890), 14 Bom., 562.

⁸ *Sukeenath Banoo v. Huro Churn Buruj* (1866), 6 W. R. C. R., 34; *Gunput Lall (Lalla) v. Toorun Koonwar (Mussamut)* (1871), 16 W. R. C. R., 52. See Macnaghten's Hindu Law, vol. ii, chap. xi, case 6, p. 296 (1818).

⁹ *Sadashiv Bhaskar Joshi v. Dhakubai* (1880), 5 Bom., 450.

¹⁰ *Gunput Lall (Lalla) v. Toorun Koonwar (Mussamut)* (1871), 16 W. R. C. R., 52.

¹¹ *Makundi v. Sarabsukh* (1884), 6 All., 417, at p. 421. See *post*, chap. xxii.

(3) The reasonable marriage expenses¹ of the minor,² and of the dependent female members of his family.³ Marriage expenses.

(4) The necessary expenses of a suit or prosecution brought against the minor,⁴ or prosecuted on his behalf for the recovery or preservation of his estate, or for the protection of his person. Expenses of litigation.

(5) The payment of Government revenue or other dues or debts, the non-payment of which would imperil the estate.⁵ Debts.

All circumstances of pressure which render the raising of money necessary for the protection or preservation of the minor's estate, or for his personal well-being, would support a sale or charge.

In determining whether a sale or mortgage for a family necessity is justifiable, a reasonable latitude must be allowed for the exercise of the manager's judgment, especially in the case of a father or of a manager of a trading family, though this must not be extended so far as to free the persons dealing with him from the need of all precautions where a minor has an interest in the property.⁶ Family necessity.

The circumstances that to meet the necessities of his ward the guardian has pledged his personal credit, does not disentitle him to charge or sell the ward's property,⁷ but he can only charge or sell it for the purpose of paying money which the minor was under an obligation to pay.⁸ Guardian may sell to repay money borrowed on personal credit.

Hunooman Persaud Panday's case,⁹ and the decisions following it, also decide that a person lending money on the security of a minor's estate, or buying that estate, is bound to Purchaser or mortgage bound to inquire as to necessity.

¹ This would include money paid for the purchase of the bride in the *asura* form of marriage, *Bhagirathi v. Jokhu Ram Upadhia* (1910), 32 All., 575, at p. 580.

² *Juggessur Sircar v. Nilambur Biswas* (1865), 3 W. R. C. R., 217; *Gunput Lall (Lalla) v. Toorun Koonwar (Mussamut)* (1871), 16 W. R. C. R., 52; *Makundi v. Sarabsukh* (1884), 6 All., 417, at p. 421.

³ *Preaj Narain v. Ajodhyapurshad* (1848), 7 Ben. Sel. Rep., 513; 2nd Edn., 602; cf. *Sundrabai v. Shivnarayana* (1907), 32 Bom., 81; 9 Bom. L. R., 1366.

⁴ *Gunga Pershad v. Phool Singh*

(1868), 10 W. R. C. R., 106; 10 B. L. R., note to p. 368.

⁵ Macnaghten's Hindu Law, vol. ii, chap. xi, case 2, p. 293; *Gooroo-persaud Jena v. Muddunmohun Soor*, Ben. S. D. A. Rep., 1856, p. 980.

⁶ *Babaji Mahadaji v. Krishnaji Devji* (1878), 2 Bom., 666.

⁷ *Succaram Morarji v. Kalidas Kallianji* (1894), 18 Bom., 631, at p. 635.

⁸ *Ranmal Singji (Maharana Shri) v. Vadilal Vakhatchand* (1894), 20 Bom., 61.

⁹ (1856), 6 M. L. A., 393; 18 W. R. C. R., note to p. 81, ante, p. 152.

exercise due care and attention in seeing that there was a legal necessity for the loan,¹ and must satisfy himself as well as he can,² and as an honest man,³ with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate,⁴ and that circumstances of necessity had occurred which, under the Hindu law, would justify the sale of the property.⁵

But he need not see to the application of the purchase-money.

If he does so inquire and acts honestly, the real existence of an alleged sufficient, and reasonably credited, necessity is not a condition precedent to the validity of his charge;⁶ and, under such circumstances, he is not bound to see to the application of the purchase-money.⁷ "It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security; and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improvident management. The purposes for which a loan is wanted are often future as regards the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application."⁸

¹ *Gour Pershad Narain v. Sheo Pershad Ram* (1866), 5 W. R. C. R., 103; *Lootf Hossein (Syud) v. Dursun Lall Sahoo* (1875), 23 W. R. C. R., 424.

² *Muthoora Doss v. Kanoo Beharee Singh* (1874), 21 W. R. C. R., 287; *Dalibai v. Gopibai* (1902), 26 Bom., 433; 4 Bom. L. R., 105.

³ *Looloo Singh v. Rajendur Laha* (1867), 8 W. R. C. R., 364; *Runnoo Pandey v. Buksh Ali* (1871), 3 N.-W. P. H. C. Rep., 2. See Act IV of 1882, sec. 38; *Jamsetji N. Tata v. Kashinath Jivan Manglia* (1901), 26 Bom., 326; 3 Bom. L. R., 898.

⁴ *Bunseedhur (Lalla) v. Bindeseree Dutt Singh (Koonwur)* (1866), 10 M. I. A., 454, at p. 471; 1 Ind. Jur. N. S., 165; *Trimbuck Anunt v. Gopallshet* (1863), 1 Bom. H. C. Rep., 2nd Edn., 27.

⁵ *Kasheenath Bose v. Chunder Mohun Nundee*, Ben. S. D. A. 1858, p. 1791. A judgment-debt binding the minor or his estate is *primâ facie* proof of necessity: *Girdharee Lall v. Kantoo Lall* (1874), 1 I. A., 321, at

p. 334; 14 B. L. R., 187, at p. 199; 22 W. R. C. R., 56; *Bhowna (Mussumat) v. Roop Kishore* (1873), 5 N.-W. P. H. C. Rep., 89; *Sheoraj Kooer v. Nuckchedee Lall* (1870), 14 W. R. C. R., 72. See, however, *Lootf Hossein (Syud) v. Dursun Lall Sahoo* (1874), 23 W. R. C. R., 424.

⁶ See also *Tajoodeen Hossein (Sheikh) v. Bhugwanlol Sahoo*, Ben. S. D. A., 1860, p. 33; *Mahabeer Pershad Singh v. Dumreram Opadhya* W. R. 1864, C. R., 166.

⁷ *Rudha Kishore Mookerjee v. Mirtoonjoy Gow* (1867), 7 W. R. C. R., 23; *Sukeenath Banoo v. Huro Churn Buruj* (1866), 6 W. R. C. R., 34; *Mahabeer Pershad Sing v. Dumreram Opadhya*, W. R. 1864, C. R., 166; *Gomain Sircar v. Prannath Gopto* (1864), 1 W. R. C. R., 14; *Kandhia Lal v. Muna Bibi* (1897), 20 All., 135.

⁸ *Hunooman Persaud Panday v. Munraj Koonweree (Mussamat Babooc)* (1856), 6 M. I. A., 393, at p. 424; 18 W. R. C. R., note to p. 81.

This principle is to be found in sec. 38 of the Transfer of Property Act,¹ which is as follows :—

“Where any person, authorized only under circumstances in² their nature variable to dispose of immovable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.”

Transfer by person authorized only under certain circumstances to transfer.

Illustration.

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable inquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

The fact of there being a necessity and sufficient pressure on the estate is all that the lender need inquire about.² He need not inquire into its causes,³ or what is the exact amount required to be borrowed.⁴ Where the lender knows, or by ordinary diligence might have known, that there are funds available and sufficient for paying off the debt, the sale would be invalid.⁵

The lender must be entirely on his guard. If he is lending for the purposes of a family, he must see whether the family with which he is dealing be divided or undivided; and if the latter, at his peril he must see that the transaction be one by which the co-heirs will be concluded.⁶ The debt incurred by the head of a joint Hindu family is, under ordinary circumstances, presumed to be a family debt; but when one of the members is a minor, the creditor seeking to enforce his claim against the family property must see that the transaction is

Joint family debt.

¹ Act IV of 1882. See *Jamsetji N. C. R.*, 122.

Tata v. Kashinath Jivan Manglia (1901), 26 Bom., 326, at p. 336; 3 Bom. L. R., 898; *Balappa v. Chanasappa* (1915), 17 Bom. L. R., 1134.

² *Sheoraj Kooer v. Nuckchedee Lall* (1870), 14 W. R. C. R., 72.

³ *Mohabeer Kooer v. Joobha Singh* (1871), 16 W. R. C. R., 221.

⁴ *Nuffer Chunder Banerjee v. Guddadhur Mundle* (1865), 3 W. R.

⁵ *Kaleenarain Roy Chowdhry v. Ram Coomar Chand*, W. R. 1864, C. R., 99. See *Gomain Sircar v. Prannath Goopto* (1864), 1 W. R. C. R., 14; *Ravaneshwar Prasad Singh v. Chandi Prasad Singh* (1911), 38 Cal., 721.

⁶ *Strange's Hindu Law*, vol. i, p. 200; *Dalpatsing v. Nanabhai* (1864), 2 Bom. H. C. Rep., 2nd Edn., 306.

entered into for some common family necessity, or on account of the necessities of the minor.¹ The fact that other adult members of the family support the manager in the transaction might justify the person advancing the money in giving additional credit to the representations of the manager.²

Lender must not take unfair advantage of guardian.

The lender must take no unfair advantage of the guardian. Where the guardian is a *purdahnashin*, and the purchaser or lender is a man of business, the fact that the guardian has had no independent advice, will raise a strong presumption of fraud against the purchaser.³

It is especially necessary in dealing with a *purdahnashin* guardian to see that the transaction was a proper one, and that the lady was fully cognizant of what she was doing, and of the effect upon the rights of the infant.⁴

Independent advice may not always be absolutely necessary, but is frequently necessary to prove an intelligent appreciation of the transaction.⁵

Burden of proof in suit by minor to set aside sale or mortgage.

Where a suit is brought by a minor on coming of age to set aside a sale or mortgage contracted for him by his guardian during his minority, the purchaser or mortgagee must prove that the transaction was entered into in good faith;⁶ that he advanced in consideration of the sale or mortgage a sum of money which was reasonable with reference to the value of the property;⁷ that the money was raised or applied⁸ for the relief of a recognized necessity;⁹ or that proper inquiries were made by him with respect to the existence of a necessity justifying the sale, and that the result of such inquiries was such as to satisfy him as an honest man of the existence of such necessity.¹⁰

¹ *Trimbuck Anunt v. Gopallshet* (1863), 1 Bom. H. C. Rep., 2nd Edn., 27; *Tandavaraya Mudali v. Valli Ammal* (1863), 1 Mad. H. C. Rep., 398; *Babaji Mahadaji v. Krishnaji Devji* (1878), 2 Bom., 666.

² *Balvant Santaram v. Babaji* (1884), 8 Bom., 602, at p. 609.

³ *Bunseedhur (Lalla) v. Bindesree Dutt Singh* (1866), 10 M. I. A., 454, at p. 471; 1 Ind. Jur. N. S., 165.

⁴ See *Kali Baksh Singh v. Ram Gopal Singh* (1913), 41 I. A. 23; 36 All., 81; 18 C. W. N., 282; 16 Bom. L. R., 147, and cases referred to in Trevelyan's Hindu Law, p. 490.

⁵ *Roopmarain Sing v. Gugadhur Pershad Narain* (1868), 9 W. R. C. R., 297.

⁶ See *Saravana Tevan v. Muttayi Ammal* (1871), 6 Mad. H. C. Rep., 371.

⁷ *Muthoora Doss v. Kanoo Beharee Singh* (1874), 21 W. R. C. R., 287, and cases ante, p. 158, and post, p. 162.

⁸ *Debi Dayal Sahoo v. Bhan Pertap Singh* (1903), 31 Calc., 433, at p. 445; *Jamna v. Nain Sukh* (1887), 9 All., 493.

⁹ Cases ante, pp. 157, 158. *Amar-nath Sah (Lala) v. Achan Kuar (Rani)* (1892), 19 I. A., 196; 14 All., 420;

In *Hunooman Persaud Panday's case*¹ their Lordships of the Privy Council said: "Next as to the consideration for the bond. The argument for the appellant in the reply, if correct, would indeed reduce the matter for consideration to a very short point; for, according to that argument, if the *factum* of a deed of charge by a manager for an infant be established, and the fact of the advance be proved, the presumption of law is *primâ facie*, to support the charge and the onus of disproving it rests on the heir. For this position a decision, or rather a *dictum* of the Sudder Dewany Adawlut at Agra in the case of *Omed Rai v. Heeralall*,² was quoted and relied upon. But the *dictum* there, though general, must be read in connection with the facts of that case. It might be a correct course to adopt with reference to suits of that particular character, which was one where the sons of a living father were, with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate created by the father, on the ground of the alleged misconduct of the father in extravagant waste of the estate. Now, it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know, or to come prepared with proof, of the antecedent economy and good conduct of the owner of an ancestral estate; whilst the antecedents of their father's career would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger; consequently, this *dictum* may perhaps be supported on the general principle that the allegation, and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge,³ as well as on the obvious ground in such suits of the danger of collusion between father and sons in fraud of the creditor of the former. But this case is of a description wholly different, and the *dictum* does not profess to be a general one, nor is it so to be regarded. Their Lordships think that the question on whom does the *onus* of proof lie in such suits as the present is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by, and dependent on, them.⁴ Thus, where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one, whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan.

Kameswar Pershad (Baboo) v. Run Bahadoor Singh (1880), 8 I. A., 8; 6 Calc., 843; 8 C. L. R., 361; *Poolunder Singh v. Ram Pershad* (1867), 2 Agra H. C. Reps., 147; *Kasheenath Bose v. Chunder Mohun Nundee*, Ben. S. D. A., 1858, p. 1791; *Bhekarnain Singh v. Januk Singh* (1877), 2 Calc., 438; *Jamna v. Nain Sukh* (1887), 9 All., 493; *Kumola Pershad Narain Singh v. Nokh Lall Sahoo* (1866), 6 W. R. C. R., 30; *Sheo Pershad Ram v. Thakoore Pershad* (1866), 5 W. R. C. R., 103.

¹ *Hunooman Persaud Panday v. Munraj Koonweree (Mussamut Babooee)*, (1856), 6 M. I. A., 393; 18 W. R. C. R., note to p. 81.

² 6 S. D. A. N.-W. P., 618.

³ See also the Indian Evidence Act I of 1872, sec. 106, which provides that "when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him."

⁴ See *Kailur Singh v. Roop Singh* (1871), 3 N.-W. P. H. C. Rep., 4.

Representations by manager or guardian.

"It is to be observed that the representations by the manager accompanying the loan as part of the *res gestæ* and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir; and as their Lordships are informed that such *primâ facie* proof has been generally required in the Supreme Court of Calcutta between the lender and the heir; where the lender is enforcing his security against the heir they think it reasonable and right that it should be required. A case in the time of Sir Edward Hyde East, reported in his decisions in the 2nd volume of Morley's Digest, seems to be the foundation of this practice (see also the case of *Brown v. Ram Kunaee Dutt*¹). It is obvious, however, that it might be unreasonable to require such proof from one not an original party after a lapse of time and enjoyment, and apparent acquiescence; consequently, if, as is the case here as to part of the charge, it be created by substitution of a new security for an older one, when the consideration for the older one was an old precedent debt of an ancestor not previously questioned, a presumption of the kind contended for by the appellant would be reasonable."

Fraud.

Evidence of the *bona fides* of the transaction would of course be subject to be rebutted by evidence that the purchaser had acted *malâ fide*, or in collusion with the manager or guardian to the injury of the minor.² If there be any fraud in proceedings to enforce a charge, which was free from fraud, such proceedings may be set aside.³

Charge for a portion of advance.

When the purchaser or lender is unable to prove necessity for the raising of the whole of the money, or is unable to prove that he was satisfied as to the necessity for the raising of the whole sum, he is entitled to a charge on the property for the amount which it was necessary to raise, or which after reasonable inquiries was shown to him to be necessary to raise.⁴ In any case he would be entitled to a charge for what is actually applied for the benefit of the minor.⁵ In the case of his

¹ Ben. S. D. A., 1853, p. 883.

² *Bunseedhur (Lalla) v. Bindeseree Dutt Singh* (1866), 10 M. I. A., 454, at pp. 471, 472; 1 Ind. Jur. N. S., 165.

³ As to the rights of a purchaser at an execution-sale without notice of the fraud, see *Khettermonee Dossee v. Kishenmohun Mitter* (1863), Marsh., 313; 2 Hay, 196. The question whether the sale should be set aside must be determined by the Court in accordance with the principles of justice, equity, and good conscience: *Abdul Haye v. Nawab Raj* (1868), B. L. R., F. B. R., 911; 9 W. R. C. R., 196.

⁴ *Doorganath Roy (Konwur) v. Ramchunder Sen* (1875), 4 I. A., 52;

2 Calc., 311. Cf. *Deputy Commissioner of Kheri v. Khanjan Singh* (1907), 34 I. A., 72; 29 All., 331; 11 C. W. N., 474; 9 Bom. L. R., 591, and other cases cited in Trevelyan's Hindu Law, pp. 491, 492.

⁵ *Muthoora Doss v. Kanoo Beharee Singh* (1876), 21 W. R. C. R., 287. See *Hasmat Rai (Koer) v. Sunder Das* (1885), 11 Calc., 396; *Bunseedhur (Lalla) v. Bindeseree Dutt Singh* (1866), 10 M. I. A. 454; 1 Ind. Jur. N. S., 165; *Paran Chandra Pal v. Karunamayi Dasi* (1871), 7 B. L. R., 90; 15 W. R. C. R., 268; *Venkatramanbhat v. Padmanabh* (1912), 14 Bom. L. R., 393.

obtaining such charge, a creditor, who has acted fairly, would ordinarily be entitled to interest at the contract rate.¹ Interest.

In determining the question of the validity of a sale, adequacy of price is often an important point to be considered,² Adequacy of price. though inadequacy of price is not necessarily conclusive proof of *mala fides*.³

The mere fact that the manager or guardian might at the time of the sale have been able to make some more advantageous arrangement for the estate of the minor would not nullify a sale to *bonâ fide* purchasers for value.⁴

Foreclosure proceedings, or a purchase at a sale held under a decree in a suit on the mortgage would not relieve a mortgagee from the burden of proving the *bona fides* of the transaction, or place him in any better position with regard to the minor,⁵ although a *bonâ fide* purchaser without notice at a sale held in execution of a decree in a suit in which the minor was properly represented might not be bound to inquire into the propriety of the loan which formed the basis of the decree.⁶ Burden of proof not altered by foreclosure proceedings or decree.

The Mahomedan law permits no one except the *near* guardians⁷ of a minor under any circumstances to alienate the minor's property.⁸ Sale and mortgage under Mahomedan law.

A *de facto* guardian has not, as in the case of Hindu law,⁹ any right to alienate his ward's property.

¹ See *Bunseedhur (Lalla) v. Bindesree Dutt Singh* (1866), 10 M. I. A., 454; 1 Ind. Jur. N. S. 165.

² *Dagdu v. Kamble* (1864), 2 Bom. H. C. Rep., 348, at pp. 360, 361; *Khettermonee Dassee v. Kishenmohun Mitter* (1863), Marsh., 313; 2 Hay, 196; *Kumola Pershad Narain Singh (Baboo) v. Nokh Lall Sahoo* (1866), 6 W. R. C. R., 30.

³ *Kumola Pershad Narain Singh (Baboo) v. Nokh Lall Sahoo* (1866), 6 W. R. C. R., 30, at p. 33.

⁴ *Kool Chunder Surmah v. Ramjoy Surmona* (1868), 10 W. R. C. R., 8.

⁵ *Buzrung Sahoy Singh v. Mautora Chowdhraïn (Mussamut)* (1874), 22 W. R. C. R., 119.

⁶ See *post*, chap. xxvii, and *ante*, p. 162, note 3.

⁷ As to who are *near* guardians, see *ante*, p. 53.

⁸ *Mahadin v. Ahmad Ali (Sheikh)* (1912), 39 I. A., 49; 34 All., 213; 10 C. W. N., 338; 14 Bom. L. R. 192; *Moyna Bibi v. Banku Behari*

Biswas (1912), 29 Calc., 473; 6 C. W. N., 667; *Baba v. Shivappa* (1895), 20 Bom., 199; *Bhutnath Dey v. Ahmed Hosain* (1885), 11 Calc., 417; *Nizam-ud-din Shah v. Anandi Prasad* (1896), 18 All., 373; *Bukshan (Mussamut) v. Maldai Kooeri (Mussamut)* (1869), 3 B. L. R., A. C., 324; s.c., *Bukshun v. Doolhin*, 12 W. R. C. R., 337; *Ruttun v. Dhomee Khan* (1868), 3 Agra H. C. Rep., 21; *Hamir Singh v. Zakia (Mussamut)* (1875), 1 All., 57; *Gulabdas Juggivandas v. Collector of Surat* (1878), 6 I. A., 54; 3 Bom., 186; *Sita Ram v. Amir Begam* (1886), 8 All., 324, at p. 338. In *Hasan Ali v. Medhi Husain* (1877), 1 All., 533, the Court upheld a mortgage by an aunt who was manager, but in this case there was no offer by the ward to pay the amount which had been expended on his behalf. See *Sectul Pershad (Lalla) v. Chand Khan* (1870), 2 N.-W. P. H. C. Rep., 428.

⁹ *Ante*, p. 153.

In *Matadin v. Sheikh Ahmad Ali*¹ the Judicial Committee said: "It is difficult to see how the situation of an unauthorized guardian is bettered by describing him as a *de facto* guardian. He may by his *de facto* guardianship assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it."

In another case² the Judicial Committee said: "Without some authority their Lordships are unable to accept the view of the learned judges of the division Bench that there is no difference between the position and powers of a manager and those of a guardian. They are, however, of opinion that it is not within the competence of a manager of a minor's estate to bind the minor or the minor's estate by a contract for the purchase of immovable property."

There are also some decisions of the Indian High Courts to the same effect.³

In recent cases⁴ the Madras and Allahabad High Courts have held that a *de facto* guardian can alienate his ward's property in case of necessity. These decisions are, it is submitted, inconsistent with the above views of the Judicial Committee.

Where, however, the minor has received any advantage by the sale or incumbrance, the Court, in setting it aside at his instance, will require him to recoup the purchaser or incumbrancer to the extent of the advantage.⁵

The *remote* guardians⁶ can only sell with the sanction of the ruling authority,⁷ in whom the power to sell vests in default of *near* guardians.

The circumstances which would justify a sale by a *near* guardian would justify a sale by a *remote* guardian with the sanction of the ruling authority, *i.e.* the Court.⁸

¹ (1912), 39 I. A., 49; 34 All., 213; 16 C. W. N., 338; 14 Bom. L. R., 192.

² *Sarwarjan (Mir) v. Fakhruddin Mahomed Chowdhuri* (1911), 39 I. A., 16; 39 Calc., 232; 16 C. W. N., 74; 14 Bom. L. R., 5. These decisions in effect overrule, *Ram Charan Sanyal v. Anukul Chandra Acharjya* (1906), 34 Calc., 65; 11 C. W. N., 160; *Mafazzal Hosain v. Basid Sheikh* (1906), 34 Calc., 36; 11 C. W. N., 71; *Majidan v. Ram Narain* (1903), 26 All., 22 (cf. *Ummi Begum v. Kesho Das* (1908), 30 All., 462); *Hasan Ali v. Mehdi Husain* (1877), 1 All., 533; *Syedun (Mussamut) v. Velayet Ali Khan (Syud)* (1872), 17 W. R. C. R., 238.

³ *Ante*, p. 163, note 8; *Bukshan (Mussamut) v. Maldai Kooeri (Mussamut)* (1869), 3 B. L. R. A. C., 423; 12 W. R. C. R., 337; *Durgozi Row v. Fakeer Sahib* (1906), 30 Mad., 197; *Pathummabi v. Vittel Ummachabi* (1902), 26 Mad., 734; *Abdul Khader v. Chidambaram Chettiyar* (1908), 32 Mad., 276; *Sita Ram v. Amir Begam*

(1886), 8 All., 324; *Hamir Singh v. Mahomed Zakir* (1875), 1 All., 57.

⁴ *Ayderman Kutti v. Syed Ali* (1912), 37 Mad., 514; *Abid Ali v. Imam Ali* (1915), 38 All., 92.

⁵ *Bukshan (Mussamut) v. Maldai Kooeri (Mussamut)* (1869), 3 B. L. R., A. C., 423; *s.c.*, *Bukshun v. Doolhin*, 12 W. R. C. R., 337; *Hamir Singh v. Zakia (Mussamut)* (1875), 1 All., 57; *Pana Ali (Mirza) v. Sadik Hossein (Saïad)* (1875), 7 N.-W. P. H. C. Rep., 201; *Sahee Ram v. Mahomed Abdul Rahman* (1874), 6 N.-W. P. H. C. Rep., 268; *Nizam-uddin v. Anandi Prasad* (1896), 18 All., 373. See *post*, pp. 204, 205.

⁶ *Ante*, pp. 55, 56.

⁷ That is ordinarily the Court, as representing the ruling authority. In *Husein Begam v. Zia-ul-Nissa Begam* (1882), 6 Bom., 467, a sale by a brother at Surat with the assent of the Agent of the Governor of Bombay was upheld.

⁸ *Husein Begam v. Zia-ul-Nissa*

The following are alone the circumstances under which a *near* guardian can sell the immovable property of his ward¹ :—

- (1) where he can obtain double its value ;
- (2) where the minor has no other property, and the sale of it is absolutely necessary for his maintenance ;
- (3) where the late incumbent died in debt which cannot be liquidated but by the sale of such property ;
- (4) where there are some general provisions in the will, which cannot be carried into effect without such sale ;
- (5) where the produce of the property is not sufficient to defray the expenses of keeping it ;
- (6) where the property may be in danger of being destroyed ;
- (7) where it has been usurped, and the guardian has reason to fear that there is no chance of fair restitution.

In one case² the Judicial Committee of the Privy Council upheld a sale by the father for the purpose of putting an end to pending litigation.³

A guardian cannot under any circumstances sell his ward's real property to himself or to any one connected with him.⁴

Although the Mahomedan law does not contemplate the case of a mortgage, a mortgage or other incumbrance will be governed by the same rules as those which govern sales.⁵

Every transaction entered into by a *near* guardian on behalf, and for the benefit, of his ward, is valid and binding upon the ward, as far as regards his personal property, provided there be no unfair dealing or fraud.⁶

Begam (1882), 6 Bom., 467. Neither the Mahomedan nor the Hindu law restricts the powers of the Court to direct a sale in a suit (*post*, chap. xxiv), or to permit a sale by a guardian appointed by it, *ante*, p. 143.

¹ Macnaghten's Principles of Mahomedan Law, chap. viii, princ. 14. Ameer Ali's Mahomedan Law, vol. ii, 2nd Edn., pp. 479, 480; *Bishnath Singh v. Ashrafunnissa*, N.-W. P. W. N., 1894, p. 89; *Kali Dutt Jha v. Abdul Ali* (1888), 16 I. A., 96; 16 Calc., 627. See *Thottoli Kotilan Aliyamma v. Kunhammed* (1910), 34 Mad., 527.

² *Kali Dutt Jha v. Abdul Ali*

(1888), 16 I. A., 96; 16 Calc., 627.

³ *Ante*, p. 164.

⁴ Ameer Ali's Mahomedan Law, vol. ii, 2nd Edn., p. 479.

⁵ *Hurbai v. Hiraji Byramji Shamji* (1895), 20 Bom., 116. In *Girraj Bakhsh v. Hamid Ali (Kazi)* (1886), 9 All., 340, the minor's estate had received benefits from the transaction, which was therefore supported: see *Bishnath Singh v. Ashrafunnissa*, N.-W. P. W. N., 1894, p. 89.

⁶ Macnaghten's Principles of Mahomedan Law, chap. viii, princ. 15. *Syedun (Mussamut) v. Velayet Ali Khan (Syud)* (1872), 17 W R C R., 239.



Burden of proof.

The rules as laid down in *Hunooman Persaud Panday's case*¹ with respect to the duty of a purchaser or mortgagee from the guardian of a minor's estate as to inquiry, and with respect to the burden of proving that inquiry, would apply equally where the minor is a Mahomedan.²

That particular portion of the judgment of the Judicial Committee is based rather upon the general principles of equity³ than upon the Hindu law particularly.

Recital of necessity in deed.

In the case of Hindus and Mahomedans alike, the deed by which the guardian deals with his ward's property need not contain any recital of the necessity on account of which the property is sold,⁴ but it is always better to recite the circumstances of necessity.

A recital of the necessity is by itself not sufficient evidence of necessity;⁵ but it may be some evidence of the representations made at the time.⁶

Description of vendor.

Although it is desirable that he should do so, it is not material whether the guardian or manager describes himself as such in the instrument of sale, provided it be clear from the terms of the instrument and from the surrounding circumstances that it is the property of the minor which is being sold.⁷

Registration.

The fact that the transfer does not bind the minor does not exempt the guardian or other person executing it from being compelled to register it.⁸

¹ *Ante*, pp. 157, 158.

² See *Denobundo Pundit v. Mohamed Hossein* (1863), 2 Hay, 549; *Kaleenarain Roy Chowdhry v. Ram Coomar Chand*, W. R., 1864, C. R., 99.

³ See Act IV of 1882, sec. 38, *ante*, p. 159.

⁴ *Womes Chunder Sircar v. Digunburce Dossee* (1865), 3 W. R. C. R., 154.

⁵ *Brij Lal v. Inda Kunwar* (1914), 36 All., 187; 18 C. W. N., 652; 16 Bom. L. R., 352. See *Raj Lukhee Dabea v. Gokool Chandra Chowdry* (1869), 13 M. I. A., 209; 3 B. L. R., P. C., 57; 12 W. R., P. C., 47; *Makundi v. Sarabsukh* (1884), 6 All., 417.

⁶ *Sikher Chund v. Dulputty Singh* (1879), 5 Calc., 363, at p. 375; 5 C. L. R., 374, at p. 387. *Ante*, p. 162.

⁷ *Hunooman Persaud Panday v. Munraj Koonweree (Mussamut Babooee)* (1856), 6 M. I. A., 393, at p. 412; 18 W. R. C. R., note to p. 81; *Makundi v. Sarabsukh* (1884), 6 All., 417; *Judoonath Chuckerbutty v. Tweedie* (1869), 11 W. R. C. R., 20; *Gopee Mohun Takoor v. Radhanath (Rajah)* (1834), 2 Knapp's P. C. Rep., 228; *Succaram Morarji Shetay v. Kalidas Kalianji* (1894), 18 Bom., 631; *Murari v. Tayana* (1895), 20 Bom., 286; *Watson v. Shamlal Mitter* (1887), 14 I. A., 178; 15 Calc., 8; see *Bahur Ali v. Sookeea Bibee* (1870), 13 W. R. C. R., 63; and *ante*, p. 141.

⁸ See *Raj Lakhi Ghose v. Debendra Chundra Mojumdar* (1897), 24 Calc., 668; 1 C. W. N., 444; Acts III of 1877, and XVI of 1908 (Registration).

It has been held that when a deed has been executed by a guardian for himself and for his ward, registration by the guardian alone is not sufficient.¹

Although a guardian may have power to sell or mortgage the estate of his ward, the Court will not decree against the minor specific performance of an agreement for such sale or mortgage, or any other agreement made by his guardian or the *de facto* manager of his property, unless it be quite certain that the agreement was for the benefit of the minor, that it will be for his benefit that it should be enforced, and that it be one which would be impossible for him to avoid on attaining majority.²

Specific performance of agreement by guardian.

The Court will not grant specific performance to a minor unless the agreement be one which would have bound him.³

In some cases the minor may be entitled to damages.⁴

Damages.

The law applicable to persons other than Hindus and Mahomedans does not permit guardians, other than those appointed by the Court,⁵ or having power given to them by the instrument appointing them, to sell or charge the immovable property of their wards.

Sale not under Hindu or Mahomedan law.

Where it be necessary in the interests of minors, to whom the Hindu and Mahomedan laws have no application, to sell or charge their immovable property, the best course is to apply it for the appointment of guardian,⁶ and on such appointment being made to obtain the sanction of the Court to the sale.⁷

¹ *Shankar Das v. Jograj* (1883), 5 All., 599. In that case the Court acted upon the decision of the Privy Council in *Muhammad Ewaz v. Birj Lall* (1877), 4 I. A., 166; 1 All., 465; but that decision, it is submitted, would not be in point where the guardian, and not the minor, is the executant; see Act III of 1877 (Registration), sec. 3, and Act XVI of 1908 (Registration), sec. 2, definition of "representative."

² *Chhitar Mal v. Jagan Nath Prasad* (1906), 29 All., 213; *Krishnasami v. Sundarappayyar* (1894), 18 Mad., 415; *Khairunnessa Bibi v. Lokenath Pal* (1899), 27 Calc., 276; *Jamsetji N. Tata v. Kashinath Jivan Manglia* (1901), 26 Bom., 326, at p. 337; 3 Bom. L. R., 898; *Jugul Kishori Chowdhurany v. Anundalal Chowdhry* (1895), 22 Calc., 545; *Fatima Bibi v. Debnauth Shah* (1893), 20 Calc., 508; *Etwaria (Musst)*

v. Chandra Nath Mukherjee (1905), 10 C. W. N., 763; *Poraka Subbarami Reddy v. Vadlamudi Seshachalam Chetty* (1909), 33 Mad., 359; *Gurusami Sastrial v. Ganapathia Pillai* (1882), 5 Mad., 337. See *Rashmoni Dabi v. Soorja Kanta Roy Chowdhry* (1905), 32 Calc., 832; 9 C. W. N., 1019, where the minor had died, and the agreement was not such as would have bound him, if alive.

³ *Sarwarjan (Mir) v. Fakhruddin Mahomed* (1911), 39 I. A., 1; 39 Calc., 232; 16 C. W. N., 74; 14 Bom. L. R., 5, reversing *Ibid.* (1906), 34 Calc., 163; 11 C. W. N., 34.

⁴ *Babu Ram v. Said-un-Nissa* (1913), 35 All., 499.

⁵ As to the powers of guardians appointed by the Court, see *ante*, pp. 143-146.

⁶ *Ante*, chaps. xi and xiv.

⁷ *Ante*, pp. 143, 144, and 149. A

Power of trustee.

A trustee, to whom power to sell is given by the document creating the trust, may, whether he be a guardian or not, exercise such power independently of the Court, and can give a valid receipt for the purchase-money.¹

Alienation not void.

An alienation by a guardian, which does not bind the minor, is not void, but voidable at the instance of the ward. Subject to the repayment of such money as he may have obtained the benefit of,² the minor is entitled, before or after attaining his majority, to recover such of his property as by the wrongful or unauthorized act of his guardian has come into the hands of other persons.

Charge for money expended for benefit of minor.

When in consequence of the absence of necessity³ or for any other defect in the power of the person acting for the minor, the Court is unable to give effect to a sale or mortgage, the person who advanced the money is entitled to a charge upon the property for such money as may have actually been applied for the benefit of the minor, or of which the minor has in any way obtained the benefit,⁴ provided that the object of the debt was a legitimate one.⁵

guardian appointed by a High Court under its Charter (*ante*, chap. xiv) must also obtain the sanction of that Court to a sale or charge. The Court would also have power in certain cases to order the sale of the minor's property: see *post*, chap. xxiv.

¹ *Sowarsby v. Lacy* (1819), 4 Maddocks, 142.

² *Post*, pp. 204, 205

³ *Ante*, p. 162.

⁴ *Hasmal Rai (Koer) v. Sunder Das* (1885), 11 Calc., 396; *Girraj*

Baksh v. Hamid Ali (Kazi) (1886), 9 All., 340; *Shurrut Chunder v. Rajkissen Mookerjee* (1875), 15 B. L. R., 350; s.c., *Surat Chunder Chatterjee v. Ashutosh Chatterjee*, 24 W. R. C. R., 46; *Hamir Singh v. Zakia (Mussamut)* (1875), 1 All., 57; *Hem Chandra Sarkar v. Lalit Mohan Kar* (1912), 16 C. W. N., 715; Act IX of 1872 (Contracts), sec. 65.

⁵ *Ranmal Singji (Maharana Shri) v. Vadilal Vakhatchand* (1894), 20 Bom., 61.

CHAPTER XVIII.

POWERS OF GUARDIANS OF PROPERTY (*continued*).

ALTHOUGH a guardian may under certain circumstances sell or charge his ward's property, he cannot bind his ward personally by a simple contract debt,¹ by bill of exchange,² by a covenant, or by any promise to pay money or damages,³ unless such promise be made merely to pay⁴ or to keep alive⁵ a debt for which the ward's property was liable.

Covenant or promise by guardian to pay money.

Where the promise is to pay money which has been expended for necessaries the minor may be liable, not on the promise, but because the money has been supplied.⁶ Where a minor comes to Court to have an account taken as between himself and his agent, and it is found that the agent has made advances to the guardian, and such advances have been applied for the benefit of the minor, the agent ought to be allowed credit for these advances.⁷

A guardian cannot bind his ward's estate except by a document purporting to bind it.⁸

¹ *Radhanath Mookerjee v. Muthoor-mohun Roy*, unreported appeal from Original Side, Calcutta, No. 48 of 1881.

² *Sanka Krishnamurti v. Bank of Burma* (1911), 35 Mad., 692.

³ *Wagehela Rajsanji v. Masludin (Shekh)* (1887), 14 I. A., 89; 11 Bom., 551; *Indur Chunder Singh v. Radhakishore Ghose* (1892), 19 I. A., 90; 19 Calc., 507; *Ranmal Singji (Maharana Shri) v. Vadilal Vakhatchand* (1894), 20 Bom., 61; *Surendra Nath Sircar v. Atul Chandra Roy* (1907), 34 Calc., 892. See also *Anon.* (1812), 1 Morl. Dig., 276 (a suit for rent unduly levied); *Neek Singh v. Anoopun Das* (1815), 2 Ben. Sel. Rep., 154; 2nd Edn., 197. Cf. *post*, p. 407.

⁴ *Duraisani Reddi v. Muthial Reddi*

(1908), 13 Mad., 458; *Subramania Ayyar v. Arumuga Chetty* (1902), 26 Mad., 230.

⁵ *Subramania Ayyar v. Arumuga Chetty* (1902), 26 Mad., 330; *Bhawul Sahu v. Baijnath Pertab Narain Singh* (1907), 35 Calc., 320; 12 C. W. N., 256.

⁶ See *Sundararaja Ayyangar v. Pattanathusami Tevar* (1894), 17 Mad., 306; *Bhawul Sahu v. Baijnath Pertab Narain Singh* (1907), 35 Calc., 320; 12 C. W. N., 256; Act IX of 1872 (Contracts), sec. 68, *ante*, pp. 15 to 19.

⁷ *Surendra Nath Sircar v. Atul Chandra Roy* (1907), 34 Calc., 892.

⁸ *Ranmal Singji (Maharana Shri) v. Vadilal Vakhatchand* (1894), 20 Bom. 61; *Bhawul Sahu v. Baijnath Pertab Narain Singh* (1907), 35 Calc., 320; 12 C. W. N., 256.

Repairs. A guardian may lay out money belonging to his ward in repairing the ward's houses or in otherwise preserving his estate.

Payment of debts. He may, and should, pay all debts, for which the ward or his estate is liable,¹ including those which are charged upon the estate.²

Pre-emption. A guardian can exercise a right of pre-emption on behalf of his ward, provided there be funds belonging to his ward available for the purpose,³ and he can accept or refuse an offer of a share in pursuance of such a right.⁴

Where the guardian has neither asserted a right nor accepted or refused the offer, there is, according to Shiah law, nothing to prevent the minor on his attaining majority insisting on his right to pre-emption;⁵ but according to the Sunnis minority does not extend the time for claiming the right of pre-emption.⁶

Investments. He may, if it be for the benefit of his ward, invest money belonging to the ward in the purchase of immovable or other property; but he is not entitled to mortgage or sell the lands of his ward for that purpose.⁷

Except the general provision in sec. 27 of the Guardians and Wards Act,⁸ there is no statutory restriction upon the powers of a guardian to invest the money of his wards. If he be appointed by an instrument he must strictly follow the directions (if any) in that behalf contained in the instrument appointing him. If he has been appointed by a Court he should, in case of any doubt, apply for the directions of the Court. He must be careful to avoid any hazardous or speculative investment,⁹ and would generally be acting the safer part, if he invest only in such securities as a trustee would be justified in investing in.¹⁰

¹ *Ante*, p. 127.

² Act IV of 1882 (Transfer of Property), sec. 91.

³ *Jadu Lal Sahu v. Janki Koor (Maharani)* (1912), 39 I. A., 101; 39 Cal. 915; 16 C. W. N., 553; 14 Bom. L. R., 436; *Nubo Kant Doss v. Abdool Juleel (Syud)* (1873), 20 W. R. C. R., 372; *Lal Bahadur Singh v. Durga Singh* (1881), 3 All., 437.

⁴ *Lal Bahadur Singh v. Durga Singh* (1881), 3 All., 437; *Umr Rao Singh v. Dalip Singh* (1901), 23 All., 129.

⁵ Baillie's Mahomedan Law, vol. ii,

p. 180; *Lal Bahadur Singh v. Durga Singh* (1881), 3 All., 437.

⁶ Wilson's Anglo-Muhammadan Law, 4th Edn., 422, see Act IX of 1908 (Limitation), sec. 8.

⁷ *Nubo Kant Doss v. Abdool Juleel (Syud)* (1873), 20 W. R. C. R., 372, *ante*, p. 154.

⁸ *Ante*, pp. 143-145.

⁹ As to the liability of the guardian, see *post*, chap. xix.

¹⁰ *In re Cassumali* (1906), 30 Bom., 591; 8 Bom. L. R., 883. Although the Indian Trusts Act (II of 1882) is not of authority in this respect it

The manager of a minor's estate cannot bind him or his estate by a contract for the purchase of immovable property.¹ Purchase of property.

A minor might be entitled to recover damages where he had been ousted from property purchased on his behalf.²

A guardian has power to grant such leases as would be necessary for the ordinary and proper management of the estate.³ Power of guardian to grant leases.

The powers of the manager might depend upon what form of management is usual in the particular estate; but he would not be justified in granting a permanent or long lease,⁴ except under circumstances which would justify the sale or mortgage of the estate.⁵ Where he does grant such lease, and the necessity or benefit of the minor does not justify the grant, the lease would enure until the expiration of the ward's minority, when it would be voidable by the ward.

As to leases by guardians appointed by the Civil Court, see *ante*, p. 143.

As to leases by managers under the Courts of Wards, see *post*, pp. 338, 371, 402.

A minor is not bound by the covenants for payment of rent contained in a lease which has been accepted by his guardian on his behalf,⁶ but he is bound by an arrangement for Acceptance of lease.

may be a useful guide. Sec. 20 of that Act, as amended by Act III of 1908, permits trustees to invest—

(a) in Promissory notes, debentures, stock, or other securities of the Government of India, or of the United Kingdom of Great Britain or Ireland;

(b) in bonds, debentures, and annuities charged by the Imperial Parliament on the revenues of India;

(c) stock, or debentures of, or shares in, railway or other companies, the interest whereon is guaranteed by the Secretary of State for India in Council;

(d) debentures or other securities for money issued, under the authority of any Act of a Legislature established in British India by, or on behalf of, any Municipal body, port trust, or city improvement trust in any Presidency-town or in Rangoon-town, or by or on behalf of the trustees of the port of Karachi;

(e) on a first mortgage of immovable property situate in British India: provided that the property is not a leasehold for a term of years and that the value of the property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the

mortgage money.

The powers of the Courts of Wards might also guide a guardian, see *post*, pp. 341, 342, 374, 404, 405.

¹ *Sarwarjan (Mir) v. Fakruddin Chowdhuri* (1911), 39 I. A., 1; 39 Calc., 232; 16 C. W. N., 74; 14 Bom. L. R., 5.

² *Walidad Khan v. Janak Singh* (1913), 35 All., 370.

³ Act VIII of 1890, sec. 27, *ante*, p. 139. See *Mangala Debi v. Dinanath Bose* (1869), 4 B. L. R. O. C., 72, p. 81; 12 W. R. O. C., 35, at p. 38; *Khairunessa Bibi v. Loknath Pal* (1899), 27 Calc., 276.

⁴ *Gopeenath (Baboo) v. Ramjeewun Lall*, Ben. S. D. A. Rep., 1859, p. 913; *Bungo Chunder Bose v. Ruheemollah* (1864), 1 W. R. C. R., 211.

⁵ *Oddoyto Chunder Koondoo v. Prosunno Coomar Bhattacharjee* (1865), 2 W. R. C. R., 325; *Nubokishen Mookerjee v. Kalee Pershad Roy*, Ben. S. D. A., 1859, p. 607. It was held in *Bulwant v. Chutter*, N.-W. P. H. C., 25th March, 1870, that a guardian could not give a lease for twenty-eight years.

⁶ *Indur Chunder Singh v. Radhakishore Ghose* (1892), 19 I. A., 90; 19 Calc., 507.

the payment of enhanced rent, which could have been enforced by suit.¹

Surrender and renewal of leases in which minors are interested.

In cases governed by the English law,² as administered by the High Courts in the exercise of their original jurisdiction, where a minor is entitled to any lease of property within the limits of such original jurisdiction made for the life or lives of one or more person or persons, or for any term of years, either absolute or determinable upon the death of one or more person or persons, or otherwise, he or his guardian or other person on his behalf may apply to the High Court by petition or motion in a summary way; and by the order and direction of the Court, he or his guardian, or any person appointed in the place of such guardian by the Court, may be enabled from time to time, by deed or deeds, to surrender such lease, and accept and take, in the place and for the benefit of such minor, one or more new lease or leases of the premises comprised in such lease so surrendered, for and during such number of lives, or for such term or terms of years determinable upon such number of lives, or for such term of years absolute, as was mentioned or contained in the lease so surrendered at the making thereof, or otherwise, as the Court may direct.³

Charges attending renewal.

Every sum of money and other consideration paid by any guardian or other person as a fine, premium, or income, or in the nature of a fine, premium, or income, for the renewal of any such lease, and all reasonable charges incident thereto, shall be paid out of the estate or effects of the minor for whose benefit the lease is renewed, or shall be a charge upon the leasehold premises, together with interest for the same, as the Court shall direct or determine.⁴

New leases to be to the same uses.

Every lease so renewed shall operate and be to the same uses, and be liable to the same trusts, charges, incumbrances, dispositions, devises, and conditions, as the lease so surrendered was or would have been subject to in case such surrender had not been made.⁵

¹ *Watson v. Shamlal Mitter* (1887), 14 I. A., 178; 15 Cal., 8.

² *Ante*, p. 32, note 13.

³ See Act XXIV of 1841, secs. 1 and 5, extending 11 Geo. IV and 1 Will. IV, cap. LXXV, to cases

governed by the English law within the jurisdiction of the Supreme Court.

⁴ *Ibid.*

⁵ *Ibid.*

Where the minor might, in pursuance of any covenant or agreement, if not under disability, be compelled to renew any lease made for the life or lives of one or more person or persons, or for any term or number of years absolute or determinable on the death of one or more person or persons, he or his guardian in his name may, by the direction of the Court, to be signified by an order to be made in a summary way upon the petition of the minor or his guardian, or of any person entitled to such renewal, from time to time accept of a surrender of such lease, and make and execute a new lease of the premises comprised in such lease, for and during such number of lives, or for such term or terms of years absolute, as was or were mentioned in the lease so surrendered at the making thereof or otherwise as the Court by such order shall direct.¹

Minors empowered to grant renewal of leases.

The Court may also authorize such minors or their guardians to make leases of lands belonging to such minors when it is for the benefit of the estate.²

Court may authorize leases by minors.

A guardian can receive payment of, and give valid discharges for, debts or other moneys due to his ward.³

Receipt of debts.

Payment to the minor will not discharge the debtor, but if by the purchase of necessaries or otherwise the minor has received benefits by the payment, he will not afterwards be entitled to repudiate it.⁴

Unless it be for the benefit of his ward a guardian cannot settle or state an account or acknowledge a debt on behalf of his ward.⁵

Settlement of accounts.

A minor is not estopped by any act of his guardian.⁶

Estoppel.

Except there be a power in the instrument appointing

Trade.

¹ Act XXIV of 1841, secs. 1 and 5, extending 11 Geo. IV and 1 Will. IV, cap. LXV, to cases governed by the English law within the jurisdiction of the Supreme Court.

² See 11 Geo. IV and 1 Will. IV, cap. LXV, sec. 17, extended by Act XXIV of 1841 to cases governed by the English law within the jurisdiction of the Supreme Court.

³ See *Ex parte Mahadev Gangadhar Deshpande* (1904), 28 Bom., 344; *Motee Ram Sahoo v. Khuleel-ool-lah (Nawab)* (1867), 2 Agra H. C. Rep., 338 (in this case a receipt given before the certificate was granted was up-

held). As to the payment of legacies, see *ante*, pp. 28, 29.

⁴ See *Ram Ratun Singh v. Shew Nandan Singh* (1901), 29 Calc., 126; 6 C. W. N., 132.

⁵ *Azuddin Hossain v. Lloyd* (1883), 13 C. L. R., 112. As to the effect of an acknowledgment by a guardian on the limitation of suits, see *post*, pp. 296, 297. As to admissions in suits, see *post*, p. 271.

⁶ *Bhogaraju Venkatrama Jogiraju v. Addepalli Seshayya* (1911), 35 Mad., 560; *Ram Charan Das v. Joy Ram Majhi* (1912), 17 C. W. N., 10.

him, a guardian cannot, without the sanction of the Court, embark in a trade on behalf of his ward.¹

Ancestral
trade.

Where a minor is a member of a joint family, and as such entitled to a share in an ancestral trade, the manager of the family can, so long as it be beneficial to the minor, continue the trade on the minor's behalf. Minor members of the family are bound by the acts of the manager which are necessarily incident to, and flowing out of, the carrying on of such trade,² including loans contracted for the purposes of the trade.³ Where a minor is sole owner of a business, he is bound in the same way by the acts of the manager,⁴ but he is not liable in respect of liabilities not properly incurred on account of the business.⁵

The minor cannot be made personally liable, nor can he be adjudicated an insolvent,⁶ but his estate is liable to the extent of the partnership property,⁷ i.e. at least the property which is used by the family for the purposes of the trade or which has been acquired out of the profits thereof.⁸

Some of the decisions make the interest of the minor in the whole family property liable,⁹ but the above limitation of liability is, it is submitted, correct.¹⁰

"A trade like other personal property is descendible amongst Hindus, but it does not follow that a Hindu infant, who by birth or inheritance becomes entitled to an interest in a joint family business, becomes at the same time a member of the trading partnership which carries on the

¹ See *Makhun Lall Dutt v. Ramlall Shaw* (1898), 3 C. W. N., 134; *ante*, pp. 19, 20.

² *Ramlal Thakursidas v. Lakmi-chand Muniram* (1861), 1 Bom. H. C. Rep., App. li, followed in *Johurra Bibee v. Sreegopal Misser* (1876), 1 Calc., 470. See *Kishen Parshad v. Har Narain Singh* (1911), 38 L. A., 45, at p. 51; 33 All., 272, at p. 276; 15 C. W. N., 321, at p. 326; 13 Bom. L. R., 359, at p. 365; *Raghunathji Tarachand v. Bank of Bombay* (1909), 34 Bom., 72; 11 Bom., L. R., 255. As to the liability of a minor partner, see Act IX of 1872, secs. 247, 248, *ante*, pp. 19, 20.

³ *Premchand Banthra v. Radhica Lall Roy* (1877), 1 Shome's Law Reporter, 1.

⁴ *Rampartab Samrathrai v. Fooli-*

bai (1896), 20 Bom., 767.

⁵ *Sanka Krishnamurthi v. Bank of Burma* (1911), 35 Mad., 692.

⁶ *Ante*, p. 23.

⁷ *Joykisto Cowar v. Nittyannund Nundy* (1878), 3 Calc., 738; 2 C. L. R., 440.

⁸ *Johurra Bibee v. Sreegopal Misser* (1876), 1 Calc., 470; *Bishambhar Nath v. Sheo Narain* (1906), 29 All., 116; *Bishambhar Nath v. Fateh Lal* (1906), *Ibid.*, p. 176. See *Joharmal v. Chetram* (1914), 39 Bom., 715; 17 Bom. L. R., 293.

⁹ See *Bishambhar Nath v. Sheo Narain* (1906), 29 All., 166; *Gopal Kastur v. Amarchand* (1907), 9 Bom. L. R., 1289.

¹⁰ See *Joykisto Cowar v. Nittyannund Nundy* (1878), 3 Calc., 738; 2 C. L. R., 440.

business. He can only become a member of the partnership by a consentient act on the part of himself and the partners.¹

A compromise between co-partners of partnership accounts and differences by a transfer and division of partnership property must be shown clearly to be of benefit to the minor before the compromise will be enforced.²

As soon as the guardian sees that the interests of his ward are likely to be prejudiced by his property remaining in the trade, it becomes his duty to take steps to effect the withdrawal of the ward's property from the partnership.

A compromise of claims, or a family arrangement, will not be upheld except on proof of necessity, or of clear benefit to the ward.³ The compromise must be made in good faith,⁴ and be free from fraud.⁵

Compromises
by guardians.

Where the compromise operates to assign immovable property of the ward, the guardian, if appointed by the Court, must obtain the previous permission of the Court.⁶

Under Bengal Act IV of 1870, the Court of Wards in Bengal possessed express powers to compromise claims by or against its wards.⁷ The present Act contains no such express powers, but the general powers⁸ of the Court would be sufficient to cover any compromise (otherwise than in a suit)⁹ properly entered into in the interest of the minor. Similar powers are possessed by the other Courts of Wards.¹⁰

Compromise
by Court of
Wards.

¹ *Lutchmanen Chetty v. Siva Prokasa Modeliar* (1899), 26 Calc., 349, at p. 354; 3 C. W. N., 190, at pp. 192, 193. *Anant Ram v. Channu Lal* (1903), 25 All., 378; *Lalji Nensey v. Keshowji Punja* (1912), 37 Bom., 340; 14 Bom. L. R., 840. See ante, p. 19, note 6.

² *Ramlal Thakursidas v. Lakmi Chand Muniram* (1861), 1 Bom. H. C. Rep., App. li.

³ *Dharmaji Vaman v. Gurrav Shrinivas* (1873), 10 Bom. H. C. Rep., 311; *Roshun Jehan (Ranee) v. Enaet Hossein (Rajah Syud)* (1866), 5 W. R. C. R., 4; s.c., W. R., 1864, C. R., 83; *Boodhmul (Lalla) v. Gowree Sunkur (Lalla)* (1865) 4 W. R. C. R., 71; s.c. (1866), 6 W. R. C. R., 16; *Roteekant Bose v. Nobinchunder Bose*, 2 Hay, 619; *Ramlal Thakursidas v. Lakmi Chand Muniram* (1861), 1 Bom. H. C. Rep., App. li; *Gopeenath (Baboo) v. Ramjeevan Lall*, Ben. S. D. A., 1859, p. 813; *Venkatraghava v.*

Rangamma (1892), 15 Mad., 498; *Nirvanaya v. Nirvanaya* (1885), 9 Bom., 365.

⁴ See *Makbul Ali v. Masnad Bibi (Srimati)* (1869), 3 B. L. R., A. C. J., 54.

⁵ See *Ram Autar v. Muhammad Mumtaz Ali Khan* (1897), 24 I. A., 107; 24 Calc., 853; 1 C. W. N., 417.

⁶ Act VIII of 1890, sec. 29, ante, p. 143. *Brijmohan Lal v. Ghasi Ram*, N.-W. P. W. N., 1891, p. 46.

As to a compromise of a dispute as to adoption, see *Lingappa v. Sangawa* (1910), 12 Bom. L. R., 370.

⁷ Act IV (B. C.) of 1870, sec. 73.

⁸ Act IX (B. C.) of 1879, secs. 14 and 18, post, pp. 327, 328, 331.

⁹ As to the compromise of suits by Courts of Wards, see post, p. 275, note 5.

¹⁰ See Act I (M. C.) of 1902, sec. 35, post, p. 376. Act IV (U. P. C.) of 1912, sec. 38, post, p. 406. Act I (Bo. C.) of 1905, sec. 27, post, p. 430.

As to the compromise of suits, see *post*, pp. 272-275.

Gift by
guardian.

A guardian cannot give away his ward's property in charity or otherwise.¹ If he does so the ward can recover it back.²

The Hindu law allowed a gift even of immovable property by the guardian in case of necessity, such as the support of the family.³

Relinquish-
ment of right.

He cannot waive or relinquish his ward's rights or claims⁴ except for a due consideration, as in the case of a proper compromise.

Reference to
arbitration.

A reference to arbitration made by a properly constituted guardian, or by a manager of a joint family, in good faith and for the benefit of a minor, will be upheld.⁵

It is necessary for him to obtain the sanction of the Court when the arbitration is in a suit, *post*, p. 274;⁶ but the application need not be in writing.⁷

An arbitration in which a minor is not properly represented does not bind him.⁸

¹ *Luchmeswar Singh (Maharajah) v. Chairman, Darbhanga Municipality* (1890), 17 I. A., 90; 18 Calc., 99; *Mohammad Mumtaz Ali Khan (Raja) v. Sakhawat Ali Khan* (1901), 28 I. A., 190; 23 All., 394; 5 C. W. N., 881. As to the power of a guardian appointed by a Court to give away the immovable property of the ward with the sanction of the Court, see Act VIII of 1890, sec. 29, *ante*, p. 143. As to the powers of the Courts of Wards of Madras, and the United Provinces, to apply the money of the ward in donations, see Act I (M. C.) of 1902, sec. 32 (*post*, p. 374), and Act IV (U. P. C.) of 1912, sec. 36 (*post*, p. 404).

² *Mahadaji Parashram v. Balaji Sitaram*, Bombay Printed Judgments, 1882, p. 267; *Sundrammal v. Rangasami Mudaliar* (1894), 18 Mad., 193, at p. 200.

³ Nitakshara, chap. i, sec. i, paras. 28, 29; see *Kalu v. Barsu* (1894), 19 Bom., 803.

⁴ *Kedarnath Mookerjee v. Mathuranath Dutt* (1868), 1 B. L. R. A. C., 17; 10 W. R. C. R., 59; s.c. on review *Mathuranath Dutt v. Kedarnath Mookerjee* (1868), 2 B. L. R. A. C., 126;

Luchmeswar Singh (Maharajah) v. Chairman, Darbhanga Municipality (1890), 17 I. A., 90; 18 Calc., 99. A guardian cannot revoke or repudiate a trust of which his ward is a beneficiary. This can only be done by the ward on attaining majority: cf. Act II of 1882, sec. 78, which is in accordance with the general law.

⁵ See *Romonkissen Sett v. Hurrololl Sett* (1892), 19 Calc., 334; *Temmakal v. Subbammal* (1864), 2 Mad. H. C. Rep., 47; *Ramnarain Poramanick v. Sreemutty* (1864), 1 W. R. C. R., 281; *Balaji Narayan Gokhale v. Nana* (1903), 27 Bom., 287; 5 Bom. L. R., 95; *Vithaldas Ganpat v. Dattaram Ramchandra* (1901), 26 Bom., 298; *Sakrappa v. Shivappa* (1910), 35 Bom., 153; 12 Bom. L. R., 984.

⁶ *Hardeo Sahai v. Gauri Shankar* (1905), 28 All., 35.

⁷ *Umed Singh (Thakur) v. Sobhag Mal Dhadha* (1915), 43 I. A., 1; 20 C. W. N., 137.

⁸ See *Rashid-un-Nisa (Musammat) v. Muhammad Ismail Khan* (1909), 36 I. A., 168; 31 All., 572; 13 C. W. N., 1182; 11 Bom. L. R., 1225; *Surya Narain Jha v. Banwari Jha* (1912), 18 C. W. N., 626.

A guardian cannot bind his ward by an admission, which has Admissions, no connection with the present management of the property.¹

It is not ordinarily in the interests of a minor member of Partition, a joint Hindu family, or of any other minor joint-owner, that his share should be separated.

Primâ facie, a partition is not for a minor's benefit, because, ordinarily speaking, the family estate is better managed, and yields a greater ratio of profit in union than when split up and distributed among the several parceners, and moreover, by partition, a minor member of a Mitakshara family would lose the benefit of survivorship.²

Such special circumstances, as would render a suit for partition necessary in the interest of the minor, would justify a guardian in arranging a partition.³

Where an adult co-sharer insists upon partition the guardian cannot resist it, but must do his best in the interests of the minor.⁴

A partition or separation by arbitration,⁵ or by arrangement,⁶ or by the Collector,⁷ is binding on a minor, provided that he be not injuriously affected thereby, that it be fair, that he be duly represented,⁸ and that the person representing him in such proceedings act *bonâ fide* and with a due regard to his interest.⁹

“There is no doubt that a valid agreement for partition may be made during the minority of one or more of the co-parceners. That seems to follow from the admitted right of one co-parcener to claim a partition,

¹ *Bhogaraju Venkatrama Jogiraju, v. Addepalli Seshayya* (1911), 35 Mad. 560, at p. 565.

² *Kamakshi Ammal v. Chidambara Reddi* (1861), 3 Mad. H. C. Rep., 94; see *ante*, pp. 126, 127.

³ *Ante*, pp. 126, 127. West and Bühler, 2nd Edn., p. 303.

⁴ See *Nallappa Reddi v. Balammal* (1864), 2 Mad. H. C. Rep., 182.

⁵ *Ramnarain Poramanick v. Sreemutty* (1864), 1 W. R. C. R., 281; *Balaji Narayan Gokhale v. Nana* (1903), 27 Bom., 287; 5 Bom. L. R., 95; *Jagan Nath v. Mannu Lal* (1894), 16 All., 231.

⁶ *Deo Bunsee Kooer (Mussamat) v. Dwarkanath* (1868), 10 W. R. C. R., 273; s.c., *Deowanti v. Dwarkanath*, 8 B. L. R., 363 note; *Awadh Sarju Prasad Singh v. Sita Ram Singh* (1906), 29 All., 37; *Daya Shankar v. Hub Lal* (1914), 37 All., 105; see *Parbati*

(*Musammal*) v. *Naunihal Singh (Chaudhri)* (1909), 36 L. A., 71; 31 All., 412; 13 C. W. N., 983; 11 Bom. L. R., 878.

⁷ *Hari Prasad Jha (Baboo) v. Mudan Mohan Thakur* (1872), 8 B. L. R., Ap., 72; 17 W. R. C. R., 217.

⁸ *Lal Bahadur Singh v. Sispal Singh* (1892), 14 All., 498; *Krishnabai v. Khanqowda* (1893), 18 Bom., 197. Representation by the managing member is sufficient: *Bhagwati Prasad v. Bhagwati Prasad* (1912), 35 All., 126.

⁹ *Kalee Sunkar Sannyal v. Denendro Nath Sannyal* (1874), 23 W. R. C. R., 68; *Chanvirapa v. Danava* (1894), 19 Bom., 593; *Nallapa Reddi v. Balammal* (1864), 2 Mad. H. C. Rep., 182. As to cases governed by Malabar law, see *Arayalprath Kunhi Pocker v. Kanthilath Ahmad Kuti* (1905), 29 Mad., 62.

and if an agreement for partition could not be made binding on minors, a partition could hardly ever take place. No doubt, if the partition were unfair or prejudicial to the minor's interests, he might, on attaining his majority, by proper proceedings set it aside so far as regards himself."¹

The partition can be impeached, if a share be given to a stranger,² as a gift of a minor's property is not permissible.³

Reunion.

A guardian would apparently have no power to effect an arrangement for reunion on behalf of his ward.⁴

Employment of agents, etc.

A guardian or manager would be entitled to employ such persons as may be necessary for the purpose of the management of the property, and their acts would bind the ward's estate, provided they were performed in the course of the management, but not otherwise.⁵

Shares in limited companies.

Although shares in limited companies may be dealt with by a guardian in the same way as other movable property of his ward, the Court would not be inclined to compel the registration of a transfer by the guardian,⁶ except it be perfectly clear that the minor cannot repudiate the transfer.⁷

Power to vote.

The power of a guardian to vote for his ward at meetings of a company depends upon the articles of association of the company.⁸

Shares in Presidency Banks.

Where the ward is a proprietor or shareholder in a Presidency Bank his guardian may vote for him.⁹

Letters of administration, etc.

As to the powers of a guardian to apply for letters of administration or succession certificates, see *ante*, pp. 35, 36.

Distress.

Under the Bengal Tenancy Act he can in the name of his ward apply for distraint.¹⁰

Hereditary offices in Bombay.

In the Bombay Presidency when any head of a family, or representative *wátándár*,¹¹ is under the age of eighteen years his guardian, if not a female,¹²

¹ *Balkishen Das v. Ram Narain Sahu* (1903), 30 I. A., 139, at p. 150; 30 Calc., 738, at p. 752; 7 C. W. N., 578, at p. 590; 5 Bom. L. R., 461; *Chanvirapa v. Danava* (1894), 19 Bom., 593. As to the limitation for such suit, see *Lal Bahadur Singh v. Sispal Singh* (1892), 14 All., 498; *Krishmabai v. Khangowda* (1893), 18 Bom., 197; *Chanvirapa v. Danava* (1894), 19 Bom., 593.

² *Ramkishore Kedarnath v. Jainarayan Ramrachhpal* (1913), 40 I. A., 213; 40 Calc., 966; 17 C. W. N., 1189; 15 Bom. L. R., 867.

³ *Ante*, p. 176.

⁴ *Balabuz Ladhuram v. Rukhmabai* (1903), 30 I. A., 130, at p. 136; 30 Calc., 725, at pp. 734, 735; 7 C. W. at p. 646; 5 Bom. L. R., 46.

⁵ See *Bahadur Singh (Maharaj) v. Pareshnath Singh* (1904), 31 Calc., 839, at p. 848; *Sanka Krishnamurthi v. Bank of Burma* (1911), 35 Mad., 692.

⁶ See Act VII of 1913, sec. 38.

⁷ As, for instance, in the case of a transfer by a guardian appointed by the Court, or having authority by the deed appointing him.

⁸ In companies which have adopted Table A, the guardian cannot vote. Cf. Act VII of 1913, Table A, Art. 62.

⁹ Act XI of 1876, sec. 58.

¹⁰ Act VIII of 1885, sec. 121.

¹¹ For definitions of "Head of Family," "Wátándár," and "Guardian," see Act III (Bo. C.) of 1874, sec. 4.

¹² Act III (Bo. C.) of 1874, sec. 51.

may exercise all powers and perform all duties conferred and imposed by Bombay Act III of 1874.¹

In case of the registered representative *wátándár*, or his widow, adopting an heir the guardian of the heir should, on the death of the *wátándár* or widow, report the adoption to the Collector.² Adoption by *wátándár*.

The guardian of a *matadar* who is under eighteen years of age may act on his behalf in an election to the office of *patel*.³ Election of *patel*.

The settlement of a mahal under the Land Revenue (N.-W. P.) Act, must be made with the guardian or manager of a minor.⁴ Settlement of mahal (N.-W.P.).

The right to vote under the Bengal Drainage Act may be exercised by a manager appointed by the Court of Wards or by the Civil Court, or, where no such manager has been appointed, by any person who, in the opinion of the Commissioners, duly represents the interests of the minor.⁵ Bengal Drainage Act.

On the death of one of two or more joint guardians, the guardianship continues to the survivor or survivors until a further appointment be made by the Court.⁶ Right of survivorship among joint guardians.

The powers of a guardian of the property cease—

(a) by his death, removal, or discharge ;

(b) by the Court of Wards assuming superintendence of the property of the ward ; or

(c) by the ward ceasing to be a minor.⁷

They also cease on the death of the ward.

Cessation of authority of guardian.

¹ See sec. 37 as amended by Act III (Bo. C.) of 1886. This Act does not apply to Matadars in the districts of Ahmedabad, Kaira, Broach, and Surat, and in villages in the Panch Mahals district to which Act VI (Bo. C.) of 1887 has been applied. Act VI (Bo. C.) of 1887, sec. 1.

² Act III (Bo. C.) of 1874, sec. 34.

³ Act VI (Bo. C.) of 1887, sec. 23.

⁴ Act III (N.-W. P. C.) of 1901, sec. 65.

⁵ Act VI (B. C.) of 1880, sec. 16 (2).

⁶ Act VIII of 1890, sec. 38.

⁷ Act VIII of 1890, sec. 41 (2). See also sec. 4 (1).

CHAPTER XIX.

LIABILITIES OF GUARDIANS.

Liability to Ward.

Liability to ward. As in the case of any other trustee a guardian's liabilities are measured by his duties.¹

The liability of a *de facto* guardian, who has no legal title to custody of the infant or of his property would be at least as great as that of a *de jure* guardian.

For breach of duty. Every plain neglect of duty by a guardian amounts to a breach of trust, and he must compensate his ward for any loss occasioned thereby.²

His liability extends to profits actually received, or profits which would have been received, but for his gross and wilful default. He is not liable for the profits of property in the wrongful possession of a stranger.³

Loss by investment. He is liable to his ward for loss sustained by an improper or hazardous investment of the ward's money.⁴

Liability for waste, etc. A ward can either during his minority (by a next friend), or after he has attained his majority, sue his guardian for damages for the waste, malversation, or maladministration of his estate,⁵ or for negligence in the management thereof,⁶ or in the conduct of suits.⁷

¹ As to the duties of a guardian, see *ante*, chap. xv.

² *Issur Chander Rai v. Ragub Indernarain*, Ben. S. D. A., 1860, p. 349; s.c. on review at p. 611.

³ *Sarat Chandra Roy Chowdhury v. Rajoni Mohan Roy* (1908), 12 C. W. N., 481.

⁴ *Fletcher v. Walker* (1818), 3 Maddock, 73. As to investment, see *ante*, pp. 128 and 170.

⁵ *Lakhi Prya Dasi (Srimati) v. Nobin Chandra Nag* (1869), 3 B. L. R. A. C., 37; 11 W. R. C. R., 370; *Alimelammal v. Arunachellam Pillai*

(1866), 3 Mad. H. C. Repts., 69; *Ujoodhya Persaud Narain Singh (Baboo) v. Collector of Sarun*, Ben. S. D. A., 1851, p. 370; *Taruck Chunder Sein v. Doorga Churn Sein* (1873), 20 W. R. C. R., 2.

⁶ *Gopeenath (Baboo) v. Ramjeeewun Lall*, Ben. S. D. A., 1859, p. 913; *Ujoodhya Persaud Narain Singh (Baboo) v. Collector of Sarun*, Ben. S. D. A., 1851, p. 370.

⁷ *Issur Chander Rai v. Ragub Indernarain*, Ben. S. D. A., 1860, p. 349; s.c. on review at p. 611.

Where a guardian, by availing himself of his character as such, gains for himself any advantage, or where he enters into dealings under circumstances in which his own interests are, or may be, adverse to those of the ward, and thereby gains for himself an advantage, he must hold the advantage so gained for the benefit of the ward.¹

Advantage
gained by
guardian.

He may be required to account to his ward for property obtained by him in a suit, which was maintained in his own name, but in fact for the minor.²

When a guardian has ousted his ward from possession of property he will be required to pay mesne profits for the whole term of dispossession, without regard to the period of limitation.³

A guardian can at any time be compelled by a suit to perform his duty, or to refrain from committing a breach of trust.

Injunction
against
guardian.

A ward has no summary remedy against his guardian except that he can compel him on the termination of his guardianship to deliver up property and accounts in his possession.⁴

A minor can, at any time during his minority,⁵ require his guardian⁶ to account to him for his dealings with his property,⁷ and should his guardian unreasonably neglect or refuse so to do, or should there be any suspected mismanagement of the property, he can by a next friend⁸ sue the guardian for an account.⁹

Account
against
guardian
during
minority.

¹ See Act II of 1882, sec. 88, illus. (h).

² *Dhurm Das Pandey v. Shama-soondri Dibiah (Mussumal)* (1843), 3 M. I. A., 229; 6 W. R. P. C., 43.

³ *Basanta Kumari Debi v. Kamikshya Kumari Debi* (1905), 32 I. A., 181; 33 Calc., 23; 10 C. W. N., 1; 9 Bom. L. R., 904.

⁴ Act VIII of 1890, sec. 41 (3), *post*, p. 183.

⁵ As to his right to an account on attaining majority, see *post*, pp. 184, 185.

⁶ This would include the manager of a joint family or any other person having charge of the property of a minor: *Abhay Chandra Roy Chowdhry v. Pyarimohan Guho* (1870), 5 B. L. R., 347; 13 W. R. F. B., 75, *Chuckun Lall Singh v. Poran Chunder*

(1868), 9 W. R. C. R., 483. As to the nature of the account to be rendered to a minor member by the manager of a joint family, see *Damodardas Maneklal v. Uttamram Maneklal* (1892), 17 Bom., 271.

⁷ *Cary v. Bertie* (1697), 2 Vernon, 333, at p. 342.

⁸ As to the procedure in suits by minors, see *post*, chap. xxv.

⁹ The guardian would, in cases where he has acted properly, be entitled to his costs of a suit for an account, and the next friend of a minor suing his guardian for an account may be made personally liable for the costs of such suit, when it appears that the charges of mismanagement, on which it is based, are unfounded (see *post*, p. 279).

A wrongful refusal or neglect to account might also justify an application for the removal of a guardian appointed by the Court.¹

It has been held by the Allahabad High Court that the heir of the guardian cannot be compelled to account for moneys received by the guardian,² but that decision has been doubted by the Calcutta High Court.³ It is submitted that the person into whose hands the property of the guardian and the account books or other materials (if any) for making up the accounts of the ward's estate may come, is liable to an account. He can discharge himself from such liability on giving all the information in his power.⁴

Suit against guardian where administration bond is taken.

Where a guardian appointed or declared by a Civil Court under the Guardians and Wards Act has given a bond duly to account for what he may receive in respect of the property of his ward,⁵ the Court may, on application made by petition and on being satisfied that the engagement of the bond has not been kept, and upon such terms as to security, or providing that any money received be paid into the Court, or otherwise as the Court thinks fit, assign the bond to some proper person, who shall thereupon be entitled to sue on the bond in his own name as if the bond had been originally given to him instead of to the Judge of the Court, and shall be entitled to recover thereon as trustee for the ward, in respect of any breach thereof.⁶ Where the amount of this bond is not sufficient to cover the liability, the guardian remains liable. A suit for the amount not covered by the bond would have to be brought in the name of the minor, or after his death by his representative.⁷

Suit against guardian where administration bond not taken.

Where a guardian appointed or declared by the Court has

¹ *Ante*, pp. 101, 102.

² *Manmothonath Bose Mullick v. Basunto Kumar Bose Mullick* (1900), 22 All., 332.

³ *Bahadur Sing (Maharaj) v. Basunto Kumar Roy* (1913), 17 C. W. N., 695.

⁴ See Act VIII of 1890, secs. 36, 37, *post*, p. 183, sec. 41 (3), *post*, p. 183.

⁵ This would include the balance actually in hand at the time of the appointment or declaration, but the Court cannot in a suit on the bond open up the accounts of previous years in order to ascertain the balance which the guardian ought to have had at the time of his office being recognized by the Court: see Appeal 9 and 10 of 1875, Bombay Printed Judgments, 1877. As to a

suit for the purpose of taking previous accounts, see *ante*, p. 181.

⁶ Act VIII of 1890, sec. 35. Without the assignment no person, other than the judge to whom the bond is given, can sue on it: *Amarnath v. Thakur Doss* (1883), 5 All., 248. On the guardianship ceasing the judge may assign the bond to the ward or to some other person. It may be assigned to the ward's representative after his death. See *Ganpat Tatia Maimkar v. Anna* (1905), 30 Bom., 164; 7 Bom. L. R., 803. There is no appeal from an order declining to assign the bond. *Ibid.* For a case of a bond given under Act XL of 1858, see *Bahadur Singh (Maharaj) v. Basunto Kumar Roy* (1913), 17 C. W. N., 695.

⁷ See Act VIII of 1890, sec. 36.

not given such bond any person, with the leave of the Court; may as next friend, at any time during the continuance of the minority of the ward, and upon such terms as in the case where a bond is taken, institute a suit against the guardian,¹ or, in case of his death, against his representative, for an account of what the guardian has received in respect of the property of the ward, and may recover in the suit, as trustee for the ward, such amount as may be found to be payable by the guardian or his representative, as the case may be.²

After attaining majority the ward can continue such suit in the same way as he can continue other suits instituted on his behalf.³

Such suits can be instituted in any Court having jurisdiction to try suits of a similar description against persons other than guardians appointed by the Court.⁴

Court in which suits to be brought.

These provisions do not deprive a ward or his representative of any other remedy against his guardian, or the representative of the guardian, which any other beneficiary or his representative would have against his trustee or the representative of the trustee.⁵

General liability of guardian as trustee.

When for any cause the powers of a guardian cease,⁶ the Court may require him or, if he is dead, his representative⁷ to deliver as it directs any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward.⁸

Delivery of property and accounts.

When he has delivered the property or accounts as required by the Court, the Court may declare him to be discharged from his liabilities save as regards any fraud which may subsequently be discovered.⁹

Discharge from liability.

¹ This is subject to the provisions of the Civil Procedure Code (Act V of 1908), order 32, rules 1, 4 (2); (see *post*, chap. xxv.), Act VIII of 1890, sec. 36 (2).

² Act VIII of 1890, sec. 36 (1). Although a suit cannot be brought under this section after the death of the minor (*In the matter of Narmadabai* (1883), 8 Bom., 14), the representative of the minor can sue for an account, *post*, p. 185.

³ Civil Procedure Code (Act V of 1908), order 32, rule 12 (1), *post*, p. 266.

⁴ There was a decision to the contrary effect under Act XX of 1864:

Uttamram Maniklal v. Damodhardas Maniklal (1872), 9 Bom. H. C. Rep., 39.

⁵ Act VIII of 1890, sec. 37. As to a suit for an account, see *post*, p. 185.

⁶ *Ante*, p. 179. This applies to the case of any guardian: see definition of guardian, *ante*, p. 48.

⁷ *i.e.* his executor or administrator, or, in the absence of such representative, the person succeeding to his property and obtaining possession of the property or accounts of the ward.

⁸ Act VIII of 1890, sec. 41 (3).

⁹ *Ibid.*, sec. 41 (4).

It has been held that such declaration has the effect of protecting the guardian from all suits in connection with the management of the minor's property except in the case of fraud discovered after the declaration.¹

When the Court has not made such order the guardian can be sued for an account.²

Penalty for not complying with requisition.

If a person who has ceased to be a guardian or the representative of such person, fails to deliver any property or accounts in compliance with the requisition of the Court, he is liable by order of the Court³ to a fine not exceeding one hundred rupees, and in case of recusancy to a further fine not exceeding ten rupees for each day⁴ after the first during which the default continues, and not exceeding five hundred rupees in the aggregate, and to detention in the civil jail until he undertakes to deliver the property or accounts.⁵

This has no application when there is a *bonâ fide* question as to the guardian's liability.⁶

If he is released from detention on giving such undertaking, and fails to carry out the undertaking within the time allowed by the Court, the Court may cause him to be arrested and recommitted to the civil jail.⁷

Appeal.

The order inflicting a penalty⁸ is appealable to the High Court.⁹

Extent of summary remedy.

This summary remedy only applies to property and accounts actually in the possession or under the control of the guardian. He cannot be thereby required to make up accounts or to explain them or to vouch them or to give any information on the subject of his dealings with the property.¹⁰

Suit for an account after termination of a guardianship.

In addition to this remedy a ward on attaining majority, a new guardian in the name of the ward, or the ward's

¹ *Murlidhar v. Vallabhdas* (1909), 33 Bom., 419; 11 Bom. L. R., 512.

² *Kaniz Fatima v. Sajjad Hosain* (1906), 34 Calc., 211.

³ *i.e.* the Court making the requisition.

⁴ *Ante*, p. 84, note 4.

⁵ Act VIII of 1890, sec. 45.

⁶ *Motilal Kalyandas v. Ichha (Bai)* (1908), 11 Bom. L. R., 190.

⁷ Act VIII of 1890, sec. 45.

⁸ Whether of fine or imprisonment.

⁹ Act VIII of 1890, sec. 47.

¹⁰ Cf. Act XL of 1858, sec. 23, and Act XX of 1864, sec. 23. In the case where the ward claims more than the guardian admits, it might be necessary to take some sort of account, but in case of there being a *bonâ fide* dispute as to the accounts, it would generally be better to refer the parties to a suit.

representative on the death of the ward, may by suit require a guardian ¹ to account for his dealings with the property and to deliver such property as may belong to the ward, and such money as upon the taking of the accounts by the Court may be found to be due to him.

As to the remedy against the representative of the guardian, see *ante*, pp. 182, 183.

The Courts have discretion in allotting the costs of suits and must be guided by the circumstances of each case, bearing in mind the rule that the person responsible for the litigation is ordinarily liable for the costs of his opponent; but in a suit of this nature a reasonable mode of dealing with the costs in cases where the guardian had refused or unreasonably neglected or delayed to render a proper account to his ward, might ordinarily be to make him liable for the costs incurred up to and including the interlocutory decree, which makes the order for an account. In other cases he might be allowed such costs.² The cost of taking the accounts by the Court and of the final decree, if any, might in many cases depend upon the result of the accounts. A guardian would ordinarily obtain the costs of an unsuccessful suit against him. Where both parties are to blame for the litigation or in the conduct of it, the Court may reasonably require each party to pay their own costs, but in the absence of misconduct a guardian, like any other trustee, is entitled to his costs, charges, and expenses ³ out of the ward's estate.

Although a suit against a guardian or his representatives for the purpose of following in his or their hands specific property belonging to the ward is not barred by any length of time,⁴ a suit for an account (*i.e.* to have an account taken and for payment of the balance to be found due) must be brought within six years from the termination of the guardianship,⁵ and a suit to make good out of the general estate of a deceased guardian the loss occasioned by a breach of trust must be brought within three years from the date of the guardian's death, or if the loss has not then resulted the date of the loss.⁶

These periods are subject to an extension where the cause of action has arisen during the minority of the ward.⁷

A guardian who dishonestly misappropriates or converts

Criminal breach of trust by guardian.

¹ This includes the manager of a joint family or any other person having rightfully or wrongfully charge of a minor or his property: see *ante*, p. 181, note 6.

² Either from the plaintiff, or if the ward be suing by next friend, from the next friend, or out of the ward's estate.

³ One reason which should make a Court disinclined to deprive a guardian of his costs is that the greater the burdens placed upon the

shoulders of guardians, the greater the difficulty in persuading competent persons to undertake the trust.

⁴ Act IX of 1908, sec. 10; *Hurro Coomaree Dossee v. Tarini Churn Bysack* (1882), 8 Calc., 766.

⁵ Act IX of 1908, sch. i, art. 120; *Saroda Persad Chattopadaya v. Brojonnath Bhattacharjee* (1880), 5 Calc., 910; *Hurro Comarce Dossee v. Tarini Churn Bysack* (1882), 8 Calc., 766.

⁶ Act IX of 1908, sch. i, art. 98.

⁷ *Post*, pp. 291, 292.

to his own use the property of his ward is liable to be punished by the criminal law.¹

Liability to Persons other than Ward.

Personal liability of guardian on contract.

Although a person who has *bonâ fide* contracted with the guardian² of a minor may not be able to make his contract binding against the estate of the minor, he may sometimes, where he has been intentionally deceived, have a remedy against the guardian, by way of damages. A contract as guardian does not imply any warranty of authority as such.³

When a guardian borrows money on his own credit he alone is liable, although the money may have been applied for the benefit of the ward.⁴

In the case of a sale by the guardian, which does not bind the ward, a purchaser, who has not been deceived, has no remedy against the guardian.⁵ Where he has been deceived by the guardian and has acted *bonâ fide*, he can recover from the guardian all that he has paid to the guardian⁶ or that the ward has required him to give up.⁷

In an old case⁸ a guardian was held to be responsible for all claims arising out of transactions during his management, and that to him

¹ Act XLV of 1860, sec. 405: "Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust.'" Sec. 406; "Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

² As to how a question whether the contract is made on behalf of the minor must be determined, see *ante*, p. 141.

³ See *Manibhai Premabhai (Shet) v. Rupaliba (Bai)* (1899), 24 Bom., 166; 1 Bom. L. R., 646.

⁴ *Gadgeppa Desai v. Apaji Jivanrao* (1879), 3 Bom., 237.

⁵ *Bhoopnarain Chowbey v. Rughoo Nath Gobind Roy* (1872), 18 W. R. C. R., 230. See *Doorga Churn Bhattacharjee v. Shosheebhoosun Mitter* (1866), 5 W. R. S. C. C. Ref., 23.

⁶ *Ashruf Ali (Moulovee Syud) v. Mirza Quasim* (1820), 3 Ben. Sel. Reps., 49, 2nd Edn., 65. See *Ashrufooddeen Alee Khan (Nawab Syud) v. Shama Soonderce Dasee (Mussumat)*, Ben. S. D. A., 1853, p. 531.

⁷ *Futteh Narain v. Deen Dyal Lall* (1871), 15 W. R. C. R., 37.

⁸ *Anon.* (1812), 1 Mad. Dec., 51; 1 Morl. Dig., 276. See also *Jowahir Singh v. Chundernarain Rai* (1821), 3 Ben. Sel. Reps., 83, 2nd Edn., 110; and *Neek Singh v. Anoopun Das* (1815), 2 Ben. Sel. Reps., 154, 2nd Edn., 197.

therefore, must claimants look for satisfaction of their demands, and not to the minor whose estate he manages, but that the estate of the minor is responsible for all just debts incurred on account of such minor; and that his guardian, having rendered full and fair accounts, would be entitled to recover from the estate any sums that might appear to have been borrowed from necessity, and for the evident benefit of the minor. The principle of this case cannot, it is submitted, now be carried out in its entirety as in the case of necessities supplied,¹ and other payments which bind the minor's estate, recourse may be had in the first instance to the minor's estate.

When a guardian enters into an agreement of apprenticeship² on behalf of his ward, and covenants with the master with respect to the service or behaviour of the ward, he is liable to be sued on such agreement, if the ward absents himself or neglects to perform his work. Contract of apprenticeship.

As to the liability of a guardian for breach of a contract of marriage entered into by him on behalf of his ward, see *post*, p. 245. Marriage contract.

A guardian would also incur the ordinary liabilities incident to the occupation of land, and would be responsible for those acts and omissions for which an occupier would be liable.³ He is also personally liable for any wrongful acts committed by him, even if they might have been done in the interests of the ward.⁴ The ward's property is not liable for such acts.⁵ Liability as occupier.
Wrongs by guardian.

If he has sufficient funds in his hands, he would be subject to the liabilities placed upon owners of property by the several Municipal Acts.⁶ Liability under Municipal Acts.

A guardian is not, as such, liable for damages for wrongful acts committed by his ward.⁷ Wrongs by ward.

As to the liability of a father or guardian with respect to the commission by children of acts endangering the safety of persons travelling by railway, see Act IX of 1890, sec. 130, *ante*, p. 43. Railway offences by children.

¹ *Ante*, pp. 15 to 19.

² See Act XIX of 1850, *ante*, pp. 133, *et seq*.

³ As to offences against the Salt laws, see *ante*, p. 128.

⁴ *Gooroo Das Roy*, 1 Ben. S. D. A., Summary Cases, Part i, 16. See *Jowahir Singh v. Chundernarain Rai* (1821), 3 Ben. Sel. Repts., 83, 2nd Edn., 110.

⁵ *Maharaj Bahadur Singh v. Paresnath Singh* (1904), 31 Calc., 839; see *Jowahir Singh v. Chundernarain Rai* (1821), 3 Ben. Sel. R., 83 (2nd Edn., 110); *Sonu Vishram Chawan v.*

Dhondu Vishram Chawan (1904), 28 Bom., 330; 6 Bom. L. R., 122.

⁶ See Act III (B. C.) of 1884, sec. 6 (11); Act III (B. C.) of 1899, sec. 3, definition of "owner"; Act VI (Bo. C.) of 1873, sec. 3, definition of "owner"; Act III (Bo. C.) of 1888, sec. 3 (m); Act III (M. C.) of 1904, sec. 3 (23); Act IV (M. C.) of 1884, sec. 3 (xiii), as amended by Act III (M. C.) of 1897, sec. 3 (xix); Act I (N.-W. P. C.) of 1900, sec. 3 (6).

⁷ *Luchman Dass v. Narayan* (1871), 3 N.-W. P. H. C. Rep., 191.

Holding over
after death
of ward.

On the death of his ward a guardian is bound to make over to the next owner possession of the property held by him, and in case of his neglect is liable to be sued for possession and damages.¹

Production of
ward at
instance of
reversioner.

A High Court has power to compel a guardian who is within the limits of its ordinary original civil jurisdiction to produce his ward where an application is made by a reversioner, stating that he has reason to believe that the minor is dead, and that the guardian is concealing such death.²

¹ See 6 Anne, cap. 18, sec. 5.

² 6 Anne, cap. 18.

CHAPTER XX.

MODES OF ENFORCING RIGHT TO CUSTODY OF PROPERTY AND PERSON OF MINOR.

EXCEPT that he can obtain an order from the Court requiring a former guardian or his representative to deliver over property of the ward into his possession,¹ the only remedy available to a guardian who seeks to obtain possession of property belonging to his ward is by a suit in the name of his ward.

A guardian who desires to obtain or recover the custody of his ward may proceed either by suit² or by the summary remedies available to him. Custody of ward.

It has been held by the Allahabad High Court³ that no such suit lies. It may be said that this decision is supported by the view of the Judicial Committee in *Besant v. Narayaniah*⁴ that a suit will not lie for an appointment of a guardian. If a suit for the custody of a ward does not lie, a guardian outside the Presidency towns can, it is submitted, only assert his rights when the ward leaves or is removed from his custody, or is confined under circumstances amounting to an offence. This can scarcely be the case. The Legislature has recognized a suit for the custody of a minor in Act IX of 1887, 2nd Schedule (37).

The summary remedies, when they are available, would ordinarily be more convenient and less expensive than a remedy by a suit, but they

¹ Act VIII of 1890, sec. 41 (3), *ante*, pp. 105 and 183.

² *Sharifa v. Munekhan* (1901), 25 Bom., 574; 2 Bom. L. R., 617; *Balmakund v. Janki* (1881), 3 All., 403. The guardian would bring the suit in his own name. For recent examples of suits of this kind, see *Krishna v. Reade* (1885), 9 Mad., 31; s.c., *Reade v. Krishna* (1886), 9 Mad., 391; *Venkamma v. Savitramma* (1888), 12 Mad., 67; *Abasi v. Dunne* (1878), 1 All., 598. Such suit can be brought in a District Munsiff's Court: *Krishna v. Reade* (1885), 9 Mad., 31. It is not cognizable by a Provincial suit of Small Causes: Act IX of 1887, 2nd schedule (37). Such a suit is not expressly excluded from

the cognizance of a Presidency Small Cause Court, but it can scarcely be contemplated that such suit could be brought in a Small Cause Court. Such a suit will not survive against the representative of the defendant: *Sharifa v. Munekhan* (1901), 25 Bom., 574; 2 Bom. L. R., 617.

