

**GOVERNMENT OF INDIA
MINISTRY OF LAW, JUSTICE AND
COMPANY AFFAIRS**



**LAW COMMISSION OF INDIA
SIXTY-SIXTH REPORT
ON
MARRIED WOMEN'S PROPERTY
ACT, 1874**

MAY, 1976

P. B. GAJENDRAGADKAR,

Chairman

*Shastri Bhavan,
New Delhi-110 001
May 12, 1976.*

I have great pleasure in forwarding herewith the Sixty-sixth Report of the Commission on the Married Women's Property Act, 1874. In the latter half of 1975, the Commission took up this subject *suo motu*, because it thought that, in the International Women Year 1975, it would be appropriate to revise this Act.

As usual, a preliminary study of the relevant material was made, a draft report prepared and discussed in detail. In consequence, changes were made in the draft report and it was then finalised.

You are aware that the present Act, which was passed in 1874, is based mainly on the earlier English Statute of 1870. Thereafter, statutory developments in England and elsewhere in regard to the question of married women's right to property have been fairly extensive; as a consequence, the whole concept and character of married women's right to property has been revolutionised. This revolutionary change is consistent with modern juristic thinking on the subject and the changed sociological notions. This development, which has taken place during the century after the passing of the Act, the Commission thought, required a comprehensive revision of the Act.

In order to decide what recommendations the Commission should make in regard to the changes in the Act, the Commission thought it necessary to consider the background of the Act and take notice of the historical development of the various rules of Common Law and Equity relevant to the subject.

The Commission also thought it necessary to undertake a study in depth of the comparative material in order to enable the Commission to consider and decide the various aspects of the problem pertaining to the formulation of the Commission's recommendations on the subject. The recommendations made by the Commission will speak for themselves; but I think it would not be inappropriate if, in this covering letter, I indicate some of the broad features of the radical changes we suggest in the Act.

The old common law notion that the wife's person was, for all legal purposes, merged in that of her husband and that, while the marriage lasted, her real estate and (with certain exceptions) her personal property became her husband's property, has now become completely obsolete. That is why we have made suitable recommendations in that behalf to bring our statutory law in conformity with modern juristic principles.

(i)

The Commission also thought that the separate liability of the wife should no longer be proprietary only, but should be a personal liability quite independent of her husband. This, we thought, should be made clear by legislation, not merely in regard to married women of the particular community to which this Act applies at present, but also in regard to married women of other communities as well. That, in brief, is the approach adopted by the Commission in making its recommendations.

Section 6 of the Act which deals with the policies of life insurance is undoubtedly a provision of considerable sociological importance and, as at present worded, it presents certain difficult questions of interpretation. The problems posed by section 6 have, therefore, been dealt with in our Report in a separate Chapter in order to enable the Commission to set out its views both from the sociological and juristic points of view.

After the Commission was constituted in September 1971, it has forwarded to the Government Twenty-two Reports (Nos. forty-five to sixty-six) including the present one and after the present Commission was re-constituted in September 1974, it has forwarded six Reports including the present one.

Before I conclude, I would like to invite your attention to the request made by me while forwarding the sixty-fifth Report. I had suggested—and I wish to repeat my suggestion that, after the present Report is printed, copies of the Report should be circulated to the relevant academic and professional institutions so that it may encourage a debate on the questions considered by the Commission and that, in turn, may assist the Government in coming to its own conclusions on the relevant recommendations made by the Commission in this Report. I trust you will appreciate my point and accept my suggestion.

With warm personal regards.

Yours sincerely,
(Sd./-)
(P. B. Gajendragadkar)

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CONTENTS

CHAPTER 1	— Introductory.	1
CHAPTER 2	— History of English law on the subject.	6
CHAPTER 3	— Women's Position in India—brief historical study.	10
CHAPTER 4	— Scheme of the Act of 1874.	26
CHAPTER 5	— Cognate provisions in other Acts.	27
CHAPTER 6	— Extent and application of Act of 1874.	33
CHAPTER 7	— Married Women's wages and earnings.	34
CHAPTER 8	— Insurances by wives and husbands.	35
CHAPTER 9	— Legal proceedings.	61
CHAPTER 10	— Wife's liability for husband's debts.	63
CHAPTER 11	— Husband's liability for wife's debts.	65
CHAPTER 12	— Husband's liability for wife's breach of trust or devastation.	65
CHAPTER 13	— Other matters.	66
CHAPTER 14	— Recommended amendments in the Act of 1874 by way of simplification in a few sections.	67
CHAPTER 15	— Amendments in other Acts.	69

APPENDICES

APPENDIX 1	— The Married Women's Property and Miscellaneous Provisions Bill.	73
APPENDIX 2	— Existing sections 20 to 22, Indian Succession Act, 1925.	75
APPENDIX 3	— Section 11, Married Women's Property Act, 1882 (Eng.).	75
APPENDIX 4	— Law Reform (Married Women and Tort Feasors) Act, 1935 (Eng.).	76
APPENDIX 5	— Married Women (Restraint upon Anticipation) Act, 1949 (Eng.).	77
APPENDIX 6	— Law Reform (Husband and Wife) Act, 1962 (Eng.).	78

CHAPTER 1

INTRODUCTORY

1.1. A hundred years ago was passed the Married Women's Right to Property Act, 1874, which¹ sought to free married women from certain anachronistic rules of the common law which were regarded as applicable to persons of certain communities in India also. This is a short Act, containing only 10 sections, but, as our Report will show, it raises certain important issues.

Scope of the Report.

A few years before the Act was passed, section 4 of the Indian Succession Act, 1865, had established the principle that by marriage the husband does not acquire any rights in the property of the wife. A few years later, legislation recognising what is known as the restraint on anticipation in case of married women, was enacted in section 10 of the Transfer of Property Act, 1882. These legislative provisions have, during a century or so of their existence, given rise to certain problems and difficulties and the Law Commission, in the International Women's Year, 1975 considered it appropriate to take up these provisions for examination with a view to suggesting such changes as may be necessary for their improvement.

1.2. The need for revision of the Act of 1874 and cognate provisions has arisen from various factors, which may be briefly enumerated:

Reason for revision.

- (a) Change in social notions.
- (b) Difficulties felt with reference to application of the beneficial provisions of the Act, particularly section 6.
- (c) Scope for drafting improvements for removing certain apparent inconsistencies.

1.3. While many of the provisions of the Act of 1874 are not applicable to the majority of Indian women, a very important section—section 6—is so applicable. That section deals with the effect of certain arrangements that may be made by the husband for the benefit of his wife or children or both his wife and children, in relation to policies of life insurance. The sociological importance of these arrangements is obvious. In making this provision, which is a very beneficial one, the legislature showed awareness of the financial interests of the wife, and her dependence on the husband as the provider for the family. The provision is intended to protect the monetary security offered by such arrangements which, in a sense, are to be considered as substitutes for the economic security offered by matrimony. While marriage does not grant to either spouse a right in the property of the other spouse, it does create expectations of emotional as well as economic support from the other spouse. This is particularly so in the case of the wife. The family is still an economic unit. Section 6, which is vitally concerned with the economic welfare of the wife and children, takes note of this aspect, and proceeds to make certain provisions intended to render more effective the arrangements made by the husband in relation to the disposal of moneys to be received on an insurance of his life.

Applicability of the Act of 1874.

1.4. While, therefore, a radical change in the principle of the existing section is not required, there is an urgent need for amendments which will more effectively carry out the principle which underlies the provisions of section 6.

Need for amendment of section 6.

¹The Act will be referred to in brief as the Act of 1874.

(Chapter 1.—Introductory—Contd.)

It is in this context, that we have considered it proper to examine section 6 at length. It so happens that apart from the practical importance of section 6, it bears examination from the theoretical point of view, as it deals with the interesting subject of the mode of assignment of an actionable claim. For historical reasons, the freedom of assignment of actionable claims was, in common law, beset with technical difficulties throughout its history. Though there was no fundamental objection, in the laymind, to such assignments, a sound and uniform doctrine of assignments failed to develop in common law, and the kind of assistance which the law courts could give was "surreptitious and spasmodic".¹ Section 6 gives a positive mandate as to the effect of an arrangement.

Economic aspects
of family law.

1.5. So long as the family is a going concern, rights in property and rights to maintenance are of purely academic interest. But the economic aspects of family law become important when the marriage breaks down during the parties' lifetime. These aspects also become important on the death of one of the parties, and, similarly, they become important if one spouse becomes insolvent. The development of the status of the wife from a subservient member of the family to the co-equal head of the family has been substantially achieved ; but a few points of detail are still in need of reform. In general, rights in property are not greatly affected by the relationship of husband and wife, but in some respects, the law requires to be brought up-to-date.

Inferiority of wo-
men.

1.6. Voltaire, in his *Dictionnaire Philosophique*², asserted, with respect to the word "woman": "It is not surprising that in every country man has become woman's master, because everything is based upon strength. He usually possesses great superiority by virtue of his body and even his mind Women are commonly concerned to be sociable and conciliatory. Generally speaking, it appears that they are made to assuage men's manners."

This notion will today appear as obsolete ; but, in early times, this notion of woman's inferiority was reflected in the legal status assigned to her in the West.

The social changes of the nineteenth century, however, increasingly obliged industrial societies to modify the woman's position in society in a manner that has tended towards her emancipation. Our law is tending towards treatment of the woman as an individual, not only in the family but also in society generally.

It is hardly necessary to add that in India, the Constitution guarantees complete equality of the sexes. In fact, the Constitution³ allows the State to make special provisions for woman. The statutory provisions with which the Report is concerned also illustrate the trend towards equality of the sexes. But, as we have already stated⁴ those provisions require to be brought up-to-date.

Need for widen-
ing section 7.

1.7. Apart from the questions pertaining directly to the existing provisions, there are two matters on which we propose to make recommendations with a view to widening the scope and effect of section 7 of the Act. Our object in making these recommendations is to provide and clarify statutorily that all married women in our country, whatever be the religion they profess, are free to sue and be sued in respect of claims arising under contracts, torts or otherwise. Before

¹Bailey, "Assignment of debts", (1932) 48 L.Q.R. 547.

²Voltaire, *Dictionnaire Philosophique*.

³Chapter 3, *infra*.

⁴Para 1.5, *supra*.

(Chapter 1.—Introductory—Contd.)

we reached this conclusion, we examined the problem in depth and, as the discussion in the relevant portion of our Report shows¹, we carefully considered the important judicial decisions bearing on the point.