³ *Utma Kuar v. Bhagwanta Kuar* (1915), 37 All., 515; *Sham Lal v. Bindo* (1904), 20 All., 594. In the former case the Court considered that a guardian was entitled to an order for custody under sec. 24 of the Guardians and Wards Act (VIII of 1890) (*ante*, pp. 123, 124).

⁴ (1914), 41 I. A., 314; 38 Mad., 807; 18 C. W. N., 1089; 16 Bom. L. R., 625.

are not meant to be used for the purpose of determining difficult questions of right, as, for instance, where testamentary guardianship is claimed, and the *factum* or construction of the will is disputed.¹ Unless the welfare of the minor preemtorily demands the determination of such questions the Court would be justified in abstaining from determining them.²

These remedies are—

1. By a proceeding under sec. 25 of the Guardians and Wards Act.³

In *Utma Kuar v. Bhagwanta Kuar* (1915), 37 All., 515, the Court considered that a guardian was entitled to an order for custody by virtue of sec. 24 of the Act (*ante*, pp. 123, 124).

2. By a proceeding under sec. 491 of the Code of Criminal Procedure.⁴

3. In the case of European British subjects by a proceeding under sec. 456 of the same Code.⁵

4. Where the child is confined under such circumstances that the confinement amounts to an offence, by a proceeding under sec. 100 of the same Code.⁶

5. In the case of a female child under fourteen years of age, by a proceeding under sec. 552 of the same Code.⁷

6. In the case of children, the marriage of whose parents is the subject of a divorce suit, by an application under the Indian Divorce Act.⁸

Applicants put upon terms.

Persons seeking the aid of the Court to obtain possession of minors may be put upon terms.⁹

The exercise of these summary powers does not interfere

¹ In that particular case the Court might let the application for guardianship stand over until the determination of the fact of the will in a properly constituted probate proceeding.

² In two cases (*Balmakund v. Janki* (1881), 3 All., 403, and *Pakhandu v. Manki* (1881), 3 All., 506) the Allahabad High Court declined to allow the question as to a husband's right to obtain the custody of his wife to be determined in a proceeding under Act IX of 1861. In the former case the marriage was denied. In the latter the wife pleaded that the husband was out of caste, and that she would lose her own caste if she resided with him. See *per* Broughton, J., *In the matter of Kashichunder Sen* (1881), 8 Cal.,

266; s.c., *Bromhomoyee v. Kashi Chunder Sen*, 10 C. L. R. 91, in which case the *factum* of a marriage was tried in a summary proceeding under Act IX of 1861.

³ *Post*, p. 191.

⁴ *Post*, pp. 192, 193.

⁵ *Post*, p. 196.

⁶ *Post*, pp. 196, 197.

⁷ *Post*, p. 197.

⁸ *Ibid.*

⁹ In *Shridhar v. Hiralal Vithal* (1887), 12 Bom., 480, where paternal relations were seeking possession of a girl in order to give her in marriage, provision was made in the order that the girl should not be married to a person living in a foreign territory, and should not be forced into marrying a person whom she did not like.

with the rights of guardians subsequently appointed, or with those of the Courts of Wards.

1. In addition to its powers to provide for the custody of a minor, pending the appointment of a guardian,¹ the District Court² having jurisdiction in the place where the ward for the time being ordinarily resides³ can provide summarily for the custody of minors independently of any proceeding for the appointment of guardians, and whether such proceeding be pending or not.

Guardians and Wards Act, sec. 25.

Section 25 of the Guardians and Wards Act (VIII of 1890) is as follows:—

Guardians and Wards Act, sec. 25.

“(1) If a ward leaves or is removed from the custody of a guardian of his person the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

Title of guardian to custody of ward.

“(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by sec. 100 of the Code of Criminal Procedure.”⁴

“Guardian” in sec. 25, as in the rest of the Act, means a person having the care of the person of the minor,⁵ and includes not only a guardian appointed by the Court, but also a natural or testamentary guardian,⁶ and having regard to the principles upon which the Courts in India and in England have acted in the summary disposal of the custody of minors would include any person not wrongfully having the custody of the minor.

Who is entitled to apply.

Except pending the appointment of a guardian,⁷ the Court has, under the Guardians and Wards Act, no summary power to remove a ward from the custody of his guardian even where the custody of the minor by the guardian is calculated to injure the minor. The remedy, in that case, is to apply for the appointment of a guardian and for an interlocutory order.

The Court can only act where it is for the welfare of the minor, but where the constituted guardian is fit for the trust, it is ordinarily for the benefit of the minor that he should be restored to the custody of such guardian.

The powers conferred by this section upon the Court are limited to providing for the custody of the minor. The Court cannot thereunder

Powers limited to custody.

¹ *Ante*, p. 83.

⁴ *Post*, pp. 196, 197.

² This includes a High Court in the exercise of its ordinary original civil jurisdiction: Act VIII of 1890, sec. 4 (4).

⁵ Act VIII of 1890, sec. 4 (2).

⁶ *Dayabhai Raghunathdas v. Parvati (Bai)* (1915), 39 Bom. 438; 17 Bom. L. R., 332.

³ Act VIII of 1890, sec. 4 (5).

⁷ *Ante*, p. 83.

provide for the maintenance, education, or marriage¹ of a minor or deal with his property.

Procedure in application under sec. 25.

No special procedure is provided for the hearing of an application under sec. 25. The application would be by petition, and the Court can only make an order after due notice to the person in whose custody the minor is, and after hearing such person, if he wishes to be heard, and such evidence, if any, as he may produce.

In making an order the Court can act only upon legal evidence.²

Penalty for disobeying order under sec. 25.

If a person having the custody of a minor fails to do his utmost to compel the minor to return to the custody of his guardian in obedience to an order under sec. 25, sub-sec. 1, he is liable by order of the Court³ to fine not exceeding one hundred rupees, and in case of recusancy further fine not exceeding ten rupees for each day after the first during which the default continues,⁴ and not exceeding five hundred rupees in the aggregate, and to detention in the civil jail until he undertakes to compel the minor's return. If a person who has been released from detention on giving such undertaking fails to carry out the undertaking within the time allowed by the Court, the Court may cause him to be arrested, and recommitted to the civil jail.⁵

Appeals.

Orders imposing a penalty under this provision,⁶ and orders under sec. 25 making or refusing to make an order for the return of the ward to the custody of his guardian, are appealable to the High Court.⁷

Act V of 1898, sec. 491.

2. The High Courts of Bengal, Madras, and Bombay have also power to determine questions as to the proper custody of minors under sec. 491 of the Code of Criminal Procedure.⁸

¹ It was held under Act IX of 1861, which was repealed by Act VIII of 1890, that the Court could decide the right to give in marriage: *In the matter of Kashi Chunder Sen* (1881), 8 Calc., 266; s.c., *Bromho-moyee v. Kashi Chunder Sen*. 10 C. L. R., 91; but sec. 25 of the Guardians and Wards Act does not contain the word "guardianship," which was to be found in Act IX of 1861, sec. 3.

² This would include a report

made by a Collector or a subordinate Court: Act VIII of 1890, sec. 46, *ante*, p. 107.

³ *i.e.* the Court which made the order.

⁴ See *ante*, p. 84, note 4.

⁵ Act VIII of 1890, sec. 45, see *ante*, p. 85, note 1.

⁶ Either by way of fine or imprisonment.

⁷ Act VIII of 1890, sec. 47 (c).

⁸ Act V of 1898.

Sec. 491 provides that any one of those High Courts may, whenever it thinks fit, direct “(a) That a person within the limits of its ordinary original civil jurisdiction be brought up before the Court to be dealt with according to law. (b) That a person illegally or improperly detained in public or private custody within such limits be set at liberty.”

This provision takes the place of the writ of *habeas corpus*, which used to be issued by the Supreme Courts, and by the High Courts until 1875, when it was abolished so far as these purposes are concerned.¹

This power may be exercised at the instance of guardians or at the instance of other persons who seek to remove minors from the custody of their guardians.²

It has been under this section and under similar sections of previous Codes of Criminal Procedure,³ that the High Courts have most frequently dealt with questions as to the custody of minors.

Any person interested in the welfare of a minor can apply under sec. 491, but it would rarely happen that an order would be made except at the instance of the minor or of some person claiming the custody of the minor.

The High Courts have in the main acted upon the principles which guide the Court of King's Bench in issuing writs of *habeas corpus*; but as Indian High Courts have always administered both common law and equity they were not confined to the same strict rules as governed the Queen's Bench before rules of equity prevailed in that Court.⁴ In applying this section, the welfare, and interest, of the minor, is the main feature to be regarded;⁵ but the Court will restore a minor to the custody of his guardian unless it be shown that such custody be likely to be injurious to the minor.

Except in the case where the Court finds the child in the custody of the father or other legal guardian, it will ordinarily restore a minor to the custody from which he has been

¹ Act X of 1875, sec. 148.

² Outside the limits of their ordinary original civil jurisdiction, the High Courts have no summary powers to remove a ward from the custody of his guardian, except under sec. 12 of Act VIII of 1890, *ante*, p. 83.

³ Act X of 1875, sec. 148, Act X of 1882, sec. 491.

⁴ *In the matter of Saithri* (1891), 16 Bom., 307. In questions as to the custody and education of minors,

the rules of equity now prevail in the Common law Courts as in the Chancery Courts in England: *In re Goldsworthy* (1876), 2 Q. B. D., 75.

⁵ *In the matter of Saithri* (1891), 16 Bom., 307, at p. 336; *In the matter of Joshy Assam* (1895), 23 Calc., 290; *Kristo Kissor Neoghy v. Kadermoye Dasse* (1878), 2 C. L. R., 583, at p. 588; *Ex parte Intiazzoonnissa Begum* (1814), 2 Madras Notes of Cases, 107.

removed by force or fraud,¹ provided that custody is not an unlawful one, or one injurious to the minor.²

Guardians and Wards Act.

The Court will not act unless it be in the interest of the minor that it should do so,³ and will, so far as possible, administer the principles contained in the Guardians and Wards Act,⁴ while refusing to recognize the rights of a guardian who had shown himself by his bad conduct, or otherwise, incapable of properly performing his duties as guardian.

Rights of father or guardian.

In a summary proceeding of this description the Court will only interfere with the rights of the father, or other guardian, who has the custody of the child, where the danger to the minor is imminent, as where he has been guilty of cruelty to, or personal ill-usage of, the minor, or his conduct be of such a nature as to be likely to contaminate and corrupt the morals of his ward.⁵

Distinction between cases where the father is applying for custody, and cases where the application is made against the father.

This applies only where the Court, being moved by the minor, or his mother, or other relative, actually finds the minor in the custody of his legal guardian.⁶ Where the legal guardian is applying to the Court for the enforcement of his rights to the custody of the child, the Court will go beyond those questions, and will not give the child to such guardian in any of the cases which⁷ would justify the Court in appointing a person to act as guardian in the place of such guardian, or in restraining the father from interference with the education and maintenance and custody of his child, as, for example, where he has lost his rights by waiver.⁸

Guardian appointed by the Court.

Where the minor has a guardian appointed by the Court, the custody of the minor should as of course be confided to such guardian, leaving it to the Court, which appointed him, to dismiss him if he ought to be removed.⁹

¹ See *Ex parte Hopkins* (1732), 3 Peere. Wms., 154; 7 East., 579; *R. v. Moseley* (1798), 5 East., 224, note. Forsyth on the Custody of Infants, p. 92.

² See *Ex parte Intiazoonnissa Begum* (1814), 2 Madras Notes of Cases, 107, at p. 113.

³ Cases *ante*, p. 193, note 5.

⁴ VIII of 1890, *ante*, pp. 90-93. *In the matter of Saithri* (1891), 16 Bom., 307, at p. 336; *In the matter of Joshy Assam* (1895), 23 Calc., 290.

⁵ See *In the matter of Carrau*

(1862), 1 Hyde, 143.

⁶ See Forsyth on the Custody of Infants, p. 66.

⁷ *Ante*, chaps. x and xii.

⁸ *Ante*, p. 70.

⁹ As to the removal of guardians appointed by the Court, see *ante*, chaps. xii and xiv. Interference with the rights of a guardian appointed by a Court may amount to a contempt of the authority of the Court appointing him, and may be punished as such: *ante*, p. 130.

The Court in acting under this section would pay regard to the wishes of a minor old enough to form a sound opinion as to his custody.¹ Effect given to wishes of minor.

In a proceeding under sec. 491, the Court cannot appoint a guardian of the minor's person. All it can do is to release the minor from illegal or improper custody, and where the minor is capable of exercising a discretion, to allow him to choose in whose custody he should remain; or where the minor is not of such capacity, it can commit him to proper custody. Duty of Court.

An application under sec. 491 should be supported by an affidavit, stating in whose custody the minor is, and such circumstances as would justify the Court in removing him from that custody,² and the right of the person, if any, applying for such custody. Practice under sec. 491 of Act V of 1898.

The Court is not bound by any fixed rule as to whether it should accept the truth of the answer to the application,³ but must arrive at such conclusion, as may be possible, on the materials before it. Answer to application.

It may, if it thinks fit, require the persons making affidavits to be subjected to cross-examination, and may take *vivâ voce* evidence, but it would not often be necessary to adopt such a course, as the proceeding is intended to be a summary one, and where there are difficult or complicated questions of law or fact to be determined, or where the welfare of the minor may be imperilled by delay, it is better to require the parties to take proper proceedings for the appointment of a guardian.⁴ Evidence.

If the minor be of an age of intelligence the Court may examine him. The minor should in almost every case be brought into Court, so that the Court may ascertain whether he is under any illegal restraint. Although the Court would, in making an order, endeavour to provide for a compliance with the customs and manners of the country,⁵ it would ordinarily be necessary to require a minor *purdahnashin* to be produced in Court, as her examination by commission would rarely be satisfactory.⁶ Examination of minor.

The Court has power to deal with the costs of proceedings under sec. 491.⁷ Costs.

¹ *Ante*, p. 92, note 4. "If the infant be of an age to elect for itself, the Court will merely interfere so far as to get it free from illegal restraint without handing it over to anybody." *In re Andrews* (1873), L. R., 8 Q. B., 153, at p. 158.

² See rule 3 of rules made by the High Court of Bengal under sec. 148 of Act X of 1875.

³ On this question there were, when the writ of *habeas corpus* was in force, two conflicting decisions of the High Court of Bengal within a short time of one another: *Queen v. Vaughan* (1870), 5 B. L. R., 418, and *In the matter of Khatija Bibi* (1870), 5 B. L. R., 557.

⁴ *Ante*, chaps. xi. and xiv.

⁵ See Act VIII of 1890, sec. 12 (2), *ante*, p. 83.

⁶ *In the matter of Beenodeeny Dossee (Sreemutty)* (1863), 2 Hyde, 152; Coryton, 78. See *In re Thakormoney Dossee* (1862), 1 Hyde, 176.

⁷ See *Kristokissor Neoghy Kadermoye Dossee* (1878), 2 C. L. R., 583; *In the matter of Joshy Assam* (1895), 23 Calc., 290. In certain cases under the Criminal Procedure Code express power is given to deal with costs (see secs. 433, 488, and 526). It might be argued from this that where no such power is given, none exists (see *In the matter of Louis* (1875), 15 B. L. R., App. 14). It

Appeal.

An appeal lies in a High Court from the decision of a single judge dealing with the custody of a minor under sec. 491 of the Criminal Procedure Code.¹ Where it be desirable in the interests of the minor, the Court will stay execution of the order appealed from.

European British subjects.

3. The following provisions of the Criminal Procedure Code² empower High Courts³ to deal with the detention of minors who are European British subjects :—

Right of European British subject unlawfully detained to apply for order to be brought before High Court.

“Section 456.—When any European British subject is unlawfully detained in custody by any person, such European British subject or any person on his behalf may apply to the High Court which would have jurisdiction over such European British subject in respect of any offence committed by him at the place where he is detained, or to which he would be entitled to appeal from any conviction for any such offence, for an order directing the person detaining him to bring him before the High Court to abide such further order as it may pass.

Procedure on such application.

“Section 457.—The High Court, if it thinks fit, may, before issuing such order, inquire, on affidavit or otherwise, into the grounds on which it is applied for, and grant or refuse such application; or it may issue the order in the first instance, and, when the person applying for it is brought before it, it may make such further order in the case as it thinks fit, after such inquiry (if any) as it thinks necessary.

Territories throughout which High Court may issue such orders.

“Section 458.—The High Court may issue such orders throughout the territories within the local limits of its appellate criminal jurisdiction, and such other territories as the Governor-General in Council may direct.”

4. The provisions of sec. 100 of the Criminal Procedure Code,⁴ although not limited to minors, would apply to them—

Search for persons wrongfully confined.

“If any Presidency Magistrate, Magistrate of the first class, or Sub-divisional Magistrate has reason to believe that

must be remembered that sec. 491, although situate in a Code of Criminal Procedure, does not deal with matter of crime. It has merely taken the place of the writ of *habeas corpus*, with the costs of which the Courts were competent to deal.

¹ *In the matter of Narrondas Dhanji* (1890), 14 Bom., 555; *Kristokissor Neogy v. Kadermoye Dossee* (1878), 2 C. L. R., 583.

² Act V of 1898.

³ This includes not only the four High Courts, but also the chief Courts of the Punjab and Burmah and the highest Court of Criminal Appeal or revision for any local area; or, where no such Court is established under any law for the time being in force, such officer as the Governor-General in Council may appoint in this behalf. Act V of 1898, sec. 3 (j).

⁴ Act V of 1898.

any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person if found shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper."

5. Certain limited powers are also possessed by the Presidency and District Magistrates with respect to the custody of female infants. Sec. 552 of the Criminal Procedure Code¹ provides that "upon complaint made to a Presidency Magistrate or District Magistrate on oath of the abduction or unlawful detention of a female child under the age of fourteen years, for any unlawful purpose,² he may make an order for the immediate restoration of such female child to her husband, parent, guardian, or other person having the lawful charge of such child,³ and may compel compliance with such order, using such force as may be necessary."

Power of
Presidency
and District
Magistrates.

6. A Divorce Court has power to provide for the custody of minor children, the marriage of whose parents is the subject of a suit.⁴

As to the power of a Collector to make an order for the temporary custody of a minor heir, see, as to Bengal, Act IX (B. C.) of 1879, sec. 30, *post*, p. 324; as to Madras, Act I (M. C.) of 1902, secs. 10 and 11, *post*, p. 361; as to the United Provinces, Act IV (U. P. C.) of 1912, sec. 14, *post*, pp. 391, 392; and as to Bombay, Act I (Bo. C.) of 1905, sec. 10, *post*, p. 419.

Court of
Wards.

¹ Act V of 1898.

² This must be a purpose in itself unlawful, not one which only becomes unlawful when entertained towards a child in opposition to the wishes of her guardian: *Abraham v. Mahtabo* (1889), 16 Calc., 487.

³ The Magistrate would only have power to enter into the question as to what is the lawful charge, and if he finds any one who is entitled to the guardianship, he should commit the child to the charge of such person. If there be no such person, then the Magistrate should restore the

child to any (not unlawful) custody from which she may have been removed.

⁴ Act IV of 1869, secs. 41 to 44. "Minor children" means, in the case of sons of native fathers, boys who have not completed the age of sixteen years, and in the case of daughters of native fathers, girls who have not completed the age of thirteen years. In other cases it means unmarried children who have not completed the age of eighteen years: see *ante*, pp. 8, 9.

CHAPTER XXI.

RATIFICATION AND AVOIDANCE.

Ratification of guardian's acts.

ON coming of age a minor must consider whether he will ratify or avoid the acts of his guardian. However much a guardian may have exceeded his powers, or otherwise acted improperly in his trusts, his acts will be rendered binding on the ward by being ratified, or acquiesced in, by him, after he has attained majority,¹ and has full knowledge of his rights, and of all the material facts connected with the transaction so ratified.² A ward after coming of age is entitled to adopt any of the acts of his guardian, which were done on his behalf, whether they were or were not for his benefit. Completed acts of the guardian, even if not ratified, must be treated as valid until they are avoided.³

The acts of a person having no authority to represent the minor, being void cannot be ratified.⁴ In a case⁵ where after her majority a woman had acted upon a family settlement which had been made during her minority and in which she had been in part, although not formally represented, and which could not be undone, the Judicial Committee upheld the settlement.

Acts of minor himself.

Agreements and transfers of property by minors, being void,⁶ are incapable of ratification.

¹ *Chetty Colum Comara Vencatachella Reddyer v. Rungasawmy Stree-munth Jyengar Bahadoor (Rajah)* (1861), 8 M. L. A., 319; *Kumurooddeen (Shaikh) v. Bhadoo (Shaikh)* (1869), 11 W. R. C. R., 134; *Saudut Alee Khan v. Khajah Aleemoollah*, Ben. S. D. A., 1853, p. 494; *Prosonno Koomar Bural v. Sajudoor Ruhman (Chowdree)*, Ben. S. D. A., 1853, p. 525; *Ramasami Aiyar v. Venkataramaiyan* (1879), 6 I. A., 196; 2 Mad., 91.

² In *Gulabdas Juggivandas v. Collector of Surat* (1878), 6 I. A., 54, at p. 62; 3 Bom., 186, at p. 193 (in High Court, Bombay P. J. No. 69 of 1873), it was held that a minor, who

ratified a mortgage under the mistaken belief that the property charged came to him as assets liable for ancestral debts, was not bound.

³ See *Prosonna Nath Roy Chowdry v. Afzolonnessa Begum* (1878), 4 Calc., 523, at p. 525. As to avoidance, see *post*, pp. 202, 203.

⁴ *Arumugam Chetti v. Duraisingha Tevar* (1911), 37 Mad. 38.

⁵ *Chuah Hooi Gnoh v. Khaw Sim Bee* (1915), 19 C. W. N. 787.

⁶ *Ante*, pp. 13, 14. As to a promise made after majority to compensate for services rendered before that event, see *Sindha Shri Ganpat-singji v. Abraham* (1895), 20 Bom., 755.

As to the case of there being a fresh consideration for the ratification, see *ante*, p. 14.

The principles, which apply to the ratification and avoidance of the acts of guardians, apply also to transactions which have taken place between a guardian and ward while the influence of the guardian remains.¹

Ratification may be expressed or implied from conduct.² To amount to a ratification, there must be after majority, and after the late minor has acquired full knowledge of the nature and effect of the transaction, some promise or other act, which shows an intentional acknowledgment of his liability in respect of the act done on his behalf during minority, and an election not to avoid it but to be bound by it.³ What amounts to ratification.

An acknowledgment of the guardian's or manager's acts, admitting himself liable on account of them,⁴ or acting in such a way as to lead a person dealing with him to suppose that he had ratified them,⁵ would amount to a ratification.⁶

¹ *Ante*, pp. 121 to 123.

² Cf. Act IX of 1872, sec. 197.

³ See *Rowe v. Hopwood* (1868), L. R., 4 Q. B., 1; *Maccord v. Osborne* (1876), 1 C. P. D., 568; *Ditcham v. Worrall* (1880), 5 C. P. D., 410. "Every one who is of sufficient age and intelligence to execute a deed, whether he be an infant or a man of full age, and who does execute a deed, must be treated as knowing the contents of the instrument, which he executes," *per* Lord Macnaghten in *Edwards v. Carter*, [1893] A. C., at p. 367.

⁴ *Hurrochunder Chowdhry v. Bungsee Mohun Doss* (1864), 1 W. R. M. A., 16; *Saudut Alee Khan v. Aleemoollah Khajah*, Ben. S. D. A. Reps., 1853, p. 494; *Chetty Colum Comara Venkatachella Reddyer v. Rungasawmy Streemunth Jyengar Bahadoor* (1861), 8 M. L. A., 319.

⁵ *Kalce Sunkur Sannyal v. Denendro Nath Sannyal* (1874), 23 W. R. C. R., 68. Cf. Act I of 1872, sec. 115.

⁶ In *Kebul Kristo Doss v. Ram Coomar Shah* (1868), 9 W. R. C. R., 571, the plaintiff, eleven months after attaining his majority, signed for his mother a written statement in a suit to the effect that the property

had been sold by her to the defendant, and in that suit he conducted his mother's defence, which was that the purchaser from her was entitled to what he claimed. It was held that he must be considered to have acquiesced in, and to have ratified, the sale. In *Golaub Koonvuree Bebee v. Eshan Chunder Chowdhoree* (1861), 8 M. L. A., 447; 2 W. R. P. C., 47, the defendants on attaining majority, being desirous of avoiding payment of certain bonds, which had been executed during their minority by their guardian, were advised that they could only do so by instituting a suit to which the guardian must be a party, and in which a settlement of his accounts would be required; but as the guardian was their spiritual guide, and had been their father's also, instead of instituting a suit against him, they thought it better to come to terms with the plaintiff in order to obtain time for the payment of the debt by instalments, and a *kistbundee* was accordingly executed. It was held by the Privy Council that the defendants could not, after the death of the guardian, dispute their liability for the payment of the debts.

A minor cannot make a conclusive election. A ratification or avoidance made by him before he attains majority can be avoided by him after majority, and no amount of acquiescence during minority will affect his rights.

Mere delay is not a ratification.

Mere delay in repudiating an act cannot be treated as a ratification of the act, and is no bar to a suit to set aside, so long as the delay falls short of the period prescribed by the law of limitation ;¹ but it is evidence of ratification.

Silence.

The silence of the ward may, coupled with other circumstances, justify the Court in raising therefrom the inference that the transaction has been ratified,² as, for instance, where a ward, having full knowledge of the sale of his property by his guardian, and of the circumstances of such sale, sees the purchaser laying out large sums of money on the land, and raises no objection.³

Where a ward has had full knowledge of a transaction entered into on his behalf by his guardian, and has received the benefit of the consideration-money, or some other benefit from the transaction, or where he has acted on the arrangement or has permitted other parties to act on it, or where he has allowed third persons to acquire rights under it, ratification may be inferred.⁴

Any act, which expressly or impliedly recognizes the guardian's act as binding, will be taken as confirming it.

For instance, continuance in possession after majority would be held to confirm a lease executed by the guardian. A re-sale of property bought

¹ *Rajnarain Deb Chowdhry v. Kusse Chunder Chowdhry* (1872), 10 B. L. R., 324; *Kristo Gopaul Ghose v. Nilmoney* (1863), 2 Hay, 164; *Dharmaji Vaman v. Gurrav Shrinivas* (1873), 10 Bom. H. C. Rep., 311; *Dagdu v. Kamble* (1864), 2 Bom. H. C. Rep., 348, at p. 360; *Abu Mahomed Abdool Kadir (Moulvi) v. Amtal Karim Banu (Srimati)* (1888), 15 I. A., 220; 16 Calc., 161. As to the period of limitation, see Act IX of 1908, sec. 6, and 1st schedule, art. 44, *post*, p. 202.

² *Rajnarain Deb Chowdhry v. Kusse Chunder Chowdhry* (1872), 10 B. L. R., 324; *Boiddonath Dey v.*

Ramkishore Dey (1870), 13 W. R. C. R., 166; 10 B. L. R., note to p. 326; *Doorga Churn Shaha v. Ram Narain Doss* (1870), 13 W. R. C. R., 172; 10 B. L. R., note to p. 327; *Moungooney Dossee (Doe dem) v. Gooroopersaud Bose* (1820), 2 Morl. Dig., 188.

³ *Bhobanny Persaud Ghose (Doe dem) v. Teerpoorachurn Mitter* (1817), 2 Morl. Dig., 100, at p. 103; *Dattaji Sakharam Rajadhiksh v. Kalba Yese Parabhu* (1896), 21 Bom., 749.

⁴ *Abu Mahomed Abdool Kadir (Moulvi) v. Amtal Karim Banu (Srimati)* (1888), 15 I. A., 220; 16 Calc., 161.

by the guardian for his ward would ratify the original purchase. Acceptance of rent under a lease amounts to a confirmation of the lease.¹

A person who has been admitted to the benefits of part-Partnership. nership under the age of majority becomes, on attaining that age, liable for all obligations incurred by the partnership since he was so admitted, unless he gives public notice, within a reasonable time, of his repudiation of the partnership.² If he gives such notice, his share in the partnership business is alone liable.³

A repudiation within a reasonable time is also necessary Continuing obligations. in the case of continuing obligations entered into by the minor, or on his behalf, during his minority, as, for instance, where he has engaged a servant, or an attorney,⁴ or has himself entered into a contract of service⁵ before attaining majority, and the service continues after he has attained that age; but in these cases, as he cannot enter into a contract,⁶ he will not, even with an express ratification, be held liable on that part of the obligation which existed only before he attained majority.

The absence of repudiation will merely imply a fresh contract entered into on attaining his majority, and will not render him liable for that part of the service of the servant or attorney which was performed before he was of age, except perhaps where the continued employment is such as to amount to an implied undertaking to pay the prior part of the demand incurred during minority.⁷

No one can ratify a voidable act when such ratification Ratification in will injure rights validly created subsequently to his having prejudice of attained majority, as, for instance, he cannot after he has valid act. transferred property to another ratify charges created on such property by his guardian.⁸

A person who has once ratified an act of his guardian cannot Withdrawal of afterwards withdraw such ratification, except where it has ratification. been obtained from him by fraud or misrepresentation.⁹

¹ *Ram Chunder Sircar v. Pran Gobind Boishnub* (1876), 25 W. R. C. R., 71.

² Act IX of 1872, sec. 248, *ante*, pp. 19, 20.

³ *Ibid.*, sec. 247, *ante*, p. 19.

⁴ *Thomas v. Waldo* (1858), 1 F. & F. 173; Simpson on Infants, 3rd Edn., p. 60.

⁵ *Wray v. West*, 15 L. T. N. S.,

190. See Macnaghten's Precedents of Mahomedan Law, chap. viii, case 6.

⁶ *Ante*, p. 13.

⁷ See Simpson on Infants, 3rd Edn., p. 60.

⁸ *Rawuth Lal (Lalla) v. Chadee Thuthara*, Ben. S. D. A., 1858, p. 312.

⁹ *Saudut Alee Khan v. Aleemollah (Khajah)*, Ben. S. D. A., 1853, p.

494.

Limitation of suit to set aside acts of guardian. A suit to set aside a transfer of a ward's property made by his guardian must be brought within three years from the time of the ward attaining the age of majority.¹

Repudiation of voidable transaction. A transaction which is voidable at the instance of the minor may be repudiated by any act or omission of the late minor, by which he intends to communicate the repudiation, or which has the effect of repudiating it;² for instance, a transfer of land by him avoids a transfer of the same land made by his guardian before he attained the age of majority.

It is not necessary that he should bring a suit;³ but a suit to set aside the acts of his guardian during his minority amounts of course to an express repudiation.

The repudiation may be similarly revoked.

No summary remedy. There is no summary remedy available to a minor who wishes to avoid an unauthorized act of his guardian.⁴

Repudiation by representatives. Where a person dies during minority, or after the attainment of his majority, without having ratified an act of his guardian, which if ratified would have bound his estate, the persons entitled to succeed to his property after his death can avoid the act, but no one else can avoid it. A purchaser can avoid the acts of the guardian of the vendor,⁵ but it has been held that a purchaser at an execution-sale cannot repudiate encumbrances charged on the estate by the guardian,⁶ or any other transactions which would be valid unless repudiated.

Guardian cannot repudiate his own act. A guardian cannot repudiate his own act, or endeavour to set aside any dealing by him with his ward's property, on the ground that it was prejudicial to the interests of the ward.⁷

¹ Act IX of 1908, sched. i, art. 44. As to the law before the passing of Act IX of 1908 see Act XV of 1877, sched. ii, articles 44, 91, 144; *Bachchan Singh v. Kamta Prasad* (1910), 32 All., 392; *Ramphul Singh v. Deynarain Singh* (1881), 8 Cal., 517; 10 C. L. R., 489; *Romansar Pandey v. Raghubar Jati* (1883), 5 All., 490. This has no application to a person who has no authority to act as guardian: *Mutadin v. Ahmed Ali* (1912), 39 L. A., 49; 34 All., 213; 10 C. W. N., 338; 14 Bom. L. R., 192; *Balappa v. Chanbasappa* (1915), 17 Bom. L. R., 1134; *Thayammal v. Kuppanna Koundan* (1914), 18 Mad., 1125.

² See Act IX of 1872, secs. 3, 5, and 66.

³ *Abdul Rahman v. Sukhdayal Singh* (1905), 27 All., 30; *Hem Chandra Sarkar v. Lalit Mohan Kar* (1912), 16 C. W. N., 715; *Muthukumara Chetty v. Udayar* (1914), 38 Mad., 867.

⁴ *Mukrumunnissa v. Abdool Jubbar* (1872), W. R. C. R., 171.

⁵ See *Dattaji Sakharam Rajadiksh v. Kalba Yese Parabhu* (1896), 21 Bom., 749.

⁶ See *Hari Ram v. Jitan Ram* (1869), 3 B. L. R. A. C., 427; 12 W. R. C. R., 378.

⁷ *Monmohinee Joginee v. Jugobundhoo Sadhooka* (1873), 19 W. R. C. R., 233; *Ram Doolary Kooer (Mussamut) v. Thacoor Roy* (1878), 2 C. L. R., 547. See Act I of 1872, sec. 115.

During the minority, any friend of the minor may repudiate the transaction by bringing a suit on the minor's behalf.

A guardian can repudiate a transaction entered by another person, professing to act on behalf of the minor. He may also repudiate the acts of a former guardian or manager.¹

When the Court gives possession of property which purports to have been sold by a minor, or by his guardian on his behalf, it will require the purchaser to account to the minor for the mesne profits of the estate while it has been in his possession.²

A person who disputes the authority of another to act as his guardian, or repudiates the acts done by his guardian, cannot take advantage of those acts so far only as they are beneficial to him.³ He cannot avoid a contract or other arrangement which is free from fraud or a like defect, without restoring a party thereto, who has acted upon it, to the position which he occupied at the time of the arrangement being made.⁴ If he disavows a sale made by his guardian to clear his estate from debt, he is only entitled to get back the property in the position in which it would have been had no sale taken place; that is to say, with the incumbrances which the sale was intended to remove; ⁵ and in the case of any sale or charge where the purchaser or lender has acted *bonâ fide*, and, if he is a purchaser, has paid a fair price for the property, and the money has been applied in any way to the minor's benefit, the property will be considered as charged with the payment of such money and the minor is not entitled to a decree for possession without refunding with interest such money as has been applied for his benefit, a set-off being allowed to him for net rents and

Mesne profits.

Person repudiating act must restore other party to position which he occupied at time of act.

¹ See *Bolakee Sahoo v. Court of Wards* (1870), 14 W. R. C. R., 34; *Sheo Pershad Jha v. Gunga Ram Jha* (1866), 5 W. R. C. R., 221; *Venkatramanbhat v. Padmanabh* (1912), 14 Bom. L. R., 393. It was held in *Muthukumara Chetty v. Udayar* (1914), 38 Mad., 867, that he could only do so by a suit.

² *Shurrut Chunder Dey Sircar v. Jadub Narain Nundee* (1864), 1 W. R. C. R., 90; *Luchmun Singh v. Miriam (Mussamut Bibee)* (1866), 5 W. R. C. R., 219; *Gour Pershad Narain v. Sheo Pershad Ram* (1866), 5 W. R. C. R., 103; *Bunseedhur (Lalla) v. Bindessere Dutt Singh (Koonwar)* (1866), 10 M. I. A., 454; 1 Ind. Jur. N. S., 165.

³ *Doorga Lal Jha (Soobah) v. Neclanund Singh (Rajah)* (1867), 7 W. R. C. R., 74.

⁴ Cf. Act IX of 1872, secs. 64 and 65.

⁵ *Bukshan (Mussamut) v. Maldai Kooeri (Mussamut)* (1869), 3 B. L. R. A. C., 423; s.c., *Bukshun (Mussamut) v. Doolhin (Mussamut)*, 12 W. R. C. R., 337; *Hamir Singh v. Zakia (Musammat)* (1875), 1 All., 57.

profits for the time the property was in the possession of the purchaser.¹

Although the minor may have benefited from the purchase money, there is no obligation to repay the money when it has been paid to a person who had no real, or pretended, authority to act for the minor.²

Improvements.

The minor may also be required to repay any money which a purchaser or lessee may have laid out in improvements; but it would depend upon the circumstances under which the purchaser or lessee took possession and the nature of his outlay, whether he ought in equity to be allowed to claim reimbursement of the money expended by him.³

Transfer or contract by minor.

As we have seen, a transfer or contract made by a minor is void,⁴ and therefore it is not necessary for the executant to repudiate it on arriving at majority.

The Court in cancelling the instrument may require the party to whom such relief is granted to make any compensation to the other which justice may require.⁵ Apart from this provision the person who has paid money under such transfer or contract is not entitled to claim a refund.⁶

Recovery of money paid under contract made during minority.

Where a person repudiating a contract made during his minority endeavours to recover money paid under that contract, the English rule of law is, that where the consideration, on account of which the money was paid, has totally failed,

¹ *Bachchan Singh v. Kamta Prasad* (1886), 9 All., 340. See, however, (1910), 32 All., 392; *Muthoora Doss v. Kanoo Beharee Singh* (1874), 21 W. R. C. R., 287; *Kesar (Bai) v. Ganga (Bai)* (1871), 8 Bom. H. C. A. C., 31; *Kuvarji v. Moti Haridas* (1878), 3 Bom., 234; *Nizam-ud-din Shah v. Anandi Prasad* (1896), 18 All., 373; *Makundi v. Sarabsukh* (1884), 6 All., 417; *Bunseedhur (Lalla) v. Bindeseree Dutt Singh* (1866), 10 M. I. A., 454; 1 Ind. Jur. N. S., 165; *Paran Chunder Pal v. Karunamayi Dasi* (1871), 7 B. L. R., 90; 15 W. R. C. R., 268; *Shooghury Koer (Mussamut) v. Boshisht Narain Singh* (1867), 8 W. R. C. R., 331; *Shurrut Chunder v. Rajkissen Mookerjee* (1875), 15 B. L. R., 350; s.c., *Surut Chunder Chatterjee v. Ashutosh Chatterjee*, 24 W. R. C. R. 46; *Tejpal v. Ganga* (1902), 25 All., 59; *Sinaya Pillai v. Muni-sami Ayyan* (1899), 22 Mad., 289; *Girraj Baksh v. Hamid Ali (Kazi)*

(1886), 9 All., 340. See, however, *Marappa Gaundan v. Rangasami Gaundan* (1899), 23 Mad., 89. See Act IX of 1872, sec. 65.

² See *Nathu Piraji Marwadi v. Bahwantrao* (1903), 27 Bom., 390; 5 Bom. L. R., 301; *Abhassi Begum v. Rajroop Koonwar (Moharane)* (1878), 4 Calc., 33; 2 C. L. R., 249.

³ *Dattaji Sakharam Rajadiksh v. Kalba Yese Parabhu* (1896), 21 Bom., 749. See Act IV of 1882, sec. 51.

⁴ *Ante*, pp. 13 and 23.

⁵ Specific Relief Act (I of 1877), sec. 41. See *Dattaram Govindbhai Guzar v. Vinayak Balkrishna Agashe* (1903), 28 Bom., 181; 5 Bom. L. R., 916.

⁶ *Mohuri Bibee v. Dhurmodas Ghose* (1903), 30 I. A., 114, at pp. 125, 126; 30 Calc., 539, at p. 549; 7 C. W. N., 441, at p. 449; 5 Bom. L. R., 421; *Kamta Prasad v. Sheo Gopal Lal* (1904), 26 All., 342.

the minor can recover back his money ;¹ but that, where there has been a performance of any part of the consideration, he cannot recover back any portion of the money advanced by him, unless he is able to restore the other party to the position which he occupied before the contract.² The Indian law is, it is submitted, on the same footing.

In the case of a gift, or other transfer without real con-
sideration, made by a person, who has recently arrived at
majority, in favour of his guardian, the person repudiating the
transaction may be required to refund money expended for
the improvement or preservation of the property ; but it will
depend upon the circumstances of the case whether he ought
to be required so to do.

¹ *Corpe v. Overton* (1833), 10 Bing., 252. See Simpson on Infants, 3rd Edn., p. 64. p. 64 ; *Holmes v. Blogg* (1888), 8 Taunt., 508 ; Dart's Vendors and Purchasers, 7th Edn., p. 33.

² Simpson on Infants, 3rd Edn.,

CHAPTER XXII.

MAINTENANCE, ADVANCEMENT, AND EDUCATION.

Duty of father to maintain his children. ACCORDING to the Hindu, Mahomedan, and English laws alike, it is the duty of a father to support such of his minor children as are incapable of supporting themselves.

Hindu law. It is the duty of a Hindu to maintain his minor sons and unmarried daughters.¹

The duty does not extend to requiring him to support such as are interested in property sufficient for their support or are otherwise capable of maintaining themselves.

With the exception of the case of *Ghana Kanta Mohanta v. Gereli*,² in which it was held that a suit would lie by the mother of an illegitimate child against the putative father for the maintenance of the child, and of a case in Madras,³ the Reports do not show any cases of suits brought against Hindu fathers by their children to enforce this duty of maintenance, and it may be doubtful whether this duty be more than one of moral obligation.⁴ It is clear, however, that on the death of the father, this obligation, if it did not before amount to a legal obligation, then ripens into one.⁵

The unmarried daughters are entitled to be maintained out of the father's property,⁶ or out of co-parcenary property in which he is interested.

¹ Manu, ix, para. 108; xi, paras. 9, 10; Colebrooke's Digest, bk. v, para. lxxvii; bk. ii, chap. iv, paras. xi, xii; Strange's Hindu Law, vol. i, p. 67.

² (1904), 32 Calc., 479. In that decision the learned judges relied upon *Run Murdun Syn (Chhoturya) v. Sahub Parhulad Syn* (1857), 7 M. I. A., 18; 4 W. R. P. C., 132, which was a suit claiming maintenance out of the deceased father's estate. The judges go on to say, "But apart from the Hindu law, we should think that, upon general principles, the defendant, having begotten the child, is bound to provide for its mainte-

nance, if that is necessary. It is submitted that there are no grounds for this general proposition.

³ *Kuppa v. Singaravelu* (1885), S Mad., 325.

⁴ K. K. Bhattacharya ("Law of the Joint Family," p. 282) repudiates any distinction between a moral and a legal obligation, except in the Bengal School.

⁵ See Trevelyan's Hindu Law, pp. 200, 202.

⁶ *Mangal (Bai) v. Rukhmini (Bai)* (1898), 23 Bom., 291, at pp. 293-295; *Tulsha v. Gopal Rai* (1884), 6 All., 632; Vyavastha Darpana, 2nd Edn., p. 370.

There is also a moral duty to maintain a widowed daughter who is without means, and who is unable to obtain support from her husband's family.

Widowed
daughter.

This duty is not enforceable during the father's lifetime, and it has been held that it is not enforceable against his property after his death.¹

A Hindu is morally, but not legally, bound to maintain the widow of his son even "if he has no fund with the disposal of which his son, if alive, could interfere, and if he has inherited nothing from his son, and has not had his rights in any property enlarged by his son's death."²

Widowed
daughter-in-
law.

After his death the person who inherits his property, whether he be governed by the Mitakshara or the Bengal school of Hindu law, is legally bound to maintain her out of the property which he has so inherited, whether such property was ancestral or self-acquired.³

It is also the duty of a Hindu to maintain his illegitimate sons.⁴

Illegitimate
sons.

If he be a member of one of the three regenerate classes, they are, after his death, entitled to maintenance out of his estate, or out of joint family property in which he was interested as co-parcener.⁵

If he be a Sudra they are only entitled to maintenance in case they are not entitled to inherit.⁶

¹ *Mangal (Bai) v. Rukhmini (Bai)* (1898), 23 Bom., 291. See *Mokhada Dassee v. Nundo Lall Halder* (1901), 28 Calc., 278, at p. 288; 5 C. W. N., 297, at p. 300.

(1865), 2 W. R. C. R., 134; *Rangammal v. Echammal* (1898), 22 Mad., 305, at p. 307; *Devi Prasad v. Gunwanti Koer* (1895), 22 Calc., 410, at p. 417.

² *Janki v. Nand Ram* (1888), 11 All., 194, at pp. 198, 199, 200; *Kalu v. Kashibai* (1882), 7 Bom. 127; *Khetramani Dasi v. Kashinath Das* (1868), 2 B. L. R. A. C., 15; 10 W. R. F. B., 89; s.c., 9 W. R. C. R., 413, differing from *Koodee Monee Debea v. Tarrachand Chuckerbutty* (1865), 2 W. R. C. R., 134; *Adhibai v. Cursandas Nathu* (1886), 11 Bom., 199, at p. 207; *Ganga Bai v. Sitaram* (1876), 1 All., 170; *Rujjomoney Dossee v. Shishchunder Mullick* (1864), 2 Hyde, 103. See *Yamunabai v. Manubai* (1899), 23 Bom. 608, at p. 609.

⁴ See *Ghana Kanta Mohanta v. Gereli* (1904), 32 Calc., 479, ante, p. 206.

⁵ *Run Murdun Syn (Chuoturya) v. Sahub Purhulad Syn* (1857), 7 M. I. A., 18; 4 W. R. P. C., 132; *Roshan Singh v. Balwant Singh* (1899), 27 I. A., 51; 22 All., 191; 4 C. W. N., 353; *Hargobind Kuari v. Dharam Singh* (1884), 6 All., 329; *Pershad Singh v. Muherree (Ranee)* (1821), 3 Ben. Sel. R., 132 (new edn., 176).

³ *Siddessury Dabee v. Janardhan Sarkar* (1902), 29 Calc., 557; 6 C. W. N., 530; *Janki v. Nandram* (1888), 11 All., 194; *Kamini Dassee v. Chandra Pole Mundle* (1889), 17 Calc., 373; *Yamunabai v. Manubai* (1899), 23 Bom., 608; *Koodee Monee Debea v. Tarrachand Chuckerbutty*

⁶ See *Inderun Valungypooly Taver v. Ramasawmy Pandia Talaver* (1869), 13 M. I. A., 111, at p. 159; 3 B. L. R. P. C., 1, at p. 4; 12 W. R. P. C., 41, at p. 43; *Muttusawmy Jagavera Yettappa Naicker v. Vencataswara Yettaya* (1868), 12 M. I. A., 203; 2 B. L. R. P. C., 15; 11 W. R. P. C., 6; *Vencataram v. Vencata Lutchemee Ummal* (1815), 2 Str. N. C., 127, at p. 139.

Where the father is the owner of an impartible zemindary, his illegitimate son is entitled to maintenance from its revenues.¹

It is immaterial whether the mother was a kept mistress, or whether the child was the result of a casual connection.² The fact that the relations between the parents are adulterous does not destroy the right,³ but the right of suit is apparently limited to the case where the mother is a Hindu.⁴

In a Madras case it was said,⁵ "In determining the rate of maintenance, an illegitimate member of a family, who is not entitled to inherit, can be allowed only a compassionate rate of maintenance, and he cannot claim maintenance on the same principles and on the same scale as disqualified heirs and females who have become members of the family by marriage. In fixing, however, the compassionate rate of maintenance for the plaintiff, regard, no doubt, should be had to the interest of his deceased father in the joint family property and the position of the mother's family."

The right of an illegitimate daughter to maintenance under the Hindu law has been denied.⁶

Co-parcener.

A minor co-parcener is entitled to maintenance out of the property of the co-parcenary, and that property is also liable for the maintenance of minor dependent members of the family who are not co-parceners, such as minor sons and unmarried daughters of co-parceners.⁷

Mahomedan law.

The Mahomedan law requires a father to maintain his minor sons who are incapable of working and his minor daughters.⁸

Such maintenance would amount only to bare subsistence from the son, and not to maintenance according to the condition in life of the father. It is not a charge upon the father's property.⁹

¹ *Yettapa Naikar (Coomara) v. Venkateswara Yettia* (1870), 5 Mad. H. C., 405. See *Muttusawmy Jagavera Yettappa Naikar v. Venkateswara Yettaya* (1868), 12 M. I. A., 203; 2 B. L. R. P. C., 15; 11 W. R. P. C., 6.

² See *Muttusawmy Jagavira Yettapa Naikar v. Venkatasubba Yettia* (1865), 2 Mad. H. C., 293; s.c., on appeal 12 M. I. A., 203 (see p. 220); 2 B. L. R. P. C., 15 (see p. 20); 11 W. R. P. C., 6 (see p. 9).

³ *Viraramuthi Udayan v. Singaravelu* (1877), 1 Mad., 306; *Rahi v. Govinda Valad Teja* (1875), 1 Bom., 97.

⁴ See *Addoyto Chunder Doss v. Woojan Bebee* (1878), 4 C. L. R., 154.

⁵ *Gopalasami Chetti v. Aruna-*

chelam Chetti (1903), 27 Mad., 32, at pp. 36, 37.

⁶ *Parvati v. Ganpatrao Balal* (1893), 18 Bom., 177, at p. 183.

⁷ See Mayne's Hindu Law, 7th Edn., p. 602.

⁸ Baillie's Digest, vol. i, p. 458.

"When male children have strength enough to work for their livelihood, though not actually adult, the father may set them to work for their own maintenance or hire them out, and maintain them out of their wages; but he has no power to hire females out for work or service." *Ibid.*

⁹ *Mahomed Jusab v. Haji Adam* (1911), 37 Bom., 71; 14 Bom., L. R., 336.

If the father be unable to support them, relatives within the prohibited degrees are required to support male minors, and female minors, who are unmarried or whose husbands are unable or unwilling to support them.¹

A husband is bound to maintain his wife, in a manner suitable to his wealth, or at least to the extent of the mean between his wealth and hers if she be poorer.² He is not bound to maintain her if she be not old enough for matrimonial intercourse.³

In cases which are not governed by either the Hindu or the Mahomedan law, the English law would apparently be applicable.⁴

Persons
other than
Hindus and
Mahomedans.

Although that law recognizes the duty of the father to maintain and educate his children, the Civil Courts have no direct means of enforcing this obligation,⁵ so as to compel him to maintain them out of property in which they have no interest. The Court can, however, in certain cases where the father attempts to relieve himself of the obligation by applying to the maintenance of his child separate funds belonging to that child, indirectly impose upon him the liability of providing for his child out of his own income.⁶

Where the father does any specific act, from which it can be reasonably inferred that he has given his child authority to contract a debt for his maintenance, the father may be liable in respect of the debt so contracted, but the mere moral obligation to maintain the child affords no inference of a legal promise to pay his debts.⁷

Authority to
contract debts
for main-
tenance.

Where no authority is proved, or can be inferred, or where the facts expressly negative any such inference, as, for instance, where the father has no knowledge of the debts being incurred,⁸ or where the son has an allowance,⁹ there can be no liability. Where the father permits his children to live with his wife, or any other person, apart from him, it is a question in each case whether by so doing he has authorized his wife, or such other person, to incur debts for necessaries for his children.¹⁰

¹ Wilson's Digest of Anglo-Muhammadan Law, 4th Edn., pp. 212, 213; Baillie's Digest, vol. i, p. 457.

² Wilson's Digest, 4th Edn., pp. 136, 137; Baillie's Digest, vol. i, pp. 441, 442.

³ Wilson's Digest, 4th Edn., p. 137; Baillie's Digest, vol. i, p. 437, ante, pp. 57, 58.

⁴ See ante, p. 58, note 5.

⁵ See remarks of Lord Eldon, L.C.,

in *Wellesley v. Beaufort* (1827), 2 Russ., 1, at p. 23.

⁶ *Post*, p. 216.

⁷ *Mortimore v. Wright* (1840), 6 M. & W., 482, at p. 487.

⁸ *Urmston v. Newcomen* (1836), 4 A. & E., 899.

⁹ *Crantz v. Gill* (1796), 2 Esp., 471.

¹⁰ *Rawlins v. Vandyke* (1801), 3 Esp. 250, at p. 252; *Cooper v. Phillips* (1831), 4 C. & P., 581.

Criminal Pro-
cedure Code.

The Code of Criminal Procedure¹ provides a summary mode of compelling a father,² of whatever religion or race he may be, residing in British India, to maintain his infant children, but under that Act he cannot be compelled to educate them, or even to support them according to his own station in life.

That Code provides³ as follows: “(1) If any person,⁴ having sufficient means,⁵ neglects⁶ or refuses to maintain his wife, or legitimate child⁷ unable to maintain himself,⁸ the District Magistrate,⁹ a Presidency Magistrate, a Sub-Divisional Magistrate, or a Magistrate of the first class, may, upon proof¹⁰ of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child at such monthly rate,¹¹ not exceeding fifty rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.¹²”

¹ Act V of 1898.

² Sir Roland Wilson (Digest of Anglo-Muhammadan Law, 4th Edn., p. 212) suggests that the terms of sec. 488 would include a proceeding against a mother, but it is submitted that the terms of the section do not justify such a construction. See *post*, p. 221.

³ Sec. 488. This section applies to Malabar, *Ayyapattar v. Kalianiammal* (1893), referred to at 19 Mad., 462.

⁴ Even though himself a minor, *Queen v. Roshun Lall* (1872), 4 N.-W. P. H. C., Rep. 123. A married woman may obtain an order for the maintenance of her illegitimate children by the putative father: *Rozario v. Ingles* (1893), 18 Bom., 468.

⁵ See *Queen v. Roshun Lall* (1872), 4 N.-W. P. H. C. Rep., 123.

⁶ In the case of parties governed by the Marumakkatayam law, it is doubtful if the father could be held to have neglected his duty if the children are actually maintained by the karnavan of their mother's tarwad who is bound to maintain them: *Kariyadan Pokkar v. Kayat Beeran Kutti* (1895), 19 Mad., 461, at p. 464 (see *post*, pp. 221, 222). The question of the relative blame of the parents is not to be considered: *Queen v. Roshun Lall* (1872), 4 N.-W. P. H. C. Rep., 123.

⁷ An order for the maintenance of an unborn child cannot be made: *Larlee (Mussumat) v. Bunsee Ditchit*

(1871), 3 N.-W. P. H. C. Rep., 70. The father is equally liable whether he has the right to the custody, or he has lost such right. He is liable even if the mother wrongly refuses to make over the custody to him: *Lal Dass v. Nekunjo* (1878), 4 Calc., 374. See *Kariyadan Pokkar v. Kayat Beeran Kutti* (1895), 19 Mad., 461. “Child” means a child who has not attained the age of majority: *Krishnaswami Ayyar v. Chandravadana* (1913), 37 Mad., 565.

⁸ *i.e.* by moral means: *Krishnaswami Ayyar v. Chandravadana* (1913), 37 Mad., 565.

⁹ In Bombay it has been held that this means the Magistrate of the District in which the person against whom the complaint is made resides: *In re Fakruddin* (1884), 9 Bom., 40. *Contrâ*: *In the matter of Todd* (1873), 5 N.-W. P. H. C. Rep., 237.

¹⁰ *i.e.* legal proof, *Gonda v. Pyari Doss Gossain* (1870), 13 W. R. Cr. R., 19; *Lopotee Domnee v. Tikha Modai* (1867), 8 W. R. Cr. R., 67.

¹¹ The Magistrate must order a fixed sum. He cannot make an order at a progressively increasing rate. Where there is a change of circumstances the rate can be increased under sec. 489 (*post*, p. 211): *In re Ramayee* (1890), 14 Mad., 398; *Upendranath Dhal v. Sowdaminee Dasi* (1886), 12 Calc., 535.

¹² The Magistrate cannot appoint a guardian or make any order as to the

“(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

“(3) If any person so ordered wilfully neglects to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines,¹ and may sentence such person for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month, or until payment, if sooner made.”²

Enforcement of order.

Evidence must be taken in the presence of the father, or where his personal attendance is dispensed with, in the presence of his pleader and must be recorded as in summons cases.³ The reputed father may be called as a witness.⁴

The Court in dealing with applications for maintenance may make such order as to costs as may be just.⁵

The Code of Criminal Procedure⁶ also provides that, on proof of a change in the circumstances of any person receiving under sec. 488 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or a child, the Magistrate may make such alteration in the allowance as he thinks fit, provided the monthly rate of fifty rupees in the whole be not exceeded.

Alteration of allowance.

This provision furnishes the only mode by which a Magistrate's order for maintenance can be modified.⁷ It cannot be used as a means of reviewing the Magistrate's decision except upon proof of facts which have occurred since the date of the order.

There is no appeal from an order made by the Magistrate requiring Revision.

custody of a child: *Lal Das v. Nekunjo* (1878), 4 Calc., 374. This can only be done by a Civil Court. The Magistrate is not obliged to order the allowance to be paid to the person having the custody of the minor, but in the absence of good reason to the contrary he would ordinarily do so.

¹ *i.e.* by distress and sale of the movable property of the father: Act V of 1898, secs. 386 and 387. As to the carrying out of orders against European British soldiers, see 1 & 2 Geo. V., cap. 3, continuing 44 & 45 Vict., cap. 58, secs. 138 (8) and 145.

² *i.e.* one month's imprisonment for each month's default: *Allapichai Ravuthar v. Mohidin Bibi* (1896), 20 Mad., 3. The defaulter is not en-

titled to release on payment of the amount due: *Bijacha v. Moidin Kutli* (1884), 8 Mad., 70, but a discharge from an Insolvent Court relieves him of the debt: *Tokee Bibee v. Abdool Khan* (1879), 5 Calc., 536.

³ Act V of 1898, sec. 488 (6). *Hurkishore Malo v. Bharoti Jelyani* (1875), 24 W. R. C. R., 61.

⁴ Act V of 1898, sec. 488 (7). *Noor Mahomed v. Bismulla Jan* (1889), 16 Calc., 781; *Hira Lal v. Saheb Jan* (1895), 18 All., 107.

⁵ Act V of 1898, sec. 488 (8).

⁶ Act V of 1898, sec. 489. There cannot be a prospective order for an alteration: *Munglo (Mussumat) v. Jumna Dass* (1870), 2 N.-W. P. H. C. Rep., 454. *Ante*, p. 210, note 11.

⁷ *Budhni v. Dabal* (1904), 27 All., 11.

a person to make a monthly allowance for the maintenance of his wife or child; ¹ but if there be any material error in the proceedings, the order may be revised by a High Court. ²

Maintenance of minor wives.

The rights of minor wives to maintenance from their husbands are enforceable in the same way as the rights of adult wives to such maintenance. ³

Enforcement of order of maintenance.

A copy of the order of maintenance is to be given without payment to the person in whose favour it is made or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order is enforceable by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due. ⁴

Duty of guardians as to maintenance of ward.

Where a minor has property of his own, or has an interest in property, for instance, as a co-parcener in joint family property, the guardian of his estate must make proper provision for his maintenance out of the income thereof, and, if there be a separate guardian of the minor's person must supply to such person means sufficient for the purpose. ⁵

The guardian of a minor's person must see that the minor is clothed, housed, fed, and educated in a manner suitable to his position in life, and to the fortune which he is to enjoy on attaining the age of majority; he will be allowed all sums properly expended for the protection and safety, or for the maintenance and support of the ward. ⁶

Maintenance of members of family.

The guardian must also provide for the maintenance of such of the members of his ward's family as, according to the customs of the family or race to which the ward belongs, are dependent upon the ward for support. ⁷

Amount of maintenance.

The principles which influence the High Courts in determining what sum should be allowed for the maintenance or advancement of a minor ⁸ should also guide a guardian. He should never allow his ward's estate to be used for his maintenance in cases where the Court would not allow it, and he must

¹ *Queen v. Gholam Hossein Chowdry* (1867), 7 W. R. Cr. R., 10.

² Act V of 1898, sec. 439.

³ See Act V of 1898, sec. 488, *ante*, p. 210. As to Mahomedan wives, see *In the matter of Khatija Bibi* (1870), 5 B. L. R., 557, at p. 567; *Kolashun Bibee v. Didar Buksh (Sheikh)* (1875), 24 W. R. Cr. R., 44. *Ante*, pp. 57, 58.

⁴ Act V of 1898, sec. 490.

⁵ *Ante*, pp. 123 to 125.

⁶ Act VIII of 1890, sec. 24, *ante*, pp. 123, 124, 130. *Nelson v. Duncombe* (1846), 9 Beav., 211, at p. 232.

⁷ See Act VIII of 1890, sec. 34 (e), *ante*, p. 125.

⁸ *Post*, pp. 215 to 221. See *Barnes v. Ross*, [1896] A. C., 625.

not expend more than the Court would allow. Otherwise the guardian might become personally liable for the amount expended by him.

A guardian of a minor's property appointed or declared by a Court under the Guardians and Wards Act must apply for the maintenance, education, and advancement of the ward and of such persons as are dependent on him, and for the celebration of ceremonies to which the ward or any of those persons may be a party, such portion of the income of the property of the ward as the Court from time to time directs, and, if the Court so directs, the whole or any part of that property.¹ The guardian can apply by petition to the Court for its opinion, advice, and direction as to the amount to be expended by him, and if he states in good faith the facts in his petition, he is absolved from responsibility.²

Duty of guardian appointed or declared by Court.

Application to Court for advice, etc.

The following rule³ applies to the appointment of guardians by the Original side of the High Court of Bengal under the Guardians and Wards Act :—

“ At the hearing, the Court may determine the amount to be allowed for the maintenance and education of the minor, and the amount, if any, to be allowed to the guardian as his remuneration, and may also give any special directions as to the power to be exercised by the guardian. High Court, Bengal.

“ If any person is entitled to maintenance out of the property or to reside in any house, of the minor, the Court may fix the amount to be paid to such person for maintenance, or in respect of maintenance and residence, or give such directions with respect thereto as it thinks fit.”

A guardian appointed by a High Court can apply by petition to the Court which appointed him for directions.

The Guardians and Wards Act is silent as to what principles should guide Courts acting under that Act in fixing maintenance. The Courts should have regard to the status in life of the ward and the amount of his income. They should also, so far as possible, apply the principles which guide the High Courts in fixing maintenance.⁴

A guardian, who has not been appointed or declared by a

Duty of natural guardian.

¹ Act VIII of 1890, sec. 34 (e). The duty of a guardian appointed by a High Court under the powers contained in its Charter would be the same. Without an order of Court a payment by a guardian on these

accounts would be at his peril.

² Act VIII of 1890, sec. 33, *ante*, p. 148.

³ Rules of 1st September, 1905, See also Bombay rules.

⁴ *Post*, pp. 215 to 221.

Court, and whose ward is neither resident, nor possesses any property, within the original civil jurisdiction of a High Court, must act upon his own responsibility, or require the Court to appoint a guardian.

Application to High Court.

Where a guardian, who has not been appointed by the Court, has any real difficulty with reference to the application of the minor's funds towards his maintenance or advancement, he should, if the minor be resident within the original civil jurisdiction of a High Court¹ or his property be within the limits of that jurisdiction, apply to that Court for its sanction or direction. He may do so either by a suit or by a petition without a suit.²

Difference of opinion between guardians.

Where there are more guardians than one, and they cannot agree as to the manner or amount of the minor's maintenance, one of them may apply to the Court of the District in which the minor ordinarily resides for directions.³

Discretion of trustees.

Where the instrument, which creates the minor's interest in property, gives a discretion to trustees, the Court will not interfere with the *bonâ fide* exercise of that discretion.⁴

Powers of trustees holding property in trust for minors.

When property is held by trustees in trust for a minor, full powers to provide for the maintenance of their *cestui que trust* are given, in cases to which the English law is applicable,⁵ by the Trustees and Mortgagees Powers Act.⁶

Sec. 33 of that Act enacts that "in all cases where any property is held by trustees in trust for a minor, either absolutely or contingently on his attaining majority, or on the occurrence of any event previously to his attaining majority, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such minor, or otherwise to apply for or towards the maintenance or education of such minor, the whole or any part of the income to which such minor may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education, or not :

"And such trustees shall accumulate all the residue of such income by way of compound interest, by investing the same, and the resulting income thereof from time to time in proper securities, for the benefit of the person

¹ These powers extend to all European British subjects resident within the Province. See *ante*, p. 113.

² *In the goods of Dwarkanath Dutt* (1884), Belchambers's Practice, p. 444 c; *Ex parte Whitfield* (1742), 2 Atk., 315; *Ex parte Chambers* (1829), 1 Russell and Mylne, 577. See also *In the matter of Bittan*, (1877), 2 Calc., 357.

³ Act VIII of 1890, sec. 43, *ante*, pp. 149, 150.

⁴ *In re Bryant* [1894], 1 Ch. 324.

⁵ *Ante*, p. 32, note 13.

⁶ Act XXVIII of 1866, sec. 33. This section has been repealed in places to which the Indian Trusts Act, 1882, extends; Act II of 1882, sec. 2; see *ante*, p. 32, note 11.

who shall ultimately become entitled to the property from which such accumulations shall have arisen :

“ Provided always that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations, as if the same were part of the income arising in the then current year.”

By sec. 36 of the Indian Trusts Act, 1882,¹ in addition to the powers expressly conferred by the Act, and by the instrument of trust and subject to the restrictions, if any, contained in such instrument, and to the provisions of sec. 17,² a trustee may do all acts which are reasonable and proper for the protection or support of a beneficiary who is not competent to contract.

By sec. 41 of the same Act : “ Where any property is held by a trustee in trust for a minor, such trustee may, at his discretion, pay to the guardians (if any) of such minor, or otherwise apply for or towards his maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the whole or any part of the income to which he may be entitled in respect of such property :

“ And such trustee shall accumulate all the residue of such income by way of compound interest by investing the same, and the resulting income thereof from time to time in any of the securities mentioned or referred to in sec. 20,³ for the benefit of the person who shall ultimately become entitled to the property, from which such accumulations have arisen.

“ Provided that such trustee may, at any time, if he think fit, apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

“ Where the income of the trust property is insufficient for the minor's maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage, or funeral, the trustee may, with the permission of a principal Civil Court of original jurisdiction, but not otherwise, apply the whole or any part of such property for or towards such maintenance, education, advancement, or expenses.

“ Nothing in this section shall be deemed to affect the provisions of any local law for the time being in force relating to the persons and property of minors.”

The High Courts in the exercise of their jurisdiction, as respects infants, and also in the exercise of their ordinary original Civil Jurisdiction, can provide for the maintenance and education of minors.

¹ Act II of 1882 ; as to its application, see *ante*, p. 32, note 11.

² Sec. 17 is as follows : “ Where there are more beneficiaries than one, the trustee is bound to be impartial, and must not execute the trust for the advantage of one at the expense

of another. Where the trustee has a discretionary power, nothing in this section shall be deemed to authorize the Court to control the exercise reasonably, and in good faith of such discretion.”

³ *Ante*, p. 170, note 10.

The exercise of this power is regulated by principles similar to those which guide the Court of Chancery in allotting maintenance to minors. An order can be made whether or not the instrument creating the minor's interest contains any direction for maintenance.

There must be a clear fund or income.

An order cannot be made unless the minor possesses a clear fund or income applicable to the purpose, and not depending on the doubtful result of accounts. Where it is clear that, after the taking of the accounts and the payment of debts, a certain balance will be left to the minor, maintenance not exceeding the income of such balance may be ordered.¹

Interest must be vested.

The minor must have a vested interest in the fund² or must be entitled to immediate payment of the income.³

Exceptions to this rule.

No provision can be made for a minor's maintenance out of a gift which is vested but the payment of it is postponed,⁴ or out of a contingent gift,⁵ except where the instrument, by which the minor takes, itself provides for maintenance (in which case maintenance can always be allowed⁶), or where the gift is one made by the father, or by some other person standing *in loco parentis* to the minor, and the minor is otherwise unprovided for,⁷ or it is a gift to a class, all or some of whose members must take, or it is a gift to a class or an individual, and the donees over in default of the class or individual taking consent to maintenance being given.⁸

Indirect means of compelling father to maintain children.

Cases where Court will allow maintenance to minor during lifetime of father.

The Court can indirectly enforce the duty of the father to maintain his children by preventing, or superintending, the appropriation of the minor's funds for the purpose of their maintenance. It will allow maintenance out of funds belonging to the minor even during the lifetime of the father, where the father is not in such circumstances as to be able to give his child such an education as is suitable to the fortune of such child,⁹ or in a case, where to refuse maintenance would be a hardship upon the father's other children.¹⁰

¹ *Warter v.* — (1806), 13 Ves., 92.

² Macpherson on Infants, p. 241; Simpson on Infants, 3rd Edn., p. 224. As to the vesting of legacies, see Part XIII of Act X of 1865. A direction to accumulate the income during minority will not prevent maintenance being given: see Act X of 1865, sec. 104, and illustration (c) to the same section.

³ *Boycot v. Cotton* (1738), 1 Atk., 552.

⁴ See *Festing v. Allen* (1842), 5 Hare, 573, at p. 577.

⁵ Simpson on Infants, 3rd Edn., p. 226.

⁶ See *Lyddon v. Lyddon* (1808), 14 Ves., 558; *Ellis v. Maxwell* (1841), 3 Beav., 587.

⁷ See Simpson on Infants, 3rd Edn., p. 227; Macpherson on Infants, p. 234.

⁸ See Simpson on Infants, 3rd Edn., p. 231.

⁹ See *Buckworth v. Buckworth* (1784), 1 Cox, 80. In *Jervoise v. Silk* (1813), G. Cooper, 52 Grant, M.R., said that it would be a harsh thing for the Court to oblige the father to put down his establishment in any part to educate his children when they have incomes of their own. A father cannot, where his children have incomes of their own, be required to stint himself and alter his own mode of living for the purpose of giving them a maintenance or education suitable to their independent fortunes.

¹⁰ *Hoste v. Pratt* (1798), 3 Vesey Jun., 729, at p. 733; *Andrews v. Partington* (1790), 3 Brown's Chancery Cases, 60; 2 Cox, 223.

Where in an ante-nuptial settlement there are express trusts and provisions for the maintenance of the offspring of the proposed marriage, the father is entitled to have such trusts carried out, whether or not he is of ability to support the children.

Trust for maintenance in marriage settlement.

If the settlement merely gives power to apply the income or any part thereof to the maintenance of the children, then the father is not so entitled.¹ This doctrine will not be extended to the case of a voluntary post-nuptial settlement.²

Where a fund is expressly given for the maintenance of his children, the father can, although of sufficient ability to support the child out of his other income, apply it, or insist upon its being applied, for that purpose.³

Gift to father for maintenance.

The obligation which the law imposes upon the father to maintain his children exists only where the father enjoys the care and custody of their persons and the superintendence of their education.

Obligation to maintain exists only where he has the custody.

Where the Court has in consequence of his misconduct interfered with the father's right to the custody of them, or where the father has himself waived that right in favour of some other person, the private fortunes of the children must be applied to their maintenance, quite independently of the question whether the father is of sufficient ability to support them.⁴

Apart from special circumstances, the income of the minor's estate should alone be applied to his maintenance and education, and no encroachment should be made upon the principal.

Funds from which maintenance given.

Trustees would rarely be allowed any payment made by them in excess of the income of the fund; but where the income is not a constant one, or the result disappoints a reasonable expectation of what that income would be, the trustees would be allowed what they had properly expended in view of the probable income of the estate.⁵

Income.

In some cases trustees can employ the surplus accumulations of the

¹ *Ransome v. Burgess* (1866), L. R. 3 Eq., 773, at p. 780; *Wilson v. Turner* (1883), 22 Ch. D., 521.

² *Re Kerrison's Trusts* (1871), L. R., 12 Eq., 422.

³ *Hamley v. Gilbert* (1821), Jacob, 354, at p. 361; *Berkeley v. Swinburne* (1834), 6 Sim., 613. See cases cited at p. 242, note (h), of Simpson on the Law of Infants, 3rd Edn., and see Macpherson on the

Law of Infants, p. 245.

⁴ Lord Eldon says in *Wellesley v. Beaufort* (1827), 2 Russ., 1, at p. 29; "I am not aware of any case in which the Court, where it has taken away from the father the care and custody of his children, has called in aid of their own means the property of the father."

⁵ *Ante*, pp. 214, 215.

Accumulations.

income of the fund for the maintenance of the *cestui que trust*,¹ but their powers in this respect depend upon the construction of the instrument creating the trust. Where there is an express power in the instrument, the trustees can exercise it according to their discretion; but where, on the other hand, the instrument places the accumulations on the same footing as the capital fund, neither the trustees nor the Court can break in upon the accumulations, except in the same events as would justify them in breaking in on the capital.²

Where more than one fund.

Where there is more than one fund from which maintenance can be taken, the fund, the taking from which would be the least likely to diminish the property which the minor would come into on attaining his majority, should be selected.³

Maintenance allowed out of capital.

There are certain cases where the Court will permit maintenance for a minor to be taken out of the capital of his property.⁴

It is, however, never wise for the guardian or trustee to entrench on the minor's capital without receiving the sanction of the Court,⁵ as even if he were right in breaking in upon the capital he may have to bear the costs of subsequently obtaining the sanction of the Court, if there be a deficiency of assets.⁶

When property small.

Where the minor's property is very small, and the income of it is insufficient to maintain him or to give him a suitable education, the Court will break in on the principal.⁷ It will also do so where a sum of money is necessary for the purpose of setting the minor up in, or educating him for, a business or profession, or otherwise advancing him in life.⁸

For advancement
lifetime of
father.

An advance can only be made out of the capital where the minor is absolutely entitled to the fund, or a power is given by the instrument of gift.⁹ Sums of money for the maintenance, education, or advancement of minors may also be raised out of their reversionary or contingent interests

¹ See *Edwards v. Grove* (1860), 2 De Gex, Fisher & Jones, 210.

² See *Ex parte McKey* (1807), 1 Ball. & Beatty, 405. As to wills, see Act X of 1865, sec. 104, illustration (e).

³ See Simpson on Infants, 3rd Edn., p. 262; Macpherson on Infants, p. 252.

⁴ See Simpson on Infants, 3rd Edn., p. 251.

⁵ If an executor or trustee does without application what the Court would have approved, he will not be called to account, and forced to undo

that, merely because it was done without application: *Lee v. Brown* (1798), 4 Vesey Jun., 362.

⁶ *Robison v. Killey* (1862), 30 Beav., 520.

⁷ See *Barlow v. Grant* (1684), 1 Vern., 255.

⁸ *Re Lane*, 17 Jur., 219; *Re Clark*, 17 Jur., 362; and cases collected in Simpson on Infants, 3rd Edn., p. 252, note (r); Macpherson on Infants, pp. 252, 255.

⁹ Simpson on Infants, 3rd Edn., chap. xiii.

in property by means of a scheme of insurance or otherwise.¹ The Court would be very reluctant to allow a sale if it could possibly be avoided, and in preference to a sale would frequently allow the money to be raised by mortgage.

The amount which the Court will allow, or a guardian may with safety expend, depends upon the age, the rank, the fortune, and the expectations of the minor. It must be sufficient to give to him maintenance and education suitable to the position which he will occupy on coming of age.² Amount allowed.

In awarding maintenance to a minor out of his own income the Court will often grant a sum larger than is requisite for his own maintenance and education, when his father or mother is in indigent circumstances,³ or where his infant brothers or sisters are unprovided for,⁴ or where he has relatives dependent upon him.⁵ Provision for the maintenance of the minor's wife or children must also be included in the allowance given to the minor.⁶ Similarly in awarding maintenance for a female minor provision must be made for the support of her husband, if he be without means. Wife and children.

The Court has full power to increase the amount of maintenance allowed for the minor according as his needs require it, and additional provision may sometimes be granted for special expenditure, as for instance, the marriage of the minor or of female relatives dependent upon him, or for keeping up the worship of the ancestral deity, or for the performance of the *shrads* of the minor's ancestors, or for the purpose of providing for all such other proper obligations as the minor, were he an adult, would be morally bound to perform. Increase of allowance.
Provision for special expenditure.

Maintenance can be given at any time after the minor has come into possession of the property, and past maintenance may also be given; but such past maintenance must Past main-tenance.

¹ See *De Witte v. Palin* (1872), L. R., 14 Eq., 251.

² See *Barnes v. Ross*, [1896] A. C., 637.

³ *Allen v. Coster* (1839), 1 Beav., 202; see *Bomwetsch v. Bomwetsch* (1908), 35 Calc., 381; Macpherson on Infants, p. 250.

⁴ *Wellesley v. Beaufort* (1827), 2 Russ. 1, at p. 28; *Tweddell v. Tweddell* (1822), Turner & Russell, 13.

⁵ *Ante*, pp. 125, 212.

⁶ In the case of Mahomedans, where the wife is too young for matrimonial intercourse, she has no right of maintenance from her husband, whether she be living in his house or not: *In the matter of Khatija Bibi* (1870), 5 B. L. R., 557, at p. 567; *Kolashun Bibee v. Didar Buksh (Sheikh)* (1875), 24 W. R. Cr. R., 44. *Ante*, pp. 57, 58, 209.

be of a scale with regard not to the time when the order is made, but to the time when the money was expended for the maintenance of the minor.¹

An allowance for past maintenance can only be granted for sums actually expended. It is not necessary, however, to take an account of the actual sums expended by the guardian, but an enquiry should be made as to the scale of expenditure upon which the minor was maintained, and an allowance can be granted upon that scale.²

As a general rule, the father will not be allowed anything in respect of past maintenance, but this may be done under special circumstances, as where he is in embarrassed circumstances, or has incurred a debt for maintenance, or is not of ability, having regard to other children unprovided for.³

With respect to persons other than the father, past maintenance can only be allowed where it was expended with the intention of claiming the amount as a debt, or with the expectation of being recouped out of the minor's property.⁴ If trustees have a discretionary power to allow maintenance, past maintenance will be given, if they have not exercised the power,⁵ or if by mistake as to the amount of the income they have allowed only a small part of it.⁶

In addition to its power to make an allowance for the past maintenance of a minor, the Court can sanction the payment of any sums which have been expended for necessaries supplied to the minor.⁷

Period.

As a general rule, unless a time be fixed by the instrument if any, which provides for the minor's maintenance, the allowance will be given up to the time when the minor attains the age of majority.

Accumulations of maintenance.

Where the minor is entitled to the whole income of the fund given for his maintenance, such part of the income as is not applied for his maintenance belongs to him absolutely, or to his representative, in the case of his death; but where the minor is not entitled to the income of the fund, but only to maintenance thereout, the surplus goes to the person entitled to the capital.⁸

To whom allowance is to be paid.

The guardian of the minor's person will generally be

¹ *Chaplin v. Chaplin* (1735), 3 Peere. Wms., 368.

² *Bruin v. Knott* (1845), 1 Phillips, 572.

³ Simpson on Infants, 3rd Edn., p. 256.

⁴ *Joyce v. Cottrell* (1871), L. R., 12 Eq., 566.

⁵ *Maberley v. Turton* (1808), 14 Ves. Jun., 499; see *ante*, pp. 214, 215.

⁶ *Stopford v. Canterbury* (1840), 11 Sim., 82, at p. 99.

⁷ Act IX of 1872, sec. 68, *ante*, pp. 15 to 19.

⁸ Simpson on Infants, 3rd Edn., pp. 260-262.

entitled to receive the allowance made for his maintenance, but the Court will not permit money allowed for future maintenance to be paid over to any person who is not within its jurisdiction.¹ The Court will, however, in some cases, where the minor is residing outside the jurisdiction, appoint a guardian within the jurisdiction, *pro tanto*, to receive and remit the amount allowed for the minor's maintenance to a guardian resident outside of the jurisdiction.²

In cases which would have been covered by English law as administered by the late Supreme Courts,³ the High Courts have a statutory power to order dividends of stock⁴ standing in the name of a minor to be paid for his maintenance, education, or otherwise for his benefit. Dividends of stock in name of minor.

The order can be made on a petition of the guardian, or if there be no guardian it can be made in a suit.⁵

A Divorce Court⁶ has power to provide for the maintenance of children, the marriage of whose parents is the subject of a suit.⁷ Powers of Divorce Court.

Maintenance for a child may be spent for the purpose of maintaining a joint home for the infant and his or her parent.⁸

Except that by omitting to supply her child with food she may be liable for an offence under the criminal law,⁹ a mother is neither directly nor indirectly liable for the maintenance or education of her children, whether legitimate or illegitimate.¹⁰ Liability of mother.

The following provision of the Malabar Marriage Act, 1896,¹¹ applies to persons domiciled in the Presidency of Madras following the Marumak-katayam or the Aliyasantana law of inheritance. Malabar and Canara.

“The wife and children shall be entitled to be maintained by husband

¹ *Logan v. Fairlee* (1821), Jacob, 193.

² See *Coverdale v. Greenway*, Bignell, 11; *In re Meakin* (1896), 21 Bom., 137.

³ This expression would apparently include the cases of all European British subjects resident in the Province, and all others who are resident within the original jurisdiction of a High Court. See *ante*, p. 32, note 13.

⁴ *In re Alexander* (1851), Perry's Oriental Cases, p. 162, an order was made in respect of money in the hands of the Accountant-General of Bombay.

⁵ Act XXIV of 1841 applying 11

Geo. IV. and 1 Wm. IV, chap. 65, sec. 32.

⁶ This does not include a High Court in the exercise of its powers of confirming the decree of the District Court: *Wallace v. Wallace* (1915), 40 Bom. 109; 17 Bom. L. R., 948.

⁷ Act IV of 1869, secs. 41 to 44.

⁸ *Bomwetsch v. Bomwetsch* (1908), 35 Cal., 381.

⁹ *Ante*, p. 47.

¹⁰ *Ruttinger v. Temple* (1863), 4 Best & Smith, 491. See *ante*, p. 210, note 2.

¹¹ Act IV (M.C.) of 1896, sec. 17.

or father as the case may be. In a civil suit by the wife or children for maintenance, it shall be open to the husband or father to plead all defences open in such a suit to a Hindu governed by the ordinary Hindu law. Nothing herein contained shall affect the right of the wife and children to be maintained by the tarwad."

Right of
father to
control educa-
tion.

Except he be removed from acting as their guardian,¹ or has lost his right by waiver or acquiescence,² a father is entitled to control the secular and religious education of his children.³ The fact of his insolvency or poverty will not, provided he be of good character, deprive him of such right, even when his children would, on account of a special provision or fund for their benefit, obtain greater pecuniary advantages, and a better education by being entrusted to a person other than their father.⁴

Religious
education.

The Court will not interfere with the custody of children by the father on account of his religious principles, nor will it interfere with the religious education of children by their father; but after the father's death the Court will, in many cases, interfere with the mode of religious education adopted by the mother or other guardian. According to law a father has a right to have his children brought up in his own religion, both during his lifetime and after his death.⁵

This principle has, for a long time, been recognized by the English Courts; ⁶ and in *Skinner v. Orde*,⁷ where the father of the minor was a Christian, and the mother after the death of the father became a Mahomedan, and was bringing up the child in the Mahomedan faith, the Privy Council upheld the order of the High Court of the North-Western Provinces removing the child from the guardianship of the mother, and placing her under a Christian guardian.

In that case the Judicial Committee said: "The course of decisions in the English and Irish Courts of Chancery has been such as to lay it down as a matter of positive law of the Court that, in the matter of religious

¹ See *ante*, chap. xii.

² See *ante*, pp. 70 to 71, and *post*, pp. 223, 224.

³ *In re Agar Ellis* (1883), 24 Ch. D., 317.

⁴ Macpherson on Infants, p. 142; *Ex parte Hopkins* (1732), 3 Peere. Wms., 154, *ante*, pp. 70, 71.

⁵ See *In the matter of Himnauth Bose* (1862), 1 Hyde, 111; *Reade v. Krishna* (1886), 9 Mad., 391; *Queen v. Nesbitt* (1843), Perry's Oriental

Cases, 103.

⁶ *Talbot v. Shrewsbury* (1840), 4 Mylne & Craig, 672; *Re Newbery* (1865), L. R., 1 Eq., 431; on appeal (1866), L. R., 1 Ch., 263; *Hawksworth v. Hawksworth* (1871), L. R., 6 Ch., 539.

⁷ (1871) L. R., 4 P. C., 60; 14 M. I. A., 309; 10 B. L. R., 125. The decision of the High Court is reported in 2 N.-W. P. H. C. Reps., 275.

education, great and, in the absence of controlling circumstances, paramount weight should be given to the expressed or implied wishes of the deceased father. It was contended with some plausibility before their Lordships that this rule had its origin in the statutory power of English fathers to appoint guardians for their children. However this may be, their Lordships do not think it desirable, for the determination of this case, to refer to or rely on any such rule. The Indian Act (IX of 1861) certainly does not expressly refer to any such right, and appears to have had one object in contemplation, the protection of the infant ward, and to have given the Judge (subject, of course, to appeal) the power, and to have imposed on him the duty, of doing what, in his judgment, is best for the infant, and no other power or duty. In India, however, all, or almost all, the great religious communities of the world exist side by side under the impartial rule of the British Government; while Brahman and Buddhist, Christian and Mahomedan, Parsee and Sikh are one nation, enjoying equal political rights, and having perfect equality before the tribunals, they co-exist as separate and very distinct communities, having distinct laws affecting every relation of life. The law of husband and wife, parent and child, the descent, devolution, and disposition of property, are all different, depending in each case on the body to which the individual is deemed to belong, and the difference of religion pervades and governs all domestic usages and social relations. From the very necessity of the case, a child in India, under ordinary circumstances, must be presumed to have his father's religion and his corresponding civil and social status; and it is therefore ordinarily and in the absence of controlling circumstances, the duty of the guardian to train his infant ward in such religion."

The right of the father to control the religious education of his minor children is one given to him by the law not for his own benefit, but for that of his children. He cannot, therefore, release such right or bind himself to execute it in a particular way.¹

Right cannot be released.

This rule has been held even to extend to an agreement made with respect to the religious education of their children by the father and mother before marriage, even though the marriage, but for such agreement, would not have taken place.² Such ante-nuptial agreements are, however, not uncommon in the case of marriages between persons belonging to different forms of the Christian religion; and they are, after the death of the father, often of utility to the Court in determining whether the father's rights have been lost by waiver.

Ante-nuptial agreements.

In some cases the father has been held to have waived by his conduct before his death his right that his children shall after his death be brought up in his religion, and under certain circumstances a father, during his lifetime, loses by

Waiver of right.

¹ *Andrews v. Salt* (1873), L. R., 8 Ch., 622, at p. 636.

² *Ibid.*, 622.

waiver that right; but in the latter event, the Court would require stronger evidence of the waiver than in the former.¹

The Court will be reluctant in any case to interfere with the wishes of the father, but it will do so even during his lifetime where the impressions produced on the child's mind by the course of education which he is receiving are so great and permanent as to induce the Court to fear lest any attempt at altering them would do more harm than good, and would end in unsettling the child's faith altogether, and so produce a fatal result in that respect.²

Where the father has expressed no wishes as to the religious education of the child, and the child has for a long time been brought up in a religion different from that of the father, the Court may decline to interfere, if a change would unsettle the child's faith altogether.³

Departure
from rule.

The Court will depart from the rule that the child should be brought up in his father's religion, if it can be shown clearly that the welfare of the child, *i.e.* its moral and religious welfare,⁴ requires such departure, or that the father has otherwise wished or directed.⁵

In the English cases the conflict has ordinarily been between different churches of the Christian religion, but in India it usually arises between on the one hand the Christian, and on the other, the Hindu or Mahomedan religion.⁶ This distinction would make it the more necessary that the father's abandonment of his right should be proved by the clearest evidence.

¹ As to waiver by father of his right to custody, see *ante*, pp. 70, 71.

² *Mokoond Lal Singh v. Nobodip Chunder Singha* (1898), 25 Calc., 881; 2 C. W. N., 379; *In the matter of Joshy Assam* (1895), 23 Calc., 290, where the father had consented to his child being baptized as a Christian, he was not allowed to interfere with the custody of the persons to whom he had entrusted her and who had brought her up as a Christian: *Hawksworth v. Hawksworth* (1871), L. R., 6 Ch., 539, *per James*, L.J.; *Lyons v. Blenkin* (1821), Jac., 245, at p. 260; *In re Agar Ellis* (1883), 24 Ch. D., 317; *In re Newton*, [1896] 1 Ch., 740.

³ *Stourton v. Stourton* (1857), 8 De Gex, Macnaghten & Gordon, 760.

⁴ *Mokoond Lal Singh v. Nobodip Chunder Singha* (1898), 25 Calc., 881, at p. 885; 2 C. W. N., 379, at p. 382.

⁵ *In re McGrath*, [1893] 1 Ch., 143; *In re Nevin*, [1891] 2 Ch., 299.

⁶ See *Mokoond Lal Singh v. Nobodip Chunder Singha* (1898), 25 Calc., 881; 2 C. W. N., 379; *Reade v. Krishna*, (1886), 9 Mad., 391; *In the matter of Himnauth Bose* (1862), 1 Hyde, 111; *Sarat Chandra Chakarbaty v. Forman* (1889), 12 All., 212; *In the matter of Saithri* (1891), 16 Bom., 307; *Queen v. Nesbitt* (1843), Perry's Oriental Cases, 103; *Ex parte Intiazoonnissa Begum* (1814), 2 Madras Notes of Cases, 107; *In the matter of Joshy Assam* (1895), 23 Calc., 290.

Only in a case where the interests of the minor peremptorily demand an order, would the Court permit the child of a Hindu or Mahomedan father to be brought up as a Christian or *vice versa*.

There is no distinct rule to be laid down as to what kind of conduct constitutes a waiver on the part of the father,¹ but when a father has, during his lifetime, for some time permitted his children to be brought up in a religion differing from his own, and especially where he had done so sufficiently long for them to have imbibed the principles of that religion, it would, in questions arising after his death with respect to their religious education, be held that he had waived his right to have them brought up after his death in his own religion.

Where the father or other guardian changes his religion, he does not, as we have seen,² lose his right to the custody of the minor; but if the minor had been educated in his father's former religion sufficiently long enough to have imbibed the principles of that religion, the father or other guardian might, by changing his religion, lose the control of the religious education of the minor.³ Similarly a father or guardian who had abandoned all religious principles might be prevented from controlling the religious education of his ward.⁴

In giving to his ward a religious and moral education, which he is bound to give him in addition to mere secular instruction,⁵ the guardian must respect the wishes of the father of his ward,⁶ so far as he is able to ascertain those wishes and by whatever means they may have been expressed.⁷

¹ In *Hill v. Hill* (1862), 31 L. J. Eq., 505; 8 Jur. N. S., 609, where a Roman Catholic father (who lived till his eldest child was seven years old) allowed the mother, who was a Protestant, to have the exclusive charge of the education of the children during his life, and they were with his full knowledge brought up in the Protestant faith, Vice-Chancellor Wood held that he had abdicated his right to direct the religious education of his children; and in ordering a scheme to be settled for their education, disregarded a direction in his will that they should be brought up in the Roman Catholic faith. In their case the will was the only evidence of

the father's desire, and he had by his acts during his lifetime abundantly shown a relinquishment of the religious education of the children to their mother. See cases *ante*, p. 224, note 2.