1.7A. We shall now briefly indicate, the background in which the Act of 1874, and other cognate provisions were enacted. Prior to January 1866, the law applicable in India, to persons who were not Hindus, Muslims, Buddhists, Sikhs or Jains, was, in general, the English common law as regards matters concerning personal status. Hindus, Muslims, Buddhists, Sikhs and Jains were governed by their own personal law. The persons to whom the English common law was thus applicable, for want of their own personal law, included Europeans and Indian Christians, Jews, Armenians and Parsis,—to mention some of the most important communities. Accordingly, the restrictions as regards possession and alienation of the property of an English woman generally applied to women belonging to these communities. The position in this respect, as it prevailed before 1866, could be analysed as under:

English law applicable to persons of certain communities.

- (a) As to "real estate", the husband acquired by marriage an interest in the property of the wife, and, during marriage, the wife could not alienate the property without the consent of her husband. In the event of her death leaving children, the husband became a tenant by curtesy, subject to certain limitations². In fact, it is understood³ that in the conveyances by Parsi married women, executed prior to January 1866,—that is, prior to the enactment of section 4 of the Indian Succession Act, 1865—the husband was made a party for the purpose of giving his consent to the alienation. This was because, by a statutory provision⁴ it was provided that a married woman was empowered to dispose of her estate by deed *acknowledged with her husband's concurrence*; and it was also provided that no deed would be valid unless her husband concurred therein or in case of disability of the husband unless the deed was acknowledged before the judge of the Supreme Court.
- (b) As regards moveable property belonging to the wife, the husband acquired, by marriage, a vested interest in moveable property in possession of the wife, and also acquired the right to reduce into possession the wife's outstanding personal choses in action.

1.8. These disabilities of the wife were abolished by the enactment of section 4 of the Indian Succession Act, 1865,—later replaced⁵ by section 20 of the Indian Succession Act, 1925.

Section 4 Indian Succession Act, 1865.

As regards Hindus, Muslims and other communities mentioned above, it was not considered appropriate to deal with the matter by legislation, because they were governed by their personal law. For this reason; section 2 of the Married Women's Property Act, 1874, excluded those communities from the operation of section 4 of the Indian Succession Act, 1865. This exclusion has been re-enacted in section 20(2)(b) of the Indian Succession Act, 1925. Consequently, section 393 (9th Schedule) of the Indian Succession Act, 1925, has repealed section 2 of the Married Women's Property Act, 1874.

¹Chapter, 9, *infra*.

²Paruck, Indian Succession Act (1966), page 33.

³Paruck, Indian Succession Act (1966), page 33.

⁴Section 3 of the Act 31 of 1854 (The Conveyance of Land Act, 1854), repealed by the Repealing and Amending Act, 48 of 1952.

⁵Para 5.2, *infra*.

(Chapter 1.—Introductory—Contd.)

Object.

1.9. In the statement of Objects and Reasons,¹ annexed to the Bill which led to the Married Women's Property Act, 1874, the object was thus stated—

"The Indian Succession Act (X of 1865) section four, declares that no person shall by marriage acquire any interest in the property of the person whom he or she married. This section, however, does not apply to marriages contracted before the 1st January, 1866, and, in the case of persons married after that day, the Act does not protect the husband from liability from the debts of his wife contracted before marriage, nor does it expressly provide for the enforcement of claims by or against such wives.

"The objects of the present Bill are, first, to extend the protection afforded to wives by section four of the Succession Act (so far as regards future wages and earnings and policies of insurance) to women married before 1st January, 1866; secondly, to declare that a married woman may sue in her own name for any property which by force of the Succession Act, or the proposed Act, is her separate property; thirdly, to relieve the husband of a wife married after the 31st December, 1865, from her antenuptial debts; and, lastly, to declare that any person entering into a contract with a wife (otherwise than as her husband's agent), shall be entitled to sue her, and, to the extent of her separate property, to recover against her whatever he might have recovered had she been unmarried."

Equitable intervention with rules of common law and subsequent developments in England.

1.10. We shall, in this connection, very briefly refer to the development in England.²

(a) In England, the progressive emancipation of the married woman from the restrictions imposed by the Common Law upon her capacity to hold and to deal with real and personal property was, until the second part of the nineteenth century, almost exclusively the result of equitable intervention. At common law, a wife's chattels became the absolute property of the husband. He possessed also the power to reduce her choses in action into possession; whilst, upon the birth of issue, he enjoyed the seisin for life of such present estates of inheritance as his wife might have possessed, as a "tenant by the curtesy".

(b) From the reign of Elizabeth onwards³, however, the Court of Chancery steadily evolved the doctrine of the *separate estate* of the married woman, although it does not seem that this doctrine was applied to real property before the Restoration. In pursuance of this doctrine, the Court of Chancery established that wherever property was given to *trustees* for the separate use of a married woman, she could hold and dispose of it in Equity free from her husband's interference; and such property was protected effectually against the husband's debts and other obligations. Eventually, it was decided that wherever the donee had expressed a plain intention that the property was for the separate use of the married woman, this should be effective, whether trustees had been appointed or not, the trust being, in the last resort, imposed on the husband himself.

It should be noted that it was not until the Legislature had accorded to a married woman financial independence from her husband that it was finally established that she had a similar right to her personal liberty.

¹Gazette of India, 1873, Part V, page 457.

²For detailed discussion, see Chapter 2, *infra*.

³Sandy v. Golding, (1579), Cary 86; Gorge v. Chansey (1639), 1 Rep. Ch. 125; Darcy v. Chute, (1663) 1 Cas. in Ch. 21; Cotton v. Cotton, (1690), 2. V. nn. 290.

(Chapter 1.—Introductory—Contd.)

In *R. v. Jackson*,¹ the wife applied for a writ of *habeas corpus* against the husband, and it was held that it was no defence that the husband, was merely confining her to exercise a right of consortium. It was then that the concept that the wife is a chattel, came to an end.

(c) As a further development of the doctrine of separate property, Lord Thurlow, at the end of the eighteenth century, evolved the "restraint on anticipation" clause, the object of which was to protect the wife against the solicitations of her husband (or her natural inclination) to surrender her beneficial enjoyment of the property to him. Such a clause made either the capital or the income of property (or both) incapable of alienation or anticipation so long as she was subject to coverture, and the effectiveness of the clause was finally established before Lord Eldon in *Jackson v. Hobhouse*.²

(d) Nineteenth century statutes, whose purpose was carried a stage further in the property legislation of 1925, have now permitted the enjoyment of full proprietary rights by a married woman at law, and have therefore greatly minimised the importance of a very characteristic product of Equity, which only became possible through the evolution of the modern law of trusts.

(e) Under modern social conditions, however, the necessity for protecting a married woman against the designs of her husband has practically disappeared and, in spite of statutory provisions for lifting the restraint on anticipation on various occasions, it nevertheless remained a serious obstacle to the enforcement of the claims of the married woman's creditors. The Law Reform (Married Woman and Tort-feasers) Act, 1935, therefore abolished the "separate property" of a married woman, putting her in the position of a *feme sole*, and virtually prohibited the imposition of restraints on anticipation in the future.

(f) By the Married Women (Restraint upon Anticipation) Act, 1949, all existing restraints were abolished. Section 1(1) of that Act provides that "no restriction upon anticipation or alienation attached, or purported to be attached, to the enjoyment of any property by a woman could not have been attached to the enjoyment of that property by a man shall be of any effect after the passing of this Act."

1.11. The present position in England, therefore, is that on marriage each spouse continues to own separately the property that belonged to him or her before marriage. Property acquired by one or the other during marriage remains the property of the acquiring spouse. In short, marriage creates no property rights, nor does it create any disability in respect of property.

Present position
in England.

1.12. In India, the Act of 1874, and the provisions of section 4 of the Indian Succession Act, 1865, were in the true sense, fundamental reforms in the 19th century in respect of married woman's right to property. The legal device employed was, no doubt, based on an equitable concept, namely, the doctrine of the wife's "separate property". But it served its purpose. The Act of 1874, however, did not abolish the doctrine of restraint on anticipation. In fact, because of the provisions of section 10 of the Transfer of Property Act, 1882, it is still possible to certain communities, in such a way as to prevent her from dealing with it, while similar restrictions cannot be imposed on a married man. A total restraint on alienation cannot be attached in respect of property transferred to a married man, but it can be attached in the case of property transferred to a married woman of the specified community.

Position in India.

This, in brief, is the background of the Act.

¹*R. v. Jackson*, (1891) 1 Q.B. 671 (Court of Appeal).

²*Jackson v. Hobhouse*, (1817) 2 Mer, 483.

CHAPTER 2

HISTORY OF ENGLISH LAW ON THE SUBJECT

Introductory.

2.1. In this Chapter, we propose to deal in brief with the evolution of the English law on the subject. This has more than academic interest, because many of the provisions of the Act of 1874 would be better understood if the background in which it was passed is kept in mind ; it is not disputed that that background was mainly the English non-statutory law.¹

Property.

2.2. The principal doctrine of the common law concerning the property² of married persons was that while marriage did not deprive a woman of any property which she already had, or affect her right to acquire property as such, it gave the husband certain valuable rights, which had important consequences. This position was gradually modified by legislation,—legislation which was mostly enacted under the title of "Married Women's Property Act" or under a title substantially similar thereto.

Property of Married woman—English statutes.

2.3. So far as legislation relating to *property*³ of married women is concerned, the major Acts in England were of 1857, 1870, 1882, 1935 and 1949. Section 25 of the Matrimonial Causes Act, 1857, provided that so long as a judicial separation was in force, the wife was to be deemed to be a *feme sole* with respect to any property which she should acquire. Secondly, section 21 of that Act provided that if a wife were deserted, she might obtain a protection order, which would have the effect of protecting from seizure by the husband and the husband's creditors, any property and earnings to which she became entitled after the desertion, and of vesting them in her as if she were a *feme sole*. These two provisions modify the common law rule to which we have referred.⁴

The Married Women's Property Act, 1870, created a further exception to the common law rule, by providing that in certain cases specified in the Act, property acquired by the wife should be deemed to be held for her separate use. Amongst the important cases of property so specified were her earnings, deposits in savings banks, stocks and shares, and, in very limited circumstances, property devolving upon her on intestacy. This Act was repealed by the Married Women's Property Act, 1882, which is considered below.

Acts of 1882 and 1935—provisions as to property.

2.4. The Married Women's Property Act, 1882, provided⁵ (a) that any woman marrying after 1882 should be entitled to retain all property owned by her at the time of the marriage as *her separate* property, and that, (b) whenever she was married, any property acquired by a married woman after 1882 should be held by her in the same way.⁶ It also enacted that "A married woman shall be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee."⁷

It further provided that the law relating to restraint upon anticipation should remain unaffected.⁸

¹Para 1.9 to 1.12, *supra*.

²See para 2.10, *infra*, for a detailed discussion.