² *Ante*, p. 74.

³ See *Mokoond Lal Singh v. Nobodip Chunder Singha* (1898), 25 Calc., 881; 2 C. W. N., 379.

⁴ *Ante*, pp. 69, 70.

⁵ *Wellesley v. Beauport* (1827), 2 Russ., 1, at p. 29.

⁶ *Campbell v. Mackay* (1837), 2 Mylne & Craig, 31, at p. 34.

⁷ *Skinner v. Orde* (1871), L. R., 4 P. C., 60; 14 M. I. A., 309; 10 B. L. R., 125.

Where the father has left no direction as to the mode of the religious education of his minor children, and did not during his life by his conduct waive his right to have them brought up in his own religion, it is the duty of the guardian to bring up the children in the father's religion.¹

Mother.

Where the parents of children are not of the same religion, the mother cannot, after the death of the father, even where he has left no directions on the subject, educate them in her own religion.

She may have charge of them, but she is bound to bring them up in their father's religion.²

Discretion of guardian as to education.

The Court will not interfere with a guardian who properly exercises his discretion as to the education of his wards.³

If in the exercise of his discretion the guardian should think it desirable that his ward should be educated at a school, he must choose a school for his ward.

Where the ward is of the age at which the Courts consider that a minor is capable of expressing an opinion as to the custody in which he shall remain,⁴ the guardian might to some extent consult the wishes of his ward with respect to the place of education. But in other cases the guardian need not pay any attention to the wishes of the ward; and even in cases where the ward is of an age to exercise a discretion with respect to the custody of his person, the Court would not interfere with the selection of a school by the guardian, unless there were reasons, other than the fact that the wishes of the minor had not been consulted, for the Court's interference.⁵ In addition to upholding a guardian's right to select a school for his ward, the Court might go so far as to send its own officer for the purpose of taking the ward to and keeping him at the school selected for him by his guardian.⁶

Disagreement of guardians.

Where guardians disagree as to the mode of their wards' education, the Court can make such order respecting the matter in difference as it thinks fit.⁷

¹ *Hawksworth v. Hawksworth* (1871), L. R., 6 Ch., 539; *Skinner v. Orde* (1871), L. R., 4 P. C., 60; 14 M. L. A., 309; 10 B. L. R., 125. This rule would, in many cases, create a barrier between a widowed mother and her child; but apart from the right of the father to control the religious education of the minor children, it is manifestly for the benefit of minors that they should not, on the death of their fathers, be liable to a change of religion as result of the change of guardianship: *Hawksworth v. Hawksworth* (1871),

L. R., 6 Ch., p. 540, note.

² *Campbell v. Mackay* (1837), 2 Mylne & Craig, 31, at p. 37; *Dwijipada Karmakar v. Baileau* (1915), 20 C. W., 608.

³ See *Talbot v. Shrewsbury* (1840), 4 Mylne & Craig, 673.

⁴ *Ante*, p. 92.

⁵ See *Hall v. Hall* (1749), 3 Atk., 721.

⁶ *Tremaine's case* (1719), 1 Strange, 168. See Act VIII of 1890, sec. 25, *ante*, p. 191.

⁷ Act VIII of 1890, sec. 43, *ante*, p. 149.

It is the duty of guardians to bring up their wards with feelings of affection and dutiful obedience to their parents, however bad and immoral those parents may be, and although the custody of their children may have been taken away from such parents on account of their bad conduct.¹ This duty is more clear where the character of the parent is liable to no reproach.

As to the maintenance and education of wards of the Bengal Court of Wards, see *post*, pp. 340, 349; of wards of the Madras Court of Wards, see *post*, pp. 368, 373; of wards of the Court of Wards of the United Provinces, see *post*, p. 404; and of wards of the Bombay Court of Wards, see *post*, p. 429.²

¹ See *Ex parte Ilchester* (1803), 7 Ves., 348, at p. 381; and *Wellesley v. Beaufort* (1827), 2 Russ., 1, at p. 43.

² The above remarks as to the

duty of guardians to bring up wards in their father's religion apply equally to wards of the Court of Wards.

CHAPTER XXIII.

THE MARRIAGE OF MINORS.

THE law, which governs the capacity of minors¹ to enter into a valid marriage, varies according to the religion of the contracting parties.

Hindus.

A person who is a minor according to Hindu law² cannot under that law enter of himself or herself into a valid contract of marriage, but may do so with the consent of his or her guardian.³ A marriage properly contracted with the consent of the guardian is indissoluble.⁴

The Hindu religion requires that girls should, before they arrive at puberty, be married to a suitable husband capable of procreating children.⁵

A father or other guardian is under no legal obligation to get his daughter married.⁶ The father is therefore not liable for the marriage expenses which have been incurred by the mother, but after the father's death, such expenses must be paid out of his property or the property in which he was interested as a co-parcener.⁷

There is also authority that after a Hindu's death his estate is liable for the marriage expenses of his son's daughter.⁸

Right to give in marriage.

The law endows certain of the relations of a female infant in succession with the right of giving her in marriage.

¹ The capacity to enter into marriage contracts is not affected by the Indian Majority Act, *ante*, p. 8.

² See Banerjee's Law of Marriage and Stridhan, 3rd Edn., p. 36.

³ *Nundlal Bhugwandas v. Tapeedas* (1809), 1 Borr., 14; 1 Morl., 287.

⁴ *Venkatacharyulu v. Rangacharyulu* (1890), 14 Mad., 316, at p. 320; *Kateeram Dokanee v. Gendhence (Mussamat)* (1875), 23 W. R. C. R., 178.

⁵ *Gunga (Baee) v. Dhurumdoss Nurseedass* (1841), Bellasis, 16; *Jumona Dassya Chowdhrani v. Bamasoonderai Dassya Chowdhrani* (1876), 3 I. A., 72, at p. 78; 1 Calc., 289, at pp. 294, 295; 25 W. R. C. R.,

235, at p. 236; *Venkatacharyulu v. Rangacharyulu* (1890), 14 Mad., 316, at p. 322; Strange's Hindu Law, vol. i, p. 36; Manu, chap. ix, par. 88; Vyavastha Darpana, 2nd Edn., p. 651.

⁶ *Sundari Ammal v. Subramania Ayyar* (1902), 26 Mad., 505.

⁷ *Vaikuntam Ammanagar v. Kallapiran Ayyangar* (1900), 23 Mad., 512; *Gunput Lall (Lalla) v. Toorun Koonwar (Mussamat)* (1871), 16 W. R. C. R., 52; *Praajnarain v. Ajodhyapershad* (1848), 7 Ben. Sel. R., 513, 2nd Edn., 602.

⁸ *Ramcoomar Mitter v. Ichamoyi Dasi* (1880), 6 Calc., 36, at p. 37; 6 C. L. R., 429, at p. 430.

Where the person entitled to give the infant in marriage is absent at the time when she ought so to be given, or if he neglects or refuses to obtain a husband for her at the proper time, the person next entitled to give the infant in marriage would be justified in giving her in marriage.¹

If the father be alive, and not incapacitated by insanity ^{Right of father.} or any other cause disqualifying him from exercising the office of guardian to his children, it is for him to give his daughter in marriage.²

A father can delegate to another his authority to give his ^{Delegation of right.} daughter in marriage, and such delegation may be sometimes presumed from the father's conduct.³

It is submitted that no other guardian can delegate his right, except perhaps to a person on whom the right might eventually devolve, as in the case of *Ram Bunsee Koonwaree (Maharane)* v. *Soobh Koonwaree (Maharane)*,⁴ where the nearest male kinsman assented to the paternal grandmother giving the girl in marriage.

A father or other guardian loses the right to give a girl ^{Loss of right.} in marriage where he has neglected to exercise the right for a long time, or has in other ways waived the right.⁵

The conviction of the father for theft does not necessarily destroy his right to give his daughter in marriage.⁶

After the death of the father, or in case of his having per- ^{Devolution of right in default of father.} manently emigrated or having become a recluse,⁷ or having lost his right, by waiver or otherwise, the right of selecting a

¹ See *King v. C. Kistnama Naik* (1814), 2 Strange's Notes of Cases, 89; *Gunga (Bae)* v. *Dhurumdoss Nurseedass* (1841), Bellasis, 16.

² *Nanabhai Ganpatrav Dhairyavan v. Janardhan Vasudev* (1886), 12 Bom., 110, at p. 118; *Golamee Gopee Ghose v. Juggessur Ghose* (1865), 3 W. R. C. R., 193; *Ex parte Jankypersaud Agurwallah* (1859), 2 Boul., 28 & 114; *Nundlal Bhugwandass v. Tapeedass* (1809), 1 Borradaile, 14; 1 Morl. Dig., 287.

³ Such delegation was presumed in a case (*Golamee Gopee Ghose v. Juggessur Ghose* (1865), 3 W. R. C. R., 193), where the father had made over the care and custody of his daughter when two years of age to another, left her with him till the proper time for her to be married had arrived, allowed the person with whom he left her to give her in

marriage, and did nothing for four years to impeach the question of the validity of the marriage.

⁴ (1867), 7 W. R. C. R., 321.

⁵ See *Khusalchand Lalchand v. Mani (Bai)* (1886), 11 Bom., 247; *King v. Kistnama Naik* (1814), 2 Str. N. C., 89; 1 Norton, L. C., 1; *Ghazi v. Sukru* (1897), 19 All., 55. In *Modhoosoodun Mookerjee v. Jadub Chunder Banerjee* (1865), 3 W. R. C. R., 194, where the father was a Coolin Brahmin married to several wives, and only occasionally visited the mother of the infant, it was held that the duty and right of giving the infant in marriage devolved upon the mother. See cases *post*, p. 232, note 1.

⁶ See *Nanubhai Ganpatrav Dhairyavan v. Janardhan Vasudev* (1886), 12 Bom., 110.

⁷ See *ante*, p. 71.

husband for a female infant devolves,¹ in the first place, upon her paternal male relations, namely, on her paternal grandfather; then on her brother;² and in default of brothers on her paternal relations as far as the tenth degree of affinity in order of proximity.³

Failing these persons the right, according to the Mitakshara school of Hindu law, devolves upon the mother, and, failing her, upon the maternal grandfather, maternal uncle, and other maternal relations in order of proximity. According to the Bengal school, the right of the mother is postponed to that of the maternal grandfather and maternal uncle.⁴

It has been held⁵ that a male relation giving a girl in marriage is required to consult her mother, but it is submitted that this is a moral rather than a legal duty. In another case⁶ it was held that the mother was to be preferred to the male relations, and was entitled to the expenses of the marriage, but in that case the marriage had actually taken place, and therefore was valid.⁷

The female kindred may dispose of a minor in marriage provided they are authorized by those who are entitled to the right.⁸

Any guardian would lose his right under circumstances similar to those which destroy the father's right.⁹

The expressed wishes of a dead father should always be,

¹ Strange's Hindu Law, i, 36; ii, 28; Macnaghten's Hindu Law, ii, 204; Vyavastha Darpana, 2nd Edn., 651; West and Bühler's Hindu Law, 3rd Edn., 272, 675; See *Ram Bunsee Koonwaree (Maharane) v. Soobh Koonwaree (Maharane)* (1867), 7 W. R. C. R., 321, at p. 323; 2 Ind. Jur. N. S., 193; *Shridhar v. Hirald Vilhal* (1887), 12 Bom., 480, at p. 484; *Ex parte Jankypersaud Agurwallah* (1859), 2 Boul., 28, 174. It has been held in Madras (*Ranganaiiki Ammal v. Ramanuja Aiyangar* (1911), 35 Mad., 728, that this refers only to the ceremonial act of giving, and not to the right of disposing of the child in marriage.

² *Ex parte Jankypersaud Agurwallah* (1859), 2 Boul., 28, 114; Strange's Hindu Law, ii, 30; Macnaghten's Hindu Law, ii, 204.

³ As to the right of the paternal uncle, see *Brindabun Chandra Kurmoker v. Chundra Kurmoker* (1885),

12 Calc., 140, at p. 142; *Shridhar v. Hirald Vilhal* (1887), 12 Bom., 480, at p. 484.

⁴ *Banerjee's Law of Marriage*, 3rd Edn., 47; *Bhattacharjee's Hindu Law*, 2nd Edn., 816; *Vyavastha Darpana*, 2nd Edn., 651; *Strange's Hindu Law*, ii, 28; *Macnaghten's Hindu Law*, ii, 28. See *Narada Smriti*, xii, 20, 21.

⁵ *Ramkore (Bai) v. Jamnadas* (1912), 37 Bom., 18; 14 Bom. L. R., 766.

⁶ *Ranganaiiki Ammal v. Ramanuja Aiyangar* (1911), 35 Mad., 728.

⁷ *Post*, pp. 231, 232.

⁸ It was held in the case of *Ram Bunsee Koonwaree (Maharane) v. Soobh Koonwaree (Maharane)* (1867), 7 W. R. C. R., 321; 2 Ind. Jur., N. S., 193, that a paternal grandmother, with the assent of the nearest male kindred on the father's side, has, in preference to the stepmother, the right to dispose of a minor in marriage.

⁹ *Ante*, p. 229.

as far as possible, attended to,¹ and after the death of the father the mother ought to be consulted as to the disposal of an infant daughter in marriage.²

Although it would rarely happen that a Hindu girl would be consulted as to the choice of a bridegroom, and although the form of a Hindu marriage contemplates the gift of the girl by her father or other guardian,³ rather than a contract between the parties to the marriage, a bridegroom cannot be forced upon an unwilling bride.⁴

The right of giving in marriage does not extend beyond the time when the girl has attained her majority according to the Hindu law.⁵ Termination of right.

With respect to male minors, there is not the same obligation upon fathers and other guardians under the Hindu law to provide for their marriage. Marriage completes for a Hindu the essential ceremonies of Hindu initiation, and is the only such ceremony that is allowed for a Sudra.⁶ Moreover marriage, being the means of obtaining legitimate male issue, is a matter of religious obligation amongst Hindus.⁷ For these reasons it is the right, though not a peremptory duty, of the father or guardian to provide a wife for his son or male ward.⁸ The relatives are entitled to dispose of a boy in marriage, in the same order as in the case of girls.⁹ Marriage of male minors.

The rules as to the duty of giving in marriage are directory and not mandatory. Therefore a marriage otherwise legally Effect of absence of consent.

¹ This is, however, rather a matter of moral, than of legal obligation. It is by no means clear that any effect could be given to it by a Court except perhaps when a contract had been made by the father. See *Juggernathpersad Agurwallah v. Jankypersad* (1859), 2 Boul., 28.

² *S. Namasevayan Pillay v. Annammai Ummal* (1869), 4 Mad. H. C. Rep., 339; *Ramkore (Bai) v. Jamnadas* (1912), 37 Bom., 18; 14 Bom. L. R., 766.

³ The gift is made in discharge of the duty of the guardian, and not in exercise of any right of property in the girl. See *Khushalchand Lalchand v. Mani (Bai)* (1886), 11 Bom., 243, at p. 255.

⁴ See *Shridhar v. Hiratal Vithal*

(1887), 12 Bom., 480, at p. 486. Colebrooke's Digest, bk. iv, par. clxix.

⁵ See *ante*, p. 2. The Indian Majority Act does not affect questions of marriage, see *ante*, p. 8.

⁶ *Strange's Hindu Law*, vol. i, p. 35; Colebrooke's Digest, bk. v, pars. cxxii, cxxxiv, note.

⁷ *Manu*, ix, 138; *Dayabhaga*, v, 6; *Dattaka Mimansa*, i, 5; Colebrooke's Digest, bk. v, pars. excviii, cccii-ccciv; *Sundrabai v. Shivnarayana* (1907), 32 Bom., 81.

⁸ See *Govindarazulu Narasimham v. Devarabholla Venkatanarasayya* (1903), 27 Mad., 206.

⁹ See Macnaghten's *Hindu Law*, vol. ii, chap. vii, case 2, Edn. 1828, p. 204, *ante*, p. 230.

contracted, and performed with the necessary ceremonies, is not necessarily invalidated by the absence of consent of the guardian entitled to give such consent.¹

It is submitted that the Courts would have power to set aside a marriage entered into without such consent, and would probably do so, at any rate, if the marriage had not been consummated, in a case where the interests of the child have been disregarded and the marriage brought about by a person having no pretence of authority.² Except perhaps where the parties belong to a caste in which remarriages are permitted, there would be great difficulties in setting aside a marriage which had been consummated, and in any case it would be difficult to obtain a bridegroom for a Hindu girl who had already gone through the form of marriage with another person.

The absence of such consent would be an answer to a suit to obtain damages for the breach of a marriage contract.³

Force and
fraud.

Where the marriage has been brought about by force or fraud,⁴ it would on that account be invalid, apart from any question of the want of consent.⁵

The circumstances that the marriage was celebrated in disobedience of the order of a Civil Court does not invalidate it.⁶

Remedy of
guardian.

A father, or other guardian in marriage, can enforce his right by suing for an injunction to prevent the marriage of his ward to a person of whom he does not approve,⁷ and the Court will in a suitable case grant an injunction *pendente lite* to restrain such marriage.⁸

¹ *Ghazi v. Sukru* (1897), 19 All., 515; *Mulchand Kuber v. Bhudhia* (1897), 22 Bom., 812; *Diwali (Bai) v. Moti Karson* (1896), 22 Bom., 509; *Khusalchand Lalchand v. Mani (Bai)* (1886), 11 Bom., 247; *Brindaban Chandra Kurmoker v. Chandra Kurmoker* (1885), 12 Calc., 140; *Venkatacharyulu v. Rangacharyulu* (1890), 14 Mad., 316; *Modhoosoodun Mookerjee v. Jadub Chander Banerjee* (1865), 3 W. R. C. R., 194; *Rulyat (Bace) v. Jeychund Kewal* (1843), Bellasis, 43; 1 Morl. Dig. N. S., 181.

² See *Aunjona Dasi v. Prahlad Chandra Ghose* (1870), 6 B. L. R., 243; 14 W. R., 403; Banerjee's *Marriage and Stridhan*, 3rd Edn., 52. See, however, *Khusalchand Lalchand v. Mani (Bai)* (1886), 11 Bom., 247; *Mulchand Kuber v. Bhudhia* (1897), 22 Bom., 812.

³ See *Nundlal Bhugwandass v. Tapeedass* (1809), 1 Borradaile, 14.

⁴ i.e. fraud on the minor. Mere

fraud on the guardian, such as in *Venkatacharyulu v. Rangacharyulu* (1890), 14 Mad., 316, where the mother falsely stated that she had the father's permission, would not of itself invalidate the marriage: see *Khusalchand Lalchand v. Mani (Bai)* (1886), 11 Bom., 247.

⁵ *Venkatacharyulu v. Rangacharyulu* (1890), 14 Mad., 311, at p. 320; *Aunjona Dasi v. Prahlad Chandra Ghose* (1870), 6 B. L. R., 243, at p. 259; 14 W. R. C. R., 403, at p. 405.

⁶ *Diwali (Bai) v. Moti Karson* (1896), 22 Bom., 509.

⁷ See *In the matter of Kashi Chundra Sen* (1881), 8 Calc., 266; s.c. *Bromhomoyee v. Kashi Chunder Sen*, 10 C. L. R., 91; *Khusalchand Lalchand v. Mani (Bai)* (1886), 11 Bom., 247, at p. 253.

⁸ *Nanabhai Ganpatrav Dhairyavan v. Janardhan Vasudev* (1886), 12 Bom., 110.

When a guardian seeks the help of the Court, the Court may in the interest of the ward, impose conditions upon the exercise of the rights of the guardian.¹

The Court will restrain a guardian from an improper exercise of his authority, but will not, except in a case of gross misconduct, interfere with the exercise of his discretion by a father,² or, except the interest of the minor clearly demands it, interfere with the exercise of his discretion by any other guardian.

The Hindu law permits a girl to choose a husband for herself if there be no available relation having a right to give her in marriage,³ or if her guardian in marriage has neglected to provide a husband for her, at any rate, three years after she has attained a marriageable age.⁴

In the former case the Hindu law requires the girl to obtain permission from the King before selecting a husband for herself.⁵

Although the Courts of law now exercise the functions relating to minors, which were formerly exercised by the sovereign himself, no such application to the Court seems to be contemplated by modern practice. The case would not be likely to occur, but effect would apparently be given to a marriage entered into by a girl who has no relations entitled to give her in marriage, provided the marriage be in other respects unexceptionable. In the case of the guardian neglecting to give the girl in marriage, the right of the guardian next in order would apparently accrue,⁶ rather than that the girl should be able to select a husband for herself.⁷

It is said that, if a girl chooses a husband for herself, she cannot take with her any ornaments which have been given to her by her father, mother, or brothers.⁸

The remarriage of a minor⁹ Hindu widow, whose marriage has not been consummated, can, if not entered into with the consent of her father, or, if she has no father, of her paternal grandfather, or, failing him, of her mother, or, failing all these, of her elder brother, or, failing also brothers, of her next male relative, be declared void by a Court of law; but the necessary

¹ See *Shridar v. Hiralal Vithal* (1887), 12 Bom., 481.

² See *Ibid.*, at pp. 484, 485.

³ *Narada Smriti*, xii, 20-22; *Yajnavalkya*, i, 63.

⁴ *Manu*, ix, pars. 90, 91; *Colebrooke's Digest*, bk. iv, chap. i, sec. xvii; *Strange's Hindu Law*, vol. i, p. 36. According to *Gautama* (xviii, 20-23), she need only wait three months. The marriageable age is said to be the completion of the eighth

year, *Banerjee's Law of Marriage*, 3rd Edn., p. 45. See *Manu*, ix, 89.

⁵ *Narada Smriti*, xii, 22; *Yajnavalkya*, i, 63.

⁶ *Ante*, p. 230.

⁷ See *Strange's Hindu Law*, i, 36.

⁸ *Manu*, ix, 92, and other authorities referred to in *Mayne's Hindu Law*, 8th Edn., p. 110, note (f).

⁹ *i.e.* minor according to Hindu law.

consent is to be presumed until the contrary is proved, and no marriage can be declared void after it has been consummated.¹ The remarriage of a minor widow, whose marriage has been consummated, requires no consent but her own.²

Malabar Marriage Act, 1896.

In the case of Hindus domiciled in the Presidency of Madras following the Marumakkatayam or the Aliyasantana Law of Inheritance a party to a sambandham,³ who is a minor, must have obtained the consent of his or her legal guardian to the registration of the sambandham as a marriage.⁴ But the absence of such consent does not invalidate the marriage.⁵ The required declaration must be signed by the guardian.⁶

Mahomedans.

The Mahomedan law does not impose upon guardians any religious obligation to provide suitable marriages for their wards.⁷ It gives them the power to contract marriages; but except where the person giving him in marriage is the father or paternal grandfather,⁸ the minor has, on attaining the age of majority, *i.e.* on arriving at puberty,⁹ the option of either ratifying the marriage or repudiating it.¹⁰

On obtaining puberty a minor can contract an irrevocable marriage.

Right of giving in marriage.

The right of giving a male or female minor in marriage falls upon a line of guardians, different from that to which the management of the minor's property is entrusted, and also from that to which the custody of his person is confined.

Father and grandfather.

The father is first entitled to give his child in marriage, and after him the paternal grandfather (how high soever)¹¹ is so entitled.¹²

¹ Act XV of 1856, sec. 7. The same section renders those who knowingly abet a marriage made without the necessary consent liable to imprisonment for a term not exceeding one year, or to fine, or to both. The Court can by injunction prevent a contemplated marriage without the required consent.

² Act XV of 1856, sec. 7.

³ *i.e.* an alliance between a man and a woman by reason of which they, in accordance with the custom of the community to which they belong or either of them belongs, cohabit or intend to cohabit as husband and wife: Act IV (M. C.) of 1896, sec. 2.

⁴ Act IV (M. C.) of 1896, sec. 3.

⁵ *Ibid.*, sec. 15.

⁶ *Ibid.*, sec. 11.

⁷ *Monijan Bibi v. District Judge, Birbhum* (1913), 42 Cal., 351; 19 C. W. N., 290, and authorities there cited.

⁸ *Mulka Jehan Sahiba (Newab) v. Mahomed Ushkurree Khan* (1873), L. A. Sup. Vol., 192; 26 W. R. C. R., 26; *Badal v. Queen-Empress* (1891), 19 Cal., 79; Baillie's Digest, vol. ii, p. 7; Macnaghten's Mahomedan Law, chap. vii, princ. 18, p. 58.

⁹ *Ante*, pp. 2 to 4.

¹⁰ See *post*, pp. 237, 238.

¹¹ *i.e.* great-grandfather and so forth.

¹² Baillie's Digest, vol. i, p. 45.

The executor of the father or grandfather has no power, as such, to contract a minor in marriage even though he be appointed for that purpose by the testator.¹

In default of the father and grandfather, the next entitled to give a Mahomedan minor in marriage are the other agnate relatives in the order in which they would be entitled to inherit the estate of the minor.

Devolution of right in default of father and grandfather.

After the grandfather comes the full brother; then the half-brother by the father's side; then the son of the full brother; then the son of the half-brother by the father's side; then the full uncle; then the half-uncle by the father's side; then the son of the full uncle; then the son of the half-uncle by the father's side and their descendants; then the father's full paternal uncle; then his paternal half-uncle by the father's side; then the sons of both in the same order; then the grandfather's full paternal uncle; then his paternal half-uncle by the father's side, and then the sons of both in the same order; then the sons of a more distant paternal uncle.²

After these the mother follows; and failing her other relatives, who might inherit from the minor, attain the right in order of proximity.³

These are the full sisters; ⁴ then the half-sister by the father's side; then the half-brother and sister by the mother, and then their children. Then come paternal aunts, maternal uncles; then maternal aunts, then the daughters of maternal uncles, then the daughters of maternal aunts.

After these people the right of providing for the marriage of a minor devolves, according to Mahomedan law, upon the *mowla-ool-mowalat*, or successor by contract, who is apparently now obsolete; ⁵ then on the ruling authority, ⁶ or its representative the *kazi*.

¹ Baillie's Digest, vol. i, p. 47; vol. ii, p. 291. The executor may, of course, contract the minor in marriage when he happens to be the natural guardian: *Ibid.*

² Baillie's Digest, vol. i, pp. 45 and 46.

³ Tagore Law Lectures, 1873, pp. 329 and 331; Baillie's Digest, vol. i, p. 46.

⁴ The false or maternal grandfather is preferred to the sister according to Aboo Haneefa.

⁵ A successor by contract is thus described:—If a person of unknown descent says to another, "Thou art my kinsman and shall be my succes-

sor when I am dead, and thou shalt pay for me any fine and ransom to which I may become liable," and if the other says, "I accept," then it is a valid contract according to our doctrine: Tagore Law Lectures, 1873, p. 92.

⁶ Baillie's Digest, vol. i, pp. 46, 47. The ruling authority is now represented by the Courts of Law, *ante*, pp. 54 and 164, note 8. As their marriages may be repudiated by minors on attaining majority, the Courts would not be likely to arrange for their marriages, although it might sanction provision being made for marriage expenses.

If there be no *kazi* present, then the minor, if of sound discretion, may himself or herself contract the marriage, which, however, may be repudiated by him or her on attaining puberty.¹

Circumstances causing devolution of right.

The consent of the nearest guardian in the above scale is essential to the validity of the marriage of a minor,² but if the nearest guardian be incapacitated by reason of minority, insanity, profligacy, absence at such a distance as to preclude him from acting,³ or any circumstances which prevent him from providing for his ward a suitable marriage at the proper age,⁴ the next guardian becomes entitled to enter into the marriage contract.⁵

Repudiation of marriage.

A marriage entered into with the consent of the father

¹ Macnaghten's Mahomedan Law, Precedents, chap. vi, case 16, p. 265.

² *Ibid*, case 15, p. 263, and case 18 note, p. 267; Principles, chap. vii, princ. 16, p. 58. In *Kureemoonissa (Mussumaut) v. Ruheem Ali* (1817), 2 Ben. Sel. Rep., 233; 2nd Edn., 299, it was held by the Bengal Sudder Court that if a boy and girl, both minors, in the presence of witnesses enter into a marriage contract as their own act, and the husband acknowledged himself indebted so many thousand rupees to the wife, and the guardians of the minors, being also present, give their consent either at first or afterwards, or if the minors, on coming of age, confirm the agreement, in either case the marriage is valid; but that if the guardians were not present at the marriage, and after hearing of it did not give their consent, and if the minors on coming of age do not acknowledge the marriage as valid, then it is void.

³ It is not easy to say how far a guardian must be distant in order to give validity to a marriage contract effected by a more remote guardian. In the *Hedaya* (vol. i, bk. ii, chap. iii) we find this: "If the parents or other first natural guardians of an infant should be removed such a distance as is termed *gheebat moonkatat*, it is in that case lawful for the guardian next in degree to contract the infant in marriage." And again we find, "By the absence

termed *gheebat moonkatat* is to be understood the guardian being removed to a city out of the track of the caravans, or which is not visited by the caravan more than once in every year; some, however, have defined it to signify any distance amounting to three days' journey." In Macnaghten's Mahomedan Law, Precedents, chap. vi, case 14, p. 263, a case is mentioned where it was held that a distance of three days' journey is sufficient to justify the next guardian in contracting the infant in marriage. A day's journey or stage is explained in the *Rusailool-Arkan* to mean as far as a person may be able to travel, at a moderate pace, in the shortest day of the year between morning and the setting of the sun; Macnaghten's Mahomedan Law, Precedents, chap. v, case 9, p. 207. This arbitrary rule would not, probably, be now recognized by the Courts of law, and whenever the legal guardian is within a reasonable distance from the place of residence of the minor, his consent to the marriage contract would be deemed to be necessary. See Ameer Ali's Mahomedan Law, ii, 2nd Edn., 243.

⁴ For instance, where the guardian is in jail, and not likely to be released for a long period: *Kaloo Shaikh v. Gureebullah Shaikh* (1868), 10 W. R. C. R., 12; 13 B. L. R., note to p. 163. As to the loss of the right by apostacy, see *ante*, p. 74.

⁵ Baillie's Digest, vol. i, p. 49.

or paternal grandfather cannot be repudiated¹ except it be manifestly to the disadvantage of the child,² in which case it can be set aside either by the guardian next in order, or by the minor on attaining puberty.³

In the case of marriages entered into by themselves, or by a guardian other than a father or paternal grandfather, it is for minors on attaining puberty to determine whether they will accept or repudiate their marriages.⁴

In a case where the girl was married to a person below her station in life, the Court ordered a governess to be appointed to stay with her until puberty, the husband not to have access to her meanwhile, so that the girl might be able to repudiate the marriage on attaining puberty.⁵

According to the Shiah, the marriage has no effect except it be expressly ratified after majority, or there be facts from which such express ratification can be presumed.⁶ According

¹ Macnaghten's Mahomedan Law, Principles, chap. vii, princ. 18, p. 58; *Mulka Jehan v. Mahomed Ushkuree Khan* (1873), L. A. Sup. Vol., 192; 26 W. R. C. R., 26.

² As where it is grossly unequal or one of the contracting parties is suffering from an incurable disease, see Ameer Ali's Mahomedan Law, vol. ii, 2nd Edn., p. 327.

³ Ameer Ali's Mahomedan Law, vol. ii, 2nd Edn., p. 327.

⁴ See *Kureemoonissa (Mussummaut) v. Ruheem Ali* (1817), 2 Ben. Sel. Rep., 233 (2nd Edn., 299), ante, p. 236, note 2. According to the Sunnis, at any rate, if a minor continues to live with her husband after arriving at puberty, and permits him to consummate the marriage, she loses her right to avoid it: see per Ameer Ali J., in *Badal v. Queen-Empress* (1891), 19 Calc., 79, at p. 83.

⁵ *In the matter of Hurunnessa Bibee (Musst)*, (1913), 18 C. W. N., 853.

⁶ See Baillie's Digest, part ii, chap. i, sec. 2, pp. 9 and 10, and chap. iv, p. 294; Macnaghten's Mahomedan Law, Principles, chap. vii, princ. 18. *Badal v. Queen-Empress* (1891), 19 Calc., 79, at p. 83, per Ameer Ali, J. In the case of *Mulka Jehan Sahiba (Newab) v. Mahomed Ushkuree Khan* (1873), L. A., Sup. Vol., 192, at p. 197,

26 W. R. C. R., 26, at p. 29, the Privy Council said:—"The law of the Sunnis appears to adopt a very stringent rule requiring the option of dissent to be declared by the girl as soon as puberty is developed. But the doctrine of the Shiah seems to be that the matter ought to be propounded to her, so that she may advisedly give or withhold her assent. This is a rational provision of law, for assent ought to be the expression of the mind and will of the girl upon the marriage, when it is brought to her notice and is present to her understanding. It appears by the extracts from Baillie (part ii, chap. i, sec. 2, pp. 9 and 10; chap. iv, p. 294), that the girl's assent, if a virgin, may be inferred from her silence when the matter is propounded to her; but a woman, who is not, must be put to the trouble of giving expression by actual speech of her assent. The mention of this distinction (which involves a concession to the modesty of a virgin) strongly indicates the view of the Shiah school that assent must be evidenced in such a way as to leave no doubt that it is the act of the mind and will. Their Lordships, however, do not mean to hold that it must, in all cases, be shown that the question of the marriage was distinctly propounded to the

to the Sunnis, it is effectual unless avoided by express dissent immediately after majority.

In the cases of Hindus and Mahomedans alike, a guardian appointed by the High Court, or by a Civil Court under Act VIII of 1890, would not, as such, have any power to dispose of his ward in marriage.

It is for the guardian in marriage to select a suitable bride or bridegroom, and for the Court to sanction the choice, if it be a suitable one.¹

It is doubtful whether the Court would have any power to give a guardian, appointed by it, permission to contract his ward in marriage,² but it is submitted that the Court would have such power,³ although the exercise of the power might be attended with a considerable amount of difficulty. If no such power exists a ward, who has no relations, might, however much religion or custom might require it, be unable to contract a marriage.

A guardian can avoid a marriage which has been entered into by his ward without his consent, but he must do so before the birth of issue.⁴

It is submitted that remedies similar to those which are available to and against a Hindu guardian in marriage are available to and against Mahomedan guardians in marriage.⁵

Dower.

Although there is old authority that a Mahomedan minor who is adolescent can legally contract for dower,⁶ it is submitted that under the present law he cannot enter into such contract.⁷ He can, after obtaining majority, ratify a contract for a dower made by a guardian on his behalf.⁸

A guardian is bound to see that, on the marriage of his ward, a proper provision is made for her dower.

girl. They have no doubt that it may, in some cases, be presumed from the conduct and demeanour of the parties after they have attained puberty and mature understanding. Circumstances may obviously exist which would properly lead to the inference that the marriage had been recognized and ratified, although no distinct assent could be proved."

¹ See *Monijan Bibi v. District Judge, Birbhum* (1914), 42 Calc., 351; 19 C. W. N., 290.

² See *Diwali (Bai) v. Moti Karson* (1896), 22 Bom., 509, at p. 513; *Sahodra Koer v. Dhajadhari Gosain*

(1911), 16 C. W. N., 447, at pp. 450, 451.

³ See Act VIII of 1890, sec. 43, *ante*, p. 149.

⁴ Macnaghten's Mahomedan Law, Principles, chap. vii, princ. 16 & 17, p. 58, and Precedents, chap. vi, cases 15 and 17.

⁵ *Ante*, pp. 232, 233.

⁶ *Abdul Karim v. Fazilatunnissa (Mussummaut)* (1830), 5 Ben. Sel. Rep., 75; 2nd Edn., 90.

⁷ *Ante*, p. 13.

⁸ *Kureemoonnissa (Mussummaut) v. Ruheem Ali* (1817), 2 Ben. Sel. Rep., 233; 2nd Edn., 299.

He can enter into a contract of dower on behalf of his male ward.¹

A minor cannot under Mahomedan law effect a valid Divorce. divorce.²

The Parsee Marriage Act requires the consent of the father Parsees. or guardian to the marriage of persons under the age of twenty-one years,³ and makes a marriage without such consent invalid.⁴

A marriage without such consent can be ratified, when the husband or wife attains the age of twenty-one years.⁵

It follows from the Act, and from the practice of infant marriage prevalent among Parsees in Western India, that a marriage with the requisite consent is binding on a minor.⁶

It has been held that a Parsee cannot, until he is twenty-one years of age, bring, of himself, a suit for divorce under sec. 30 of the Parsee Marriage Act.⁷

The duty of guardians of minors, who are neither Hindus Europeans. nor Mahomedans, is confined to preventing them from entering etc. into unfitting marriages, to providing out of their estate for the reasonable expenses of suitable marriages, and to providing for a marriage settlement.⁸

The Legislature has enacted the following provisions for the marriages of Christians.

By the Indian Christian Marriage Act, 1872,⁹ which con- Christians. solidates the law relating to the solemnization in India of the marriages of persons professing the Christian religion,¹⁰ when one of the persons intending marriage is a minor (that is to say, a

¹ *Basir Ali v. Nazir Ali (Hafiz)* (1908), 13 C. W. N., 153.

² See Tagore Law Lectures for 1873, p. 389; Macnaghten's Mahomedan Law, Principles, chap. viii, princ. 12, p. 63.

³ Act XV of 1865, sec. 3. Where the husband sought to set aside the marriage nineteen years after it had taken place, the formal consent of the uncle and the tacit consent of the father was held sufficient to validate the marriage: *Peshotam Hormasjee Dustoor v. Meherbai* (1888), 13 Bom., 302.

⁴ Sec. 3. A suit to set aside the marriage can be brought in the High Court. It need not be brought in

the Special Court: *Peshotam Hormasjee Dustoor v. Meherbai* (1888), 13 Bom., 302.

⁵ See *Peshotam Hormasjee Dustoor v. Meherbai* (1888), 13 Bom., 302.

⁶ *Ibid.*

⁷ Act XV of 1865. *Sorabji Cowasji Polishvala v. Buchoobai* (1894), 18 Bom., 366.

⁸ See *post*, pp. 244, 245. *Barker v. Taylor* (1823), 1 C. & P., 101.

⁹ Act XV of 1872, sec. 15.

¹⁰ This includes not only adults, who profess the Christian religion, but also their children, who are in law presumed to follow their father's religion: *Queen-Empress v. Veeradu* (1894), 18 Mad., 230.

person who is under the age of twenty-one years and is not a widower or widow¹), every Minister receiving the notice required by the Act to be given by one of the persons intending marriage shall send by the post or otherwise, a copy of such notice to the Marriage Registrar of the district, or if there be more than one Registrar of such district, to the Senior Marriage Registrar. The Marriage Registrar or Senior Marriage Registrar, as the case may be, on receiving any such notice shall affix it to some conspicuous place in his own office, and the latter shall further cause a copy of the said notice to be sent to each of the other Marriage Registrars in the same district, who shall likewise publish the same in the above manner.²

The father,³ if living, of any minor, or if the father be dead, the guardian of the person⁴ of such minor, and in case there be no such guardian, then the mother of such minor may give consent to the minor's marriage.⁵

No marriage can be solemnized without such consent, unless no person authorized to give such consent be resident in India.⁶

The person whose consent is so required may⁷ prohibit the issue of the certificate, which the Act⁸ makes a condition precedent to the solemnization of a marriage, and on the receipt of such notice of prohibition the Minister shall not issue his certificate, and shall not solemnize the said marriage until he has examined into the matter of the prohibition, and is satisfied that the person prohibiting the marriage has no lawful authority for such prohibition, or until the said notice is withdrawn by the person who gave it.⁹

When either of the persons intending marriage is a minor,

¹ Act XV of 1872, sec. 3.

² Act XV of 1872, sec. 16.

³ The right of the father is not one which can be lost or which in consequence of his unfitness would devolve on any one else.

⁴ This includes a guardian appointed by the father as well as a guardian appointed by the Court.

⁵ Act XV of 1872, sec. 19.

⁶ *Ibid.* Failing the father a testamentary guardian or a guardian of the person appointed by the Court and the mother, there is no one who can consent. It might be necessary in some

cases to obtain an appointment of a guardian by the Court in order that the requisite consent may be given. If the father is insane, or otherwise incapable of giving his consent, there is not, as under 4 Geo. IV. c. 76, sec. 17, power to obtain an order from a Court. If he be living in India, the marriage cannot be held except before a Marriage Registrar on an order made under sec. 45: see *post*, p. 242.

⁷ Act XV of 1872, sec. 20.

⁸ *Ibid.*, sec. 17.

⁹ *Ibid.*, sec. 21.

Guardians may prohibit issue of certificate.

Issue of certificate.

and the Minister is not satisfied that the consent of the person whose consent to such marriage is required has been obtained, such Minister shall not issue such certificate required by the Act until the expiration of fourteen days after the receipt by him of the notice of marriage.¹

A marriage cannot be held between Native Christians, unless the age of the man exceeds sixteen years, and that of the woman exceeds thirteen years.² Native Christians.

The consent of the father, guardian, or mother,³ if there be one alive, is necessary up to the age of eighteen years, but not beyond.⁴

In the case of a marriage to be solemnized by, or in the presence of, a Marriage Registrar, when one of the parties intending marriage is a minor,⁵ the Marriage Registrar must within twenty-four hours after the receipt by him of notice of the marriage send, by post or otherwise, a copy of such notice to each of the other Marriage Registrars (if any) in the same district, who shall affix the copy in some conspicuous place in his own office.⁶ Marriage by Registrar.

When either of the parties is a minor, the Marriage Registrar cannot give a certificate unless one of the parties intending marriage appears personally before him and makes oath (among other things necessary) that the consent or consents to such marriage required by law has or have been obtained thereto,⁷ or that there is no person resident in India authorized to give such consent as the case may be ;⁸ and until fourteen days after the entry of the notice of marriage has expired.⁹

When one of the parties intending marriage is a minor, and both such parties are at the time resident in any of the towns of Calcutta, Madras, and Bombay, and are desirous of being married in less than fourteen days after the entry of the required notice,¹⁰ they may apply by petition to a Judge of the High Court for an order upon the Marriage Registrar to whom the notice of marriage has been given, directing him to issue his certificate before the expiration of the fourteen days. On Petition to High Court to order certificate in less than fourteen days.

¹ Act XV of 1872, sec. 22.

² *Ibid.*, sec. 60.

³ *Ibid.*, sec. 19, *ante*, p. 240.

⁴ *Ibid.*, sec. 60.

⁵ *Ante*, pp. 239, 240

⁶ Act XV of 1872, sec. 39.

⁷ *Ibid.*, sec. 19, *ante*, p. 240, and secs. 42 and 44.

⁸ Act XV of 1872, sec. 42.

⁹ *Ibid.*, sec. 41.

¹⁰ *Ibid.*

sufficient cause being shown, the Judge may, in his discretion, make an order upon such Marriage Registrar, directing him to issue his certificate at any time to be mentioned in the said order before the expiration of the fourteen days. The Marriage Registrar on receipt of the order must issue his certificate in accordance therewith.¹

Protest
against issue
of certificate.

Any person whose consent to the marriage would be required² may enter a protest against the issue of the Marriage Registrar's certificate, by writing, at any time before the issue of the certificate, the word "forbidden" opposite to the entry of the notice of such intended marriage in the marriage notice book, and by subscribing thereto his or her name and place of abode, and his or her position with respect to either of the parties, by reason of which he or she is so authorized.³

Effect of
protest.

When such protest has been entered, no certificate can be issued until the Marriage Registrar has examined into the matter of the protest, and is satisfied that it ought not to obstruct the issue of the certificate, or until the protest be withdrawn by the person who entered it.⁴

Where
guardian is
insane or
unjustly with-
holds consent.

If any person whose consent is necessary to a marriage before the Registrar is of unsound mind, or if any such person (other than the father) without just cause withholds his consent to the marriage, the parties intending marriage may apply by petition, where the person, whose consent is necessary, is resident within any of the towns of Calcutta, Madras, and Bombay, to a Judge of the High Court, or if he is not resident within any of the said towns, then to the District Judge,⁵ and the Judge may examine the allegations of the petition in a summary way, and if upon examination such marriage appears proper the Judge shall declare the marriage to be a proper marriage. Such declaration is as effectual as if the person whose consent was needed had consented to the marriage, and if he has forbidden the issue of the certificate, such certificate shall be issued.⁶

Petition when
Registrar
doubts
authority of
person for-
bidding.

When the Registrar is not satisfied that the person forbidding the issue of the certificate is authorized by law so to do he must apply by petition, where his district is within any of

¹ Act XV of 1872, sec. 43.

² *Ante*, p. 240.

³ Act XV of 1872, sec. 44.

⁴ *Ibid.*

⁵ See Act XV of 1872, sec. 85.

⁶ Act XV of 1872, sec. 45.



the towns of Calcutta, Madras, and Bombay, to a Judge of the High Court, or if such District be not within any of such towns, then to the District Judge.

The petition must state all the circumstances of the case, and pray for the order and direction of the Court. The Judge is to examine into the allegations of the petition and the circumstances of the case, and if, upon such examination, it appears that the person forbidding the issue of the certificate is not authorized by law so to do, the Judge shall declare that the person forbidding the issue of the certificate is not authorized, and thereupon the certificate shall be issued.¹

Every person entering a protest with the Marriage Registrar against the issue of a certificate on grounds which the Registrar or Judge declares to be frivolous and such as ought not to obstruct the issue of the certificate, is liable for the costs of all proceedings in relation thereto and for damages to be recovered by suit by the person against whose marriage such protest was entered.² Liability for frivolous protest.

In cases to which the Indian Christian Marriage Act (XV of 1872) applies, the absence of the consent of the father or guardian does not of itself avoid the marriage.³ Effect of want of consent.

The High Courts have also power⁴ to issue marriage licenses for the marriage in Christian Churches of persons subject to their Ecclesiastical jurisdiction; but before doing so they will, in the case of minors,⁵ require the consent of their guardians.⁶ Marriage by license of High Court.

Act III of 1872, which provides a form of marriage for persons who do not profess the Christian, Jewish, Hindu, Mahomedan, Parsee, Buddhist, Sikh or Jain religion, does not permit the marriage of any person under the age of twenty-one years without the consent of his or her father or guardian, and even Act III of 1872.

¹ Act XV of 1872, sec. 48.

² *Ibid.*, sec. 49.

³ See Act XV of 1872, sec. 77. *R. v. Birmingham* (1828), 8 B. & C., 29.

⁴ See Belchambers' Rules and Orders, p. 312, note.

⁵ Although the ages under which a person is to be considered a minor for the purposes of Act XV of 1872 (sec. 3, *ante*, p. 239, and sec. 60, *ante*, p. 241) do not strictly apply, a High Court would have regard to those ages, in issuing a marriage license.

⁶ In a case where the parties were minors, and the father of each of the parties was dead, a marriage license for the Church of England was issued, with the consent of the mother of the lady, and upon an affidavit of the gentleman that his mother, his surviving parent, was in England, and there was no one in India authorized to consent to the marriage: *Re Lovell*, Belchambers' Practice, p. 413.

with such consent it does not permit the marriage of a man under eighteen, or a woman under fourteen years of age.¹

Objection.

Any person may object to any marriage under this Act on the ground that the parties have not reached the prescribed age, or that they have not received the necessary consent to their marriage. The nature of the objection made shall be recorded in writing by the Registrar in the register, and shall, if necessary, be read over and explained to the person making the objection, and shall be signed by him or on his behalf.²

The Act further provides: "*Section 7.*—On receipt of such notice of objection, the Registrar shall not solemnize the marriage until the lapse of fourteen days from the receipt of such objection, if there be a Court of competent jurisdiction open at the time, or, if there be no such Court open at the time, until the lapse of fourteen days from the opening of such Court."

Suit by objector.

The person objecting to the intended marriage may file a suit in any Civil Court having local jurisdiction (other than a Court of Small Causes) for a declaratory decree, declaring that the marriage would contravene the conditions prescribed by the Act.³ If the objection be not reasonable and *bonâ fide*, the Court, in which the suit is filed, may inflict on the objector a fine not exceeding one thousand rupees.⁴

Settlement of marriage.

The guardian of a female minor who is a European, or brought up as such, should ordinarily see that a proper settlement of her property is made on her marriage.

In England, where the husband by marriage acquired rights in the property of his wife, this duty was a most necessary one, and although in this country no person by marriage acquires any interest in the property of the person whom he or she marries, it is clear that the influence which the husband exercises over his wife, together with the want of capacity of the wife herself, is calculated to endanger the wife's interest in her property.

Succession Act.

The Indian Succession Act⁵ provides that "the property of a minor may be settled in contemplation of marriage, provided the settlement be made by the minor with the approbation of the minor's father, or, if he be dead or absent from British India, with the approbation of the High Court."⁶

The amount to be settled on a minor about to marry would depend on the circumstances of each particular case, and it is not possible to lay down any fixed rule either with respect to the proportion of the amount settled to the income of the minor's estate, or with respect to the way in which it is to be settled. The High Courts in settling the minor's property

¹ Sec. 2. If either party has not completed the age of 21 years, the necessary declaration must be signed by his or her father or guardian, except in the case of a widow: sec. 10.

² Sec. 6.

³ Sec. 7.

⁴ Sec. 8.

⁵ X of 1865, sec. 45.

⁶ The application to the High Court should be by petition.

under the powers given to them by the Succession Act, would probably be guided by the rules which are followed by the High Court in England in settling on marriage the property of its wards.

The settlement should maintain the interest of the minor modified to some extent by a consideration of what the minor is to gain by the marriage. Terms of settlement. According to the English practice, as Mr. Simpson points out in his work on the Law of Infants:¹ "The usual outline of a settlement would probably be, that the husband would take the first life-interest in his own property, and the wife the first life-interest in hers, to her separate use without power of anticipation. Then the issue of the marriage would be provided for in the usual way, and in default of issue, the property of the husband is generally limited to him absolutely; and the property of his wife, if she survive her husband, to her absolutely; if she die in his lifetime, according as she shall appoint by will, and in default of appointment, to her statutory next-of-kin. The more recent practice, it seems, is to give a power of appointment to the wife whether she survives her husband or not."² In most cases a husband will be given some interest in his wife's property, except he may have married her in contempt of Court, in which case he may, unless the contempt be not an aggravated one, be excluded from any participation therein.³

Where the fund is small, it is sometimes paid over to the husband, or given to him to be employed by him in trade. The Court will generally sanction what the minor's relations consider as a prudent and safe settlement of his property.

An agreement for a marriage cannot be specifically enforced Breach of agreement for marriage. against either the guardian or the ward;⁴ but it has been held⁵ that a suit for damages will lie against a Hindu guardian, where the agreement has been broken, and there seems to be no reason why a similar suit should not lie in the case of any other guardian.⁶

It has been held that, amongst Hindus, at any rate, a suit will lie to recover money paid or property given as a consideration for a marriage the contract for which has fallen through.⁷

¹ Third Edition, pp. 281, 282; Davidson's Conveyancing, 3rd Edn., vol. iii, 95 n.

² See *Smith v. Illife* (1875), L. R., 20 Eq., 666.

³ Where the woman is the offending party, the Court will not exclude her from all interest in her husband's property: *Re Murray* (1842), 3 Drury and Warren, 83.

⁴ *In the matter of Gunput Narain Singh* (1875), 1 Calc., 75; *Umed Kika v. Nagindas Narotamdas* (1870), 7 Bom. H. C., O. C. J., 122.

⁵ *Umed Kika v. Nagindas Narotamdas* (1870), 7 Bom. H. C. Rep.,

O. C. J., 122; *Mulji Thakersey v. Gombi* (1887), 11 Bom., 412; *Purshotamdas Tribhovandas v. Purshotamdas Mangaldas Nathubhoy* (1890), 21 Bom., 23; *In the matter of Gunput Narain Singh* (1875), 1 Calc., 75; see *Nowbut Singh v. Ladkooer* (1873), 5 N.-W. P. H. C. R., 102.

⁶ Act I of 1877, sec. 21, cl. b. See *Asgar Ali Chowdry v. Mahabhat Ali* (1894), 13 B. L. R., App., 34; *Muhammad Ashruff Hussain Saheb Hakima v. Muhammad Ali Saheb (Syed)* (1901), 24 Mad., 652.

⁷ *Ramchand Sen v. Audaito Sen* (1884), 10 Calc., 1054, following

Agreement to
recompense
guardian.

Any agreement by which the guardian obtains a pecuniary or other consideration for the marriage of his ward is void according to English law,¹ and in British India also it is void² with regard, at any rate, to persons who are not Hindus or Mahomedans, and do not belong to races amongst whom such arrangements may be usual.

It is unsettled whether a Hindu father or other guardian can enforce an agreement to recompense him in consideration of the marriage of his child or ward, although the marriage be in the *asura* form, which itself contemplates a payment to the guardian.³

It is submitted that compensation cannot be recovered in a Court of law. The Allahabad High Court holds that each case must be judged by its circumstances.⁴

The father or other guardian can recover money for a marriage which has not taken place.⁵

It has been held that an agreement that a sum of money should be paid if a contemplated marriage did not take place is void.⁶

There is not the same objection to a payment of money by the guardian to the proposed bridegroom.⁷

An arrangement to pay money to a person other than the guardian is, according to the High Courts of Madras and

Jogeswar Chakrabatti v. Panchkauri Chakrabatti (1870), 5 B. L. R., 395; 14 W. R. C. R., 154; *Rambhat v. Timmaya* (1892), 16 Bom., 673; *Mulji Thakersey v. Gomti* (1887), 11 Bom., 412.

¹ Simpson on Infants, 3rd Edn., p. 111.

² See Act IX of 1872, sec. 24.

³ *Gulabchand v. Fulba* (1909), 33 Bom., 411; 11 Bom. L. R., 649; *Baldeo Das Agarwalla v. Mohamoya Persad* (1911), 13 C. W. N., 447; *Venkata Kristnayya (Kalavagunta) v. Lakshmi Narayana (Kalavagunta)* (1908), 32 Mad., 835; *Vaithyanatham v. Gangarazu* (1893), 17 Mad., 9; *Dholidas Ishvar v. Fulchand* (1897), 22 Bom., 658; *Dulari v. Vallabdas Pragji* (1888), 13 Bom., 126. See *Pitamber Ratansi v. Jagjivan Hansraj* (1884), 13 Bom., 131; *Rambhat v. Timmaya* (1892), 16 Bom., 673; *Visvanathan v. Saminathan* (1889), 13 Mad., 83; *Whattacharjee's Hindu Law*, 2nd

Edn., pp. 101, 102, Manu says (iii, 51), "Let no father, who knows the law, receive a gratuity, however small, for giving his daughter in marriage, since the man who through avarice takes gratuity for that purpose, is a seller of his offspring;" but the practice is very common.

⁴ *Baldeo Sahai v. Jamna Kunwar* (1901), 23 All., 495.

⁵ *Ram Chand Sen v. Audaito Sen* (1884), 10 Calc., 1054. See *Lallumonee Dossee (Ranee) v. Nobin Mohun Singh* (1875), 25 W. R. C. R. 32; *Juggernath Persad Agurwallah v. Jankey Persad* (1859), 2 Boul., 28; *Jogeswar Chakrabatti v. Panchkauri Chakrabatti* (1870), 5 B. L. R., 395; 14 W. R. C. R., 154.

⁶ *Devarayan Chetty v. Muthuraman Chetty* (1912), 37 Mad., 393.

⁷ Illustration (a) of sec. 65 of Act IX of 1872 seems to assume that there would be no objection to such an arrangement.

Bombay, contrary to public policy, even in the case of Hindus.¹

An agreement in restraint of the marriage of a minor is valid.² Agreements in restraint of marriage.

It is the duty of the guardian of a minor's estate to make suitable provision out of such estate for the proper marriage of his ward, and, in the cases of Hindus, of the ward's dependent female relations.³ Duty of guardian.

As to the liability of a father's estate for the expenses of the marriage of his daughter, see *ante*, p. 228.

If the minor is a coparcener the expenses must be paid out of the joint family property.⁴

In one case where the mother gave her daughter in marriage against the wish of her father-in-law, the Madras High Court held that she was nevertheless entitled to be repaid the expenses out of the family property.⁵

It is the duty of a guardian by every means in his power to prevent his ward entering into an unsuitable marriage.⁶ Fitness of marriage.
It is not possible to lay down any rule as to what is, and what is not, an unsuitable marriage. Congruity of age and equality of rank and fortune are the chief means of determining the fitness of a marriage of a European ward.

Except there be any objection arising from nearness of Marriage of guardian and ward

¹ *Vaithyanatham v. Gangarazu* (1893), 17 Mad., 9; *Pitamber Ratanji v. Jagjivan Hansraj* (1884), 13 Bom., 131, at p. 136; *Dulari v. Vallabdas Pragji* (1888), 13 Bom., 126. See, however, *Jogeswar Chakrabatti v. Panchkauri Chakrabatti* (1870), 5 B. L. R., 395; 14 W. R. C. R., 154.

² Act IX of 1872, sec. 26.

³ The amount to be expended must necessarily vary in accordance with the position and wealth of the minor, and the customs of the community to which he belongs. Europeans, and those brought up as such, do not usually spend large amounts on their marriage ceremonies, whereas Hindus especially and Mahomedans are more lavish on those occasions. The High Court of Bengal in determining, when occasion requires, what amount should be expended on the marriage of a Hindu minor, has been always guided by Hindu ideas, with-

out regard to the more parsimonious expenditure of European weddings. A guardian would not ordinarily be justified in heavily encumbering an estate to raise marriage expenses. As to the right of a Hindu guardian to charge the estate for this purpose, see *ante*, p. 157. As to the right of a guardian to apply to the Court for directions when he is in difficulty, see *ante*, p. 148. An order cannot be made under the Guardians & Wards Act, 1890 (Act VIII of 1890). It can only be made in a suit: *Somakka v. Ramiyah* (1911), 36 Mad., 39.

⁴ See *Vaikuntham Ammangar v. Kalapiran Ayyangar* (1900), 23 Mad., 512; *Sundrabai v. Shivanarayana* (1907), 32 Bom., 81; 9 Bom. L. R., 1366; *Bhagirathi v. Jokhu Ram Upadhia* (1910), 32 All., 575.

⁵ *Ranganaiiki Ammal v. Ramanuja Aiyangar* (1911), 35 Mad., 728.

⁶ *Barker v. Taylor* (1823), 1 C. & P., 101.

relationship, or from the exercise of force or undue influence,¹ there is nothing in the law to prevent a guardian himself marrying his ward.²

Power of Court. Injunction to restrain marriage.

In cases where a guardian has been appointed by a Court, such Court can give all necessary directions, and make proper provision for the marriage of the ward;³ and in any case a Civil Court can prevent by injunction⁴ the improper marriage of a minor subject to its jurisdiction, and in some cases would remove a guardian who is conniving at the improper marriage of his ward.⁵

Under the English law, where a minor is a ward of Court,⁶ a person marrying such ward, or attempting to bring about a marriage of the ward without the sanction of the Court, is liable to be punished for contempt of Court. This rule has not, so far as can be ascertained from the reports, been acted upon in India, although the High Courts might be entitled to adopt it.⁷

Wards of Courts of Wards.

As to the marriage of wards of the Bengal Court of Wards, see *post*, p. 350. As to the marriage of wards of the Madras Court of Wards, see *post*, pp. 368, 369.

Abetting marriage of ward of Madras Court of Wards.

The Madras Court of Wards Act,⁸ 1902, provides that whoever without the previous consent of the Court of Wards abets the marriage of a minor who owns or has a life interest in land either solely or as co-sharer⁹ shall be liable, on conviction before a Court of Session, to a fine not exceeding Rs. 2000, or to imprisonment for a term not exceeding six months, or to both.

Although the words of the section are wide enough to include the case of every minor proprietor of land, it is submitted that the section was only intended to apply to the case of wards of the Court of Wards.

¹ *Harford v. Morris* (1776), 2 Hagg. Con. Rep., 423, at p. 436.

² The Mahomedan law does not allow the *Kazi* who is (see *ante*, p. 235) after her relatives and the *mowla-ool-mowalat*, entitled to give a female minor in marriage, to marry her himself, or to give her in marriage to his son, but this prohibition does not extend to other guardians; See Ameer Ali's Mahomedan Law, vol. ii, 2nd Edn., p. 292.

³ See Act VIII of 1890, secs. 33 and 43, *ante*, pp. 148-150. Cf. *Chellathammal v. Ammayappa Mudaliar* (1908), 32 Mad., 253.

⁴ *Wellesley v. Beaufort* (1827), 2 Russ., 1, at p. 29; *Monijan Bibi v. District Judge, Birbhum* (1914), 42 Calc., 351; 19 C. W. N., 390. See *ante*, p. 232. This would ordinarily

be by suit, but where the minor is a ward of Court (*ante*, pp. 100, 117, 118), there is no reason why proceedings should not be taken, at any rate, in the High Courts by petition in the proceeding in which the minor has been constituted a ward of the Court. In the District Courts also an application may be made under Act VIII of 1890, sec. 43, *ante*, p. 149.

⁵ *Ante*, p. 101.

⁶ *Ante*, pp. 100, 117, 118.

⁷ See *ante*, p. 130. *Subhadraoer v. Dhajadhari Goswami* (1911), 15 C. L. J. 147, referred to in *Monijan Bibi v. District Judge, Birbhum* (1914), 42 Calc., 351; 19 C. W. N., 390.

⁸ Act I (M. C.) of 1902, sec. 67.

⁹ *Ibid.*, secs. 4, 9.

The minority of the husband is no answer to a suit for restitution of conjugal rights, instituted either by him or against him. Suit for restitution of conjugal rights.

The minority of the wife would be no answer to a suit by the husband except under circumstances which would disentitle him to act as guardian of her person,¹ and perhaps in all cases it would be an answer where the girl was under twelve years of age.²

In such a suit it might be proper to put the husband upon terms, for instance, that she should be placed by him in charge of a female member of his family.³

The minority of the wife is no answer to a suit by her in the case of Hindus. It apparently might be in the case of a Mahomedan girl who is too young for intercourse.⁴

¹ *Ante*, p. 88.

² See Act XLV of 1860, sec. 375, *ante*, p. 44.

³ *Surjymoni Dasi v. Kalikanta*

Das (1900), 28 Calc., 37; 5 C. W. N., 195; *Kateeram Dokanee v. Gendhence* (1875), 23 W. R. C. R., 178.

⁴ See *ante*, p. 57.

CHAPTER XXIV.

POWERS OF COURTS OVER PROPERTY OF MINORS.

Powers of
High Courts.

IN addition to their powers of controlling the action of guardians appointed by them,¹ and of giving sanction to the disposal of property under the Guardians and Wards Act,² the High Courts of Bengal, Madras, and Bombay, in the exercise of their ordinary original civil jurisdictions, possess powers over the estates of minors similar to those which were exercised by the Court of Chancery in England at the time of the establishment of the Supreme Courts.

Sale, mort-
gage, applica-
tion, and
investments.

They can direct or authorize a sale or mortgage of the minor's property for necessary purposes, and can provide for the application or investment of funds belonging to him.³ This can be done whether or not there be a suit pending to which the minor is a party.⁴

The only cases, apparently, where the English Court of Chancery will allow the sale or mortgage of minor's property is for the purpose of paying necessary expenses which have been incurred with reference thereto, such as necessary repairs and improvements, or to pay off legacies or other charges on the estate, or to pay the costs of a suit relating to the estate, or the expenses of renewing renewable leaseholds.⁵

Powers of
Court under
Guardians and
Wards Act.

A Court cannot in the exercise of its jurisdiction under the Guardians and Wards Act deal with property belonging to or claimed by the minor except in strict accordance with that Act.⁶

District
Courts.

The Courts in the districts might perhaps in a suit properly

¹ *Ante*, pp. 148-150.

² *Ante*, p. 143.

³ A suit is not necessary : see *ante*, p. 213.

⁴ See *ante*, pp. 114, 214.

⁵ Simpson on the Law of Infants,

3rd Edn., p. 296.

⁶ In *Babaji v. Sheshgiri* (1882), 6 Bom., 593, it was held that the Court could not under Act XX of 1864 attach and divide joint property.

framed have power to direct the sale of the property of minors, but it would rarely be necessary to exercise this power.¹

In any case in which the minor's property could have been sold *in invitum* by the Court, if he had been an adult, a Court can order a sale in execution of a decree.²

When a sale is ordered by the Court, the Court may itself execute, or may direct one of its officers or a Receiver appointed by the Court³ to execute, a transfer in the name of the minor,⁴ but the Court cannot enter into any covenant for title, for quiet enjoyment or otherwise, on behalf of a minor.⁵

Execution of transfer.

As to the duty of the purchaser in the case of a sale by order of the Court, see *ante*, p. 145, and *post*, chap. xxvii.

Duty of purchaser.

In cases to which the English law is applicable,⁶ a High Court, when it directs the sale of immovable property, may make an order vesting such property in the purchaser or other person as it may think fit.⁷

Power of High Court to vest property in purchaser.

In cases which would have been governed by English law as administered by the late Supreme Courts,⁸ the High Courts can require a minor heir or devisee to convey estates ordered to be sold for payment of debts due by the person whose heir or devisee he is.⁹

To order conveyance by minor heir or devisee.

¹ Ordinarily the appointment of a guardian and sanction to dispose of the property under Act VIII of 1890, sec. 29, would be the better course to pursue.

² As to sales in execution of decrees against minors, see *post*, pp. 286 to 290.

³ See *Basir Ali v. Hafiz Nazir Ali* (1915), 19 C. W. N., 817.

⁴ See Civil Procedure Code (Act V of 1908), order 21, rule 34. The following rule applies to the Original Side of the Bengal High Court (rule 441): "If any person certified by the Registrar to be a necessary party to a conveyance be a minor, * * * an order may be obtained, directing the Registrar to execute the conveyance for him in his name. * * * The application shall be on summons, and shall be supported by an affidavit or affirmation of the facts, and it shall be shown that the person required to execute the conveyance was certified

by the Registrar to be a necessary party, and that the conveyance has been approved of such party or by the Registrar. See *Ramchunder Dutt v. Dwarkanath Bysack* (1889), 16 Cal., 330. In an unreported case (1877) (see Belchambers' Rules and Orders, p. 174), Kennedy, J., held that Act VIII of 1859, sec. 202 (corresponding with order 21, rule 34, of Act V of 1908), did not apply to minors.

⁵ *Ramchunder Dutt v. Dwarkanath Bysack* (1889), 16 Cal., 330.

⁶ See *ante*, p. 32, note 13.

⁷ Act XXVII of 1866, sec. 32.

⁸ This expression has not received judicial interpretation, so far as can be ascertained, see *ante*, pp. 32, note 13, and 221, note 3. It is wide enough to include the cases of all persons within the original jurisdiction of a High Court and all European British subjects in the Provinces of Bengal, Bombay, and Madras.

⁹ Act XXIV of 1841, secs. 4 and 5,

As to the surrender and renewal of leases in which minors are interested, see *ante*, p. 172.

Investment of money paid into Court.

A Court has power to direct the investment of money belonging to a minor, which has been paid into Court in any suit or proceeding.

It would ordinarily require the investment to be made in securities of the Government of India.¹

Indian Trusts Act.

The Indian Trusts Act, 1882, which extends to the Madras Presidency, the United Provinces of Agra and Oudh, the Punjab, the Bombay Presidency, the Central Provinces, Coorg, Assam and the town of Rangoon, and may be extended to any other part of British India by the Local Governments, provides² that a trust may be created, with the permission of a principal Civil Court of original jurisdiction, by or on behalf of a minor; but subject to the law for the time being in force as to the circumstances and extent in and to which the author of the trust may dispose of the trust property.

Creation of trust.

Modification of trust.

Under the same Act,³ where there is a minor beneficiary a principal Court of original jurisdiction may consent to the modification of the directions of the author of the trust.⁴

applying sec. 11 of 11 Geo. IV & 1 Wm. IV, chap. 47. If a minor refuses to execute, an attachment might issue against him: *Thomas v. Gwynne* (1845), 8 Beav., 312, or an order can be made under order 21, rule 34, of the Civil Procedure Code (Act V of 1908). Having regard to this rule it would seem unnecessary

to make an order requiring the minor himself to execute a conveyance.

¹ See Belchambers' Rules and Orders, p. 242, rule 605.

² Act II of 1882, sec. 7.

³ Sec. 11.

⁴ *i.e.* a modification of the terms of the trust.

CHAPTER XXV.

SUITS AND PROCEEDINGS BY AND AGAINST MINORS.

EXCEPT that a suit cannot be brought on behalf of or against a minor in a Village Court,¹ a minor is as much entitled to bring or defend a suit as an adult,² but he cannot of himself institute any suit,³ except a suit in a Presidency Small Cause Court for a sum of money not exceeding five hundred rupees, which may be due to him for wages or piece-work or for work as a servant.⁴

Village Courts.
Civil suit or proceeding.

He cannot of himself defend⁵ any suit, prefer or defend an appeal,⁶ or make or defend any application to a Civil Court.

It is not the practice to postpone suits against minors until they come of age.⁷

There is nothing to prevent his instituting, prosecuting, or defending any criminal proceeding, or making any application to a Criminal Court, in his own name.

Criminal proceeding.

Every suit on behalf of a minor must be instituted in his name by an adult person, who in such suit is called the next friend of the minor and may be ordered to pay any costs in the suit as if he were the plaintiff.⁸

Suit on behalf of a minor.

¹ Act III (N.-W. P.) of 1892, sec. 9; Act I (M. C.) of 1889, sec. 13.

² As to suits in a Mamlatdar's Court, see *Dattatraya Keshav v. Vaman Govind* (1895), 21 Bom., 88; *Saifulla (Sayad) v. Haji Miya (Sayad)* (1899), 24 Bom., 238; 1 Bom. L. R., 664. A suit may be brought on behalf of an infant *en ventre sa mère*: Macpherson on Infants, p. 364.

³ Civil Procedure Code (Act V of 1908) order 32, rules 1, 2, 4 (2), 5 (2).

⁴ Act XV of 1882, sec. 32. See *ante*, p. 20.

⁵ Civil Procedure Code (Act V of 1908), order 32, rules 3 (1), 4, 5 (2).

⁶ *Ibid.*, sec. 107 (2).

⁷ *Vaktuba (Bai Shri) v. Agarsingji Raisingji* (1910), 12 Bom. L. R., 697.

⁸ Civil Procedure Code (Act V of 1908), order 32, rules 1, 4 (2). As to costs, see *post*, chap. xxvi. As to the course to be taken by a defendant when a minor brings a suit without a next friend, see *post*, p. 256. The absence of a next friend does not make the suit a nullity. The institution of a suit without a next friend prevents limitation running, and the suit may be proceeded with on a next friend being added: *Parikh Gokaldas v. Ravlal Jalam*, Bom. P. J. 1884, p. 262.

Under Rule 315 of the Bombay High Court when a suit is brought on behalf of a minor, the next friend shall make an affidavit, to be presented to the Judge with the plaint in the suit, that he has no interest directly or indirectly adverse to that of the minor, and that he is otherwise a fit and proper person to act as such next friend. The age of the minor should also be stated. Rule 65 of the Madras High Court is in similar terms.

Title of suit.

The plaint, and subsequent portions of the record, should, where the plaintiff is a minor, be intituled "A. B., a minor by C. D., his next friend *versus* E. F.;"¹ but, if the minor is really suing, and there is a next friend properly acting on his behalf, the form of title to the suit is immaterial.² It is, however, desirable that the original Court should, to prevent future complications, require the next friend to adopt the proper form.

Who may be next friend.

Except where the minor has a guardian appointed or declared by an authority competent in this behalf,³ any person⁴ who is of sound mind and has attained majority may by presenting a plaint or petition on behalf of a minor constitute

¹ *Mrinamoyi Dabia v. Juggodishuri Dabia* (1879), 5 Calc., 450; *Durgachurn Shaha v. Nilmoney Dass* (1883), 10 Calc., 134; s.c., *Durga Churn Shaha v. Gourmoni Dasi*, 13 C. L. R., 369; *Russick Das Bairagy v. Preonath Misree* (1883), 10 Calc., 102; s.c., *Rasick Das Barragi v. Jagudamba Dabee*, 13 C. L. R., 405. As to the title in suits by wards of the Court of Wards, see *post*, pp. 439, 440, 443, 446, 449.

² See *Surjakant Acharjya (Raja) v. Hemanta Kumari Dabi (Rani)* (1892), 20 I. A., 25; 20 Calc., 498. In *Bhabapershad Khan v. Secretary of State* (1886), 14 Calc., 159, a Full Bench held that the question for the Appeal Court is whether on the construction of the plaint and written statements the minor is really a party to the suit. This decision overrules *Mrinamoyi Dabia v. Juggodishuri Dabia* (1879), 5 Calc., 450; *Russick Das Bairagy v. Preonath Misree* (1883), 10 Calc., 102; s.c., *Rasick Das Barragi v. Jagudamba Dabee*, 13 C. L. R., 405; and *Shonai Bewa v. Monoram Mundul* (1882), 11 C. L. R., 15, so far as those cases treat the objection as fatal. See also *Durgachurn Shaha v. Nilmoney Dass* (1883), 10 Calc., 134; s.c., *Durgachurn Shaha v. Gourmoni Dasi*, 13 C. L. R., 369; *Alim Buksh Fakir*

v. Jhalo Bibi (1885), 12 Calc., 48; *Grish Chunder Mookerjee v. Miller* (1878), 3 C. L. R., 17.

³ Act VIII of 1890, sec. 53A. See *post*, pp. 257, 258, 262. This would include a guardian appointed by a Civil Court or by a Court of Wards, but does not include a testamentary guardian: *Budhilal Manji v. Morarji Premji* (1907), 31 Bom., 413; 9 Bom. L. R., 553. As to the duties of guardians with reference to the institution and defence of suits, see *ante*, pp. 125, 126.

⁴ See *Dullabh De (Mussummaul) v. Manu Bibi* (1830), 5 Ben. Sel. Rep., 50; 2nd Edn., p. 61; *Nag Thakur v. Madnaji Sadashiv* (1883), 8 Bom., 239. The observations in *Russick Das Bairagy v. Preonath Misree* (1883), 10 Calc., 102; s.c., *Rasick Das Barragi v. Jagudamba Dabee*, 13 C. L. R., 405, must be taken in connection with the facts of that case. There is nothing to prevent a married woman from being next friend of a minor plaintiff: *Asirun Bibi v. Sharip Mondul* (1890), 17 Calc., 488, overruling *Gurupershad Singh v. Gossain Munraj Puri* (1885), 11 Calc., 733. A Mahomedan uncle can bring a suit on behalf of his nephew, although he cannot be guardian of his property under Mahomedan law: *Abdul Bari v. Rashbehari Pal* (1880), 6 C. L. R., 413.

himself next friend of a minor and may act as such, provided his interest is not adverse to that of such minor, and he is not a defendant in the suit or proceeding,¹ and he resides in British India.²

In suits under the Indian Divorce Act, a minor can only sue by a next friend to be approved by the Court.³ Suit for divorce, etc.

The Court can at any time before the hearing inquire whether any suit is for the benefit of a minor plaintiff, and whether his next friend is a proper person to act as such.⁴ Inquiry whether suit is for benefit of minor.

Should it appear that the suit is clearly not for the benefit of the minor, the Court can direct the plaint to be taken off the file. Should the suit be beneficial, but the next friend be objectionable, the Court may remove the next friend,⁵ and will stay the proceedings until a new next friend be appointed.⁶

When at the time of presentation of a plaint on behalf of a minor it appears to the Court that the interest of the next friend in any way conflicts with, or is likely to conflict with, the interest of the minor, the Court should refuse to admit the plaint, unless it appear that the minor's interest will be prejudiced by delay in instituting the suit, in which case it should admit the plaint, and stay proceedings until the appointment of a new next friend.⁷ Interest of next friend conflicting with that of minor.

¹ Civil Procedure Code (Act V of 1908), order 32, rule 4. If a person whose interest is adverse to that of the minor does act as next friend or guardian for the suit, the minor is not bound by the suit, and can repudiate his liability thereunder on the ground that he was not properly represented in the suit: *Unnoda Dabee v. Stevenson* (1874), 22 W. R. C. R., 291; s.c. in High Court, *French v. Baranashee Banerjee* (1867), 8 W. R. C. R., 29. The minor would, before the proceedings be set aside, be required to show that he had been prejudicially affected.

² See Civil Procedure Code (Act V of 1908), order 32, rule 9. *Ganeshgiri v. Baba Ramapa*, Bom. P. J. 1881, p. 96.

³ Act IV of 1869, sec. 49. The Court would ordinarily approve of the minor's guardian acting as his next friend. In other cases it would be more strict in seeing whether the

suit is for the benefit of the minor. On it appearing at any stage of the suit that the Court did not approve of the next friend, the petition should be taken off the file.

⁴ See *Nalder v. Hawkins* (1833), 2 M. & K., 243, at p. 249; Macpherson on Infants, p. 365; Simpson on Infants, 3rd Edn., pp. 382, 383.

⁵ Civil Procedure Code (Act V of 1908), order 32, rule 9.

⁶ *Ibid.*, order 32, rule 2.

⁷ As to the procedure when the fact of the interest of the next friend being adverse to the interest of the minor comes to the knowledge of the Court after the institution of the suit, see Civil Procedure Code (Act V of 1908), order 32, rule 9, *post*, p. 265. To take an instance of the jealousy with which the Court regards any conflict of interest between a minor and a person acting on his behalf, and bound to protect his interest; by an order of the

Suit *in forma pauperis*.

A minor who is possessed of no means can sue as a pauper, whether his next friend be solvent¹ or a pauper.² In the case of his so doing, the provisions of the Code of Civil Procedure relating to suits by paupers will apply.

Course when
plaint filed
without next
friend.

If a plaint be filed by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader³ or other person by whom it was presented. Notice of such application must be given to such person by the defendant, and the Court, after hearing his objections, if any, may make such order in the matter as it thinks fit.⁴

Supreme Court of Madras, it was ordered that when the property of infants is unprotected, the Registrar should, with the previous consent of the Court, institute proceedings on behalf of the infant for the purpose of protecting him and his property. It was held by the Privy Council that the order was void, it being against public policy to allow an officer of the Court to institute suits in the conduct of which he might have a direct personal interest: *Kerakoose v. Serle* (1844), 3 M. I. A., 329.

¹ *Venkatanarasayya v. Achemma* (1881), 3 Mad., 3. See also *Afzul Sultan*, Ben. S. D. A. Summary Cases, 78; *Raj Rajindro Misser v. Bissonath Muttyloll* (1844), Fulton, 490. Care would have to be taken to prevent the process of the Court being abused, and a suit by a pauper next friend, which is entirely vexatious, may be stopped.

² *Gokupmonnee Dossee (S. M.) v. Prosonomoyee Dossee (S. M.)* (1873), 11 B. L. R., 373; *Raj Rajindro Misser v. Bissonath Muttyloll* (1844), Fulton, 490.

³ "Pleader" means every person entitled to appear and plead for another in Court, and includes an advocate, a vakil, and an attorney of the High Court: Civil Procedure Code (Act V of 1908), sec. 2 (15).

⁴ Civil Procedure Code (Act V of 1908), order 32, rule 2. The Court, as a rule, only takes the plaint off

the file where it appears on the face of the plaint that it was filed by a minor, or where it is proved that it was filed with the knowledge that the plaintiff was a minor, and with the intention of deceiving the Court and evading the payment of costs in case the plaintiff fails in his claim. When the fact of the minority is a *bonâ fide* question of evidence (or of law) and the defendant's allegation is found correct, then the usual course is to suspend all proceedings, and to allow sufficient time to enable the minor to be properly represented in the suit by a next friend: *Rattonbhai v. Chabildas Lalloobhai* (1888), 13 Bom., 7. In *Beniram Bhutt v. Ramlall Dhukri* (1886), 13 Cal., 189, it was held that sec. 442 of the then Code of Civil Procedure (Act XIV of 1882) which corresponds with the above rule only refers to a case where the plaint on the face of it appears to have been filed by a minor; but it is submitted that there is no reason why the section should be so limited. The mischief which the section has been enacted to cure, would be all the greater when the fact of the minority is suppressed. In exercising its discretion the Court should, in making an order, have regard to the interest of the minor. Generally, an application to take the plaint off the file should not be encouraged unless it be made at an early stage.

In making such order the Court cannot require the minor's estate to pay the costs.¹

An order taking the plaint off the file is appealable as a decree.²

Appeal from order.

A defendant who waives the irregularity of the suit being brought without a next friend cannot afterwards take advantage of the objection,³ and although the minor could repudiate the suit, there is nothing to prevent his adopting it and obtaining execution of a decree made in a suit in which he was not properly represented.⁴

Waiver of objection.

Where a minor has a guardian appointed or declared⁵ by competent authority,⁶ no person⁷ other than such guardian can act⁸ as the next friend of the minor unless the Court⁹ considers,¹⁰

Next friend when plaintiff has guardian appointed by Court.

¹ *Amichand Talakchand v. Collector of Sholapur* (1888), 13 Bom., 234.

² *Beniram Bhutt v. Ramlall Dhukri* (1886), 13 Calc., 189.

³ *Kamalakshi v. Ramasami Chetti* (1895), 19 Mad., 127; *Ex parte Brocklebank* (1879), 6 Ch. D., 358, referred to in *Doorgamohun Dass v. Tahir Ally* (1894), 22 Calc., 270.

⁴ *Mahomed Hatum v. Jumees & Bibee (Mussamat)* (1866), 6 W. R. C. R., 183; *Bird v. Pegg* (1822), 5 Barn. & Ald., 418.

⁵ Although the order has not been formally drawn up: *Mungniram v. Gursahainand (Mohunt)* (1889), 16 I. A., 195; 17 Calc., 347.

⁶ See ante, chaps. xi and xiv.

⁷ However nearly related to the minor: see *Madho Rao Apa v. Thakoor Persad* (1868), 3 Agra H. C. Rep., 127; *Sitarambhat v. Sitaram Ganesh* (1869), 6 Bom. H. C., 250; *Dhunraj v. Roodur Pertab Singh* (1868), 3 Agra H. C. Rep., 300; *Rutnee (Mussamat) v. Rughober Dyal (Misser)* (1867), 2 Agra H. C. Rep., 278; *Zorawar Singh v. Jawahir Sing* (1868), 3 Agra H. C. Rep., 167; *Boodhmul (Lalla) v. Gowree Sunkur (Lalla)* (1865), 4 W. R. C. R., 71. Even if he be the karta of a joint family of which the plaintiff is a member: *Shamkrishna v. Ramdas* (1897), 20 All., 162.

⁸ In a suit or in any proceedings in the nature of a suit, as for instance, proceedings to enforce an award under the Civil Procedure Code: see *Vasudev Vishnu v. Narayan Jaganath* (1872), 9 Bom. H. C., 289.

⁹ This means a Court of competent

jurisdiction in which it is proposed to institute the suit, not "the Court" as defined in sec. 4 (5) of the Guardians and Wards Act. The remainder of sec. 53 of Act VIII of 1890 shows that "the Court" has the same meaning as in order 32 of the Code of Civil Procedure (Act V of 1908). "Court" would include a Provincial Court of Small Causes: *Khanto Bewah v. Nund Ram Nath* (1871), 15 W. R. C. R., 369. It would also include an Appellate Court having jurisdiction in appeal from the Court in which it is proposed to institute the suit: *Hurendhur Lall Sahoo v. Rajendur Purtap Sahae (Maharaja)* (1864), 1 W. R. C. R., 260; *Taramonee Chowdhraani v. Rajlukhee Chowdhraani* (1863), 2 Hay's Rep., 575. An order made under this rule is not appealable as such, it can only come before an Appellate Court where there is an appeal from the decree or from an order having the effect of a decree (see Act V of 1908, secs. 2 and 105). Unless the first Court makes an improper use of its discretion an Appeal Court would not interfere: *Gounomonee Debia v. Ram Komul Sandle* (1872), 17 W. R. C. R., 144; *Nabadwip Chandra Sircar v. Kalinath Pal* (1869), 3 B. L. R., App., 130.

¹⁰ It is more regular to place the permission formally on the record: *Mrinamoyee Dabia v. Jugodishuri Dabia* (1879), 5 Calc., 450; 5 C. L. R., 361; but the omission to do so will not prevent the operation of the permission.

for reasons to be recorded,¹ that it is for the minor's welfare that another person be permitted to act.

The order should apparently be made after notice to such guardian and after hearing any objections which he may desire to make with respect to the institution of the suit, and the Court should not grant such leave unless it is of opinion that it is for the welfare of the minor that the person proposing to institute the suit in the name of the minor should be permitted to do so.²

In a case where the suit relates to property, over which the guardian has no power, as for instance, where it relates to the property of a joint family governed by the Mitakshara school of Hindu law,³ it is submitted that leave should be given. Such leave would, of course, also be given in a proper suit against the guardian.

As ordinarily the guardian appointed by the Court would be the right person to determine whether a suit would be instituted, permission would not be given unless it be clear that he is exercising his discretion erroneously or is negligent of the interests of his ward, or is unable from poverty or other cause to take necessary proceedings.

Statement of guardianship in plaint.

The fact that the next friend has been appointed or declared to be guardian by competent authority should be stated in the plaint.⁴

Suits by wards of Court of Wards.

The Court has no power to give such leave in cases where a local law has specially provided for the way in which suits are to be brought; as, for instance, a suit on behalf of a ward of a Court of Wards.⁵

Effect of institution of suit without leave.

A suit, which has been instituted without such leave, may be treated as a suit without a next friend, and therefore not

¹ Before Act V of 1908 was passed it was held in some cases that although a formal order was more regular no formal leave was necessary, but that the leave of the Court could be inferred from the admission of the plaint, or from the Court having allowed the continuance of the suit or from other circumstances: see *Sridhar Rao v. Ram Lal* (1908), 31 All., 7; *Bhabapershad Khan v. Secretary of State* (1886), 14 Calc., 159; *Parmessar Doss v. Bela* (1887), 9 All., 508; *Aukhil Chunder v. Tripoora Soonduree* (1874), 22 W. R. C. R., 525; *Bonomalee Kesh v. Hungshessur Roy* (1872), 17 W. R. C. R., 492; *Luchmiput Singh v. Amir Alum* (1882), 9 Calc., 176; *Jogi Singh v. Kunj Behari Singh* (1885), 11 Calc., 509; *Durga Churn*

Shaha v. Nilmoney Doss (1883), 10 Calc., 134; s.c., *Durga Churn Shaha v. Gourmoni Dasi*, 13 C. L. R., 369; *Alim Buksh Fakir v. Jhalo Bibi* (1885), 12 Calc., 48. Under the present law there must be a formal adjudication as to the right to institute the suit. In the case of a suit against the guardian, notice to the guardian would not always be necessary, as, for instance, in a suit under sec. 35 or 36 of Act VIII of 1890, *ante*, pp. 182-184.

² Cf. Act XIV of 1882, as amended by Act VIII of 1890, sec. 53A.

³ See *ante*, pp. 95, 96.

⁴ Cf. Act XIV of 1882, sec. 50, *illus. (c)*.

⁵ Civil Procedure Code (Act V of 1908), order 32, rule 16.

binding the minor.¹ It may on that ground be dismissed,² or the plaint may be returned for amendment.³

Should the minor have obtained any benefit, he will not be allowed to avoid the proceedings without making restitution.⁴

The objection to the irregularity may be waived by the minor on attaining majority, and he will then be allowed to continue a suit, which was instituted by a next friend without authority.⁵ It is submitted that the objection may be waived by the defendants.⁶

If there be a conflict between guardians, as to the right to institute a suit, the Court must determine the right. Ordinarily the guardian of his person would be entitled to bring suits affecting the ward's person, and the guardian of his property suits affecting such property.

When a plaint is presented by a next friend other than a guardian appointed by the Court, the Judge should inquire whether a guardian has been appointed by the Court. The fact that no objection is raised or pressed by the opposite party does not relieve the Judge from the necessity of making such inquiries as may be available.

Should a plaint be admitted either through inadvertence, or from the Court not being aware that a guardian had been appointed, it should, as soon as the mistake is discovered, be taken off the file unless the interests of the minor will be prejudiced by the plaint being removed from the file, in which case should the guardian not be desirous of acting as next friend the Court can permit the next friend who instituted the suit to continue it.

The Court should not permit a minor to be joined as co-plaintiff in a suit with persons whose interests are adverse to his. When the Court finds that a suit has been so brought, it should require the minor to be made a defendant, and should appoint a guardian for the suit to protect his interests,⁷ or it might provide for the conduct of the suit by the next friend of the minor independently of his co-plaintiffs.

In a suit against a minor, the minor should be described therein as defendant,⁸ and after a guardian for the suit has been appointed to watch his interests, the title of the suit

Waiver of objection.

Conflict between guardians.

Duty of Court on presentation of plaint.

Subsequent discovery that next friend not guardian.

Interest of co-plaintiffs adverse to minor.

Title of suit against minor.

¹ *Ante*, pp. 256, 257. Cf. *Sreenath Koondoo v. Hureenarain Mudduck* (1867), 7 W. R. C. R., 399; *Doorgapersad v. Keshopersad Singh* (1884), 9 I. A., 27; 8 Cal., 656; 11 C. L. R., 210.

² Cf. *Madhub Chunder Chowdhry v. Buktessuree Debia* (1869), 12 W. R. C. R., 102.

³ *Sham Krishna v. Ramdas* (1897), 20 All., 162. See *ante*, p. 256.

⁴ *Vishnu Keshav v. Ramchandra Bhaskar* (1886), 11 Bom., 130; *Daji Himat v. Dhirajram Sadaram* (1887),

12 Bom., 18.

⁵ *Madhub Chunder Chowdhry v. Buktessuree Debia* (1869), 12 W. R. C. R., 102. See cases *ante*, p. 257, note 4.

⁶ See *ante*, p. 257.

⁷ *Krishnabai v. Sonubai* (1865), 2 Bom. H. C., 310.

⁸ *Mongola Dossee v. Saroda Dossee* (1873), 12 B. L. R., App., 2; 20 W. R. C. R., 48; *Abdool Hye v. Mitterjeet Singh* (1875), 23 W. R. C. R., 348.

should be " *A. B. v. C. D. by E. F. his guardian for the suit* " ; but if it be clear that the minor is really sued and that there be a guardian for the suit properly appointed, the form of the title to the suit is immaterial.¹

This applies also to minor respondents to appeals.

When a minor is sued as an adult the plaint may be amended on the defendant claiming to be a minor.²

Appointment
of guardian for
the suit when
defendant is a
minor,

Where a defendant is a minor, the Court,³ on being satisfied of the fact of his minority,⁴ should appoint a proper person to be guardian for the suit for such minor,⁵ whether or not a guardian of his person or property has been appointed by a competent Court.⁶

Under rule 316 of the Bombay High Court, when a plaintiff knows that a defendant is a minor, he shall, on presentation of the plaint present a petition for the appointment of a guardian for the suit for such defendant (see also rules 317, 318, 319, and see Madras High Court, rule 66).

When to be
made.