³For some of these Act, see Appendices 3 to 5.

⁴Para 2.2, *supra*.

⁵Appendix 3.

⁶Sections 2 and 5.

⁷Section 1(1).

⁸Section 9.

(Chapter 2.—History of English Law on the Subject—contd.)

It now became impossible for a married man to acquire any further interest in his wife's property "jure mariti" by operation of law.¹

Other provisions of the Act of 1882 need not be considered at this place. Important amongst them are—the spouses' liability in contract, tort and criminal law, claims in bankruptcy, policies of insurance in favour of a spouse or children and disputes over property arising between spouses.²

2.5. The Law Reform (Married Women and Tortfeasors) Act, 1935, is the next Act of importance. By 1935 almost all married women's property was owned by them as their separate property. To speak of "separate property" was, therefore, becoming something of an anomaly, since married women in almost all cases had the same capacity to hold and dispose of it as a man or a *feme sole*. Because of this position, the Legislature, in the Law Reform (Married Women and Tortfeasors) Act, 1935, abolished the concept of the separate estate, and gave to the wife the same rights and powers as were already possessed by other adults of full capacity. The material provision³ was as follows:

Act of 1935—Provisions as to property.

"..... A married woman shall be capable of acquiring, holding, and disposing of, any property in all respects as if she were a *feme sole*."

"..... All property which—

- (a) immediately before the passing of this Act was the separate property of a married woman or held for her separate use in equity; or
- (b) belongs at the time of her marriage to a woman married after the passing of this Act; or
- (c) after the passing of this Act is acquired by or devolves upon a married woman,

shall belong to her in all respects as if she were a *feme sole* and may be disposed of accordingly."

The Act did not touch any existing restraint on anticipation.⁴ But it sounded the death knell of the latter, for it rendered void any attempted imposition of a restraint on anticipation in any instrument executed after 1935 and in the will of any person dying after 1945, even though the will was executed before 1936.⁵

2.6. The Married Women's (Restraint upon Anticipation) Act, 1949, totally abolished⁶ the validity of restraints on anticipation. In 1882, it was apparently necessary to protect a married woman's property, but the restraint could no longer be justified in the middle of the present century, when it served no useful purpose but merely acted as an undue fetter on the wife's power of alienation.

Restraint on anticipation.

¹But a married woman still could not be made bankrupt unless she came within the express provisions of section 1(5) by carrying on a trade separately from her husband.

²See para 2.7 to 2.10, infra.

³Sections 1(a) and 2(1) of the Act of 1935. (Appendix 4).

⁴Section 2(1). (Appendix 4).

⁵Sections 2(2), 3 and Appendix 4.

⁶Appendix 5.

(Chapter 2.—History of English Law on the Subject—contd.)

Contracts.

2.7. We have so far discussed property rights in general. As regards contracts, at common law,¹ a married woman possessed no contractual capacity whatever, and could not, therefore, make a binding agreement either with her husband or with any other person. This general rule was subject to certain exceptions, which are not important now. Further, the marriage automatically vested in the husband the benefit of all contracts already made by the wife, and during marriage both spouses were liable to be sued on them. At equity, a wife could bind separate property effectively on contract—that is, upto the extent of the property ; but she could not render herself personally liable.²

Statutory provision as to contracts—Acts of 1857, 1870 and 1874.

2.8. On the principle of the common law relating to contracts mentioned above,³ the first statutory inroad in England was made by the Matrimonial Clauses Act, 1857, section 26, which provided that so long as a decree of judicial separation was in force, a married woman could be considered as a *feme sole* for various purposes, including the making and enforcement of contracts. The Married Women's Property Act, 1870 enacted (by sections 1 to 11), that a married woman's wages and earnings should be regarded as her separate property, and gave her a power to maintain an action to recover them in her own name (by section 12). The Act of 1870 also abolished the common law rule that a husband should be liable for his wife's pre-marriage contracts; but this led to certain anomalies.

Subsequently, by the Married Women's property Act, (1870), Amendment Act, 1874, this part of the Act of 1870 was replaced by a provision limiting the husband's liability for his wife's pre-marriage contracts to the extent of the value of the wife's property which vested in the husband by virtue of the marriage under the law as it then stood.

Act of 1882—provision as to contracts.

2.8A. The Married Women's Property Act, 1882, made certain important provisions regarding a married women's separate property, which have already been mentioned.⁴ That Act (as amended by the Married Women's Property Act, 1892), also gave the married woman full contractual capacity, but even these Acts did not make her personally liable. Lastly, the Act of 1882, in section 14, enacted that a husband should be liable for his wife's antenuptial debts and contracts only to the extent of property belonging to her which he acquired or to which he became entitled. This was a retention of the principle of the English Act⁵ of 1874.

Act of 1935—provision as to contracts.

2.9. The major reform in the field of contracts was made by the Law Reform (Married Women and Tortfeasors) Act, 1935. Section 1 of the Act provided⁶ that a married woman shall be capable of rendering herself liable and being rendered liable in respect of any contract, debt or obligation and of suing and being sued for contract, and also that she shall be subject to the law of bankruptcy and to the enforcement of judgment and orders, in all respects as if she were a *feme sole*. This Act also abolished the concept of separate estate, and enabled a married woman to hold her property in all respects as if she were a *feme sole*. Finally, the Act abolished the liability of the husband for contracts of the wife entered into before marriage—the reason being that the husband does not, by marriage, acquire any property of the wife with which he could meet her debts.

¹See also para 2.10, *infra*.

²Pollock, Contracts (20th Ed.), pages 557-561.

³Para 2.7, *supra*.

⁴Para 2.4, *supra*.

⁵Para 2.8, *supra*.

⁶Act of 1935 (Appendix 4).

(Chapter 2.—History of English Law on the Subject—contd.)

2.10. The position emerging from these statutes may be contrasted with the common law. The position at common law was well summarised by a writer in the Harvard Law Review¹, in these words:—

Position at com-
mon law.

"At common law a woman's capacity to hold or receive title to property was not destroyed by marriage, but marriage had important consequences. It gave a man a right to use and enjoy whatever property his wife owned at the time of marriage or acquired during coverture. A husband acquired a right to possess his wife's real estate and to enjoy the rents and profits thereof, but the fee remained in the wife. His interest was described as an estate for joint lives, since coverture normally could be terminated only by the death of one of the parties, but more accurately it was an estate for the duration of coverture. If he predeceased his wife, the fee was in her; if she predeceased her husband, the fee went to her heirs, subject to a life estate in the husband by the courtesy if issue had been born alive. The husband had a right to use his wife's chases in action, and to this end to reduce them to possession, after which they became chattels personal. In view of the perishable nature of chattels, and the common law denial of estates therein, his right to use these involved such complete dominion as to amount to ownership, and consequently marriage was said to give him the legal title by operation of law."²

"A married woman had no capacity to contract for herself, and her executory undertakings were void, but she had capacity to act as agent for others, including her husband. She had no capacity to convey her fee to real property, except in England by fine and recovery, and in the United States by joining with her husband in the conveyance. Consequently, husband and wife were under equal disability and lack of capacity to contract with or convey to the other."³

"The husband was entitled to his wife's services and earnings whether performed in the home or elsewhere, for himself or another⁴; and the husband was under a duty to support⁵. A married woman had no capacity to sue or be sued alone in her own name, but whenever she had a substantive capacity, or was substantively the holder of a right, or subject to a duty, suit must be brought in the name of husband and wife, and judgment was enforced in favour of the husband or against both husband and wife. In the case of torts committed against a married woman, her legal personality was substantively recognized, and in so far as the tortious act caused injury to a legally recognized interest of the woman herself, it was a chose in action of the woman's, and if the husband predeceased the wife before having reduced her chose, it remained to the wife;⁶ but, insofar as the injury was to the husband alone, either

¹William McCurdy, "Torts between persons in domestic relation" (1929-1930) 43 Harv. L. Rev. 1030, 1031, 1033.

²As to property at common law, see McCurdy, Cases on Persons and Domestic Relations (1927) 507-19, and cases therein cited.

³As to post-nuptial contracts, conveyances, and transfers at common law, see McCurdy, Cases on Persons and Domestic Relations at 520-36, and cases therein collected.

⁴Prat v. Taylor, Cro. Eliz. 61 (1587); Brashford v. Buckingham, Cro. Jac. 77 (1606); Buckley v. Collier, 1 Salk. 114 (1701); see Warren, 'Husband's Right to Wife's Services' (1925) 38 Harv. L. Rev. 321, 622.

⁵See McCurdy, Cases on Persons and Domestic Relations at 709-35, and cases therein cited.

⁶McCurdy, cases on Persons and Domestic Relations at 770-81, 794-818, and cases therein cited.

(Chapter 2.—History of English Law on the Subject—contd.)

by depriving him of some interest, such as services and earnings, or by increasing the burden of his duties, such as support, it was a chese in action of the husband's. And the converse is likewise true. A married woman substantively had capacity to commit most torts, but her liability was in a sense suspended during coverture, and the husband subjected. If she committed a tort during marriage, or committed a tort or contracted a debt before marriage, although the duty was substantively hers, suit must be brought against husband and wife, and judgment could be enforced against property of either; but if the husband predeceased the wife before judgment, the action remained against the wife alone.¹ If the wife should predecease the husband before judgment, a question of survival of causes of action would arise."

CHAPTER 3

WOMEN'S POSITION IN INDIA—BRIEF HISTORICAL REVIEW

I. INTRODUCTORY

Introductory.

3.1. In the preceding Chapter, we have traced the history of the English law as to the property rights of married women. A brief historical survey of the position of women in India would be useful at this stage.

Ideals of society.

3.2. The estimation in which woman is held, the status occupied by her in society and the treatment accorded to her, have been justly regarded as an index of the degree of civilization and culture attained in any country. Our moral ideals regarding women have been too often conceived in a narrow sense—as concerned with sexual morality and the obligations of chastity and marital fidelity.²

But such an approach would give a very incomplete picture of the attitude of society in its totality. The ideals of a society as to womanhood include not merely the relation of husband and wife or mother and children, or the other intimate relationships of family life, but also the notions we form about her capacity, her character, her claim to equality, independence and freedom for development, her rights to personal liberty, to the ownership and control of property, to the choice of her vocation and other rights as well as duties as a member of society.²

Two general observations.

3.3. Keeping this in mind, we propose to make a brief historical survey of the position of women in India in general, with special reference to their legal rights regarding property. We would like to preface the survey with two general observations regarding the legal rights of women. First, these rights have been fluctuating during various historical periods for reasons which we need not go into. Secondly, these legal rights seem to have been recognised earlier in India than elsewhere.