Such appointment should not ordinarily be made until after the summons has been served upon the minor.⁷

¹ See *Kedar Prosunno Lahiri v. Protap Chunder Talukdar* (1891), 20 Calc., 11; *Harisaran Moitra v. Bhubaneswari Debi* (1888), 15 I. A., 195; 16 Calc., 40; *Suresh Chunder Wum Chowdhry v. Jugut Chunder Deb* (1886), 14 Calc., 204; *Komal Chunder Sen v. Surbessur Doss Gooplo* (1874), 21 W. R. C. R., 298; *Sherafutollah Chowdhry v. Abedonissa Bibee (Sreemutty)* (1872), 17 W. R. C. R., 374; *Hari v. Narayan* (1887), 12 Bom., 427; *Jogi Sing v. Kunj Behary Sing* (1885), 11 Cal., 509; *Kunhammad v. Kutti* (1888), 12 Mad., 90; *Natesayyan v. Narasimmayyar* (1890), 13 Mad., 480; *Vasudev Morbhat Kale v. Krishnaji Ballal Gokhale* (1895), 20 Bom., 534.

² *Kristo Das Roy v. Harendra Nath Banerjee* (1906), 10 C. W. N., xciii, following *Panchanan Singh v. Hassan Ali (Syed)* (1901), unreported.

³ In the High Court of Bengal, Original Side, an order for the appointment of a guardian for the suit may be made by the Registrar: Rules of 18th February, 1888.

⁴ Where the defendant is sued as an adult and pleads his minority, or where he is sued as a minor and pleads that he has attained majority,

proceedings in the suit should be stayed until the preliminary issue of minority has been decided. In an inquiry in the former case he should be represented by a guardian for the purpose of the inquiry: *Kasi Doss v. Kassim Sait* (1892), 16 Mad., 344. If the result of the issue is that the defendant is found to be a minor, then no further proceedings can be taken until a guardian for the suit is appointed. If he is found to be of age, then his guardian for the suit (if any) should be discharged.

⁵ Civil Procedure Code (Act V of 1908), order 3, rule 1; *Rohilkund and Kumaon Bank v. Row* (1884), 7 All., 490.

⁶ *Dakeshur Pershad Narain Sing v. Rewat Mehton* (1896), 24 Calc., 25.

⁷ *Suresh Chunder Wum Chowdhry v. Jugut Chunder Deb* (1886), 14 Calc., 204. This is the safer course, as the service of summons on the minor would generally ensure that the persons most likely to look after his interests would be aware of the suit. As to the Calcutta practice, see Belchambers' Rules and Orders, rules 588, 589, *post*, p. 262, note 6; as to the service of summons, see *post*, p. 269.

An appointment of a person without his consent is no appointment at all.¹ An *ex parte* order is not fatal to the suit, provided it appear that the minor is not prejudiced thereby.² And even the want of a formal order is not fatal to the suit, provided it appear on the face of the proceedings that the Court has sanctioned the appointment.³

The Court must exercise a judicial discretion in the matter. Where these provisions are not substantially⁴ followed, any decree against the minor is a nullity,⁵ and he is to be treated as not being a party to the suit.⁶

It is immaterial whether the plaintiff knew of the minority⁷ or not.

When the appointment is brought about by fraud, the minor is not bound by the decree.⁸

When an appointment has been made, it must be presumed in the absence of evidence to the contrary to have been regularly made.⁹

Any person who is of sound mind and has attained majority may be appointed guardian for the suit.¹⁰

There is no objection to a co-defendant whose interest is not adverse to that of the minor.¹¹ In a partition suit a co-defendant would generally be ineligible.

Under Act XIV of 1882,¹² a married woman was ineligible, and

¹ *Narendra Chandra Mandal v. Jogendra Narayan Roy* (1914), 19 C. W. N., 537.

² *Suresh Chunder Wum Chowdhry v. Jugut Chunder Deb* (1886), 14 Calc., 204.

³ *Walian (Mussumat) Bibi v. Banke Behari Pershad Singh* (1903), 30 I. A., 182; 30 Calc., 1021; 7 C. W. N., 774; 5 Bom. L. R., 822; *Hari Saran Moitra v. Bhubaneswari Debi* (1888), 15 I. A., 195; 16 Calc., 40; *Suresh Chunder Wum Chowdhry v. Jugut Chunder Deb* (1886), 14 Calc., 204; *Kunhammad v. Kutti* (1888), 12 Mad., 90; *Hari v. Narayan* (1887), 12 Bom., 427; *Bhura Mal v. Harkishan Das* (1902), 24 All., 383, at p. 394. See *Hanuman Prasad v. Muhammad Ishaq* (1905), 28 All., 137.

⁴ For an instance of an irregular appointment, see *Bhagwan Dayal v. Param Sukh* (1915), 37 All., 179.

⁵ See *Khiarajmal v. Daim* (1904), 32 I. A., 23; 32 Calc., 296; 9 C. W. N., 201; 7 Bom. L. R., 1; *Partab Singh v. Bhabuti Singh* (1913), 40 I. A., 182;

35 All., 487; 17 C. W. N., 1165; 15 Bom. L. R., 1001; *Hanuman Prasad v. Muhammad Ishaq* (1905), 28 All., 137; *Balkesen Lal v. Choudhuri Tapesur Singh* (1911), 17 C. W. N., 219; *post*, pp. 288, 289.

⁶ *Abdul Rab Chowdhury v. Eggur* (1907), 35 Calc., 182; 12 C. W. N., 160; *Krishna Pershad Singh (Tekait) v. Moti Chand* (1913), 40 I. A., 140; 40 Calc., 635; 17 C. W. N., 637; 15 Bom. L. R., 515.

⁷ *Purna Chandra Kumar v. Bejoy Chand Mahatab* (1913), 17 C. W. N., 549.

⁸ See *Maruthamalai v. Palani* (1912), 37 Mad., 535.

⁹ *Mannulal (Munshi) v. Ghulam Abbas* (1910), 37 I. A., 77; 32 All., 287; 14 C. W. N., 794; 12 Bom. L. R., 439.

¹⁰ Civil Procedure Code (Act V of 1908), order 32, rule 4.

¹¹ See *Narain Das v. Har Dayal* (1913), 35 All., 571.

¹² Sec. 457.

her appointment vitiated the proceedings,¹ but a widow was eligible.²

As to the appointment of a guardian for the suit in Madras, see Madras High Court Rules, 67 to 72.

Guardian appointed by Court to be preferred.

Where a minor has a guardian appointed or declared by competent authority no person other than such guardian shall be appointed guardian for the suit, unless the Court considers, for reasons to be recorded, it is for the minor's welfare that another person be appointed.³

The appointment of some other person by oversight does not vitiate the decree on a sale in execution of the decree.⁴

Consent.
Residence of guardian for suit.

No person shall without his consent be appointed guardian for a suit.⁵ The Court would not appoint as guardian for the suit any person who ordinarily resides out of British India, or so far off from the place where the suit is proceeding as to make it unlikely that the interests of the minor will be protected by him.

Petition for appointment of guardian for the suit.

An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor by a next friend for the purposes of the application, or by the plaintiff.⁶ Such application must be supported by

¹ See *Rashid-un-nissa (Musammat) v. Muhammad Ismail Khan* (1909), 36 L. A., 168; 31 All., 572; 13 C. W. N., 1182; 11 Bom. L. R., 1225; *Kundan Lal v. Gajadhar Lal* (1907), 29 All., 728; *Sham Lal v. Ghasita* (1901), 23 All., 459; *Kachayi Kuttiali Haji v. Udumpunthala Kunbi Putha* (1905), 29 Mad., 58.

² *In the matter of the petition of Danapa* (1863), 1 Bom. H. C. A. C., (2nd Edn.), 134.

³ Civil Procedure Code (Act V of 1908), order 32, rule 4. An order under this rule is not appealable as such: see *ante*, p. 257, note 9.

⁴ *Dammar Singh v. Pirblu Singh* (1907), 29 All., 290.

⁵ Civil Procedure Code (Act V of 1908), order 32, rule 4 (3).

⁶ It is desirable that an appointment should not be made at the instance of the plaintiff unless the minor, and his friends or relations, in whose care he may be, or the guardian appointed or declared by a competent Court, have failed to apply within a reasonable time after having notice of the suit. The practice in the High

Court of Bengal, Original Side, is as follows:—(See Belchambers' Rules and Orders, Rules 588, 589). If no application for the appointment of a guardian *ad litem* be made on behalf of a defendant [or respondent to any application] who is an infant, the plaintiff, or applicant, may, if default be made by the defendant [or respondent] in appearing to the suit, or answering the application, apply, by summons at chambers, that a guardian *ad litem* may be appointed, and the Judge, on being satisfied that such defendant [or respondent] is an infant, so that he is unable of himself to protect his interests in the suit or application, may assign a guardian of such defendant [or respondent] by whom he may appear to and defend such suit, or answer such application.

No such order is to be made, unless it appears to the Judge, on the hearing of the application for the appointment of a guardian *ad litem*, that a copy of the summons was duly served, and that notice of such application was, after the time within which the defendant or respondent

an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor,¹ and that he is a fit person to be so appointed.²

No order shall be made except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian³ of the minor or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with such notice.⁴

It must also appear that the proposed guardian for the suit is willing to act.⁵

There is no objection to a Collector acting as guardian for the suit even of a minor who is not a ward of a Court of Wards.⁶

Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.⁷

Appointment
of officer of
Court.

was required to appear or answer, and at least four clear days before the hearing of such application, served upon the person with whom, or under whose care such defendant or respondent was at the time of serving the summons; and in case of such defendant or respondent being an infant not residing with, or being under the care of, his father or guardian, that notice of such application was also served upon the father or guardian, if any, of such infant, unless the Court or a Judge, at the time of hearing the application, shall think fit to dispense with such last-mentioned service.

¹ i.e. whose interest, present or future, can in no way conflict with that of the minor.

² Civil Procedure Code (Act V of 1908), order 32, rule 3.

³ See *ante*, chap. viii.

⁴ Civil Procedure Code (Act V of 1908), order 32, rule 3.

⁵ See *Jadow Mulji v. Chhagan Raichand* (1881), 5 Bom., 306; *Bubaji v. Maruti* (1874), 5 Bom., 310; 11 Bom. H. C., 182. Rules of High Court N.-W. P., rule 128.

⁶ *Subramanya Pandya Chokka Talavar v. Siva Subramanya Pillai* (1894), 17 Mad., 316.

⁷ Civil Procedure Code (Act V of 1908), order 32, rule 4. *Issur Chunder Gupto v. Nobokristo Gupto* (1880), 7 C. L. R., 407. The appointment of an officer of the Court does not oust the Court's jurisdiction to try the suit. See *Jadow Mulji v. Chhagan Raichand* (1881), 5 Bom., 306, which holds that sec. 3 cl. (b) of Act XV of 1880, supersedes the law as laid down on this subject in *Mohan Ishwar v. Haku Rupa* (1880), 4 Bom., 633.

The Court may also appoint an attorney or pleader as guardian for the suit.

Indemnity to officer for costs.

In making such order the Court will ordinarily require the plaintiff to indemnify the officer, attorney or pleader, and also to make provision for his costs. The Court may allow the plaintiff to add to his own costs such costs as under these circumstances he may be required to pay.¹

Provision for costs of next friend.

Provision can also be made for the costs of the next friend, but this would only be done in very exceptional cases, such as where a suit is urgently necessary, and no next friend willing to undertake the risk of costs can be found.

It has been held that in other cases the Court cannot compel the plaintiff to indemnify the guardian for the suit.² There is nothing to prevent an arrangement that he should do so.³

Under Rule 72 of the Madras High Court the Court may order the plaintiff to advance moneys to the guardian for the purpose of his defence, and all moneys so advanced form part of the plaintiff's costs of the suit.

Order obtained without next friend or guardian may be discharged.

Every order⁴ made in a suit or on any application before the Court, in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, if the pleader of the party, at whose instance such order was obtained, knew or might reasonably have known the fact of such minority, with costs to be paid by such pleader.⁵

Duty of Court when minor unrepresented.

Whenever a suit is brought by or against a minor, it is the duty of the Court to see that he is properly represented in such suit.

If the Court finds that the minor is not properly represented, it should either strike his name out of the suit,⁶ or stay the proceedings until such time as he can be properly represented by a next friend or guardian for the suit, as the case may be.⁷ The latter course is generally the most desirable.

¹ See Belchambers' Practice, p. 265, and cases there cited; Civil Procedure Code (Act V of 1908), order 32, rule 11, *post*, p. 268.

² *Venkata Vijaya Gopalraju v. Timmaya Pantulu* (1899), 22 Mad., 314.

³ *Post*, chap. xxvi.

⁴ This does not include a decree; see Civil Procedure Code (Act V of 1908), sec. 2 (14), definition of "order." As to setting aside a decree, see *post*, pp. 286 to 290.

⁵ Civil Procedure Code (Act V of 1908), order 32, rule 5 (2). See

ante, p. 256, note 3. As to the effect of a decree or order where a minor is not represented, see *post*, pp. 288, 289.

⁶ *Radhakristo Surma v. Ramchunder Doss* (1869), 11 W. R. C. R., 300; *Dhoondh Bahadoor Singh (Baboo) v. Priag Singh (Baboo)* (1872), 17 W. R. C. R., 314.

⁷ *Rollo v. Smith* (1867), 1 B. L. R. O. C., 10; *Bamasoondurce Dabee v. Grish Chunder Banerjee* (1865), 4 W. R. C. R., 106; *Moorlee Dhur v. Nathonee Mahtoon* (1876), 25 W. R. C. R., 184.

The Court may also at the instance of the defendant take the plaint off the file.¹ The Court would have power to dismiss the suit on the ground that the minor was not represented,² but it could not give any costs against the minor or his estate,³ and the dismissal of the suit would not prevent a fresh suit on the same cause of action.

The law does not recognize any act of a minor who has not a next friend or guardian for the suit before the Court,⁴ and the Court should not take any proceedings at the instance of the minor himself.

Where the interest of the next friend of a minor is adverse to that of such minor, or where he is so connected with a defendant whose interest is adverse to that of the minor, as to make it unlikely that the minor's interest will be properly protected by him, or where he does not do his duty,⁵ or, during the pendency of the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the minor,⁶ or by a defendant, for his removal; and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, and make such other order as to costs as it thinks fit.⁷

Removal of next friend.

When a Court finds that a next friend does not do his duty in relation to a suit, it is its duty not to permit him to prejudice the interests of the minor, but to adjourn the suit in order that some one interested in the minor may apply on behalf of the minor for the removal of the next friend and for the appointment of a new next friend, or in order that the minor plaintiff himself may, on coming of age, elect to proceed with the suit or withdraw from it.⁸

Unless otherwise ordered by the Court, a next friend cannot retire without first procuring a fit person to be put

Retirement of next friend.

¹ *Ante*, p. 256.

² *Chinniah v. Baubun Saib* (1870), 5 Mad. H. C., Rep., 435; *Madhub Chunder Chowdhry v. Buktessuree Debia* (1869), 12 W. R. C. R., 102. See *Abdul Rab Chowdhury v. Eggar* (1907), 35 Calc., 152; 12 C. W. N., 160.

³ *Amichand Talakchund v. Collector of Sholapur* (1888), 13 Bom., 234.

⁴ *Bamasoonduree Debia v. Grish Chunder Banerjee* (1865), 3 W. R., Act X, R. 138. See cases above, note 2.

⁵ As to the duty of a next friend, see *post*, p. 270.

⁶ By a next friend for the purposes of the application. Although

an application under this section is not excepted from the operation of order 32, rule 5 (1) (see *post*, p. 269), it follows that the application must ordinarily be made by a next friend other than the next friend for the suit, as it is that next friend whom it is sought to remove.

⁷ Civil Procedure Code (Act V of 1908), order 32, rule 9 (1). The removal of a guardian of a minor's person or estate would not *per se* operate to remove him from the office of next friend in a suit: cf. *Banarsi Prasad v. Ram Narain* (1907), 30 All., 105.

⁸ *Doraswami Pillai v. Thungasami Pillai* (1903), 27 Mad., 377.

in his place, and giving security for the costs already incurred.¹

Application of appointment of new next friend.

The application for the appointment of a new next friend must be supported by affidavit showing the fitness of the person proposed, and also that he has no interest adverse to the minor.²

Stay of proceeding on death or removal of next friend.

On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.³

Application for appointment of new next friend.

If the pleader⁴ of such minor omits, within a reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or the matter at issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.⁵

Course to be followed by minor plaintiff on coming of age.

A minor plaintiff, or a minor not a party to a suit, on whose behalf an application is pending, on coming of age, must elect whether he will proceed with the suit or application.⁶

Where minor elects to proceed.

Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend, and for leave to proceed in his own name.⁷ This application must be made on notice to the next friend.⁸

¹ Civil Procedure Code (Act V of 1908), order 32, rule 8 (1).

² Civil Procedure Code (Act V of 1908), order 32, rule 8 (2). It should also appear that the proposed new next friend is willing to act, as no one can be appointed a next friend against his will.

³ Civil Procedure Code (Act V of 1908), order 32, rule 10 (1).

⁴ See *ante*, p. 256, note 3. This shows that the death or removal of the next friend does not avoid a warrant of attorney given by him; see *Krishna Vijaya Puchaya Naicker v. Maradanayagam Pillai* (1891), 15 Mad., 135, *post*, p. 280.

⁵ Civil Procedure Code (Act V of 1908), order 32, rule 10 (2). *Ibid.*, rule 5 (1) (*post*, p. 269), excepts this application from those which must be made by the next friend acting in the suit.

⁶ Civil Procedure Code (Act V of 1908), order 32, rule 12 (1). In the case of *Madhubchunder Chowdhry*

v. Buktessuree Debia (1869), 12 W. R. C. R., 102, where the suit had been dismissed by the lower Appellate Court on the ground that the minor plaintiff was not properly represented, the High Court, after the minor had attained majority, permitted him to continue the suit, but on the terms that he should first pay all the costs of the defendant incurred up to that time. By adopting the suit the minor might make himself liable for costs previously incurred by his next friend; see *Devkabei v. Jefferson* (1886), 10 Bom., 248.

⁷ Civil Procedure Code (Act V of 1908), order 32, rule 12 (2). An application under this section may be made at any time. An order on it will be given as of course, and the omission to make such an application will not necessarily create a bar to further proceedings: *Doorgamohun Dass v. Tahir Ally* (1894), 22 Calc., 270.

⁸ Civil Procedure Code (Act V of 1908), order 32, rule 12 (5).

The title of the suit or application shall, in such case, be Amended title. corrected so as to read thenceforth thus :—

“ *A. B.*, late a minor, by *C. D.*, his next friend, but now having attained majority.”¹

Where he elects to abandon the suit or application, he shall, When he elects to abandon it. if a sole plaintiff, or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party, or which may have been paid by his next friend.²

This application may be made *ex parte*.³

This application should be supported by affidavit that the late minor Proving application. has attained his full age.⁴

When the late minor does not wish to continue the suit or application, and does not consent to pay costs, he can refrain from taking any steps. In that case the defendant can obtain the dismissal of the suit, but he cannot compel the plaintiff to pay any costs.⁵ The next friend can be made to pay them if the suit is improper.

Where a minor co-plaintiff, on attaining majority, desires Minor co-plaintiff repudiating suit. to repudiate the suit, he shall apply to have his name struck out as co-plaintiff; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit. Notice of the application shall be served on the next friend as well as on the defendant.⁶ The costs of all parties of such application and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs. Where the applicant is a necessary party to the suit, the Court may direct him to be made a defendant.⁷ It must be proved by affidavit that the late minor has attained his full age.⁸

A minor on attaining majority may, if a sole plaintiff, When suit unreasonable or improper. apply that a suit instituted in his name by a next friend be dismissed on the ground that it was unreasonable or improper. Notice of the application shall be served on all the parties

¹ Civil Procedure Code (Act V of 1908), order 32, rule 12 (3). This does not apply to proceedings in execution: *Doorgamohun Dass v. Tahir Ally* (1894), 22 Cal., 270.

² Civil Procedure Code (Act V of 1908), order 32, rule 12 (4).

³ *Ibid.*, rule 12 (5).

⁴ Cf. Act XIV of 1882, sec. 453. The applicant's own affidavit alone would rarely be sufficient.

⁵ See *Turner v. Turner* (1726), 1 Stra., 708.

⁶ The co-plaintiffs of the minor might be interested in the question. It would therefore generally be better to serve them also with notice of the application.

⁷ Civil Procedure Code (Act V of 1908), order 32, rule 13.

⁸ See note 4 above.

concerned; and the Court, on being satisfied of such unreasonableness or impropriety, may grant the application, and order the next friend to pay the cost of all parties in respect of the application, and of anything done in the suit, or make such other order as it thinks fit.¹

Next friend cannot continue suit after majority.

A next friend cannot, after the minor has attained majority, and has elected not to go on with a suit or application commenced on his behalf, insist on continuing such suit or application.² If he has incurred any costs, he has a sufficient remedy for them against his late ward.³

On death.

Similarly, a next friend cannot continue a suit after the death of the minor.⁴

Change of attorney on coming of age.

According to the practice of the Bengal High Court, a minor plaintiff or defendant on coming of age is not allowed to appear by another attorney, unless he has obtained an order from the Court.⁵

Retirement or removal of guardian for the suit.

Where the guardian for the suit desires to retire or does not do his duty,⁶ or where other sufficient ground⁷ is made to appear, the Court may permit such guardian to retire or may remove him and may make such other order as to costs as it thinks fit.⁸

The removal or discharge of the guardian of a minor's person or estate does not *per se* operate to remove him from being guardian for the suit.⁹

New guardian for the suit.

Where the guardian for the suit retires, dies, or is removed by the Court, during the pendency of the suit, the Court shall appoint a new guardian in his place.¹⁰

Discharge of guardian for suit on minor attaining majority.

When a minor defendant attains his majority he should apply to the

¹ Civil Procedure Code (Act V of 1908), order 32, rule 14.

² *Bisloopria Putmadye (Ranee) v. Nund Dhal* (1870), 13 M. L. A., 602; 6 B. L. R., 190; 15 W. R. P. C., 19.

³ See *post*, pp. 278, 281.

⁴ *Hulodhur Roy Chowdhry v. Judoonath Mookerjee* (1870), 14 W. R. C. R., 162.

⁵ Belchambers' Rules and Orders, rule 585. It has been held that the order for change will only be granted on payment of costs already incurred: Belchambers' Practice, p. 266. In England this rule applies to a minor co-plaintiff: *Swift v. Gracebrook* (1842), 13 Sim., 185. As to a change of attorney by a next friend or guardian for the suit, see *post*, p. 280, note 2.

⁶ See *post*, p. 270.

⁷ If an officer of the Court or a pleader or attorney be appointed guardian for the suit, and the plaintiff does not put him in funds to conduct the defence, the Court may under this section relieve him from acting. See *Narayandas Ramdas v. Sahib Husen* (1888), 12 Bom., 53; *Gopilal Manilal v. Agarsingji Raisingji* (1904), 28 Bom., 626; 6 Bom. L. R., 544.

⁸ Civil Procedure Code (Act V of 1908), order 32, rule 11 (1). An order under this section directing the guardian for the suit to pay costs is appealable: *ibid.*

⁹ *Banarsi Prasad v. Ram Narain* (1907), 30 All., 105.

¹⁰ Civil Procedure Code (Act V of 1908), order 32, rule 11 (2).

Court for the discharge of his guardian for the suit. Such application should be supported by an affidavit showing the date of the defendant's birth, and that he has attained his majority. Notice of the application should be given to the guardian for the suit, and to the plaintiff.

Where there is a minor defendant, he should be served with the summons ¹ or citation ² in the way provided for the service upon adults. Service of summons or citation on minor.

A citation upon a minor as represented by her mother, who was the applicant for probate, is not properly served.³

Mere service of a citation upon a minor is not sufficient. He is not bound by the proceedings unless a guardian for the proceedings be appointed.⁴

All notices of applications and other process in a suit where the plaintiff is a minor should be served on the next friend. They should be served upon the guardian for the suit in a suit where a minor is defendant. Service of notices and other process.

Every application to the Court on behalf of a minor other than an application for a new next friend when the next friend has retired, been removed or died, must be made by his next friend, or by his guardian for the suit.⁵ Application to Court by minor.

Where the application seeks the removal of the next friend or guardian for the suit,⁶ or has to be made before the appointment of a guardian for the suit,⁷ the application should be made in the name of the minor by a next friend for the purpose of the application.⁸

No order can be made upon an application to which a minor is respondent, unless a guardian for the suit be appointed.

¹ Civil Procedure Code (Act V of 1908), secs. 8, 89, order 5; *Abdul Rab Chowdhury v. Eggar* (1907), 35 Calc., 182; 12 C. W. N., 160; *Jatindra Mohun Poddar v. Srinath Roy* (1898), 26 Calc., 267; 3 C. W. N., 261. In a case (*Luckimonee v. Khettermoney*) cited in Broughton's Civil Procedure, 4th Edn., p. 92, Mr. Justice Norman required the summons to be served upon a minor defendant personally. Where a guardian for the suit has been properly appointed, he can waive service of the summons, if it be in the interest of the minor so to do; but as pointed out above (p. 260), a guardian for the suit ought not ordinarily to be appointed until after service of summons. As to the service in suits brought against wards of the Courts of Wards, see *post*, pp. 440, 449.

² *In the goods of Amrita Lal Mullick* (1900), 27 Calc., 350; *Rebells v. Rebells* (1897), 2 C. W. N., 100.

³ *Shorashibala Debi v. Anandomoyee Debi* (1906), 12 C. W. N., 6.

⁴ See *Narendra Chandra Lahiri v. Afjannesa Bibi* (1914), 19 C. W. N., 751.

⁵ Civil Procedure Code (Act V of 1908), order 32, rule 5. As to applications not in suits, see *post*, pp. 277, 278.

⁶ *Ante*, pp. 265, 268.

⁷ In *Jotendronath Mitter v. Rajkristo Mitter* (1889), 16 Calc., 771, an application for the transfer of a case from a District Court to the High Court was allowed to be made by the next friend of a minor defendant, where no guardian for the suit had been appointed.

⁸ *Cox v. Wright*, 9 Jur., N. S., 981.

Written statement.

According to the Calcutta practice, neither a minor defendant nor his guardian for the suit can be compelled to file a written statement, but his guardian may file one.¹ It is otherwise in Bombay.² When the minor comes of age before the hearing, the Court will allow him to file a further written statement.

Appearance in Bengal High Court. Suits taken as defended.

In a suit brought on the Original Side of the Bengal High Court the guardian should enter appearance.³ All suits against minors brought in that Court are taken as defended suits.⁴

Duty of guardian for suit and next friend.

It is the duty of a guardian for the suit, as well as of a next friend, to do all that in him lies to further the interests of the minor, and he should be at least as active in guarding and promoting the interests of the minor as he would be expected to be if his own interests were involved.⁵ He stands in a fiduciary relationship to the minor for whom he is acting, and will not be permitted to retain any advantage obtained by him personally from the litigation.⁶ He may be liable to the minor for damages in case of negligence in the conduct of the suit.

Where the guardian for the suit after an examination of all the materials for the defence, which may be available, finds that he can do nothing positively for the minor's benefit, his best course is merely to see that the case against the minor is strictly proved and to submit the rights of the minor to the Court.⁷

As was said by the Judicial Committee of the Privy Council in *Lekraj Roy (Baboo) v. Mahtab Chund (Baboo)* (1871), 14 M. L. A., 393, at p. 399; 10 B. L. R., 35, at p. 44; 17 W. R. C. R., 117, at p. 118: "The interests of infants would seriously suffer if a notion were to prevail that guardians were bound for their own security to contest all claims against an infant's estate whether well or ill-founded." See also *Debi Dutt Sahoo v. Subodra Bibee* (1876), 2 Calc., 283; 251 W. R. C. R., 449.

A next friend or guardian for the suit must continue to act until a person be appointed in his place in accordance with

¹ See Belchambers' Rules and Orders, rule 244. As to admissions by guardian for the suit, see *post*, p. 271.

² *Per* Farran, J., in *Nathmull Narsingdas v. Malharrao Holkar* (1894), 19 Bom., 350.

³ Belchambers' Rules and Orders, rule 224.

⁴ *Ibid.*, rule 221.

⁵ Officers of the Court, and pleaders or attorneys, when appointed guardians for the suit, should be at least as active in the interests of the minor as other guardians. It is their duty to endeavour to ascertain what defence,

if any, the minor has to the suit, and to support such defence by evidence. The fact that they are strangers to the minor does not in any way relieve them from their responsibilities. If they are not as active as possible, they should be removed.

⁶ See *ante*, pp. 180, 181. He will not be permitted to bid at a sale of the minor's property by the Court: *Dodson v. Bishop*, Seton's Judgments and Orders, 6th Edn., p. 341.

⁷ *Court of Wards v. Deo Nundun Singh (Raj Coomar)* (1871), 16 W. R. C. R., 142; *Venkatesh v. Bhavani-shankar* (1903), 5 Bom. L. R., 542.

law;¹ but if no funds be available, a guardian for the suit cannot be required to use his own for the minor.²

Next friends and guardians for the suit can do anything in the ordinary conduct of the litigation which may be in the interest of their wards.³ They can consent to any matter relating to the conduct of the suit,⁴ provided that such consent be for the benefit of the minor.⁵

Powers of next friend and guardian for the suit.

A guardian for the suit can waive fresh proclamations.⁶

Unless it be for the benefit of the minor, they cannot bind him by any admissions,⁷ either in the pleadings or otherwise; nor can they waive objections,⁸ which could be taken on his behalf.

Admissions, Waiver of objections.

¹ *Ante*, pp. 265, 268.

² See *ante*, p. 268, note 7.

³ See *Rhodes v. Swithenbank* (1889), 22 Q. B. D., 577.

⁴ They may consent to evidence being taken by affidavit: *Knatchbull v. Fowle* (1876), 1 Ch. D., 604.

⁵ *Rhodes v. Swithenbank* (1889), 22 Q. B. D., at p. 579.

⁶ *Bepin Behary Mitter v. Jotindra Nath Ghosh* (1910), 37 Cal., 897; 14 C. W. N., 1019.

⁷ Under English law a minor is not bound by any admissions made on his behalf in a suit to which he is a party. In *Abdool Hye (Syud) v. Banee Pershad (Baboo)* (1874), 21 W. R. C. R., 228, at p. 229, however, Phear, J., said: "We are very far from intending to say that the guardian of an infant defendant, if properly advised on all the circumstances surrounding the infant and his relations to the matter of the suit, cannot on his behalf admit facts essential to his adversary's case. It is, however, incumbent upon the Court, which is called upon to try an issue between a person of mature years and an infant, to take care that nothing of this kind is done unadvisedly. It should take nothing as admitted against an infant party to the suit, unless it is satisfied that the admission is made by some one competent to bind the infant, and fully informed upon the facts of the matter in litigation." See *Surujmookhi Konwar v. Bhagwati Konwar* (1881), 10 C. L. R., 377. The ad-

mission of a next friend or guardian for the suit seems to be only admissible, under circumstances which would render the admissions of an attorney admissible. See Taylor on Evidence, 10th Edn., p. 532. (Cf. *Bhogaraju Venkatrama Jogiraju v. Addepalli Seshayya* (1911), 35 Mad., 560, at p. 565.) A minor is apparently not bound by the statements of fact contained in a special case submitted for the opinion of the Court, unless such statements are substantiated by evidence. In England a minor is not bound by a special case unless leave has been given by the Court to set it down for hearing, and such leave cannot be given unless the Court be of opinion that it is proper that the question raised thereon shall be determined thereon, and be satisfied by affidavit or other sufficient evidence that the statements contained therein, so far as they affect the interest of the infant, are true; order XXIV, rule 2; but there is no such provision in the Civil Procedure Code (Act V of 1908, order xxxvi).

⁸ In *Swamirao v. Collector of Dharwar* (1892), 17 Bom., 299, it was held that the guardian for the suit was not empowered to waive objections as to the capacity of the Judge, as in that case such waiver was not for the minor's benefit. This case followed *Rhodes v. Swithenbank* (1889), 22 Q. B. D., 577, where it was held that the next friend cannot waive a right of appeal, as such waiver was not for the minor's benefit.

The minor would be bound by the admission of his predecessor in title in the suit. He would not be bound by any admissions made in the suit by himself, but statements made by him as to matters relevant to the inquiry may be used against him in suits brought during or after the expiration of his minority, although their evidentiary value would be more or less diminished by the fact of his minority.¹

Discovery
against minor.

Neither the minor nor his next friend or guardian for the suit can be compelled to answer interrogatories.²

Production of
documents.

It has been held in Calcutta³ that they cannot, and in Bombay⁴ that they can, be compelled to give discovery of documents by affidavit. They can be compelled to give evidence,⁵ and there does not seem to be any reason why the Court should not be able to enforce the production of documents proved to be in the possession of the minor or his next friend or guardian for the suit.⁶

The power of a next friend or guardian for the suit to compromise a suit is dealt with by the Code of Civil Procedure.

Compromise of
suits.

The power of the next friend or guardian for the suit to bind a minor by a compromise⁷ entered into by him on behalf of the minor depended entirely, before the passing of Act X of 1877,⁸ upon whether such compromise was for the benefit of the minor and was free from fraud⁹ or mistake,¹⁰ except that a suit on the Original Side of the High Court of Bengal could not be compromised without the leave of that Court.¹¹ Where, however, the compromise had been confirmed by a decree, or where a length of time had elapsed between the time when the minor attained majority and the date of the institution of the suit to set aside the compromise, the Court would not set aside such compromise without the clearest proof of fraud or collusion.¹²

¹ The Evidence Act makes no distinction between admissions by adults and by minors (Act I of 1872, secs. 17 *et seq.*).

² See *Waghji Thackersey v. Khatao Rowji* (1886), 10 Bom., 167, at p. 171; *Ingram v. Little* (1883), 11 Q. B. D., 251.

³ *Duncan v. Bhojro Prosad* (1895), 22 Calc., 891. See *Curtis v. Mundy*, [1892] 2 Q. B., 178.

⁴ *Nathmull Narsingdas v. Malharao Holkar* (1894), 19 Bom., 350.

⁵ As to the testimony of minors, see *ante*, pp. 37 to 39.

⁶ Civil Procedure Code (V of 1908), order 11, rule 14.

⁷ As to the compromise of claims, see *ante*, p. 175.

⁸ The then Code of Civil Procedure.

⁹ *Dharmaji Vaman v. Gurrav Shrinivas* (1873), 10 Bom., H. C. Reps.,

311; *Roshun Jehan (Ranee) v. E-raet Hossein (Syud)*, W. R., 1864, C. R., 83; (1866), 5 W. R. C. R., 4; *Abdool Ali (Moulvi) v. Mozuffer Hossein Chowdhry* (1871), 16 W. R. P. C., 22; *Lekraj Roy (Baboo) v. Mahtab Chand (Baboo)* (1871), 14 M. I. A., 393; 10 B. L. R., 35; 17 W. R. C. R., 117; *Gopeenath (Baboo) v. Ranjeewun Lall*, Beng. S. D. A., 1859, p. 913. Fraud would include the withholding of knowledge which is in the possession of one side and not of the other: *Brooke v. Mostyn* (1867), 2 De G. J. & S., 415.

¹⁰ See per Garth, C.J., in *Solomon (Bibee) v. Abdool Azeez* (1881), 6 Calc., 687, at p. 706; 8 C. L. R., 169, at p. 187.

¹¹ Belchambers' Rules and Orders, rule 596.

¹² *Lekraj Roy (Baboo) v. Mahtab*

Order 32, rule 7, of the Code of Civil Procedure is as follows :

(1) " No next friend or guardian for the suit ¹ shall, without the leave of the Court, expressly recorded in the proceedings,² enter into any agreement or compromise ³ on behalf of a minor with reference to the suit in which he acts as next friend or guardian.⁴

(2) " Any such agreement or compromise so recorded entered into without the leave of the Court shall be voidable against all parties other than the minor."

As to the compromise of a Probate proceeding, see *Kunja Lal Chowdhury v. Kailash Chandra Chowdhury* (1910), 14 C. W. N., 1008.

The compromise can be set aside either in a suit brought for that purpose or by an application for review,⁵ but not by an appeal from a decree on the compromise,⁶ or in a proceeding for the execution of the decree.⁷

This provision, renders any compromise, whether before or after decree,⁸ made without the leave of the Court, voidable by the minor.⁹

Chand (Baboo) (1871), 14 M. L. A., 393; 10 B. L. R., 35; 17 W. R. C. R., 117.

¹ Even though he has been appointed guardian: *Majlis Sahai (Lalla) v. Narain Bibi (Musst)* (1902), 7 C. W. N., 90. Or be the managing member of a joint Hindu family of which the minor is a member: *Ganesh Row v. Tuljaram Row* (1913), 40 I. A., 132; 37 Mad., 295; 17 C. W. N., 765; 15 Bom. L. R., 626; *Partab Singh v. Bhabuti Sing* (1913), 40 I. A., 182; 35 All., 487; 17 C. W. N., 1165; 15 Bom. L. R., 1001.

² See *Krishun Prosad Ray Bhro Musban (Kanungoe) v. Romesh Chunder Mundul* (1908), 13 C. W. N., 163; *Govindasami Naidu v. Alagirisami Naidu* (1905), 29 Mad., 104.

³ This includes a compromise made after decree, and embodied in a decree: *Majlis Sahai (Lalla) v. Narain Bibi (Musst)* (1902), 7 C. W. N., 90; and would include a waiver of a right to an account: *Sarat Chunder Singh v. Nitye Sunder Singh* (1900), 27 Calc., 1013, at p. 1021; or the withdrawal of a suit: *Doraswami Pillai v. Thungasami Pillai* (1903), 27 Mad., 377.

⁴ This section has no application except where there is an existing guardian, and pending litigation:

Vithaldas Ganpat v. Dattaram Ramchandra (1901), 26 Bom., 298.

⁵ Civil Procedure Code (Act V of 1908), sec. 114; order 47, rule 1; *Karmali Rahimbhoy v. Rahimbhoy Habibbhoy* (1888), 13 Bom., 137. It was suggested in *Solomon (Bibee) v. Abdool Azeez* (1881), 6 Calc., 687, at p. 707; 8 C. L. R., 169, at p. 188, that an application for review cannot be granted if the compromise, though tainted by fraud or mistake, was for the benefit of the infant, but that in the case of a suit being brought to set aside the compromise the question of the benefit of the infant does not arise. As to setting aside decrees against minors, see *post*, pp. 286, 287.

⁶ *Rakhal Mani Dassi v. Adwyta Prosad Roy* (1903), 30 Calc., 613; 7 C. W. N., 419. See *Biraj Mohini Dasi v. Chinta Moni Dasi (Srimati)* (1901), 5 C. W. N., 877.

⁷ *Arunachallam v. Muruguppa* (1889), 12 Mad., 503.

⁸ *Arunachellam Chetty v. Ramnadhan Chetty* (1905), 29 Mad., 309.

⁹ See *Virupakshappa v. Shidappa* (1901), 26 Bom., 109; 3 Bom. L. R., 565; *Rakhal Moni Dassi v. Adwyta Prosad Roy* (1903), 30 Calc., 613; 7 C. W. N., 419; *Subramanian Chettiar v. Rajeswara Dorai* (1915), 20 C. W. N., 201, cases above, note 2.

whether it be for his benefit or not.¹ A minor can dispute a compromise, even though sanctioned by the Court, on the ground that such sanction was obtained by fraud or by concealment of material facts,² or upon grounds sufficient to set aside a compromise between persons both of whom are *sui juris*,³ as for instance where the next friend or guardian for the suit has not consented to the compromise,⁴ but not otherwise.⁵

The abandonment of an issue⁶ may be made without the sanction of the Court; but a reference to arbitration in a suit cannot be made without the sanction of the Court.⁷

Duty of Court
sanctioning
compromise.

Before sanctioning a compromise the Court must endeavour to obtain from the parties all possible information as to the rights of the minor, and the Court should not sanction the compromise unless it be quite clear that it is for the benefit of the minor. Where the facts have not been ascertained in the proceedings, the Court should satisfy itself by evidence, and should use its best endeavours to test such evidence as may be produced.⁸ It is, moreover, the duty of the parties to place all possible materials before the Court.⁹

The rule is not complied with unless it is shown that leave was formally given after the attention of the Court had been directly called by petition or otherwise to the fact that a minor was a party thereto.¹⁰

¹ *Bhiwa v. Devchand Bechar* (1911), 35 Bom., 322; 13 Bom. L. R., 280.

² *Solomon (Bibee) v. Abdool Azeez* (1881), 6 Calc., 687; 8 C. L. R., 169.

³ See *Kachayi Kuttiali Haji v. Udumpunthala Kunhi Putha* (1905), 29 Mad., 58.

⁴ *Surendra Nath Ghose v. Heman-gini Dasi* (1906), 34 Calc., 83.

⁵ See *Rameswar Pershad Singh v. Ram Badahur Singh* (1906), 34 Calc., 70; 11 C. W. N., 178; s.c. in Court below (1904), 31 Calc., 111.

⁶ *Venkata Narasimha Naidu v. Bhashyakarlu Naidu* (1899), 22 Mad., 538.

⁷ *Atmaram v. Bhila* (1912), 15 Bom. L. R., 223, following *Lakshmana Chetti v. Chinnathambi Chetti* (1900), 24 Mad., 326, and dissenting from *Hardeo Sahai v. Gawri Shankar* (1905), 28 All., 35.

⁸ *Solomon (Bibee) v. Abdool Azeez* (1881), 6 Calc., 687; 8 C. L. R., 169; *Kalavati v. Chedi Lal* (1895), 17 All., 531. In the latter case it was

held that the leave of the Court must be obtained before the agreement is entered into. Where the compromise affects the minor's rights to immovable property, the Court may require a guardian appointed by a Civil Court to obtain the consent of that Court to the compromise: *Sheonundun Singh v. Kahsa Kooer (Mussumat)* (1874), 6 N.-W. P. H. C. Rep., 179.

⁹ *Solomon (Bibee) v. Abdool Azeez* (1881), 6 Calc., 688; 8 C. L. R., 169.

¹⁰ *Manohar Lall v. Jadunath Singh* (1906), 33 I. A., 128; 18 All., 585; 10 C. W. N., 898; 8 Bom. L. R., 489; *Subramanian Chettiar v. Rajeswara Dorai (Rajah)* (1915), 20 C. W. N., 201; *Sharat Chunder Ghosh v. Kartik Chunder Mitter* (1883), 9 Calc., 810; 12 C. L. R., 453; *Rajagopal Takkaya Naiker v. Muttupalem Chetti* (1881), 3 Mad., 103; *Kalavati v. Chedilal* (1895), 17 All., 531; *Pirojshah v. Manibhai* (1911), 36 Bom., 53; 13 Bom. L. R., 963.

In a case where the compromise was sanctioned by the Court after it had been entered into, where there was no fraud and the compromise was not disadvantageous to the minor, the Allahabad High Court declined to set aside the decree; ¹ but the Madras High Court has, it is submitted rightly, declined to follow that decision. ²

It has been held ³ that without the sanction of the Court a guardian for the suit can bind an infant defendant by consenting to the determination of an issue by the oath of the plaintiff, under sec. 9 of the Indian Oaths Act. ⁴

As to the powers of managers of estates under the Court of Wards of the United Provinces, ⁵ see *post*, p. 448.

In a suit for partition a request for sale may be made, or an undertaking, or application for leave to buy, may be given or made on behalf of a minor by his next friend or guardian for the suit, but the Court is not bound to comply with such request, undertaking, or application, unless it is of opinion that the sale or purchase will be for the benefit of the minor. ⁶

Sale of property in partition suits.

A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other movable property on behalf of a minor, either—

Receipt by next friend or guardian for the suit of property under decree for minor.

(a) by way of compromise before decree or order, or

(b) under a decree or order in favour of the minor.

Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other movable property, the Court must, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application. ⁷

¹ *Aman Singh v. Narain Singh* (1897), 20 All., 98.

² *Sethuram Sahib v. Vasanta Rao* (1910), 34 Mad., 314.

³ *Chengal Reddi v. Venkata Reddi* (1889), 12 Mad., 483; *Sheonath Saran v. Sukh Lal Singh* (1899), 27 Cal., 229.

⁴ Act X of 1873.

⁵ The Civil Procedure Code (Act V of 1908), order 32, rule 16, enacts that nothing in that order shall derogate from the provisions of any local law for the time being in force relating to suits by and against minors. As there is no provision in the Acts constituting the Courts of Wards as

to the compromise of suits, it follows that a Court of Wards is on the same footing as any other guardian in requiring the sanction of the Court in which the suit has been brought. As to the powers of a Court of Wards to compromise claims, see *ante*, p. 175. A manager may, subject to the control of the Collector, compromise suits or other proceedings in Revenue Courts in the United Provinces: see *post*, p. 448.

⁶ Act IV of 1893, sec. 5.

⁷ Civil Procedure Code (Act V of 1908), order 32, rule 6. As to the investment of money paid into Court, see *ante*, p. 252.

The managing member of a joint Hindu family governed by the Mitakshara school, who has been appointed guardian of his minor brother for the purpose of a rent suit, in which both the brothers obtained a decree for arrears of rent against their tenant is exempt from these restrictions.¹

Princes and
Chiefs.

Nothing in order 32 of the Civil Procedure Code (relating to suits by and against minors) applies to a Sovereign Prince or ruling Chief suing or being sued in the name of his State, or being sued, by direction of the Governor-General in Council or a Local Government, in the name of an agent or in any other name.²

Appeals.

The appointment of a guardian for the suit enures for any appeal from a decree or order in the suit and for the whole litigation.³ The next friend who has acted in the suit can also act for the minor whether he be appellant or respondent in the appeal. Unless they be removed, the next friend and guardian for the suit are the only persons entitled to prefer an appeal on behalf of the minor.⁴

Where after the decree in the Court below a minor has, by the death of a party or otherwise, become a necessary party to an appeal he must, when added as a party, be represented by a next friend or guardian for the suit, as the case may be. The rules as to the appointment of next friends and guardians for the suit in suits will in that case be applicable.⁵

Appeals to
His Majesty
in Council.

In appeals to His Majesty in Council a minor must be represented in all applications by the person who appears on the record as his next friend or guardian for the suit.⁶

Where pending an appeal to His Majesty in Council it becomes necessary to substitute a minor heir in the place of a party who is dead, the High Court should take evidence, or cause it to be taken, and transmit the same to the Privy Council with an expression of opinion as to whether the minor is the

¹ *Harihar Pershad Singh v. Mathura Lal* (1908), 35 Calc., 561; 12 C. W. N., 598.

² Civil Procedure Code (Act V of 1908), order 32, rule 16. See *Venkatrav Raje Ghorpade v. Madhavram Ramchandra* (1886), 11 Bom., 53.

³ *Jwala Dei v. Pirbhu* (1891), 14 All., 35; *Venkata Chandrasekhara Raz v. Alakarajamba Maharani* (1898), 22 Mad., 187.

⁴ *Chedi Pande v. Lachminarain,*

N.-W. P. W. N., 1893, p. 161.

⁵ See Civil Procedure Code (Act V of 1908), sec. 107 (2); order 22, rule 11. In *Bhobotarini Debi v. Sreeram Paul* (1883), 9 Calc., 629, where the next friend alone was made respondent to an appeal, it was held that the appeal must be dismissed.

⁶ Rules of Bengal High Court, Appellate Side, part ii, chap. iv, rule 22.

proper person to be placed upon the record. In that case, and in every other case where a minor is a party to the appeal and there is no next friend or guardian upon the record, an application for the appointment of a next friend or guardian must be made,¹ and the High Court should transmit with the petition and evidence its opinion as to who should be permitted to represent the minor on the appeal. On the receipt of such evidence and opinion, the Judicial Committee of the Privy Council will make the necessary order.²

There is a class of cases which only indirectly forms a portion of the law of minors. Those cases are where a suit is brought on behalf of or against an adult, as though he were a minor. The proper course in the former case for the opposite party to pursue is, it is submitted, to apply to have the plaint taken off the file or amended.

Suit by or against adult described as minor.

If he does not do so, the addition of a next friend or guardian may, it is submitted, be taken as surplusage.³

In the latter case the appointment of the guardian for the suit may, it is submitted, be taken as surplusage.⁴

The question of minority, if in dispute, may have to be determined on a preliminary issue.⁵ If the suit is brought or a decree is made without the knowledge of the alleged minor, it will not bind him; but if he appear at the hearing or acquiesce in the decree, he will be bound.

The rules contained in the Civil Procedure Code for the procedure in cases of suits by or against minors are, so far as may be, applicable to all miscellaneous proceedings in a Court of Civil Jurisdiction other than suits and appeals.⁶

Applications otherwise than in a suit.

¹ See Bengal High Court Rules Appellate Side, part ii, chap. iv, rule 23.

² *Haidar Ali v. Tassaduk Rasul* (1888), 15 I. A., 309; 16 Calc., 184.

³ *Taqi Jan v. Obaidulla* (1894), 21 Calc., 866; *Ramachari v. Duraisami Pillai* (1898), 21 Mad., 167. *Contrâ*, *Sheorania v. Bharat Singh* (1897), 20 All., 90. See *Saramma v. Seshayya* (1905), 28 Mad., 396; *Shama Charan Ghose v. Taraknath Mukhopadhyaya* (1869), 3 B. L. R., App. 115.

⁴ *Net Lall Sahoo v. Kareem Bux* (1896), 23 Calc., 686.

⁵ As to the proof of minority, when in issue, see *post*, chap. xxix.

⁶ Civil Procedure Code (Act V of 1908), sec. 141. These rules would apply also to proceedings to file and enforce an award under the Civil Procedure Code and proceedings on agreement of parties, *ante*, p. 271, note 7. See *Vasudev Vishnu v. Narayan Jagannath* (1872), 9 Bom. H. C. Rep., 289.

Every application otherwise than in a suit must be made by a next friend for the purpose of the application, and no order can be made upon an application to which a minor is a respondent unless a guardian for the application be appointed to protect his interests.¹

Provided his interest be not adverse to his ward, a guardian² is entitled to act for his ward in proceedings under the Land Acquisition Act.³

If it be shown to the satisfaction of the Collector or Court that the interest of the guardian is adverse to that of his ward, the minor may appear by a next friend, or in default of his appearance by a next friend, the Collector or Court, as the case may be, shall appoint a guardian for the case to act on his behalf in the conduct thereof.⁴

The provisions of order 32 of the Civil Procedure Code,⁵ *mutatis mutandis*, apply in the case of a minor appearing by a next friend or guardian for the case in such proceedings.⁶

No guardian can receive the compensation-money payable to his ward, unless he would be competent to alienate the land and receive and give a good discharge for the purchase-money on a voluntary sale.⁷

Where there is no person competent to alienate the land, the Court can order it to be invested in (a) the purchase of other lands to be held under the like title and conditions of ownership as the land for which the compensation-money is deposited was held, or (b) if such purchase cannot be effected forthwith, then in such Government or other approved securities as the Court shall think fit. The money is to remain so invested until it be applied in the purchase of such other lands or in payment to the person becoming absolutely entitled.⁸

The income is to be paid to the person entitled to the possession of the land.⁹ This would ordinarily be the guardian of the minor.

The Court shall order the costs, charges, and expenses of the investments and of orders for the payment of the income, and for the payment out of Court of the principal, and of all proceedings relating thereto, except such as may be occasioned by litigation between adverse claimants, to be paid by the Collector.¹⁰

¹ As to applications in suits, see *ante*, p. 269.

² *i.e.* a guardian appointed by the Court, or a natural or testamentary guardian, or a manager appointed by a Court of Wards.

³ Act I of 1894, sec. 3 (g). The guardian must zealously maintain the interests of his ward in these proceedings, and cannot come to an arrangement by which the rights of the ward are given up: *Luchmeswar Singh (Maharajah) v. Chairman, Darbhanga Municipality* (1890), 17 I. A., 90; 18 Calc., 99.

⁴ Act I of 1894, sec. 3 (g), provisos (i) and (ii).

⁵ *Ante*, pp. 253 to 275.

⁶ Act I of 1894, sec. 3 (g) proviso (iii).

⁷ *Ibid.*, proviso (iv). This would apparently apply only to guardians having the leave of the Court to sell, or being empowered so to do by the document appointing them; but on a Hindu guardian making such a case of necessity as would have justified a voluntary sale (*ante*, pp. 152 to 157), the Collector or Court could apparently allow him to receive the money.

⁸ Act I of 1894, sec. 32 (1).

⁹ *Ibid.*

¹⁰ Act I of 1894, sec. 32 (2).

Proceedings under Land Acquisition Act.

Procedure if interest of guardian adverse.

Applications of sections of Civil Procedure Code.

Receipt of compensation or money.

Investment of compensation money.

Payment of income.

Costs, etc.

CHAPTER XXVI.

COSTS OF SUITS BY AND AGAINST MINORS.

THE next friend of a minor in a suit or other civil proceeding may be ordered to pay costs as if he were plaintiff.¹ Liability of next friend for costs.

It is not desirable to run any risk of stopping a suit filed on behalf of a minor, which may be a proper suit to bring, merely because of some inability of the next friend to give security for costs.² Security for costs.

In the cases where an adult plaintiff would be ordered to pay the costs of the suit, the next friend would ordinarily be ordered to pay the costs of the opposite party,³ even when he is an officer of the Court.⁴

It is not right to require a minor plaintiff to pay costs personally, and except in cases which would justify a personal decree for money against a minor,⁵ it would rarely be right to make a personal decree against him for costs; but in some cases the circumstances would justify an order that costs be paid out of the property of the minor,⁶ or be charged upon a portion of his estate.⁷ Payment by minor.

The following useful rule is to be found in the rules of the High Court of Bengal, appellate side :—

¹ See *Devkabai v. Jefferson* (1886), 10 Bom., 248; *Geereeballa Dabee v. Chunder Kant Mookerjee* (1885), 11 Cal., 213. This was expressly provided for in the former Civil Procedure Code (Act XIV of 1882, sec. 440). Although there is no similar provision in Act V of 1908, sec. 35 is wide enough to cover the case.

² *Bhaishanker Ambashanker v. Mulji Asharam* (1910), 35 Bom., 339; *Porebai (Bai) v. Devji Meghji* (1898), 23 Bom., 100.

³ See *Omrao Singh v. Prem Narain Singh* (1875), 24 W. R. C. R., 264. He would not be liable unless an order to that effect be made against him: *Brijessuree Dossia v. Kishore*

Doss (1876), 25 W. R. C. R., 316.

⁴ *Stephen v. Hume* (1835), Morton, 281. See *ante*, p. 263.

⁵ *Ante*, p. 40.

⁶ As the question of payment of costs is a matter within the discretion of the Court, it is not possible to lay down any rules as to what cases would justify an order that payment of the costs of his opponent should be made out of a minor's estate. Generally, such an order would be made in a case where the minor defendant, if an adult, would have been ordered to pay the costs of the plaintiff, *post*, p. 282.

⁷ As, for instance, his share of the costs of a partition.

"In drawing up decrees of this Court, dismissing with costs appeals by minors, or dismissing with costs suits by minors, the Bench Clerks should be careful to make the next friend of the minor liable for such costs, unless the Court otherwise orders.

"In cases where the minor is respondent and the decree of the Court below is reversed or altered, it shall be the duty of the Bench Clerk to call the attention of the Division Court to the fact that the respondent is a minor, in order that special directions may be given as to the payment of costs."

Costs in suits
for divorce,
etc.

No petition presented by a minor under the Indian Divorce Act can be filed until the next friend has undertaken in writing to be answerable for costs. Such undertaking must be filed in Court, and the next friend is thereupon liable in the same manner and to the same extent as if he were a plaintiff in an ordinary suit.¹

Appointment
of attorney.

A next friend or guardian for the suit can appoint an attorney or pleader to act for the minor.²

The death or removal of the next friend or guardian for the suit does not, of itself, discharge the attorney or pleader.³

Costs of
attorney.

Unless he relieves himself from liability by special agreement,⁴ a next friend or guardian for the suit is liable in the first instance for the costs incurred by the attorney or pleader employed by him.⁵

¹ Act IV of 1869, sec. 49, *ante*, p. 255.

² A next friend or guardian for the suit is allowed, as of course, to change from one attorney to another; *Dinendra Nath Dutt v. Wilson* (1901), 28 Calc., 264, 5 C. W. N., 434; *Ram Chunder Roy v. Poorno Chunder Roy* (1900), 4 C. W. N., 175 (notes); *Sarat Chunder Dawn v. Kristo Dhone Dawn* (1901), 5 C. W. N., 83 (notes); *Brown v. Brown* (1849), 11 Beav., 562. There is no reason why a next friend should be in this respect in a position different from that of an ordinary suitor. As no order of the Court is necessary in the case of a change of pleader, there seems to be nothing to prevent a next friend changing his pleader whenever he likes. The interests of a minor would suffer if a next friend was compelled to employ an attorney of whom he disapproved.

³ See *Krishna Vijaya Puchaya Naicker v. Marudanayagam Pillai* (1891), 15 Mad., 135; *ante*, p. 266.

⁴ *Radhanath Bose v. Suttoprosono Ghose* (1867), 2 Ind. Jur. N. S., 269.

⁵ The attorney cannot sue the minor or his representatives because the contract is made by the next friend. See *Radhanath Bose v. Suttoprosono Ghose* (1867), 2 Ind. Jur. N. S., 269; *Joynarain Bose v. Mohesh Chunder Moonshee*, Ben. S. D. A., 1858, p. 1215; *Branson v. Appasami* (1894), 17 Mad., 257. In *Steed v. Preece* (1874), L. R., 18 Eq., 192, at p. 196, Jessell, M.R., says: "An infant has no costs; the costs incurred on his behalf in a suit are the costs of his guardian or next friend." In *Watkins v. Dhunnoo* (1881), 7 Calc., 140; 8 C. L. R., 433, and in *Kumar Krishna Dutt v. Hari Narayan Ganguli* (1915), 20 C. W. N. 537, a decree against the minor's estate was made at the suit of the attorney.

If the suit or proceeding has been properly brought, and properly conducted, whether it has been successful or not, the next friend can recover from the estate of the minor the costs which he has been compelled to pay to a defendant,¹ and also such costs, charges, and expenses as have been properly incurred in conducting the suit on behalf of the minor.² Similarly, a guardian for the suit is, where his conduct is not improper, entitled to recover from the minor's estate his costs and expenses, and also such costs as he may have been compelled to pay to another party to the litigation.³ Where the suit or proceeding is unnecessary or improper, or it has been improperly conducted, the next friend will not be permitted to recover his costs from the estate of the minor.⁴

Recovery of costs from estate.

As to security for the costs of an officer of the Court or an attorney or pleader who is appointed guardian for the suit, see *ante*, p. 263.

An attorney acting on behalf of a minor has a lien for his costs on sums recovered in the suit or proceeding.⁵

Lien of attorney.

¹ *Bistooprya Patmadaye (Ranee) v. Basudeb Dhall* (1870), 13 M. I. A., 602; 6 B. L. R., 190; 15 W. R. P. C., 19; *Taner v. Ivié* (1752), 2 Ves. Sen., 466. See Act IX of 1872, sec. 68, *ante*, p. 17.

² *Fearns v. Young* (1804), 10 Ves., 184. As to the costs of next friends in suits by wards of the Courts of Wards, see *post*, pp. 440, 444, 449.

³ See Civil Procedure Code (Act V of 1908), sec. 35. See *Morgan v. Morgan*, 11 Jur. N. S., 233. He ought first to endeavour to obtain from other parties such costs as may have been ordered to be paid to him by them. It is not necessary that a suit should be brought by the next friend or guardian for the suit. The guardian of the minor's estate is justified in paying thereout such costs as have been properly incurred by a next friend or guardian for the suit. If the minor's property be in the hands of the Court, or as in the case of an administration or partition-suit there is property belonging to the minor with which the Court can deal, the Court can order the costs to be paid thereout. In *Gobind Chunder Gangooly v. Buddinath Biswas*,

which was a suit to set aside an adoption, Pontifex, J. (Dec. 19th, 1878) ordered the costs of a minor defendant to be paid out of his estate. The suit had been dismissed with costs, and the guardian for the suit was unable to recover his costs from the plaintiff, who had been admitted to sue as a pauper.

⁴ *Pearce v. Pearce* (1804), 9 Ves., 548; *Flight v. Bolland* (1828), 4 Russ., 298; *Devkabai v. Jefferson* (1885), 10 Bom., 248, at p. 250. It was held in *Whittaker v. Marlur* (1786), 1 Cox, 285, that nothing short of a dishonest intention will be sufficient to render a next friend liable personally for the costs, and that no degree of mistake or misapprehension will be sufficient. But negligence in bringing an unnecessary or improper suit, or impropriety in the conduct of it, would be sufficient. This is recognized by order 32, rule 14, of Act V of 1908, *ante*, pp. 267, 268.

⁵ *Pritchard v. Roberts* (1873), L. R., 17 Eq., 222; *Radhanath Bose v. Suttoprosono Ghose* (1867), 2 Ind. Jur. N. S., 269. See *Devkabai v. Jefferson* (1886), 10 Bom., 248; Act IX of 1872, sec. 171.

Liability of guardian for the suit.

It is only in the case of breach of duty or improper conduct of the defence that a guardian for the suit can be made personally liable for the costs incurred by other parties.¹ He may, however, be liable, at any rate in the first instance, for the costs of unsuccessful applications made, or appeals preferred, by him.²

Apart from any misconduct on his part, a guardian for the suit cannot be made liable for costs, or for anything which may be decreed against the minor in the suit.³

In a suit against a minor, if the Court considers that the guardian for the suit should be personally ordered to pay the costs, it should so state it in the decree or order.

Where the guardian is simply declared liable for them as the defendant in the case, the liability must be taken to refer to him as the representative of the minor, and as representing his estate.⁴

Payment out of estate.

The Court can in a proper case order the costs of any of the parties to be paid out of the estate of a minor⁵ and will ordinarily do so where the minor defendant, if of age, would have been required to pay costs.

Guardians and Wards Act.

As to costs in proceedings under the Guardians and Wards Act, see Act VIII of 1890, sec. 49, *ante*, p. 110.

Suits against guardians.

As to the costs of suits against guardians for an account, see *ante*, p. 185.

¹ Order 32, rule 11 (1) of Act V of 1908 (*ante*, p. 268) does not apply only to cases where the guardian is removed, but applies to all cases where costs have been occasioned by his breach of duty. It is only in a case of flagrant impropriety that a guardian should be made personally liable for costs. In *Goolam Hoosein Noor Mahomed v. Fatmabai* (1884), 8 Bom., 491, where a guardian for the suit had been guilty of gross misconduct in putting executors to proof of a will which he wished to upset for his own private purposes, and which the evidence showed was to his knowledge duly executed by the testatrix in a sound state of mind, he was held liable for the costs of the suit. Where there has been no breach of duty there can be no order for costs: *Narasimha Rau v.*

Lakshmi pati Rau (1881), 3 Mad., 263.

² He would in these cases be in a position similar to that of a next friend; *Shapurji Hormasji v. Monosseh Jacob* (1909), 34 Bom., 374; 11 Bom. L. R., 1011.

³ *Morgan v. Morgan*, 11 Jur. N. S., 233. See, however, Macpherson on Infants, p. 397.

⁴ *Komul Chunder Sen v. Surbessur Dass Goopto* (1874), 21 W. R. C. R., 298; *Brojomohun Mojoomdar v. Roodronath Surmah Mojoomdar* (1871), 15 W. R. C. R., 192.

⁵ Civil Procedure Code (Act V of 1908), sec. 35; *Orford v. Churchill* (1814), 3 V. & B. 59; *ante*, p. 279. As to the powers of the Court to authorize the sale or mortgage of property belonging to a minor, see *ante*, chap. xxiv.

CHAPTER XXVII.

DECREES IN SUITS BY AND AGAINST MINORS.

It is the duty of the Court in all the proceedings of a suit, and particularly at the trial, to watch and guard the interests of minor parties.¹

Duty of Court to watch interests of minor party to suit.

It is the duty of the Court, where minors are concerned to examine the pleadings and raise such issues in regard to the minors as may be called for by the legal aspects presented by the plaint or the pleadings.²

If the minor be a defendant, the strictest proof should be required before a decree be made against him.³

Case to be proved against minor.

It has been held that where a person prefers a claim against the estate of a deceased person, which has devolved upon a minor, he cannot sustain the action solely by his own deposition.⁴ This case, it is submitted, goes too far. Where corroboration is possible, it should be insisted on.

The Court should not allow a decree by consent to be made against a minor without ascertaining that it is for the benefit of the minor that such a decree should be made,⁵ and that the person consenting has authority to bind the minor.⁶

It is the duty of the Court, as far as possible, to prevent

¹ This rule requiring the Court to protect the interests of a minor, even though he be properly represented, applies to all proceedings in the suit, and the Court should especially prevent an improper sale of a minor's property. In the case of *Abdool Kureem v. Jaun Ali* (1872), 18 W. R. C. R., 55, at p. 57, Couch, C.J., said: "It seems to us that the Courts ought to be extremely careful with regard to allowing the property of minors to be sold in execution of a decree. These are cases in which the proceedings ought to be carefully watched, and care ought to be taken that the property of minors is not disposed of except with proper pre-

cautions, and it is distinctly made to appear that the property of the minor is about to be sold."

² *Sheikh Chand v. Hiralal* (1907), 9 Bom. L. R., 1114.

³ *Holden v. Hearn* (1839), 1 Beav., 445.

⁴ *Balapa v. Bhutaji* (1903), 5 Bom. L. R., 181.

⁵ *Ramchurn Raha Buxshee v. Mungul Sircar* (1871), 16 W. R. C. R., 232. A consent decree is on the same footing as a compromise of a suit, as to which see *ante*, pp. 272-274.

⁶ *Muhammad Mumtaz Ali Khan (Rajah) v. Sheoratanjir* (1896), 23 I. A., 75, at p. 82; 23 Cal., 934, at p. 941.

the minor being injured by the fraud, laches, or negligence of his next friend or guardian for the suit.¹

Decree properly made binds minors.

If he be properly represented² by a next friend³ or guardian for the suit,⁴ and there be no fraud or collusion on the part of his next friend or guardian⁵ or of the opposite party,⁶ and his next friend or guardian be not guilty of gross negligence,⁷

¹ As, for instance, where the next friend or guardian has allowed proceedings to drop. Where an appeal has been struck off in consequence of the neglect or inability of the guardian to prosecute it, the Appellate Court may restore the appeal: *Rajunder Narain Rae v. Bijai Govind Sing* (1839), 2 M. I. A., 181; 1 Moore's P. C., 117; *Birjobuttee (Ranee) v. Pertaub Sing* (1860), 8 M. I. A., 160; *Orphan Board v. Van Reenen* (1829), 1 Knapp. P. C. Rep., 83. In *Kesho Persad v. Hirdaynarain* (1878), 6 C. L. R., 69, the Court acting under sec. 119 of Act VIII of 1859 (Act V of 1908, order 9, rule 13), set aside an *ex parte* decree, where a guardian for the suit had neglected to appear. The Court treated it in that case as a neglect of duty, and held that the minors had been prevented "by sufficient cause from appearing." The mere omission of the guardian to appear is not a reason for setting aside an *ex parte* decree: *Ajodhya Pershad Singh v. Sheo Pershad Sahu* (1900), 5 C. W. N., 58. See *post*, note 7.

² *Jungee Lall v. Sham Lall Misser* (1873), 20 W. R. C. R., 120; *Khoo-shalo (Mussumat) v. Subsookh* (1866), 1 Agra H. C. Rep., 175; *Mrinamoyi Dabia v. Jogodishuri Dabia* (1879), 5 Calc., 550.

³ As to representation by a next friend, see *ante*, pp. 253 to 255.

⁴ As to the appointment of a guardian for the suit, see *ante*, pp. 260 to 263.

⁵ In *Gregory v. Molesworth* (1747), 3 Atk., 626, Lord Hardwicke said that it was right for Courts of Equity "to follow the rule of law, where it was held, an infant is as much bound by a judgment in his own action as if of full age; and this is general, unless gross laches or fraud and

collusion appear in the *prochein amy*, then the infant might open it by a new bill." See also *Sheffield v. Buckinghamshire* (1739), 1 Atk., 628, at p. 631. Fraudulent omission by a guardian to plead a defence avoids the decree: *Grish Chunder Mookerjee v. Miller* (1878), 3 C. L. R., 17.

⁶ In *Bholanund Jha v. Padmanund Singh* (1901), 6 C. W. N., 348, at p. 357, the Court considered that the omissions of the decree-holder to bring to the notice of the Court that the amount of the decree was payable by instalments amounted to a fraud upon the minor judgment debtor.

⁷ *Sheo Churn Lal (Lalla) v. Ramnandan Dobey* (1894), 22 Calc., 8; *Cursandas Natha v. Ladkavahu* (1895), 19 Bom., 571. See *Kylash Chunder Sirkar v. Gooroo Churn Sirkar* (1865), 3 W. R. C. R., 43; *Re Hoghton* (1874), L. R., 18 Eq., 573, at p. 576; Macpherson on Infants, p. 386. Mere negligence is not sufficient: *Daulat Singh v. Raghubir Sing*, N.-W. P. W. N., 1894, p. 141. It is not every kind of negligence nor any amount of negligence which would render proceedings otherwise regular and proper liable to be opened up. It must be such negligence as leads to the loss of a suit, which, if it had been conducted with due care, must have been successful. The mere omission to defend a suit is not a ground for setting aside a decree. *Venkatesh v. Bhavanishankar* (1903), 5 Bom. L. R., 174; *Vishnu Narayan v. Datto Vasadeo* (1907), 9 Bom. L. R., 1099. See *ante*, p. 270. In *Ram Sarup Lal v. Shah Latafat Hossein* (1902), 29 Calc., 735, the withdrawal of the suit by the next friend was treated as gross negligence. See *ante*, pp. 270, 271, as to the duty of next friends and guardians for the suit.

a minor is as much bound by a decree or order¹ made in a suit or proceeding to which he is a party, whether it be made for his benefit or not,² as if he were of full age,³ and it can be executed against him or his property, as the case may be, in accordance with law.

This rule applies not only to decrees made after a judicial adjudication on the questions in issue, but also to cases where an act or omission operates as a statutory bar to the institution of a new suit.⁴

Except so far as the sanction of the Court may be required to justify a compromise or arrangement which has been embodied in a consent decree,⁵ a decree by consent is on the same footing as other decrees, and can only be set aside under the circumstances which would justify a minor in applying to set aside a decree made otherwise than by consent,⁶ or under the circumstances which would justify an adult in applying to set aside a consent decree.

Except in a suit for damages for a wrongful act or in case of fraud, no personal decree for money, whether for costs or

Decrees by consent.

Personal decree against minor.

¹ For an instance of fraud in proceedings before a Settlement Court, see *Ram Autar v. Muhammad Mumtaz Ali Khan (Raja)* (1897), 24 I. A., 107; 24 Calc., 853; 1 C. W. N., 417.

² It was held in *Wall v. Bushby* (1785), 1 B. C. C., 484, that a decree made by consent bound minor parties to the suit, although there had been no reference as to whether such decree would be for their benefit.

³ *Eshan Chunder Safooi v. Nundamoni Dassee* (1884), 10 Calc., 357; *Hanmantapa v. Jivubhai* (1900), 24 Bom., 547; *Raghubar Dyal Sahu v. Bhikya Lall Misser* (1885), 12 Calc., 69; *Cursandas Natha v. Ladkavahu* (1895), 19 Bom., 571; *Modhoo Soodun Singh v. Prihee Bullub Paul (Rajah)* (1871), 16 W. R. C. R., 231. See *Musleah v. Musleah*, 1 Boulnois, 58. As to the old practice, see *Nistarcenee v. Ramnarain Mookerjee*, 3 Taylor & Bell, 31.

⁴ Such as the withdrawal of a suit without leave to bring a fresh suit: *Eshan Chunder Safooi v. Nundamoni Dassee* (1884), 10 Calc., 357; the dismissal of a suit for default:

Venkatachalam v. Mahalakshamma (1887), 10 Mad., 272; *Sheo Churn Lal (Lalla) v. Ramnandan Dobey* (1894), 22 Calc., 8; allowing an appeal to abate: *Paru v. Variangattil Raman Menon* (1904), 28 Mad., 359. The

omission of a next friend to sue for a portion of the claim would operate as a bar under order 2, rule 2, of Act V of 1908, but where there had been fraud or negligence it might be possible to set aside the former decree (see *ante*, p. 284): see *Kylash Chunder Sircar v. Gooroo Churn Sircar* (1865), 3 W. R. C. R., 43; *Gopal Rao v. Narasinga Rao* (1899), 22 Mad., 309.

⁵ *Ante*, pp. 272 to 274.

⁶ *Ramchurn Raha Bukshee v. Mungul Sircar* (1871), 16 W. R. C. R., 232. As to the making of consent decrees, see *ante*, pp. 283, 284. "It is necessary that one who rests his case on a decree made by consent against an infant should show that the consent was given by somebody having authority to bind the infant:" *Muhammad Mumtaz Ali Khan (Rajah) v. Sheorattanji* (1896), 23 I. A., 75, at p. 82; 23 Calc., 934, at p. 941.

otherwise, would ordinarily be made against a minor in such a way as to be capable of execution against him personally during his minority.¹

Execution of
decree against
minor.

There is no reason why a decree against a minor should not be executed against him personally after he has attained majority,² and if a personal decree has been made against a minor, there is nothing in the law to prevent its being executed against his person or property.³

Contempt of
Court.

An order can be enforced against a minor by arrest, and he may, like an adult, be punished for a contempt of the authority of a Court.⁴

Sale for arrears
of Government
Revenue.

As to the exemption of a minor's property from sale for arrears of Government Revenue, see *post*, pp. 352-354, 388, 415, 431, 432.

Decrees how
set aside.

There are generally two courses open to a minor who seeks to set aside a decree or other order on the ground of fraud or negligence. He may either apply by way of a review to the Court which made the decree or order, or he may bring a suit to set aside the decree or order.⁵ He might also, apparently, bring a fresh suit for the same cause of action, setting up fraud as an answer to the statutory bar.⁶ An appeal would not always

¹ See *Turner v. Turner* (1726), 1 Stra., 208. In *Bhashyam v. Jayaram* (1887), 11 Mad., 303, the Court, under the former Civil Procedure Code (Act XIV of 1882, sec. 622), set aside a personal decree against minors for the debt of their father. In *Radhanath Mookerjee v. Muthoor-mohun Roy* (Appeal from Original Side No. 48 of 1881) the Calcutta High Court on appeal made a similar order in the case of a family debt. The minor's estate may be made liable. Most suits against minors are against them as representing persons from whom they have obtained property; in that case the decree can rightly be made so as to be capable of execution against the property, which they have inherited or received.

² *Sherafutoollah Chowdhry v. Abdooomissa Bibee (Sreemutty)* (1872), 17 W. R. C. R., 374.

³ *Collins v. Brook* (1860), 5 H. & N., 708. If the decree be made

against the minor, the Court cannot in execution proceedings go behind it, *post*, p. 290. The minor should, if the decree has been erroneously made, endeavour to get it set aside.

⁴ See *Thomas v. Gwynne* (1845), 8 Beav., 312.

⁵ Civil Procedure Code (Act V of 1908), sec. 114; order 47; *Karmali Rahimbhoy v. Rahimbhoy Habibbhoy* (1888), 13 Bom., at p. 142; *Vīrupakshappa v. Shidappa* (1899), 23 Bom., 620; *Arunachallam v. Mura-gappa* (1889), 12 Mad., 503; *Rakhalmoni Dassi v. Adwyta Prosad Roy* (1903), 30 Calc., 613; 7 C. W. N., 419; *Biraj Mohini Dasi v. Chintamoni (Srimati)* (1901), 5 C. W. N., 877.

⁶ *Eshan Chunder Safooi v. Nunda-moni Dassee* (1884), 10 Calc., 357, at p. 367. See also *Daulat Sing v. Raghubir Singh*, N.-W. P. W. N., 1894, p. 141; *Sheo Churn Lal (Lalla) v. Ramnandan Dohay* (1894), 22 Calc., 8.

be an appropriate remedy, as in appeal the Court must deal with the case on the materials on the record.¹

If the decree be an *ex parte* one, the procedure provided by the Civil Procedure Code for setting aside *ex parte* decrees² should be adopted, if complete relief can be obtained thereby,³ but the minor is not obliged to adopt that course.⁴

Where it is possible that by a reconsideration of the judgment, the rights of the minor, which were lost by the decree, can be restored, the proper course to pursue is for the minor to apply for a review,⁵ if such remedy be otherwise available.

Where, however, such course would not restore the minor to the position in which he was placed before the decree, or where the prejudice to the minor's interests arises from transactions which formed no part of the proceedings in the former suit, and of such a nature that a mere review of judgment would prove ineffectual, his only remedy is to proceed by a suit against the persons in possession of his rights.⁶

It is not necessary that the minor should wait until he attains majority before taking proceedings to get rid of the consequences of his next friend or guardian's fraud or negligence. Proceedings can be taken on his behalf by another next friend.

When the decree is set aside, all proceedings under it will be liable to be set aside by the minor, and an execution-sale even to a *bonâ fide* purchaser will not, under these circumstances, bind a minor, at any rate, where such purchaser at or before the time of the sale has notice that the minor is not bound by the decree.⁷

When decree set aside, effect on subsequent proceedings.

¹ See *Rakhalmoni Dassi v. Adwytla Prosad Roy* (1903), 30 Calc., 613; 7 C. W. N., 419; *Birajmohini Dasi v. Chintamoni (Srimati)* (1901), 5 C. W. N., 877.

² Civil Procedure Code (Act V of 1908), order 9, rules 13, 14.

³ *Raghubar Dyal Sahu v. Bhikya Lal Misser* (1885), 12 Calc., 69. When a special and less costly remedy is available and is calculated to give complete relief, the fact that a suit is brought may be a matter to be considered in determining the question of payment of costs.

⁴ *Bhagwan Dayal v. Param Sukh Das* (1915), 37 All., 179.

⁵ As, for instance, where an available good ground of defence was not

put forward at the hearing by the guardian: *Raghubar Dyal Sahu v. Bhikya Lal Misser* (1885), 12 Calc., 69. See *Debi Dutt Sahoo v. Subodra Bibee* (1876), 2 Calc., 283, at p. 286; 25 W. R. C. R., 449; *Karmali Rahimbhoy v. Rahimbhoy Habibbhoy* (1888), 13 Bom., 137, at p. 142. Civil Procedure Code (Act V of 1908), sec. 114; order 47; Limitation Act (Act IX of 1908), sch. 1, arts. 161, 162, 163.

⁶ *Debi Dutt Sahoo v. Subodra Bibee* (1871), 2 Calc., 283, at p. 286; 25 W. R. C. R., 449. As to the limitation for such suits, see Act IX of 1908, sec. 6; sch. 1, arts. 44, 95, 144, *post*, chap. xxviii.

⁷ *Jungee Lall v. Shamlall Misser*

When the purchaser has no such notice, he will not generally, if he has acted *bonâ fide*, be required to give up his purchase; ¹ but this question depends entirely upon the circumstances of each particular case. It is for the Court to say in each case whether it will be in accordance with the principles of justice, equity, and good conscience that the sale ought to be set aside or not. ² As a rule, all that a purchaser who is no party to a decree need look to is the decree and the order for sale. ³

Fraud.

Where the purchaser has been a party to any fraud, which has directly or indirectly brought about the sale, the Court will set aside the sale. ⁴

Purchase by judgment-creditor.

Where the judgment-creditor is himself the purchaser, it would be unnecessary to prove that he has had notice of any of the proceedings, and an irregularity therein, which has been prejudicial to the minor, would justify the setting aside of the sale. ⁵

Unless properly represented, decree or order does not bind minor.

If a minor is not properly represented in a suit or other non-criminal judicial proceeding by a next friend or guardian for the suit or proceeding, as the case may be, neither the decree nor any order made on an application to which the minor is a necessary party ⁶ will

(1873), 20 W. R. C. R., 120; *Debi Dutt Sahoo v. Subodra Bibee* (1876), 2 Calc., 283; 25 W. R. C. R., 449; *Grish Chunder Mookerjee v. Miller* (1878), 3 C. L. R., 17.

¹ See *Khetermonee Dasse v. Kishenmohun Mitter* (1863), Marsh., 313; 2 Hay, 196; *Natha Hari v. Jamni* (1871), 8 Bom. H. C. A. C. J., 37; *Daji Himat v. Dhirajram Sadaram* (1887), 12 Bom., 18.

² *Abdul Hye v. Nawab Raj* (1868), B. L. R., F. B. R., 911, 9 W. R. C. R. 196. See *Jan Ali v. Jan Ali Chowdhry* (1868), 1 B. L. R. A. C., 56; 10 W. R. C. R., 154. As to the position of *bonâ fide* purchasers at execution-sales, see *Zain-ul-Abdin Khan (Nawab) v. Muhammad Ashgar Ali Khan* (1887), 15 I. A., 12; I. L. R., 10 All., 166; *Rewa Mahton v. Ramkishan Singh* (1886), 13 I. A., 106; 14 Calc., 18; *Mothura Mohun Ghose v. Akhoy Coomar Mitter* (1888), 15 Calc., 557; *Pat Dasi v. Sharup Chand Mala* (1887), 14 Calc., 376; *Debi Dutt Sahoo v. Subodra Bibee* (1876), 2 Calc., 283; 25 W. R. C. R., 449; *Rangasami Chetti v. Periasami*

Mudali (1893), 17 Mad., 58.

³ *Zain-ul-Abdin Khan (Nawab) v. Muhammad Ashgar Ali Khan* (1886), 15 I. A., 12; 10 All., 166. See *Abdool Kureem (Shaikh) v. Jaun Ali (Syud)* (1872), 18 W. R. C. R., 56; *Ishan Chunder Mitter v. Buksh Ali Soudagur* (1863), Marsh., 614; W. R., F. B. R., 119.

⁴ *Bunseedhur (Lalla) v. Bindesree Dutt Singh* (1866), 10 M. I. A., 454; 1 Ind. Jur. N. S., 165, ante, p. 141.

⁵ See *Zain-ul-Abdin Khan (Nawab) v. Muhammad Ashgar Ali Khan* (1886), 15 I. A., 12; 10 All., 166. Where the irregularity has only been in the publishing or conducting a sale in execution, the sale can only be set aside under order 21, rule 90, of the Civil Procedure Code (Act V of 1908).

⁶ An *ex parte* application by the plaintiff for execution is not vitiated by the death of the guardian for the suit before such application: *Nettall Sahoo v. Kareem Bux* (1896), 23 Calc., 686. It would be otherwise where the order could not be made except on notice to the minor.

bind him or his estate,¹ but he can take advantage of them.²

Where the guardian for the suit declines to continue to act, and does not act, the minor being unrepresented is not bound.³

Until set aside the decree or order cannot be challenged by third parties.⁴

Where a minor is a necessary party to the suit the fact of his not being represented will have the same effect as the omission to make him a party.⁵

This rule has no application to cases where the minor, although not a party, would have been bound by the decree or order.⁶

It is not always necessary in order to bind the interest of infant members of a Hindu co-parcenary that they should be joined as co-plaintiffs in suits instituted by the adult members of the family. Decrees obtained by or against the manager of the business are presumed to have been obtained in his representative capacity, and are binding on the whole joint family.⁷

As to the cases where a minor co-parcener is bound by a decree obtained

¹ Cases ante, p. 261. *Rashid un-nisa (Musammal) v. Muhammad Ismail Khan* (1909), 36 I. A., 168; 31 All., 572; 13 C. W. N., 1182; 11 Bom. L. R., 1225; *Sundra v. Sakharan* (1914), 39 Bom., 29; 16 Bom. L. R., 616; *Shidapa v. Venkaji* (1908), 32 Bom., 404; 10 Bom. L. R., 550; *Ganga Prasad Chowdhry v. Umbica Churn Coondoo* (1887), 14 Calc., 754; *Hanuman Prasad v. Muhammad Ishaq* (1905), 28 All., 137; *Bhura Mal v. Har Kishan Das* (1902), 24 All., 383; *Sham Lal v. Ghasita* (1901), 23 All., 459; *Sreenath Koondoo v. Hureenarain Mudduck* (1867), 7 W. R. C. R., 399; *Radha Kristo Surma v. Ram Chunder Doss* (1869), 11 W. R. C. R., 300; *Bamasoonduree Debia v. Grish Chunder Banerjee* (1865), 3 W. R., Act X, R., 138; s.c. on review, 4 W. R. C. R., 106; *Nundcoomar Foutchdar v. Bunso Gopal Sahoy* (1875), 23 W. R. C. R., 342; *Padmakar Vinayak Joshi v. Mahadev Krishna Joshi* (1885), 10 Bom., 21; *Doorga Persad v. Kesho Persad Singh* (1882), 9 I. A., 27; 8 Calc., 656; 11 C. L. R., 210; see also *Unnoda Dabee v. Stevenson* (1874), 22 W. R. C. R., 290; s.c. in Court below, *French v. Baranashee Banerjee*, 8 W. R. C. R., 29; *Kerakoose v. Serle* (1844), 3 M. I. A., 329; *Sreenarain Mitter v. Kishensoondery Dossee (Sreemutty)* (1873), 11 B. L. R., 171, at p. 191; s.c., *Nogendro Chander Mittro v. Kishensoondery Dossee*, 19 W. R. C. R.,

139. Where a guardian for the suit died pending an appeal at the hearing of which the minor was not represented, but a new guardian was appointed before the hearing of a further appeal, the Court held that there was a mere irregularity: *Ram Dayal v. Ajudhia Prasad* (1906), 28 All., 328. In *Ram Chandra Mukerjee v. Ranjit Singh* (1899), 27 Calc., 242; 4 C. W. N., 405, it was held that a minor was not bound by a proceeding instituted by a manager without the sanction of the Court of Wards. No order for costs can be made against the minor's estate unless he be properly represented: *Amichand Talakchand v. Collector of Sholapur* (1888), 13 Bom., 234.

² Ante, pp. 257-262.

³ See *Krishna Prasad Singh (Tekait) v. Moti Chand* (1913), 40 I. A., 140; 40 Calc., 635; 17 C. W. N., 637; 15 Bom. L. R., 515.

⁴ *Tangor Majhi v. Jaladhar Deari* (1909), 14 C. W. N., 322.

⁵ See *Abdul Rab Chowdhury (Syed) v. Eggar*, 35 Calc., 182; 12 C. W. N., 160.

⁶ See *Devji v. Sambhu* (1899), 24 Bom., 135; 1 Bom. L. R., 627, and cases therein cited.

⁷ See *Devji v. Sambhu* (1899), 24 Bom., 135, and cases therein cited; *Lutchmanen Chetty v. Sivaprokasa Modeliar* (1899), 26 Calc., 349; 3 C. W. N., 190; *Kishen Parshad v. Har Narain Singh* (1911), 38 I. A., 45; 33 All., 272; 15 C. W. N., 321; 13 Bom. L. R., 359; *Lalji v. Keshowji* (1912), 14 Bom. L. R., 840.

by or against the manager of the family, see *Khiarajmal v. Daim* (1904), 32 I. A., 23, at p. 35; 32 Calc., 296, at p. 314; 9 C. W. N., 201, at p. 215; 7 Bom. L. R., 1; Trevelyan's Hindu Law, p. 266.

It has been held that where the names of all the adult members of the family are on the record, they may be taken to represent the minor members of the family.¹

It has been held that the defect cannot be considered in execution proceedings, as in such proceedings it must be assumed that the decree was properly made.²

Effect of suit or proceeding in which minor is not a party.

A minor is not bound by a suit, appeal, or proceeding in which he is ignored,³ but, if he has obtained any benefit thereby, he cannot get rid of its effect without restoring the other party to the position which he occupied before.⁴

Sale where interest of minor not sold.

A minor is not bound by a sale in execution, if neither his rights and interest in the property, nor those of the person through whom he claims, are expressed to be sold.⁵

It is necessary to see in each case what is actually sold.⁶

Conditions on which sale set aside.

Where the minor has benefited by the decree, or by the sale in execution, the purchaser has to that extent an equitable claim against the minor,⁷ and where any portion of the proceeds of a sale in execution have been applied in any way for the benefit of the minor, the sale will not be set aside, except such sum, which has been so applied, be refunded by the minor.⁸

¹ *Krishna Jiva Tewari v. Bishnath Kalwar* (1912), 34 All., 615; *Hori Lal v. Mannar Kunwar* (1912), *ibid.*, 549; *Nathee Lal v. Lala* (1912), *ibid.*, 572.

² *Mahomed Noorollah Khan (Nawab) v. Harcharan Rai* (1874), 6 N.-W. P. H. C. R., 98. See *Subindra v. Budan* (1885), 9 Mad., 80; *Arunachallam v. Murugappa* (1889), 12 Mad., 503. See, however, cases *ante*, p. 289, note 1.

³ *Bhobotarini Debi v. Sreeram Paul* (1883), 9 Calc., 629; *Maruti Narayan v. Lilachund* (1882), 6 Bom., 564; *Akoba Dada v. Sakharam* (1885), 9 Bom., 429; *Jatha Naik v. Venktapa* (1880), 5 Bom., 14; *Subbanna v. Venkatakrishnan* (1888), 11 Mad., 408; *Siva Bhagiam v. Palani Padichchi* (1882), 4 Mad., 401. As to a partition suit see *Basir Ali v. Nasir Ali (Hafiz)* (1908), 13 C. W. N., 153.

⁴ See cases below, notes 7 and 8.

⁵ *Abdool Kurreem (Shaikh) v. Jawn Ali (Syud)* (1872), 18 W. R. C. R., 56; *Dyal Singh (Sirdar) v. Ram Buddun Singh (Baboo)* (1872), 17 W. R. C. R.,

454; *Denobundo Pundit v. Mahomed Hossein* (1863), 2 Hay, 549.

⁶ *Bissessurlall Sahoo v. Luchmessur Sing (Maharajah)* (1879), 6 I. A., 233; *General Manager of the Raj Durbungah v. Ramaput Sing (Maharajah Coomar)* (1872), 14 M. I. A., 605; *Devji v. Sambhu* (1899), 24 Bom., 135; *Jairam Bajaba Shet v. Joma Kondia* (1886), 11 Bom., 361; *Ishan Chunder Mitter v. Buksh Ali Soudagur* (1863), Marsh., 614; W. R. F. B. R., 119; *Dyal Singh (Sirdar) v. Ram Buddun Singh (Baboo)* (1872), 17 W. R. C. R., 454.

⁷ *Dyal Singh (Sirdar) v. Ram Buddun Singh (Baboo)* (1872), 17 W. R. C. R., 454.

⁸ *Vishnu Keshav v. Ramchandra Bhaskar* (1886), 11 Bom., 130; *Hamir Singh v. Zakia (Mussamut)* (1875), 1 All., 57; *Daji Himat v. Dhirajram Sadaram* (1887), 12 Bom., 18; *Jatha Naik v. Venktapa* (1880), 5 Bom., 14; *Jungeelall v. Shamlall Misser* (1873), 20 W. R. C. R., 120; see *ante*, p. 203.

CHAPTER XXVIII.

LIMITATION OF SUITS BY AND AGAINST MINORS.

EXCEPT in the case of certain special or local laws,¹ an extension of the period of limitation provided for suits is given to a minor.

Effect of minority on the law of limitation of suits.

According to section 6 of the Limitation Act, 1908,² where a person entitled to institute a suit³ or make an application for the execution of a decree⁴ is, at the time from which the period of limitation is to be reckoned,⁵ a minor,⁶ he may institute the suit or make the application within the same period,⁷ after the

¹ Act IX of 1908, sec. 29, *post*, p. 296.

² This section corresponds to section 7 of Act XV of 1877.

³ Whether for himself or as a sebaite or other trustee: *Jagadindra Nath Roy Bahadoor (Maharajah) v. Hemanta Kumari Debi (Rani)* (1904), 31 I. A., 213; 32 Calc., 129; 8 C. W. N., 809; 6 Bom. L. R., 765.

⁴ As to the old law see *Lolit Mohun Misser v. Janokynath Roy* (1893), 20 Calc., 714; *Norendranath Pahari v. Bhupendranath Roy* (1895), 23 Calc., 374; *Zamir Hasan v. Sundar* (1899), 22 All., 199; *Monmohun Buksee v. Gunga Soondery Dabee* (1882), 9 Calc., 181; 11 C. L. R., 34; *Anantharama Ayyan v. Karuppanan Kalingarayan* (1881), 4 Mad., 119; *Jagjivan Amirchand v. Hasan Abraham* (1883), 7 Bom., 179; *Anundee Koonwar v. Takoor Pandey* (1865), 4 W. R. M. A., 21; 1 Ind. Jur. N. S., 31. As to an application for the sale of mortgaged property, see *Abdul Latif (Sheikh) v. Rajani Mohun Roy* (1907), 11 C. W. N., 831.

⁵ The minor does not obtain this advantage if the cause of action accrued before he acquired any rights therein: Act IX of 1908, sec. 9, Act XV of 1877, sec. 9, *post*, p. 295. *Benod Bihari Bhadra v. Ram Sarup*

Chamar (1912), 16 C. W. N., 1015. A minor plaintiff is not excluded from the benefit of this section merely because the right of some other person, through whom he does not claim, to sue for similar relief has become time-barred; thus a minor reversioner to an estate held by a Hindu widow can benefit by this section: *Bhagwanta v. Sukhi* (1899), 22 All., 33. See *post*, p. 294. In *Ramphul Singh v. Degnarain Singh* (1881), 8 Calc., 517; 10 C. L. R., 489, it was held that a suit by a son to set aside an alienation made by the father in a family governed by the Mitakshara law can be brought within three years from majority. As to a suit to set aside an alienation made by a guardian, see *Prosonna Nath Roy Chowdhry v. Afzolonnessa Begum* (1878), 4 Calc., 523.

⁶ I.e. a minor according to the general law (*ante*, p. 6). See *Hari Mahadaji Joshi v. Vasudev Moreshwar Joshi* (1865), 2 Bom. H. C. Rep., 244; 2nd Edn., 325. The question of minority, if disputed, must be determined by evidence, see *Panchee Mondal v. Isaf (Sheikh)* (1913), 17 C. W. N., 667.

⁷ Provided it does not exceed three years; *post*, p. 292.

disability has ceased,¹ as would otherwise have been allowed from the time from which by that Act the period begins to run in the case of an adult, provided that the time so allowed shall not exceed three years from the cessation of the disability or the death of the person affected thereby,² or in other words, when the period prescribed by an article in Schedule I of the Limitation Act, 1908, extends to three years or more, and expires within three years from the date of attainment of majority, the intention is that the late minor should have the full three years. When the period prescribed is less than three years, the prescribed period is not enlarged to three years.³

By the Limitation Act, 1908, minors as such have no privilege except as regards suits and application for execution. As long as limitation has not begun to run a person who was a minor at the time the Act came into force has the extended privilege which was applied by Act XV of 1877 to all applications.⁴

When the period has been extended by an acknowledgment in writing,⁵ or by a part payment of principal, or a payment of interest as such⁶ during the minority, the minor obtains the benefit of sec. 6.⁷

Right of legal representative.

When his disability continues up to his death, his legal representative⁸ may institute the suit, or make the application, within the same period after the death of the minor as would otherwise have been allowed from the time so prescribed.⁹

When representative under disability.

When the representative is, at the time of the death, himself under disability, time is extended for him also in the same way.¹⁰

¹ The day of attaining majority will be excluded in the calculation: Act IX of 1908, sec. 9.

² Act V of 1908, sec. 8; *Vasudeva Padhi Khadanga Garu v. Maguni Devan Bakshi Mahapatralu Garu* (1901), 28 I. A., 81; 24 Mad., 387; 5 C. W. N., 545; 3 Bom. L. R., 303.

³ *Subramanya Pandya Chokka Talavar v. Siva Subramanya Pillai* (1894), 17 Mad., 316.

⁴ *Fazl Karim v. Annada Mohan Roy* (1911), 15 C. W. N., 845.

⁵ Act IX of 1908, sec. 19.

⁶ *Ibid.*, sec. 20.

⁷ *Venkataramayyar v. Sothandara-*

mayyar (1889), 13 Mad., 135.

⁸ This does not include a purchaser from the minor, *post*, p. 293. It would include a son subsequently adopted in the place of the deceased minor: *Prosonnanath Roy Chowdhry v. Afzolonnessa Begum* (1878), 4 Calc., 523; 3 C. L. R., 391. See *Harek Chand Babu v. Bejoy Chand Mahatab* (1905), 9 C. W. N., 795.

⁹ Act IX of 1908, sec. 6.

¹⁰ *Ibid.* As to the position of a son adopted by a minor widow, see *Harek Chand Babu v. Bejoy Chand Mahatab* (1905), 9 C. W. N., 795.

Section 6 of the Limitation Act, 1908, does not apply to suits to enforce rights of pre-emption, and it does not extend for more than three years from the cessation of the disability, or the death of the person affected thereby, the period within which any suit must be instituted or application made.¹ It does not diminish the period of limitation.²

Suits for pre-emption.
Extension of period of limitation how limited.

There is a conflict of opinion as to whether the benefits of sec. 16 of the Limitation Act extend to cases where the minor is jointly interested in a decree with other persons, who are not under disability;³ but it is submitted that, except in cases where a discharge can be given without the concurrence of the minor,⁴ the rights of a minor are not altered by the circumstances that others are equally interested.

Minor jointly interested with others.

The benefits of sec. 6 are personal to the minor, and cannot be taken advantage of by his assignee either before or after his death.⁵

Assignee of minor.

A minor appellant is confined to the same period as an adult.⁶

Appeals.

The Court has power to admit appeals or applications for a review of judgment or any other application to which sec. 5

¹ Act IX of 1908, sec. 8.

² In the following cases it was held that the fact of a plaintiff not suing within three years of his attaining majority does not, in cases where the law allows a general limitation of twelve years, bar his suit, if brought within twelve years of the time when the cause of action accrued:—*Guz Behary Sing v. Washun (Mussamut Bibee)*, W. R., 1864, C. R., 302; *Bissumbhur Sircar v. Soorodhuny Dassee* (1865), 3 W. R. C. R., 21; *Hurish Chunder Nag v. Abbas Ali* (1866), 5 W. R. C. R., 204; *Luchmun Singh v. Kazim Ali Khan* (1866), 5 W. R. C. R., 219; *Poorun Singh v. Kasheenath Singh* (1866), 6 W. R. C. R., 20; *Radhamohun Gowee v. Mohesh Chunder Kotwal* (1867), 7 W. R. C. R., 4; *Sree Pershad v. Trecumbuknath Deo (Rajgooroo)* (1868), 10 W. R. C. R., 44; *Bahur Ali v. Sookeca Bibee* (1870), 13 W. R. C. R., 63.

³ *Periasami v. Krishna Ayyan* (1902), 25 Mad., 431; *Seshan v. Rajagopala* (1889), 13 Mad., 236; *Vigneswara v. Bapayya* (1893), 16

Mad., 436; *Surja Kumar Dutt v. Arunchunder Roy* (1901), 28 Calc., 465; 5 C. W. N., 767; *Govindram v. Tatia* (1895), 20 Bom., 383; *Zamir Hassan v. Sundar* (1899), 22 All., 199; *Anando Kishore Dass Bakshi v. Anando Kishore Bose* (1886), 14 Calc., 50; *Johnson v. Madras Railway Company* (1905), 28 Mad., 479; *Sri Ram v. Het Ram* (1907), 29 All., 279.

⁴ See Act V of 1908, sec. 7, *post*, p. 294.

⁵ *Mahadev Ram Mesta Sutar v. Babi Chimnaji Sutar* (1902), 26 Bom., 730; 4 Bom. L. R., 513; *Harak Chand v. Bhagbut Prosad Singh* (1897), 25 Calc., 409. See *Mahomed Arsad Chowdhry v. Yakoob Ally* (1875), 15 B. L. R., 357; 24 W. R. C. R., 181; followed by a full Bench of the Bengal High Court in *Rudra Kant Surma Sircar v. Nobokishore Surma Biswas* (1883), 9 Calc., 663; 12 C. L. R., 269.

⁶ See *Khoda Bux v. Budree Narain Singh* (1881), 7 Calc., 137; 8 C. L. R., 806. As to appeals to His Majesty in Council, see *Thurai Rajah v. Jainilabdeen Rowthan* (1895), 18 Mad., 484.

of Act IX of 1908 may be made applicable by any enactment or rule for the time being in force, after the period of limitation when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.¹

Where the next friend of the minor has for his own advantage or by negligence allowed the time for appeal to expire, the Court may give the minor leave to appeal after time.²

Minority of one joint creditor.

Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is a minor, and a discharge³ can be given without the concurrence of such person,⁴ time will run against them all; but where no such discharge can be given,⁵ time will not run against any of them until one of them becomes capable of giving such discharge or until the disability has ceased.⁶

Where one of two members of a joint family attains majority and becomes manager, he can give such discharge.⁷

A receiver of the property, can give such discharge.⁸

Suit or application during minority not barred.

A next friend can, on behalf of a minor, institute a suit or make an application, for which the law gives to the minor

¹ Act IX of 1908, sec. 5.

² *Cursandas Natha v. Ladkavahu* (1895), 20 Bom., 104. See *ante*, p. 284, note 1.

³ This applies only when the act of the adult owner is *per se* a valid discharge: *Govindram v. Tatia* (1895), 20 Bom., 383; *Seshan v. Rajagopala* (1889), 13 Mad., 236; *Zamir Hasan v. Sundar* (1899), 22 All., 199.

⁴ As, for instance, in the case of a loan by a manager of a joint Hindu family: *Surjuprasad Singh v. Kwahish Ali* (1882), 4 All., 512; or a debt to a partnership: Act XV of 1877, sec. 8, illus. (a); or a rent decree: *Bholanand Jha v. Padmanund Singh* (1901), 6 C. W. N., 348; not so in the case of joint obligees under a money bond: *Manzur Ali v. Mahmudunnissa* (1902), 25 All., 155.

⁵ *Ganga Dayal v. Mani Ram* (1908), 31 All., 156.

⁶ Act IX of 1908, sec. 7; *Manchand Panachand v. Kesari* (1910), 34 Bom., 672. See *Anando Kishore Das v. Anando Kishore Bose* (1886), 14 Calc., 50; *Yeknath Ramchandra v. Waman*

Brahmadev (1885), 10 Bom., 241; *Govindram v. Tatia* (1895), 20 Bom., 383; *Seshan v. Rajagopala* (1889), 13 Mad., 236; *Paru v. Variangattil Raman Menon* (1904), 28 Mad., 359; *Jivan Ram v. Ram Sarup Ram* (1904), 27 All., 67; *Surja Kumar Dutt v. Arun Chunder Roy* (1901), 28 Calc., 465; 5 C. W. N., 767; *Zamir Hasan v. Sundar*, 22 All., 199; *Ganpat v. Sheshgiri* (1904), 6 Bom., L. R., 647.

⁷ *Mahableshtar Krishnappa v. Ramchandra Mangesh* (1913), 38 Bom., 94; 15 Bom. L. R., 882. See the following cases under the corresponding section (sec. 8 of Act XV of 1877). *Doraisami Serumadan v. Nondisami Saluvan* (1912), 38 Mad., 118; *Ahinsa Bibi v. Abdul Kader Saheb* (1901), 25 Mad., 26, at p. 39; *Vigneswara v. Bapayya* (1893), 16 Mad., 436; *Surju Prasad Singh v. Kwahish Ali* (1882), 4 All., 572.

⁸ *Girja Nandan Singh (Raj Kumar) v. Kanhya Prasad Sahu* (1913), 18 C. W. N., 138.

an extended period of limitation after the attainment of his majority, at any time during the minority of the minor, even though the period of limitation which would have bound the minor, if he had been an adult, has expired, counting it from the time when the right to institute the suit or make the application accrued to the minor.¹

A minor does not lose the benefit of the provisions of the Limitation Act in his favour by the fact that during his minority his interests have been in the charge of a competent guardian, or under a Court of Wards, and a suit could have been maintained on his behalf.²

Limitation not affected by fact that minor has competent guardian.

When once time has begun to run, no subsequent disability, or inability to sue, stops it.³

Continuous running of time.

Where a guardian has by negligence allowed his ward's

Loss of right by negligence of guardian.

¹ *Phoolbas Koonwar (Mussumat) v. Jogeshur Sahoy (Lalla)* (1876), 3 I. A., 7, at p. 25; 1 Calc., 226, at p. 243; *Shama Churn Hui v. Kanangai Chaitan Prosad* (1903), 7 C. W. N., 594, where a mortgage was taken by the guardian in his own name. *Norendra Nath Pahari v. Bhupendra Narain Roy* (1895), 23 Calc., 374; *Guneshwar Singh (Maharaj Kumar) v. Jagadathri Persad Narain Singh* (1898), 3 C. W. N., 24; *Khoda Bux v. Budree Narain Singh* (1881), 7 Calc., 137; 8 C. L. R., 306; *Monmohun Buksee v. Gunga Soondery Dabee* (1882), 9 Calc., 181; 11 C. L. R., 34; approved of in *Lolit Mohun Misser v. Janokynath Roy* (1893), 20 Calc., 714; *Baldeo Singh v. Kishan Lal* (1887), 9 All., 411; *Ram Chunder Roy v. Umbica Dossia* (1867), 7 W. R. C. R., 161; *Ram Ghose v. Greedhur Ghose* (1870), 14 W. R. C. R., 429; *Suffuroonissa Bibee (Sreemutty) v. Noorul Hossein (Moonshee)* (1872), 17 W. R. C. R., 419; *Ram Autar v. Dhunee Ram* (1869), 1 N.-W. P. H. C. Rep., 122; *Baroo Mull v. Chujjoo Mull* (1872), N.-W. P. H., C. Rep. 125.

² *Jagadindra Nath Roy Bahadur (Maharajah) v. Hemanta Kumara Debi (Rani)* (1904), 31 I. A., 203; 32 Calc., 129; 8 C. W. N., 809; 6 Bom. L. R., 765; *Anantharamu Ayyan v. Karuppanan Kalingarayan*

(1881), 4 Mad., 119; *Moro Sadashiv v. Visaji Raghunath* (1891), 16 Bom., 536; *Monmohun Buksee v. Gunga Soondery Dabee* (1882), 5 Calc., 181; 11 C. L. R., 34; *Mahipatray Chandrarav v. Nensuk Anandrav Shet Marvadi* (1867), 4 Bom., H. C. Rep., A. C. J., 199.

³ Act V of 1908, sec. 9; i.e. when a cause of action arises in favour of an adult, the minority of a person upon whom the cause of action devolves does not prevent limitation running. See *Benod Bihari Bhadra v. Ram Sarup Chamar* (1912), 16 C. W. N., 1015; *Bhagwant Ramchandra v. Mahamed Abbas (Khaji)* (1912) 36 Bom., 498; 14 Bom. L. R., 387; *Bhagat Bihari Lal v. Ram Nath* (1905), 27 All., 704; *Harnabh Pershad v. Mandil Dass* (1899), 27 Calc., 379, at p. 403; *Anundee Koonwar v. Thakoor Panday* (1865), 1 Ind. Jur. N. S., 31; 4 W. R. M. A., 21; *Nusheeram Roy v. Shushee Bhooshun Roy* (1866), 5 W. R. C. R., 169; *Taruck Chander Sein v. Doorga Churn Sein* (1873), 20 W. R. C. R., 2; *Ramcoomar Roy v. Shitil Pershad Roy* (1873), 19 W. R. C. R., 425; *Siddhessur Dutt v. Shamchand Nundun* (1875), 23 W. R. C. R., 285. As to an application for execution, see *Jivraj Gulabchand v. Babaji Apa Khadake* (1904), 29 Bom., 68; 6 Bom. L. R., 639; *Gobind Coomar Chowdhry v. Huro Chunder Chowdhry* (1866), 7 W. R. C. R., 134.

right of suit to be barred by limitation, the ward cannot, after attaining majority, bring the suit, but must suffer by the *laches* of his guardian.¹ Should the omission to sue be the result of a fraudulent arrangement between the guardian and the person against whom the claim should have been made, it would be otherwise.²

Fraud.

Special laws of limitation.

The Limitation Act, 1908,³ has no operation upon periods of limitation prescribed by any special or local law,⁴ or by the Indian Divorce Act (IV of 1869).⁵

The Bengal Tenancy Act expressly excludes the operation of sec. 6 of the Limitation Act from suits for which a special period of limitation is provided by the former Act.⁶

As to the Revenue Sale Law (Act XI of 1859), see *Panchkouri Ghosh v. Pran Gopal Mukerjee* (1909), 13 C. W. N., 518.

The prohibition contained in sec. 48 of the Civil Procedure Code (Act V of 1908), viz. that certain decrees cannot be executed after twelve years, applies even to minors who are decree holders.⁷

Suits against minors.

The law of limitation does not treat suits against minors as in any way different from suits against adults.⁸

Acknowledgments by guardian.

The question whether in the case of a minor defendant an acknowledgment on his behalf will extend the period of limitation⁹ depends upon the authority of the person making the acknowledgment. By the combined effect of sections 19 and 21 (1) of the Limitation Act, 1908 (Act IX of 1908) the minor's lawful guardian, or manager or an agent duly authorized by such guardian or manager or a Court of Wards can bind the minor by such acknowledgment.¹⁰

¹ *Anundee Koonwar v. Takoor Pandey* (1865), 4 W. R. M. A., 21; 1 Ind. Jur. N. S., 31.

² *Abdool Ali (Moulvie) v. Mahomed Mozuffur Hossein (Meer)* (1866), 5 W. R. C. R., 173; s.c. on appeal (1871), 16 W. R. P. C., 22. Cf. Act XV of 1877, sec. 18 and 2nd Schedule, art. 95.

³ *Ante*, p. 291.

⁴ Act IX of 1908, sec. 29. *Girija Nath Roy Bahadur v. Patani Bibee* (1889), 17 Calc., 263; *Veeramma v. Abbiah* (1894), 18 Mad., 99.

⁵ Act IX of 1908, sec. 29.

⁶ Act VIII of 1885, sec. 185.

⁷ *Ramana Reddi v. Babu Reddi* (1912), 37 Mad., 186; *Bataram Vithal Chand v. Maruti* (1914), 39 Bom., 256; 17 Bom. L. R., 178;

Prem Nath Tiwari v. Chatarpal Man Tiwari (1915), 37 All., 638. See *Moro Sadashiv v. Visaji Raghunath* (1891), 16 Bom., 536; *Monunohun Buksee v. Gunga Soondery Dabee* (1882), 9 Calc., 181; 11 C. L. R., 34.

⁸ The period of limitation for suits against minors must be calculated back from the date of filing the plaint, and not from that of the appointment of a guardian for the suit: *Khem Karan v. Har Dyal* (1881), 4 All., 37; *Rup Chand v. Dasodha* (1907), 30 All., 55.

⁹ See Act IX of 1908, sec. 19.

¹⁰ *Har Prosad Das v. Harihar Prosad Singh (Bakshi)* (1915), 19 C. W. N., 860; *Rashbehary Lal Mandar v. Anand Ram* (1915), 43 Calc., 211.

According to the decisions under the previous Limitation Act (XV of 1877), the manager of a business, or of a joint Hindu family in which the minor was a sharer, ordinarily had such authority;¹ and where the acknowledgment was made for the benefit of the minor,² as, for instance, to save him from a ruinous suit, or to obtain necessary time for the payment of money, a guardian, whether he be a natural guardian,³ or one appointed by a Civil Court,⁴ ordinarily had power to bind a minor by an acknowledgment on his behalf, but not otherwise.

The effect of a payment of interest, or part payment of principal,⁵ also depends upon the authority of the person making such payment,⁶ a guardian, a manager, or their agent being authorized to bind the minor thereby.⁷ Part payments and payments of interest.

It has been held that the payment of interest by a guardian appointed under the Guardians and Wards Act extends the period of limitation,⁸ but there is authority to the contrary.⁹

A guardian has no power to revive a debt, already barred by limitation, by promising to pay it, on behalf of his ward.¹⁰ Promise by guardian.

An acknowledgment by a minor himself would only be efficacious in the case of a contract which he could not avoid, Acknowledgment by minor.

¹ *Bhasker Tatya Shet v. Vijalal Nathu* (1892), 17 Bom., 512, following *Chinnaya Nayudu v. Gurunatham Chetti* (1881), 5 Mad., 169, which, in reversing, *Kumarasami Nadan v. Pala Nagappa Chetti* (1878), 1 Mad., 385, held that the manager of a Hindu family has the same authority to acknowledge as to create debts on behalf of the family: *Sarada Charan Chakravarti v. Durgaram De Sinha* (1910), 37 Calc., 461; 14 C. W. N., 741. He cannot, however, revive a time-barred debt except as against himself: *Dinkar v. Appaji* (1894), 20 Bom., 155; *Chinnaya Nayudu v. Gurunatham Chetti* (1881), 5 Mad., 169; *Sobhanadri Appa Rau v. Sriramulu* (1893), 17 Mad., 221.

² *Ram Charan Das v. Gaya Prasad* (1908), 30 All., 422; *Bhulli v. Nanalal* (1902), 4 Bom. L. R., 812.

³ See *Azuddin Hossain v. Lloyd* (1883), 13 C. L. R., 112; *Wajibun v. Kadir Buksh* (1886), 13 Calc., 292; *Ranmal Singji (Maharana Shri) v. Vadilal Vakhatchand* (1894), 20 Bom., 61; contra, *Sobhanadri Appa Rau v. Sriramulu* (1893), 17 Mad., 221.

⁴ *Annapagauda Tammangauda v. Sangadigyapa* (1901), 26 Bom., 221; 3 Bom. L. R., 817; *Chhato Ram v. Bilto Ali* (1898), 26 Calc., 51.

⁵ See Act IX of 1908, sec. 20.

⁶ See *Sarada Charan Chakravarti v. Durgaram De Sinha* (1910), 37 Calc., 461; 14 C. W. N., 741.

⁷ Act IX of 1908 (Limitation), secs. 20, 21 (1).

⁸ *Narendra Nath Sarkar v. Rai Charan Haldar* (1902), 6 C. W. N., 729. See *Annapagauda Tammangauda v. Sangadigyapa* (1901), 26 Bom., 221; *Kailasa Padiachi v. Punnukannu* (1894), 18 Mad., 456.

⁹ *Tilak Singh v. Chhutta Singh* (1904), 26 All., 598; dissented from in *Ram Charan Das v. Gaya Prasad* (1908), 30 All., 422; *Wajibun v. Kadir Buksh* (1886), 13 Calc., 292; *Ranmal Singji (Maharana Shri) v. Vadilal Vakhatchand* (1894), 20 Bom., 61.

¹⁰ See *Suryanarayana v. Narendra Thatraz* (1895), 19 Mad., 255; Act IX of 1872, sec. 25 (3); and cases above, note 1.

such as a contract for necessaries.¹ It would have no effect on any other cause of action.

Easements. An easement can be acquired under the Limitation Act² by or against a minor.³

Suit to set aside sale by guardian. A special limitation of three years from the ward's attaining majority is provided for the case of a suit to set aside a sale by a guardian.⁴

Suits against guardians. As to the limitation of suits against guardians, see *ante*, p. 185.

¹ See *ante*, pp. 15 to 19. *Willins v. Smith* (1854), 4 El. & Bl., 180; 24 L. J. Q. B., 62.

² Act IX of 1908, sec. 26.

³ See *Arzan v. Rakhal Chunder Roy Chowdhry* (1883), 10 Calc., 214, at pp. 217, 218. Easements arising from express or implied grants cannot be acquired against a minor. Grants of easements would stand upon the same footing as other transfers; see *ante*, p. 23.

⁴ Act IX of 1908, sch. I, art. 44, *Madugula Latchiah v. Pally Mukkalinga* (1907), 30 Mad., 393; *Satish Chundra Guha v. Chunder Kant Pyne* (1898), 3 C. W. N., 278; *Prosonna*

Nath Roy Chowdhry v. Afzolonnessa Begum (1878), 4 Calc., 523. This only applies to private sales, not to execution-sales in suits against the ward. It does not apply to mortgages or leases, as to which see art. 91, read with sec. 6. As to suits to set aside partitions made by guardians, see *Chanvirupa v. Danava* (1894), 19 Bom., 593; *Krishnabai v. Khangowda* (1893), 18 Bom., 197; *Lal Bahadur Singh v. Sispal Singh* (1892), 14 All., 498. This article has no application to the case of a sale by a person wholly unauthorised to make a transfer; *Balappa v. Chanbasappa* (1915), 17 Bom. L. R. 1134.

CHAPTER XXIX.

PROOF OF MINORITY WHEN IN ISSUE.

WHEN the fact of the minority of a person (whether a party to the suit or not) is in issue in a suit, the burden of proving minority at the date in question generally falls upon the person alleging it.¹

Burden of proof when minority in issue.

It has, however, been held² that in a suit by a ward against his guardian for the possession of his property, the plaintiff alleging that he has attained majority, it is for the plaintiff to prove when he arrived at that age; and in a probate suit where the testator was alleged to be a minor, it was held that it must be proved that he was of capacity to make a will.³

As to the amount of evidence required after a lapse of many years, see *Ara Begam (Nawab Shah) v. Nanhi Begam* (1906), 34 L. A., 1; 29 All., 29; 11 C. W. N., 130; 9 Bom. L. R., 80.

As to the burden of proof in criminal charges against minors, see *ante*, p. 41, note 1.

The appearance of the alleged minor may be taken into consideration, but the decision with respect to the issue of minority would generally rest mainly upon positive evidence of his age.⁴ Evidence that he has on other occasions acted

Evidence of minority.

¹ *Khettermohun Ghose v. Ramessur Ghose*, W. R., 1864, C. R., 304; *Nil Monee Chowdhry v. Zuheerunnissa Khanum (Musst)* (1867), 8 W. R. C. R., 371; *Chyet Narain Singh v. Bunwaree Singh* (1875), 23 W. R. C. R., 395; *Virupakshappa v. Shidappa* (1901), 26 Bom., 109; 3 Bom. L. R., 565; *Sheebsunkur Dass v. Uluckchunder Aych*, Ben. S. D. A., 1859, 885, at p. 889; *Goor Das Roy (Baboo) v. Shurfoonissa Khatoon*, Ben. S. D. A., 1852, p. 94.

² *Joy Tara Dossee Chowdrain v. Roychunder Ghose* (1864), 1 W. R. C. R., 136.

³ An unreported case decided by

the Bengal High Court on an appeal from the Original side.

⁴ *Khettermohun Ghose v. Ramessur Ghose*, W. R., 1864, C. R., 304; *Kalee Holder v. Sreeram Ghose*, W. R., 1864, C. R., 366; *Chyet Narain Singh v. Bunwaree Singh* (1875), 23 W. R. C. R., 395. See *Moorlee Dhur v. Nathonee Mahtoon* (1876), 25 W. R. C. R., 184. The Mahomedan law provides that when a boy or girl approaches the age of puberty, and they declare themselves adult, and their outward appearance indicates nothing to the contrary, their declaration must be credited, and thence they become subject to all the laws

as an adult,¹ as, for instance, where he has executed deeds, which would only bind him if of full age,² would be of importance.

Inspection. A Judge has no power to order the inspection of an alleged minor's person by a medical man.³

Order appointing guardian. An order appointing a guardian is no evidence of minority; ⁴ no more is a horoscope, even when the person making it is dead.⁵

Horoscope. A horoscope may, however, be used for refreshing the memory of the person who made it, or saw it at or soon after the time it was made and knew it to be correct.⁶

Statements by relatives. Statements made by deceased relatives as to the date of birth of an alleged minor have been held to be admissible in evidence on this question.⁷

Entry in register. An entry in a register of births kept in accordance with law ⁸ is some evidence that the birth took place before the date on which it was registered.⁹

Offences under Factories Acts. Where an act or omission would, if a person were under or over a certain age, be an offence punishable under the Indian Factories Act, 1911,¹⁰ and such person is, in the opinion of the Court, apparently under or over such age, it is for the accused to prove that such person is not under such age.

affecting adults; *Shumsoon Nissa Begum v. Ashrufoon Nissa* (1840), 1 Morley's Dig., p. 303; 2 Sev., 299; Macnaghten's Precedents of Mahomedan Law, chap. vi, case 17; Hedaya, vol. iii; Tagore Law Lectures, 1873, pp. 474, 475; see *ante*, p. 4.

¹ *Kalee Holder v. Sreeram Ghose* W. R., 1864, C. R., 366.

² *Ramrutton v. Ahmed Hossein Khan*, S. D. A. N.-W. P., 22nd February, 1853.

³ *Queen-Empress v. Gurucharan Dusad* (decided by the High Court of Bengal). In 1847, a Judge of the Madras Supreme Court ordered such an inspection: *In re Mooniatta*, *Madras Native Herald* for 1847, p. 193; Norton's Leading Cases, vol. i, p. 114.

⁴ *Gunjra Kuar v. Ablakh Pande* (1896), 18 All., 478; *Satischander Mukhopadhyaya v. Mohendro Lal Pathuk* (1890), 17 Calc., 849; *In Parsen (Bai)*

v. Vrijbhukan Vrindavandas, Bombay P. J., 1876, p. 134, a certificate of administration seems to have been treated as some evidence of minority. See *Nilmonee Chowdhry v. Zuheerunnissa Khanum* (1867), 8 W. R. C. R., 371.

⁵ *Satischander Mukhopadhyaya v. Mohendro Lal Pathuk* (1890), 17 Calc., 849, following *Ramnarain Kallia v. Monee* (1883), 9 Calc., 613.

⁶ See Act I of 1872, sec. 159.

⁷ *Ramchandra Dutt v. Jogeswar-narain Deo* (1893), 20 Calc., 758; *Dhanmull v. Ramchunder Ghose* (1890), 24 Calc., 265; 1 Calc. W. N., 270, differing from *Bepinbehary Daw v. Sreedamchunder Dey* (1886), 13 Calc., 42.

⁸ As to registration of births, see *ante*, p. 124.

⁹ *Re Wintle* (1870), L. R., 9 Eq., 373. See Act I of 1872, secs. 74 to 77.

¹⁰ Act XII of 1911, *ante*, pp. 21, 22.

A declaration in writing by a certifying surgeon that he has personally examined a person employed in a factory, and believes him to be under or over the age set forth in such declaration, is, for the purpose of the Indian Factories Act, admissible as evidence of the age of that person.¹

As to proof of age in questions which arise as to the right of a master to the continuance of the service of his apprentice, see Act XIX of 1850, sec. 2, *ante*, p. 133.

¹ Act XII of 1911, sec. 47.

CHAPTER XXX.

COURTS OF WARDS.

Courts of
Wards.

OUTSIDE the Presidency towns power has been given to the Revenue authorities, under the name of Courts of Wards, to protect the persons and properties of minor proprietors of land.

When the estate is being administered by the executor of the will of the deceased proprietor, a minor beneficiary cannot be said to be a "proprietor."¹

There are separate Courts of Wards in Bengal,² Madras,³ Bombay,⁴ the United Provinces of Agra and Oudh,⁵ and in the Province of Bihar and Orissa.⁶ There are also Courts of Wards in the Punjab,⁷ the Central Provinces,⁸ and Ajmere, and Merwara.⁹

Between 1905 and 1912 there was a Court of Wards for the then Province of Eastern-Bengal and Assam.¹⁰ In 1912 on the reconstitution of the Province of Bengal such Court ceased to exist, its jurisdiction being transferred to the Board of Revenue of Bengal, but the laws, enactments, etc., in force with regard to such Courts apply in the places where such Courts had jurisdiction.¹¹

Rights of
Court of
Wards super-
sede those
of other
guardians.

The rights and powers of natural and testamentary guardians are superseded by the minor, or his estate, being taken under the superintendence of a Court of Wards. Except in Bombay¹² a Court of Wards having jurisdiction can disregard the appointment of a guardian of the person, or property, of a minor by any Civil Court, other than a High Court, and, in spite of such

¹ *Ganoda Sundary Chaudhurany v. Nalini Ranjan Raha* (1908), 35 Calc., 28; 12 C. W. N., 1065.

² *Post*, chaps, xxxi to xxxiii.

³ *Post*, chap. xxxiv.

⁴ *Post*, chap. xxxvi.

⁵ *Post*, chap. xxxv.

⁶ Act-VII of 1912 (Bengal, Bihar,

and Orissa Laws Act), sec. 4.

⁷ Act II (Punj. C.) of 1903.

⁸ Act XXIV of 1899.

⁹ Reg. I of 1888

¹⁰ Act VII of 1905.

¹¹ Act VII of 1912, sec. 3.

¹² *Post*, p. 417.

appointment, it can take upon itself the care of the minor's person and property in accordance with law.¹

The Civil Court cannot under the Guardians and Wards Act appoint a guardian of the property of a minor who is under the superintendence of a Court of Wards, or appoint or declare a guardian of the person of the minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.²

Ouster of jurisdiction of Civil Court.

The possession of the estate of a minor proprietor by a Court of Wards cannot be disturbed by any proceeding under the Curators Act.³ A Court of Wards may apply for relief under that Act against wrongful possession of property to which the minor is entitled to succeed.⁴ In case a minor whose property is subject to a Court of Wards by the party on whose behalf an application is made under that Act, the Judge, if he determines to cite the party in possession, and also appoint a curator, shall invest the Court of Wards with the curatorship of the estate pending the suit without taking security. If the minor shall, upon the adjudication of the summary suit provided for in that Act, appear to be entitled to the property, possession shall be delivered to the Court of Wards.⁵

The Curators Act.

Courts of Wards, their officers, and the managers and guardians appointed by them, stand in the same fiduciary relation to their wards as other guardians, and are bound to do all that lies in their power in furtherance of the interests of their wards.⁶ They must make no profit beyond that allowed to them in accordance with the law, and in taking care of the property or person of a ward must look only to his interests.

Relation to wards and duties.

Although a Revenue Officer may have duties to perform besides those arising from his connection with a Court of Wards, he must be careful that the ward's interests are guarded, and that, when his action in pursuance of other duties may be such as to prejudice the ward, or at any rate to require such officer to consider the interests of Government or some other person as well as the interests of the ward, he should, as far as possible,

Conflict of duties.

¹ Act VIII of 1890, secs. 3 and 41, ante, pp. 76, 138, 179. *Madhusudan Sing v. Collector of Midnapore* (1865), B. L. R., F. B. R., 199; 3 W. R. C. R., 83. As to Bombay, see post, p. 417.

² Act VIII of 1890, sec. 19, ante, p. 88.

³ XIX of 1841, sec. 16; see ante, pp. 29, 30.

⁴ *Ibid.*, sec. 2, ante, pp. 29, 30.

⁵ *Ibid.*, sec. 16.

⁶ See Act IX (B. C.) of 1879, sec. 40, post, p. 337. Act I (M. C.) of 1902, sec. 29, post, pp. 371, 372. Act IV (U. P. C.) of 1912, sec. 31, post, p. 402; *Luchmeswar Singh (Maharajah) v. Chairman, Darbhanga Municipality* (1890), 17 I. A., 90, at p. 95; 18 Cal., 99, at p. 105.

provide that there be some one independent of him, to care for the interests of the ward.¹

Responsibility
as trustees.

Like other guardians,² Courts of Wards, and the managers, and guardians appointed by them, are responsible to their wards, as trustees, for the property entrusted to their care.³

A servant of a Court of Wards can be prosecuted by the proprietor for breach of trust committed while the estate was under the management of the Court.⁴

Exempt from
interference
by Civil
Courts.

They are not liable to be sued in respect of acts done by them within their powers, and the Civil Courts cannot in any way interfere with the exercise of the powers entrusted by the Legislature to Courts of Wards.⁵

As to the power of a Court under sec. 45 of the Specific Relief Act (I of 1877) to order a Court of Wards to do a specific act, see *Kesho Prasad Singh v. Board of Revenue* (1911), 38 Calc., 553; 15 C. W. N., 503.

Authority of
Court of
Wards limited.

The authority of a Court of Wards is limited. It has all the ordinary powers of a guardian over a ward's property, supplemented by certain additional powers given by the Legislature.⁶ It cannot exercise any authority, except such as has been given to it by the Legislature, and it can exercise that authority only in the way prescribed.⁷

It has no power to undertake other duties, as, for instance, those of executor or administrator of a deceased person,⁸ and it cannot take upon

¹ See *Seshama v. Sankara* (1888), 12 Mad., 1; *Bikromajet M. O. Deb (Rajah) v. Court of Wards* (1874), 21 W. R. C. R., 312, where the officer instituting the suit tried it; *Luchmeswar Singh (Maharajah) v. Chairman, Darbhanga Municipality* (1890), 17 I. A., 90, at p. 95; 18 Calc., 99, at p. 105.

² *Ante*, p. 119. See Act VIII of 1890, sec. 37, *ante*, p. 183.

³ Although Courts of Wards are trustees for the ward, the Government does not constitute itself a trustee for the rightful owner by directing the Court of Wards to take charge of property: *Viziamaramazu Virabahu Narendra Rau Bahadur v. Secretary of State* (1882), 5 Mad., 91; s.c. on appeal *Zemindar of Palcondah v. Secretary of State* (1885), 12 I. A., 120; 8 Mad., 525.

⁴ *Tarak Nath Nundy v. Gobinda*

Chandra Mitra (1900), 5 C. W. N., 248.

⁵ *Collector of Beerbhoom v. Mukadinee Debia*, W. R., 1864, C. R., 332; 1 W. R. M. A., 7; *Shurut Soonduree Debia (Ranee) v. Collector of Mymensingh* (1867), 7 W. R. C. R., 221; Act I. (M. C.) of 1902, sec. 48, *post*, p. 383; Act IV. (U. P. C.) of 1912, sec. 53, *post*, p. 414; Act I (Pom. C.) of 1905, sec. 45, *post*, p. 436.

⁶ *Mohammad Mumtaz Ali Khan (Raja) v. Sakhawat Ali Khan* (1901), 28 I. A., 190, at p. 195; 23 All., 394, at p. 404; 5 C. W. N., 881, at p. 887.

⁷ See *Ganoda Sundary Chaudhurani v. Nalini Ranjan Raha* (1908), 36 Calc., 28; 12 C. W. N., 1065; *Lakhai Narayan Ghosh v. The Emperor* (1910), 14 C. W. N., 589.

⁸ *Ganjessur Koer v. Collector of Patna* (1898), 25 Calc., 795; 2 C. W. N., 349; *Rowshun Jehan v.*

itself the management of any estates other than those which the Legislature has subjected to its jurisdiction.¹

Except where express powers in that behalf have been conferred upon them by the Legislature,² the powers of the Courts of Wards do not extend to property held by minors in trust for others.³ No power over trust property.

Except that in Madras the Court of Wards can make arrangements for the preservation of property belonging to an institution, establishment, or endowment of which the ward is hereditary trustee or manager,⁴ Courts of Wards cannot interfere with any property granted for the support of, or otherwise belonging to, any mosque, temple, or other religious establishment.⁵ In *Jagannath Gir v. Tirguna Nand* (1915), 37 All., 185, the Court of Wards held *math* property on account of a minor *mohunt*.

A Court of Wards represents the ward in all matters connected with his estate, but not in respect of property which it has not taken over.⁶

The Court of Wards in Bombay is entitled to bring a suit under the Dekkan Agriculturists' Relief Act (XVII of 1879).⁷

A Court of Wards has no greater power to deal with the property than the ward would have if *sui juris*.

In cases where letters of administration or a succession certificate would otherwise be necessary, the possession by the Court of Wards does not obviate such necessity.⁸

Except there be a power given to it by the Legislature,⁹ Retention of property after majority.

Collector of Purneah (1870), 14 W. R. C. R., 295. Where the testator wished the minor's estate to be entrusted to the Court of Wards, there is nothing to prevent the High Court appointing the nominee of the Court of Wards (in most instances the manager) administrator of the testator's estate with the will annexed under sec. 31 of the Probate and Administration Act (V of 1881): *Nrittya Gopal Biswas v. Administrator General of Bengal* (1905), 10 C. W. N., 241.

¹ *Rowshun Jehan v. Collector of Purneah* (1870), 14 W. R. C. R., 295. See Act IX (B. C.) of 1879, sec. 5, *post*, p. 313; *Mohummud Zahoor Ali Khan v. Rutta Koer (Mussumat Thakooranee)* (1867), 11 M. I. A., 468, at p. 477.

² See Act I (M. C.) of 1902, sec. 63, *post*, p. 386.

³ See *Rajessuree Debia v. Jogendro Nath Roy* (1875), 23 W. R. C. R., 278. As to minor trustees, see *ante*, Chap. IV.

⁴ Act I (M. C.) of 1902, sec. 63, *post*, p. 386.

⁵ See Act XX of 1863, sec. 22.

⁶ *Krishna Prasad Singh (Tekait) v. Moti Chand* (1913), 40 I. A., 140; 40 Calc., 635; 17 C. W. N., 637; 15 Bom. L. R., 515.

⁷ *Manobar Ramchandra v. Collector of Nasik* (1912), 37 Bom., 97; 14 Bom. L. R., 943.

⁸ As, for instance, in the case of the sale of Government securities standing in the name of the ward's ancestor.

⁹ See Act IX (B. C.) of 1879, secs. 11 and 13, *post*, pp. 321, 327. Act I (M. C.) of 1902, sec. 57, *post*, p. 384; sec. 61, *post*, p. 386. Act IV (U. P. C.) of 1912, secs. 45, 46, 48, *post*, pp. 410, 411, 412. Act I (Bom. C.) of 1905, sec. 39, *post*, p. 432.

a Court of Wards cannot retain charge after the ward has attained majority, or the jurisdiction of the Court has otherwise ceased, whether there has been a formal relinquishment or not.¹

There is nothing to prevent a late ward making a Court of Wards his agent, but in that case the provisions of the enactment which governs that Court would not apply.

Acts in excess
of authority.

If Courts of Wards, or their subordinates, act against the law, exceed their powers, or assume powers not given to them by law, they may be treated as persons dealing with property without legal authority.²

A colourable exercise of authority for an indirect purpose, and not with the object of benefiting the ward, can be contested as not being a real exercise of discretion.³

Liability of
subordinates.

Managers, guardians, and other persons (including Collectors and other officers of Government) professing to act under the authority of a Court of Wards are liable to be sued either by the ward during his minority with a properly constituted next friend, or after the ward's estate has ceased to be under the superintendence of the Court by the ward, or the heir or successor to his estate,⁴ for money received by them or on security bonds executed by them, or for damages in respect of any act or omission contrary to law or for any breach of their respective trusts, except so far as they may be protected by enactment.⁵ A Court of Wards may also be liable for the acts of its officers.⁶

It has been held that no notice of suit is necessary when officers of Courts of Wards are sued not in an official capacity but as individual trespassers.⁷ Where the act purported to be done by them in their official capacity, notice would be necessary under sec. 80 of the Civil Procedure Code (Act V of 1908).

¹ *Noormahomed v. Koondun Singh*, 2 Sel. Rep., S. D. A. N.-W. P., 496.

² *Collector of Sarun v. Ramlal*, Ben. S. D. A., 1854, p. 247; *Ganoda Sundary Chaudhurani v. Nalini Ranjan Raha* (1908), 36 Calc., 28; 12 C. W. N., 1065.

³ *Luchmeswar Singh (Maharajah) v. Chairman, Darbhanga Municipality* (1890), 17 I. A., 90; 18 Calc., 99; *Mohammad Mumtaz Ali Khan (Raja) v. Sakhawat Ali Khan* (1901), 28 I. A., 190; 23 All., 394; 5 C. W. N., 881.

⁴ *Kishennath Raee (Rajah) v. Ramlal Mookerjee*, Ben. S. D. A., 1847, p. 506; *Anundnath Raee (Rajah) v. Collector of Rajshaye*, Ben. S. D. A., 1850, p. 301.

⁵ See Act I (Bo. C.) of 1905, sec. 45, *post*, p. 436; Act IV (U.P.C.) of 1912, sec 53 (2), *post*, p. 446.

⁶ *Collector of Sarun v. Ramlal*, Ben. S. D. A., 1854, p. 247.

⁷ *Ganoda Sundary Chaudhurani v. Nalini Ranjan Raha* (1908), 36 Calc., 28; 12 C. W. N., 1065; *post*, pp. 443, 446, 448. See *post*, p. 307, note 11.

A Court of Wards is not a Government office.¹

Court of Wards
not a Govern-
ment office.

Thus Government may be in adverse possession of property as against a Court of Wards.²

A Civil Court cannot send for the records of a Court of Wards except by summons.³

In Bengal every person employed by the Court under the Court of Wards Act, 1879,⁴ is a public servant for the purposes of the Penal Code.⁵

In Bombay⁶ and in the United Provinces⁷ every guardian manager, or other servant of the Court of Wards is to be deemed a public servant for the purpose of chapter ix. of the Indian Penal Code.⁸ In Madras⁹ they are only deemed public servants within the meaning of secs. 161, 162, 163, and 165 of that code. In all these three Presidencies in the definition of legal remuneration contained in sec. 161 of that code the word "Government" is to be deemed to include the Court of Wards.

How far
managers, etc.,
are Govern-
ment servants.

Except so far as the above-mentioned provisions apply, managers, guardians, and other persons employed in the management of the estate of a ward or in the care of his person, are not public officers or public servants or in the employ of Government:¹⁰ but a Collector performing duties imposed upon him as such by the law applicable to Courts of Wards would enjoy such advantages as are given by law to public officers or officers of Government.¹¹

¹ See *Sobbee Jha v. Shosheenath Jha* (1876), 15 W. R. C. R., 150; *Guru Dass Kundu Chowdhury v. Basanta Kumar Roy (Kumar)* (1909), 14 C. W. N., 317.

² *Guru Dass Kundu Chowdhury v. Basanta Kumar Roy (Kumar)* (1909), 14 C. W. N., 317.

³ *Sobbee Jha v. Shosheenath Jha* (1876), 15 W. R. C. R., 150.

⁴ Act IX (B. C.) of 1879.

⁵ Act I (B. C.) of 1906, sec. 7; Act III (E. B. & A.) of 1907, sec. 9.

⁶ Act I (B. C.) of 1905, sec. 21 (2), *post*, p. 427.

⁷ Act IV (U. P. C.), of 1912, sec. 33.

⁸ Act XLV of 1860, secs. 161 to 171.

⁹ Act I (M. C.) of 1902, sec. 30.

¹⁰ See *Nazamuddin v. Queen-*

Empress (1900), 28 Calc., 344; 4 C. W. N., 798; *Queen-Empress v. Mathura Prosad* (1898), 21 All., 127; *Collector of Bijnor v. Munwar* (1880), 3 All., 20; *Queen v. Arayi* (1883), 7 Mad., 17; *Sheoraj Singh (Chowdhree) v. Collector of Moradabad* (1870), 2 N.-W. P. H. C. Rep., 379. Approved of in *Guru Dass Kundu Chowdhury v. Basanta Kumar Roy (Kumar)* (1909), 14 C. W. N., 317. Under Act IV (B. C.) of 1870, sec. 42, the manager and all persons employed in the management of the estate of any ward were deemed to be officers in the pay of Government in respect of their employment and remuneration; but this provision was not reproduced in Act IX (B. C.) of 1879.

¹¹ In the *Collector of Bijnor v.*

Disabilities of wards.

In addition to any special disabilities, which the respective Acts relating to them may impose, minor wards of the several Courts of Wards are subject to the same disabilities as other minors.

The Government Management of Private Estates Act.

Estates under the Courts of Wards and minor's estates placed under the guardianship of a Revenue officer of the Government by a Civil Court are subject to the provisions of the Government Management of Private Estates Act,¹ which are as follows:—

Power to levy rate.

“Section 3.—It shall be lawful for the local Government—

“(1) To levy on all private estates under Government management a rate, not exceeding five per cent. on the gross income,² calculated as nearly as may be possible to cover—

“(a) the costs of all Government establishments in so far as they may be employed in the supervision³ or management of such estates other than establishments specially entertained for the supervision or management of any particular estate or group of estates; and

“(b) all contingent expenditure incurred in consequence of such supervision or management.

In Madras the rate levied is 2½ per cent.⁴

As to Lower Bengal, see *Calcutta Gazette*, 23rd December, 1908, Part I,

Munwar (1880), 3 All., 20, the Collector was held entitled to notice of suit under sec. 424 of Act X of 1877, which corresponds with Act V of 1908, sec. 80, *ante*, p. 306.

¹ X of 1892, sec. 2 (3).

² “Gross income” includes all receipts of every kind in produce or cash except money borrowed, recoveries of principal, and the proceeds of sale of immovable property or of movable property, properly classed as capital, sec. 2 (2); immovable property includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries, or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops or grass, sec. 2 (1). As to the levy of rates in the United Provinces, see Court of Wards Manual, rules 40 to 56.

³ In the United Provinces this includes—

- (1) the cost of supervision by the Board of Revenue, Commissioners, and District officers;
- (2) the contribution to the salary and establishment of the Legal Remembrancer;
- (3) the contribution to the remuneration of the Government Advocate;
- (4) the cost of the Court of Wards' department in the Board's office;
- (5) the cost of the Court of Wards establishments in Commissioners' and district offices. It does not include the charges levied for drafting deeds or for the audit of accounts: Court of Wards Manual, rule 41.

⁴ Court of Wards Standing Order,

p. 2059; Court of Wards Manual, pp. 300, 301. As to Bihar and Orissa, see *Bihar and Orissa Gazette*, 7th January, 1914, Part II, pp. 16, 17, as amended on 23rd January, 1915.

“(2) From time to time to vary such rate; and

“(3) To reduce or remit such rate in any special case or cases as may be equitable:

“Provided that, in deciding the amount of the rate to be levied under this Act on any particular estate or group of estates, the local Government shall consider the expenditure incurred on special establishments for such estate or estates.

Power to levy special charges.

“*Section 4.*—In cases where an officer of the Government is employed to give legal advice or to audit accounts on behalf of any estate, the local Government, if it considers the services rendered to be of a special nature, may in its discretion direct a special charge to be made against that estate on account of such services, irrespective of the rate leviable under the last foregoing section.

“*Section 5.*—Nothing in this Act shall apply to the cost of establishments specially entertained or to the expenditure of any description specially incurred in respect of any particular estate or estates.

Saving as to special expenditure.

“*Section 6.*—All rates for general supervision or management levied by any local Government before the commencement of this Act¹ shall be deemed to have been levied under this Act.

Validation of levy of past rates.

“*Section 7.*—The local Government may make any rules and issue any orders which may be necessary for carrying this Act into effect, and which are consistent therewith.

Power to make rules.

The rules in force in the United Provinces are to be found in the Court of Wards Manual, 1914, pp. 6-8.

“*Section 8.*—Where any Government establishment is employed in such supervision as aforesaid the local Government shall be the sole judge of the cost attributable to such employment, and its decision thereon shall not be questioned in any Court of law or otherwise.”

Exemption from jurisdiction of Courts.

¹ 25th October, 1892; see sec. 1 (3).

CHAPTER XXXI.

THE COURTS OF WARDS IN BENGAL, AND IN BIHAR AND ORISSA, CONSTITUTION AND POWERS.

The reason for
its establish-
ment.

IN Bengal, the Court of Wards was originally established more for the purpose of ensuring the collection of the revenue than for that of protecting minor proprietors.¹ The provisions of the Decennial Settlement, which was subsequently made permanent by Bengal Regulation I of 1793, gave rise to the necessity for the management by Government of the estates of minors and other persons disqualified from managing their property. In order to meet this necessity, and also in consequence of the many instances which occurred of minors, females, and other disqualified landholders, being entire proprietors of lands paying revenue immediately to Government, being reduced to ruin by the misconduct of those entrusted with their affairs, as well as of the frequent instances of minors being brought up in ignorance and dissipation by persons entrusted with their care and education with a view to engross the management of their affairs when they might come of age,² the system of management of the estates of disqualified landowners by Government officials under the denomination of the Court of Wards was established.

The Board of
Revenue con-
stituted a
Court of
Wards.

This system was inaugurated on the 20th August, 1790, when the Governor-General in Council constituted the Board of Revenue a Court of Wards with powers to superintend the conduct, and inspect the accounts of the managers of estates of landholders disqualified from having the management of their own lands by the rules prescribed for the Decennial Settlement (that is to say, females, with the exception of those whom the Governor-General in Council might deem competent to the management of their own estates, minors, lunatics, and

¹ Markby's Lectures on Indian Law, p. 65.

² See the Preamble to Ben. Reg. X. of 1793.

persons of notorious profligacy of character, who not being partners with others of a different description were or might be entire proprietors of lands paying revenue immediately to Government). The Court of Wards also received instructions to see that minors received an education suitable to their rank and circumstances in life, such as might qualify them for the future management of their own concerns.¹

For the guidance of the Board of Revenue as the Court of Wards certain rules were issued on the 15th July, 1791, and with modifications were subsequently re-enacted in Bengal Regulation X of 1793. The general scheme of that Regulation was, that the estate and properties belonging to disqualified persons were to be managed by a serberakar, or manager, while their persons and education were committed to a guardian. Large powers were entrusted to the manager and guardian, who were, however, subject to the immediate control of the Collector and to the general superintendence of the Court of Wards.

By Bengal Regulation LII of 1803, amended by sec. 29 of Bengal Regulation VIII of 1805, the rules for constituting, and for fixing the jurisdiction of, the Court of Wards, contained in Regulation X of 1793, were extended to the ceded and conquered provinces; and Bengal Regulation VI of 1822 extended Regulation LII of 1803, with the addition contained in sec. 29, Regulation VIII of 1805, to the province of Benares.

By Bengal Regulation I of 1829 the Commissioners of Revenue and Circuit were entrusted, within the districts comprised in their respective divisions, with the powers and authority then vested in the Boards of Revenue and Courts of Wards, subject to the control and direction of a sudder or head Board, to be ordinarily stationed in each Presidency, unless otherwise directed by the Governor-General in Council.²

“From this time,” says Sir William Markby,³ “the administration of the law upon this subject seems to have fallen into some confusion. We very frequently find the Collector spoken of as acting ‘in his capacity of Court of Wards’; and the Collector also appears to have exercised himself many of the functions which are conferred by the Regulation upon the manager or guardian. But for this concentration of power into the hands

¹ Colebrooke's Digest of the Regulations, vol. iii, pp. 298 and 299.

² Sec. 4.

³ Lectures on Indian Law, p. 67.

of the Collector, there does not appear to have been any authority in law."

Act XXVI of
1854.

The Collector was, by Act XXVI of 1854,¹ entrusted with the general superintendence and control of the education of male minors, whose property was under the Court of Wards.

Act IV (B. C.)
of 1870.

In 1870 the law relating to the Court of Wards within the provinces subject to the control of the Lieutenant-Governor of Bengal, was consolidated and amended by Act IV of the Acts of the Bengal Council for that year.

By that Act the Commissioner of Revenue of each division was constituted a Court of Wards,² but his powers were to be exercised subject to the control and supervision of the Board of Revenue and of the Lieutenant-Governor.³

Court of
Wards Act,
1879.

Bengal Act IV of 1870 was repealed by the Court of Wards Act of 1879,⁴ which, as amended by Act III (B. C.) of 1881, and I (B. C.) of 1906, contains the present law on this subject. It extends⁵ to all the territories then under the administration of the Governor of Bengal, including the scheduled districts of Bengal, as defined in the Scheduled Districts Act, 1874.⁶

The powers of the Lieutenant-Governor of Bengal are now vested in the Governor of Bengal in Council.⁷

Saving of
jurisdiction of
High Courts.

The Court of Wards Act does not affect the jurisdiction as respects infants of any High Court of Judicature.⁸

¹ Repealed so far as relates to the provinces under the control of the Lieutenant-Governor of Bengal by Act IV (B. C.) of 1870, sec. 86.

² Sec. 8.

³ Sec. 85.

⁴ Act IX (B. C.) of 1879, sec. 2.

⁵ Sec. 1.

⁶ Act XIV of 1874.

⁷ Act VII of 1912, sec. 3.

⁸ Act IX (B. C.) of 1879, sec. 4. Cf. Act I (M. C.) of 1902, sec. 3, *post*, p. 361. See *ante*, chap. xiv. This provision seems to be unnecessary, as the jurisdiction of the High Court cannot be affected by an Act of the Bengal Legislative Council. There is nothing to prevent the Court of Wards from exercising its jurisdiction over a minor who may be resident or may possess property within the limits of the Ordinary Original Civil Jurisdiction of the

High Court of Bengal, but the High Court would retain its power over the minor and such of its property as might be within the jurisdiction of the High Court, and could at any time exclude the Court of Wards from the charge thereof. In practice it would be unlikely that any inconvenience would arise from this dual jurisdiction, as in cases where the Court of Wards has taken charge of the minor's property or person, the High Court would, unless another course were very manifestly necessary in the interests of the minor, either decline to interfere, or appoint as a guardian such person as the Court of Wards may have appointed guardian or manager. Moreover, the Court of Wards would necessarily be reluctant to interfere with cases which could more appropriately be dealt with by the High Court. The

By the Court of Wards Act, 1879,¹ the Board of Revenue is constituted the Court of Wards for the territories to which the Act extends, and is directed to deal with every person and every property of which it may take or retain charge under the Act, or which may be placed under its charge by order of a competent Court, in accordance with the provisions of the Act.²

Constitution
of Court of
Wards.

It is to be guided by such orders and instructions as it may from time to time receive from the Governor in Council.³

Control of
Governor.

By virtue of the Bengal and Assam Laws Act, 1905,⁴ the authority of the Bengal Board of Revenue was, so far as the districts of Goalpara, Kamrup, Darrang, Nowgong, Sibsagar, Lakhimpur, Sylhet, Cachar, Garo Hills, Khasia and Jaintia Hills, Naga Hills, and Lushai Hills were concerned, vested in the Local Government of the Province of Eastern Bengal and Assam; and so far as the districts of Dacca, Mymensing, Faridpur, Backergunge, Tippera, Noakhali, Chittagong, the Chittagong Hill Tracts, Rajshahi, Dinajpur, Jalpaiguri, Rangpur, Bogra, Pabna, and Malda were concerned, in the Board of Revenue of that Province. The provisions of law in 1905 in force in Bengal with relation to the Court of Wards applied to the new Province until they are altered by the Legislature.

Eastern
Bengal and
Assam.

Some alterations were made by Eastern Bengal and Assam Act III of 1907.

On the reconstitution of Bengal in 1912 the functions of the Board of Revenue in Assam became vested in the Chief Commissioner of Assam.⁵

In 1912 a Board of Revenue was established for Bihar and Orissa.⁶ Such Board is the Court of Wards for such Province. The Court of Wards is there governed by the law as applicable to Bengal at the time of the constitution of the new Province⁷

Bihar and
Orissa.

present law goes further than Act IV (B. C.) of 1870, which did not in any way affect proprietors who were subject to the jurisdiction as respects infants of a High Court; see sec. 2.

¹ Act IX (B. C.) of 1879, sec. 5.

² See Act IX (B. C.) of 1879, sec. 10, *ante*, pp. 86, 87. Except in pursuance of a statutory power, a Civil Court cannot empower or direct the Court of Wards to take charge of the person

or property of a minor. A Civil Court can only appoint an individual as guardian; see *ante*, p. 94.

³ Act IX (B. C.) of 1879, sec. 69; Act VII of 1912, sec. 3.

⁴ Act VII of 1905, sec. 3, sch. D, repealed by Act VII of 1912, sec. 8.

⁵ Act VII of 1912, schedule D.

⁶ Act VII of 1912, sec. 4.

⁷ *Ibid.*, sec. 3.

with such alterations as may be made by the legislature, or under rules having the force of law.

Jurisdiction
of Court over
minor
proprietors.

The powers of the Bengal Courts of Wards are as follows :—

Whenever the sole proprietor of lands,¹ which are borne on the revenue-roll of a Collector as liable for the payment of one and the same demand of land revenue,² or of lands which have been settled under the Bengal Settled Estates Act, 1904,³ or of a share in such lands other than an undivided share held in co-parcenary as the property of a Hindu joint family governed by the *Mitakshara* or *Mithila* law,⁴ or all the joint proprietors of such lands or share are declared by the Court of Wards⁵ to be minors,⁶ that Court can take charge of all the property of every such proprietor or joint proprietor within its jurisdiction,⁷ and of the person of any such proprietor, or joint proprietor who is resident within its jurisdiction;⁸ and also of the person and property of any minor⁹ member of the family¹⁰ of any such proprietor or joint proprietor, or of any

¹ See *Ganoda Sundary Chaudhurany v. Nalini Ranjan Raha* (1908), 36 Cal., 28; 12 C. W. N., 1065.

² Definition of "estate" in Act IX (B. C.) of 1879, sec. 3. The mode of acquisition by the proprietor is immaterial; Cf. Act IV (B. C.) of 1870, secs. 3 and 4.

³ Act III (B. C.) of 1904, sec. 38.

⁴ Act IV of 1892, sec. 2.

⁵ Act IX (B. C.) of 1879, sec. 6. See sec. 27, *post*, p. 322. A formal declaration of the minority is necessary to give the Court jurisdiction. This declaration could be made under sec. 27, or it might be included in the declaration provided for by sec. 35, *post*, p. 324.

⁶ *i.e.* under the age of twenty-one years; Act IX (B. C.) of 1879, sec. 3. See *ante*, p. 9.

⁷ *i.e.* within the territories to which the Act applies (*ante*, p. 312). Although the possession of revenue-paying property is a condition precedent to the jurisdiction of the Court of Wards attaching, when once that jurisdiction has attached all the property of the ward (whether separate or joint) becomes subject to the control of the Court of Wards; *Dhunput Singh v. Shoobhudra Kumari* (1882), 8 Cal., 620; *s.c.*, *Dhunput*

Singh v. Court of Wards, 11 C. L. R., 295.

⁸ As to minors resident in Calcutta, see *ante*, p. 312, note 8.

⁹ There is not, as in the cases of minor proprietors (*post*, pp. 322, 323), any procedure for the ascertainment and declaration of the minority of members of his family; the Court of Wards must in such cases ascertain as best it can whether the proposed ward be in fact a minor. The decision of the Court of Wards would not in this case bind a Civil Court, or be any evidence before a Civil Court on the question of minority; see *ante*, p. 300. Should it turn out on an inquiry in a suit that the person taken charge of is not a minor, or is otherwise not subject to the jurisdiction of the Court, then any act of the Court of Wards in respect of the person or property of such alleged minor would be without jurisdiction. A minor member of a ward's family thus taken charge of is a ward within the meaning of the Act (sec. 3), and would be subject to the same disabilities as the ward and would not attain majority until twenty-one.

¹⁰ The word "family" is not defined. It would include not only the wife and children of the minor, but

other disqualified proprietor,¹ who has an immediate² or reversionary interest in the property of such proprietor or joint proprietor.³

The fact that the minor is entitled to the property under a will does not prevent the Court of Wards from taking charge of the estate from the executor.⁴ In such case the Court of Wards would be entitled to possession where the circumstances are such as would have entitled the minor, if he had been an adult, to possession.

The Court of Wards has no power to oust the executor of an unadministered estate,⁵ but where the estate has been administered and the executor is acting as manager the Court can take over charge.⁶

Where there are minor sons of a disqualified proprietor governed by the Mitakshara law, whose estate is taken over by the Court of Wards, the Court should take charge of the whole estate.

The Court can take such charge although originally it may have refrained from acting.⁷

Whenever the circumstances of any ward become such that the Court could not take charge of him, or of his property, if he were not under its charge already, the Court is bound to release him and his property from its charge.⁸

Court when bound to give up charge.

brothers and sisters or other near relations. A minor mother might also be included. In the case of a minor leaving two minor widows, the younger only having a reversionary interest, such younger widow can be brought under the jurisdiction of the Court: Board's Proceedings of 21st December, 1889, Nos. 197-99, Collection 3, File 413 of 1889.

¹ Disqualified proprietors include—

(a) females declared by the Court incompetent to manage their own property;

(b) persons declared by the Court to be minors;

(c) persons adjudged by a competent Civil Court to be of unsound mind, and incapable of managing their affairs;

(d) persons adjudged by a competent Civil Court to be otherwise rendered incapable by physical defects or infirmities of managing their own property;

(e) persons as to whom the Court (Act V (B. C.) of 1915) has declared, on their own application, that they are disqualified,

and that it is expedient in the public interest that their estates should be managed by the Court.

² The expression "an immediate interest" is not one having any technical meaning. Having regard to the purposes of the Act, it is apparently intended to include only a right to present enjoyment, such as a charge upon the property, or a life interest in a portion of it, or a right of maintenance.

³ Act IX (B. C.) of 1879, sec. 7.

⁴ *Taran Singh Hazari v. Ramratan Tewari* (1903), 31 Calc., 89.

⁵ *Ganoda Soondary Chaudhurany v. Nalini Ranjan Raha* (1908), 36 Calc., 28; 12 C. W. N., 1065.

⁶ *Taran Singh Hazari v. Ram Ratan Tewari* (1903), 31 Calc., 89.

⁷ *Madhusudan Sing v. Collector of Midnapore* (1865), B. L. R. F. B. R., 199; 3 W. R. C. R., 83.

⁸ Act IX (B. C.) of 1879, sec. 8; as, for instance, when the ward attains his majority, or where the result of a suit has deprived him of the estate, which gave the Court of Wards jurisdiction, or in the case contemplated

Discretion of
Court as to
taking charge.

The Court of Wards may¹ in its discretion in any case in which it is empowered by the Act to take charge of the person and property of any disqualified proprietor,

- (a) take charge of such property without taking charge of such person ;²
- (b) refrain from taking charge of any such person or property ;
- (c) at any time withdraw from such charge if taken ;³
- (d) at any time resume such charge, after having withdrawn from it.

The following applies to Assam.⁴

Effect of
withdrawal
from charge.

- (1) When the Court shall withdraw from the charge of such property—
 - (a) Such charge shall terminate with effect from the date fixed in accordance with the provisions of sec. 65⁵ ;
 - (b) the owner of the said property shall be restored to the possession thereof from the said date subject to any contracts entered into by the Court for the preservation or benefit of such property ;
 - (c) the claims referred to in sec. 10A, sub-sec. (5)⁶ shall revive unless the Court in its discretion shall otherwise direct.
 - (d) In calculating the periods of limitation applicable to suits to recover claims for interest or claims to recover and enforce debts and liabilities revised under this section the time during which such charge has continued shall be excluded.

INVOLVED ESTATES.

Bengal Act I. of 1906⁷ adds to the Court of Wards Act, 1879, the following provisions for dealing with debts due by an estate :—

Notice to
creditors.

“ 10A.—(1) Whenever the Court assumes charge of any

by sec. 11 (*post*, p. 321), where no order is made under that section. Where the right of the ward to the possession of his property is disputed by the Court of Wards, as, for instance, where contrary to his allegation the Court asserts that he is still a minor, the right to possession can only be determined by a suit for possession in a Civil Court. As to the procedure, when the ward's jurisdiction ceases, see Act IX (B.C.) of 1879, sec. 65, *post*, p. 357.

¹ Act IX (B. C.) 1879, sec. 9.

² The Court could not take charge of a portion only of the minor's property. It must take charge of the whole or none. The Act does not permit the Court to take charge of the minor's person without taking

charge of his property, and if it takes charge of his person, it must take upon itself the whole charge of the custody, maintenance, and education.

³ The Court cannot withdraw from a portion of the charge it has taken, except that it may withdraw from the charge of the minor's person, while retaining the charge of his property. It cannot withdraw from the charge of his property, while retaining the charge of his person. As to the procedure on withdrawal, see Act IX (B. C.) of 1879, sec. 65, *post*, p. 356.

⁴ Act III (E. B. & A.) of 1907, sec. 9A.

⁵ *Post*, p. 356.

⁶ *Post*, p. 318.

⁷ Sec. 3.

person or property under section 7,¹ or section 10,² it shall publish, in the manner provided in section 64A,³ a notice calling upon all creditors having claims against the ward or his immovable property to submit the same in writing to the Court, at a place to be named in the notice, within six months from the date of the publication of the notice aforesaid.

A draft of the notice should be submitted by the Commissioner with his application that the Court do take charge.⁴

There is a similar enactment for Assam in Act III (E. B. & A.) of 1907, sec. 3.

Under sec. 12 of that Act any notice required to be published by the provisions of sub-sec. (1) of sec. 10A shall be published—

(a) in the English and in the Vernacular Official Gazettes ;

(b) for such period as the Court shall think fit in the following newspapers :—

(i) a newspaper, if any, published in the district or division in which the ward ordinarily resides or has last resided.

(ii) two newspapers published in Dacca.

(iii) three daily newspapers ;

(c) by posting such notice on the notice-boards in the offices of the Collector and of the Judge of the district in which the place named in the notice is situate :

(d) by beat of drum in the village in which the ward ordinarily resides or has last resided ; and

(e) in such other ways, if any, as the Court may by rule direct.

“(2) Every such claim (other than a claim on the part of the Government) not submitted to the Court in compliance with the provisions of sub-section (1) shall, save in the case provided for by section 10E, sub-section (2), clause (c), notwithstanding any law, contract, decree, or award to the contrary, cease to carry interest from the date of the expiry of the period aforesaid :

“Provided that, if the Court⁵ is satisfied that the creditor was prevented by any sufficient cause from complying with

¹ *Ante*, pp. 313-315.

² *Ante*, pp. 87, 105.

³ *i.e.* it shall be published—

(a) in the English and in the *Calcutta Gazette* ;

(b) in at least three issues each of one English and one vernacular newspaper published in Calcutta ;

(c) in two issues of a newspaper (if any) published in the district or division in which the ward ordinarily resides,

or has last resided ; and

(d) by posting such notice on the notice boards in the offices of the Collector and of the Judge of the district in which the place named in the notice is situate : Act I (B. C.) of 1906, sec. 10, as amended by Act I (B. C.) of 1914 (Bengal Laws), sec. 5.

⁴ Court of Wards, rule 75.

⁵ A Civil Court cannot allow interest even if a suit be brought.

the provisions of sub-section (1), it may consider and allow, either wholly or in part, his claim for interest at any time after the date of the expiry of the period aforesaid.

Instead of this second provision Act III (E. B. & A.) of 1907, sec. 3 enacted

“(2) The Court shall also make such inquiry as it thinks fit to ascertain the particulars of all claims against the ward or his property, and may for the purpose of the said inquiry require the ward or any person or persons who may have acted as his guardian, committee, or other legal curator before the Court assumed charge of his person or property to file a complete statement of all debts and liabilities to which the ward is subject or with which his property is charged.

“(3) A copy of the notice published under sub-sec. (1) shall be sent by registered post to all creditors whose names and addresses are ascertained in the course of the enquiry made under sub-sec. (2).

“(4) After the expiration of six months from the date of the publication of the notice specified in sub-sec. (1) the Court shall frame a schedule of all claims submitted under sub-sec. (1) or ascertained in the course of the enquiry under sub-sec. (2).

“Provided that entry in this schedule shall not be deemed to be sufficient evidence to charge any person with liability.

“(5) Every claim, other than a claim on the part of Government, not entered in the schedule framed under the preceding sub-section shall, save in the case provided by sec. 9A, sub-sec. 1, clause c,¹ be deemed for all purposes and on all occasions, whether during the continuance of the management or afterwards, to have been duly discharged. Provided that the Court, if it thinks fit, may receive a claim at any time after the framing of the said schedule, or may refuse to receive it; and the Court may, if it receive the claim, disallow the payment of interest in whole or in part, and may impose such terms and conditions, as to the time of payment of the sum which it may find to be payable under the claim, as to the Court may seem fit.

“(6) No order of the Court under the preceding sub-section refusing to receive a claim, or disallowing interest, or imposing terms or conditions shall be liable to be contested or set aside in any Civil Court.”

“10B.—(1) Every creditor submitting his claim in compliance with the provisions of section 10A, sub-section (1), shall furnish, along with his written statement of claim, full particulars thereof, and shall, within such time as the Court may appoint, produce all documents which are in his possession, power, or control (including entries in books of account), on which he relies to support his claim, together with a true copy of every such document.

“(2) The Court shall, after marking for the purpose of identification, every original document so produced, and verifying the correctness of the copy, retain the copy and return the original to the creditor.

Creditors to
furnish full
particulars
and docu-
ments.

“(3) If any document, which to the knowledge of the creditor is in his possession, power, or control, is not produced by him as required by sub-section (1), the document shall not be admissible in evidence against the ward, whether during the continuance of the management or afterwards, in any suit brought by the creditor or any person claiming under him in respect of such claim.”

Act III (Eastern Bengal and Assam) of 1907, sec. 3, applied to cases in that Province similar provisions with regard to claims in compliance with the provisions of sub-sec. (1) or the proviso to sub-sec. (5) of sec. 10A,¹ enacted by that Act.

“10c.—If a Civil Court has directed any process of execution to issue against any immovable property of a ward or the rents thereof or any crops standing thereon, the Court of Wards may at any time within one year after it assumes charge of such property, apply to the Civil Court to stay proceedings in the matter of such process; and the Civil Court may, on such terms regarding interest or compensation for delay as may appear to it to be just and reasonable, stay such proceedings for such period as it may deem fit.”

Stay of proceedings of Civil Courts.

A similar provision for Assam is to be found in Act III (E. B. & A.) of 1907, sec. 3.

“10D.—(1) On receipt of all claims submitted in compliance with the provisions of sections 10A and 10B, the Court shall proceed to investigate such claims and shall decide which of them are to be wholly or partly admitted or wholly or partly rejected, as the case may be, and shall communicate its decision in writing to each claimant concerned.”

Adjudication of claims.

A similar provision for Assam is to be found in Act III (E. B. & A.) of 1907, sec. 3, with the distinction that the investigation is to be made on the framing of the schedule.²

“(2) When the Court has admitted any claim under sub-section (1), it may make to the creditor a proposal in writing for the reduction of the claim, or of the rate of interest to be paid in future, or of both; and if such proposal, or any modification of it, is accepted by the creditor and his acceptance is finally recorded and attested by the Court,³

¹ *Ante*, p. 318.

² *Ante*, p. 318.

³ The taking of evidence or the

hearing of parties would apparently be within the discretion of the Court.

The Court is not acting judicially.

it shall be conclusively ¹ binding upon the creditor and upon the ward :

“ Provided that, if when the superintendence of the property by the Court is relinquished or otherwise terminates, any portion of the claim reduced as aforesaid is still unsatisfied, the creditor shall be entitled to recover a sum bearing the same proportion to the original claim admitted under sub-section (1) as the unsatisfied portion bears to the reduced claim.”

A similar provision for Assam is to be found in Act III (Eastern Bengal and Assam) of 1907, sec. 3, with the addition that it applies to claims admitted under the proviso to sub-sec. (5).²

“(3) Subject to the provisions of sub-section (2), nothing in this section shall be construed to bar the institution of a suit in a Civil Court for the recovery of a claim against a ward or his property which has been submitted to the Court of Wards :

“ Provided that no decision of the Court of Wards under this section shall be proved in any such suit as against the defendant.”

For this was substituted by Act III (Eastern Bengal and Assam) of 1907, sec. 3, the following :—

“(3) Subject to the provisions of sub-sec. (2), nothing in this section shall be construed to bar the institution of a suit in a Civil Court for the recovery of a claim against a ward or his property which has been entered in the schedule framed under sec. 10A, sub-sec. 4.³ Provided that no decision of the Court of Wards under this section shall be proved in any such suit as against the defendant.”

“(4) In calculating the period of limitation applicable to suits for the recovery of a claim which has been submitted to the Court of Wards, the period from the date of the submission of the claim up to the date of communication of the Court's decision thereon to the creditor shall be excluded.”

For this was substituted by Act III (Eastern Bengal and Assam) of 1907, sec. 3, the following :—

“(4) In calculating the period of limitation applicable to suits for recovery of a claim which has been entered in the schedule framed under sec. 10A, sub-sec. (4),⁴ the period from the date of submission of the claim up to the date of the communication of the Court's decision thereon to the creditor shall be excluded.”

¹ It is submitted that fraud would vitiate the arrangement.

² *Ante*, p. 318.

³ *Ante*, p. 318.

⁴ *Ante*, p. 318.

" 10E.—(1) The Court of Wards may, after making an investigation under section 10D, when it appears to the Court that the estate is involved beyond all hope of extrication, or for any other sufficient reason, by notice published in the manner provided by section 64A,¹ declare that it will, on a date to be fixed by the notice, relinquish charge of the property and person (or of the property, as the case may be) of the ward under this section.

Relinquish-
ment of inex-
tricably in-
volved estates.

" (2) On the date so fixed—

" (a) such charge shall terminate ;

" (b) the owner of the said property shall be restored to the possession thereof, subject to any contracts entered into by the Court of Wards for the preservation or benefit of such property ; and

" (c) the claims for interest barred under section 10A, sub-section (2), shall revive in case the debt or liability in respect of which the interest is claimed be not then barred by any law of limitation.

" (3) In calculating the periods of limitation applicable to suits to recover claims for interest revived under this section, the time during which such charge has continued shall be excluded."

Whenever one or more of the joint proprietors, of whose properties the Court of Wards has taken charge, ceases to be subject to the jurisdiction of such Court, the Court may retain charge of the persons and properties of the still disqualified proprietors during the continuance of their disqualification.²

Procedure
when one of
joint pro-
prietors ceases
to be dis-
qualified.

In case any person entitled to any property jointly with any disqualified proprietor shall consent thereto, the Court of Wards may retain or resume the charge of the property of such proprietor or any part thereof, so long as the property of any such disqualified proprietor remains in charge of the Court.³ Such person becomes a ward of the Court for the purpose of

¹ *Ante*, p. 317, note 3.

² Act IX (B. C.) of 1879, sec. 11, as amended by Act IV of 1892, sec. 7. The powers of the Court under this section have been delegated to Commissioners. The matter should be reported to the Board:

Court of Wards, rules 7, 81.

³ Act IX (B. C.) of 1879, sec. 11, as amended by Act IV of 1892, sec. 7. It is not clear whether this consent can be withdrawn without the assent of the Court of Wards. Apparently it cannot.

part vii of the Act (relating to suits),¹ sec. 60² and sec. 61,³ but only so far as regards such property.⁴

In that case no part of the surplus shall be expended by the Court otherwise than in the liquidation of debts, or in the improvement of the lands or property.

Provided that, before paying any portion of such surplus, the Court may deduct therefrom and retain at its disposal any sums which it may consider necessary to retain—

(1) As a working balance for the management of the property and expenses incidental thereto ;

(2) In order to make provision for any special charges which are expected to become payable on account of the property, and which probably cannot be met from the expected surplus of the following years.⁵

The share of the non-disqualified proprietor in such surplus remaining after provision has been made for such purposes, shall be paid to him on the 15th May :⁶

Withdrawal
from charge.

The Court of Wards may at any time withdraw from such charge.⁷

The following procedure must⁸ be followed, when the person and estate of a minor proprietor⁹ are taken under the superintendence of the Court of Wards.

Collector to
make inquiry
and report as
to disqualified
proprietors.

Whenever any Collector has reason to believe that any person residing in his district, or being the proprietor of an estate borne on the revenue-roll of his district, should be declared or adjudged to be a minor, he shall make such inquiry¹⁰ as he may deem necessary, and if satisfied that such person

¹ *Post*, pp. 439-441.

² *Post*, p. 356.

³ *Post*, pp. 356, 357.

⁴ Act I (B. C.) of 1906, sec. 8.

⁵ Act IX (B. C.) of 1879, sec. 49.

⁶ Court of Wards, rule 175.

⁷ Act IX (B. C.) of 1879, sec. 12.

⁸ *Ante*, p. 304.

⁹ *Ante*, pp. 313, 314. The Collector need only take action in the cases of such proprietors, whose persons or properties ought in his opinion to be committed to the charge of the Court of Wards.

¹⁰ In making any inquiry under the Act, the Collector may exercise any power conferred by the Code of

Civil Procedure (Act V of 1908) on a Civil Court for the trial of suits: Act IX (B. C.) of 1879, sec. 66. This would include not only the powers given to the Court at the hearing of a suit, but also all such powers as are ancillary to the trial and determination of the questions to be tried. It would also apparently include a power to determine how the costs are to be borne. The inquiry should include one as to the age and birthday of the proprietor. The Collector must record and report through the Commissioner for the Court's information, the evidence on which his conclusions are based: Court of Wards, rule 80.

should be so declared or adjudged, shall make a report of the same to the Court; and the Court shall, on receipt of such report, make such order consistent with this Act as may seem to it expedient.¹

The Court will not ordinarily take charge of estates where the proprietors have male advisers who are willing and can be trusted to look after their affairs,² nor will it ordinarily take charge of insolvent estates.³

If any arrear of revenue be due from an estate of which it is proposed that the Court shall take charge, a report of the circumstance must be specially made through the Commissioner to the Board before the estate is brought under the Court; and if the estate be the sole property of a minor or two or more minors, having descended to them by the regular course of inheritance, or by virtue of the will of the deceased owner, the report must with reference to sec. 24 of the Act⁴ state what portion of the arrear has accrued before, and what portion has accrued after, the date on which the minor or minors succeeded to the property.⁵

The Court or the Local Government may put the provisions of the Act in force without any report from the Collector.⁶

Whenever any Collector receives information that the sole proprietor of an estate which is borne on the revenue-roll of his district has died, or that the sole proprietor of any estate has died within his district, and such Collector has reason to believe that the heirs of such proprietor should be declared or adjudged to be minors, he may take such steps and make such orders for the safety and preservation of the movable property of such heirs, and of all deeds, documents, or papers relating to the property of such heirs, as to him may seem fit.⁷

Report of arrears of revenue before charge is taken.

Power to enforce provisions of Act without report.

Proceedings on death of a proprietor whose heirs are minors.

¹ Act IX (B. C.) of 1879, sec. 27. The Court can refuse to take the ward or his property under its superintendence: *ante*, p. 314. Should it determine to accept the charge, it must make an order as provided for in Act IX (B. C.) of 1879, sec. 35, *post*, p. 324. As to the case when the minor takes under a will of the deceased proprietor, see *ante*, p. 315.

² Court of Wards, rule 71.

³ *Ibid.*, rule 72.

⁴ *Post*, p. 354.

⁵ Court of Wards, rule 76.

⁶ Act IX (B. C.) of 1879, sec. 28.

⁷ *Ibid.*, sec. 29. Any person who refuses to comply with an order of a Collector under this section is liable, by order of that Collector (Court of

Wards, rule 94), to a fine not exceeding five hundred rupees: Act IX (B. C.) of 1879, sec. 57. Such fine, with the reasons or grounds thereof, must be formally recorded by the Collector: *ibid.*, sec. 64. A fine can only be inflicted after the Collector has given the person charged an opportunity of being heard and of adducing evidence in his defence. The fine is to be levied in accordance with the Criminal Procedure Code (Act V of 1898, secs. 386, 387, and 389); see Act V (B. C.) of 1867, sec. 4. An appeal lies to the Commissioner to whom the Collector passing the order is ordinarily subordinate: Court of Wards, rules 94, 248. Employés of the Court when

Such Collector may call upon any other Collector in whose jurisdiction any such movable property, or any such deeds, documents, or papers may be, to take charge of the same, and thereupon such other Collector shall have the same powers with respect to such property, deeds, documents, and papers within his district as are conferred on the first-mentioned Collector.

Recovery of expenses.

If the property is not afterwards taken under the charge of the Court, the expenses incurred by the Collector are recoverable as arrears of revenue from the owner of such property or the person or persons whom the Collector shall find to be in possession of such property, and constitute a demand under Bengal Act VII of 1868, or any similar law for the time being in force.¹

Production of minor proprietor, and order for his temporary custody.

The Collector may direct that any person who has the custody of a minor heir of any such deceased proprietor shall produce such minor before such Collector or before any other Collector on a day fixed, and the Collector before whom the minor is so produced may make such order for the temporary custody and protection of such minor as to him may seem fit.

If the minor is a female, she shall not be brought into the presence of the Collector, but the Collector may take such steps for her identification as he may think fit.²

The following is the procedure after the ascertainment of the minority of the proprietor :—

Order declaring estate under charge of Court.

Whenever the Court has determined to take the person or property of a minor proprietor under its charge, whether in accordance with an order of the Civil Court or otherwise, the Court shall make an order declaring the fact and directing that

taking charge should secure the attendance of respectable independent witnesses at the opening of any room or receptacle, supposed to contain deeds, documents, papers, accounts, money, jewellery, and other valuables, and the verification of the lists of such property : Court of Wards, rule 77.

¹ Act IX (B. C.) of 1879, sec. 29. See Act III (B. C.) of 1913, repealing I (B. C.) of 1895 and I (B. C.) of 1897.

² Act IX (B. C.) of 1879, sec. 30. The Collector can only exercise the powers given to him by this section if the proprietor is in fact a minor;

and he should refrain, if possible, from exercising them unless the minority be beyond question. Should the Collector make an order in respect of a person who is in fact an adult, such person might be able to recover damages against the person detaining him; see *ante*, p. 306. A person disobeying an order made by a Collector under this section is liable by order of the same Collector to a fine as in cases under sec. 29, *ante*, p. 323; see Act IX (B. C.) of 1879, secs. 57 and 64; Court of Wards, rule 94.

possession be taken of such person and property, or of such property, on behalf of the Court, and the Court shall be held to be in charge of such property from the time when possession shall have been so taken.¹

If, subsequent to the assumption of charge by the Court of Wards, any other property is acquired by the ward by succession or otherwise, a fresh formal order with reference to this property must be issued.²

As soon as conveniently may be after such order, the Collector of every district within which any part of the ward's property may be situated, or some person authorized in writing by him in that behalf, shall take possession of all accounts, papers, and movable property of the ward, and place under proper custody such portion thereof as he may think necessary.³

Collector to take possession of movable property.

Any such Collector, or some person authorized as aforesaid may, in case he has reason to believe that any such account, paper, or property is in any room, box, or receptacle within any house in the actual possession of the ward, break open the same for the purpose of searching for such account, paper, or property.⁴

Breaking open receptacle.

Any such Collector may also order all persons in the employ of the ward or all persons who were in the employ of the deceased proprietor from whom the ward has derived his property to attend before him, and may order any person to deliver up any accounts, papers, or movable property belonging to the ward, or any accounts or papers relating to the ward's property, which the Collector has reason to believe are in such person's possession, and may order all holders of tenures and under-tenures on such property to produce their titles to such tenures and under-tenures.⁵

Additional powers of Collector.

Accounts and property.

Titles to tenures.

¹ Act IX (B. C.) of 1879, sec. 35. This order should generally declare the fact of minority if there be no such declaration in the order under sec. 27, *ante*, p. 322. As to the case when the minor takes under the will of the deceased proprietor, see *ante*, p. 315.

² Court of Wards Manual, p. 25.

³ Act IX (B. C.) of 1879, sec. 36. Any person who refuses to comply with an order of a Collector under this section is liable to fine, as in cases under sec. 29, *ante*, p. 323, note 7: see Act IX (B. C.) of 1879,

secs. 57 and 64; Court of Wards, rule 94. In taking charge under this section, the attendance of independent witnesses should be obtained as in cases under sec. 29, *ante*, p. 323, note 7: Court of Wards, rule 77.

⁴ Act IX (B. C.) of 1879, sec. 36.

⁵ Act IX (B. C.) of 1879, sec. 37. Any person who refuses to comply with an order of a Collector under this section is liable to fine, as in cases under sec. 29, *ante*, p. 323; see Act IX (B. C.) of 1879, secs. 57 and 64, and Court of Wards, rule 94.

Custody of title-deeds, etc.

All title-deeds and other valuables belonging to an estate are to be taken charge of by the Collector and kept in the treasury unless otherwise ordered by the Commissioners.¹

Report of estate brought under charge.

When an estate is brought under the charge of the Court of Wards the Collector shall, as soon as conveniently may be, submit to the Commissioner a report containing all information requisite to explain how he proposes to manage the immovable and movable property, to provide for the maintenance of the ward and his family and for their education, the establishments that should be entertained, the debts due to and by the property, and the measures suggested for their liquidation.² The report should be accompanied by a scheme showing the estimated available annual assets of the estate and the details of the proposed regular expenditure.³

The Commissioners shall pass the necessary orders on this report, except in the case of estates with a rent and cess demand of over a lakh of rupees, when he shall forward the report for the order of the Court with his recommendations.⁴

Record of rights.

As soon as an estate comes under the Court of Wards, the Collector must submit proposals for a survey and preparation of a record of rights. The state of the rent-roll, that is, whether doubts exist as to the rents payable, whether there are disputes with the tenants, and whether the rents appear to be fair, should be noticed, and the funds available for the operations under the Bengal Tenancy Act should also be reported on.⁵

The Collector must open a separate account for an undivided share under sec. 10 or 11 of Act XI of 1859, or sec. 70 of Act VII (B. C.) of 1876.⁶

Procedure when succession to property disputed.

Whenever, on the death of any ward, the succession to his property or any part thereof is in dispute, the Court of Wards may either direct that such property or part thereof be made over to any person claiming such property, or may retain charge of the same until the right to possession of the claimant has been determined under Bengal Act VII of 1876,⁷ (or, in

¹ Court of Wards, rule 261.

² *Ibid.*, rule 120. Generally the report may be submitted complete in all respects except as to the liabilities and financial position of the estate, which it takes some time to ascertain: Court of Wards, rule 121.

³ Court of Wards, rule 122. As to the arrangement of the scheme and the form of the statements of the financial position and prospects of the property, see Court of Wards, rules 123, 124.

⁴ *Ibid.*, rules 120, 212.

⁵ *Ibid.*, rule 197; Act VIII of 1885, chap. x.

⁶ *Ibid.*, rule 216.