¹ McCurdy, Cases on Persons and Domestic Relations at 677-708, and cases therein cited.

² P. S. Sivaswami Iyer, Evolution of Hindu Moral Ideals (Kamla Lectures, Calcutta University), (1935), page 54.

(Chapter 3.—Women's Position in India—Brief Historical Review.)

3.4. As to the first aspect—fluctuations in legal rights—the participation of women in heritable property¹ may be taken as an instance.

In the Hindu system, Bhattacharya² traces two antagonist principles,—one excluding women generally from inheritance, and the other giving them partial right. But he adds that jealousy and antagonism are equally discernible. Bhattacharya³ further states, that, in general, exclusion is the primitive type, while admission to partial rights is modern; but he points out that the law is not continuously progressive in every case.

Thus, for example, though the law of property promulgated in the Dayabhaga is of later growth than the Mitakshara system, yet the Mitakshara⁴ is in advance of the Dayabhaga⁵ as regards the rights of the daughter in the father's property where there are sons existing.

3.4A. Secondly, we would like to point out that the right of a woman to hold separate property of her own was recognised in the Hindu law, long before it was admitted in the European countries.⁶

Thus, presents given to a woman at her marriage by her own relations or her husband, and what she received after marriage from her husband and his family belonged to her, though the husband had certain claims thereto. Property received by a maiden in the shape of ornaments or other presents from her own family or from her affianced bridegroom was regarded as her own property. Women had considerable right of disposal of property much earlier than elsewhere.

All these features indicate a comparatively liberal attitude in regard to property rights.

3.5. With the position as it prevailed in India, we may contrast the position in Rome. In Rome⁷, a marriage with *conventio in manus*, which was the regular form of marriage in early times, gave the husband a right to all the property which the wife had when she married, and entitled the husband to all she might acquire afterwards whether by gift or by her own labour. Later on, no doubt, the marriage without manus became the ordinary Roman marriage, and the position improved. But the point to be noted is that the recognition of women's rights took place much earlier in India than elsewhere.

II. POSITION OF HINDU WOMEN—THE MAIN CHRONOLOGICAL DIVISIONS

3.6. The fluctuations in women's rights, and the comparatively early recognition of their status, will be evident from the historical survey which follows. We propose to divide our historical survey of the position of women in India into the following divisions:

(I) The period from c. 4000 B.C. to 1500 B.C.—broadly corresponding to the age of the Vedas.⁸

¹See also para 3.28, *infra*.

²Bhattacharya, Joint Hindu Family, (T.L.L. 1884, 1885), pages 63-64.

³Mitakshara, Chapter 1, section 7, paragraphs 11 & 14.

⁴Dayabhaga, Chapter 3, section 2, paragraphs 36 & 37.

⁵P. S. Sivaswami Iyer, Evolution of Hindu Moral Ideals (Kamla Lectures, University of Calcutta), (1935), p. 50.

⁶Banerji, Marriage and Stridhana (1923), page 394.

⁷Para 3.4, *supra*.

⁸As to the age of the Rig Veda. See Kane, History of Hindu Dharmasastras, Vol. 2, Part I, page xi.

Right of Hindu Woman recognised along before its admission elsewhere.

Position in Rome—Marriage with manus.

Historical survey.

(Chapter 3.—Women's Position in India—Brief Historical Review.)

- (2) The period from c. 1500 B.C. to 500 B.C.—broadly corresponding to the age of the later Samhitas,¹ Brahmanas and Upanishads.
- (3) The period from c. 500 B.C. to 500 A.D.—broadly corresponding to the age of the Dharmasutras, Epics and early Smritis.
- (4) The period from c. 500 A.D. to c. 1800 A.D.—broadly, corresponding to the age of the later Smritis, Commentators and Digests.
- (5) The period from 1801 A.D. to 1955 A.D. (which may be conveniently called the British period).
- (6) The period from 1956 A.D.

III. THE VEDIC PERIOD

First period—
(4000 B.C. to 1500
B.C.).

3.7. By common consent, the first period is a glorious chapter in the social history of India. The Vedas themselves are rich in their description of natural phenomena, in their inspiring invocations of the deities belonging to the pantheon as conceived by the Aryans, and in the full-blooded images of all that gave them delight or captured their fancy. In the expression of man's sense of awe and thrill at the beautiful, the wondrous and the magnificent, they have never been surpassed, and rarely been equalled. This deep interest in nature, and this capacity for soul-stirring delineations of all that they perceived or imagined, bespeak a healthy society.

Society in that age was predominantly agricultural, but not necessarily primitive. Women enjoyed equal status with men.² The "initiation" ceremony ("Upanayana"—literally, taking *near* the teacher's house), was performed for girls as well as for boys. Women studied the Vedas, and even composed Vedic hymns.³ In public life, they participated freely. Monogamy was the general rule, and the wife of a householder had an honourable place. There were certain disabilities regarding the proprietary rights of women, but this was primarily due to the fact that the Aryans were just settling down, and were not sure that women could defend their property against hostile races.⁴

The position of women in India in the Vedic age was far from being analogous to what it usually was in early uncivilized societies.

Marriage.

3.7A. The Rig Veda⁵ clearly shows that the Aryan bride was an adult.

The ideal marriage of the Vedic period was a religious sacrament, which made the couple joint owners of the household—which is evident from the etymological meaning of the Vedic word "Dampati".^{6-6a} The old tradition that the wife was the property of the husband had not yet completely died down; the famous hymn about gambling in the Rig Veda⁷ shows that sometimes confirmed gamblers would take away their wives to their opponents. But the advice given to the gambler in this hymn, shows that social conscience had already begun to disapprove of this practice.

¹As to the Second, Third and Fourth periods, see Altekar, Position of Women in Hindu Civilization (1956), page 336.

²Altekar, Position of Women in Hindu Civilization, (1956), page 409 and pages 335-339.

³Para 3.8, *infra*.

⁴Altekar, Position of Women in Hindu Civilization, (1956), page 409.

⁵Rig Veda, X.85.42.46.

^{6-6a}, दम्पती,

⁷Altekar, Position of Women in Hindu Civilization, Chapter on married life.

⁷Rig Veda, X.38.

(Chapter 3.—Women's Position in India—Brief Historical Review.)

These are the verses¹ relevant to gamblers:

"10. The deserted wife of the gamester is afflicted: the mother (grieves) for the son wandering wherever he likes; involved in debt, even in fear, anxious for wealth, (the gambler) goes forth by night to the dwellings of others (to plunder)."

"11. The gamester, having observed the happy wife and well-ordered home of others, suffers regret: yet in the forenoon he puts to the tawny steeds, and at night the sinner lies down by the fire."

The position of women, then, was satisfactory. Ordinarily, girls were, no doubt, less welcome than boys, for economic reasons.

But, there were also some parents in society who would perform special religious rituals for getting learned and capable daughters. This is evident from the text of one of the Upanishads.² Girls were educated like boys and had to pass through a period of Brahmacharya. The marriage of girls used to take place at fairly advanced age, the normal age being 16 or 17 years.³

3.8. We read of women being conceded the highest intellectual honours⁴ in the ancient past, particularly during the Vedic period. For example, three classes of hymns have been attributed to women in the Rig Veda and the Upanishads.⁵ Certain hymns belong entirely to female "Rishis", certain hymns are partly chanted by them, and about a few hymns, there is some uncertainty. In the first group, we can certainly⁶ include Vishvavara and Apala.⁷ To the second group belong Lopamudra and Shashiyasi⁸—to mention only two examples. In the third group—to take one example—falls the hymn of Ghosha, a leper maiden, who is believed to have been cured of the disease by the divine physicians and composed hymns in their honour.⁹⁻¹²

In another Vedic hymn, Vak (Speech personified) is described as a "Queen of Gods".¹¹ She is said to be the daughter of the sage Ambhrina. Vak is the "word", the first creation and representative of the spirit, and the means of communication between men and Gods.¹²

She describes one of her qualities in these inspiring words¹³—

"3. I am the Queen, the gatherer-up of treasures, most thoughtful, first of those who merit worship.

Thus Gods have established me in many places with many homes to enter and abide in.

¹Rig Veda, X. 3.5, Verses 10-11, H. H. Wilson (Ed.), Rig Veda (1928), Vol. 6, page 57.

²Brih. UP, VI, 4, 27.

³Altekar, Position of Woman in Hindu Civilization, Chapter on Childhood and education.

⁴Padmimi Sen-Gupta, The Story of Women of India (1974), page 42.

⁵Shakuntala Rao Sastry, Women in the Vedic Age, pages 25, 26

⁶Rig Veda V, 28, and VII, 91.

⁷Rig Veda, Book VIII, Hymn 80.

⁸Rig Veda I, 179, 1 and 2, and Rig Veda V, 62, 5-8.

⁹Rig Veda, V, 39, X, Hymns 39-40.

¹⁰For an exhaustive list see R. K. Mookarji, Ancient Indian Education (Macmillan 1951), page 51.

¹¹Rig Veda, Book VIII, Hymn 89, Verse 10; Ralph Griffith, Hymns of the Veda (Chowkhamba Sanskrit Studies Series No. XXXV) (1963), Vol. II, p. 251.

¹²Ralph Griffith, Hymns of the Veda (Chowkhamba Sanskrit Studies Series, No. XXXV), (1963), Vol. II, p. 571, footnote.

¹³Rig Veda, Book X, Hymn 125, Verses 3 and 4; Ralph Griffith, Hymns of the Rig-Veda (Chowkhamba Sanskrit Studies Series, No. XXXV), (1963), Vol. II, page 571.

(Chapter 3.—Women's Position in India—Brief Historical Review.)

4. Through me alone all eat the food that feeds them,—each man who sees, breathes, hears the word outspoken.

They know it, but yet they dwell beside me. Hear, one and all, the truth as I declare it."

3.8A. From one of the inscriptions in the Bharhut sculptures (2nd century B.C.),¹ it would appear that some of the pupils of an ascetic were rishis.²

IV. THE POST-VEDIC PERIOD

Second period—
(1500 B.C. to 500
B.C.).

3.9. The second period shows no radical deterioration in the position of women. Down to about 500 B.C., the custom of Sati and Child Marriage did not exist to embitter the lot of the woman. She was properly educated, and given the same religious privileges as man. She could have a voice in the settlement of her marriage, and occupy an honoured position in the household. She could move freely in family and society, and take an intelligent part in public affairs. It was possible for her to take to a career, if urged by an inclination or a necessity.³ In fact, there is contemporary evidence of the careers pursued by women, to which we shall refer later.⁴

Women of higher castes were indispensable partners of their husbands in the yajna.⁵ Women could hold property, and widows could remarry. The age of the Upanishads produced philosophers like Gargi who challenged the invincible Yajnavalkya in debate, and Maitreyi who spurned wealth because it would not give her immortal light (amrta).⁶

3.10. The Upanishads, it may be noted, present the highest point reached in Indian metaphysics. Although differently worded, the principal strands of thought, in their essence, remain the same in all these works. They voice the inner visualisation of the ever-existent unity between the universal principle and the phenomena, even though the embarrassing multitude of all individual experience may dim the vision of that unity.

One of the noblest prayers in the literature of the world occurs in one of the Upanishads—the prayer which implores the universal spirit to take one from darkness to light,⁷ from untruth to truth, and from mortality to immortality.

Great questions are raised in these debates, and the answers given are simple: Yet, the dialogue never loses its sublime quality.

We are referring to this aspect to show that a married woman not possessing an extraordinary intellectual capacity—or, for that matter, any person of ordinary intellectual status—could not have participated in the discussions.

Social status.

3.11. to 3.13. No doubt, some deterioration in the *social status* of women did take place in the second period. But, still, the position of Indian women compared favourably with women in other countries. In fact, while, in the first

¹R. K. Mukerjee, Ancient Indian Education, (Macmillan 1951), plate No. 1, facing page 68 (Hermitages in Bharhut sculptures).

²Cauningham's view, referred to by R. K. Mukherjee.

³Altekar, Position of Women in Hindu Civilization (1956), page 343.

⁴See para 3.11, *infra*.

⁵Gazeteer of India (1973), Vol. 2, page 147.

⁶Brihad 1, 328.

(Chapter 3.—Women's Position in India—Brief Historical Review.)

period, women had certain disabilities regarding property, in the second period the position improved in this regard, at least as regards marriage gifts of movable property.¹

V. THE AGE OF THE DHARMA SUTRAS, EPICS, ETC.

3.14. In the third period, which was the age of the Dharmasutras, the Epics and the early Smritis, the position of women deteriorated to some extent. This is attributed by Altekar² to the practice of inter-marriage with the local (non-Aryan) races. He says—

Third period—
(500 B.C. to 500
A.D.).

"The introduction of the non-Aryan wife into the Aryan household is the key to the general deterioration of the position of "women that gradually imperceptibly started at about 1000 B.C. and became quite marked in about 100 years. This was because of the fact that the non-Aryan wife, with her ignorance of the Sanskrit language and Hindu religion, obviously did not enjoy the same privilege in religion as the Aryan wife. Evidently, the whole class of women was declared ineligible for study and religious duties."

It was during this period that marriage was substituted for "initiation", in the case of girls.

3.15. But, even during this period, one comes across sayings not implying the subordination of women and pointing to a more enlightened opinion.³ In the Mahabharata, for example, a unique place is assigned to Saraswati, who is described as "Mother of the Vedas".⁴

Subordination of
women not ap-
proved in some
sayings.

3.16. In fact, the situation in India seems to have been better than what it was elsewhere. It may be noted that the Roman law regarded the wife as the "daughter" of her husband, as far as her juridical status was concerned; for a long time the wife could not sign a will, make a contract or become a witness⁵ under Roman law.

Position in Rome
and other coun-
tries.

This 'property' in women, sons and slaves is said to have been familiar to the ancient Greeks and Romans.⁶

"Community" of wives was known to the Greeks⁷.

3.17. In India, the deterioration in the position of women is perceptible in the Gupta age (320-540 A.D.). The Svayamvara (choice of the groom by the bride after a contest of valour) and the Gandharva form of marriage, fell into comparative disuse during this period. The re-marriage of widows was coming into a disfavour, though not absolutely forbidden.⁸ In general, there was a decline in the social status of women.

Gupta age.

¹Radha Kumud Mookerji, "Women in Ancient India" in Baig (Ed.), Women of India (1958), pages 1, 6.

²Altekar, Position of Women in Hindu Civilization (1956), Chapter on Retrospect and Prospect (Chap. 12).

³For "Initiation", see Para 3.7, *supra*.

⁴Cambridge History of India, Vol. 1, page 261.

⁵Mahabharata, Shanti Parva, 12.920.

⁶Altekar, Position of Women in Hindu Civilization, (1956), page 331.

⁷Plutarch's Lives (45 A.D.—125 A.D.)—Lycurgus (Ward Lock), page 36, Catg. the Younger, pages 538, 539; contra, Aristotle, Politics, II, Ch. 2; Hist. Animals, IX-i, all referred to by Gour, Hindu Code (1938), page 8, para 17.

⁸Herodotus IV 104; Plato's Republic (Concord Ed.), page 152, foot-note.

⁹R. C. Majumdar, (Ed.) History and Culture of the Indian People, Vol. 3 (The Classical Age), page 567.

(Chapter 3.—Women's Position in India—Brief Historical Review.)

Even so, there are many instances of women acquiring exceptional proficiency in sciences and letters. The names of Lilavati and Khana, legendary masters of arithmetic and astronomy, may be noted in this context. There was, as yet, no purda or seclusion,¹—except for ladies of the Royal families, and that too not so strictly observed as in later times.

In Kalidas's famous drama, the heroine Sakuntala appears at the Royal court with a veil, but unveils herself when pressed to prove her identity.² In Harshacharita³, princess Rajyastri wears a veil of red silk when seen by the bridegroom.

But these were women of higher classes. The silence of Hiuen Tsang and I-tsing,⁴ as to the seclusion of women, indicates that there was no such general practice, because such a peculiar custom would surely have been noticed by them.

Two classes of women⁵ students are mentioned in the literature of the times: *Brahmavadini* or life long students of sacred texts, and *Sadyōdvaha* who prosecuted their studies till their marriage—also called sadyo—Vadhu.⁶

Literary pursuits.

3.17A. The literary pursuits of women during this period could be gathered from several sources. The great grammarian, Panini,⁷ in his work named Ashtadhyayi,⁸ cites illustrations of his grammatical rules which show how women were, like men, going in for regular Vedic studies.

Thus, the formation “Kathi” means a female student of the katha sakha of the Veda in that particular recension. Similarly, the term “bahurichi” means a female student who is well versed in many hymns, i.e. of the Rigveda.⁹

Learned ladies of those days naturally functioned as teachers.

Katyayana,¹⁰ in his *Varttika*¹¹ (commentary) refers to women teachers who were called Upadhyaya, or Upadhyayi, as distinguished from Upadhyayanis, i.e. wives of teachers. The necessity of coining a new term shows that the women teachers were large in number. Patanjali also refers to a special designation for the women scholars who made a special study of Mimamsa philosophy.¹²

¹R. C. Majumdar, (Ed.) History and Culture of the Indian People, Vol. 3 (The Classical Age), page 569 and Vol. 2, page 575.

²Sakuntala, Act V.

³Harshacharita IV.

⁴Majumdar (Ed.), History and Culture of the Indian People, Vol. 3, (The Classical Age), page 569.

⁵R. C. Majundar (Ed.), History and Culture of the Indian People (The Age of Imperial Unity), Vol. 2, page 563.

⁶R. K. Mookerjee, Ancient Indian Education (Macmillan 1951), 208 and 51.

⁷Panini's period falls somewhere between 600 B.C. and 300 B.C., Kane, History of Hindu Dharmashastras, Vol. 2, page xi (600—300 B.C.); R. G. Bhandarkar, Journal of the Bombay Branch of the Royal Asiatic Society, Vol. 16, page 340 (5th Century B.C.); Keith, History of Sanskrit literature, page 425. (5th Century B.C.).

⁸Panini IV. 1.63.

⁹Radha Kumud Mookerji, “Women in Ancient India”, in Baig (Ed.), Women of India (1958), pages 1, 6.

¹⁰Katyayana's period was roughly 200 B.C.

¹¹Katyayana on IV. 1, 48: Radha Kumud Mookerji, “Women in Ancient India” in Baig (Ed.) Women of India, (1958), pages 1, 6.

¹²R. C. Majumdar, History and Culture of the Indian People. (The Age of Imperial Unity), Vol. 2, page 563.

(Chapter 3.—Women's Position in India—Brief Historical Review.)

3.17B. Apart from literary pursuits, military pursuits also seem to have been open to women. For example, the great grammarian, Patanjali, in his *Mahabhashya*,¹ uses the formation "saktiki" to indicate a female bearer of a spear.²

Military pursuits.

It may be noted that there is a sculpture at Bharhut of about the 2nd century B.C. which represents a woman carrying a standard on horse-back as belonging to the vanguard of the cavalry.³

We also hear of the Amazonian bodyguard of armed women employed by the Emperor Chandragupta Maurya, in his place, as described by Megasthenes,⁴ the Greek Ambassador to his Court. Similarly, Kautilya,⁵ in his *Arthashastra*, refers to women soldiers armed with bows and arrows (*striganaih dhanvibhih*).

3.17C. It would appear that the lowering of the age of marriage during this period affected the general education and culture of women in an adverse way.⁶ But the final stage in this downward movement was not reached during the period under review. The period upto 320 A.D. was rather a transitional period, and we really find two entirely different pictures of women, reflected in the literary works.⁷

Lowering of age of marriage.

3.18. Curiously, in the third period, the position of women in India improved in the sphere of *proprietary rights*—e.g., the increased recognition in Katyayana⁸ of the women's right to her property.

Improvement in proprietary rights.

VI. THE AGE OF THE LATER SMRITIS

3.19. In the fourth period—which is the age of the later Smritis, Commentators and Digest writers,—the position of woman further deteriorated in the social sphere. Permission for child widows to re-marry became obsolete in this period. The practice of Sati also gained ground.

Fourth period.

3.20. The only sphere in which the position of women improved in this age was the one of *proprietary rights*. The right of the widow to inherit the share of her husband came to be eventually recognised all over the country by c. 1200 A.D. In Bengal, the position was further improved by conceding her this right even when her husband had not separated from the joint family at the time of his death. The scope of *Stridhana* was further extended by the *Mitakshara* school, by including in it property acquired even by inheritance and partition. How far this position survived, will be discussed later⁹. The widow's estate continued to be a limited one, but in some parts of South India she was allowed to gift it away for religious purposes without the consent of the reversoners.

Proprietary rights.

¹Patanjali on IV. 1, 15(6).²Radha Kumud Mookerji, "Women in Ancient India" in Baig (Ed.) *Women of India* (1958), pages 1, 6.³Mc Crindle, *Megasthenes*, page 72.⁴Kautilya, quoted in Radha Kumud Mookerji, "Women in Ancient India" in Baig (Ed.) *Women of India* (1958), pages 1, 6.⁵R. C. Majumdar (Editor), *History & Culture of the Indian People*, Vol. 2, (The Age of Imperial Unity), page 562.⁶Katyayana, Verses 921-927; R. C. Majumdar, (Ed.), *History and Culture of the Indian People* (The Classical Age), Vol. 3, page 569.⁷Para 3.29 and 3.30, *infra*.