⁷ The Land Registration Act, 1876. Sec. 55 of that Act, as amended by

Act V (B. C.) of 1878, contains the following:—

“If the applicant's possession of, succession to, or acquisition by transfer of, the extent of interest in respect of which he has applied to be registered, is disputed by or on behalf of any person making a conflicting claim in respect thereof, and if it is not proved to the satisfaction of the Collector that any person is in possession of the interest in dispute, the Collector shall determine summarily the right to possession of the same, and shall deliver possession accordingly and shall make the necessary entry in the registers; or if, in the opinion of the Collector, the dispute be one which can more properly be determined by a Civil

cases which were subject to the Court of Wards in Eastern Bengal and Assam, under the Assam Land and Revenue Regulation, 1886 (I of 1886))¹ or until the dispute has been determined by a competent Civil Court.²

If, when the ward dies or attains majority, there remain undischarged any debts or liabilities which were incurred by, or are due from such proprietor, or which are a charge upon his property or any part thereof, the Court may either withdraw from the charge of such property, or retain such charge until such debts and liabilities, as the Court considers necessary to be discharged together with all interest due thereon have been discharged :

Power of Court to retain charge of property until payment of debts.

Provided that, after the death of a proprietor, the Court shall not retain charge on account of any debt or liability which has been declared by a competent Civil Court not to be binding on his representative.³

A similar provision was made for Eastern Bengal and Assam.⁴

Subject to the provisions of the Act, the Court of Wards may, through its manager, do all such things requisite for the proper care and management of any property of which it may

General powers of Court of Wards.

Court, the Collector shall refer the matter in dispute to the Principal Civil Court of the district for determination as hereinafter provided."

¹ See Act III (E. B. and A.), 1907, sec. 4.

² Act IX (B. C.) of 1879, sec. 13. The powers of the Court under this section have been delegated to Commissioners: Court of Wards Rules, rule 8. The Court must, on the death of the ward, decide which course to adopt. It cannot await the determination of a question of possession by a Criminal Court acting under sec. 145 of the Code of Criminal Procedure (Act V of 1898) or of a Civil Court, acting under sec. 8 of the Specific Relief Act (I of 1877), or under its powers as a Court of Probate, unless the decision of such Civil Court completely determines the matters in dispute. It need not, however, await the decision of an Appellate Court, and it would not be entitled to await such decision

unless execution be stayed in accordance with law. Under the old law (Act IV (B. C.) of 1870, secs. 80 and 81), the Court of Wards had express power in the case of disputed succession to sell the property in dispute by public auction, and to invest the proceeds in Government Promissory Notes. Now under Act IX (B. C.) of 1879, sec. 18 (*post*, p. 331), the Court has power to sell so long as the property is under its charge, and this would apparently apply to the case of property remaining in charge of the Court of Wards in consequence of the succession being in dispute. The Court of Wards can bring suits in respect of the property while it is under its superintendence. See *Soomungul Kooer (Mussamat) v. Court of Wards* (1872), 17 W. R. C. R., 560.

³ Act I (B. C.) of 1906, sec. 4.

⁴ Act III (E. B. & A.) of 1907, sec. 5.

take or retain charge under the Act, or which may be placed under its charge by order of a competent Civil Court, as the proprietor of any such property, if not disqualified, might do for its care and management,¹ and may, in respect of the person of any ward, do all such things as might be lawfully done by the legal guardian of such ward.²

Penalty for disobeying order of Court.

Any person who disobeys any lawful order of the Court is liable, on conviction before a Magistrate, to a fine not exceeding five hundred rupees, and if he is a manager or guardian appointed by the Court, to a fine not exceeding one thousand rupees.³

Exercise of powers conferred on Court through others.

The Court of Wards may exercise all or any powers conferred on it by the Act through the Commissioners of the divisions and the Collectors of the districts in which any part of the property of the ward may be situated, or through any other person whom it may appoint for such purpose.

Delegation of powers.

The Court of Wards may from time to time delegate any of its powers to such Commissioners or Collectors or other persons as afore-said, and may at any time revoke such delegation.⁴

As to the delegation of powers to sub-divisional officers, see Court of Wards Manual, rule 273.

Managing Collector.

When the estate or lands of a ward are situate within one district only, the Collector of that district is the Managing Collector,⁵ both as regards the property and person of the ward.⁶

When the estate or lands of the ward are situate within more than one district, but in the same division, the Commissioner of such division shall determine which of the Collectors shall be the managing Collector, both as regards the person and property of the ward. The Commissioner may in such cases appoint in respect of estates with current rent and cess

¹ This only applies to the care and management. Sales, mortgages, leases, and farms can only be effected or given by the Court or the person acting for it (see sec. 15), and not by the manager; see sec. 18, *post*, p. 331.

² Act IX (B. C.) of 1879, sec. 14. As to the powers of a guardian of the person, see *ante*, chap. xvi.

³ Act IX (B. C.) of 1879, sec. 59; see *ante*, p. 323, note 7.

⁴ *Ibid.*, sec. 15, as amended by Act V (B. C.) of 1915. As to appeals from

orders of Collectors and Commissioners, see Act IX (B. C.) of 1879, sec. 67, *post*, p. 358. For the cases where the Court has delegated its powers, see Court of Wards Rules, chap. ii.

⁵ *i.e.* the Collector through whom the Court will ordinarily exercise the powers conferred on it, or who will exercise the powers conferred on Collectors by the Act, or by the Court under the Act: Court of Wards, rule 90.

⁶ *Ibid.*, rule 91.

demands of Rs. 100,000 or less each Collector to be the managing Collector as regards the property and lands of the ward, situated in his district, reporting his action for the Board's information. In all other cases the approval of the Court is necessary.¹

If the estate or lands of the ward are situated in different divisions, the Court will appoint one of the Commissioners of such divisions, and one of the Collectors in the division of that Commissioner to be the managing Commissioner and managing Collector,² both as regards the person and property of the ward; or if it sees fit, the Court may appoint each Commissioner and each Collector within whose jurisdiction any part of the property lies, to be the managing Commissioner and managing Collector as far as regards that portion of the property.³

Managing
Commissioner
or Collector
when estate
situate in
different
divisions.

The Court may from time to time order such establishments to be entertained, and expenses to be incurred, as it shall consider requisite for the care and management of the persons and properties, under its charge, for superintendence, for the audit of accounts, and generally for all the purposes of the Act, and may order that such expenses, inclusive of all salaries, gratuities, and payments on account of the leave allowances of such establishments, be charged against any one or more properties for the purposes of which such establishments are, or have been, entertained or such expenses have been incurred.⁴

Establish-
ments and
expenses.

The following rules have been made by the Court of Wards on this subject:—⁵

All establishments to be charged to a particular estate will, so far as regards the scale of remuneration and the number of officers and servants to be entertained, require the sanction of the Court in cases where the current rent and cess demands exceeds one lakh. In other cases and in the

¹ Court of Wards, rule 92.

² *Ante*, p. 328, note 5. "Managing Commissioner" is similarly defined.

³ Court of Wards, rule 93.

⁴ Act IX (B. C.) of 1879, sec. 16, as amended by Act III (B. C.) of 1881, sec. 3. Under Act IV (B. C.) of 1870, the remuneration of the guardian and the expense of an establishment of necessary servants had to be defrayed from the allowance fixed for the support of the ward, but now the Court can either require them to be paid out of such allowance or can deal with them under this section. As to the liability of an estate under the Court of Wards to contribute to the expense of Government establishments and

the contingent expenditure incurred by Government, see Act X of 1892, sec. 9 of which repeals Act IX (B. C.) of 1879, sec. 17, as amended by Act III (B. C.) of 1881; *ante*, pp. 308, 309.

⁵ Court of Wards, rules 95 *et seq.* When the officer is under Government and pays a portion of his salary to Government towards his pension and leave allowances, the amounts here given will represent his gross and not his net salary. *Ibid.*, rule 97. As to appointments to posts for which the passed agricultural students of the Sabour Agricultural College are eligible, see rule 99.

case of temporary establishments the sanction of the Commissioner is sufficient.¹

Commissioners and Collectors may at their discretion entertain in anticipation of sanction such establishments as are necessary.²

Appointments
in sanctioned
establish-
ments.

Appointments to posts on duly sanctioned establishments shall ordinarily be made as follows:—

(a) to posts of which the remuneration, including commission as estimated, is not above Rs. 50 a month, by managers; above Rs. 50 and not above Rs. 100, by Collectors; above Rs. 100 and not above Rs. 200, by Commissioners; above Rs. 200, and not above Rs. 400, by the Court; above Rs. 400, by the Court with the previous sanction of Government:

(b) the Court, Commissioners, Collectors, and managers may respectively appoint to all posts which are immediately attached to their own respective offices, provided that the remuneration is not above the maximum to which they are authorized to appoint under clause (a):

(c) The Court, Commissioners, and Collectors respectively may specially reserve to themselves the appointment to any post to which a subordinate authority is generally authorized to appoint under clause (a).³

The appointment of a person of European or Eurasian descent with a pay of Rs. 200 or less is forbidden.⁴ Estates of a ward in one district should be under a single manager.⁵

Nominations
for vacancies.

Every Collector in reporting to the Commissioner a vacancy in a post to which the Commissioner is authorized to appoint, and every Commissioner in reporting to the Court a vacancy in a post to which he is not authorized to appoint, shall ordinarily submit the names of one or more persons whom he considers qualified to fill the post, with the grounds of his opinion. Such nominations will be duly considered with the claims of other candidates.⁶

Appointment
by manager.

Commissioners and Collectors respectively may at their discretion, and by a general order, authorize the manager, when the latter is an officer drawing a salary of above Rs. 200 a month, and has been appointed by the Court, to appoint to any post on a sanctioned establishment under his own immediate control, to which the Commissioner and the Collector respectively are authorized to appoint.⁷

Penalties for
misconduct.

Every officer, other than a manager, is liable⁸ in case of misconduct, (a) to be reduced to a lower grade or to have his pay reduced; (b) to suspension for a period not exceeding six months; and (c) to dismissal.

Managers may punish their subordinates drawing salaries up to Rs. 50 per mensem, subject to the control of the Collector, but the subordinate will have a right of appeal to the Collector in every case.⁹

In other cases punishment to the extent stated above may be inflicted

¹ Court of Wards, rule 95.

² *Ibid.*, rules 10, 96.

³ *Ibid.*, rule 97.

⁴ *Ibid.*, rule 97A.

⁵ *Ibid.*, rule 97B.

⁶ *Ibid.*, rule 98.

⁷ *Ibid.*, rules 12, 48. As to the

power of managers to entertain temporary establishments, see rule 100. As to extraordinary establishments, see rule 101.

⁸ *Ibid.*, rule 109.

⁹ *Ibid.*

by the Collector, or, in the case of an officer who is attached to the office of the Court or the Commissioner, by those authorities respectively; but no officer can be dismissed by the order of any authority inferior to that by which he was appointed to the post.¹

As to the leave of managers and other officers, see Court of Wards, rules 110 to 113.

Collectors should see that sufficient security is taken from all subordinates of managers through whose hands money passes, and should be guided by the principles of the rules relating to the taking of security from public officers² in fixing the amount and character of the security.³

Security from manager's subordinates.

Managers may sanction leave of any kind to subordinates who are not Government servants, and whose pay does not exceed Rs. 200 a month.⁴

As to Provident Funds in estates under the management of the Court, see Court of Wards, rule 265.

As to the employment of Government and District engineers on engineering and architectural work in wards' estates, see Court of Wards, rule 187.

The Court may sanction the giving of leases or farms of the whole or part of any property under its charge, and may direct the mortgage or sale of any part of such property, and may direct the doing of all such other acts as it may judge to be most for the benefit of the property and the advantage of the ward.⁵

Power to manage property.

A lease granted without such sanction is voidable.⁶

The powers of the Court under this section to sanction the sale of movable property and live stock,⁷ and leases and farms have been delegated to Commissioners.⁸

Commissioners may direct in the case of estates with an annual rent and cess demand of Rs. 100,000 or less, the mortgage or sale of any part of

¹ Court of Wards, rule 109.

² Chap. IX of the Board's Rules, 1902.

³ Court of Wards, rule 115.

⁴ *Ibid.*

⁵ Act IX (B. C.) of 1879, sec. 18. This gives the largest possible powers, in addition to the powers of management given by sec. 14, *ante*, pp. 327, 328; but it is to be remembered that the Court can only consider the benefit of the property and the advantage of the ward. The interests of other individuals, of the public, or of Government, must not be considered. The exercise of the discretion here given to the Court of Wards cannot be questioned by a Civil Court except in the case of a colourable exercise of discretion, such as a pretended

sale for a nominal consideration as in the cases of *Luchmeswar Singh (Maharajah) v. Chairman, Darbhanga Municipality* (1890), 17 I. A., 90; 18 Calc., 99; and *Mohammad Mumtaz Ali Khan (Raja) v. Sakiawat Ali Khan* (1901), 28 I. A., 190; 23 All., 394; 5 C. W. N., 881, where the alienations were without consideration. The Court of Wards would have no power to make a gift of any portion of the ward's property (*ante*, p. 176), except under the conditions specified in sec. 48, Class II of the Act; *post*, p. 340. See above cases.

⁶ *Uma Churn Mahaldar v. Narendranath Basu* (1905), 33 Calc., 273; 10 C. W. N., 126.

⁷ Court of Wards, rule 14.

⁸ *Ibid.*, rules 15, 189.

the property of a ward and the doing of all such acts as they may judge to be most for the benefit of the property and the advantage of the ward.¹

Except in special cases with the previous sanction of the Board no loan should ordinarily be raised until after the adjudication of claims under sec. 10D of the Act, and the sanction of a scheme for the management of the estate.² No guarantee that the Court should retain charge under sec. 13A should be given without the express approval of the Board.³

No loan should be taken unless it can be shown that the assets of the estate may reasonably be expected to be sufficient to meet with regularity not only the interest, but also the charge for liquidation of the principal within a reasonable period.⁴

When the property of a ward situated in a district other than that of the managing Collector has to be sold, the managing Collector should arrange to have the sale conducted by the Collector of the district in which the property is situated. In all cases the latter Collector should be consulted before a private offer is accepted.⁵

Execution of instrument of sale.

All conveyances relating to the sale of any property should be executed by the manager, they should contain a recital that the sale is by direction of the Court, and in evidence of this the Collector should also sign.⁶

It is not necessary to obtain the signature of the ward.⁷

For the purpose of selling or dealing with Government securities, it may be necessary for the Court or Commissioner to apply for letters of administration to the estate of the former owner,⁸ or to a certificate of administration under sec. VII of 1889.⁹

Farming of estates.

The giving of farms is to be discouraged, and will only be sanctioned by the Commissioner in exceptional cases.¹⁰ Direct management should be encouraged whenever possible.¹¹

Delegation of powers.

Collectors and managers¹² may sanction the sale of movable property and live-stock,¹³ when the value of each item is below Rs. 1000 and Rs. 50 respectively. In other cases the Commissioner may sanction the sale.

Managers may sanction the sale of fruit, fish, and crops to any value, and of trees to a value not exceeding Rs. 100 a year. Managers of large

¹ Court of Wards, rule 16.

² *Ibid.*, rule 83, as amended May 1, 1912.

³ *Ibid.*, rule 83B.

⁴ Rule 83A, amended May 1, 1912.

⁵ *Ibid.*, rule 190.

⁶ *Ibid.*, rule 191.

⁷ See Court of Wards Manual, 1909, p. 29.

⁸ See *ante*, p. 304, note 8.

⁹ Court of Wards, rule 263.

¹⁰ *Ibid.*, rule 192. The only circumstances under which a proposal to give a usufructuary mortgage or the grant of a farm on payment of a bonus in connection with a ward's estate can be entertained are, when care has been taken to see that the interests of the raiyats are completely

protected, and that the mortgagee in possession, or farmer, is either bound down to collect only according to the jamabundi settled by the Collector, or is debarred from enhancing rents save under conditions and circumstances to be determined beforehand. Under no circumstances should farms or *zur-i-peshgi* leases be given to enable the farmer or mortgagee to force against the wishes of the tenancy, the cultivation of indigo or any other crop through the influence he will obtain as farmer or mortgagee: *ibid.*

¹¹ *Ibid.*

¹² Court of Wards, rules 50, 63.

¹³ *Ibid.*, rule 17.

estates may, with the special permission of the Court, be allowed to sell trees up to a value of Rs. 1000 a year.

Commissioners, Collectors, and managers may sanction the creation of holdings at fixed rents or fixed rates of rent (excluding tenancies paying produce rents) or the modification of the rent of such a tenancy.

Collectors and managers may sanction such settlement or re-settlement when the rental of each holding so settled or re-settled does not exceed Rs. 200 and Rs. 50 respectively, and reduction of rent when the reduction in each holding is below Rs. 200 and Rs. 10 respectively. In the case of managers, the reductions in any one year should not exceed Rs. 200, and must be reported to the Collector. When the holding is mukarrari, the Commissioner's sanction is required to re-settlements or reductions in rent. Leases are to be signed by the manager.¹

In Bihar and Orissa Commissioners can sanction the commutation of rent payable in kind to any extent.² Collectors can sanction up to Rs. 250,³ and managers up to Rs. 100 in any year.⁴

Commissioners may sanction the remission, and writing off the accounts, of all arrears of rent or other debts, whether covered by decrees or not, which are barred by limitation or are otherwise irrecoverable, when the amount exceeds Rs. 500 on any one item.⁵

Commissioners may sanction, in the case of all estates, the suspension of rents or other moneys due to an estate. In cases of estates with a current rent and cess demand exceeding a lakh of rupees a report should be submitted to the Board explaining the action taken.⁶ Suspension of rent, etc.

Commissioners may sanction schemes of regular expenditure and budget estimates of estates with a current rent and cess demand not exceeding a lakh of rupees, and in other estates may sanction, after the budget has been passed by the Court, all items of ordinary and contingent expenditure included therein, whether specially reserved by the Court when passing the budget or not, up to a limit of Rs. 500 on any one item.⁷ Collectors and managers have similar powers up to a limit of Rs. 100 and Rs. 20 respectively.

In such estates Commissioners may sanction exceptional expenditure⁸ up to Rs. 1500 provided it can be met from general savings in the budget.⁹

Collectors may decide whether an application should be made by the manager to the Land Acquisition officer for a reference to the Civil Court under sec. 18 of the Land Acquisition Act,¹⁰ when, in his opinion, the award is incorrect or inadequate.¹¹ Land Acquisition.

If the Court of Wards thinks it expedient to direct the sale or mortgage of any part of an estate, of which the ward is the sole proprietor, it may order the Collector to partition off such part into a separate estate, and the demand of land revenue When Court may order property to be formed into a separate estate.

¹ Court of Wards, rule 194A.

² *Ibid.*, rule 17A.

³ *Ibid.*, rule 51B.

⁴ *Ibid.*, rule 65B.

⁵ *Ibid.*, rule 18.

⁶ *Ibid.*, rule 18A.

⁷ *Ibid.*, rule 19.

⁸ See Court of Wards, rule 157.

⁹ *Ibid.*, rule 20.

¹⁰ I of 1894.

¹¹ Court of Wards, rule 55.

and of the cesses for which the original estate was liable shall be assessed upon and divided between the two separate estates so formed, respectively, in such manner as the Court of Wards with the sanction of the Lieutenant-Governor may direct.¹

Recovery of
arrears of land
revenue in
settled estates.

If after an estate settled under the Bengal Settled Estates Act, 1904, or part thereof held by a tenant for life has been managed and released by the Collector under sub-secs. (1) and (2) of sec. 34 of that Act, any arrear of land-revenue, or any other arrear which is recoverable in the same manner as an arrear of land-revenue, again occurs in respect of the estate or part during the life of the same tenant, and if the sale of the estate or part thereof for the recovery of the arrear is not sanctioned by the Local Government, the Court of Wards may take charge of and deal with the estate or part under the provision of the Court of Wards Act, 1879; and may retain such charge until the death of such tenant, and if the next holder is then a minor, until such minor attains his majority.²

¹ Act IX (B. C.) of 1879, sec. 19. It is only for the purpose of sale or mortgage that the Court of Wards has power to order the Collector as a revenue officer to partition off property. It is competent to the Court of

Wards in other cases to direct proceedings for a partition to be taken in a Revenue or in a Civil Court, but in these cases it would not be in a better position than that of any other suitor.

² Act III (B. C.) of 1904, sec. 34.

CHAPTER XXXII.

THE COURT OF WARDS IN BENGAL AND IN BIHAR AND ORISSA (continued), MANAGERS AND GUARDIANS.

THE Court of Wards may appoint one or more managers for the property¹ of any ward, and one or more guardians for the care of the person of any ward under the charge of the Court, and may control and remove² any manager or guardian so appointed.³

Appointment
of managers
and guardians.

As to the desirability of appointing resident managers and as to the appointment of a manager for a group of estates, see Court of Wards, rule 84.

On any minor becoming a ward, the Court of Wards may, at its discretion, confirm or refuse to recognize any appointment of a person to be guardian of such minor which may have been made by a will.⁴

¹ There is nothing to prevent a manager being appointed to manage only a portion of the property of the ward.

² Although the Court of Wards has power to remove managers and guardians, they are entitled to reasonable notice, in case of their removal without just cause, to damages which may be assessed at the amount of their salaries for the period for which they are entitled to notice.

³ Act IX (B. C.) of 1879, sec. 20. No one can be appointed manager or guardian against his will. See *Jadow Mulji v. Chhagan Raichand* (1880), 5 Bom., 306; *Babaji v. Maruti* (1874), 5 Bom., 310; 11 Bom. H. C. Rep., 182.

⁴ Act IX (B. C.) of 1879, sec. 20. This is a departure from the policy previously adopted by the Legisla-

ture in recognizing the testamentary appointments of guardians. Ben. Reg. V of 1799, sec. 2; Ben. Reg. I of 1800; and Act XL of 1858, sec. 7, gave absolute rights to testamentary guardians, and Act IV (B. C.) of 1870, sec. 31, enacted that when a guardian of a minor ward shall have been appointed by will, such person shall be appointed his guardian by the Court, unless the Board of Revenue, after a report, received from the Court of Wards, and after calling on the testamentary guardian to show cause, shall consider him disqualified or unfit. Although the Court of Wards has under the present law power to appoint a guardian without notice to the testamentary guardian, it would ordinarily be in the interests of the ward that such notice should be given, as by the

Appointments to posts on duly sanctioned establishments, including managers and guardians at salaries not exceeding Rs. 100, may be made by Collectors, between Rs. 100 and Rs. 200 by Commissioners, between Rs. 200 and Rs. 400 by the Court, and above Rs. 400 by the Court with the previous sanction of Government.¹

They are also empowered by the rules to suspend and dismiss managers or guardians; but no manager or guardian can be dismissed by the order of any authority inferior to that by which he was appointed to the post.²

Choice of manager.

Except that the present policy of the Government is to employ Deputy Collectors and Sub-Deputy Collectors,³ character and capacity for the trust are the only guides for the selection. Certain rules giving the preference to near relations of the ward, and creditable servants of his family, were prescribed by Bengal Regulation X of 1793,⁴ but it was soon found necessary to repeal this provision.⁵

Collector when to be deemed manager.

If no manager of the property of a ward is appointed by the Court of Wards, the Collector of the district in which the greater part of such property is situated, or any other Collector whom the Court of Wards may appoint in that behalf, is competent to do under the orders of the Court of Wards anything that might be lawfully done by the manager of such property.⁶

Power of manager.

Subject to the control of the Court of Wards,⁷ which can at any time set aside any of his acts, or require him to perform particular acts, every manager appointed by the Court has power to manage all property which may be committed to his charge; to collect the rents of the land entrusted to him, as well as all other money due to the ward, and to grant receipts therefor; and may, under the orders of the Court, grant or renew such leases and farms as may be necessary for the good management of the property.⁸

appointment the father has shown his confidence in the person appointed by him, and has presumably considered such person, as the best fitted to exercise the trust.

¹ Court of Wards, rule 97. A Commissioner may authorize a manager to make an appointment. *Ibid.*, rule 12.

² *Ibid.*, rule 109.

³ *Ibid.*, rule 105. Gazetted officers cannot be appointed managers without the sanction of Government; *ibid.*, rule 104.

⁴ Sec. 8.

⁵ Ben. Reg. VII of 1799, sec. 26.

⁶ Act IX (B. C.) of 1879, sec. 38.

⁷ *Ibid.*, sec. 20.

⁸ *Ibid.*, sec. 39. As to whether any presumption is to be made as to the manager having acted under the order of the Court, see *Uma Churn Mahaldar v. Narendra Nath Basu* (1905), 33 Cal., 273; 10 C. W. N., 126. The powers of a manager are confined strictly to the management of the property. He cannot, except under the express orders of the Court, contract for the sale or mortgage of the property or in any way charge the estate. As to his powers to sell movable property, see *ante*, p. 331. He has all the usual powers incident to, and necessary for, the management

Every manager must manage the property committed to him diligently and faithfully for the benefit of the proprietor, and must in every respect act to the best of his judgment for the ward's interest as if the property were his own.¹

General duty of manager.

This includes a right to claim pre-emption.²

Every manager appointed by the Court of Wards shall—³

Special duties of manager.

(a) have the care of so much of the property of the ward as the Court may direct ;

The Collector must make a specific order directing what property of the ward shall be in the care of the manager.⁴

(b) give such security⁵ (if any)⁶ as the Court thinks fit to the Collector duly to account for all such property and for what he shall receive in respect of such property ;⁷

(c) continue liable to account to the Court, after he has ceased to be manager, for his receipts and disbursements during the period of his management ;⁸

(d) pass his accounts at such periods and in such form as the Court may direct ;

(e) pay the balance due from him thereon ;

(f) apply for the sanction of the Court to any act which may involve the property in expense not previously sanctioned by such Court ;

(g) sign all papers, deeds, documents, and writings which may be executed by him by virtue of his office ;⁹

of property. He can vote under the Bengal Drainage Act (VI (B. C.) of 1880), sec. 16 (2).

¹ Act IX (B. C.) of 1879, sec. 40 ; see *ante*, p. 303. As to the powers of a manager to appoint, suspend, or punish employes, see *ante*, p. 330.

² *Jadu Lal Sahu v. Janki Koer (Maharani)* (1912), 39 I. A., 101 ; 39 Calc., 915 ; 16 C. W. N., 553 ; 14 Bom. L. R., 436.

³ Act IX (B. C.) of 1879, sec. 41.

⁴ Court of Wards, rule 79A.

⁵ In cash or promissory notes and not in landed property : Court of Wards, rule 114. The amount is to be fixed by the Collector. *Ibid.*

⁶ With the assent of the Collector the security may be dispensed with :

Court of Wards, rule 114.

⁷ A natural guardian, when appointed manager or guardian, is not exempt from giving security if the Court requires him to do so. A testamentary guardian is exempt ; Deputy and Sub-Deputy Collectors are not exempt : Court of Wards, rule 114. On the manager passing his accounts he is entitled to get his security back.

⁸ See Act IX (B. C.) of 1879, sec. 46, *post*, p. 351. This is a matter for the Court of Wards to deal with, irrespective of the wishes of the late ward ; see Ward's Manual, 1909, p. 27.

⁹ It is not now, as under the old law (Act IV (B. C.) of 1870, sec. 36),

(h) be entitled to such allowance, to be paid out of the property, as the Court may think fit for his care and pains in the execution of his duties ;¹

(i) be responsible for any loss occasioned to the property by his wilful default or gross negligence.²

As to the duty of the manager to register his name under the Land Registration Act, see that Act (VII (B. C.) of 1876), sec. 42.³

On taking charge the manager should examine the annual accounts of rent collectors in order to ascertain what is recoverable.⁴

Duty of manager as to tenants, etc.

The duty of the manager is not only to realize rents. The general well-being of the raiyats, the investigation and record of their rights, the introduction among them of improved methods of cultivation, and the equalization of the assessment are as much a part of his duty as the collection of rents. He should extend clearances, introduce the cultivation of new staples, the adoption of a better system of agriculture, and the appliance of machinery in the numerous ways in which it can save labour.⁵

Occupancy rights.

Managers must not discourage the growth of legal occupancy rights, and where they have accrued must recognize them in the zemindari papers.⁶

Settlements of fair rents.

When a survey is being made and a record of rights being prepared,⁷ the manager should be instructed to apply for the settlement of fair rents ;⁸ where it is likely that the estate will remain under the Court's management for seven years or more ; and in other special cases where he may expect to obtain an enhancement.⁹

When the estate is under settlement the manager, or a competent officer on his behalf, should be present at the time of attestation ; and he should collaborate with the Settlement Officer and place before him all the papers and information available.¹⁰

Grant of leases.

If a raiyat wishes to take a pottah for a term of years, his request should always be complied with, but pottahs should not be forced upon unwilling raiyats. There should be as little interference as possible with existing general rates. Each raiyat should be required to give a *kabulyat*, but it need not be annually renewed.¹¹

necessary that in signing papers he should describe himself as manager, but it is always very desirable that he should do so.

¹ This allowance may be altered from time to time, and although the word "allowance" generally refers to an annual or a monthly allowance, the general powers of the Court (secs. 16 and 18, *ante*, pp. 329, 331) would permit special remuneration for special services. As to the travelling and halting allowances of managers, tutors, guardians, and other officers, see Court of Wards, rules 117 to 119A.

² *i.e.* suffer the same liability as an ordinary guardian, as to which see *ante*, chap. xix.

³ As to the registration of the name of a temporary manager, see Bengal Court of Wards, rule 87A.

⁴ Court of Wards, rule 84A.

⁵ *Ibid.*, rule 84. As to proceedings against defaulters, see *post*, pp. 339, 344.

⁶ *Ibid.*, rule 204.

⁷ Act VIII of 1885, chap. x, *ante*, p. 326.

⁸ *Ibid.*, sec. 104.

⁹ Court of Wards, rule 206

¹⁰ *Ibid.*, rule 209, which also see as to objections to draft records and appeals against decisions of Settlement Officers.

¹¹ Court of Wards, rule 194. The expenses of registration should be equally divided between the estate and the raiyat : *ibid.*

Arrears of rent, or other demands recoverable as rent, due to an estate under the management of the Court of Wards, whether such arrears became due before or after the management devolved upon the Court of Wards, can be recovered by the certificate procedure provided for the recovery of public demands.¹

Recovery of rent by certificate procedure.

Any amount of interest which has accrued due on arrears of rent or other demand recoverable as rent payable to the manager, may be recovered in any manner and by any process according to which such arrears may be recovered under any law for the time being in force, and any Court or officer who is competent to make an order or certificate in execution of which such arrears or other demand are recoverable, may direct that any costs incurred by the manager in obtaining such order or certificate, and in executing the same, shall be recovered in the same manner and by the same process as if the amount thereof had been included in the order or certificate.²

Recovery of interest on arrears of rent.

Commissioners and Collectors must positively satisfy themselves that each manager is and continues to be mentally and physically competent for his work ; that his office and books are in proper order ; that his system of management is careful and sound ; that the rent collections are promptly and regularly made and duly brought to credit ; and generally that the affairs of the ward are being honestly and efficiently managed.³

Supervision over manager.

All moneys received by the manager shall be applied to the purposes hereinafter mentioned in accordance with such instructions as the Court of Wards may from time to time give in that behalf.⁴ Unless the Board of Revenue shall specially otherwise direct, priority shall be given to the purposes in Class I over those included in Class II, and priority shall be given to the purposes included in Class II over those included in Class III.

Application of moneys received by manager.

¹ See Acts I (B. C.) of 1897, secs. 6, 7, 8 ; and I (B. C.) of 1895, secs. 7 (f) and (g), 8, 9, 14, and 27. Except where a survey has been made, and a record of rights prepared or the estate has been declared by a formal order of the Commissioner to be ripe for the application of the certificate procedure, the manager must not use that procedure. It cannot be applied to recover arrears accrued before the estate came under the management of the Court of Wards without the pre-

vious sanction of the Commissioner : Court of Wards, rule 197.

² Act III (B. C.) of 1881, sec. 10, amending Act IX (B. C.) of 1879, sec. 63.

³ Court of Wards, rule 82.

⁴ Act IX (B. C.) of 1879, sec. 48, as amended by Act III (B. C.) of 1881, sec. 5, and Act IV of 1892, sec. 9. As in the case of other acts of the manager, these payments are subject to the control of the Court : Act IX (B. C.) of 1879, sec. 20, *ante*, p. 335.

CLASS I.

The payment of all charges necessary for the maintenance,¹ education, and religious observances of the ward and his family, for the management and supervision of the property of the ward,² and the discharge of the instalments of Government revenue and of all cesses and other public demands from time to time due in respect of such property or any part of such property.³

CLASS II.

The payment of all rents, cesses, and other demands due to any superior landlords in respect of any land held on behalf of the ward, the liquidation of debts payable by the ward,⁴ the payment of all expenses which may be necessary to protect the interests of the ward in the Civil Courts or otherwise,⁵ the maintenance in an efficient condition of the estates, buildings, and other immovable property belonging to the ward, and the payment of such religious, charitable, and other allowances as were paid out of the proceeds of the property before it came under the charge of the Court, and such allowances and donations befitting the position of the ward's family as the Court may authorize to be paid.⁶

CLASS III.

The improvement of the land and property of the ward, and the benefit of the ward and his property generally.⁷

¹ See *ante*, chap. xxii. The Court of Wards is not necessarily limited to the amount provided in a will: Ward's Manual, 1909, p. 29.

² The manager can only pay the allowance sanctioned by the Court under sec. 22 (*post*, p. 348), or such other sums as may be allowed under sec. 16, *ante*, p. 329.

³ The manager must pay the income-tax: Act II of 1886, sec. 22, *ante*, p. 128.

⁴ This might include not only such debts as the ward could be sued for, but also such debts as would affect his property.

⁵ See Act IX (B. C.) of 1879, sec.

53, *post*, p. 438.

⁶ This includes donations and subscriptions to dispensaries and schools. The Court of Wards looks with favour on expenditure for the former purpose, and also approves of money being spent on real primary schools for the benefit of the poorer classes: Court of Wards, rule 177.

⁷ Court of Wards, rule 178 (4), enumerates the following as improvements:—

(a) Survey and records of rights:

(b) Gilandazi or other irrigation works, and sinking wells or digging and improving tanks for the improvement of agriculture:

The manager may spend on his own authority, after the budget estimate has been passed by the Court or the Commissioner,¹ and in cases where the allotments in the budget are not specially reserved by the sanctioning authority, items of expenditure, the details of which are given in the budget.²

If any surplus remains after providing, so far as the Court of Wards or the Commissioner, subject to the control of the Court in cases of particular difficulty, such as loans to other estates,³ may think fit for the objects for which the moneys received by a manager are to be applied,⁴ the same shall be applied⁵ in the purchase of other landed property, or invested at interest on the security of—

promissory notes, debentures, stock, and other securities of the Government of India, or of the United Kingdom of Great Britain and Ireland;⁶

(c) Embankments, if undertaken with the advice of experts.

(d) Model farms and experiments in farming for the benefit of the estate:

(e) Planting of mango topes or other valuable trees on *khas* lands:

(f) Construction and maintenance of branch or feeder roads and of communications which cannot reasonably be required from District Boards:

(g) Village sanitation, and the making, cleansing, and protection of tanks:

(h) Reclamation of waste lands:

(i) Establishment and improvement of *hâts* or markets:

(j) Advances to cultivators in the shape of either seed or cattle, or money to be expended on some permanent improvement, when given on the security of long leases, and conditional on the payment of enhanced rent:

(k) In the case of richer and more extensive estates, consideration may be given to large and comprehensive undertakings such as railways, tramways, or canals. In all these matters the benefit of the particular estate, and not that of the country generally, is to be considered. Before undertaking any improvements, managers must obtain sanction and should include them in their budget:

Court of Wards, rule 180. In submitting proposals for agricultural improvements, officers must consider and discuss how the cost is to be distributed between landlord and tenant: Court of Wards, rule 185. At least 3 per cent. of the rental in solvent wards' estates should be allotted to works of agricultural and sanitary improvements: *ibid.*, rule 180. The money cannot be spent upon works of public utility, which are of no benefit to the estate: Ward's Manual, 1909, p. 30.

¹ *Post*, p. 347.

² Court of Wards, rule 67.

³ *Ibid.*, rule 33.

⁴ *Ante*, p. 339.

⁵ Act IX (B. C.) of 1879, sec. 50; Act III (B. C.) of 1881, sec. 6.

⁶ Investments in Government Securities must be through the Comptroller-General who will correspond and be in account with the Accountant-General only, who, in his turn, will correspond and be in account with the Collectors or other officers in charge of wards' estates. The securities will stand in the name of the Comptroller-General and will be kept in his custody. He is entitled to a commission of one-eighth per cent. for the purchase, and of one quarter per cent. for drawing and remitting interest: Court of Wards, rule 179.

bonds, debentures, and annuities charged by the Imperial Parliament on the revenues of India ;

stock or debentures of, or shares in, railway, or other companies, the interest whereon has been guaranteed by the Secretary of State for India in Council ;

debentures or other securities for money paid by, or on behalf of, any municipal body under the authority of any Act of a legislature established in British India ;¹

or such other securities, stocks, or shares, guaranteed by the Government of India or the Government of Bengal as to the Court of Wards shall seem fit ;

or mortgages on immovable property.²

The Advocate-General gave his opinion that under this section as amended by Act II (B. C.) of 1909, the powers of the Court of Wards were almost identical with those of trustees in general (*vide* sec. 20 of Indian Trusts Act II of 1882, *ante*, p. 170, note 10) ; that trustees are not generally encouraged to change a first-class security for another which might yield a better interest, and was an authorized investment, but less safe than the former one ; and that Courts of Equity do not encourage an investment by which the security of Government is changed for the less reliable security of private property ; also that a trustee should never advance more than two-thirds of the value of the estate upon which the advance was made ; and that it is not reasonable or prudent to lend on a mortgage for a long term repayable by instalments.³

Purchase of
tenant rights.

Managers may purchase tenant rights or other movable or immovable property in execution sales, provided that the expenditure can be met from the provision of the budget estimate passed by the Court or by the Commissioner, and sell the same at their discretion.

The Court of Wards has expressed its preference⁴ for the investment in—

(a) purchase of patni tenures settled at an unduly low rent, intercalated holdings of outsiders, and neighbouring villages to get a better boundary line ;

(b) purchase of patni, darpatni, or other mokarrari rights, subordinate to the estates, or tenures of the ward ;

(c) release of estates or tenures belonging to the ward which have been leased in usufructuary mortgages ;

(d) purchase of house property in Calcutta or other places, where it may be anticipated that houses will let for an adequate rent ;

Purchase of
landed
property.

¹ This would include a District Board : Ward's Manual, 1909, p. 30. Provincial, municipal, and railway debentures are to be forwarded to the Accountant-General. Provincial debentures will be endorsed and passed on to the Comptroller-General, municipal and railway debentures will remain with the Accountant-General,

who will himself draw the interest and forward it, less commission, to the Collector or officer in charge : Court of Wards, rule 179.

² Acts II (B. C.) of 1909, sec. 2.

³ Court of Wards Manual, 1909, p. 30 ; Board's file 20 of 1909.

⁴ Court of Wards, rule 178.

(e) building houses in Sadar stations or other places on land already belonging to the ward, where the houses are likely to let at an adequate rent ;
 (f) purchasing building sites, and building houses thereon.

The soundness of the investment must be carefully ascertained by the manager before applying for sanction. With his application he must submit a statement showing as far as possible (a) the net profits of the property calculated in accordance with the method laid down in Column 7, Table V, of the form of Return No. XXXI of Appendix J of the Rules (which see) ; (b) the liabilities to which it is subject ; and (c) other particulars affecting its value, including approximately the rate of interest the investment is expected to yield.

In the case of patni, certificate, and other sales, this detailed inquiry will usually not be possible, and Collectors must decide to the best of their ability on the facts before them whether to buy or not ; but even in such cases all possible inquiries must be made in order to guard against the risk of making a bad investment.

When the purchase of any interest in land at an auction is recommended for the approval of the Court of Wards, the limit up to which it is proposed to bid should be indicated demi-officially, care being taken that the amount is not known to possible competitors. It should be borne in mind that if secrecy is not observed, the price may be forced up to the amount which the Collector is prepared to offer.¹

Receipts and disbursements should, whenever possible, be made through the Government Treasury, but a manager cannot refuse to receive cash tendered by persons having payments to make.² In order to make the receipt valid as to details, a person paying money through the Government Treasury should get the chalan initialled in the manager's office.³

To meet ordinary and contingent charges a permanent advance will be sanctioned by the Commissioner for each estate. The Commissioner must settle in each case the character of the charges to be met from such advance, and the amount of the advance.⁴ The manager must keep in his office a register of all sums spent from his permanent advance.⁵

When the manager's head-quarters are at a Sadar station, or at a sub-division, disbursements (not from the permanent advance) are to be made from the treasury by cheques signed by the manager except where a landlord objects to receive a cheque.⁶

On the 31st of March of each year the manager must certify the amount of his cash balance detailing his outstanding cheques.⁷

On the first of each month, or as soon after as possible, the manager will submit his establishment bill to the Collector for audit, and no money shall be drawn or disbursed on account of pay of establishment until this bill be passed ; but in cases in which the manager is well qualified and can be thoroughly relied on, the Collector may refrain from exercising the check which the preaudit of the bill gives.⁸

¹ Court of Wards, rule 178.

² *Ibid.*, rule 162 ; see also rules 163 and 164.

³ *Ibid.*, rule 164.

⁴ *Ibid.*, rule 165.

⁵ *Ibid.*, rule 166.

⁶ *Ibid.*, rule 167. Vouchers and

orders to pay must be endorsed as cancelled as soon as the cheque discharging them is filled up, and before it is signed : *ibid.*

⁷ *Ibid.*, rule 168.

⁸ *Ibid.*, rule 169.

Exemption of certain managers.	The above rules ¹ as to payment of receipts and disbursements, permanent advance, payment, certificate of cash balance, and establishment bill are only strictly applicable when the manager's office is at a Sadar station, or at the head-quarters of a sub-division, and Commissioners are authorized to exempt all large estates with managers whose status is equal to that of a Deputy Collector from compliance with them. ²
Separate treasury.	When the ward's estate has a separate treasury, the Collector must inspect it thoroughly once in each half-year and report the result of his inspection to the Commissioner, who must bring to the notice of the Court any irregularities. The Commissioner must inspect it once a year, and report to the Court when necessary. ³
Monthly return of collections in arrear.	For every estate in which the collections are in considerable arrear, the manager must submit a monthly return of collections and outstandings. Collectors must satisfy themselves personally that care is being taken to realize the dues of the estate, and to manage it efficiently. ⁴
Half-yearly return by manager to Collector.	A return is to be submitted in duplicate by the manager to the Collector on or before the 10th of October for the preceding half-year from April to September. No separate return is required for the period October to March. Both in this return and in the monthly return the explanations of arrears which have been outstanding for some time should be directed to showing what has been done by the manager <i>during the period to which the statement relates for the realization of the arrears.</i> ⁵ A statement of additions and reductions of rent sanctioned by the Commissioner with a brief explanation should accompany the half-yearly and yearly returns. ⁶
Return by Collector to Commissioner.	The Collector on receipt of the return shall forward one copy to the Commissioner, so as to reach him by the 20th of October as above. The return will be examined and reviewed in the Commissioner's office, but will not be forwarded to the Board unless specially called for. ⁷
Compulsory proceedings against tenants in arrear.	On each return the Collector should carefully consider whether the reasons given for not having taken compulsory proceedings against any tenants who are in arrears are sufficient. Substantial reasons should always be required for deferring such proceedings beyond the third quarter of the year against such raiyats as have not paid up any portion of the rent of the year. ⁸
Annual return by manager to Collector.	On or before the 1st May in each year, or if the time is specially extended by the Commissioner, not later than the 1st June, the manager must submit

¹ Courts of Wards, rules 162-169.

² *Ibid.*, rule 170.

³ *Ibid.*, rule 172.

⁴ *Ibid.*, rule 142, which see as to the form of return.

⁵ *Ibid.*, rule 143. This return shows the rent and cesses due in the previous and current year collected in this and previous quarters, and also the remissions sanctioned and the gross annual rental; see Return XXI, App. I to Court of Wards Rules.

⁶ Court of Wards, rule 196.

⁷ *Ibid.*, rule 144.

⁸ *Ibid.*, rule 145. Action under Ben. Reg. VIII of 1819 should in-

variably be taken on the first opportunity against patnidars who are in arrears, unless the Collector's express sanction to withhold such proceedings is obtained, and interest at the full rate allowed by law must be exacted from all such tenants, and in general from all middlemen on all rents not paid according to stipulated instalments. It is not considered expedient to adopt even in the case of cultivating raiyats any measures which may destroy the right to interest or render its exercise more difficult. *Ibid.*, rule 88.

to the Collector an annual return in triplicate for the property of each separate proprietor or body of proprietors.¹

The Collector is, after due examination of the return in his office, to record his resolution on it in two parts. Part I will contain his remarks on the details of the return, and will be forwarded to the manager for his information and guidance. Part II will comprise his remarks on the copies of the return containing the total figures, and is to be forwarded with the return in duplicate to the Commissioner, so as to reach his office on the 10th June. The Commissioner in his turn will similarly examine and review the return. If the demand exceeds a lakh, the Commissioner will forward with his and the Collector's remarks, one copy of the return to the Board, so as to reach their office on the 1st July.²

Resolution of
Collector.

With the return the manager must submit an annual report on the management of each property in the form of a connected narrative.³

Annual report
by manager.

The manager's report should contain information on the following points:—⁴

(a) For each property it should be shown at what date, under what circumstances, and under what provision of law it came under Government care, with the names and ages of the wards.

(b) The situation and area (if possible) of each item of landed property should be stated, and a brief account given of the natural features and products.

(c) The character of the estate and tenures making up the property should be explained, and it should be shown how much is held direct from Government, how much under perpetual leases (as *patnis* or the like), how much under temporary lease, how much as rent-free holding.

(d) The nature and *personnel* of the managing agency should then be stated, and its efficiency or the reverse noticed.

(e) The general features of the management should be described, and it should be shown what portion of the property is let in perpetual lease, what portion in temporary lease, and what portion is managed *khas*.

(f) The financial results should for the sake of completeness be briefly summarized, and the position of the property in regard to liabilities be noticed.

(g) Any improvements in the landed property made by the management should then be noticed. In this connection anything done for the encouragement of education or in the way of establishing dispensaries should not be forgotten.

(h) The condition of the tenantry, and the relations between landlord and tenant, as illustrated by the management, should then be fully discussed,

¹ Court of Wards, rule 146. As to the form and contents of the return, see Form XXXI (Appendix J); and Test Table (Appendix K); Courts of Wards, rule 146. In the return a "Suspense Account" should be avoided, if possible; see Court of Wards, rule 161. No transaction relating to the permanent advance should appear except the original debit and the credit for actual repayment: Court of Wards, rule 165.

² Court of Wards, rule 149.

³ *Ibid.*, rule 125.

⁴ *Ibid.*, rule 126. In the first report the information should be given in full; but in subsequent reports it is sufficient to refer specifically to such paragraphs of the first or any previous report relating to each of the points as are still applicable, and to describe only such changes and other events as have taken place during the year under report. In some cases no information may be available on some of these heads. In others there may be materials for other topics: *Ibid.*

(i) Any extension of cultivation, any improvements of agriculture, the introduction of new crops, or change in the proportions of old staples cultivated should not be overlooked.

(j) Finally the arrangements made for the support, care, and education of the wards should be stated, and their well-being or otherwise, physical, intellectual, and moral, briefly noticed.

Collector's
and Commis-
sioner's
reports.

Each Collector and Commissioner is to submit an annual report on the estates in his district and division respectively. The Collector's report will be due in the Commissioner's office on the 10th June, and the Commissioner's report will be due in the Board's office on the 1st July.¹

Conciseness.

The reports must contain the greatest amount of information in the fewest words possible. No unnecessary contentious matter is to be introduced. An intelligent review of the main facts and occurrences of the year is required. Extracts from the reports of subordinates are to be summarized, not strung together. Definite proposals should form the subject of separate communications.²

Range.

The subjects should be separately noticed, but only so far as illustrated by the figures of the year. Where all that has to be said has already been mentioned in recent reports, such reports should be expressly referred to.³

Order of
subjects.

The following order of subjects is to be observed:—⁴

1. Preliminary.⁵

PART I.—*General Review of Management*—

2. Number of estates under management. 3. Revenue and cesses due to Government. 4. Rent and cesses due to superior landlords. 5. Collections of rent and cesses due to estates. 6. Balances of rent and cesses due to estates. 7. Debts of estates. 8. Management charges. 9. Rates. 10. Audit of accounts by the Examiner of Local Accounts. 11. Schools, dispensaries, works of improvement, etc. 12. Agricultural improvements or experiments. 13. Surveys and records of rights. 14. Operation of the certificate procedure. 15. Civil suits. 16. Tours of managers. 17. Condition of tenantry. 18. Education of wards.⁶ 19. Working of the laws. 20. Merits of officers.⁷

PART II.—*Special notices of Estates taken in charge or released during the year.*⁸

¹ Court of Wards Rules, rule 127. As to the necessity for punctuality, see rules 128, 129.

² *Ibid.*, rule 131.

³ *Ibid.*, rule 132.

⁴ *Ibid.*, rule 134. Each subject is to be commenced on the top of the first or third page of a sheet of paper: rule 133.

⁵ The Collector's reports should begin by giving a memorandum of the date of receipt of the manager's returns and reports. The Commissioner's report should begin with a memorandum of the date of receipt of the returns and reports from the Collectors. Any other preliminary matters should then be briefly disposed of: Court of Wards, rule 136.

⁶ The personal education and pro-

gress of each male minor should be reviewed. The report should show under whose care each ward is placed, the arrangements made for his education, when and by whom his progress and acquirements were last tested, and with what result; and how his acquirements stand as compared with the average of boys of his age who are educated at Zillah Schools: Court of Wards, rule 138.

⁷ The qualifications and conduct of managers and of assistant managers on a monthly salary of Rs. 100 and above, and the control exercised by Collectors over the management of estates should be recorded in the prescribed form: Court of Wards, rule 139.

⁸ The estates in this Part should

PART III.—*Special notices of Encumbered Estates in the Chota Nagpur Division.*

The Appendices contain an account of the income and disbursements of the estate, the classification of the balances, the operation of the certificate procedure, and civil suits instituted.¹

On or before the 15th January, the manager must send to the Collector in triplicate the budget estimate for the succeeding financial year. The Collector must send two of the copies to the Commissioner not later than the 1st February.²

Entries in excess of the amount sanctioned must be briefly explained. The Commissioner will then, in the case of estates with a current rent and cess demand not exceeding a lakh of rupees, either sanction the disbursement or call for such further details as may be required before sanctioning. In the case of all other estates he will forward, for sanction, one copy of the budget to the Court not later than the 1st March.³

The Collector is required to submit to the Board for approval by the first week in March programmes of improvements for execution during the next five years, or any lesser period during which the estates are likely to remain under the Court of Wards. They are to be classified under the following heads:—

- (a) Construction and repairs of cutcherry buildings, etc.
- (b) Maintenance in efficient condition of estates, buildings, and other immovable property; and
- (c) Improvement of land and property and benefit of ward.
 - (i) Agricultural.
 - (ii) Sanitary.
 - (iii) Miscellaneous.⁴

Disbursements may be made in accordance with the Collector's scheme if it has been sanctioned. With the exception of the Legal Remembrancer's fees, which may be paid on his bill, and of debts, which may be paid without sanction, all other items of expenditure under heads which are not covered by the scheme but are included in the budget, with the exception of those specially reserved by the authority sanctioning the budget, may, after the budget has been passed, be incurred.⁵

In the case of estates with a current rent and cess demand of over a lakh of rupees, the Commissioner may also sanction expenditure not in the budget, not exceeding Rs. 1500 on any one item, provided it can be met from general savings in the budget.⁷ In all other estates Commissioners can sanction such expenditure without any restriction.⁸ Collectors may in all estates under similar conditions sanction up to Rs. 500, the action to be at once reported to the Commissioner.⁹

In Bihar and Orissa in estates with a current rent and cess demand

be arranged entirely according to the gross rental. This Part should give an account of all estates of which charge has been taken or given up during the year: Court of Wards, rule 140.

¹ For form, see Court of Wards, rules 135 to 141.

² Court of Wards, rule 151.

³ *Ibid.*, rule 152. For form, see

Appendix K to Rules. For particulars to be inserted in the budget, see rules 153 to 155.

⁴ *Ibid.*, rule 181.

⁵ *Ante*, p. 326.

⁶ Court of Wards, rule 155.

⁷ *Ibid.*, rule 156.

⁸ *Ibid.*, rule 156.

⁹ *Ibid.*, rule 156A.

exceeding one lakh of rupees an improvement exceeding Rs. 7500 in amount cannot be commenced without the sanction of the Board. The sanction of the Commissioner is required in cases of over Rs. 2500. The Collector can sanction lesser sums, and the manager can expend up to Rs. 500 without sanction.¹

Managers may entertain temporary establishments at a cost not exceeding Rs. 25 a month for three months for the collection of rents, for the management of stables, philkhana, etc., to guard the utensils and ornaments of idols on the occasion of religious ceremonies, and to watch the proprietors' houses; such establishments to be retained and expenses incurred irrespective of the provisions made in the budget estimate, provided the expenditure can be met from the general savings in the budget.²

Monthly
accounts.

Every manager, whose office is not at or close to the head-quarters of the district, shall submit by the 15th of each month a monthly account current of cash transactions, with vouchers of his receipts and disbursements and abstracts of receipts, disbursements, and cash balances to the managing Collector.³

Audit.

The Collector, or with his sanction any Deputy Collector, shall audit these accounts and especially satisfy himself—

(a) that the expenditure is properly vouched for, and that it has been incurred under proper sanction and is free from objection:

(b) that the opening balance and closing balance are correctly shown and tally with those shown in the personal ledgers in the treasury, all discrepancies being reconciled before the accounts and abstracts are passed:

(c) that more money than is necessary is not left in the hands of the manager:

(d) that the manager has applied the funds in the manner directed by secs. 48 and 50 of the Act.⁴

The Commissioner may assign the duty of auditing the accounts of managers to any other person than the Collector or a Deputy Collector, but this discretion should be exercised sparingly.⁵

Appointment
of guardians.

The only rules which control the appointment of guardians are as follows:—

No person to
be guardian
who can
succeed a
ward.

(1) No person (other than the mother of a ward or a testamentary guardian) who would be the next legal heir of a ward, or would otherwise be immediately interested in outliving a ward,⁶ can be appointed to be his guardian.⁷

¹ Court of Wards, rule 183, as amended May 31, 1915.

² *Ibid.*, rule 100.

³ *Ibid.*, rule 157.

⁴ *Ante*, pp. 339 to 341. Court of Wards, rule 158. When the manager's office is at or close to the head-quarters of the district, the audit must be carried out within the first half of each month in the office of the manager by examination of the books in actual use. The audit must in all cases be full, and a quarterly statement shall be submitted by the

Collector to the Commissioner, showing for each estate the date of the audit in each month of the previous quarter and the result. This statement shall include all estates, and not merely those whose accounts are professionally audited: *ibid.*

⁵ Court of Wards, rule 159.

⁶ For instance, a person who is entitled in reversion on the death of the ward, or is possessed of an insurance on the life of the ward.

⁷ Act IX (B. C.) of 1879, sec. 44. This would even exclude the father

(2) A female of the same religion shall, except in the case of a testamentary guardian, be appointed guardian of a female ward, preference being given to female relatives¹ if any such be eligible; but no guardian shall ordinarily be appointed or continued for a female ward if she has an adult husband.²

Guardian of female ward.

The Court of Wards may³ make such orders as to it may seem fit in respect of the custody, education,⁴ and residence of a minor ward,⁵ and such minor members of the ward's family as are under its charge.

Custody, education and residence of wards.

Wards of different families should not be placed under the same roof and the same guardian without the special sanction of the Board of Revenue.⁶

Wards should be sent to the best school in their own or some neighbouring district. The Board should arrange, in communication with the Director of Public Instruction and Collectors, the course best to follow in each case, looking to the age and present proficiency of each ward.⁷

School.

Between the ages of 18 and 21 the ward should be initiated into the system of management of his estate. Whenever a ward attains the age of 18, the Collector must report to the Commissioner the steps which he proposes to take gradually to teach the ward the business of the estate.⁸

Initiation into zemindari management.

The Court of Wards must allow,⁹ for the support¹⁰ of each ward and of his family,¹¹ such monthly sum as it thinks fit (if any) with regard to the rank and circumstances of the parties.¹²

Allowance for ward and his family.

in the case of the son possessing separate property; see Court of Ward's Manual, 1909, p. 28.

¹ Not necessarily in order of propinquity.

² Act IX (B. C.) of 1879, sec. 45; see *ante*, pp. 52, 57, 88.

³ Act IX (B. C.) of 1879, sec. 21.

⁴ As to the duties of a guardian with reference to the religious and secular education of his ward, see *ante*, pp. 225, 226. As to the duty of the Collector, see rule 212; *ante*, p. 326.

⁵ The Court is not obliged to appoint a guardian, but may make other arrangements for the ward's custody, education, or residence, such as by sending him to a school or college.

⁶ Court of Wards, rule 213.

⁷ *Ibid.*

⁸ *Ibid.*, rule 215.

⁹ Act IX (B. C.) of 1879, sec. 22.

¹⁰ "Support" would include education, residence, servants, and other expenses, such as of journeys, amusements, carriages and horses, etc.,

which may be suitable to the ward's position in life, and may be justified by his income. Apart from the monthly allowance, the Court would, under sec. 16 (*ante*, p. 329), be able to provide for suitable expenditure.

¹¹ For the purposes of this section "family" would apparently include not only the wife and children of the ward, but such relations as the ward would, if an adult, be either legally or morally required according to the usages of his religion, race, or family to support.

¹² Where the Court has not taken charge of the person of the ward (*ante*, p. 316), the allowance should be paid to the legal guardian of the ward's person, but where it has charge of such person, the allowance should be paid to the guardian appointed by the Court, or, where there is no such guardian, to such other person as to the Court may seem fit. The Act does not contemplate the guardian of the ward, as such, having any-

Marriage of ward.

No marriage of a ward should be authorized, and no steps or negotiations preliminary to marriage be recognized, without the previous sanction and approval of the Court, or of the Commissioner in respect of estates with a current rent and cess demand not exceeding a lakh of rupees.¹

General duty of guardian.

Subject to the control of the Court of Wards,² the guardian (if any) appointed to the care of a ward is charged with the custody of the ward, and must look to his maintenance, health, and education.³

Specific duties of guardian.

Every guardian appointed by the Court of Wards must⁴—

- (a) give such security⁵ (if any⁶) as the Court thinks fit to the Collector for the due performance of his duty ;
- (b) pass his accounts at such periods and in such form as the Court may direct ;
- (c) pay the balance due from him thereon ;
- (d) continue liable to account to the Court, after he has ceased to be guardian for his receipts, and disbursements during the period of his guardianship ;

thing to do with the ward's family in the absence of a special order ; but if any money be paid to him for the support of such family, he would be accountable therefor in the same way as for other moneys received by him as such guardian. In fixing the amount of maintenance, the Court is not obliged to consider the fact that a ward has a parent able to support him ; but it would probably be guided to a great extent by the rules followed by Civil Courts, *ante*, pp. 216 to 221.

¹ Court of Wards, rule 266. Collectors should intimate to the guardians and relatives of wards that at least three months' notice must be given of their wish to celebrate any marriage, otherwise they will run the risk of the Court or the Commissioner refusing to authorize payment of the expenses of the marriage out of the ward's funds. An estimate of the proposed expenditure must be submitted with the notice for the sanction of the Court or the Commissioner, as the case may be : *ibid.* This is the only control which the Court can exercise over the marriage of its wards. It might remove a guardian

who acted improperly with regard to the marriage : *ibid.* As to the marriage of minors, see *ante*, chap. xxiii.

² Act IX (B. C.) of 1879, sec. 20.

³ *Ibid.*, sec. 42. Under Act IV (B. C.) of 1870, sec. 61, the Collector in charge of a ward had, in the absence of a guardian, a right to the custody of the ward's person. Under the present law the Collector can provide for the temporary custody of a minor proprietor (Act IX (B. C.) of 1879, sec. 30, *ante*, p. 324), and as representing the Court, the Collector can, under sec. 7 (*ante*, p. 315), take charge of a ward's person and of the persons of such of his family as have come under the charge of the Court.

⁴ Act IX (B. C.) of 1879, sec. 43.

⁵ In cash or promissory notes, and not in houses or landed property : Court of Wards, rule 114.

⁶ The Collector may dispense with the security. Testamentary guardians are exempt from giving security ; Deputy and Sub-Deputy Collectors are not exempt : Court of Wards, rule 114.

(e) apply for the sanction of the Court to any act which may involve expense not previously sanctioned by the Court ;

(f) be entitled to such allowance, to be paid out of the property of the ward, as the Court may think fit, for his care and pains in the execution of his duties.¹

Every sum due to the Court of Wards from a manager or guardian, or from the sureties of a manager or guardian, or from any officer or servant employed under the Court of Wards, or from the sureties of any such officer or servant, is recoverable as a demand under Bengal Act VII of 1868, or any similar law for the time being in force.²

Sums due recoverable as demands.

The Court of Wards or the Collector³ may order any past or present manager or guardian, or past or present officer subordinate to a manager or guardian, to deliver up his accounts or any property which may be in his possession within such time as may be fixed by them.⁴

Court may order guardian or manager to make over property.

Any person who refuses to comply with such order may be punished by order of the Court of Wards, or of the Collector,⁵ with simple imprisonment and attachment of his property until the order is complied with. Provided that the Collector may release any person who has been so imprisoned on his furnishing sufficient security for his attendance, and for the delivery of the accounts or property required within such time as the Collector shall think fit. The Collector may at any time rescind such order of release, and direct that effect shall be given to the previous order of imprisonment.⁶

Penalty for disobeying order.

¹ *Ante*, p. 338, note 1. This allowance need not be paid out of the sum allowed for the support of the ward. The Court can make such arrangement for the payment as it thinks fit.

² Act IX (B. C.) of 1879, sec. 46 ; see Acts II (B. C.) of 1871, VII (B. C.) of 1880 ; Act III (B. C.) of 1913, repealing Act I (B. C.) of 1895, and Act I (B. C.) of 1897. In addition, there are remedies by suit ; see *ante*, p. 304.

³ Court of Wards, rule 56.

⁴ Act IX (B. C.) of 1879, sec. 47. This order may be made at any time.

⁵ Court of Wards, rule 60.

⁶ Act IX (B. C.) of 1879, sec. 58, as amended by Act III (B. C.) of 1881, sec. 8. The Court or Collector when imposing a penalty must make a formal record of the same, with the reasons or grounds thereof : Act IX (B. C.) of 1879, sec. 64. A recusant manager, in addition to the above penalty, is liable to fine : Act IX (B. C.) of 1879, sec. 59, *ante*, p. 328. The release of the estate from the control of the Court does not put an end to the order for imprisonment : Wards Manual, 1909, p. 32.

CHAPTER XXXIII.

THE COURT OF WARDS IN BENGAL, AND IN BIHAR AND ORISSA—Miscellaneous.

Protection from sale for arrears of Government revenue.

THE Court of Wards Act¹ protects estates which are the sole property of a minor or minors² from sale for arrears of Government revenue under certain circumstances.

The portions of the Act which deal with this subject are as follows :—

Estate under charge of Court exempt from sale.

“Section 23,³ cl. 1.—Except as hereinafter provided by sec. 23A, every estate, and subject to the provisions of sec. 14 of Act XI of 1859,⁴ every share or part of an estate for which a separate account has been opened under sec. 10 or sec. 11 of the said Act, or under sec. 70 of Bengal Act VII of 1876,⁵ (and in cases which would have been subject to the Court of Wards of Eastern Bengal and Assam, subject to the provisions of sec. 70, sub-section (2) of the Assam Land and Revenue Regulation, 1886 (I of 1886), every share or part of an estate for which a separate account has been opened under sec. 65 of the said Regulation)⁶ shall be exempt from sale for arrears of Government

¹ Act IX (B. C.) of 1879, as amended by Act III (B. C.) of 1881, sec. 4.

² Where the minor has only a share in a joint undivided estate, and no separate account thereof has been opened under sec. 10 or sec. 11 of Act IX of 1859, or under sec. 70 of Act VII (B. C.) of 1876, his share is not exempt from sale, and, where the estate has come to the minor otherwise than by the regular course of inheritance or by virtue of the will or of some settlement made by some deceased owner thereof, the estate is only exempt from sale for arrears which have accrued while the estate has been under charge of the Court :

Act IX (B. C.) of 1879, secs. 23 and 24. As to arrears of revenue due by estates of wards, see Court of Wards rules, chap. xii.

³ As amended by Act III (B. C.) of 1881, sec. 4. Cf. Act I (M. C.) of 1902, sec. 65, *post*, p. 388.

⁴ *i.e.* if the arrears cannot be otherwise realized, the entire estate may be sold.

⁵ This exemption only applies to arrears which accrue after separation ; see Court of Wards, rule 218.

⁶ Act III (E. B. & A.) of 1907, sec. 6 : see the Assam Land and Revenue Regulation, 1886 (I of 1886), sec. 70 (5), as to the exemption of property from sale for arrears of land revenue.

revenue which have accrued whilst such estate, share or part has been under charge of the Court :

“ Provided that all such arrears of revenue shall be the first charge upon the sale-proceeds of any estate, share or part which may be sold for any other cause than for such arrears of revenue. Arrears first charge.

“ *Cl. 2.*—If at the time when such estate, share or part ceases to be under the charge of the Court of Wards, an arrear of revenue is due on account thereof, the Collector may attach such estate, share or part and collect the rent, cesses and other demands due, and all arrears thereof, managing such estate, share or part either directly or through a manager, or by farming it for a period not exceeding five years, as he may think fit : Recovery of arrears of revenue due at time when estate ceases to be under charge of Court.

“ Provided that when such estate, share or part has been attached under the provisions of this clause, the proceeds shall be paid to the Collector, and the Collector after deducting the claims of Government for revenue and other public demands, together with any interest which has accrued upon such public demands other than Government revenue, and the charges of management, due up to the date of making such deduction, shall release such estate, share or part from attachment and pay any balance of the proceeds still remaining in his hands to the proprietor of such estate, share or part or to his duly constituted agent,¹ and shall furnish such proprietor or agent with an account of the receipts and expenditure extending over the time when such estate, share or part was under attachment.

“ *Section 23A.*—Notwithstanding anything in cl. 5, sec. 8, Reg. I of 1793, or in sec. 23 of this Act contained, any estate, share or part of an estate on which an arrear of revenue has accrued while under the charge of the Court, may at any time be sold under the provisions of the law for the time being in force for the recovery of arrears of Government revenue, if Conditions under which estate may be sold for arrear of revenue accrued under Court.

¹ Where the proprietor is a minor and the Court of Wards has under sec. 9 (*ante*, p. 316) withdrawn from the charge during the minority of the proprietor, it does not appear from the Act to whom the balance is to be paid. A guardian is not in

strictness a constituted agent, but it would probably be held that payment to the legal guardian of the minor's property, whether natural, testamentary, or appointed, would be sufficient to satisfy the requirements of this section.

the Court [or Commissioner]¹ has certified in writing that the interests of the ward require that such estate, share or part be so sold, and has stated in writing the reasons upon which it has arrived at such conclusion.²

Estate belonging to minor not to be sold for arrears of revenue.

“Section 24.—No estate the sole property of a minor or of two or more minors, and descended to him or them by the regular course of inheritance, or by virtue of the will of, or some settlement made by, some deceased owner thereof, shall be sold for arrears of revenue accruing subsequently to his or their succession to the same, until such minor or one of such minors has completed his age of twenty-one years, but all arrears of revenue shall be the first charge upon the proceeds of such estate if the estate is sold for any other cause during such minority.

But Collector may attach estate.

“The Collector may, on an arrear so accruing on any such estate, attach the estate and collect the rents and all arrears of rent due, managing the estate either directly or through a manager or by farming it, as he may think fit, for a period not exceeding ten years, nor extending beyond the time when such minor or one of such minors completes his age of twenty-one years.³

When exemption from sale for arrears of revenue applies.

“Section 25.—The exemption from sale for arrears of revenue given by section 24 shall only apply to cases in which a written notice of the fact that the estate is the sole property of one or more minors, and entitled to such exemption, has been served on the Collector before the sale.”

Application of proceeds of farmed estate.

When an estate has been farmed under the provisions of section 24, the proceeds of such farm shall be paid to the Collector, and the Collector, after deducting the amount of the claims of the Government for revenue and other public demands, shall either pay the proceeds to the person authorized to receive them for the proprietor, or if the proprietor is still a minor, shall invest them in the way provided for the investment of the surplus income of the estates of minor wards of the Court of Wards.⁴

Penalty for neglecting to furnish accounts, etc.

Any farmer holding or having held lands under the Court of

¹ Court of Wards, rule 25.

² Provided the reasons are stated in writing, the purchaser would not be bound to consider whether they are sufficient, or to inquire into the facts upon which such reasons are

based. See cases *ante*, p. 145, note 5.

³ This applies to estates not brought under the superintendence of the Court. See *ante*, p. 352, note 2.

⁴ Act IX (B. C.) of 1879, sec. 26. See sec. 50, *ante*, pp. 341, 342.

Wards, who, upon notice served upon him to that effect at any time during the currency of the lease or within six months after the expiry of the lease under which such lands were held, or after he has relinquished such lands, omits or refuses to furnish accounts or produce documents or papers required under such notice, and shall not show sufficient cause for such omission or refusal, shall be liable to such fine as the Collector may think fit to impose, not exceeding one hundred rupees, for such omission, and the Collector may impose such further daily fine¹ as he may think proper, not exceeding twenty rupees for each day during which such farmer shall omit to furnish the accounts, documents, or papers required after a date to be fixed by the Collector in a notice warning the farmer that such further daily fine will be imposed.

Such notice shall be served by tendering to the person to whom it may be directed a copy thereof, attested by the Collector, or by delivering such copy at the usual place of abode of such person or to some adult male member of his family; or in case it cannot be so served, by posting such copy upon some conspicuous part of the usual or last-known place of abode of such person, and in case such notice cannot be served in any of such ways it shall be served in such a way as the Collector issuing the notice may direct, and the date fixed by such notice shall not be less than fifteen days after service thereof.

The Collector may proceed from time to time to levy any amount which has become due in respect of such fine, notwithstanding that an appeal against the order imposing such fine may be pending. Provided that whenever the amount levied under such order shall have exceeded five hundred rupees, the Collector shall report the case specially to the Commissioner of the Division, and no further levy in respect of such fine shall be made otherwise than by the authority of the Commissioner.²

There is nothing to prevent property under the superintendence of the Court of Wards being attached by orders of a Civil Court.³

¹ See *ante*, p. 84, note 4.

² Act III (B. C.) of 1881, sec. 9. The fine is to be levied in accordance with the Criminal Procedure Code

(Act V of 1898, secs. 386, 387, 389); see Act V (B. C.) of 1867, sec. 4. See *ante*, p. 323, note 6.

³ By Act IV of 1892, sec. 13, a

Under the old law ¹ the payment of the charges of management, and of Government revenue, had priority over an attachment by a Civil Court. Under the present law ² Government revenue alone forms a charge, and no priority is given to undeducted charges of management.

Disabilities of ward.

A ward of the Court of Wards cannot create without the sanction of the Court,³ any charge upon, or interest in his property, or any part thereof,⁴ or assign over or charge any allowance received by him from the Court.⁵

Exemption of ward's property from execution proceedings.

No property which is or has been under the charge of the Court is liable at any time, except with the leave of the Court, to be taken in execution of a decree made in respect of any contract entered into by the ward without the leave of the Court while his property was under such charge.⁶

To this was added ⁷ for Eastern Bengal and Assam : " For the purposes of Part VII ⁸ and secs. 60 and 60A, a person whose property is under the charge of the Court of Wards by virtue of the second clause of sec. 11,⁹ a charge of whose property has been retained under sec. 13A,¹⁰ shall be deemed to be a ' ward,' but only as regards such property." These provisions are in the main, if not entirely, intended to meet the cases of wards other than minors, as in addition to the disabilities contained in the Court of Wards Act, 1879, minor wards of the Court of Wards are subject to the same disabilities as other minors.

Adoption by ward invalid without consent of Lieutenant-Governor.

No adoption by any ward, and no written or verbal permission to adopt given by any ward, is valid without the consent of the Lieutenant-Governor, obtained either previously or subsequently to such adoption, or to the giving of such permission, on application made to him through the Court.¹¹

ward's property which has been under the charge of the Court of Wards cannot, except with the leave of that Court, be taken in execution of a decree made in respect of any contract entered into by the ward without the leave of the Court, while his property was under such charge. This provision was probably intended to meet the case of contracts by adult wards only. See *ante*, p. 13.

¹ Act IV (B. C.) of 1870, sec. 47.

² Act IX (B. C.) of 1879, secs. 23 and 24, *ante*, pp. 352-354.

³ This power has been given to the Commissioner: Court of Wards, rule 37.

⁴ Act IX (B. C.) of 1879, sec. 60. See *Dhunput Singh v. Shoobhudra*

Kumari (1882), 8 Calc., 620; s.c., *Dhunput Singh v. Court of Wards*, 11 C. L. R., 285; *Balkrishna (Rai) v. Masuma Bibi (Mussumat)* (1882), 9 I. A., 182; 5 All., 142; *Mohummud Zahoor Ali Khan v. Rutta Koer (Mussumat Thakooranee)*, 11 M. I. A., 468; *Collector of Benares v. Sheopersad* (1883), 5 All., 487.

⁵ Act IV of 1892, sec. 12.

⁶ *Ibid.*, sec. 13; Act IX (B. C.) of 1879, sec. 60A.

⁷ Act III (E. B. & A.) of 1907, sec. 10.

⁸ The part of the Act relating to suits.

⁹ *Ante*, p. 321.

¹⁰ *Ante*, pp. 321, 322.

¹¹ Act IX (B. C.) of 1879, sec. 61.

Even with such consent the ward cannot adopt unless he has arrived at years of discretion.¹

Whenever the Court of Wards has determined to release the property of a ward from its charge, it must make an order that the jurisdiction of the Court over such property shall cease on a date not more than sixty and not less than fifteen days from the date of such order; and copies of such order shall be published as the Court may direct.²

Procedure when Court's jurisdiction ceases.

An order of release shall be sent by the managing Commissioner to each Commissioner and Collector in charge of any of the immovable property of the ward, and every such Commissioner and Collector must notify the intended cessation of the charge by a notice put up in his own office and in a conspicuous place in the estate.³

Publication of order of release.

When the estate is released, the Collector shall prepare a list in duplicate of the papers to be delivered and of all movable or immovable property which may be in the custody or charge of the Collector or manager, and such papers and movable property shall be given up to the late ward or his successor with one of the two lists, a receipt being affixed to the other, signed by him or his authorized agent. Only such papers of the manager's English records or correspondence relating to the estate as the Collector thinks proper to be delivered, should be made over to the late ward.⁴

Restoration of papers, etc., to late ward.

If the ward fails to take the papers over they are liable to be destroyed.⁵

As to preservation and destruction of records of released estates, see Court of Wards, rule 257A.

As soon as convenient after the release of an estate, the Collector shall submit a report with a return⁶ showing the results of the management of the property from the time charge was assumed of it till it was released.

Report and return of result of management.

This report, after examination and review, is to be forwarded by the Commissioner to the Court. The late ward or his successor may, on application, obtain a copy of this report and return.⁷

Any expense incurred by the Court on account of property under its charge may, after the release of such property, be recovered as a demand under Bengal Act VII of 1880, or any other Act at the time being in force for the recovery of public demands⁸ (in Eastern Bengal and Assam, as it were an arrear of land revenue⁹), from any person into whose possession such

Recovery of expenses incurred on account of property in charge of Court.

¹ *Ante*, p. 25.

² Act IX (B. C.) of 1879, sec. 65. The words "determined to release" seem to show that this is intended to apply only to cases where the Court of Wards can exercise an option as to the release of the property (see sec. 9 (c), *ante*, p. 316), and not to cases where it is bound to give up charge (see sec. 8, *ante*, p. 315). As a matter of practice, however, notice

is given in all cases: Court of Ward's Manual, 1909, pp. 35, 36.

³ Court of Wards, rule 256.

⁴ *Ibid.*, rule 257.

⁵ *Ibid.*, as amended 1912.

⁶ See Form XXXI, in Appendix to Court of Wards Rules.

⁷ Court of Wards, rule 258.

⁸ *Ante*, p. 351, note 2.

⁹ Act III (E. B. & A.) of 1907, sec. 13.

property or any part thereof may have passed immediately after the release by the Court of such property : Provided that the sum so recovered from any such person shall not be greater than the value of any such property which so passed into the possession of such person.¹

The following provisions of the Court of Wards Act² apply to proceedings under that Act :—

Powers of
Collector in
making in-
quiries.

“ *Section 66.*—A Collector making any inquiry under this Act may exercise any power conferred by the Code of Civil Procedure on a Civil Court for the trial of suits.³

Appeals.

“ *Section 67.*—An appeal shall lie from every order of a Collector under this Act to the Commissioner of the division, and from every order of a Commissioner under this Act to the Court.⁴

Control of
Court.

“ *Section 68.*—All orders or proceedings of the Commissioner and of the Collector under this Act shall be subject to the supervision and control of the Court, and the Court may, if it thinks fit, revise, modify, or reverse any such order or proceeding whether an appeal is presented against such order or proceeding or otherwise.”⁵

Power of Court
to make rules.

The Court of Wards may make rules⁶ consistent with the Act—

- (a) defining the powers of Commissioners and Collectors respectively when the property of a ward is situated in two or more districts or in two or more divisions ;
- (b) prescribing what reports shall be made from time to time by Collectors and Commissioners on the condition of the ward and his property ;
- (c) prescribing the periods at which, and the mode in which, accounts shall be submitted by managers

¹ Act III (B. C.) of 1881, sec. 11. This refers both to cases where the Court has, and to those where it has not, a discretion to release the property.

² Act IX (B. C.) of 1879.

³ See *ante*, p. 322, note 10.

⁴ In the case of orders under sec. 57, the appeal lies to the Commissioner to whom the Collector passing the order appealed against is ordinarily subordinate : Court of Wards, rule 248.

⁵ The appeal must be accompanied by a copy of the order appealed against, and must be prepared within one month of the date of the order, excluding the time taken to procure a copy of the order : Court of Wards, rule 251. Appeals to a Commissioner may be presented to the Collector, and appeals to the Board may be presented to the Commissioner : *ibid.*, rule 250.

⁶ Act IX (B. C.) of 1879, sec. 70.

and guardians respectively, and the mode in which such accounts shall be audited ;

- (d) regulating the custody of securities and title deeds belonging to the estate or property of a ward ;
- (e) regulating the procedure in appeals from orders of Collectors and Commissioners respectively under the Act ;
- (f) prescribing the procedure to be observed when a property ceases to be under the charge of the Court ;
- (g) and generally for the better fulfilment of the purposes of the Act.

The Court may from time to time alter, add to, or repeal such rules.¹

The provisions of the Court of Wards Act, 1879,² with reference to suits brought by and against wards of the Court of Wards, are to be found *post*, pp. 439 to 443.

Suits by and against wards of Courts of Wards.

¹ Act IX (B. C.) of 1879, sec. 70.

² Act IX (B. C.) of 1879.

CHAPTER XXXIV.

COURT OF WARDS, MADRAS.

THE Court of Wards in the Madras Presidency was created by Madras Regulation V of 1804. That Regulation was repealed by the Madras Court of Wards Act, 1902,¹ which contains the present law relating to the Court of Wards in the Madras Presidency. The Madras Board of Revenue is constituted the Court of Wards for the Presidency.²

Constitution
of Courts of
Wards.

Madras Act I of 1902 does not extend to the Scheduled tracts in Ganjam, Vizagapatam and Godavari. Regulation V of 1804 (as amended by Madras Act IV of 1899) which has been repealed by Act I of 1902, continues in force in the scheduled tracts of Godavari, while estates in the scheduled tracts of Ganjam and Vizagapatam are, if necessary, brought under the superintendence of the Board of Revenue under rule viii of the rules for the guidance of the Governor's Agents in Ganjam and Vizagapatam, which provides that the estates of minors and other incapacitated persons will be managed by the Agent, with the sanction of Government, under the orders of the Board of Revenue, without Regulation V of 1804 being made specially applicable to the Agent's jurisdiction.³

The estates of such minors * * as might in the ordinary tracts be taken under the superintendence of the Court of Wards shall, with the sanction of Government in each case and subject to the general control of the Board of Revenue, be managed by the Agent who shall be the Court of Wards for the Agency tracts.⁴

Powers of
Court, how
exercised.

The Court may exercise all or any of the powers conferred on it by the Act through the District Collectors in whose districts any part of the property of the ward may be situated; or through any other person whom it may appoint for the purpose; and may confer any of its powers on any such Collector or person and withdraw any powers so conferred.⁵

¹ Act I (M. C.) of 1902. That Act also repealed Act IV (M. C.) of 1899, which had amended Mad. Reg. V of 1804.

² Act I (M. C.) of 1902, sec. 5. As to the exercise of the jurisdiction of the Court by one member of the Board or by the Collective Board, see Madras Board of Revenue Act,

1894 (Act I (M. C.) of 1894), secs. 2, 3, 4; Act I (M. C.) of 1902, sec. 7 (1). The Secretary of the Board of Revenue may sign on behalf of the Court: Act I (M. C.) of 1902, sec. 7 (2).

³ Court of Wards Standing Order 1.

⁴ G. O., No. 1468, Judicial, 2nd July, 1914.

⁵ Act I (M. C.) of 1902, sec. 8.

All powers conferred in any orders contained in the Court of Wards Manual, 1913, are deemed to be conferred under secs. 8 and 28 of Madras Act I of 1902. When a Collector considers it desirable that additional powers should be delegated to a Divisional Officer, manager, or other officer, he should address the Court on the subject. Unless the contrary is expressly stated, additional powers thus delegated should be regarded as personal, and the sanction of the Court to their continuance must be sought whenever the officer specially empowered is succeeded by another. Conversely, Collectors may recommend the withdrawal of particular powers from particular officers when they consider such a step advisable.¹

All orders passed by a Collector or any other officer in exercise of any of the powers conferred on him are subject to revision by the Court of Wards on appeal or otherwise.²

Similar powers of revision vest in Collectors in respect of orders passed by officers subordinate to them.³

The Act does not affect the powers of the High Court.⁴

The Local Government can revise, modify, or reverse any order passed or proceedings taken under that Act, whether a petition is presented against such order or proceeding or not.⁵

Minor⁶ proprietors, *i.e.* who own or have a life interest in land, either solely or as a co-sharer,⁷ are liable to be taken under the superintendence of the Court of Wards.⁸

Liability to be taken under superintendence of Court.

Where the property is held by a trustee in trust for a minor, the ward is not a proprietor within the meaning of this provision.⁹

Whenever a Collector receives information that a proprietor of land, situate in his division or district, has died, and he has reason to believe that the heir of such proprietor is a minor—

Immediate protection of minor heirs.

(a) he may take such steps and make such order as he

¹ Court of Wards Standing Order 3.

² Act I (M. C.) of 1902, sec. 5, Court of Wards Manual, 1913, p. 42.

³ Court of Wards Manual, 1913, p. 42.

⁴ Act I (M. C.) of 1902, sec. 3.

⁵ *Ibid.*, sec. 6.

⁶ *i.e.* a person who under the provisions of the Indian Majority Act, 1875, as amended by section 52 of the Guardians and Wards Act, 1890 (*ante*, p. 6), has not attained majority: Act I (M. C.) of 1902, sec. 4. Thus after the person has attained eighteen years of age the Court of Wards cannot interfere, unless a guardian had been appointed

by a Civil Court.

⁷ Act I (M. C.) of 1902, sec. 4.

“Co-sharer” is not confined to the case of a coparcener in a joint Hindu family, but applies to all co-sharers, see sec. 17 (2), *post*, p. 364.

⁸ Act I (M. C.) of 1902, sec. 9. The payment of rent or revenue directly to Government is not a condition precedent to the exercise of the jurisdiction of the Court, as under the old law (Mad. Reg. V of 1804, sec. 2).

⁹ See Court of Wards Manual, 1913, p. 22, note; Indian Trusts Act (II of 1882), sec. 3.

thinks proper for the temporary custody and protection of the property which he has reason to believe belongs to the heir; and

(b) he may direct that the person, if any, having the custody of the minor, shall produce him, or cause him to be produced, at such place and time, and before such person, as he appoints, and may make such order for the temporary custody and protection of the minor as he thinks proper.

(c) Female minors who ought not to be compelled to appear in public shall be produced in accordance with the manners and the customs of the country.¹

If the Collector taking such action is not the District Collector, he shall report the matter forthwith to the District Collector, who shall decide whether to direct the Collector to withdraw, or himself to report the matter to the Court.²

Recovery of
expenditure.

All expenses incurred by a Collector so acting shall, whether the property is afterwards taken under the superintendence of the Court or not, form a charge upon the property concerned, and shall be recoverable from the owner of such property, or the person whom the Collector shall find to be in possession of such property, as an arrear of land revenue.³

Report by
District
Collector.

Whenever any District Collector, after making such inquiry as he deems necessary, has reason to believe that any proprietor⁴ in his district is a minor, he shall submit a report to the Court setting forth all the circumstances of the case. Provided that in the case of proprietors of land on which the annual revenue payable to Government is less than Rs. 10,000, or of which the annual rent value, as defined in the Madras Local Boards Act 1884,⁵ is less than Rs. 20,000, the District Collector need not report the case to the Court unless he is of opinion that the Court ought to assume the superintendence of the property. Provided also that the Court or the Local Government may call for a report on any case if it thinks fit.⁶

A report recommending that an estate should be brought under the

¹ Cf. Act VIII of 1890, sec. 12 (2), *ante*, p. 83.

² Act I (M. C.) of 1902, sec. 10.

³ *Ibid.*, sec. 11.

⁴ *Ante*, p. 361.

⁵ Act V (M. C.) of 1884, sec. 64, as amended by Acts III (M. C.) of 1890, and VI (M. C.) of 1900.

⁶ Act I (M. C.) of 1902, sec. 12.

superintendence of the Court should contain full information on the following points:—¹

(i) Name (in full), sex, and age of the minor; his relationship to the deceased proprietor; the circumstances in which he succeeded, the names, ages, and relation to the minor of rival claimants, if any, to the estate, and the validity of their respective claims; any litigation pending or contemplated in which the title of the proposed ward to the estate is or will be questioned, and the anticipated result of such litigation.

(ii) The names, ages and relation to the minor of other members of his family, the manner in which their interests are involved and their wishes as regards the management of the property.

(iv) A brief history of the estate, stating in particular whether it is an ancient zemindari and impartible.

(v) Whether the estate has been under the Court's superintendence on any previous occasion.

(vi) The reasons for which the Collector considers the Court's intervention necessary or desirable.

(vii) The geographical situation of the estate and information as to its approximate size and the amount of revenue and public cesses due to Government, the rent roll and total annual income and expenditure (including transactions in grain (if any)).

(viii) Present financial condition of the estate as far as ascertainable.

(ix) If there are any temples, *chattrams*,² or other institutions of which the proprietor is the hereditary trustee, the names and situation of such institutions, the value and details of their endowments, if any; their approximate annual income and expenditure, and how the deficit, if any, of the income under expenditure is made good.

(x) Special facilities or difficulties likely to affect the administration of the property.

(xi) Whether any action has been taken under sec. 10³ of the Act to obtain temporary custody of the property or person of the minor.

(xii) If the estate is heavily encumbered, the approximate extent of its indebtedness, the names of the principal creditors, the approximate amounts due to them and the securities held by them; the prospects of preserving the estate, and whether recourse will have to be had to any of the special provisions contained in secs. 37 to 40,⁴ 43,⁵ and 45 to 47.⁶

The Court shall consider the Collector's report, and shall report the case to the Local Government with its recommendation, and, pending the receipt of orders, shall have power to take such steps as it may deem necessary for the protection of the person and property of the proprietor in question.⁷

Report by Court.

¹ Court of Wards Standing Order 9.

² Places where refreshment is given gratuitously, especially to Brahmins; Wilson's Glossary, p. 104.

³ *Ante*, p. 362.

⁴ *Post*, pp. 376-379.

⁵ *Post*, p. 379.

⁶ *Post*, pp. 381-383.

⁷ Act I (M. C.) of 1902, sec. 14. Reg. V of 1804 provided a procedure to be observed by a minor, or a person described as such, who disputed the grounds on which the Collector's report had been framed.

Local Government may direct Court to assume superintendence.

Provisions to meet case of undivided Hindu families and co-sharers.

The Local Government, on receipt of the Court's recommendation, may order the Court to assume the superintendence of the person or property of the proprietor or of both.¹

The Local Government shall not order the Court to take the property of an undivided Hindu family under its superintendence unless all the co-parceners are, or are declared to be, disqualified under section 9 of the Act.²

When two or more proprietors are co-sharers³ otherwise than co-parceners in an undivided family, and one of such co-sharers is a minor, the Local Government may order the Court to institute a suit for partition on behalf of such minor, and to take under its superintendence the property allotted to such minor in the partition.⁴

Notification of assumption of superintendence.

Whenever the Local Government orders the Court to take under its superintendence the person or property of a minor or both, such order of the Local Government shall be notified in the *Fort St. George Gazette*, and also in the gazette of the district in which such property or any portion thereof is situate. The notification shall specify the District Collector, who shall discharge the duties imposed upon a Collector by the Act in respect of such person or property or both, as the case may be.⁵

Consequences of such notification.

Such minor shall be deemed to have become a ward under the Court from the date of such order of the Local Government, and the superintendence of his person or property or both shall take effect from such date, and as to property, shall extend to all movable and immovable property belonging to him at the date of the order, or to which he shall afterwards

¹ Act I (M. C.) of 1902, sec. 15.

² *Ibid.*, sec. 17 (1). These persons are—

(a) Minors.

(b) Women declared by the Local Government to be incapable of managing their property.

(c) Proprietors adjudged by a competent Civil Court to be of unsound mind and incapable of managing their property.

(d) Proprietors declared by the Local Government to be incapable of managing their property owing to any physical or mental defect or infirmity rendering them unfit to

manage their property.

As to the release from superintendence on one of the co-parceners ceasing to be disqualified, see *post*, pp. 383, 384.

³ *Ante*, p. 361, note 7.

⁴ Act I (M. C.) of 1902, sec. 17 (2). Such suit would be governed by the ordinary rules as to suits for partition on behalf of minors (*ante*, pp. 126, 177), and by the provisions of law with regard to suits by minors (*ante*, chap. xxv. and *post*, chap. xxxvii.).

⁵ Act I (M. C.) of 1902, sec. 19 (1).

become in any way entitled whilst he continues under such superintendence :

Provided that it shall be in the discretion of the Court to assume or refrain from assuming the superintendence of any property which the ward may acquire otherwise than by inheritance subsequent to the date of such order of the Local Government.¹

When the Court has assumed the superintendence of the property of a ward, the District Collector, who has been specified in the notification,² or if so directed by the Court, the Collector of the district in which any part of the property is situated, shall take possession and custody of such property on behalf of the Court.³

Collector to take charge of ward's property.