(Chapter 3.—Women's Position in India—Brief Historical Review.)

Social position in general during fourth period.

3.23. Reverting to the social aspect, we may state that although the social position of women declined in this period, there were bright exceptions. Women excelled in several pursuits. In the Mithila school, for example, there is a work called Vivada Chandra (and also other treatises) by a woman Lakshmi Devi, who wrote under the name of her nephew 'Misaru Misra'. It was written in the 18th century^a.

Hindu women in administration.

3.24. In the field of administration, Hindu women produced some notable figures during this period. There was Rudramba, the Kakateya queen^b, of whom Marco Polo (1254-1324 A.D.) speaks. The Mahratta heroine Tarabai (1700-1707) A.D.) was the life and soul of Mahratta resistance during the last determined on slaying of Aurangzeb^c. The benign rule of Mangammal is still a green memory in the South^d.

Mention must be made in this context of Ahalyabai Holkar^e, who was a lady with great administrative genius.

VII. DEVELOPMENTS AS TO POWER OF DISPOSITION

Right of disposal.

3.25. At this stage, it may be convenient to recapitulate the developments in regard to right of disposal of property. The Hindu wife's right of disposal of property seems to have undergone several vicissitudes in the course of history. Vedic literature is silent as to whether the wife could dispose of the property without her husband's permission. During secular developments in course of time, the question duly received the attention of jurists. In the beginning, the Smriti writers^f were not prepared to invest the woman with full powers, and would insist on the husband's sanction but in course of time the iniquity of this position was realised, and they later divided the property into two categories—Saudayika and A-Saudayika. The first category of property included gifts given at the time of marriage by relations out of affection; such property was under the complete control of the women.

Property in the second category,—though technically it was the property of the woman—could not be alienated by her, though she could enjoy the property.

It may be that the restriction in the case of the second category was linked with the joint family concept, since it was not in the interest of the joint family to allow the co-parcener to fritter away its resources by allowing the husband to make an unconditional gift to his wife—the gifts in the second category property would be usually of the family property.

^aMorley, Administration of Justice in British India, page 225.

^bCambridge History of India, Vol. 1, page 261.

^cK. M. Panikkar, "The Middle Period" in Baig (Ed.) Women of India (1958), pages 9, 10, 11.

^dK. M. Panikkar, "The Middle Period" in Baig (Ed.) Women of India (1958), pages 9, 10, 11.

^eK. M. Panikkar, "The Middle Period" in Baig (Ed.) Women of India (1958), pages 9, 10, 11.

^fK. M. Panikkar, "The Middle Period" in Baig (Ed.) Women of India (1958), pages 9, 10, 11.

^gManu, 9, 299.

(Chapter 3.—Women's Position in India—Brief Historical Review.)

3.26. While, as already stated¹, Vedic literature is silent about the scope of *stridhana*, Manu gives a comprehensive enumeration comprising 6 varieties², and he even says that those who would deprive the woman of his property, particularly, ornaments and costly clothes, after the husband's death, would be committing a great sin.

Scope of Stridhana.

"*Stridhana*" did not include the gifts given by non-relatives subsequent to marriage and wages earned by the wife for her³,—apparently, it was felt that such property or earning should be utilized in assisting the husband to shoulder the burden of the family⁴.

From the 7th century A.D., there was a tendency to enlarge the scope of *stridhana*—a tendency which is illustrated by the text of Devala which includes maintenance allowance and accidental gains within *stridhana*. This tendency culminated in the text of Vijnaneshvara, whose gloss on a text of Yajnavalkya amplified the definition, and made it so comprehensive that it would include every type of property in the possession of a woman, howsoever the property may have been acquired. We shall revert to this later⁵.

VIII. THE BRITISH PERIOD

3.27. As regards the fifth period (1801 to 1955 A.D.), we may note that the Shastric law was still the main source of the rules on the subject. It is not necessary to examine the rules that were in force on various rights to property, nor would it be practicable to deal with the position in every century. Some salient features relevant to this period can, however, be usefully stated—

Fifth period (1801 to 1955 A.D.).

(a) *Stridhana*, was property of which the woman was the absolute owner. The various schools differed in their interpretations of ancient texts as to exactly what property constitutes *stridhana*, and also as to her powers of alienation. But, in general, the dominion of a woman over *stridhana* gave her substantial rights of enjoyment and disposal. Examples of *stridhana* are gifts and bequests of property to a woman from her husband and her relations during maidenhood, coverture or widowhood, including gifts made to her at the nuptial fire during the marriage ceremony or at the bridal procession; gifts by the husband as consolation when taking another wife; gifts of affection from her parents-in-law, and so on.

(b) As regards her power to dispose of *stridhana*, a woman had, as a general rule, an absolute power during maidenhood and widowhood. During marriage, her right of disposal depended on the character and source of her property, and also on the school of Hindu law by which she was governed.

(c) Succession to *stridhana* was governed by special rules where the woman had issue, then the first in order of succession was the daughter,—unmarried daughters being preferred to married; the daughter's daughter; then the daughter's son. Then the property passed to the son and the son's son. Succession to the *stridhana* of a woman without issue depended on the form of marriage. It went to the husband if she was married in an approved form; otherwise to her mother and father⁶.

¹Para 3.25, *supra*.

²Manu 9, 200.

³Katyayana.

⁴Altekar, Position of Women in Hindu Civilization (1938), page 263.

⁵See para 3.29 and 3.30, *infra*.

⁶Banerji, Marriage and Stridhana, (1923), Lecture 9, page 400 *et. seq.*

(Chapter 3.—Women's Position in India—Brief Historical Review.)

Property inherited by women.

3.28. As to property inherited by women, we may state that though earlier writers like Baudhayana¹, declared the total incompetency of women for inheritance on the ground of their deficiency of strength, the text of Manu which² deals with the inheritance of the nearest Sapindas, has been interpreted by the commentators as recognising the rights of the wife as a Sapinda³, notwithstanding Manu's declaration⁴ to the contrary. There are also other passages to be found in Manu, recognising the capacity of a woman to hold property⁵.

Limitations on woman's power of disposition.

3.29. It may be stated that the texts of Yajnavalkya and Vishnu under which the widow, the daughter, and other females are recognised as heirs, do not seem to make any distinction between the estate taken by them and the estate taken by male heirs who take under the same texts. One would, therefore, suppose that so far as Smriti authority is concerned, there is, indeed, very little in it to support the *limited estate of women* in inherited property.

Yajnavalkya.

3.29A. Yajnavalkya, whose text on the definition of stridhana has been the subject of much discussion, declares⁶ :

"What was given (to a woman) by the father, the mother, the husband, or a brother, or received by her before the nuptial fire, or presented to her on her husband's marriage to another wife (adhivedanika), and the rest is denominated stridhana. So, that which is given by kindred, as well as her fee and anything bestowed after marriage."

Benares school—Mitakshara.

The highest authority in the Benares school is Mitakshara, which is also universally respected throughout India⁷. The author, adopting the text of Yajnavalkya as the basis of his definition of stridhana, has the following commentary on the first sloka on the subject (II, 143):—

"That which was given by the father, by the mother, by the husband, or by a brother; and that which was presented by the maternal uncles and the rest, at the time of wedding, before the nuptial fire; and a gift on a second marriage or gratuity on account of supersession, as will be subsequently explained in the text, 'To a woman whose husband marries a second wife, let him give, &c.,' [and, as indicated] by the word adya (and the rest), property obtained by inheritance, purchase, partition, acceptance, finding; all this is stridhana according to Manu and the rest."⁸

Vijnaneswara then remarks: "The term stridhana (woman's property) conforms in its import with its etymology, and is not technical: for, if the literal sense be admissible, a technical acceptation is improper⁹."

¹Baudhayana, Prasna II, Kanda II, 27; Banerji, Marriage and Stridhana (1923), page 369.

²Manu, IX, 187.

³Manu VIII, 416.

⁴Banerji, Marriage and Stridhana (1923), pages 369 and 373.

⁵P. S. Sivaswamy Iyer, Evolution of Hindu Moral Ideals (Kamla lectures), University of Calcutta (1935), page 65.

⁶Yajnavalkya II, 143, 144. The text in the original runs thus:—

Jimutavahana reads
adhivedanika) for
and the rest).

(and also
(adhivedanika

⁷Banerji, Marriage and Stridhana (1923), page 328.

⁸Mitakshara, Ch. II, sec. XI, 2. The translation is from Banerji, Marriage and Stridhana (1923), page 328.

⁹Mitakshara Ch. II, section XI. 3.

(Chapter 3.—Women's Position in India—Brief Historical Review.)

3.30. The Mitakshara thus includes all property belonging to a woman in the term 'stridhana', and it nowhere imposes any limitation as to her dominion over it. There are restrictions and prohibitions upon her husband and any other kinsmen using her property, but none upon the woman herself. It should, further, be stated that the Mitakshara, after referring to Manu's enumeration of Stridhana, observes:

"The enumeration of six sorts of women's property by Manu is intended not as a restriction of greater number, but as a denial of less."

It is scarcely necessary to say that Vijnaneswara's statement that stridhana is not to be understood in a technical sense (Mitak, Chapter II, section 11, S. 3) was not a mere philological observation. "By laying down that proposition, Vijnaneswara and other great commentators, who followed him, succeeded in effecting a beneficial change in the archaic Smriti law and placed women almost on a footing of equality with men as regards the capacity to hold property".

This view of the commentator, at once just liberal and correct, was unfortunately rejected by the Privy Council¹.

Mulla has the following comment²:

"Lastly, we shall note how the Judicial Committee has, notwithstanding repeated warnings given by it that the Courts of India should take the Hindu law not from the Smritis, but from the commentaries brushed aside the whole of Vijnaneswara's expansion of the word 'adya'."

VIII. RECENT DEVELOPMENTS

3.31. Subsequent developments in the judicial and legislative field are matters of recent history, and we need not set them out. We shall not therefore go into details of the sixth period, marked, mainly, by the Hindu Succession Act, 1956.

Sixth period.

3.32. However, before concluding this discussion as to the rights of Hindu women, we may draw attention to the following observations of Sir Henry Maine³, on the nature and origin of 'stridhana':—

Sir H. Maine's remarks on 'stridhana'.

"The settled property of a married woman, incapable of alienation by her husband, is well known to the Hindus under the name of 'Stridhana'. It is certainly a remarkable fact that the institution seems to have been developed among the Hindus at a period relatively much earlier than among the Romans. But instead of being matured and improved, as it was in the Western Society, there is reason to think that in the East, under various influences, which may partly be traced, it has gradually been reduced to dimensions and importance far inferior to those which at one time belonged to it."

¹Salemma v. Lutchmana, (1898) I.L.R. 21 Mad. 100, 103.

²Bhagwadeen v. Myne Ball (1867) 11 M.I.A. 482.

³Mulla, Hindu Law, (1974), page 168.

⁴Maine, Early History of Institutions, pages 321-324 cited by Banerjee, Marriage and Stridhana (1923), page 397.

(Chapter 3.—Women's Position in India—Brief Historical Review.)

IX. CHANGING SOCIAL CONDITIONS IN INDIA AND ELSEWHERE

Examples
of
Greece.

3.33. Before we go to the next topic, it may be pertinent to observe that social conditions in any country do not remain static. This is as much true of any other country as of India. Take Greece, for example. Women in the age of Homer¹ occupied a much more honourable position in society than women in the days of Pericles². In Homer's *Odyssey*, the description of many of the female characters³ shows that a considerable amount of freedom was enjoyed by women.

The divine figures depicted by Homer show this to a still larger extent. The goddess of Wisdom—Athene—is the most prominent character in the *Odyssey*⁴, being the one who guided the hero throughout. The Greek deity presiding over justice was also a woman—Themis.

Although Greek society in the time of Homer was patriarchal, the Greek woman, as described by Homer, was not a mere chattel. A good personal relationship between man and woman was highly valued,—as is obvious from the blessing given by Odysseus (the hero of *Odyssey*), to Nausicaa, the daughter of King Alcinous.

The blessing was as follows^{5,6}—

“.....may the gods grant you your heart's desire; may they give you a husband and a home, and the harmony that is so much to be desired, since there is nothing nobler or more admirable than when two people who see eye to eye, keep house as man and wife, confounding their enemies and delighting their friends, as they themselves know better than any one.”

3.34. In contrast, Pericles (492-429 B.C.) contemplated a rather modest role for women, as is apparent from his saying: “Great is the glory of the woman whose name is not in the mouths of men for either good or evil”⁷.

We may also contrast, with Homer, the later social background in which Plato (428-347 B.C.) wrote the *Republic*.

Plato's own ideas as to the education of women,—and generally as regards social organisation—were, in many respects, ahead of his times. But the fact that he had to make a strong and impassioned plea for giving equality to women leaves no doubt that the actual conditions were not very favourable to women. In his concept of the ideal commonwealth⁸, one suggestion which startled some of his contemporaries was that men and women should have the same education and the same pursuits⁹.

¹Probably, 850 B.C., see *Odyssey* (Readers' Enrichment Edition), Reader's Supplement, page 7, and Encycl. Brit. Vol. 10, page 793, left hand.

²Roughly, 445-431 B.C.

³E.g., Nausicaa and Euryclea (Nurse of Odysseus), and Arete. For Nausicaa, see *Odyssey*, Books I, III, V, VIII. For Arete (wife of Alcinous), see Book VII.

⁴*Odyssey*, Book VI; Readers' Enrichment Edition, pages 58-66.

⁵E. V. Rieu (Ed.) *Odyssey* (Penguin Classics) (1973), Book VI, page 107.

⁶Cf. Reader's Enrichment Edition of *Odyssey* (Washington Square Press), (1966), page 82.

⁷Encyclopaedia Britannica, Volume 7, Education—History of, page 984, left hand.

⁸Roughly, 429 B.C.

⁹As to the contemporary reactions, see G. C. Field, *Plato and His Contemporaries*, (1930).

(Chapter 3.—Women's Position in India—Brief Historical Review.)

According to the Republic¹, men and women are to receive the same education and share equally in all public duties. At Athens, where women lived in seclusion and took no part in politics, this proposal would be regarded as revolutionary.

It is, in fact, the theme of one of the later comedies of Aristophanes—Ecclesiazusae (Women in Parliament).

The quality of thought of Plato transcended the limits of time and place, and his major pronouncements as found in the *Republic* and in the *Laws* show a scheme, rather than a survey of the factual conditions of his time.

Compare the speech of Ismene in the Play “Antigone”² where she says—

This is what she stated—

“O think, Antigone,

we are women ;

It is not for us to fight against men”³.

It could be inferred from what is quoted above—that a certain amount of special position of women, in contrast with the position of men, was a reality.

X. MUSLIM WOMEN

3.35. We have so far dealt with the position of Hindu women. As regards the legal position of Muslim women, it is well recognised that a Muslim married woman has generally the same power to do all juristic acts (i.e. acts recognised by law as affecting rights and liabilities), as if she were not married,—except, of course, in respect of matters in regard to which the contract of marriage itself alters her rights or liabilities.

Muslim women.

3.36. Islam recognised no equivalent of the “manus” of Roman law⁴, nor did it have any theory of merger of the personality of wife and husband.

3.37. The Muslim wife has, accordingly, power to dispose of her own property by gift, sale, or lease without the consent of her husband⁵—to cite one example of her independent status.

Because of the non-recognition of the theory of unity in Muslim law, the wife may be convicted of theft of her husband’s property⁶.

3.37A. Ameer Ali, in his *Spirit of Islam*⁷, notes that in the early centuries of Islam, women continued to occupy as exalted a position as in modern society. He mentions the example of Zubaida, the wife of Harun, who played a conspicuous part in the history of the age. According to him, Humaida, wife of Faruk, a citizen of Maedina who was the sole guardian of her minor son Rabya-R-Ray, educated her son to become one of the most distinguished Jurisconsults of the day.

Exalted position
of women.

¹Plato Republic, Part II, Book IV, 445 B to 457 B; Cornford Ed. (1946), pages 141, 150, 151.

²Sophocles, Antigone.

³Antigone, 45-127; Sophocles, The Theban Plays, (Penguin Classics), (1974 Reprint), 128.

⁴Para 3.5, *supra*.

⁵Nichhabhai v. Isse Khan Abdula Khan, (1866) 2 Bom. H.C.R. 297; Tyaleji Muslim (1968) page 57 footnote 23.

⁶(a) Cf. Lata Kundal Lal v. Mt. Musharraf, (1936), 40 C.W.N. 1903 (P.C.);

(b) Luteefoonissa v. Syed Rajoor Rahman, (1867) 8 W.R. 84; (Cal.).

(c) R. v. Khato Bai, (1869) 6 Bom. H.C.R. (Cr. Ca.) 9.

⁷Ameer Ali, *Spirit of Islam* (Chritophers London) (1953 Reprint), p. 254-255.

(Chapter 3.—Women's Position in India—Brief Historical Review.)

Ameer Ali also mentions the improvement effected in the position of women by the Prophet which has been acknowledged by all unprejudiced writers. He says: "..... the Teacher who in an age when no country, no system, no community gave any right to woman, maiden or married, mother or wife, who, in a country where the birth of a daughter was considered a calamity, secured to the sex rights which are only unwillingly and under pressure being conceded to them by the civilised nations in the twentieth century, deserves the gratitude of humanity. If homammed had done nothing more, his claim to be a benefactor of mankind would have been indisputable. Even under the laws as they stand at present in the pages of the legists, the legal position of Moslem females may be said to compare favourably with that of European women."

Legal position as to Muslim women.

3.38. The same writer¹ has summed up the legal position thus—

"An ante-nuptial settlement by the husband in favour of the wife is a necessary condition, and on his failure to make a settlement the law presumes one in accordance with the social position of the wife. A Moslem marriage is a civil act, needing no priest, requiring no ceremonial. The contract of marriage gives the man no power over the woman's person, beyond what the law defines, and none whatever upon her goods and property. Her rights as a mother do not depend for their recognition upon the idiosyncrasies of individual judges. Her earnings acquired by her own exertions cannot be wasted by a prodigal husband, nor can she be ill-treated with impunity by one who is brutal. She acts, if *sui juris*, in all matters which relate to herself and her property in her own individual rights, without the intervention of husband or father. She can sue her debtors in the open courts, without the necessity of joining a next friend, or under cover of her husband's name. She continues to exercise, after she has passed from her father's house into her husband's home, all the rights which the law gives to men. All the privileges which belong to her as a woman and a wife are secured to her, not by the courtesies which "come and go," but by the actual text in the book of law. Taken as a whole, her status is not more unfavourable than that of many European women, whilst in many respects she occupies a decidedly better position. Her comparatively backward condition is the result of a want of culture among the community generally, rather than of any special feature in the laws of the fathers."

Muslim women in Administration.

3.38A. In the field of administration, many Muslim women showed their excellence², like Razia Begum (1236-1239 A.D.) and Chandbibi (16th century). Chandbibi, it may be noted, appeared on the ramparts of the fort of Ahmadnagar dressed in male attire and put heart in the defenders of that town against the prowess of Akbar in his battle against her (1595-1596 A.D.). The participation of Noor Jehan in administration is well-known.

XI. CONSTITUTIONAL PROVISIONS

Articles 15-16 of the Constitution.

3.39. The Constitution of India, in articles 15 and 16, makes a clean sweep of all discrimination against women on the ground of sex. Article 15 is of particular importance, and provides as follows:—

"15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

¹Ameer Ali, *Spirit of Islam* (Christophers London 1953), page 257.

²K. M. Panikkar, "The Middle Period" in Baig (Ed.) *Women of India* (1958), pages 9, 10, 11.

(Chapter 3.—Women's Position in India—Brief Historical Review.)

(2) Nothing in this article shall prevent the State from making any special provision for women and children."

This provision has been invoked more than once before the courts.

3.40. Recently, it was held¹ that though the State can make special provision for women, the State cannot discriminate against them only on the ground of sex. On this ground, it was held that rules laying down that women cannot succeed to any Brahmottar grant, discriminated between men and women only on the ground of sex. "On the plain interpretation of the provision, it is hit by article 15 and is void."

Caselaw.

XII. VIEWS OF GANDHIJI AND TAGORE

3.41. We may, before closing this discussion, refer to the ideals cherished by Gandhiji and Tagore. In a speech made as early as 1918, Gandhiji said²—

Gandhiji's views.

"Woman is the companion of man, gifted with equal mental capacities. She has the right to participate in every minutest detail in the activities of man, and she has an equal right of freedom and liberty with him."

3.42. In 1929, Gandhiji again wrote in the "Young India"³—

"I am uncompromising in the matter of women's rights. In my opinion, she should labour under no legal disability not suffered by man. I should treat the daughters and sons on a footing of perfect equality".

3.43. At this stage, we may state that the position of women is a reflection of the general social conditions in the country. This can be illustrated from Tagore's works. The heroines of Tagore—the important female characters of his novels, short stories, dramas and poems,—depict the changing social pattern of India, and, specially, Bengal, from 1875 to 1941. To quote the words of one author⁴. "They represent the transformation of Indian society."