Such Collector may—

- (a) order any person in possession of any movable property to the possession of which the ward is entitled,⁴ or of any accounts or papers relating to the property of such ward, to deliver up such movable property, accounts, or papers ;
- (b) in case there is reason to believe that any movable property to the possession of which the ward is entitled,⁴ or any accounts or papers relating to the property of the ward are to be found in any room, box, or receptacle within any house in the actual possession of the ward, break open such room, box, or receptacle, or authorize the same to be broken open for the purpose of searching for such property, accounts, or papers ;
- (c) order any person who is or has been in the employ of the ward, and any person who was in the employ of the deceased proprietor, if any, from whom the ward derives his title, to attend before him for examination ; and to defray the necessary

Powers of Collector in so doing.

¹ Act I (M. C.) of 1902, sec. 19 (2).

² *Ante*, p. 364.

³ Act I (M. C.) of 1902, sec. 20.

⁴ These words were inserted to make it clear that the Collector cannot

order the production of any movable property of the ward by any person who holds that property with a lien thereon ; see para. 20 of the Select Committee's report.

expenses of any person so attending out of the assets of the estate ;

(d) order all holders of tenures and under-tenures on the ward's property to produce their titles before him.¹

Submission of proposals for management.

The Collector should (in his discretion) make the necessary provisional arrangements to carry on the current administration of the estate and of the institutions attached to it, reporting them for the approval of the Court, and should submit, as early as possible, proposals for the future management of the estate under the following heads, which are arranged in the order of their urgency. As soon as the Collector is in a position to report on any one or more of these points he should do so, and not wait to report on all simultaneously :—

- (i) The appointment of manager and guardian.
- (ii) The education and upbringing of the ward and his minor brothers, sisters, etc., if any.
- (iii) Scale of the establishment required under all heads.²
- (iv) Scale of the *meras* or other allowances payable to village officers.
- (v) Allowances required for the maintenance and education of the ward, the personal and other establishments required on his account, the keep of the animals required for his personal use, and other similar items.
- (vi) List of recurring ceremonies and festivals to be observed by the ward and the amount required for each.
- (vii) Maintenance and other allowances to be paid to the other members of the ward's family.
- (viii) Allowances to be paid to other distant relatives of the ward.
- (ix) Pensions payable to old servants, and any other similar allowances.
- (x) Cost of keep of the live-stock (other than that required for the ward's personal use), such as elephants, camels, etc.
- (xi) The *peshkash* assessment, water-tax, municipal or union taxes and other public dues payable by the estate.
- (xii) List of temples or other institutions wholly or partly maintained from the funds of the main estate, and the amounts payable annually on this account.
- (xiii) Scale of establishment and other charges to be incurred in connection with temples and other trust institutions attached to the estate for which separate accounts should be maintained.³

If it is necessary to take action under secs. 37 to 40,⁴ 43⁵ and 45 to 47,⁶ no time should be lost in submitting the necessary application.⁷

Proposals for the application of sections 37 to 40, 43 and 45 to 47 of the Act.

¹ Act I (M. C.) of 1902, sec. 21.

² A distinction should be drawn between the staff which is likely to be required in normal circumstances when once the affairs of the estate have been got into fair order, and the extra establishment which is likely to be needed in the first year or so of management : Court of Wards Standing Order 15. As to the recruiting of

the staff, see Standing Order 16. As to the loan of Government servants, see Standing Orders 17 to 23.

³ Court of Wards Standing Order 11.

⁴ *Post*, pp. 377-379.

⁵ *Post*, pp. 379, 380.

⁶ *Post*, pp. 381, 383.

⁷ Court of Wards Standing Order 12.

When any immovable property of a ward, taken under the superintendence of the Court, is situate outside the Presidency of Madras, the Collector should submit proposals for its management, framed with reference to the law of the State or Province concerned.¹

Property
outside
Presidency.

As soon as practicable after the proposals for management have been submitted the Collector should submit to the Court, for sanction, a budget in the prescribed form for the portion of the current *fasti* subsequent to the assumption of management. Pending receipt of orders on this budget, the Collector may, in anticipation of sanction, incur all urgent charges on account of the current administration of the estate.²

Submission of
the first budget
for an estate
newly taken
up.

The Collector should next arrange for the preparation of the following proposals, statements and documents. They should be prepared as far as possible in the order in which the subjects appear below, and each should be submitted to the Court as soon as it is ready. All should reach the Court's office without fail within a year of the commencement of the Court's management:—

Statistical,
financial and
other state-
ments, etc., to
be furnished in
respect of an
estate newly
taken up.

(i) An inventory of the more important movable property of the ward, and proposals (1) for the disposal of the articles which need not be kept; and (2) for the custody and preservation of the others.

(ii) A list of the home farm or *pannai* lands, the method of their present management, and proposals for their future working.

(iii) A statement of the leases granted by the ward, if any, within the three years preceding the Court's assumption of management in regard to which it is necessary to take action under sec. 44 of the Act.

(iv) A statement of the debts due to or by the ward, with remarks showing how they accrued, how they are secured, what interest they bear, and when and how it is proposed to recover or repay them.³

(v) A statement showing the existing forests and the areas that should be reserved as such, with proposals for their future conservancy and working.

(vi) A list of the irrigation works in the estate showing the condition of each, the extent and rental of the *ayacut* of each, brief proposals for their maintenance and repair or improvement, and the approximate total outlay that may be required for these purposes.

(vii) A list of the buildings belonging to the estate showing the description and the approximate value of each, the use to which it is put, its condition, and, if it is urgently in need of repairs, the amount required to effect them.

(viii) A list of the roads and other communications and of new roads bridges, etc., considered to be necessary for the benefit of the estate or its tenants, with remarks as to how far the District or Taluk Board concerned will be prepared to provide or assist in providing them.

(ix) A map of the estate showing the principal topographical and geographical features, the important towns and villages, the existing and proposed roads, and other communications, the most important irrigation works, the forest areas, and the camping places suitable for superior inspecting officers.

(x) A brief memoir treating of the history of the estate, its situation, tenure, extent, topographical features, number of villages, population,

¹ Court of Wards Standing Order 2.

² *Ibid.*, Standing Order 13.

³ See Standing Order 81² as to the classification and payment of debts.

areas under wet and dry cultivation, the principal crops, the manner in which they are cultivated, and the conditions on which their successful cultivation depends, nature of the latest survey or *paimash* of the lands, the settlement or settlements in force, the prevalent rates of rent in cash or grain, the tenures of the cultivating ryots, any agricultural or revenue practices or customs peculiar to the estate and the condition of the ryots as compared with that of the ryots in Government villages in the neighbourhood.

(xi) A statement of the alienations made subsequent to the permanent settlement showing how far they can be resumed on behalf of the ward and what steps should be taken regarding those which cannot now be resumed.¹

Allowances for ward and family.

The Court may determine what sums shall be allowed for the expenses of the ward and of his family and dependents.²

As to the mode of fixing maintenance allowances, see Court of Wards Standing Order 123.

Custody, residence, education, and marriage of ward or minor relatives.

The Court may make such orders and arrangements as to it may seem fit in respect of the custody, residence, education,³ and marriage—⁴

¹ Court of Wards Standing Order 14.

² Act I (M. C.) of 1902, sec. 22. See *ante*, p. 349, note 11.

³ The Court of Wards Standing Order 126 is as follows :

(i) Great care should be bestowed on the education of minor wards. They should be withdrawn from home, if vicious influences are known or suspected to prevail there. (ii) It is extremely unlikely that, remaining in the estate and attending an up-country school, a ward will receive either the education or the training, moral, physical and social, suitable to the position which he is to occupy. The Collector should consider and report on the desirability of sending every ward who can afford it to the educational institution maintained by the Court at Madras, which is in charge of a European tutor. It is very desirable that wards should be sent to this institution at as early an age as practicable, and as soon as they have acquired a sufficient colloquial knowledge of English. A ward's ordinary expenditure at the Court's institution under all heads amounts to about Rs. 500 per mensem.

⁴ This does not affect the capacity of the ward to enter into a contract of marriage : Act I (M. C.) of 1902, sec. 34 ; and *à fortiori* it would not affect the capacity of the child, and other relations of the ward referred to in this provision. The absence of the sanction of the Court in no way invalidates the marriage. No. 133 of the Court of Wards Standing Orders is as follows :—“The Court considers it a matter of prime importance that minor wards should not be married until they have attained a reasonable degree of physical and mental maturity. Collectors will permit no steps whatever to be taken towards a minor's marriage without the special consent of the Court, and will use their influence to obtain the friendly co-operation and acquiescence of the minor's relatives in the Court's policy. It is desirable as a rule to arrange for the celebration of the minor's marriage about a year before he attains his majority, and thus obviate the extravagance which would be likely to be displayed should it take place after that date.

NOTE.—Before recommending a ward's marriage the Collector should

- (a) of any ward whose person is for the time being under its superintendence ;
- (b) of any minor child, minor brother, or minor sister of such ward, who, in the opinion of the Court, is entitled to maintenance at the charge of the ward's estate ;
- (c) of the ward's next male heir being a minor, and also so entitled to maintenance.¹

As to the religious instruction of wards, see Court of Wards Standing Order 128. Religious instruction.

As to the education of a ward's relations, see *ibid.*, Standing Order 128. Education in

As to the education of senior wards in Revenue law and in the administration of their estates, see *ibid.* Standing Orders 131, 132. management of estate.

Whoever, without the previous sanction of the Court, abets the marriage of any of such persons, is liable on conviction before a Court of Session to a fine not exceeding Rs. 2000, or to imprisonment for a term not exceeding six months, or to both.² Abetting un-sanctioned marriage of wards, etc.

The Court may appoint managers for the property, and guardians for the person, of any ward, and may control or remove any manager or guardian so appointed.³ Appointment, etc., of managers and guardians.

“ For a guardian, character, firmness and tact are of greater importance than mere intellectual qualities.”⁴

Such appointment shall terminate when the Court ceases to exercise superintendence⁵ over the person for whom a guardian, or over property for which a manager, has been appointed.⁶

If no manager of the property or guardian of the person of a ward is appointed by the Court, or the office is temporarily vacant, the District Collector specified in the notification,⁷ or any other Collector whom the Court may appoint in their behalf, shall be competent, under the control of the Court, to do anything that might be done by such manager or guardian.⁸ Collector to act if there be none.

satisfy himself that the proposed bride's family is of sufficient respectability and social status, and of a suitable caste. He should obtain the opinion of some native gentleman or lady interested in the minor who has seen or known the bride, as to her suitability as a wife for the minor : C. P. No. 1900 Mis., 13th July, 1904.

¹ Act I (M. C.) of 1902, sec. 23.

See Court of Wards Standing Order 128.

² Act I (M. C.) of 1902, sec. 67.

³ *Ibid.*, sec. 24.

⁴ Court of Wards Standing Order 124.

⁵ *Post*, pp. 383, 384.

⁶ Act I (M. C.) of 1902, sec. 24.

⁷ *Ante*, p. 364.

⁸ Act I (M. C.) of 1902, sec. 25.

Who may and
may not be
guardians.

No person being the next legal heir of a ward, or appearing to have a direct or indirect advantage in the death of such ward, shall be appointed guardian of such ward.

Provided that the mother of a ward, or any person appointed guardian by the will of a person authorized to make such appointment, may be appointed guardian by the Court at its discretion.¹

A female guardian shall be appointed for a female ward, and a male guardian for a male ward above seven years of age, unless, in any case, the Court for specific reasons shall direct otherwise.

Provided that no guardian shall ordinarily be appointed for a female ward if she has an adult husband.²

Duties of
guardians.

The guardian is charged with the custody of the ward, and, subject to the control of the Court, shall make suitable provision for his maintenance, health,³ and education,⁴ and for such other matters as are required by the personal law to which the ward is subject,⁵ and shall—

- (a) give such security, if any, as the Court thinks fit, for the due performance of his duty ;⁶
- (b) submit such accounts as the Court may direct ;
- (c) pay the balances due from him thereon ;
- (d) continue liable to account to the Court, after he has ceased to be guardian, for his receipts and disbursements during the period of guardianship ;
- (e) apply for the sanction of the Court to any act which may involve expense not previously sanctioned by the Court ;
- (f) be paid such allowance out of the property of the ward as the Court thinks fit.⁷

¹ Act I (M. C.) of 1902, sec. 26 (1). Thus the father of an unmarried Hindu minor who may have inherited property from his maternal grandfather cannot be appointed guardian.

² Act I (M. C.) of 1902, sec. 26 (2).

³ See Court of Wards Standing Order 125.

⁴ Subject to the control of the Court (sec. 23), he can appoint such servants, tutors, etc., as may be necessary, and may arrange for the education of the ward at a

school or college.

⁵ As, for instance, the performance of such ceremonies as are required by the religion of the ward.

⁶ Guardians are required to furnish cash security. In the case of paid guardians, the amount shall not exceed three months' pay or Rs. 100, whichever may be greater, and in the case of unpaid guardians it shall be Rs. 100 : Court of Wards Standing Order 29.

⁷ Act I (M. C.) of 1902, sec. 27.

Apart from these statutory duties, the guardian would owe to his ward duties similar to those of any other guardian of the person of a minor.¹

The manager has power, subject to the control of the Court, to collect the rents of land placed under his charge, as well as all other money due to the ward, and to grant receipts therefor, and may, under the orders of the Court, grant or renew such leases as may in his opinion be necessary for the good management of the property, and do all such lawful acts as he may be generally or specially authorized by the Court to do for the good management of the property.²

Powers of manager.

Collectors should take care that, except with the sanction of the Court of Wards previously obtained, no remissions are granted other than those sanctioned by the custom of the estate.³

Remissions of debts.

The manager can proceed against tenants for arrears of rent in the same manner as the minor might, if of age, have proceeded under the provisions of Madras Act VIII of 1865, and may exercise all the powers conferred by that Act on landholders, and is subject to the same restrictions, so long as the estate and lands remain under his management.⁴

Proceedings for arrears of rent.

The manager is a proper person to represent the ward in proceedings under the Madras Boundary Act (XXVIII of 1860).⁵ He is subject to the same penalties as other guardians of minors' estates for omitting to give notice of salt made in or imported into the lands in his charge.⁶

Madras Boundary Act.

Notice of salt made or imported into lands in charge of Court of Wards.

The manager shall manage the property placed under his charge diligently and faithfully, and shall—

- (a) give such security, if any, as the Court thinks fit, duly to account for what he may receive in respect of the rents and profits of the property under his charge ;⁷

Duties of manager.

¹ *Ante*, chap. xv.

² Act I (M. C.) of 1902, sec. 28. As to the acknowledgment of a debt by a manager, see Court of Wards Manual, 1913, p. 32.

³ Court of Wards Standing Order 99. In times of scarcity Collectors must report the facts fully to the Court dealing with the necessity for remission. *Ibid.*

⁴ Act III (M. C.) of 1865, sec. 85.

⁵ *Kamaraju v. Secretary of State* (1888), 11 Mad., 309.

⁶ *Ante*, p. 128. Mad. Reg. I of 1805, sec. 13.

⁷ The security to be furnished by the manager may be of any kind—cash, personal, land, or other property—as the Collector may direct, but shall be for an amount in even hundreds of rupees not less than 10 per cent. of the average monthly receipts of the estate: Court of Wards Standing Order 29. As to security from shroffs and other estate servants, see *ibid.*

- (b) keep such accounts in such form, and submit them at such times, as the Court may direct ;
- (c) deal with all moneys received by him in such manner as the Court may direct ;
- (d) apply for the sanction of the Court to any act which may involve the property in expense not previously sanctioned by the Court ;
- (e) be responsible for any loss occasioned to the property by his negligence or wilful default ;
- (f) continue liable to account to the Court, after he has ceased to be manager, for his receipts and disbursements during the period of his managership ;
- (g) be paid such allowance out of the property of the ward as the Court thinks fit.¹

The manager can exercise the same powers as to the appointment and control of village officers and servants under Madras Acts II of 1894, and III of 1895 and the rules, as the proprietor could if he were not disqualified.²

As to the Treasury and administrative accounts relating to ward's estates, see Court of Wards Standing Orders, chap. v. As to grain transactions, see *ibid.*, chap. vi. As to the Revenue administration of ward's estates, and the execution of *maramat* works in such estates, see *ibid.*, chaps. vii, viii.

No expenditure is to be incurred ordinarily without the Court's sanction and unless covered by provision in the budget.³

Budget.

The Collector must submit an annual budget of receipts and charges so as to reach the Court's office not later than the 10th of May every year.⁴

Collectors are authorized to sanction expenditure on account of unusual charges, such as unexpected ceremonies, marriage presents, etc., and on account of ordinary charges of a non-recurring nature, up to a limit of Rs. 50 on each item, except in encumbered estates.⁵

Managers and other servants deemed to be public accountants, and amenable to Mad. Reg. IX of 1822.

Every manager or other servant of the Court entrusted with the receipt, custody, or control of moneys or securities for money on behalf of the Court, or with the management of any property under its superintendence, is deemed to be a public accountant within the meaning of the Public Accountants Default Act, 1850,⁶ and is amenable to the provisions of the Madras Revenue Malversation Regulation, 1822,⁷ as if he were a native servant of the Collector's public establishments.⁸

¹ Act I (M. C.) of 1902, sec. 29.

⁵ *Ibid.*, 71.

² Court of Wards Standing Order 31.

⁶ Act XII of 1850.

³ *Ibid.*, 68.

⁷ Mad. Reg. IX of 1822.

⁴ *Ibid.*, 69.

⁸ Act I (M. C.) of 1902, sec. 31.

The principal provisions of the Public Accountants Default Act (XII of 1850) are as follows :—

“Sec. 1. Every public accountant shall give security for the due discharge of the trusts of his office, and for the due account of all moneys which shall come into his possession or control, by reason of his office.

“Sec. 4. The person or persons at the head of the office to which any public accountant belongs may proceed against any such public accountant and his sureties, for any loss or defalcation in his accounts, as if the amount thereof were an arrear of land-revenue due to Government.

“Sec. 5. All Regulations and Acts now or hereafter to be in force for the recovery of arrears of land-revenue due to Government, and for recovery of damages by any person wrongfully proceeded against for any such arrear shall apply, with such changes in the form of procedure as are necessary to make them applicable to the case, to the proceedings against and by such public accountant.”

Unless the Court otherwise directs, all moneys received by or on behalf of the Court on account of the property of any ward, shall be employed in meeting the charges included in Class I of the following list before it is employed in meeting the charges in Classes II and III, and in meeting the charges in Class II before it is employed in meeting those in Class III.

Regulation of
expenditure.

CLASS I.

Charges necessary for the maintenance, residence, education, marriage, and indispensable religious observances of the ward and his family.¹

Charges necessary for the management and supervision of the property of the ward.

Charges on account of Government revenue and of all cesses and other public demands due in respect of such property, or any part of such property.

CLASS II.

Charges on account of rent, cesses, or demands due to any superior landholder in respect of any land held on behalf of the ward.

The liquidation of debts payable by the ward.

Expenses necessary to protect the interests of the ward in the Civil Courts or otherwise.

The maintenance in efficient condition of the estates, buildings, and other immovable property, and the suitable

¹ Cf. *ante*, p. 340.

upkeep of the furniture, equipage, live stock, and other movable property belonging to the ward.

CLASS III.

The payment of such charges for the religious observances of the ward and his family, and of such religious, charitable, and other allowances, and of such donations befitting the position of the ward's family, as the Court may authorize to be paid.

The prevention and relief of distress among the ward's tenantry.

The improvement of the land and property of the ward, and the benefit of the ward and his property generally.¹

Surplus how
to be dealt
with.

Any surplus which remains after providing, so far as the Court deems fit for the above objects, shall be applied to the purchase of other landed property, or invested at interest on the security of—

- (a) promissory notes, debentures, stock, and other securities of the Government of India ;
- (b) bonds, debentures, and annuities charged by the Imperial Parliament on the revenues of India ;
- (c) stock, or debentures of, or shares in, railways or other companies, the interest whereon has been guaranteed by the Secretary of State for India in Council ;
- (d) debentures, or other securities for money, issued by, or on behalf of, any local authority under the authority of any Act of a Legislature established in British India ;
- (e) such other securities, stock, or shares guaranteed by the Government of India, or the Local Government as the Court shall deem fit ;
- (f) first mortgages of immovable property situate in British India, provided that the property is not a leasehold for a term of years, and that the value of the property exceeds by one-third, or if consisting of buildings, exceeds by one-half, the mortgage money.²

¹ Act I (M. C.) of 1902, sec. 32.

² *Ibid.*, sec. 33. The productive improvements to the existing pro-

perty are to be preferred to the purchase of securities : Court of Wards Standing Order 134.

As to the utilization of surplus funds of ward's estates, see Court of Wards Standing Orders, chap. x.

The Act ¹ also declares a ward incompetent to transfer or create any charge on, or interest in, any part of his property which is under the superintendence of the Court, or to enter into any contract or to make any acknowledgment involving him in pecuniary liability personally, or in respect of such property. Disabilities of wards.

Except so far perhaps as contracts for necessaries are concerned, this provision, so far as it relates to minor wards, does not go beyond the general law on the subject.²

This disability does not affect the capacity of a ward to enter into a contract of marriage: provided that he shall not incur in connection therewith any pecuniary liability, except such as, having regard to the personal law to which he is subject and to his rank and circumstances, the Court may, in writing, declare to be reasonable.³

A ward is also declared ⁴ incompetent to grant valid receipts for the rents and profits arising or accruing from such property, or from debts or other moneys due to the estate.

A ward cannot adopt, or give a written or verbal permission to adopt,⁵ or dispose of his property by will,⁶ without the consent of the Court. Adoption and will.

It is submitted that he cannot even with such consent adopt, or dispose of property by will, except under conditions which would have permitted an adoption by him, if he or his property had not been under the superintendence of the Court.⁷

The Court cannot withhold its consent if the adoption or testamentary disposition is not contrary to the personal or special law applicable to the ward, and does not appear likely to cause pecuniary embarrassment to the property, or to lower the influence or respectability of the family in public estimation.⁸

The Court may confirm a will or an adoption made, or a permission to adopt given, without its previous consent.⁹

¹ Act I (M. C.) of 1902, sec. 34 (a).

² *Ante*, chap. ii.

³ Act I (M. C.) of 1902, sec. 34 (a).
A contract of dower by a Mahomedan would be an example; *ante*, p. 238.

⁴ Act I (M. C.) of 1902, sec. 34 (b).

⁵ *Ibid.*, sec. 34 (c).

⁶ *Ibid.*, sec. 34 (d).

⁷ As to adoption and wills, see *ante*, p. 25.

⁸ Act I (M. C.) of 1902, sec. 34.

⁹ *Ibid.* Such confirmation will not,

Powers of Court as to property under its superintendence.

The Court may mortgage or sell the whole or any part of any property under its superintendence, and may give leases or farms of the whole or any part of such property for such terms as it thinks fit, and may make remissions of rent or other dues, and may generally pass such orders and do such acts not inconsistent with the provisions of this or any other Act for the time being in force, as it may judge to be for the advantage of the ward or for the benefit of the property.¹

This is subject to the provisions of the Madras Impartible Estates Acts (II of 1902, II of 1903, II of 1904, and VI of 1909).

The Court cannot convey a better title than the ward could if he had not been a minor.²

The Court cannot make a voluntary alienation of the ward's estate.³

Establishments and distribution of charges.

The Court may order such establishments to be employed and charges to be incurred as it shall consider requisite for the care and management of the persons and properties under its superintendence, and generally for all the purposes of the Act, and may order that such charges shall be borne by and distributed amongst such properties in such proportions as it deems fit.⁴

Notice calling upon claimants to notify claims.

On the publication of the notification, the District Collector therein specified may, at any time with the previous sanction of the Local Government, publish in the gazette of the district or districts in which such property may be situate, a notice in English and in the vernacular, calling upon all persons having pecuniary claims,⁵ whether immediately enforceable or not against the ward or his property, to notify the same in writing

it is submitted, validate an act which is otherwise not permitted by law. It merely treats the subsequent consent as equivalent to previous consent.

¹ Act I (M. C.) of 1902, sec. 35.

² Court of Wards Manual, 1913, p. 30.

³ *Mohammad Muntaz Ali Khan (Raja) v. Sakhawat Ali Khan* (1901), 28 L. A., 190; 23 All., 394; 5 C. W. N., 881; *Luchmeswar Singh v. Chairman, Darbhanga Municipality* (1890), 17 L. A., 90; 18 Calc., 99.

⁴ Act I (M. C.) of 1902, sec. 36. As to the loan of Government servants, see Court of Wards Standing Orders

16-23.

⁵ A claim is deemed to be "pecuniary" notwithstanding that a suit for its enforcement or a reference of such claim to arbitration is pending, or that a decree or award has been passed establishing the same: Act I (M. C.) of 1902, sec. 37. It does not include a pecuniary claim of Government or any local authority, or claims for maintenance or wages due to servants: Act I (M. C.) of 1902, sec. 39. It includes a right to instalments of a periodically recurring payment that have not yet fallen due: Court of Wards Manual, 1913, p. 31.

to the Collector within six months from the date of such notification.¹

Collectors should not submit applications for the issue of such notifications except when the number or complexity of the claims against an estate is such as to preclude or greatly retard their ascertainment by ordinary means. Such applications should be submitted to Government through the Court and shall fully state the grounds for its submission.²

The notice shall also be published at such places and in such manner as the Court may, by general or special order, direct, and shall be sent by registered post to every person who is known to the Collector as having a pecuniary claim against the ward or his property, and of whose address the Collector is credibly informed.³

The Local Government may at any stage of the proceedings for ascertainment of claims invest any person either by name, or by virtue of his office, with the power of a Collector for any or all of the purposes of the sections dealing with such claims.⁴

Every such claimant shall, within the above period of six months, notify to the Collector in writing his claim, with full particulars thereof.

Claimants to furnish full particulars and documents.

This notification does not save a claim from being barred by limitation.⁵

Provided that any claim presented after the expiration of such period, and within a further period of six months, may be admitted, if the claimant satisfies the Collector that he had cause for not notifying the claim at an earlier date.⁶

Every document (including entries in books of accounts) in the possession or under the control of the claimant on which he founds his claim, shall be produced before the Collector with the statement of claim or within such time after the preferring of the claim as may be allowed by the Collector in that behalf.

Provided that if the claim relates to an amount secured by a decree or award, it shall be sufficient for the claimant to produce before the Collector a certified copy of the decree and a certificate from the Court which passed or is executing the

¹ Act I (M. C.) of 1902, sec. 37 (1).

² Court of Wards Standing Order 5.

³ Act I (M. C.) of 1902, sec. 37 (2).

It is not incumbent on the Collector to ascertain the address of each

claimant: Court of Wards Manual, 1913, p. 31.

⁴ Act I (M. C.) of 1902, sec. 37 (3).

⁵ Court of Wards Manual, 1913, p. 32.

⁶ Act I (M. C.) of 1902, sec. 38 (1).

same, declaring the amount recoverable thereunder or a true copy of the award and a statement of the sum recoverable thereunder, as the case may be; and if the claim is pending adjudication in any Court, or has been referred to arbitration, it is sufficient for the claimant to produce a certified copy of the plaint or a true copy of the reference to arbitration, as the case may be.¹

The Collector may require the production by any claimant of such of the documents in his possession or power relating to his claim other than the documents, if any, produced as above, as the Collector may consider necessary.²

Unless the Collector shall otherwise direct, every document produced under these provisions shall be accompanied by a true copy thereof. The Collector shall mark the original document for the purpose of identification, and, after examining and comparing the copy with it, shall retain the copy and return the original to the claimant.³

The Collector shall, after making such inquiry as he may deem fit,⁴ decide which claims, which have been satisfied or admitted, are to be allowed in whole or in part, and which are to be disallowed, and, on his decision being confirmed by the Court, shall give written notices of the same to the claimants.

Provided that these provisions are not to be construed as precluding any claimant from continuing or instituting proceedings in any Civil Court in respect of any claim, whether such claim be allowed or disallowed by the Court in whole or in part.⁵

As to the limitation when a claimant is referred to a Civil Court, see *Regulation Collector of Uthumolai v. Sabbier* (1908), 31 Mad., 495.

Collectors can pass final orders on, or compromise claims not exceeding Rs. 500.⁶

Every pecuniary claim against the ward or his property which has not been duly notified to, or admitted by the Collector under the above provision, shall, notwithstanding any law, contract, decree, or award to the contrary, cease to carry interest from the expiration of six months from the date of

Claims admitted and disallowed.

Claims not notified cease to carry interest, etc.

¹ Act I (M. C.) of 1902, sec. 38 (2).

² *Ibid.*, sec. 38 (3).

³ *Ibid.*, sec. 38 (4).

⁴ This is not a judicial inquiry

and does not apparently contemplate the taking of evidence.

⁵ Act I (M. C.) of 1902, sec. 40.

⁶ Court of Wards Manual, 1913, p. 42.

the notification, and shall not be paid until after the discharge or satisfaction of the claims which have been notified or admitted.¹

No document in the possession or under the control of the claimant which should have been, but has not been, produced in accordance with requirements above mentioned,² shall be admissible in evidence against the ward or his representative in any suit brought by or against the claimant, or any person claiming under him, unless it be proved to the satisfaction of the Civil Court that it was not within his power to produce such document before the Collector.³

Inadmissibility in evidence of documents not produced.

When any property of a ward is in the possession of a mortgagee, or any person claiming under a mortgagee, the Local Government may, on being satisfied that it is expedient in the public interests that the estate should be preserved, and that such incumbrancer should deliver up possession of the mortgaged property, make a declaration to that effect, and direct the Court to take possession thereof; the Court shall, therefore, by an order in writing, require such incumbrancer to deliver up possession of the same to the manager at the end of the current revenue year.⁴

When mortgagee in possession may be dispossessed.

The Court of Wards is in that case in a position analogous to that of a receiver for the collection of rents and profits, in respect of such mortgaged property.⁵

This provision and also those under sections 45-47 (*post*, pp. 381-383), should not be resorted to, generally speaking, except in the case of ancient and impartible estates, which it is expedient as a matter of public policy to preserve from disintegration.⁶

If such incumbrancer refuses or neglects to obey such order, the Collector may, without resorting to a Civil Court, enter upon the property, and summarily evict the incumbrancer, and any other person obstructing or resisting on his behalf.⁷

Such dispossession of the incumbrancer does not deprive him of any summary powers which he would have had under

¹ Act I (M. C.) of 1902, sec. 41.

² *Ante*, pp. 377, 378.

³ Act I (M. C.) of 1902, sec. 42. This leaves less discretion to the Court than in an analogous case under order 7, rule 18 of the Civil

Procedure Code (Act V of 1908).

⁴ Act I (M. C.) of 1902, sec. 43 (1).

⁵ *Lodd Govinda Doss (Sowcar) v. Munappa Naidu* (1908), 31 Mad., 535.

⁶ Court of Wards Standing Order 6.

⁷ Act I (M. C.) of 1902, sec. 43 (2).

the Madras Rent Recovery Act, 1865,¹ for the recovery of arrears of rent due to him at the date of his dispossession.²

If in the instrument of mortgage under which the incumbrancer is in possession of the property no rate of interest is specified, the Collector shall, in cases where the mortgage debt has been notified to or admitted by him,³ offer to the incumbrancer the rate of interest which appears to him to be reasonable; and pass an order fixing the rate accordingly. Copy of the order shall be served upon the incumbrancer in the manner prescribed by the Code of Civil Procedure for service of summons upon a defendant.⁴ If the incumbrancer be dissatisfied with the rate of interest so fixed, he may, within three months from the date of service upon him of such order, institute a suit against the ward in a District Court within whose jurisdiction the property mortgaged or any portion thereof is situate, and the said Court shall, if the mortgage debt has been notified or admitted,⁵ pass a declaratory decree fixing such rate of interest as to it may seem reasonable. If no such suit be instituted within such period, the incumbrancer shall be deemed to have agreed to the rate paid by the Collector.⁶

If an incumbrancer is so dispossessed, the money due to him under the instrument of mortgage at the date of such dispossession, together with subsequent interest on the unliquidated principal of the mortgage debt at the rate stipulated in the instrument, and in the absence of such stipulation at the rate determined by the Collector or Court,⁷ shall, subject to the provision as to interest ceasing,⁸ and subject to the charges in Classes I and II,⁹ excepting the liquidation of debts payable by the ward, and the provisions with reference to the upkeep of the furniture, equipage, live stock, and other movable property of the ward,¹⁰ be recoverable, together with any money which he may be legally entitled to add to the principal money, on the security of the property mortgaged and of the rents and profits arising or accruing therefrom subsequent to the date of such dispossession, in the same manner as if he

¹ Act VIII (M. C.) of 1865.

² Act I (M. C.) of 1902, sec. 43 (3).

³ *Ante*, pp. 377, 378.

⁴ Act V of 1908, sec. 28; order 5, rules 9-30.

⁵ *Ante*, pp. 377, 378.

⁶ Act I (M. C.) of 1902, sec. 43 (4).

⁷ *Above*.

⁸ *Ante*, p. 378.

⁹ *Ante*, p. 373.

¹⁰ *Ibid.*

were a simple mortgagee under the instrument of such property and of such rents and profits.¹

The Collector shall, as soon as conveniently may be, after the expiration of the revenue year commencing with the date of such dispossession, and of every successive revenue year declare, subject to the approval of the Court, the gross annual rents and profits realized from such property, the several heads of expenditure and the balance, and such declaration shall be conclusive evidence of the statements therein contained. A copy of such declaration shall be furnished to the dispossessed incumbrancer free of charge.²

The Act also provides for the case of leases granted by wards for insufficient consideration,³ but these provisions can have no application to minor wards, as leases by minors are void.⁴

In the case of any specified ward of the Court, the Local Government may, with the previous sanction of the Governor-General in Council, declare by notification in the official Gazette that execution of decrees passed by Civil Courts, which are capable of execution by sale of any immovable property of such ward,⁵ or which in pursuance of a contract specifically affected by such immovable property under the sale of the same, whether such decrees be passed prior to such notification or subsequent thereto, shall be transferred to the Collector of the district in which such property or any portion thereof is situate, and rescind such notification :

Leases by wards.
Execution of decrees to be transferred to Collector in certain cases.

Provided that when a portion only of a decree passed by a Civil Court is of such description, such portion alone shall be transmitted to the Collector for execution.⁶

The Local Government may also, notwithstanding anything contained in the Code of Civil Procedure,⁷ prescribe rules for the transmission of the decree from the Civil Court to the

¹ Act I (M. C.) of 1902, sec. 43 (5).

² *Ibid.*, sec. 43 (6). The copy should be furnished even though the claim of the dispossessed incumbrancer has been disallowed under sec. 40 (*ante*, p. 378) : Court of Wards Manual, 1913, p. 34.

³ *Ibid.*, sec. 44. There is no similar provision for the case of leases granted on behalf of minor wards by their guardians for insuffi-

cient consideration.

⁴ *Ante*, p. 23.

⁵ These words apply to every decree capable of being so executed whether the decree holder desires or not to have it executed against immovable property : Court of Wards Manual, 1913, p. 35.

⁶ Act I (M. C.) of 1902, sec. 45 (1).

⁷ Act V of 1908.

Collector, and for regulating the procedure of the Collector in executing the same, and for retransmitting the decree from the Collector to the Civil Court.¹

These rules are to be found in the Court of Wards Standing Orders, Appendix M; Court of Wards Manual, 1913, pp. 405-411.

Rules so made may confer upon the Collector, or any gazetted subordinate of the Collector, all or any of the powers which a Civil Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector, including the powers of the Civil Court under order 21, rules 72 and 92 of the Code of Civil Procedure,² and may provide for orders passed by the Collector, or any gazetted subordinate of the Collector, or orders passed on appeal with respect to such orders, being subject to appeal to and revision by superior Revenue authorities as nearly as may be as the orders passed by the Civil Court, or orders passed on appeal with respect to such orders, would be subject to appeal and revision by appellate or revisional Civil Courts under the Code of Civil Procedure,² or other law for the time being in force if the decree had not been transferred to the Collector.³

Exclusion of jurisdiction of Civil Court.

A power conferred by the above rules upon the Collector, or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exercisable by the Civil Court which passed the transferred decree, or by any Civil Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of such Civil Court.⁴

Protection of Collector.

In executing a decree so transferred to the Collector, the Collector is to be deemed to be acting judicially within the meaning of the Judicial Officers' Protection Act, 1850.⁵

Collector to whom execution of decree has been transferred to cease to discharge the functions of a Collector under the Act.

When the Collector, to whom the execution of any decree has been transferred, is also the Collector who has to discharge the other functions of a Collector under the Act in respect of the ward against whom such decree has to be executed, the Local Government shall appoint some other person by name or in virtue of his office to exercise the functions of a Collector

¹ Act I (M. C.) of 1902, sec. 45 (2).

² Act V of 1908.

³ Act I (M. C.) of 1902, sec. 45 (3).

⁴ *Ibid.*, sec. 45 (4).

⁵ Act XVIII of 1850; Act I (M. C.) of 1902, sec. 45 (5).

under the Act in respect of such ward other than the execution of the decrees transferred to him.¹

The Board of Revenue may authorize the person so appointed to exercise all or any of the powers conferred on a revenue officer in charge of a division by sub-section (2) of section 16 of the Madras Estates' Village Service Act, 1894.²

Removal of village officers.

That sub-section is as follows: "The District Collector or Revenue Officer may of his own motion or on complaint and after enquiry fine, suspend, dismiss or remove any village officer for misconduct or for neglect of duty or incapacity as such village officer, or for non-residence in the village, and shall record his reasons for so doing in writing and furnish a copy of the same to the proprietor and the village officer concerned." Every village officer convicted of an offence punishable by a Criminal Court which in the opinion of the Revenue officer in charge of a division or of the District Collector disqualifies the offender from holding the office in question shall be dismissed; *Ibid.*

The provisions of the third schedule of the Code of Civil Procedure³ are, subject to the provisions of the Act and to such rules as may be prescribed by the Local Government as above, applicable as far as may be to the execution of decrees so transferred.⁴

Certain provisions of Civil Procedure Code applicable to execution of decrees transferred to Collector.

For rules made under this power, see rules of May 14, 1907, published in *Fort St. George Gazette*, 25th June, 1907, pp. 618-623.

No declaration made by the Local Government and no act done in the exercise of any discretionary power conferred by the Act can be questioned in a Civil Court.⁵

Exercise of discretion not to be questioned in Civil Court.

Where the act is without jurisdiction, as, for instance, where the Court has assumed superintendence of a person, who has attained the age of majority under the allegation that he is a subject to its jurisdiction as a minor, the Civil Court can interfere.

The Court may, with the previous sanction of the Local Government, release from its superintendence the person or property of a minor ward,⁶ and shall, except as hereinafter mentioned,⁷ release them from superintendence as soon as the ward ceases to be a minor. It shall also release from superintendence the property of an undivided family and the person

Release from superintendence.

¹ Act I (M. C.) of 1902, sec. 46 (1).

Chetti (1905), 28 Mad., 489.

² Act II (M. C.) of 1894; Act I (M. C.) of 1902, sec. 46 (2).

⁵ Act I (M. C.) of 1902, sec. 48.

³ Act V of 1908.

⁶ As to the appointment of a guardian, see *post*, p. 385.

⁴ Act I (M. C.) of 1902, sec. 47.

⁷ *Post*, p. 384.

See *Regulation Collector v. Ramasami*

of every co-parcener therein, as soon as any co-parcener ceases to be disqualified under section 9 of the Act.¹

The following rules have been made by the Court of Wards with reference to the restoration of estates² :—

Restoration of estate.

Applications for the Court's sanction for the restoration of estates to wards when their disqualification ceases should be made at least three months prior to the proposed date of restoration.³

When applying for sanction the Collector should submit a detailed estimate of postrendition charges, by which are meant those on account of (1) public works executed but not yet paid for; (2) leave allowance of Government servants lent to the estate, who have earned, but not yet taken, privilege leave; and (3) all other liabilities incurred but not discharged up to the date of restoration.

A statement showing the results of the Court's management should be submitted as soon after the restoration as possible.⁴

As to the account current of surrendered estates, the restoration of the cash balance to the proprietor, and the measures for preventing wards from squandering balances when they take charge of their estates, see Court of Wards Standing Orders, xiii, 160-162.

Option to retain superintendence in certain cases.

When a ward dies or ceases to be disqualified before the debts and liabilities binding on his estate have been discharged, the Court may, with the previous sanction of the Local Government, retain the property under its superintendence until the debts and liabilities are discharged, or for any shorter period, and when for the purpose of discharging such debts and liabilities the Court has raised money on condition that it should retain the superintendence of the property until the money so raised is repaid, the Court shall not, without the consent of the lender or his representatives, withdraw from superintendence until the money so raised has been repaid :

Provided that, after the death of the ward, the Court shall not retain charge on account of any debt or liability which has been declared by a Civil Court not to be binding on the representatives of the deceased ward.⁵

¹ *Ante*, p. 361. Act I (M. C.) of 1902, sec. 54.

² Court of Wards Standing Orders, chap. xiii.

³ The Court of Wards would not be able to refuse the restoration of his estate to a ward on attaining majority on the ground that this rule has not been complied with.

⁴ Court of Wards Standing Order 159.

⁵ Act I (M. C.) of 1902, sec. 57 : see *Lodd Govinda Dass (Sowcar) v. Munepa Naidu* (1908), 31 Mad., 534. The Court of Wards has power to bring suits in respect of the property : see *Soomungul Kooer (Mussamat) v. Court of Wards* (1872), 17 W. R. C. R., 560.

If the Court releases an estate from its superintendence under this section before the liabilities have been fully discharged, portions of the estate taken over by the Court under sec. 43 (*ante*, p. 379), from usufructuary mortgagees should on the analogy of sec. 55 (2) be restored not to the ward, but to the respective incumbrancers, irrespective of the question whether the Court has admitted or declined to admit the validity of the incumbrancer's title against the estate.¹

If the Court so retains the superintendence, the person who has succeeded to the property, or the late ward, shall, in so far as the property in question is concerned, be incompetent—

Disabilities of proprietors in such cases.

(a) to transfer or create any charge on, or interest in such property, or to enter into any contract or make any acknowledgment involving him in pecuniary liability in respect of such property. (This does not prevent him incurring in connection with a contract of marriage a pecuniary liability, such as, having regard to the personal law to which he is subject, and to his rank and circumstances, the Court may, in writing, declare to be reasonable);

(b) to grant valid receipts for the rents and profits arising or accruing from such property, or for debts or other moneys due to him in respect thereof.²

When the Court decides to release from its superintendence the person and property of a minor, it may, before such release, by an order in writing, appoint any person to be the guardian of the person or property, or both, of such minor.³ Such appointment shall take effect from the date of such release.⁴ In appointing a guardian the Court shall be guided by the provisions of section 17 of the Guardians and Wards Act, 1890.⁵

Appointment of guardian before release.

Every such guardian has, and is subject to, the same rights, duties, and liabilities as if he had been appointed under the Guardians and Wards Act, 1890.⁶

Any expense incurred by the Court on account of any property under its charge, and not defrayed from such property during the Court's superintendence, may, after the release of

Recovery of expenses after release.

¹ Court of Wards Manual, 1913, p. 38.

² Act I (M. C.) of 1902, sec. 58. See *ante*, p. 375.

³ Act I (M. C.) of 1902, sec. 59 (1).

⁴ *Ibid.*, sec. 59 (2).

⁵ Act VIII of 1890, *ante*, pp. 90, 91. Act I (M. C.) of 1902, sec. 59 (3).

⁶ Act VIII of 1890, *ante*, chaps. xv-xix. Act I (M. C.) of 1902, sec. 59 (4).

such property, be recovered as if it were an arrear of land revenue from any person into whose possession such property, or any part thereof, may have passed.

Provided that the sum so recovered from any such person shall not be greater than the value of any such property which so passed into the possession of such person.¹

Procedure when succession in ward's property is disputed.

Whenever, on the death of any ward, the succession to his property or any part thereof is disputed, the Court may either direct that such property, or part thereof, be made over to any person claiming the property, or may retain the superintendence of the property until a claimant has established his title to the same in a competent Civil Court, or institute a suit of interpleader against all the claimants.²

Notification of release from superintendence.

Whenever the Court releases any person or property from its superintendence, the fact of such release shall be notified in the *Fort St. George Gazette*, and also in the gazette of the district in which such property, or any part thereof, is situate.³

Powers of Court in regard to religious endowments of which ward is hereditary trustee or manager.

If a ward is the hereditary trustee or manager of a temple, mosque, or other religious establishment or endowment,⁴ the Court, notwithstanding anything contained in section 22 of the Religious Endowments Act, 1863,⁵ may make such arrangements as it thinks fit for the discharge, during the wardship, of the ward's duties as trustee or manager, provided that for the direct and personal management of the religious affairs of any such institution, establishment, or endowment the Court shall appoint suitable persons other than officers of Government,⁶ and that the Court shall, as far as possible, restrict its superintendence to the preservation of the property belonging to the institution, establishment, or endowment.⁷

This section does not preclude an officer of Government who is under the control of the Court from appointing, dismissing, or superintending temple servants or from making disbursements of temple funds for the

¹ Act I (M. C.) of 1902, sec. 60.

² *Ibid.*, sec. 61. As to the procedure in interpleader suits, see Civil Procedure Code (Act V of 1908), sec. 88; order 35, rules 1-6. The Court of Wards can bring suits when it retains the property under its superintendence: see *Soomungal Kooer (Mussamut) v. Court of Wards* (1872), 17 W. R. C. R., 560.

³ Act I (M. C.) of 1902, sec. 62.

⁴ As to minor trustees, see *ante*, pp. 32, 33.

⁵ Act XX of 1863.

⁶ This includes a Government servant whose services have been lent to the Court: *Court of Wards Manual*, 1913, p. 39.

⁷ Act I (M. C.) of 1902, sec. 63.

conduct of religious affairs, but he may not personally attend to or take part in such duties as the distribution of food to devotees or the conduct of festivals and other religious ceremonies.¹

Under this section the Court of Wards cannot appoint any one as trustee of a religious institution in place of the minor, but may provide for the discharge of the ward's duties as trustee by a deputy acting on his behalf and subject to the Court's superintendence. Under the general law trusteeship cannot be delegated permanently or for a term, by transfer or assignment, but the Court of Wards may lease out properties forming the endowment of a trust institution or farm the income derived from offerings by worshippers, &c., and may authorize the lessee or farmer by a general power of attorney, specifying his powers and duties and distinct from the deed relating to the lease or farm, to manage the internal affairs of the institution and control the servants attached to it as an agent of the manager, and on behalf of the ward, but not as a trustee. The Court will then be in a position to revoke the power of attorney and terminate the agency at any time irrespective of the period of the lease or farm.

Collectors and Estate Collectors will be guided by the following instructions in regard to the management of religious institutions of which the wards are the hereditary trustees:—

(i) The direct and personal management of the religious affairs of an institution of which a ward is trustee, shall not be entrusted to any person of a religion other than that to which the institution is devoted, or to any officers of the Government including those whose services have been lent to the estate.

(ii) If in the case of any temple which cannot afford to pay for a superintendent of its own, to whom the management of its affairs on behalf of the trustee (ward) can be entrusted, a respectable member of the congregation can be got to act as honorary superintendent, he shall be so appointed by a power of attorney from the manager of the estate, with the previous approval of the Collector.

(iii) When neither a paid nor an honorary superintendent can be got to manage the religious affairs of an institution on behalf of the trustee (ward), one of the servants of the estate may, subject to the restriction in clause (i) above, be appointed to discharge the duties of such superintendent in addition to his ordinary work.

(iv) When the superintendence of the religious affairs of an institution on behalf of the trustee (ward) is entrusted to a superintendent, paid or honorary, or to an estate subordinate in addition to his ordinary duties, agreeably to clause (ii) or (iii) above, such superintendent or subordinate shall be subject to the control of the Collector or manager, who will be responsible for seeing that such superintendent or subordinate discharges his duties satisfactorily.

(v) As a rule the property constituting the endowment should be administered by the manager of the estate in the same manner as the ward's *ayan* property, and where it is found necessary to leave it out, it should be leased under the same rules as those governing leases of other property in the estate, except that the period of the lease shall not exceed five years or last beyond three years of the ward's attaining majority.²

¹ Court of Wards Manual, 1913, p. 39.

² Court of Wards Standing Order 155.

Powers of persons holding inquiries.

In holding any inquiry under the Court of Wards Act, the Collector, or other person authorized to hold such inquiry, has all the powers conferred on revenue officers by the Madras Revenue Inquiries Act, 1869.¹

Property under charge of Court not liable to sale for arrears.

No immovable property under the superintendence of the Court is liable to sale on account of arrears of land revenue, accruing while such estate is under the superintendence of the Court :

Provided that all such arrears of revenue shall be the first charge upon the sale proceeds of any such property which may be sold for any other cause than for arrears or revenue.²

Power to make rules.

The Court may, with the previous sanction of the Local Government, make rules consistent with the Act—

- (a) regulating the management of property under the superintendence of the Court ; and
- (b) generally for the guidance of all persons in all proceedings under the Act, and for carrying out the provisions of the Act.³

¹ Act III (M. C.) of 1869 ; Act I (M. C.) of 1902, sec. 64.

² Act I (M. C.) of 1902, sec. 65. Cf. *ante*, pp. 353, 354.

³ *Ibid.*, sec. 66. The rules made

under Reg. V of 1804 are still in force, so far as they are consistent with the provisions of Act I (M. C.) of 1902. See Act I (M. C.) of 1891, sec. 18.

CHAPTER XXXV.

COURT OF WARDS, UNITED PROVINCES OF AGRA AND OUDH.

THE law as to the Court of Wards of the United Provinces is to be found in the United Province Court of Wards Act, 1912 (Act IV (U. P. C.) of 1912), which repealed Act III (N.-W. P. C.) of 1899.

The last-named Act had repealed the portions of Act XIX of 1873 relating to the Court of Wards. Act XIX of 1873 repealed Bengal Regulations LII of 1803, VIII of 1805, VI of 1822, and I of 1829.

The Board of Revenue of the United Provinces is the Court of Wards for such provinces.¹ Constitution of Court.

The authority vested in the Court of Wards is subject to the control of the Local Government.² Control of Local Government.

Subject to the control of the Local Government the Board of Revenue may distribute the business of the Court of Wards territorially or otherwise amongst the members or may allot the entire business of the Court of Wards to one member. Distribution of business.

All orders made by a member of the Board of Revenue in accordance with such distribution or allotment shall be held to be the orders of the Court of Wards.³

The Court of Wards may exercise all or any powers conferred on it by the Act through the Commissioners of the divisions or the Collectors of the districts in which any part of the property of its wards may be situated, or through any other person whom it may appoint for such purpose. Powers of Court of Wards, how exercised.

The Court of Wards may, with the sanction of the Local Government, from time to time delegate any of its powers to such Commissioners or Collectors or other persons, and may at any time with like sanction revoke such delegation.⁴

¹ Act IV (U. P. C.) of 1912, sec. 4.

² *Ibid.*, sec. 5.

³ *Ibid.*, sec. 6.

⁴ *Ibid.*, sec. 7. For a list of the

ASSUMPTION OF SUPERINTENDENCE.

Minor proprie-
tors.

Persons entitled as proprietors or under proprietors to any beneficial interest in a mahál¹ (as defined in the Land Revenue Act, in force for the time being in the United Provinces²) are deemed disqualified to manage their own properties, when they are minors,³ *i.e.* persons who under sec. 3 of the Indian Majority Act, 1875,⁴ have not attained their majority.⁵

Inquiry into
circum-
stances.

The Local Government may direct the Collector or such other person as it may appoint, to make an inquiry into the circumstances of any proprietor and the extent of his indebtedness.

For the purpose of compelling the attendance of witnesses and the production of documents in the course of such inquiry the Collector or other person appointed to make the inquiry may exercise all or any of the powers of a Civil Court under the Code of Civil Procedure, 1908.⁶

The Collector shall notify in the Gazette the date on which the inquiry will be held. A copy of the notification shall be served on the proprietor. The Collector shall also publish the said notification in the manner prescribed by rule for the publication of notification of assumption of charge by the Court of Wards.⁷

Power to
assume super-
intendence.

The Court of Wards may,⁸ in its discretion, assume, or refrain from assuming, the superintendence of the property or person and property of any such minor.

The Court of Wards may also assume the superintendence of the person of any minor who has an immediate or reversionary interest in the property of a disqualified proprietor,⁹

powers which have been delegated by the Court of Wards to Commissioners and District Officers, see Court of Wards Manual, 1914, rule 62.

¹ Act IV (U. P. C.) of 1912, sec. 3.

² *Ibid.*; Mahál is defined by sec. 4 of Act III (N. W. P. C.) of 1901, as meaning—

(a) any local area held under a separate engagement for the payment of the land revenue, provided that—

(i) if such area consists of a single village or portion of a village, a separate record of rights has been framed for such village or portion;

(ii) if such area consists of two or more villages or portions of villages, a separate record of rights has been framed either for the entire area, or for each of the villages or portions of villages included therein;

(b) any revenue free area for which a separate record of rights has been framed;

(c) for such purposes as the Local Government may determine, any grant of land made heretofore or hereafter under the waste land rules; and

(d) any other local area which the Local Government may by general or special order declare to be a mahál. See *Sheoraj Kunwar (Thakurain) v. Harihar Bakhsh Singh (Thakur)* (1910), 37 I. A., 124; 32 All., 351; 14 C. W. N., 817; 12 Bom. L. R., 508.

³ Act IV (U. P. C.) of 1912, sec. 8.

⁴ Act IX of 1875, *ante*, p. 8.

⁵ Act IV (U. P. C.) of 1912, sec. 3.

⁶ Act V of 1908.

⁷ Act IV (U. P. C.) of 1912, sec. 9.

⁸ *Ibid.*, sec. 12.

⁹ *Ibid.* Disqualified proprietors are (see *Ibid.*, sec. 8)—

(a) minors;

or of any proprietor in regard to whose property the Court of Wards has at his request declared it expedient to undertake the management of his property.¹

“ If the right of the Court of Wards to assume or retain the superintendence of the person or property of any disqualified proprietor is disputed by such proprietor, or, if he be a minor, by some person on his behalf, the case shall be reported to the Local Government, whose orders thereon shall be final, and shall not be questioned in any Civil Court.”²

Report to Government when Court of Wards' right of superintendence is disputed.

The first part of this provision contemplates apparently the case of disqualification other than minority, but it might apply to a case where the fact of minority is disputed.

This does not provide for the case where a minor who has an interest in the property of a disqualified proprietor disputes the right of the Court of Wards to assume the superintendence of his person.

Whenever any Collector receives information that any proprietor has died, and he has reason to believe that the successor, whether by survivorship, inheritance, or devise, of such proprietor is a minor—

Protection of person and property of heir on death of proprietor.

(a) he may, subject to the direction and control of the Court of Wards, take possession of the property of the successor and appoint a manager thereof, who shall exercise all the powers conferred by the Act³ on a manager appointed by the Court of Wards or may take such steps and make such order for the temporary custody and protection of the property of the heir as he thinks proper; and

(b) he may direct that the person, if any, having the custody of the minor, shall produce him, or cause him to be

• (b) females declared by the Local Government to be incapable of managing their own property;

(c) persons adjudged by a competent Civil Court to be of unsound mind;

(d) persons declared by the Local Government to be incapable of managing or unfitted to manage their own property—

(i) owing to any physical or mental defect or infirmity unfitting them for the management of their own property;

(ii) owing to their having been

convicted of a non-bailable offence and being unfitted by vicious habits or bad character for the management of their own property;

(iii) owing to their having entered upon a course of extravagance;

(iv) owing to their failure without sufficient reason to discharge the debts and liabilities due by them.

¹ Act IV (U. P. C.) of 1912, sec. 12.

² *Ibid.*, sec. 13.

³ *Post*, pp. 401, 402.

produced, at such place and time and before such person as he appoints, and may make such order for the temporary custody and protection of the minor as he thinks proper.¹

If the minor is a female who ought not to be compelled to appear in public, the direction for her production shall require her to be produced in accordance with the manners and the customs of the country.²

If the property is not afterwards taken under charge by the Court of Wards, all expenses incurred by a Collector acting under these powers shall be recoverable as arrears of land revenue from the owner of such property or the person or persons whom the Collector shall find to be in possession of such property, by any process by which arrears of land revenue may, for the time being, be recovered.³

The Collector must at once report any action taken by him under these powers to the Court of Wards.⁴

Report by District Officer.

The District Officer shall report for the orders of the Board of Revenue as a Court of Wards, through the Commissioner, as soon as they come to his notice, all cases in which he considers that the person or property of a minor proprietor should be brought under the superintendence of the Court of Wards.⁵

When intervention undesirable.

The Court of Wards will not ordinarily intervene if other satisfactory arrangements can be made for management of the estate and the protection of the minor's interests. Petty estates; that is to say, those with a revenue of less than Rs. 2000 per annum, belonging to minor proprietors shall in no case be recommended for Court of Wards management, unless other arrangements are absolutely impracticable.⁶

Contents of report.

The report shall, as far as is necessary, deal with the following matters:—

(1) A brief history of the family of the proprietor, giving a genealogical table showing the relationship to him of all persons who are either recognized or entitled to a share in, or maintenance from the estate, or who make any claims to a share in it, or to succeed as reversioners.

(2) The reasons for considering disqualification necessary.

(3) The reasons for recommending assumption of charge of the property, or the person and property (as the case may be) of the proprietor.

(4) A detailed account of the shares owned by the various proprietors, if more than one, in the estate, with details of their separate properties, assets, and liabilities, if any.

(5) A report regarding all persons, not recorded as proprietors, who

¹ Act IV (U. P. C.) of 1912, sec. 14.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ Court of Wards Manual, 1914, rule 1.

⁶ *Ibid.*, and note.

(a) by law or by family customs have any right to a share in the estate, the extent of such right being specified, or (b) though not recognized as entitled to a share, may make such claims on the estate as may involve it in serious litigation.

(6) A statement of the tenures or conditions on which all villages of the estate are held, *e.g.* whether ancestral or self acquired, and whether in full zamindari or on mortgage with possession. In the case of villages held on mortgage, the conditions of the deed should be given, more especially those relating to redemption.

(7) The financial position of the estate, with a clear estimate of its ordinary income and expenditure, of the debts due to it, of its liabilities, including interest, up to the probable date of assumption of charge, and, if indebted, of the possibility of clearing the debt within a reasonable time. In the case of villages belonging to the estate which are mortgaged with or without possession it should be stated whether the conditions of the deed permit of immediate redemption.

(8) Proposals for managing the estate and, when necessary, for superintending the person of the proprietor.¹

In cases in which an estate consists of property situated in more than one district, the report shall be submitted by the District Officer of that district in which the headquarters lie. He shall obtain the particulars for those portions of the estate which lie in other districts in direct communication with the District Officers concerned.²

Report in the case of estates situate in more than one district.

In forwarding a report recommending assumption of charge of an estate, the Commissioner shall record his opinion as to the advisability of taking the estate under the superintendence of the Court of Wards.³

Commissioner to record his opinion in forwarding report.

When the Court of Wards assumes the superintendence of any person or property, the order of assumption shall be notified in the Gazette, and shall specify the district the Collector of which shall be put in charge.⁴

Notification of assumption of superintendence.

The whole of the movable and immovable property of a ward shall be deemed to be under the superintendence of the Court of Wards from the date of assumption of superintendence.⁵

Whole property of ward to be deemed to be under superintendence.

The Collector, or other person appointed in that behalf, shall take possession and custody of the property, and manage it in accordance with rules made by the Court of Wards.⁶

Any property which the ward may inherit subsequent to the date of assumption or declaration shall be deemed to be under the superintendence of the Court of Wards.⁷

¹ Court of Wards Manual, 1914, rule 4. This report is to be accompanied by statements in forms Nos. 1, 2 and 3 in the Court of Wards Manual, 1914, rule 5.

² Court of Wards Manual, 1914,

rule 4, note.

³ *Ibid.*, rule 6.

⁴ Act IV (U. P. C.) of 1912, sec. 15.

⁵ *Ibid.*, sec. 16.

⁶ *Ibid.*

⁷ *Ibid.*

The Court of Wards may, in its discretion, assume, or refrain from assuming, the superintendence of any property which the ward may acquire otherwise than by inheritance subsequent to the date of assumption.¹

District Officer's action on receipt of orders of the Board.

On receiving the orders of the Board assuming charge of the person or property, or both, of a proprietor, the District Officer shall at once take possession and custody of the property (if not already in his charge under section 14 of Act IV of 1912²), and make the necessary arrangements for the management of the property, for the ascertainment of debts as laid down in chap. iv. of Act IV of 1912,³ and for the care of the wards. He shall submit to the Court of Wards, through the Commissioner, a budget for the remaining portion of the Court of Wards' year. He shall also submit in due course his proposals for the liquidation of the debts (if any). In submitting these proposals it shall be considered how far it may be necessary to sell portions of the estate; and a definite estimate shall be given of the amount that should be raised by this means, and of the amount available from the profits of the diminished estate towards liquidation of the remainder of the debt.⁴

Scheme of liquidation to include proposals for sale where necessary.

Examination of assets.

On assuming charge of an estate, the rent roll and general assets of the estate should be carefully examined. In estates which have been mismanaged it will often be found that rents are below the average prevailing in the neighbourhood and that legitimate sources of income, such as culturable land, are untouched. Occasionally it may be found that rack-renting prevails and a reduction of rent is advisable in the interests of good management. In such cases a report should be submitted to the Court of Wards for order.⁵

As to rules with regard to the preparation of permanent records, utilization of tenants in collecting rents, nazrana, bonds for arrears of rent, leases of villages, investment of savings, see Court of Wards Manual, 1914, pp. 18-20.

Age of minor to be ascertained and reported.

The District Officer shall, when taking charge of the person and property of the minor, take steps to ascertain his or her exact age. With this object the District Officer shall have a formal inquiry made as to the ward's age from relatives and others likely to be acquainted with the facts. Statements made during such inquiry shall be recorded and signed by the persons making them, and the District Officer shall record a distinct finding as to the date of birth according to both the Native and Christian eras.⁶

ASCERTAINMENT OF DEBTS.

Notice to claimants and presentation of claims.

On the publication of the notification, the Collector specified in the order of assumption,⁷ or any other Collector whom the Court of Wards may appoint in this behalf, shall publish in the Gazette a notice in English and in the vernacular, calling

¹ Act IV (U. P. C.) of 1912, sec. 16. rule 9.

² *Ante*, pp. 391, 392.

³ *Post*, pp. 394 to 398.

⁴ Court of Wards Manual, 1914,

⁵ *Ibid.*, rule 63.

⁶ *Ibid.*, rule 10.

⁷ *Ante*, p. 393.

upon all persons having claims, including decrees for money, whether secured by mortgage or not, against the ward or his property to notify the same in writing to such Collector within six months from the date of publication of the notice.¹

Provided that if the claimant be at the date of notice a minor, or insane, or an idiot, such period of six months shall begin to run in accordance with the rules contained in sec. 6 of the Indian Limitation Act, 1908.²

Provided further that if the claimant be at the date of such notice absent from British India, such period shall begin to run from the date of his return to British India.³

The notice shall also be published at such places and in such other manner as the Court of Wards may, by general or special order, direct.⁴

Notices shall be published in every important local English or vernacular newspaper circulating in the districts in which the property lies, and be posted at each collectorate and tahsil office within the limits of which the villages of the estate are situated.⁵

Every claimant shall, together with his statement of claim, present full particulars thereof :

Provided that in the case of a decree it is sufficient to file a certified copy of such decree together with particulars showing the extent to which the decree has been satisfied.⁶

Every document (including entries in books of account) on which the claimant founds his claim, or on which he relies in support thereof, shall be produced before the Collector with the statement of the claim.⁷

Every such document shall be accompanied by a true copy of the same. The Collector shall mark the original document for the purpose of identification, and, after examining and comparing the copy with it, shall retain the copy and return the original to the claimant.⁸

These provisions as to claims do not apply to claims in respect of transactions subsequent to the date of the notification.⁹

¹ Act IV (U. P. C.) of 1912, sec. 17.
For form of notice, see Court of Wards Manual, 1914, form 5.

² *Ante*, pp. 291, 292.

³ Act IV (U. P. C.) of 1912, sec. 17.

⁴ *Ibid.*

⁵ Court of Wards Manual, 1914,

rule 10.

⁶ Act IV (U. P. C.) of 1899, sec. 17.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*, see *Muazzam Ali Shah v. Chunni Lal* (1911), 33 All., 791.

Effect of failure to notify claims.

Subject to the provision for the prosecution of claims in a Civil Court,¹ every claim of the kind specified above² against the ward or his property, other than debts due to and liabilities incurred in favour of the Government, which is not notified, is to be deemed for all purposes and on all occasions, whether during continuance of the superintendence of the Court of Wards or afterwards, to have been duly discharged :

Provided that if the claimant can show sufficient cause for failure to notify his claim, the Collector shall receive his claim, and the claim so received shall be deemed to have been duly notified :

Provided also that the above provisions shall not be deemed to extinguish any such claim in any case in which the Court of Wards releases the property from its superintendence without discharging the liabilities thereof in the manner provided by the Act.³

A mortgagee in possession of immovable property of the ward is not affected by an omission to notify his claim.⁴

Power of Collector in regard to claims.

The Collector is to decide which of the claims notified or deemed to have been notified are to be allowed and which are to be disallowed, in whole or in part, and, on his decision being confirmed by the Court of Wards, shall give written notice of the same to the claimants.⁵

When a claim has been received after the fixed date,⁶ the Collector may disallow payment in part of the interest which has accrued since the publication of the notice.⁷

Where an allowed claim not being a claim merged in a decree, is due or payable, the Collector may, if such claim cannot be at once discharged, fix the rate of interest to be paid thereon from the date of his decision to the date of payment and discharge of such claim :

Provided that if such claim is not discharged by the Court of Wards within two years from the date of the decision of the Collector allowing it, any order made reducing the contractual rate of interest is inoperative.⁸

¹ Act IV (U. P. C.) of 1912, sec. 20, *post*, pp. 397, 398.

² *Ibid.*, sec. 17, *ante*, p. 395.

³ Act IV (U. P. C.) of 1912, sec. 18.

⁴ *Ibid.*

⁵ *Ibid.*, sec. 19 (1). See Court of Wards Manual, 1914, rule 12.

⁶ *Ibid.*, sec. 17, *ante*, p. 395.

⁷ *Ibid.*, sec. 19 (2).

⁸ *Ibid.*, sec. 19 (3).

The Collector may fix the rate of interest to be paid on the claim from the date of such decision to the fixed date aforesaid or to a date two years from the date of the decision, whichever may be the longer period :

Provided that if such claim be not discharged by the Court of Wards on or before the date up to which the interest has been fixed by such order, the order reducing the contractual rate of interest is inoperative.¹

The Collector cannot fix a rate of interest less than six per cent.²

These powers of the Collector as to interest are subject to the confirmation of the Court of Wards and are not open to question in any Civil Court.³

As to the record of claims and liabilities of the estate, see Court of Wards Manual, 1914, rule 12.

These provisions do not prevent any person from instituting or continuing in any competent Court any suit or proceeding in respect of any claim which has been disallowed in whole or in part by the Collector or by the Court of Wards :

Prosecution of claims in Civil Court.

Provided that where the claimant has failed to notify his claim no suit or proceeding in respect of such claim is maintainable unless the claimant shows good and sufficient cause⁴ for such failure.⁵

On the publication of a notice to claimants,⁶ no fresh proceeding in execution of any decree against the ward or his property shall be instituted in, nor shall any attachment or other process in any such proceeding then pending be issued by any Court until the decree-holder files—

Execution of decrees to be stayed till certificate filed.

• (a) A certificate to the effect that the claim has been notified or is deemed to have been notified in accordance with section 17,⁷ or

(b) A copy of a final order or decree of the Civil Court allowing the claim in any suit or proceeding in respect of a disallowed claim.⁸

¹ Act. IV (U. P. C.) of 1912, sec. 19 (4).

² *Ibid.*, sec. 19 (5).

³ *Ibid.*, sec. 19 (6).

⁴ This is apparently a question for the Civil Court.

⁵ Act IV (U. P. C.) of 1912, sec. 20.

⁶ *Ante*, p. 395.

⁷ Act IV (U. P. C.) of 1912, sec. 21 (1).

⁸ *Ibid.*

Any person holding a decree against the ward or his property shall be entitled to receive from the Collector free of cost such certificate, and such certificate shall be conclusive proof as defined by section 4 of the Indian Evidence Act, 1872,¹ of the truth of facts required to be stated therein.²

In computing the period of limitation prescribed by the Indian Limitation Act, 1908,³ or section 48 of the Code of Civil Procedure⁴ for any application for the execution of a decree proceedings in which have been stayed or temporarily barred under the above provision, the time from the date of notice or of the decree, if it was passed subsequently to the publication of the notice, to the date when the Collector's decision⁵ is confirmed by the Court of Wards, shall be excluded.⁶

Documents not produced to be inadmissible in evidence in certain cases.

If any document in the possession or under the control of any person is not produced by him as above required,⁷ such document shall not be admissible in evidence against the ward whether during the continuance of the superintendence or afterwards, in any suit brought by that person or any person claiming under him, to enforce the claim or liability founded upon or supported by it, unless good cause be shown to the satisfaction of the Court⁸ for the non-production thereof before the Collector.⁹

Stay of process of execution in a Civil Court against property of ward.

If a Civil Court has directed any process of execution to issue against any property of a ward, the Court of Wards may at any time within one year after it assumes charge of such property apply to the Civil Court to stay proceedings in the matter of such process; and the Civil Court may, on such terms regarding interest or compensation for delay as appear to it to be just and reasonable, stay such proceedings for such period as it may deem fit.¹⁰

Power to invest persons with powers under this chapter.

The Local Government may invest any person with the powers given to a Collector by the above provisions for the ascertainment of debts.¹¹

¹ Act I of 1872.

² Act IV (U. P. C.) of 1912, sec. 21 (2).

³ Act IX of 1908.

⁴ Act V of 1908.

⁵ *Ante*, pp. 396, 397.

⁶ Act IV (U. P. C.) of 1912, sec.

21 (3).

⁷ *Ibid.*, sec. 17; *ante*, p. 395.

⁸ *i.e.* the Civil Court.

⁹ Act IV (U. P. C.) of 1912, sec. 22.

¹⁰ *Ibid.*, sec. 23.

¹¹ *Ibid.*, sec. 24.

GUARDIANSHIP AND MANAGEMENT.

The Court of Wards may, from time to time, determine what sums shall be allowed in respect of the expenses of any ward and of his family and dependents.¹ Allowance for ward and his family.

If the superintendence of the person of any minor or minor member of a ward's family has been assumed, the Court of Wards may pass such order as it thinks fit in respect of the residence and education of such minor: provided that where the minor is a female the Court of Wards is not authorized to remove her from the custody of her parents, grandparents or husband.² Residence and education of wards.

The Court of Wards may appoint guardians for the care of the persons of minor wards, and may control and remove such guardians, and no appointment of a guardian for any ward shall be valid³ unless and until it is confirmed by the Court of Wards.⁴ Appointment, removal, and control of guardians.

In appointing a guardian the Court of Wards shall be guided by the provisions of section 17 of the Guardians and Wards Act, 1890.⁵

A guardian so appointed shall be charged with the custody of the ward, and must make suitable provision for his maintenance, health and education, and such other matters as the personal law, to which the ward is subject, requires,⁶ and shall— Duties of guardian.

- (a) give such security, if any, as the Court of Wards thinks fit for the due performance of his duty;
- (b) submit such accounts as the Court of Wards may direct;
- (c) pay the balance due from him thereon;
- (d) apply for the sanction of the Court of Wards to any act which may involve expense not previously sanctioned by that Court;
- (e) receive such allowance, to be paid out of the property of the ward, as the Court of Wards thinks fit;

¹ Act IV (U. P. C.) of 1912, sec. 25.

² *Ibid.*, sec. 26.

³ That is to say, valid after the ward has been brought under the superintendence of the Court of Wards.

⁴ Act IV (U. P. C.) of 1912, sec. 27 (1).

⁵ Act VIII of 1890, *ante*, pp. 90-93. Act IV (U. P. C.) of 1912, sec. 27 (2).

⁶ Including all necessary and usual religious rites and ceremonies.

(f) continue liable to account to the Court of Wards, after he has ceased to be guardian, for his receipts and disbursements during the period of his guardianship ;¹

Apart from these statutory duties, the guardian would owe to his ward duties similar to those of any other guardian of the person of a minor.²

EDUCATION OF WARDS.

Action by
District
Officer.

The District Officer shall make all arrangements for the suitable education of minor wards of estates with a gross income of below Rs. 10,000 per annum, the control over which has been vested in him by the Court of Wards.

In other cases when a minor ward is of an age to require a tutor, or to be sent to school, a report on the subject should be submitted by the District Officer to the Commissioner. The Commissioner will himself decide on all matters relating to the ward's education unless the estate is one of which he is not empowered to pass the budget, when he will refer the matter with his recommendations to the Court of Wards.³

School
arrangements.

Unless for any special reasons the appointment of a tutor is desirable, minor wards, who have attained a suitable age, should be educated at school in preference to receiving education at home. In selecting the institution due consideration should be paid to the wishes of the family, and to the advice of the Advisory Committee. Wards belonging to families of position should ordinarily be sent to the Colvin taluqdar's school, Lucknow. When the ward is educated at a school, the principal of the institution should be asked to submit an annual report on his progress. If the ward receives tuition at home, arrangements should be made for his annual examination by the Inspector of Schools or, where this is not possible, by the Deputy Inspector of Schools, who will furnish a report to the District Officer. This report should be submitted with the annual management report to the Commissioner.⁴

Instruction
in estate
management.

Minor wards during the last two years of their minority should be taught the principles of estate management. To effect this they should be taken by the manager or tutor through their estates ; and be given instruction in rent and revenue law, agriculture, and the maintenance of patwari's papers. The importance of keeping in personal touch with the tenantry should be impressed upon them. Arrangements should be made, if possible, for their residence at headquarters for a part of the year, to enable them to familiarize themselves with the working of the office and the method of keeping accounts. Reports relating to matters of estate administration should be laid before them, and they should be freely consulted in questions of importance. In some cases it may be practicable to appoint them to positions of trust, such as assistant manager, which will give them an insight into the system of management.⁵

¹ Act IV (U. P. C.) of 1912, sec. 28. rule 14.

² *Ante*, chap. xv.

⁴ *Ibid.*, rule 15.

³ Court of Wards Manual, 1914,

⁵ *Ibid.*, rule 16 (1).

The method of instruction and the aptitude of the ward for estate management should be noticed in the annual report.¹

The District Officer shall see that the guardian of a female ward, or the relatives and friends of the family, make suitable arrangements for her education to the extent which is usual in the more intelligent families of the class to which the ward belongs, and the progress made shall be noticed in the annual report.²

Education of female wards.

Estates under the Court of Wards are managed—

(1) by the District Officer with a suitable office establishment, which is paid for out of the rate levied under Act X of 1892,³ assisted by a supervising and collecting establishment which is paid for from the funds of the estates concerned; or

Management of estates.

(2) by a manager with a special office establishment, both of which establishments are paid for from the funds of the estates concerned.⁴

The Court of Wards may appoint managers for any property under its superintendence, and may control and remove such managers.

Appointment, control, and removal of managers.

Such managers shall receive such pay and allowances to be paid out of the property as the Court of Wards thinks fit.⁵

Managers shall ordinarily be deputy collectors and tahsildárs. Managers and assistant managers who are deputy collectors, or of higher rank in Government service, are liable to punishment by order of Government only. Other managers and assistant managers are liable to punishment by order of the Court of Wards.⁶

A manager will usually be appointed to the combined charge of all the estates in a district which are, or which subsequently come under the management of the Court of Wards. He may also, with the sanction of the Court of Wards, be entrusted with the charge of Government estates or private estates, under Government management in the district.⁷

To have charge of all Court of Wards' estates in one district.

The salary and allowances of managers shall, except under special orders of the Court of Wards to the contrary, be rateably defrayed by all

Salary and allowances of managers, how defrayed.

¹ Court of Wards Manual, 1914, rule 16 (2).

² *Ibid.*, rule 17.

³ *Ante*, pp. 308, 309.

⁴ Court of Wards Manual, rule 35.

⁵ Act IV (U. P. C.) of 1912, sec. 29.

⁶ Court of Wards Manual, 1914, rule 19. The Court of Wards has no power given to it by the Act to punish managers. It is submitted

that, so far as the rules authorize fines (see rule 74, as to punishment of managers under the Court of Wards), they are *ultra vires*. A power to suspend, reduce, or dismiss would be valid, but fine or deprivation of pay would only be possible if assented to by the person upon whom it is inflicted.

⁷ *Ibid.*, rule 20.

the estates under their management in proportion to the estimated gross income of each estate.¹

On the 15th July in each year a budget of establishment kept for the supervision of private estates is to be sent by the District Officer through the Commissioner to the Board.²

For rules as to the District Office Establishment, Manager's Special Office Establishment, Subordinate Supervising Establishment, Collecting Establishment, conditions of service, powers of appointment, transfers, superannuation, punishment and appeals, lease and security, see Court of Wards Manual, 1914, chap. ii.

Powers of
manager.

A manager appointed by the Court of Wards has power to collect the rents of the lands placed under his charge, as well as all other money due to the ward whose property he manages, and to grant receipts therefor ;

And he may grant agricultural leases for a term not exceeding seven years, and do all such lawful acts as he may be generally or specially authorized by the Court of Wards to do for the good management of the property.³

Duties of
manager.

Every manager appointed by the Court of Wards shall manage the property placed under his charge diligently and faithfully, and he shall—

- (a) give such security, if any, as the Court of Wards thinks fit duly to account for what he may receive in respect of the rents and profits of the property under his charge ;
- (b) keep accounts in such form and submit them at such times as the Court of Wards may direct ;
- (c) deal with all moneys received by him in such manner as the Court of Wards may direct ;
- (d) apply for the sanction of the Court of Wards to any act which may involve the property in expense not previously sanctioned by that Court ;
- (e) be responsible for any loss occasioned to the property by his negligence or wilful default ;
- (f) continue liable to account to the Court⁴ of Wards, after he has ceased to be manager, for his receipts and disbursements during the period of his management.⁴

¹ Court of Wards Manual, 1914, rule 21.

² *Ibid.*, rule 26.

³ Act, IV (U. P. C.) of 1912, sec. 30.

⁴ *Ibid.*, sec. 31. As to the duty of the manager to pay income-tax, see Act II of 1886, sec. 22, *ante*, p. 128.

These powers are to be exercised under the control of the District Officer.

As to the exercise of powers of distraint, ejection, and enhancement, see Court of Wards Manual, 1914, rules 68-72.

As to bonds for arrears of rent, see *ibid.*, rule 74.

As to leases of villages, see *ibid.*, rules 76, 77.

As to tenants' improvements, see *ibid.*, rule 134.

As to advances to tenants, see *ibid.*, rules 105, 106.

As to the duties of *Sarbarakars* and *Ziladars*, see *ibid.*, chap. v.

As to loans, see *ibid.*, chap. vi.

As to litigation, see *ibid.*, chap. viii.

As to salaries, and other charges, see *ibid.*, chap. xiv.

As to advances, see *ibid.*, chap. xv.

When an estate is under the Court of Wards, the Collector of the district, or the Assistant Collector, is deemed to be the proprietor for the purpose of nominating a patwari.¹

The appointment of any guardian or manager appointed by the Court of Wards terminates on the Court of Wards ceasing to exercise superintendence of the person or property for whom or which such guardian or manager has been appointed.²

Every guardian, manager or other servant of the Court of Wards entrusted with the receipt, custody, or control of moneys or securities for money on behalf of the Court of Wards, or with the management of any property under its superintendence, shall be deemed to be a public accountant within the meaning of the Public Accountants' Default Act, 1850 (Act XII of 1850).³

If no guardian of the person or manager of the property of a ward is appointed by the Court of Wards, the Collector of the district specified in the order of assumption,⁴ or any other Collector whom the Court of Wards may appoint in this behalf, is competent to do, under the Court of Wards, anything that might be lawfully done by a guardian or manager.⁵

All moneys received by the manager shall be applied to the following purposes in accordance with such instructions as the Court of Wards may, from time to time, give in that behalf. Priority shall be given to the purposes included under Class I over those included in Class II,⁶ and unless the Court

¹ Act III (N.-W. P.) of 1901, sec. 24.

² Act IV (U. P. C.) of 1912, sec. 32.

³ *Ibid.*, sec. 34. As to their being public servants within the meaning of the Indian Penal Code, see *ante*, p. 307.

⁴ *Ante*, p. 393.

⁵ Act IV (U. P. C.) of 1912, sec. 35.

⁶ As to this, the Court of Wards has no discretion.

of Wards shall specially otherwise direct, priority shall be given to the purposes included in Class II over those included in Class III.

CLASS I.

The payment of all charges necessary for the maintenance and education of the ward and his family, and for the management and supervision of the property of the ward.

The discharge of the instalments of Government revenue, and of all cesses and other public demands from time to time due in respect of such property or any part of such property ; and

the payment of all rents, cesses, and other demands due to any superior landlords in respect of any property held on behalf of the ward.

CLASS II.

The liquidation of debts payable by the ward ;

the payment of all expenses which may be necessary to protect the interests of the ward in the Civil Courts or otherwise ;

the maintenance in an efficient condition of the estates, buildings, and other immovable property, and the suitable upkeep of the furniture, equipage, live stock, and other movable property belonging to the ward ;

the payment of such charges for the religious observances of the ward and his family, and of such religious, charitable, and other allowances, and of such donations befitting the position of the ward's family as the Court of Wards may authorize to be paid.

CLASS III.

The prevention and relief of distress among the ward's tenantry,

the improvement of the land and property of the ward, and the benefit of the ward and his property generally, and

the purchase of other landed or house property, and investments at interest on the security of—

promissory notes, debentures, stocks, and other securities of the Governor-General in Council ;

bonds, debentures, and annuities charged by the Imperial Parliament on the revenues of India ;

stock or debentures of or shares in railway or other companies, the interest whereon has been guaranteed by the Secretary of State for India in Council ;

debentures or other securities for money paid by or on behalf of any municipal body or any port trust under the authority of any Act of a Legislature established in British India ;

such other securities, stocks, or shares guaranteed by the Governor-General in Council or the Local Government as to the Court shall seem fit ;

or mortgages on immovable property ; or

promissory notes for periods not exceeding one year executed on behalf of the proprietor of other estates under the superintendence of the Court of Wards.¹

In deciding how to dispose of savings in Court of Wards' estates the following principles shall be observed. The improvement and development of the property have the first claims on any surplus income of the estate ; but expenditure should be regulated so as to allow a balance to accumulate to meet loss occasioned by bad seasons or unexpected demands. If, after setting aside a sum for this object, there is still a surplus available, it shall, subject to the provisions of section 36 of the Act, be devoted to the following objects, which are arranged in order of importance :—

Principles upon which savings shall be invested.

(i) Purchases of property—

(a) to consolidate the estate, *e.g.*, by the purchase of under-proprietary rights, or of shares held by outsiders in villages partly owned by the estate ;

(b) to extend the estate. Care shall, however, be exercised that individual villages at a great distance from the headquarters of the estate are not proposed for acquisition without good reason.

(ii) Investments in Government or other securities, or on loan to the Court of Wards.²

For the rules of Accounts, see Court of Wards Manual, 1914, chaps. xi., xii., xiii.

For the rules as to Budgets and Annual Accounts, see *ibid.*, chap. xvii.

For the rules as to Works of Improvements, see *ibid.*, chap. vii. ; and for the Provident Fund rules, see *ibid.*, chap. xviii.

The Act provides³ that :

“ A ward shall not be competent—

“ (a) to transfer any charge on, or interest in, any part

Disabilities of wards.

¹ Act IV (U. P. C.) of 1912, sec. 36. rule 78.

² Court of Wards Manual, 1914,

³ Act IV (U. P. C.) of 1912, sec. 37.

of his property which is under the superintendence of the Court of Wards, or to enter into any contract which may involve him in pecuniary liability :¹

“ but nothing in this clause shall be deemed to affect the capacity of a ward to enter into a contract of marriage :² provided that he shall not incur, in connection therewith, any pecuniary liability, except such as, having regard to the personal law to which he is subject, and to his rank and circumstances, the Court may, in writing, declare to be reasonable :³

“ (b) to adopt without the consent in writing of the Court of Wards :⁴

“ (c) to dispose of his property by will without the consent in writing of the Court of Wards given either previously or subsequently to the making of the will but during the lifetime of the testator :⁵

“ Provided, first, that the Court of Wards shall not withhold its consent under clause (b) or clause (c) if the adoption or testamentary disposition is not contrary to the personal or special law applicable to the ward, and does not appear likely to cause pecuniary embarrassment to the property, or to lower the influence or respectability of the family in public estimation.”

Except as to a contract of marriage, and possibly as to adoption, these provisions are intended to apply to wards who have attained majority.

Powers of Court of Wards as to property under its superintendence.

The Court of Wards may mortgage or sell⁶ the whole or any part of any property under its superintendence, and may give leases or farms of the whole or any part of such property for such terms as it thinks fit, and may make such remissions of rent or other dues, and may generally pass such orders and do such acts not inconsistent with the provisions of the Court of Wards Act, or any other Act in force for the time being, as it may judge to be for the advantage of the ward or for the benefit of the property.⁷

¹ *Ante*, pp. 356, 375, 385.

² *Ante*, pp. 375, 385.

³ *Ibid.*

⁴ *Ante*, pp. 356, 375.

⁵ *Ante*, p. 375.

⁶ See *Mohsan Shah v. Mahbub Ilahi* (1907), 29 All., 589.

⁷ Act IV (U. P. C.) of 1912, sec. 38.

For the rules as to borrowing money on behalf of an estate, see chap. vi. of the Court of Wards Manual.

All deeds, contracts, or other instruments executed by the Court of Wards in exercise of its powers under the Act may be executed in its own name or on behalf of the ward as the circumstances of the case may require.¹

Deeds and other instruments.

Covenants entered into by the Court of Wards are binding on the Court of Wards only so long as the ward or property affected by such covenants remains under its superintendence, and only to the extent of such property; such covenants are binding on the ward or on the person entitled to such property after the ward or the property or both have ceased to be under the superintendence of the Court of Wards.²

When the transferor and the transferee are both wards, the Court of Wards can enter into covenants, on behalf of both the transferor and the transferee respectively.³

These provisions apply to all deeds, contracts, and other instruments, whether executed before or after the commencement of the Act.⁴

All instruments by which immovable property exceeding Rs. 200 in value is mortgaged or sold to, or by, estates under the Court of Wards, shall be submitted to the Court of Wards for its approval, before being executed.⁵

Sanction of instrument of mortgage or sale.

As to the form of draft deeds of sale and mortgage, see Court of Wards Manual, 1914, rules 168, 169.

The Court cannot make a voluntary alienation of the ward's estate.⁶

Notwithstanding anything to the contrary contained in the Agra Tenancy Act, 1901,⁷ the Oudh Rent Act,⁸ or the United Provinces Local and Rural Police Rates Act, 1906,⁹ arrears of rent, rates, and cesses due by under-proprietors, farmers, or tenants in respect of property under the charge of the Court of Wards (whether such rents, rates, and cesses become due before or after the Court of Wards took charge), may, under the orders of the Collector of the district in which such property

Arrears of rent recoverable as arrears of land revenue.

¹ Act IV (U. P. C.) of 1912, sec. 61 (1).

² *Ibid.*, sec. 61 (2).

³ *Ibid.*, sec. 61 (3).

⁴ *Ibid.*, sec. 61 (4).

⁵ Court of Wards Manual, 1914, rule 167.

⁶ *Mohammad Mumtaz Ali Khan*

(*Raja*) v. *Sakhawat Ali Khan* (1901), 28 I. A., 190; 23 All., 394; 5 C. W. N., 881; *Luchmeswar Singh v. Chairman, Darbhanga Municipality* (1890), 17 I. A., 90; 18 Cal., 99.

⁷ Act II (N.-W. P. C.) of 1901.

⁸ Act XXII of 1886.

⁹ Act II (U. P. C.) of 1906.

is situated, be recovered, as arrears of land revenue, by any process by which arrears of land revenue may, for the time being, be recovered.¹

This, and the following provisions, do not prevent the Collector from proceeding under section 185 of the United Provinces Land Revenue Act, 1901,² in any case to which that section applies.³

Grant of certificate of arrears due.

Where a Collector decides to proceed for such arrears, he shall, on being satisfied that the arrear is due and that the payment thereof has been demanded, grant a certificate stating the amount due and the person by whom it is payable, and such certificate, save as mentioned below, shall be conclusive proof of the matters therein stated.⁴

The certificate shall be for the amount of all arrears and interest due and recoverable under the Agra Tenancy Act, 1901,⁵ the Oudh Rent Act, 1886,⁶ or the United Provinces Local and Rural Police Rates Act, 1906,⁷ and there shall be payable in respect thereof a court fee of the same amount as is payable under the Court Fees Act for the time being in force in respect of a plaint for the same amount under section 172 of the Agra Tenancy Act, 1901,⁵ or section 108A (2) of the Oudh Rent Act, 1886,⁶ and the amount of such court fee may be included in the amount for which the certificate is given.⁸

Procedure if defaulter denies liability.

If the person named in the certificate deny his liability for the amount named therein, or any part thereof, he may, within thirty days from receiving notice thereof, or if no notice is given, within thirty days after any process for realizing the amount or enforcing the certificate has been executed, present a petition to the Collector stating the grounds of his denial.⁹

The Collector may—

- (1) reject such petition summarily ; or
- (2) after such inquiry as he think fit, amend or cancel the certificate, or suspend its execution for such time as he may think fit ; or
- (3) remit the certificate and petition to any Rent Court

¹ Act IV (U. P. C.) of 1912, sec. 39 (1).

² Act III (N.-W. P. C.) of 1901.

³ Act IV (U. P. C.) of 1912, sec. 39 (2).

⁴ *Ibid.*, sec. 40 (1).

⁵ Act II (N.-W. P. C.) of 1901.

⁶ Act XXII of 1886.

⁷ Act II (U. P. C.) of 1906.

⁸ Act IV (U. P. C.) of 1912, sec. 40 (2).

⁹ *Ibid.*, sec. 41 (1).

having jurisdiction to be dealt with as a suit between the manager and the petitioner, and the certificate shall thereupon be treated as a plaint duly presented under the Agra Tenancy Act, 1901,¹ or the Oudh Rent Act,² 1886.³

Any person who has presented such petition—

- (a) if that petition has been rejected summarily,
- (b) if the certificate has not been cancelled or amended to his satisfaction, or
- (c) if the petition and certificate have not been remitted to a Rent Court,

When defaulter may bring a civil suit to contest liability.

may, if he denies his liability to pay the amount entered in the certificate, or any part thereof, and pays the same under protest made in writing at the time of payment, institute a civil suit for the recovery of the amount or the part thereof so paid.⁴

In such suit the plaintiff may give evidence⁵ with respect to any matter stated in the certificate.⁶

The Court of Wards may, from time to time, order such establishments to be entertained and expenses to be incurred as it shall consider requisite for the care and management of the persons and properties under its superintendence, and generally for all the purposes of the Act, and may order that such expenses be charged against the property of the ward generally, or against any one or more properties for the purposes of which such establishments are, or have been, entertained or such expenses have been incurred.⁷

Establishments and expenses.

Any expense incurred by the Court of Wards on account of any property under its superintendence may, after the release of such property, be recovered as an arrear of land revenue due on such property.⁸

Recovery of expenses.

RELEASE OF PERSONS AND PROPERTY FROM SUPERINTENDENCE.

The Court of Wards may at any time release any person or property from its superintendence:

Power to release from superintendence.

Provided that the Court of Wards shall not, without the

¹ Act II (N.-W. P. C.) of 1901.

² Act XXII of 1886.

³ Act IV (U. P. C.) of 1912, sec. 41 (2).

⁴ *Ibid.*, sec. 42 (1).

⁵ *i.e.* can call witnesses and produce

documents.

⁶ Act IV (U. P. C.) of 1912, sec. 42 (2).

⁷ *Ibid.*, sec. 43.

⁸ *Ibid.*, sec. 62.

previous sanction of the Local Government, so release any property when steps have been taken for the liquidation of the debts and liabilities with which the property is charged, and the liquidation thereof has not been completed, and

Provided that the Court of Wards shall not, without such sanction after the expiration of one year from the date of the notification of assumption of superintendence,¹ release any property on the ground that the debts and liabilities with which it is charged are such as to render their liquidation within a reasonable time impracticable.²

Option to release or retain superintendence in certain cases.

When a minor ward dies, or attains majority before the liquidation is completed of the debts and liabilities with which the property is charged, the Court of Wards may either release such property or may retain it under its superintendence until such debts and liabilities have been discharged.³

If the Court of Wards retains the superintendence, the person who has succeeded to the property, or the person who has ceased to be disqualified, shall not be competent to transfer or create any charge on, or interest in, any part of such property while it remains under the superintendence of the Court of Wards, nor shall any debts or liabilities previously incurred by any person who has so succeeded be chargeable on such property until the debts and liabilities due by the Court of Wards have been discharged.⁴

Retention of superintendence when there are more proprietors than one.

If in the case of any property under the superintendence of the Court of Wards there are more proprietors than one, and if any one of such proprietors has ceased to be a ward, the Court of Wards, if it considers this course to be expedient in the interests of the proprietors who remain wards, may retain the whole property under its superintendence.⁵

If the Court of Wards so retains superintendence of the share of any proprietor who has ceased to be a ward, such proprietor cannot transfer or create any charge or an interest in any part of such share while it remains under the Court of Wards.⁶

¹ *Ante*, p. 393.

² Act IV (U. P. C.) of 1899, sec. 44.

³ *Ibid.*, sec. 45 (1).

⁴ *Ibid.*, sec. 45 (2). He could apparently by will, or instrument *inter vivos*, create an interest which

would take effect on the Court of Wards releasing superintendence.

⁵ Act IV (U. P. C.) of 1912, sec. 46 (1).

⁶ *Ibid.*, sec. 46 (2).

This provision does not prevent such proprietor from making a testamentary disposition or from applying for partition of his share. On the partition taking effect the Court of Wards shall release the share of the property allotted to such proprietor on partition.¹

From the date of such application and until such partition takes place, the Court of Wards shall pay to such proprietor the surplus income accruing from his share of the joint property.²

When the Court of Wards decides to release from its superintendence the person and property of any minor, it may, before such release, by an order in writing, appoint any person to be the guardian of the person or property, or both, of such minor.³

Appointment of guardian or release of minor.

Such appointment shall take effect from the date of such release.⁴

In appointing such guardian the Court of Wards shall be guided by the provisions of section 17 of the Guardians and Wards Act, 1890.⁵

Every such appointment shall be notified to the District judge within whose jurisdiction the property or any portion thereof is situated.⁶

Every such guardian shall be deemed to have been appointed by such District judge and to be subject to his jurisdiction as if so appointed and shall be subject to the same rights, duties, and liabilities, as if he had been appointed under the Guardians and Wards Act, 1890.⁷

At least two months before the ward attains majority the District Officer shall submit to the Court of Wards, through the Commissioner, a complete report of the facts, with his recommendations as to whether the Court of Wards should release the estate or retain it under the above provisions.⁸

Report by District Officer.

A similar report, together with a report as to whether there is any fit person who is willing to accept the post of guardian of the minor's person or property, or both, shall be submitted in the event of the District Officer considering it advisable that the estate should be released from superintendence, to enable the Court of Wards to pass orders or, if necessary, obtain the orders of the Local Government.⁹

When release considered desirable.

¹ Act IV (U. P. C.) of 1912, sec. 46 (2).

⁶ *Ibid.*, sec. 47 (4).

² *Ibid.*

⁷ *Ibid.*, sec. 47 (5).

³ *Ibid.*, sec. 47 (1).

⁸ Court of Wards Manual, 1914, rules 172, 173.

⁴ *Ibid.*, sec. 47 (2).

⁹ *Ibid.*, rules 174, 175.

⁵ *Ibid.*, sec. 47 (3), *ante*, pp. 90-93.

List of papers and property.

On releasing any estate the District Officer shall prepare a list in duplicate of all papers to be delivered and of all movable and immovable property which may be in his custody or charge or in that of the manager, and such papers and property shall be given over to the proprietor as soon as possible with one copy of the list, on the proprietor signing the other copy and a release bond in Form 49 of the rules on stamped paper of the value of five rupees.¹

Date of release.

The actual date of release shall in all cases be reported without delay to the Court of Wards to enable it to publish the necessary notification in the Gazette.²

Disposal of estate after death of ward when succession doubtful.

When on the death of a ward the succession to his property, or any part thereof, is disputed, the Court of Wards may either direct that the property, or part thereof, be made over to any person claiming the property, or may retain the superintendence of the property until a claimant has established his title to the same in a competent Civil Court, and in such latter case may institute a suit for interpleader against the several claimants.³

Powers to be exercised in respect of property the superintendence of which is retained.

When the Court of Wards retains superintendence of any property under the above provisions, it may exercise all or any of the powers conferred by the Act in respect of such property and may do all such things requisite for the proper care and management of the property as the proprietor thereof, if not disqualified, might do for its care and management, and may pay such allowances to relatives and dependants of a deceased ward as may seem to it reasonable; all acts done by the Court of Wards in exercise of these powers are binding on the person who succeeds to such property.⁴

All suits relating to such property shall be brought and defended in the name of the Collector in charge of such property or of such other person as the Court of Wards may appoint in this behalf.⁵

Delivery of documents and accounts on release of property.

Whenever the Court of Wards releases the property of any proprietor from its superintendence, it shall deliver to such proprietor all documents of title and all papers and accounts (other than Government records) relating to such property.⁶

Making over of records on release of estate.

The following records shall, as a rule, be made over to the proprietor of an estate released from the superintendence of the Court of Wards:—

(1) Correspondence between the District Officer, as representing the

¹ Court of Wards Manual, 1914, rule 177.

² *Ibid.*, rule 178.

³ Act IV (U. P. C.) of 1912, sec. 48. As to the position of the Court of

Wards in such case, see *Jagannath Gir v. Tirguna Nand* (1915), 37 All., 185.

⁴ *Ibid.*, sec. 49 (1).

⁵ *Ibid.*, sec. 49 (2).

⁶ *Ibid.*, sec. 50.

Court of Wards, and the vendor regarding any purchase of property made on behalf of the estate, together with all documents affecting the purchase.

(2) Correspondence between the District Officer, as representing the Court of Wards, and the persons who have claims against, or are indebted to, the estate, regarding such claims, and all documents appertaining thereto.

(3) Correspondence between the District Officer and lessees regarding leases granted by the Court of Wards.

(4) Papers regarding all civil and revenue suits and all criminal cases in which the Court of Wards has been a party, provided that an opinion given by the Legal Remembrancer or Government Pleader shall not be made over without a special order of the District Officer to that effect. Such papers shall be destroyed three years after the release of the estate.

(5) *Pattas* and all other documents entered into between the Court of Wards and cultivators of indigo, and similar documents relating to the manufacture of saltpetre.

(6) The general accounts of the estate during the time that it was under management, with all vouchers and receipts.

(7) All bonds and other documents securing repayment of money to the estate.¹

The District Officer may, with the sanction of the Court of Wards, refuse to give the proprietor of an estate any of the above records, and he may also, if he thinks fit, grant on the application of the proprietor any records not mentioned above. Provided that, without the express sanction of the Court of Wards, no records of the following nature shall be given up:—

(1) Correspondence between the District Officer or manager and superior authority and reports made by the District Officer or manager.

(2) Correspondence with the Legal Remembrancer.

(3) Correspondence reflecting in any way on the conduct of Government servants or employés of the Court of Wards.

(4) Correspondence relating to allowances made to, or claims preferred by, members of the family of the proprietor of the estate.²

As soon as convenient after the release of an estate, the District Officer shall submit the closing accounts of the estate in the usual annual form, together with a brief report on the results of the management of the property from the time charge was assumed until its release. This report, after examination and review, shall be forwarded by the Commissioner to the Court of Wards for information.³

Closing accounts and report.

Whenever the Court of Wards releases any person or property from its superintendence, the fact of such release shall be notified in the Gazette.⁴

Notification of release from superintendence.

When the Court of Wards releases property from its superintendence without discharging the liabilities in the manner provided in the Act,⁵ the time from the publication of notice⁶ to the date of such release shall be excluded in computing the

Effect of release without discharge of liabilities.

¹ Court of Wards Manual, 1914, rule 179.

² *Ibid.*, rule 180.

³ *Ibid.*, rule 181.

⁴ Act IV (U. P. C.) of 1912, sec. 51.

⁵ *Ante*, pp. 394-397.

⁶ *Ante*, p. 393.

period of limitation applicable to suits or applications for the recovery of all claims outstanding against the ward at the date of such notice.¹

Exercise of discretion not to be questioned in Civil Court.

The exercise of any discretion conferred on the Local Government or the Court of Wards by the Court of Wards Act cannot be questioned in any Civil Court.²

Appointment of advisory committees.

Section 63 of the Act provides that "an advisory committee shall be appointed in such manner and in such districts as the Local Government may direct, to advise the Court of Wards on matters connected with—

"(i) the disqualification of proprietors under section 8 ;³

* * * * *

"(iii) the allowance from the ward and his family under section 25 ;⁴

"(iv) the residence and education of the ward under section 26 ;⁵

"(v) the appointment, removal and control of guardians under section 27 ;⁶

"(vi) the liquidation of debts payable by the ward under section 36 ;⁷

"(vii) the mortgage and sale of property under section 38 ;⁸

"(viii) the release of estates from superintendence under section 44, and

"(ix) such other matters connected with the management of the estates under the superintendence of the Court of Wards as the Court of Wards may think fit."

In all of these matters, in which the orders of the Court of Wards are required, the Collector shall, unless he see special reason to the contrary, consult the advisory committee appointed for the district and submit its opinion to the Court of Wards.⁹

The functions of the committee are purely advisory, and no action of the Court of Wards is open to question on the ground that it was done without or contrary to the advice of such committee.¹⁰

¹ Act IV (U. P. C.) of 1912, sec. 52.

² *Ibid.*, sec. 53 (1).

³ *Ante*, p. 390.

⁴ *Ante*, p. 399.

⁵ *Ante*, p. 399.

⁶ *Ante*, p. 399.

⁷ *Ante*, pp. 404, 405.

⁸ *Ante*, p. 406.

⁹ Act IV (U. P. C.) of 1912, sec. 63 (2).

¹⁰ *Ibid.*, sec. 63 (3).

The Local Government may, from time to time, frame rules for the constitution of such advisory committees, for the qualification, appointment, and removal of the members thereof, for the term during which they are to serve, and generally to regulate the proceedings of such committees.¹

No member of such advisory committee is liable to be sued in any Civil Court, or is liable to a prosecution in any Criminal Court, in respect of any advice given, opinion expressed, or statement made by him in good faith in the discharge of his duty as such member.²

Such rules are to be found in the Court of Wards Manual, 1914, chap. ix.

The Board may, with the previous sanction of the Local Government, make rules consistent with the Act— Power to make rules.

- (a) regulating the management of property under the superintendence of the Court of Wards; and
- (b) generally for the guidance of all persons in all proceedings under the Act and for carrying out the provisions of the Act.³

Land under the charge of the Court of Wards is exempt from sale for arrears of revenue.⁴ Exemption from sale for arrears of revenue.

¹ Act IV (U. P. C.) of 1912, sec. 63 (4). These rules are to be found in the Court of Wards Manual, 1914.

² *Ibid.*, sec. 63 (5).

³ *Ibid.*, sec. 64.

⁴ Act III (N.-W. P. C.) of 1901, sec. 153.

CHAPTER XXXVI.

COURT OF WARDS, BOMBAY.

Establishment of Court. IN the Bombay Presidency a Court of Wards has been established by Bombay Act I of 1905, which extends to the whole of the Bombay Presidency except the City of Bombay and Aden.¹

Commissioner to be Court of Wards. The Commissioner is the Court of Wards for the limits of his division :

Provided that the Governor in Council may, if he thinks fit, by notification in the *Bombay Government Gazette*,

- (a) appoint a special officer to be the Court of Wards for a division in lieu of the Commissioner ; or
- (b) constitute a Board consisting of the Commissioner and any other officer or officers to be the Court of Wards for a division ; or
- (c) appoint any other officer or officers to be a Court of Wards for any part of the Bombay Presidency, and direct that such part shall thereupon be excluded from the jurisdiction of the Court of Wards of any division in which it lies wholly or partly.²

On the issue of a notification under the last clause, appointing the Taluqdari settlement officer to be a Court of Wards for the whole or any part of the area to which the Gujarat Taluqdari Amendment Act II (Bo. C.) of 1905 extends, the provisions of the Bombay Court of Wards Act, 1905, shall without prejudice to, and save as far as they may be inconsistent with, anything contained in that Act, be deemed to apply to, or in respect of, any estate, which thereafter may be taken under the management of the

¹ Act I (Bo. C.) of 1905, sec. 1 (2).

² *Ibid.*, sec. 3. The Agent to the Mevási estates is the Court of Wards for the scheduled district of the Mevási Chiefs' villages as defined in the Scheduled Districts Act, 1874 (XIV of 1874): G. N., No. 2156, dated 27th February, 1908. The Taluqdári Settlement officer is a

Court of Wards for the districts of Ahmedabad, Kaira and Broach: G. N., No. 9606, dated 21st September, 1908, as amended by G. N., No. 1263, dated 11th February, 1910. The Manager, Sind Incumbered Estates is the Court of Wards for the Province of Sind: G. N., No. 4007, dated 21st April, 1908.

Taluqdari settlement officer under sections 26 or 28, as if it were an estate under his superintendence as such Court of Wards, and the taluqdar whose estate is taken under management, a Government Board within the meaning of the Act.¹

In Sind the Commissioner has all the powers of the Governor Sind. in Council under the Act except the power of making rules, which he can only make with the previous sanction of the Governor in Council.²

The Court of Wards may, with the previous sanction of the Governor in Council, assume the superintendence of the property of any minor landholder,³ *i.e.* a minor in whom a right to hold land is vested, whether solely on his own account, or wholly or partly in trust for another person, or for a class of persons, or for the public (including a mortgagee vested with a right of possession), and holding land within the local limits of its jurisdiction,⁴ or of the property of any minor pension-holder, *i.e.* a minor who is lawfully entitled to the whole or a part of a pension or cash allowance granted or continued by Government on political considerations or of a hereditary pension or cash allowance.⁵

Assumption of superintendence by Court of Wards of property of minor.

The limitation of three months for calling in question such sanction does not apply to minors.⁶

Where any officer of Government is appointed or declared to be guardian of the property, or of the person and property, of a minor, under section 7, sub-section (1), of the Guardians and Wards Act, 1890,⁷ he shall intimate the fact to the Court of Wards, and the Court of Wards may thereupon, with the previous sanction of the Governor in Council, assume the superintendence of the property, or of the person and property, of such minor.⁸

Assumption of superintendence where Government officer appointed guardian.

The Court of Wards shall not assume the superintendence of the property, or of the person and property, of any minor of whose property, or of whose person and property,

Superintendence not to be assumed where guardian appointed except with consent of District Court.

¹ Act II (Bo. C.) of 1905, sec. 4.

amended by Act II (Bo. C.) of 1913, secs. 3, 4 (1).

² G. N., No. 4007A, dated 21st April, 1908.

³ Act I (Bo. C.) of 1905, sec. 4 (2), as amended by Act II (Bo. C.) of 1913, sec. 4 (2).

³ Act I (Bo. C.) of 1905, sec. 4 (1).
⁴ *Ibid.*, sec. 2 (6); Act V (Bo. C.) of 1879, sec. 3 (11).

⁷ *Ante*, p. 86.

⁵ Act I (Bo. C.) of 1905, sec. 4, as

⁸ Act I (Bo. C.) of 1905, sec. 6.

(a) a guardian has been appointed by will or other instrument,¹ or

(b) a guardian other than an officer of Government has been appointed or declared under section 7, sub-section (1), of the Guardians and Wards Act, 1890,² except with the previous consent of the District Court.³

Superintendence not to be assumed in case of undivided Hindu family unless all co-sharers disqualified; but may be assumed in other cases.

The Court of Wards shall not assume the superintendence of the property of any family which is undivided according to Hindu law, except where all the co-sharers are disqualified under sub-section (1) of section 5 of the Act,⁴ or where all the co-sharers other than those who are disqualified agree to the Court of Wards assuming superintendence.⁵

Where two or more landholders or pension-holders are co-sharers otherwise than as co-sharers in a family which is undivided according to Hindu law, and one of such co-sharers if so disqualified, the Court of Wards may assume the superintendence of the undivided share of such disqualified landholder, or pension-holder,⁶ or ⁷ may obtain partition on behalf of the disqualified landholder, or pension-holder, by suit or otherwise, and assume the superintendence of the property allotted to such landholder, or pension-holder, in the partition.⁸

Sec. 9 of Bombay Act I of 1905, provides for the assumption of superintendence on the application of landholders and pension-holders, but this provision can scarcely be intended to apply to minors.

Provisions for temporary custody of heirs and protection of property in certain cases.

Whenever the Collector receives information that any

¹ See *ante*, chap. ix.

² *Ante*, p. 86.

³ Act I (Bo. C.) of 1905, sec. 7.

⁴ *i.e.* are—

(a) minors;

(b) females declared by the District Court, on the application of the Collector and after such judicial inquiry as it thinks necessary, to be unfitted to manage their own property;

(c) persons declared by the District Court, on the like application and after the like inquiry, to be incapable of managing, or unfitted to manage, their own property owing to

(i) any physical or mental defect

or infirmity, or

(ii) such habits as cause, or are likely to cause, injury to their property or to the well-being of their inferior holders; and

(d) persons adjudged by a competent Civil Court to be of unsound mind and incapable of managing their affairs: Act I (Bo. C.) of 1905, sec. 8 (1).

⁵ Act I (Bo. C.) of 1895, sec. 8 (1), as amended by Act II (Bo. C.) of 1913, sec. 5.

⁶ Act II (Bo. C.) of 1913, s. 4 (2).

⁷ Act I (Bom.) of 1910, 1st Sch. Part II. Serial No. 24.

⁸ Act I (Bo. C.) of 1905, sec. 8 (2).

landholder,¹ or pension-holder,² is a minor, or that any landholder, or pension-holder,² has died and that his heir is a minor, he may apply to the District Court, and the District Court may authorize the Court of Wards to

(a) take such steps and make such order for the temporary custody and protection of the property as the Court of Wards thinks fit ; and

(b) direct that the person (if any) having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as the Court of Wards may appoint, and make such order for the temporary custody and protection of the minor as the Court of Wards thinks fit :

provided that, where the minor is a female and belongs to a class the females of which do not usually appear in public, her production shall be required only in accordance with the manners and customs of the country.³

As to the delegation of the powers of the Court of Wards, see *post*, p. 425.

Whenever the Court of Wards is authorized by the District Court to proceed, it shall forthwith report its action for the information of the Governor in Council.⁴

An appeal lies from such order of authorization.⁵

Where the Court of Wards assumes the superintendence of the property of any minor, it may, with the previous sanction of the Governor in Council, assume the superintendence of his person also :

Assumption of superintendence by Court of Wards of person of minor.

Provided that this does not authorize the Court of Wards to assume the superintendence of the person of a female who is married and is in the custody of her husband.⁶

Whenever the Court of Wards assumes the superintendence of the property of any landholder, or pension-holder⁷ under this Act, the fact of such assumption, and the date on which it was sanctioned by the Governor in Council, shall be notified in the *Bombay Government Gazette* and in such other manner as

Assumption of superintendence to be notified and to extend to whole of ward's property.

¹ *Ante*, p. 417.

² Act II (Bo. C.) of 1913, sec. 4 (1).

³ Act I (Bo. C.) of 1905, sec. 10 (1).

See *ante*, p. 83, note 9.

⁴ *Ibid.*, sec. 10 (2).

⁵ *Ibid.*, sec. 10 (3).

⁶ *Ibid.*, sec. 11.

⁷ Act II (Bo. C.) of 1913, sec. 4 (1).

the Governor in Council may, by general or special order, direct.¹

In Sind this notice is to be published in the *Sind Official Gazette*, and copies of it in Sindhi are to be sent for publication to all Muktiakars of the district or districts in which the property is situated.²

On and with effect from the date of such sanction, the whole of the property, movable and immovable, of such landholder, whether the existence of any such property is known to the Court of Wards or not, shall be deemed to be under the superintendence of the Court of Wards.³

Any property which the ward may inherit or acquire by succession subsequently to the date of such sanction shall also be deemed to be under the superintendence of the Court of Wards.⁴

The Court of Wards may, in its discretion, assume, or refrain from assuming, the superintendence of any property which the ward may acquire otherwise than by inheritance or succession subsequently to the date of such notification.⁵

Publication of notice to claimants against ward.

On the issue of such notification, the Court of Wards shall publish in the *Bombay Government Gazette*, and in such other manner as the Governor in Council may, by general or special order, direct, a notice, in English and also in the vernacular, calling upon all persons having claims against the ward or his property to submit the same in writing to it within six months from the date of the publication of the notice.⁶

This notice shall also be published in one or, if the Court of Wards thinks necessary, in more newspapers. A copy of such notice shall be sent to each of such persons as are known to be creditors and a copy of it shall be posted at the offices of the Collector of the district and of the Mamlátdar of the *táluka* (and where the ward resides or any of his property is situated within the limits of a petha or mahal, of the Mahálkari of the petha or mahal) and at the chavdi or other conspicuous place of the village or villages, within which the ward resides or within which any portion of his immovable property is situated.⁷

¹ Act I (Bo. C.) of 1905, sec. 13 (1). By G. N., No. 1669, dated 18th February, 1911, there is to be a further notification in such newspapers as the Court of Wards shall deem suitable.

² Sind Court of Wards Rules, 1909,

rule 14 (1).

³ Act I (Bo. C.) of 1905, sec. 13 (2).

⁴ *Ibid.*, sec. 13 (3).

⁵ *Ibid.*, sec. 13 (4).

⁶ *Ibid.*, sec. 14 (1).

⁷ Bombay Court of Wards Rules, 1908, rule 12.

There is a similar rule¹ for Sind, except that the notice is to be published in the *Sind Official Gazette*, that a copy is to be posted at the office of the Mukhtiarkar of the táluka, instead of that of the Mamlatdar, and that the words within brackets are omitted.

Where the Court of Wards is satisfied that any claimant was unable to comply with such notice, it may allow his claim to be submitted at any time after the date of the expiry of the period fixed therein ; but any such claim shall, notwithstanding any law, contract, decree, or award to the contrary, cease to carry interest from the date of the expiry of such period until submission.²

Every claim against the ward or his property (other than a claim on the part of Government) not submitted to the Court of Wards in compliance with such notice, or so allowed to be submitted, shall, save in the cases provided for by section 18, sub-section (2), clause (c) of the Act,³ and by sections 6 and 13 of the Indian Limitation Act, 1908,⁴ be deemed for all purposes and on all occasions, whether during the continuance of the superintendence or afterwards, to have been duly discharged, unless, in any suit or proceeding instituted by the claimant, or by any person claiming under him, in respect of any such claim, it is proved to the satisfaction of the Court that he was unable to comply with the above notice.⁵

The Court of Wards may by written order require that any claimant submitting his claim shall, within such reasonable time as it may prescribe in such order, furnish full particulars thereof, and produce all documents (including entries in books of account) on which he relies to support his claim, together with a true copy of every such document :

Power to require claimants to furnish full particulars and documents.

Provided that, where the claim relates to an amount secured by a decree or award, it shall be sufficient for the claimant to produce before the Court of Wards a certified copy of the decree and a certificate from the Court which passed or is executing the same declaring the amount recoverable thereunder, or a true copy of the award and a statement of the sum recoverable thereunder, as the case may be ;

¹ Sind Court of Wards Rules, 1909, rule 14 (2).

² Act I (Bo. C.) of 1905, sec. 14 (2).

³ *Post*, p. 424.

⁴ Act IX of 1908.

⁵ Act I (Bo. C.) of 1905, sec. 14 (3).

and, where the claim is pending adjudication in any Court or has been referred to arbitration, it shall be sufficient for the claimant to produce a certified copy of the plaint, or a true copy of the reference to arbitration, as the case may be.¹

The Court of Wards shall, after marking, for the purpose of identification, every original document so produced and verifying the correctness of the copy, retain the copy, and return the original to the claimant.²

Where any document, which is in the possession or under the control of a claimant, is not produced by him in accordance with the above order, the document shall not be admissible in evidence against the ward, whether during the continuance of the superintendence or afterwards, in any suit brought by such claimant, or by any person claiming under him, in respect of any claim to which such document relates, unless it is proved to the satisfaction of the Court that he was unable to produce such document as required by such order.³

Investigation
and decision
of claims.

On receipt of all claims submitted in compliance with the above provisions, the Court of Wards shall proceed to investigate such claims, and shall decide which of them are to be wholly or partly admitted or wholly or partly rejected, as the case may be, and shall communicate its decision in writing to each claimant concerned.⁴

Where the Court of Wards has admitted any claim, it may make to the claimant a proposal in writing for the reduction of the claim, or of the rate of interest to be paid in future, or of both; and if such proposal, or any modification of it, is accepted by the claimant, and his acceptance is finally recorded and attested by the Court of Wards or by any Revenue officer not below the rank of an Assistant or Deputy Collector whom the Governor in Council may, by general or special order, appoint in this behalf, it shall be conclusively binding upon the claimant :

Provided that if, when the superintendence of the property by the Court of Wards is withdrawn, any portion of the claim reduced as aforesaid is still unsatisfied, the claimant shall be entitled to recover a sum bearing the same proportion to the

¹ Act I (Bo^lC.) of 1905, sec. 15 (1).

² *Ibid.*, sec. 15 (2).

³ *Ibid.*, sec. 15 (3).

⁴ *Ibid.*, sec. 16 (1).

original claim so admitted as the unsatisfied portion bears to the reduced claim.¹

Subject to the above provisions, nothing in this section shall be construed to bar the institution of a suit in a Civil Court for the recovery of a claim against a ward or his property which has been duly submitted to the Court of Wards :

Provided that no decision of the Court of Wards under this section shall be proved in any such suit as against the defendant.²

On the publication of the notice calling for claims,³ no proceeding in execution of any decree against the Govern-
ment ward or his property shall be instituted or continued until the decree-holder files a certificate from the Court of Wards that the decree-claim has been duly submitted, or until the expiration of one month from the date of receipt by the Court of Wards of a written application for such certificate, accompanied by a certified copy of the decree.⁴

Execution of decrees to be stayed till certificate filed.

Any person holding a decree against the ward or his property shall be entitled to receive from the Court of Wards, free of cost, the above certificate.⁵

In computing the period of limitation prescribed by the Indian Limitation Act, 1908,⁶ or by section 48 : order 21, rule 31 of the Code of Civil Procedure,⁷ for any application for the execution of a decree, proceedings in which have been stayed or temporarily barred by reason of the claim not having been duly submitted, the time from the date of the notice, or of the decree if it was passed subsequently to the publication of the notice, to the date of due submission shall be excluded.⁸

When all claims have been investigated, the Court of Wards shall submit to the Governor in Council a schedule of the debts and liabilities of the Government ward, and the Governor in Council may, where the property appears to be involved beyond all hope of extrication, or for any other sufficient reason, by order published in the *Bombay Government Gazette*, direct that, on a date to be fixed by the order, the

Report to Government.

¹ Act I (Bo. C.) of 1905, sec. 16 (2).

² *Ibid.*, sec. 16 (3).

³ *Ante*, pp. 420, 421.

⁴ Act I (Bo. C.) of 1905, sec. 17 (1).

⁵ *Ibid.*, sec. 17 (2).

⁶ Act IX of 1908.

⁷ Act V of 1908.

⁸ Act I (Bo. C.) of 1905, sec. 17 (3).

superintendence of the property, or of the person and property of the ward by the Court of Wards shall be withdrawn.¹

The schedule shall be accompanied by a report containing a careful review of the financial position of the estate and shall be accompanied by the following sub-schedules:—

(1) *Sub-schedule of landed property consisting of villages, shares of villages, etc.*, in the form specified in the rules.

(2) *Sub-schedule of house property* and landed property other than that shown in sub-schedule (1).

(3) *Sub-schedule of movable property* showing the value of personal property owned by the estate under the classes (i) cash, (ii) jewels, (iii) grain, (iv) other, the total amount of the debts and arrears of rent due to the estate and the amount under each head which is probably recoverable.

(4) *Sub-schedule of income and expenditure* showing the probable average income and expenditure, the establishment ordered to be employed in managing the estate and the scale of pay of such establishment, the sums allotted annually for the maintenance of the ward and his family, and for their education and the instalments by which the debts, if any, are to be liquidated.²

Sindh Court of Wards Rules, 1909, rule 15, provides that the schedule of debts and liabilities to be submitted by the Court of Wards to the Commissioner should, in addition to a review of the financial position of the estate, be accompanied by sub-schedules—

(1) Sub-schedule of landed property (including arable land and house property).

(2) Sub-schedule similar to above sub-schedule (b) of Bombay Rules and including *takāvi* advances.

(3) Statement showing the estimated realizations for the estate and the manner in which it is proposed to dispose of them.

(4) Account current of the estate showing the results of management during the period prior to the submission of the report.

On the date so fixed,

(a) the superintendence shall terminate;

(b) the owner of the property under superintendence shall be restored to the possession thereof, subject to any contracts entered into by the Court of Wards for the preservation or benefit of such property; and

(c) the claims not submitted in pursuance of the notice³ shall revive.⁴

In calculating the periods of limitation applicable to suits to recover and enforce claims so revived, the time during which such superintendence has continued shall be excluded.⁵

¹ Act I (Bo. C.) of 1905, sec. 18 (1).

² Bombay Court of Wards Rules, 1908, rule 13.

³ *Ante*, pp. 420, 421.

⁴ Act I (Bo. C.) of 1905, sec. 18 (2).

⁵ *Ibid.*, sec. 18 (3).

With the general or special sanction of the Governor in Council, the Court of Wards may, from time to time, delegate all or any of its powers to the Collector of any district in which any part of the property of a ward is situated, or to any other officer not below the rank of an Assistant or Deputy Collector whom it may appoint in this behalf, and may, at any time, with the like sanction, revoke such delegation.¹

Delegation of powers by Court of Wards.

Subject to any general or special orders of the Governor in Council, the Court of Wards may exercise all or any of the powers conferred on it by this Act through the Collector of any district in which any part of the property of a ward is situated, or through any other officer not below the rank of an Assistant or Deputy Collector whom it may appoint in this behalf; and, subject to the like orders, any such Collector or Assistant or Deputy Collector may exercise all or any of the powers delegated to him under this Act through any Revenue-officer subordinate to him not below the rank of a Mahálkari.²

These powers of delegation do not apply to cases under sec. 10 of the Act (*ante*, p. 419).³

The Court of Wards may appoint a manager of the property of any ward under its superintendence.⁴

Appointment and remuneration of manager.

Any person interested in the good management of the property of a Government ward under the superintendence of the Court of Wards may be appointed manager of such property. Where for any reason there is no such person available, any person qualified by character, merit, industry and knowledge may be appointed manager. A manager may be appointed for property comprising a single estate or comprising a group of estates within the limits of a single district, as the Court of Wards, having regard to the size and other circumstances of the estate or estates, may deem suitable. The remuneration of such manager shall be fixed by the Court of Wards with due regard to the financial condition and other resources of the estate or estates placed under his management.⁵

A manager appointed under the Act may be removed for any of the causes for which a guardian may be removed under rule 2⁶ and for bankruptcy or insolvency and for any special cause rendering it desirable in the opinion of the Court of Wards that he should be removed.⁷

Removal of manager.

¹ Act I (Bo. C.) of 1905, sec. 19 (1).

² *Ibid.*, sec. 19 (2).

³ See Court of Wards Manual, 1914, p. 108.

⁴ Act I (Bo. C.) of 1905, sec. 20.

⁵ Bombay Court of Wards Rules,

1908, rule 4; Sind Court of Wards Rules, 1909, rule 4.

⁶ *Post*, p. 428.

⁷ Bombay Court of Wards Rules, 1908, rule 5; Sind Court of Wards Rules, 1909, rule 5.

Liabilities,
etc., of mana-
gers appointed
by Court of
Wards.

Every manager appointed by the Court of Wards shall

(a) give such security, with such sureties (if any), as the Court of Wards thinks fit for the due discharge of the trusts of his office, and for the due account of all property and moneys which come into his control or possession by reason of his office;

(1) The amount of such security shall not be less than is sufficient to cover the minimum receipts it is estimated may be in the hands of the manager at any one time.

(2) Such security may consist of a deposit in the Post Office Savings Bank or of a deposit of Government promissory notes or a security may be executed in the form A of the rules as the Court of Wards shall deem fit in each case.

(3) The manager shall, if the amount of the security does not exceed one thousand rupees, furnish at least one surety; in any other case he shall furnish at least two sureties.

(4) Servants of the estate whose duties require them to deal with money shall furnish such security as the Court of Wards shall deem fit. Such security shall consist either of a deposit in the Post Office Savings Bank or, with the approval of the Court of Wards, any such servant may execute a security bond in form A.

(5) A register of securities furnished shall be kept in the Huzur Treasury office in form I of the rules.¹

The above paragraphs 1-4, correspond with Rules 6-8 of the Sind Court of Wards Rules, 1909.

(b) be entitled to such allowance as the Court of Wards thinks fit for his care and pains in the execution of his duties; and

(c) be responsible for any loss occasioned to the property under his management by his wilful default or gross negligence; and every such loss shall be recoverable from him and from his sureties (if any) as an arrear of land-revenue.²

The following returns shall be rendered by managers to the Court of Wards:—

(1) An inventory of all the property belonging to each estate on first assumption of management in form No. ii of the Rules.

(2) A yearly statement of increase or decrease in the property of each estate and the reasons therefore in form No. ii.

(3) A yearly return of demands, collections and balances for each estate in form No. ix of the Rules.

(4) A monthly return of receipts and payments on account of personal deposits in form No. v of the Rules.

¹ Bombay Court of Wards Rules, 1908, rule 6.

² Act I (Bo. C.) of 1905, sec. 21 (1).

(5) A monthly return of receipts and expenditure for each estate in form No. iv of the Rules and a monthly abstract thereof.

(6) A yearly budget estimate for each estate for the year beginning with the 1st August to be submitted on or before the 1st May in duplicate the form No. vii of the Rules.¹

Every manager or other servant of the Court of Wards is deemed to be a "public servant" within the meaning of Chapter IX of the Indian Penal Code; and, in the definition of "legal remuneration" contained in section 161 of such Code, the word "Government" includes the Court of Wards.²

Managers and other servants to be deemed public servants.

Every manager shall keep the following accounts:—

(1) A register of securities in form No. I of the Rules.

(2) An inventory of all the property belonging to each estate on first assumption of management in form No. II of the Rules.

(3) A daybook of receipts and expenditure for each estate in form No. III of the Rules.

(4) A classified register of receipts and expenditure for each estate in form No. IV (Parts I and II) of the Rules and a monthly abstract thereof.

(5) A register of receipts and payments on account of personal deposits in form No. V of the Rules.

(6) A register of advances in form No. VI of the Rules.

(7) The budget as sanctioned from time to time by the Court of Wards in form No. VII of the Rules.

(8) A statement showing the liabilities and progress made in liquidating the debt of each estate in form No. VIII of the Rules.³

By the Sind Court of Wards Rules, 1909, rule 7, managers shall keep such accounts and submit such returns as the Court of Wards may from time to time direct. With some slight variations the Court of Wards is required by the Sind Rules, 1909, rule 16, to keep such registers and accounts.

Every manager shall send to Mamlátdar of the taluka

(a) as soon as the inventory in form No. II is completed, a copy thereof, and

(b) at the end of each year, a copy of the yearly statement in increase and decrease in form No. II.⁴

The accounts to be kept by the manager⁵ shall be for the revenue year commencing with the 1st August and ending with the 31st July.⁶

The manager⁷ shall promptly pay into the Treasury all collections of money.⁸

¹ Bombay Court of Wards Rules, 1908, rule 7.

² Act I (Bo. C.) of 1905, sec. 21 (2).

³ Bombay Court of Wards Rules, 1908, rule 14.

⁴ *Ibid.*, rule 15.

⁵ Here for "manager" read "Court of Wards" in Sind Court of Wards Rules, 1909, rule 17.

⁶ Bombay Court of Wards Rules, 1908, rule 16.

⁷ Here for "manager" read "Court of Wards and its subordinates" in Sind Court of Wards Rules, 1909, rule 18.

⁸ Bombay Court of Wards Rules, 1908, rule 17.



The manager shall be given a permanent advance to be fixed in each case by the Court of Wards.¹

All sums required for expenditure shall be drawn from the Treasury by cheques.²

Power of Court of Wards to appoint guardians of minor wards.

The Court of Wards may appoint guardians for the care of the persons of minors whose persons are, for the time being, under its superintendence.³

In appointing such guardian, the Court of Wards shall be guided by the provisions of the Guardians and Wards Act, 1890.⁴

Remuneration of guardians

The Court of Wards may award to a guardian such remuneration as, having regard to all the circumstances of the case, it thinks fit.⁵

Removal of guardians.

The Court of Wards may remove any guardian appointed for the person of a Government ward for any of the following causes :—

(a) for abuse of his trust ;

(b) for continued failure to perform the duties of his trust ;

(c) for incapacity to perform the duties of his trust ;

(d) for ill-treatment, or neglect to take proper care of his ward ;

(e) for contumacious disregard of any provision of the Act or of any order of the Court of Wards ;

(f) for conviction of an offence implying, in the opinion of the Court of Wards, a defect of character which unfits him to be the guardian of his ward ;

(g) for having an interest adverse to the faithful performance of his duties ;

(h) for ceasing to reside within the local limits of the jurisdiction of the Court of Wards ;⁶

(i) in the case of a female ward, upon her marriage to a husband who is not, in the opinion of the Court of Wards, unfit to be guardian of such ward :⁷

Provided that the Court of Wards shall not remove a guardian appointed by will or other instrument⁸ or appointed or declared under the Guardians and Wards Act, 1890,⁹ except with the previous consent of the District Court.¹⁰

A similar rule has been made for Sind by the Sind Court of Wards Rules, 1909, rule 2.

General powers of Court of Wards.

Subject to the provisions of the Act, and of any rules thereunder, the Court of Wards

(a) may, of itself or through the manager (if any) appointed

¹ Bombay Court of Wards Rules, 1908, rule 18.

² *Ibid.*, rule 19 ; Sind Court of Wards Rules, 1909, rule 19.

³ Act I (Bo. C.) of 1905, sec. 22 (1).

⁴ *Ibid.*, sec. 22 (2) ; Act VIII of 1890, *ante*, chap. xi.

⁵ Bombay Court of Wards Rules, 1908, rule 3 ; Sind Court of Wards Rules, 1909, rule 3.

⁶ The above grounds are taken from Act VIII of 1890, sec. 39, *ante*, pp. 100, 101.

⁷ This is taken from Act VIII of 1890, sec. 41, *ante*, p. 138.

⁸ *Ante*, chap. ix.

⁹ *Ante*, chap. xi.

¹⁰ Bombay Court of Wards Rules, 1908, rule 2.

by it under this Act, do all such things requisite for the proper care and management of any property of which it assumes the superintendence under this Act, as the owner of the property, if it was not under the superintendence of the Court of Wards, might do for its proper care and management ; and

- (b) may, of itself or through the guardian (if any) appointed by it under this Act, do, in respect of the person of any ward whose person is, for the time being, under its superintendence, all such things as may lawfully be done by a guardian.¹

The delegation of powers to managers shall be notified by notices posted at the offices of the Collector of the district, and of the Mamlátdar of the táluka (and where the property is situated in the limits of a petha or mahal of the Mahálkari of the petha or mahal), and at the chavdi or other conspicuous place of the village or villages, in which the property concerned is situated.²

With the exception that for "Mamlátdar" the word "Mukhtiakar" is to be read and that the words in brackets are omitted there is a similar rule for Sind.³

The Court of Wards may pass such orders as it thinks fit in respect of the custody, residence, and education of any minor ward who is under its superintendence.⁴

Custody, residence, and education of minor.

The Court of Wards may, from time to time, determine what sums shall be allowed in respect of the expenses of any ward and of his family and dependents.⁵

Allowance for minor ward, his family and dependents.

All expenses lawfully incurred in respect of an estate shall be debited to and recovered out of the income of the estate.⁶

Expenses in respect of estate.

The following is rule 13 of the Sind Court of Wards Rules, 1909 :—

(1) In the administration of estates under its superintendence the Court of Wards shall be entitled to the services of the establishment entertained by the Manager of Incumbered Estates in Sind, and to the use of all premises, furniture or other necessary things vested in, or hired or maintained by, the Manager.

(2) The general cost of superintendence and management respectively shall be defrayed as a common charge and shall be assessed proportionately on the gross produce of the estates under the superintendence of the Court of Wards together with the estates under the protection of the Manager of

¹ Act I (Bo. C.) of 1905, sec. 23, see *ante*, chap. xvi.

² Bombay Court of Wards Rules, 1908, rule 10.

³ Sind Court of Wards Rules, 1909, rule 11.

⁴ Act I (Bo. C.) of 1905, sec. 24.

⁵ *Ibid.*, sec. 25.

⁶ Bombay Court of Wards Rules, 1908, rule 11 ; Sind Court of Wards Rules, 1909, rule 12.

Incumbered Estates in Sind, under Act XX of 1896, as amended by Act II of 1906.

Duties of Court of Wards or manager.

The Court of Wards, or the manager (if any) appointed by it under this Act, shall manage the property of every ward under its superintendence or under his management diligently and faithfully for the benefit of the ward, and shall in every respect act to the best of its or his judgment for the ward's interest as if the property were its or his own.¹

Securities.

All Government securities and securities, the interest whereon is guaranteed by the Government of India or Local Government, shall be forwarded to the Accountant-General for safe custody in cases where it is likely that they will be held for a longer period than 12 months.

All such securities which are likely to be returned within a period of 12 months, all other securities, all title deeds, all savings bank pass books in which deposits are completed and all jewellery and ornaments, the use of which is not permitted to the ward, shall be deposited for safe custody in either the Taluka or District Treasury as the Court of Wards may direct.²

Powers of Court of Wards as to property of wards.

The Court of Wards may sell, exchange, mortgage or let the property of a ward, and may do all such other things as it may judge to be best for the benefit of the property and the advantage of the ward :

Provided that

- (a) The previous sanction of the Governor in Council shall be required to any sale, exchange or mortgage of, or charge on, immovable property, and to any lease of such property for a term exceeding ten years ; and
- (b) where one-fourth of such property has been sold or exchanged, no further sale or exchange shall be made.³

Power of Court of Wards to evict.

The Court of Wards may summarily evict in the manner specified in section 202 of the Bombay Land-Revenue Code, 1879,⁴ any person occupying, or in possession of, any immovable property under its superintendence, to the use and occupation of which he has ceased to be entitled under any of the provisions of that Code, or which he uses or occupies in

¹ Act I (Bo. C.) of 1905, sec. 26.

² Bombay Court of Wards Rules, 1908, rule 9; Sind Court of Wards Rules, 1909, rule 10.

³ Act I (Bo. C.) of 1905, sec. 27, as amended by Act II (Bo. C.) of 1913, sec. 6.

⁴ Act V (Bo. C.) of 1879.

contravention of any of the provisions of the Court of Wards Act.¹

For the purpose of the recovery of rents, profits and other sums due in respect of property under the superintendence of the Court of Wards (whether such arrears became due before or after the assumption of such superintendence) the Court of Wards has all the powers of a Collector under the law for the recovery of land revenue due to Government, including the power conferred by sec. 176 of Act V (Bo. C.) of 1879.²

Recovery of arrears of rent as arrears of land-revenue.

The Court of Wards shall submit to the Governor in Council an annual consolidated report upon the estates under its superintendence in form No. X of the Rules, with such variations as may from time to time be prescribed in this behalf by the Governor in Council.³

Report to Government.

In Sind the report has to be made to the Commissioner who forwards it with his remarks to the Governor in Council.⁴

The Court of Wards may from time to time delegate all or any of its powers to the Collector of any district in which any part of the property of a Government ward is situated and may at any time revoke such delegation.

Delegation of powers to Collector.

Provided that the following powers shall not be delegated without the special sanction of the Governor in Council, namely:—

(i) The power to expend any sum or incur any liability exceeding Rs. 5000 in amount or value;

(ii) the power to compromise any claim exceeding Rs. 5000 in value;

(iii) the power to raise the loan of an amount exceeding Rs. 1000;

(iv) the power generally to revise tenants' rents;

(v) the power to remove a manager in receipt of a salary of, or exceeding, Rs. 150 *per mensem*;

(vi) the power to sanction a budget for an estate yielding a gross income of, or exceeding, Rs. 20,000 *per annum*;

(vii) the power to sanction expenditure which has not been provided for in a budget, and which cannot be provided for by reappropriation;

(viii) the power to prescribe under rule 14 (8)⁵ forms of accounts to be kept by managers;

(ix) the power to give sanction to making over to a landholder records which may not be made over under rule 20⁶ or records which under rule 22⁷ may not without previous sanction of the Court of Wards be made over, and to refuse to make over any records referred to in rule 20.⁶

N.B.—In cases of emergency, the Collector may assume the powers of the Court of Wards in any case coming under heads (i) to (ix) submitting his proceedings without delay to the Court of Wards for consideration.⁸

¹ Act I (Bo. C.) of 1905, sec. 28. sec. 9.

² *Ibid.*, sec. 29, as amended by Act II (Bo. C.) of 1913, sec. 7.

³ Bombay Court of Wards Rules, 1908, rule 8.

⁴ Sind Court of Wards Rules, 1909,

⁵ *Ante*, p. 427.

⁶ *Post*, p. 434.

⁷ *Post*, p. 435.

⁸ Bombay Court of Wards Rules,

1908, rule 23.

Property under superintendence not liable to sale for arrears.

No immovable property under the superintendence of the Court of Wards shall be liable to sale on account of arrears of land-revenue :

Provided that all such arrears of land-revenue shall be the first charge upon the sale-proceeds of any such property which may be sold for any other cause than for arrears of land-revenue.¹

Disabilities of wards.

There is in the Bombay Act² a provision similar to that in Madras³ as to the disabilities of wards to enter into contracts, except contracts of marriages, but that provision was evidently intended to apply in the main to wards other than minors.

Wills by wards.

There is also, as in Madras and the United Provinces,⁴ the following provision as to a will by a ward :—

Consent of Government necessary to wills made by wards.

“ No will made by a Government ward shall be valid without the consent of the Governor in Council obtained, either previously or subsequently to the making of the will, on application made to him through the Court of Wards :

“ Provided that consent shall not be withheld unless it appears to the Governor in Council that the will is contrary to the personal or special law applicable to the ward, or that it is likely to cause considerable pecuniary embarrassment to the property, or to lower considerably the influence or respectability of the family in public estimation.”⁵

This has not apparently any application to minors.⁶

Adoption.

There is not in Bombay, as elsewhere,⁷ any prohibition of adoptions made without sanction.

Procedure when succession to ward's property is disputed.

Where, on the death of the ward, the succession to his property or any part thereof is disputed, the Court of Wards may, with the sanction of the Governor in Council, either retain the superintendence of the property until one of the claimants has established his claim to the same in a competent Civil Court, or institute a suit of interpleader against all the claimants.⁸

¹ Act I (Bo. C.) of 1905, sec. 30.

² *Ibid.*, sec. 37.

³ *Ante*, p. 375.

⁴ *Ante*, pp. 375, 406.

⁵ Act I (Bo. C.) of 1905, sec. 38.

⁶ *Ante*, p. 25.

⁷ *Ante*, pp. 356, 375.

⁸ Act I (Bo. C.) of 1905, sec. 39.
See *ante*, p. 412.

The Court of Wards may, with the sanction of the Governor in Council, at any time withdraw its superintendence from the person or property, or both, of the ward, and shall withdraw its superintendence as soon as, in the opinion of the District Court, certified to the Court of Wards, he attains or has attained his majority; or, in the case of a family which is undivided according to Hindu law, any co-sharer ceases to be disqualified: ¹

Withdrawal of superintendence of Court of Wards.

Provided, *firstly*, that

(i) where the ward dies or attains majority and his property is still encumbered with debts and liabilities, the Court of Wards may, with the sanction of the Governor in Council, retain the said property under its superintendence until such debts and liabilities have been discharged; and

(ii) in the case of landholders or pension-holders,² who are co-sharers in a family which is undivided according to Hindu law,³ where one or more of the proprietors of a property remain disqualified although another or others have ceased to be disqualified, the Court of Wards may, with the sanction of the Governor in Council, retain the whole of the property under its superintendence, paying any proprietor who has ceased to be disqualified from surplus income such portion as is proportionate to his interest in the estate.⁴

Provided, *secondly*, that, where the Court of Wards withdraws its superintendence, such withdrawal shall not affect any contract entered into by the Court of Wards in the lawful exercise of its powers.⁵

No appeal lies from the opinion of the District Court certified to the Court of Wards.⁶

Where, in exercise of the above power, the Court of Wards decides to withdraw its superintendence from the person or property, or both, of any minor, it shall, before such with-

Appointment of guardian in certain cases.

¹ *Ante*, p. 418.

² Act II (Bo. C.) of 1913, sec. 4 (2).

³ *Ante*, p. 418.

⁴ Act I (Bo. C.) of 1910, 1st

Schedule, Part II, Serial No. 28.

⁵ Act I (Bo. C.) of 1910, 1st Schedule, Part III, Serial No. 28.

⁶ Act I (Bo. C.) of 1905, sec. 40 (3).

drawal, by an order in writing, appoint some person to be guardian of the person or property, or both, of the minor, and such appointment shall take effect from the date of such withdrawal.¹

In thus appointing a guardian, the Court of Wards shall be guided by the provisions of the Guardians and Wards Act, 1890,² and every guardian so appointed shall have, and be subject to, the same rights, duties, and liabilities as if he had been appointed under that Act.³

Withdrawal to
be notified in
Gazette.

Where the Court of Wards withdraws its superintendence from any person or property under this Act, the fact of such withdrawal shall be notified in the *Bombay Government Gazette*, and in such other manner as the Governor in Council may, by general or special order, direct.⁴

Rule 20.—Where the Court of Wards withdraws its superintendence from the property of a Government ward, the following records and documents shall ordinarily, and subject to the provisions of rules 21 and 22, be made on the landholder, namely:—

(1) Correspondence between the Court of Wards and the vendor regarding any purchase of property made on behalf of the estate, together with all documents affecting the purchase.

(2) Correspondence between the Collector and the purchaser regarding the sale of any property belonging to the estate, together with all documents affecting the sale.

(3) Correspondence between the Court of Wards and any persons who have any claims against or are indebted to the estate regarding such claims and all documents appertaining thereto.

(4) Correspondence between the Court of Wards and lessees regarding leases granted by the Court of Wards.

(5) Papers connected with proceedings in civil, revenue or criminal courts relating to the person or property of a Government ward.

(6) Pattas and all other documents entered into between the Court of Wards and farmers of forest or other revenue; and counterparts received from them.

(7) Such statement of accounts as may suffice to show clearly the financial position of the estate at the time of its release from management.

NOTE.—Copies of any accounts or vouchers will be given on application at the expense of the landholder and free examination of the accounts will be permitted to him.

(8) Bonds and other documents securing repayment of money to the estate.

In the Sind Court of Wards Rules, 1909, rule 20, the second and sixth of the above items are omitted.

¹ Act I (Bo. C.) of 1905, sec. 41 (1). See *ante*, chaps. xv. to xix.

² *Ante*, chap. xi.

³ Act I (Bo. C.) of 1905, sec. 41 (2).

⁴ Act I (Bo. C.) of 1905, sec. 42.

Rule 21.—The Court of Wards may, in its discretion, direct that any of the records and documents referred to in Rule 20 shall not be made over to the landholder, and may in its discretion, on the application of the landholder, direct that any records or documents not referred to in Rule 20 shall be made over to the landholder.¹

Rule 22.—Without the express sanction of the Court of Wards none of the following records or documents shall be made over to the landholder, namely :—

- (i) correspondence between the Court of Wards or manager and any superior authority and reports made by the Court of Wards or manager ;
- (ii) correspondence with and opinions of the Remembrancer of Legal affairs or Government Pleader and copies of such correspondence or opinions ;
- (iii) correspondence reflecting in any way on the conduct of Government servants or employés of the Court of Wards ;
- (iv) correspondence relating to the allowances made to or claims preferred by members of the family of the landholder.

An appeal lies from every order, other than an order of Appeals. the District Court, passed under the Court of Wards Act, whether original or on appeal,

- (a) where the order is that of a Commissioner, or of any special or other officer appointed, or Board constituted, under the proviso to section 3 of the Act,² to the Governor in Council ;
- (b) where the order is that of a Collector, to the Commissioner, or where any such officer or Board has jurisdiction, to such officer or Board ; and
- (c) in all other cases, to the Collector.³

Provided that where any such officer or Board has been appointed to be Court of Wards and the order has been passed by any officer subordinate to such Court of Wards for the purposes of the Act, the Governor in Council may direct that appeal shall lie to such officer or Board.⁴

The provisions of sections 205 to 210, both inclusive, of the Bombay Land-Revenue Code, 1879,⁵ apply to all such appeals.⁶

All orders or proceedings under the Court of Wards Act, other than orders or proceedings of the District Court, are subject to the supervision and control of the Governor in

Control of
Governor in
Council.

¹ This is also rule 21 of the Sind Court of Wards Rules, 1909.

² *Ante*, p. 416.

³ Act I (Bo. C.) of 1905, sec. 43 (1).

⁴ This proviso was added by Act II (Bo. C.) of 1913, sec. 8.

⁵ Act V (Bo. C.) of 1879.

⁶ Act I (Bo. C.) of 1905, sec. 43 (2).

Council; and the Governor in Council may, if he thinks fit, revise, modify, or reverse any such order or proceeding, whether an appeal is presented against any such order or proceeding or not.¹

Power to
compel
attendance
of witnesses.

For the purposes of the Act, the Court of Wards may summon and enforce the attendance of witnesses and compel them to give evidence, and compel the production of documents, by the same means and, as far as possible, in the same manner, as provided in the case of a Civil Court by the Code of Civil Procedure, 1908 (Act V of 1908).²

Bar of suits.

No suit shall be brought in any Civil Court in respect of the exercise of any discretion conferred by the Act, or against the Court of Wards or any public servant or person duly appointed or authorized under this Act, in respect of anything in good faith done or purporting to be done under the provisions thereof or the rules made thereunder:

Provided, *firstly*, that any person evicted under section 28 of the Act,³ may sue for restitution; and

Provided, *secondly*, that any tenant from whom an arrear of rent has been recovered under section 29 of the Act,⁴ may sue for recovery of the amount, or any part thereof, so recovered.⁵

Power of
Governor in
Council to
make rules.

The Governor in Council may, by notification published in the *Bombay Government Gazette*, make rules to carry out the purposes and objects of the Act.⁶

In particular and without prejudice to the generality of the foregoing power, such rules may

- (a) prescribe the matters to which regard should be had in appointing or removing guardians and managers, and in fixing their remuneration;
- (b) regulate the form, conditions, and amount of security, and the number of sureties (if any), to be given by managers;
- (c) prescribe the cases in which proposals or arrangements connected with the administration of the properties of Government wards shall be reported for the sanction of the Governor in Council;

¹ Act I (Bo. C.) of 1905, sec. 44.

² Act II (Bo. C.) of 1913, sec. 9.

³ *Ante*, p. 431.

⁴ *Ante*, p. 431.

⁵ Act I (Bo. C.) of 1905, sec. 45.

⁶ *Ibid.*, sec. 46 (1).

- (d) prescribe the accounts and other returns, and the form and other particulars thereof, which shall be rendered to the Court of Wards and by the Court of Wards to the Governor in Council ;
- (e) regulate the custody of securities and title-deeds belonging to the estate or property of a Government ward ;
- (f) regulate the procedure in inquiries by, and in appeals from orders of, the Court of Wards ;
- (g) prescribe the mode in which powers delegated to managers are to be notified for the information of persons concerned ;
- (h) prescribe the mode in which any expenses incurred by the Court of Wards or the Collector under any power conferred by this Act may be recovered ; and
- (i) generally prescribe the manner in which the powers and duties of the Court of Wards under this Act shall be exercised and performed.¹

The Bombay Court of Wards Rules, 1908, which are referred to above extend to all parts of the Bombay Presidency, except Sind, but do not apply to estates within the area to which the Gujarat Talukdars Act, 1888, extends, which are under the management of the Talukdari Settlement officer as the Court of Wards within that area.²

¹ Act 1 (Bo. C.) of 1905, sec. 46 (2). rule 1 (2).

² Bombay Court of Wards Rules,

CHAPTER XXXVII.

SUITS BY AND AGAINST WARDS AND OFFICERS OF COURTS OF WARDS.

Suits by and against wards of Courts of Wards.

THERE are certain special provisions as to suits¹ brought by or against wards of the Court of Wards, which must be followed,² whether the cause of action arises before or after the minor becomes a ward of the Court.³

Where, however, the minor has been represented by the Court of Wards, and his interests have been sufficiently guarded, it does not follow that an omission to follow the letter of these provisions is fatal to the suit, or prevents the decree from binding the minor.⁴

In matters for which no special provision is made by a local law the Civil Procedure Code⁵ applies.

Notice of suit.

No suit can be brought against a Commissioner or

¹ It has been held that, except where reference is made to other proceedings, these provisions only apply to suits, properly so called. See *Kamaraju v. Secretary of State* (1888), 11 Mad., 309, at p. 315. But it is submitted that the words in all the enactments (*post*, pp. 439, 443, 446, 448) are wide enough to include all proceedings in Civil Courts, whether in what is technically called a suit or otherwise. See *Bhoopendro Narain Dutt v. Baroda Prasad Roy Chowdhry* (1891), 18 Calc., 500; *Hurro Chunder Roy Chowdhry v. Sooradhonee Debia* (1868), B. L. R. F. B. R., 985, at p. 990; 9 W. R. C. R., 403. As to suits brought after the death of a ward, when the succession is in dispute, see *Soomungul Kooer (Mussamul) v. Court of Wards* (1872), 17 W. R. C. R., 560.

² Order 32 of Act V of 1908 (*ante*,

chap. xxv.), which deals with the appointment of next friends and guardians for the suit, and their powers to receive money and compromise suits, does not derogate from the provisions of any local law for the time being in force relating to suits by or against minors: Act V of 1908, order 32, rule 16.

³ *Sheodial Chaubey v. Collector of Gorakhpur* (1883), 5 All., 265.

⁴ *Asharfi Lal v. Deputy Commissioner of Bara Banki* (1895), 22 I. A., 90; 22 Calc., 729; *Hurdeynarain Sahu v. Ruder Perkash Misser (Pundit Baboo)* (1883), 11 I. A., 26; 10 Calc., 626; *Beresford v. Ramasubba* (1889), 13 Mad., 197. See *Norendra Nath Pahari v. Bhupendra Narain Roy* (1895), 23 Calc., 374. See, however, *Ram Chandra Mukerjee v. Ranjit Singh* (1899), 27 Calc., 242.

⁵ Act V of 1908, *ante*, chap. xxv.

Collector¹ for an act purporting to be done by him in his official capacity, except after the notice required by the Civil Procedure Code.²

It has been held³ that if defendants are sued as trespassers, and not in an admitted official capacity, notice is unnecessary. It is submitted that this decision does not give sufficient effect to the word "purporting" in the section in question.

As to notice of suits relating to the person or property of wards of the Court of Wards, see *post*, pp. 443, 446, 448, 449.

No such notice is necessary in Bengal.⁴

It may happen that the Collector, manager, or other person required by law to represent a litigant ward of the Court of Wards is required to represent wards whose interests are adverse to one another. It is the duty of the Court of Wards to prevent any such conflict of interests. In Bengal this can be done by an order under sec. 52 of the Court of Wards Act, 1879.⁵ In Madras,⁶ the United Provinces,⁷ and Bombay⁸ a special procedure is provided for such a case.

Conflict of interests represented by Collector or manager.

A suit by or against a ward of the Court of Wards cannot be tried by the officer, who, as representing the Court of Wards, or in any other capacity, caused the suit to be instituted or defended;⁹ or has been concerned in the prosecution or defence of the suit.

The Court of Wards Act, 1879, contains the following provisions as to suits by or against wards of the Bengal Court of Wards, but they do not apply to suits instituted or pending in the High Court¹⁰ :—

Wards of Bengal Court of Wards.

"Section 51.—In every suit brought by or against any ward he shall be therein described as a ward of Court, and the

Manager or Collector to be next friend or guardian for the suit.

¹ *Collector of Bijnor v. Munuvar* (1880), 3 All., 20.

² *i.e.* until the expiration of two months next after notice in writing has been delivered to, or left at the office of the proposed defendant, stating the cause of action and the name, description, and place of residence of the intending plaintiff, and the relief which he claims: Act V of 1908, sec. 80.

³ *Ganoda Sundary Chaudhurani v. Nalini Ranjan Raha* (1908), 36 Calc., 28; 12 C. W. N., 1065.

⁴ See Ward's Manual, 1909, p. 31.

⁵ Act IX (B. C.) of 1879, *post*, p. 440.

⁶ Act I (M. C.) of 1902, sec. 53, *post*, p. 444.

⁷ Act IV (U. P. C.) of 1912, sec. 58, *post*, p. 448.

⁸ Act I (Bo. C.) of 1905, sec. 36, *post*, p. 450.

⁹ *Bikromajeet M. O. Deb (Rajah) v. Court of Wards* (1874), 21 W. R. C. R., 312.

¹⁰ Act IX (B. C.) of 1879, sec. 56, as amended by Act I (B. C.) of 1906, sec. 6, Act III (E. B. & A.) of 1907, sec. 8, and Act I (B. C.) of 1914, sec. 6.

manager of such ward's property, or if there is no manager,¹ the Collector of the district in which the greater part of such property is situated, or any other Collector whom the Court of Wards may appoint in that behalf, shall be named as next friend or guardian for the suit, and shall in such suit represent such ward,² and no other person shall be ordered³ to sue or be sued⁴ as next friend, or be named as guardian for the suit, by any Civil Court in which such suit may be pending.⁵

Court may substitute another person to be next friend or guardian for the suit.

"Section 52.—The Court of Wards⁶ may, by an order, nominate or substitute any other person to be next friend or guardian for any such suit; and upon receiving a copy of any such order of substitution, the Civil Court in which such suit is pending shall substitute the name of the next friend or guardian for the suit so appointed for the name of the manager or Collector.

Payment of costs.

"Section 53.—If in any such suit any Civil Court shall decree any costs against the next friend or guardian for the suit of the ward, the Court of Wards⁷ shall cause such costs to be paid out of any property of the ward which, for the time being, may be in its hands.

Service of process against ward.

"Section 54.—Every process which may be issued out of any Civil Court against any ward shall be served, through the Collector, upon the next friend or guardian for the suit as aforesaid of such ward.⁸

¹ The absence of the manager on leave does not entitle the Collector to represent the ward: *Bhoopendro Narain Dutt v. Baroda Prosad Roy Chowdhry* (1891), 18 Cal., 500.

² This course should be strictly followed: *Abdool Hye (Syud) v. Banee Pershad (Baboo)* (1874), 21 W. R. C. R., 228. Cf. *Ananda Kumari Debi v. Durga Mohan Chuckerbutty* (1915), 20 C. W. N., 31. It is not proper to make the manager plaintiff or defendant, even though he be described as the manager of the ward's estate: *Abdool Hye v. Mitterjeet Singh (Baboo)* (1875), 23 W. R. C. R., 348; see *ante*, pp. 253, 259, 260. The next friend or guardian, whether he be manager or not, must act subject to the control and orders of the Court of Wards.

³ *i.e.* permitted.

⁴ The words "or be sued" have apparently been inserted in the Act by mistake; no one can in any Court be sued as next friend.

⁵ Where the minor has been represented, and his interests have been looked after, a Court of Appeal would not interfere on the ground that the provisions of this section had not been complied with to the letter; see *ante*, p. 438.

⁶ Or the Collector: Court of Wards, rule 229.

⁷ *Ibid.* The Commissioner can also sanction the payment of any damages which may be decreed against the ward: *ibid.*

⁸ Although the Collector is responsible for the service, the Civil Court in determining whether a process had been served would have to be satisfied not only that it has been

“Section 55.—No suit shall be brought on behalf of any ward by a manager,¹ unless the same be authorized by some order of the Court :²

Suit to be authorized by Court.

“Provided that a manager may authorize a plaint to be filed in order to prevent a suit from being barred by the law of limitation,³ but such suit shall not be afterwards proceeded with except under the sanction of the Court.⁴

“Provided also that suits for arrears of rent⁵ may be brought on behalf of any ward if authorized by an order of the manager of the landed property on which such rents are due.”

A Commissioner may order all things to be done, which may be requisite for the proper conduct of any suit in which a ward is concerned.⁶

Power of Commissioner.

All suits connected with the estates of wards of Court shall be conducted in accordance with the Civil Suit Rules issued by Government.⁷

The only suits which can be brought without reference to the Legal Remembrancer are suits (other than those which are excepted from the cognizance of a Provincial Court of Small Causes)⁸ where the value is less than Rs. 500, and no question of legal principle is involved.⁹ No proceeding of any kind should be instituted or defended in the High Court unless under the orders of the Legal Remembrancer.¹⁰

Institution of suits without reference to Legal Remembrancer.

delivered to the Collector, but also that it has been served in accordance with the Civil Procedure Code (Act V of 1908, order 5, rules 9-17), through the Collector.

¹ The words “by a manager” were inserted by Act III (B. C.) of 1881, sec. 7.

² Or of the Commissioner: Court of Wards, rule 229. Collectors may sanction the institution of suits, other than rent suits, of the value of Rs. 100 and under, and may sanction the defence of such suits when instituted against the estate: *ibid.* It was held in *Dinesh Chunder Roy v. Golam Mostapha* (1888), 16 Calc., 89, that where there is no order of the Court authorizing the bringing of such suit, the suit must be dismissed, and that sanction given after appeal filed cannot have a retrospective effect; cf. *Oriental Bank v. Gobind Lall Seal* (1883), 9 Calc., 604; 13 C. L. R., 142. It was also held in *Ram Chandra Mukerjee v. Ranjit Singh* (1899), 27 Calc., 242, that the absence of the consent of the Commissioner vitiates

the suit. No order is necessary to authorize a manager to file a certificate under the Public Demands Recovery Act (VII of 1880 (B. C.), sec. 7, *ante*, pp. 351, 357): Court of Wards Manual, 1909, p. 45 note.

³ This applies to an appeal: Court of Wards, rule 229.

⁴ If the Court of Wards refuses to sanction the suit, the Civil Court should reject the suit as being incapable of being prosecuted: *Biseswar Roy (Kumar) v. Shoshi Sikar Eswar Roy (Kumar)* (1889), 17 I. A., 5; 17 Calc., 688.

⁵ *i.e.* a suit which claims arrears of rent and nothing else. A suit which claims also a right to ejectment must be authorized by the Court of Wards: Court of Wards Manual, 1909, p. 31 note.

⁶ Court of Wards, rule 229.

⁷ *Ibid.*, rule 224.

⁸ Act IX of 1887, sched. II.

⁹ Court of Wards, rule 232. If the case assume an unforeseen importance it should be referred: *ibid.*

¹⁰ *Ibid.*

A copy of the brief, *i.e.* the plaint, written statement (if any), the Government Pleader's opinion, the documentary evidence, with translation and explanation, shall be sent by the Commissioner or the Collector to the Board of Revenue for information

- (a) in all cases or classes of cases involving revenue questions in which the Board may by general order so direct ;
- (b) in all cases of importance in which the Commissioner or Collector may think that the Board, as the chief Revenue authority, should be informed of the facts.¹ A copy must be sent in all cases in which a suit is brought against Government or the Court of Wards to contest, set aside, or modify any proceedings of the Revenue authorities in which the Board has taken a part ; in cases affecting the right of Government to lands taken possession of as islands ; and in cases affecting the right of Government to assess alluvial increments ; in cases by under-tenants or raiyats to contest enhancements of rent, in which latter cases, when several suits are instituted on similar grounds, it is only necessary to send a copy of the brief in the typical case, with a report explanatory of the general circumstances.²

The order for the institution of a suit (a) extends to all steps necessary to prosecute it to final judgment, and, therefore, involves appeal, if need be ; and (b) is (1) to be written, (2) to bear the signature of the Commissioner and not of his personal assistant, and (3) to be filed with the plaint in every suit. A general order or an order by telegram is not admissible. The latter may be acted upon, but it must be supplemented by a final order.³

Conduct of suits.

After institution, suits are, as a general rule, to be conducted by the Collector under the supervision of the Commissioner ; but in the case of large estates with experienced managers, the conduct of such suits may, with the sanction of the Commissioner, be left to managers.⁴

Local pleaders to be consulted.

Important suits not to be entered upon without reference.

Collectors or managers, before instituting or defending suits, should obtain the opinion of the local pleader employed by them, and should be careful not to enter upon any suit, which may probably involve important issues, without reference to the Legal Remembrancer or the Board.⁵

Whenever the Commissioner sees reason to apprehend that any case is likely to assume unforeseen importance, he should call for such information as will enable him to judge whether the advice of the Legal Remembrancer is necessary, and, if such advice seems necessary, should forward the papers to the Legal Remembrancer.⁶

The sanction of the Board is necessary to an appeal, except that it may be filed in anticipation of such sanction, in order to prevent it being barred by limitation.⁷

Reference to Board if appeal appears necessary.

Whenever an appeal appears to be necessary in a case conducted without reference to the Legal Remembrancer, a reference should be made to the Board in respect of estates with current rent and cess demand of over Rs. 100,000, and the Commissioner in all other cases, so as, if

¹ Court of Wards, rule 225. This applies to appeals : *Ibid.*, rule 225A.

² *Ibid.*, rule 226.

³ *Ibid.*, rule 229.

⁴ *Ibid.*, rule 233.

⁵ *Ibid.*, rule 234.

⁶ *Ibid.*, rule 235.

⁷ *Ibid.*, rule 225A.

possible, to admit of their passing orders in time for the institution of the appeal; but if orders are not received the appeal may be instituted.¹

No appeal can under any circumstances be made to the High Court without reference to the Legal Remembrancer.²

Appeal to High Court.

The following provisions apply to suits by or against or relating to the person or property of wards of the Madras Court of Wards:—

Madras Court of Wards.

No suit³ relating to the person or property⁴ of any ward shall be instituted in any Civil Court until the expiration of two months after notice in writing has been delivered to or left at the office of the District Collector specified in the Government notification,⁵ or of the person appointed to discharge the functions of such Collector,⁶ as the case may be.⁷

Suit not to be instituted until after notice to Collector.

Such notice shall state the name and place of abode of the intending plaintiff, the cause of action, and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left:

Provided that such notice shall not be required in the case of any suit the period of limitation for which will expire within three months from the date of the Government notification.⁸

In all suits or proceedings in any Civil or Revenue Court the ward shall sue and be sued in his own name and the manager of his property appointed under section 24⁹ or, if there is no such manager, the officer competent to act as manager under section 25¹⁰ shall represent him, as next friend or guardian *ad litem* as the case may be.¹¹

Suit or proceeding by or against ward.

¹ Court of Wards, rule 236. An appeal under sec. 32 (1) of the Public Demands Recovery Act (VII (B. C.) of 1880) on behalf of a ward's estate against the orders of a Certificate Officer may be made without reference to any authority higher than the Collector, unless the case is one of an unusual and specially difficult character: note to rule 236. Copies of the plaint, reply, decision, grounds of appeal, Government Pleader's opinion, and the remarks of the Collector, should be sent up to the Board: *ibid.*, rule 237.

² *Ibid.*, rule 238.

³ *Ante*, p. 438, note 1.

⁴ This includes a suit for money:

Venkatachelapatty v. Siva Row Naidu Bahadur (Sri Rajah B. S. V.) (1912), 37 Mad., 383.

⁵ *Ante*, p. 364.

⁶ *Ante*, p. 365.

⁷ Act I (M. C.) of 1902, sec. 49 (1).

⁸ *Ibid.*, sec. 49 (2).

⁹ *Ante*, p. 369.

¹⁰ *Ibid.*

¹¹ Act I (M. C.) of 1911, sec. 2, amending Act I (M. C.) of 1902, sec. 50 (1). In the case of a suit pending at the time when the Court assumes superintendence, the next friend or guardian for the suit would apparently be discharged, and the manager substituted; see *ante*, pp. 265, 268.

Costs against manager, how paid.

If in any such suit or proceedings any Civil or Revenue Court shall decree any costs against the manager or other officer competent to act as manager under section 25,¹ the Court of Wards shall cause such costs to be paid out of any property of the ward which, for the time being, may be in his hands.²

Suits must be authorized by Court.

No suit shall be brought on behalf of any ward by the manager or other officer competent to act as manager under section 25,¹ unless authorized by some particular or general order of the Court :³

Provided that a manager or other officer as aforesaid, as the case may be, may file a plaint in order to prevent a suit from being barred by the law of limitation, but such suit shall not be further proceeded with until the consent of the Court has been obtained.⁴

Adjudication of civil disputes between two or more wards.

When any question arises as between two or more wards of such a nature that an adjudication upon it by a Civil Court is expedient, the Court of Wards, acting through the Collector of the district in which a case might have been stated for the opinion of the Civil Court with regard to such matter under order 36, rule 1 of the Code of Civil Procedure,⁵ may file, in the Civil Court having jurisdiction, a statement containing the point or points for determination.⁶

When such statement has been filed, the Civil Court shall appoint a guardian *ad litem* ⁷ for each ward having a separate interest, and such guardians shall thereupon conduct the case subject to the general control of the Court of Wards.⁸

The Civil Court may, if it thinks fit, amend the case so stated, and shall then proceed to hear and dispose of the case in the manner provided in order 36 of the Code of Civil Procedure ⁹ for the hearing and disposal of cases stated for opinion under that order.¹⁰

¹ *Ante*, p. 369.

² Act I (M. C.) of 1911, sec. 3, amending Act I (M. C.) of 1902, sec. 51.

³ *Ibid.*, amending Act I (M. C.) of 1902, sec. 52.

⁴ Act I (M. C.) of 1911, sec. 4, amending Act I (M. C.) of 1902, sec. 52.

⁵ Act V of 1908.

⁶ Act I (M. C.) of 1902, sec. 53 (1).

⁷ *Ante*, pp. 260, 261.

⁸ Act I (M. C.) of 1902, sec. 53 (2).

⁹ Act V of 1908.

¹⁰ Act I (M. C.) of 1902, sec. 53 (3). This procedure is optional. In some cases the ordinary procedure may be more appropriate, but there would apparently have to be separate representatives in spite of the provisions of sec. 50.

The following orders have been made by the Madras Board of Revenue :—

“ Under section 50 (2) of Madras Act I of 1902, all suits or proceedings Institution of suits. in any Civil or Revenue Court on behalf of a ward's estate shall be instituted in the name of the manager. Managers should not institute such suits or proceedings on their own authority unless empowered specially for that purpose by the Court of Wards. When difficult or doubtful points of law or special important issues are involved, the manager should obtain the sanction of the Collector before instituting the suit. Whenever in the Collector's opinion the matter is of sufficient importance, the Court's sanction should be obtained.

All other suits may be instituted by Collectors in their own names. In cases involving special and important issues the sanction of the Court of Wards must be obtained before the suit is instituted. When applying for such sanction, Collectors should briefly state the facts of the case and also forward draft plaints for approval.¹

2. Suits against ward's estates involving important issues or doubtful or difficult questions of law should be reported to the Court of Wards, to whom drafts of the written statements which it is proposed to file must also be forwarded for approval. Before applying to the Court for sanction for the defence of suits, the Collector should see that all the evidence necessary to meet the plaintiff's contention, including the statements of witnesses whom it is proposed to call on behalf of the ward, has been put on record, and he should satisfy himself that it is sufficient. A summary of the evidence should be given in his report to the Court.² Defence of suits.

3. Collectors may order appeals to be filed on questions of fact without reference to the Court of Wards in any suit originally instituted on their own authority or by managers of estates and may also oppose appeals against decisions in favour of estates whether the defence of the original suits was sanctioned by themselves or by the Court of Wards.³ Appeals.

4. The result of all suits and appeals, of which the institution or defence is sanctioned by the Court of Wards, must be reported to the Court. But copies of the decrees and judgments in such suits need not be forwarded to the Court except in the following cases :— Report of result.

(a) When the decision is unfavourable to the Court, whether wholly or partially (as for instance in regard to costs), and it is necessary to decide whether an appeal should be preferred or not :

(b) When the judgment contains a ruling or other matter of importance.⁴

5. Collectors are authorized to incur all ordinary charges incidental to the conduct of suits instituted or defended by them at their own instance or in anticipation of sanction, or with the approval of the Court of Wards. The sanction of the Court must be obtained when any extraordinary charges have to be incurred.⁵ Expenses of suits.

¹ Court of Wards Standing Order 137.

² *Ibid.*, 138. The Civil Court in fixing the date for the defendant to appear and answer should allow not less than two months' time between

the date of the summons and the date for appearance.

³ *Ibid.*, 139.

⁴ *Ibid.*, 140.

⁵ *Ibid.*, 82.

Pleaders' fees. 6. In regard to pleaders' fees, the regulation fees should not be exceeded in ordinary cases, and when only one of a batch of similar cases has actually to be argued, the Collector should try to arrange for the payment of a consolidated sum. When the regulation fee is less than Rs. 50, and appears to be insufficient, Collectors have authority to grant a higher fee not exceeding Rs. 50 in each case at their discretion.

Small causes. In Small Cause cases, pleaders' fees should ordinarily be paid at the rate of Rs. 5 and a minimum of Rs. 1, half fees only being allowed in cases decided *ex parte*, withdrawn, or compromised at the outset. In summary suits the minimum is Rs. 2.¹

As to the employment of pleaders, and of counsel for the conduct of cases in Madras, see Court of Wards Standing Orders 141 and 142.

United Provinces. The following provisions relate to the Court of Wards of the United Provinces of Agra and Oudh :

No suit shall be brought against any officer of Government, or any guardian, manager or servant appointed by and discharging his duties under the Court of Wards for anything done by him in good faith under the Act.²

Notice of civil suit. No suit relating to the person or property³ of any ward shall be instituted in any Civil Court until the expiration of two months after notice in writing has been delivered to or left at the office of the Collector or other person in charge of the property, stating the name and place of abode of the intending plaintiff, the cause of action, and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left :⁴

Suit in Civil Court. No ward can sue or be sued nor can any proceeding be taken in the Civil Court otherwise than by and in the name of the Collector in charge of his property or such other person as the Court of Wards may appoint in this behalf.⁵

Appointment of representatives in Civil Court. Where in any suit or proceeding two or more wards being parties have conflicting interests, the Court of Wards shall appoint for each such ward, a representative, and the said representative shall thereupon conduct or defend the case on behalf of the ward whom he represents, subject to the general control of the Court of Wards.⁶

Statement of case for opinion by Civil Court. Where any question arises as between two or more wards

¹ Court of Wards Standing Order 82.

² Act IV (U. P. C.) of 1912, sec. 53 (2).

³ This includes a suit for money; *ante*, p. 443, note 4.

⁴ Act IV (U. P. C.) of 1912, sec. 54; see *Muazzam Ali Shah v. Chuni Lal* (1911), 33 All., 791; *Baldeo Prasad v. Collector of Pilibhit* (1914), 37 All., 13.

⁵ Act IV (U. P. C.) of 1912, sec. 55.

⁶ *Ibid.*, sec. 56.

of such nature that an adjudication upon it by a Civil Court is expedient, the Court of Wards may appoint a representative on behalf of each ward. The representatives so appointed shall prepare a statement containing the point or points for determination and shall on behalf of the said wards file the statement in a Civil Court having jurisdiction in the form of a case for the opinion of such Court.¹

The Civil Court shall then proceed to hear and dispose of the case in the manner prescribed by the Code of Civil Procedure, 1908,² for the hearing and disposal of suits.³

The case shall be conducted on behalf of the wards by such representatives subject to the general control of the Court of Wards.⁴

When it appears to the Court of Wards that any question or dispute arising between two or more wards is a fit subject for reference to arbitration, it may appoint a representative on behalf of each such ward and require the said representatives to submit the question or dispute to the arbitration of such person or persons as it may approve.⁵

Procedure for arbitration in cases between wards.

Such reference to arbitration takes effect in the same manner, and has the same consequences as a reference made by persons who are not wards of Court.⁶

This procedure is optional. In some cases the ordinary procedure may be more desirable.

Civil suits for arrears of rent secured by bonds for sums due on account of sayar auction and other miscellaneous dues may be filed by the district officer without reference to higher authority.⁷

Power of District Officer to file without reference.

In all other civil proceedings the procedure laid down in Parts IV and VI of the Legal Remembrancer's Manual shall be followed.

* * * * *

Appeals shall be filed subject to the orders of the Commissioners, but no appeal shall be filed in the High Court or Court of Judicial Commissioners without the sanction of the Court of Wards.⁸

Where a suit is brought in the Civil Court against the Court of Wards acting on behalf of a ward in respect of any property under the superintendence of the Court of Wards

Saving of direct liability of Court of Wards for legal expenses.

¹ Act IV (U. P. C.) of 1912, sec. 57 (1).

² Act V of 1908.

³ Act IV (U. P. C.) of 1912, sec. 57 (2).

⁴ *Ibid.*, sec. 57 (3).

⁵ *Ibid.*, sec. 58.

⁶ *Ante*, p. 176.

⁷ Court of Wards Manual, 1914, rule 153.

⁸ See *ibid.*, rule 154.

and the title of the ward to the said property is lost by reason of a decree in such suit, all expenses¹ incurred by the Court of Wards in the course of such litigation shall, so far as they are not payable by the opposite party, be recoverable in the first instance from any other property belonging to the ward, and in default thereof from the property on account of which such litigation was undertaken.²

Suits, etc., in Revenue Courts.

No ward shall sue or be sued, nor shall any proceedings be taken in a Revenue Court, except by or in the name of the manager appointed by the Court of Wards, or the Collector in charge of the ward's property.³

Such manager may, subject to the control of such Collector, or, where there is no such manager such Collector may institute, defend, compromise, or otherwise deal with suits, applications, or other proceedings in Revenue Courts relating to the property entrusted to him.⁴

The following rules relate to Revenue and Rent Courts' litigation:—

Powers of manager in revenue and rent suits.

The manager may institute suits for arrears of rent or other arrears recoverable through the Revenue Courts. Suits for ejectment or enhancement of rents shall only be instituted by managers, after a full inquiry into the circumstances of the case.⁵

Legal opinion.

The District Officer or manager, before instituting, defending, or otherwise dealing with suits shall, if necessary, take advice locally and exercise care not to enter upon any suit which may involve important issues without reference to the Court of Wards or the Legal Remembrancer.⁶

The preferring or defending of appeals which lie to the Collector or Deputy Commissioner, the District Judge, Commissioner or the Board is left to the discretion of the local authorities.⁷

As to the duties of Court of Wards *mukhtars*, and *ziladars*, see Court of Wards Manual, 1914, rules 160–165.

As to appeals to the High Court or the Judicial Commissioner in rent and revenue suits, see rule 166.

Suits by and against wards of Bombay Court of Wards.

The following provisions of Bombay Act I of 1905 apply to suits by and against wards of the Court of Wards in the Bombay Presidency:—

Notice of suit.

“31.—No suit relating to the person or property⁸ of any

¹ This would include all expenses, and not be confined to what are generally known as party and party costs.

² Act IV (U. P. C.) of 1912, sec. 60.

³ *Ibid.*, sec. 58 (1).

⁴ *Ibid.*, sec. 59 (2). As to the compromise of suits by and against

minors, see *ante*, pp. 272 to 275.

⁵ Court of Wards Manual, 1914, rule 156; see rule 69.

⁶ Court of Wards Manual, 1914, rule 157.

⁷ *Ibid.*, rule 158.

⁸ As to a suit for money, see *ante*, p. 443, note 4.

Government ward shall be brought in any Civil Court until the expiration of two months after notice in writing, stating the name and place of abode of the intending plaintiff, the cause of action and the relief claimed, has been delivered to, or left at the office of, the Court of Wards; and the plaint shall contain a statement that such notice has been so delivered or left:

“ Provided that notice under this section shall not be required in the case of any suit the period of limitation for which will expire within three months from the date of a notification issued under section 13, sub-section (1).

“ 32.—Subject to the provisions of order 32, rule 4 (2) of the Code of Civil Procedure, in every suit brought by or against a Government ward, the manager of the Government ward's property, or, where there is no manager, the Court of Wards having the superintendence of the Government ward's property, shall be named as the next friend or guardian for the suit, as the case may be.

Manager of Court of Wards to be next friend or guardian in suit by or against Government wards.

This has no application to suits instituted before the Act came into force.¹

The Act does not in words contemplate a suit by the Court of Wards or by the Collector, but the words of section 10² are apparently wide enough to include a power to bring such suits in cases where an order has been made for the temporary protection of the property.³ It is better that even in these cases the suit should be brought in the name of the ward. Except for such purpose the suit must apparently be brought in the name of the ward.

“ 33.—Where, in any suit brought by or against a Government ward, any Civil Court decrees any costs against the Government ward's next friend or guardian for the suit, the Court of Wards shall cause the costs to be paid out of any property of the Government ward which may, for the time being, be in its hands.

Payment of costs.

“ 34.—Every process which may be issued out of any Civil or Revenue Court against any Government ward shall be served on the Government ward's next friend or guardian for the suit.

Processes against Government ward to be served on next friend or guardian.

“ 35.—No suit shall be brought, and no appeal in any suit shall be preferred, by any guardian or manager appointed by

Authority of Court of Wards required in case of suits brought on behalf of Government wards.

¹ *Hari Govind v. Narsingrao Konherra* (1913), 38 Bom., 194; 16 Bom. L. R., 30.

² *Ante*, pp. 418, 419.

³ See Court of Wards Manual, 1914, p. 108.

the Court of Wards on behalf of any Government ward unless it is authorized by an order in writing of the Court of Wards :

“ Provided that a manager may authorize a plaint or a memorandum of appeal to be filed in order to prevent a suit or appeal from being barred by the law of limitation, but the suit or appeal shall not afterwards be proceeded with except with the sanction of the Court of Wards.

Adjudication
of civil dis-
putes between
two or more
Government
wards.

“ 36.—(1) Where any question arises as between two or more Government wards of such a nature that an adjudication upon it by a Civil Court is expedient, it shall be lawful for the Court of Wards, acting through the Collector of the district in which a case might have been stated for the opinion of the Civil Court with regard to such matter under order 36, rule 1 of the Code of Civil Procedure, to file in the Civil Court having jurisdiction a statement containing the point or points for determination.

“ (2) When such statement has been filed, the Court shall appoint a guardian for the suit for each ward having a separate interest, and such guardian shall thereupon conduct the case subject to the general control of the Court of Wards.

“ (3) The Court may, if it thinks fit, amend the case so stated, and shall then proceed to hear and dispose of the case in the manner provided in order 36 of the Code of Civil Procedure for the hearing and disposal of cases stated for opinion under that chapter.”

Appeals.

The Acts relating to the Courts of Wards are silent as to the procedure in appeals in suits which have been instituted before the estate was brought under the superintendence of the Court.

If the appeal be pending at the time when the minor or his estate is taken under the superintendence of the Court, the next friend or guardian for the suit would apparently be able to conduct the appeal subject to the control of the Court of Wards, or such Court might require the substitution of a next friend or guardian for the appeal of its own nomination. An appeal can only be instituted with the consent of the Court of Wards after the estate has been taken under its superintendence.

Subordinate
Judge.

Under Act XIV of 1869, section 32, no subordinate Judge or

Court of Small Causes could receive or register a suit against the Court of Wards or against a Collector or other officer appointed to act as a Court of Wards.¹

There is nothing to prevent a subordinate Judge dealing with execution proceedings in a case where the Court of Wards has been added as party to such proceedings.²

This section has been amended by Bombay Act V of 1914, section 2, and as it now stands it has no application to a suit against an officer of the Government—

(i) who has been declared or appointed to be the sole member or one of a board constituting a Court of Wards, or

(ii) to whom all or any of the powers of a Court of Wards have been delegated, or

(iii) through whom all or any of the powers of a Court of Wards are exercised, or

(iv) who has been appointed a manager of the property of a Government Ward, or

(v) who has been appointed a guardian of the person of a Government ward, or

(vi) who has been appointed a guardian of the person or property, or both, of a minor under section 3,³ sub-section (1) of section 19,⁴ section 20,⁵ sub-section (1) of section 22,⁶ or sub-section (1) of section 41,⁷ respectively of the Bombay Court of Wards Act, 1905,

is in virtue of such declaration, appointment, delegation or exercise of powers a party to such suit.

¹ See *Sillwa v. Minizis* (1912), 37 Bom., 313.

² *Bandoo Krishna v. Narsingrao* (1914), 38 Bom., 662; 16 Bom. L. R., 527.

³ *Ante*, p. 416.

⁴ *Ante*, p. 425.

⁵ *Ante*, p. 425.

⁶ *Ante*, p. 428.

⁷ *Ante*, p. 439.

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