Position of woman a reflection of the general social condition.

If a detailed analysis is made of the economic, social, religious and political background of the period covered by Tagore's works, it will be apparent how his heroines are the typical products of the period in which they were created or are, in some cases, reflecting the diverse phases of rural and urban society during the sixty-six years of his creative life. With profound understanding and an insight both objective and critical, the great writer brings out, most effectively, the various stages of the emancipation of Indian women, fighting not only for their own rights but also for those of down-trodden humanity.

This does not, of course, imply that the heroines of Tagore are mere products of their age. The poet's transcendental touch makes them stand out as universal figures, "that light that never was on sea or land," with which Tagore touches them all, making them unforgettable and immortal.

¹Bhulanath v. State, A.I.R. 1974 Orissa 135, 139.

²Gandhiji's speech at the Morarji Gokhale Hall—20th February, 1918, reprinted in "To the Women", page 18.

³Gandhiji in the "Young India", 17th October, 1929, reprinted in "To the Women", page 12.

⁴Biman Behari Majumdar, Heroines of Tagore: A study in the transformation of Indian Society, 1875-1941 (Firma K. L. Mukhopadhyay, Calcutta, 1968).

(Chapter 3.—Women's Position in India—Brief Historical Review. Chapter 4.—Scheme of the Act.)

XIII. CONCLUSION

Verse in the Rig Veda.

3.44. We may close this Chapter by quoting what the Rig Veda has to say about the position of the woman. In a verse adoring the role of the wife, it says¹—

दद्युरेभव सज्जाक्षी
सज्जाक्षी भव अवश्व ।
जनार्हूरि भव सज्जाक्षी
सज्जाक्षी अर्धहेवृषु ॥

We need not quote literal translations of the text². The sentiments could be thus expressed in English, on a very free rendering—

May you, like an Empress, rule the
household of your father-in-law;
may you, like an Empress, win the
admiration of your mother-in-law;
may you, like an Empress, win
the love of your sister-in-law;
and may you, like an Empress, secure
the respect of your brothers-in-law.

Views as to dependence.

3.45. We are not unaware that there are to be found, in some of the Smritis, texts which spoke of the subordination of women or which expressed views to the effect that women deserve dependence³ or that women do not attain independence. In this connection, it is pointed out that, in those very smritis, there are also to be found texts which uphold the honour and respect that is due to women⁴. Apart from that, it may be that, in the course of time, the sentiments regarding the proper status of women went on fluctuating,—which accounts for the fact that views at both extremes are met with in the sacred texts.

CHAPTER 4

SCHEME OF THE ACT

Scheme of the 1874 Act.

4.1. We shall now examine in brief the scheme of the Married Women's Property Act, 1874.

Sections 1 to 4.

Sections 1 to 3 deal with preliminary matters.

Section 4 deals with the wages and earnings of the wife, and corresponds to section 1 of the Married Women's Property Act, 1870 (Eng.).

¹Rig Veda, Mandala 10, Hymn 85, Verse 46.

²(a) Ralph Griffith, Hymns of the Rigveda (Chowkhamba Sanskrit Studies, Series No. 35), Vol. 2, page 506, Mandal 10, Hymn 85, verse 46.

(b) H. H. Wilson, Translation of the Rig Veda, Volume VI, pages 152-46 (1928 Re-print) published by H. R. Bhagat, Poona, through Ashtekar & Co.

³(a) Yajnavalkya, 1.85;

(b) Manu IX. 3;

(c) Baudhayana II. 3.44.

⁴Vasishta V. 3.

⁵Yajnavalkya 1.82.

(*Chapter 4.—Scheme of the Act. Chapter 5.—Cognate Provisions in Other Acts.*)

4.2. Section 5 declares that any married woman may effect a policy of insurance on her own life, or on her husband's life on her own behalf, and that the amount shall be her separate property. As the law stood then, if a wife effected such a policy otherwise than out of her separate estate and died in the husband's life time, then the husband became the owner of the policy in the capacity of her administrator. Hence the need for the provision.

Sections 5 to 8.

Section 6, which we shall have occasion to consider in great detail, broadly corresponds to the second paragraph of section 10 of the English Act of 1870. It provides for a statutory trust in regard to a policy for wife's benefit, but with an important difference, namely, that while the English Act mentioned the trustee appointed by the Court of Chancery or the County Court, this section mentions the official trustee under Act 17 of 1864. There are other differences also between the Indian section and the English law, to which we shall revert when we shall consider section 6 in detail. The section provides that an insurance effected by her husband on his life and expressed to be for the benefit of the wife or children or both, shall be deemed to be a trust for the benefit of the wife and the children, and shall not be subject to the claim of the creditors of the husband, except where the transaction was intended to defraud the creditors. But for the section, such an arrangement made by the husband would have suffered from the weaknesses from which voluntary settlements suffered in England.¹

Section 7 deals with legal proceedings by married women, and broadly corresponds to section 11 of the English Act of 1870.

Section 8, in effect, declares that the law as to the liability of a wife for her post-nuptial debts is the same as was laid down in the decision of Justice Phear² of the Calcutta High Court. That decision was binding only in Bengal, while section 8 extends its authority throughout the territories to which the Act extends.

4.3. Section 9 provides for the non-liability of a husband for the debts incurred by the wife before marriage. It corresponds to section 12 of the English Act of 1870.

Sections 9-10.

Section 10 deals with the husband's liability in certain miscellaneous cases.

This, in brief, is the scheme of the Act.

CHAPTER 5

COGNATE PROVISIONS IN OTHER ACTS

I. SUCCESSION ACT

5.1. Having noted the scheme of the Act of 1874, we shall, in this Chapter, refer to certain provisions contained in other Acts which have a bearing on the rights of married women in respect of property.

Introductory.

5.2. Of these provisions, the most important is contained in section 20 of the Indian Succession Act, 1925 which replaced section 4 of the Indian Succession Act, 1865. It may be noted that this section really does not affect the law of succession.

Section 20, Indian Succession Act, 1925.

¹See discussion as to section 6, *infra* (Chapter 8).

²Para 8.4 and 8.5, *infra*.

³Archer v. Watkins, 8 Bengal Law Reports 372.

(Chapter 5.—Cognate Provisions in Other Acts.)

but relates to the immediate effect of marriage on property belonging to either of the married persons.¹ Where the restraint on alienation is created by a settlement *on the occasion of marriage*, this section has no application.²

The section reads:

"20. (1) No person shall, by marriage, acquire any interest in the property of the person whom he or she marries or become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried.

"(2) This section—

(a) shall not apply to any marriage contracted before the first day of January 1866;

(b) shall not apply, and shall be deemed never to have applied, to any marriage one or both of the parties to which professed at the time of the marriage the Hindu, Muhammadan, Buddhist, Sikh or Jain religion."

Limited application of section 20.

5.3. The section does not apply to marriages contracted before 1st January, 1866. Nor does it apply to any marriage one or both of the parties to which profess, at the time of the marriage, the Hindu, Muhammadan, Buddhist, Sikh or Jain religion. The reason is that the Legislature did not consider it appropriate to deal with the effect of marriage on property in the case of those communities as they were not governed by the English common law in matters concerning matrimonial status.

The principal effect of this section is to get rid of the principle, so far as property is concerned, that the husband and wife are one person in law. An important effect of the section is that not only does a person not acquire any interest in the property of the spouse by reason of marriage, but also marriage does not bring in any incapacity for doing any act in respect of his or her property, which he or she could have done if unmarried. The field of property and proprietary capacity is, therefore, almost totally covered by this section.

Section 21, Indian Succession Act, 1925.

5.4. Section 21 of the Indian Succession Act, 1925, corresponding to section 44 of the Act of 1865, deals with the effect of marriage between a person domiciled in India and a person not so domiciled. The section is, in a sense, an addition to the rule contained in section 20 of the Indian Succession Act³, inasmuch as the applicability of section 20 (previously section 4) in relation to the movable property of a person not having an Indian domicile was in dispute for some time⁴. The effect of section 21 is that where either of the parties had an Indian domicile and the marriage takes place in India, the rights of the parties both as to movables and immovables are, in respect of the matter dealt with by the section, governed by the territorial law of India. As Markby J. pointed out⁵: "The *jus gentium* or common law of nations has been set aside or modified" to that extent.

II. INSURANCE ACT

Sections 38-39, Insurance Act, 1938.

5.5. We may now refer to certain provisions of the Insurance Act, 1938 which deal with the question of assignment and nomination of life insurance policies—a subject also dealt with in section 6 of the Married Women's Property Act, 1874⁶.

¹Hill v. Administrator General of Bengal, (1896) I.L.R. 23 Cal. 506.

²Peters v. Manuk, 22 Weekly Report 175 (Cal.).

³Para. 5.3, *supra*.

⁴Miller v. Administrator General, (1874) I.L.R. 1 Cal. 412

⁵Chapter 8, *infra*.

(Chapter 5.—Cognate Provisions in Other Acts.)

Before the enactment of the Insurance Act, in 1938, the general rule was that a person who had his name in the policy as the one to whom payment due under the policy is to be made, did not have any rights under the policy, merely by reason of his name being mentioned, and it was necessary for him to get a succession certificate or letters of administration¹. In general, assignment of the policy was governed only by section 130 of the Transfer of Property Act², as a transfer of actionable claims, except where section 6 of the Married Women's Property Act, 1874 became operative. This position was changed by the Insurance Act, 1938. Section 38 of the Act deals with the assignment and transfer of life insurance policies. Sub-section (1) provides that a transfer or assignment of a policy of life insurance, whether with or without consideration, may be made only by an endorsement upon the policy itself or by separate instrument signed in either case by the transferor or by the assignor or his duly authorised agent and attested by at least one witness, specifically setting forth the fact of transfer or assignment. In order that the transfer or assignment may be complete and effectual as between the parties, this is enough. But, in order that the transfer or assignment may be complete and effectual against the insurer, it is also necessary that written notice of the transfer or assignment is given and certain other formalities are complied with, as provided in section 38(2) of that Act.

Section 39 of the Insurance Act deals with nomination by the holder of a policy of life insurance. Sub-section (1) of that section, so far as is material, provides that the holder may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death. The rest of the section deals with certain formalities for nomination, the effect of the nomination on an assignment or transfer under section 38 and other connected matters not material for our purpose. In general, the nominee is nothing more than an agent to receive the money, which money remains the property of the insured and at his disposal during his lifetime and on his death forms part of the estate. For our purposes, sub-section (7) of section 39 is important, and it reads as follows:—

“(7) The provisions of this section shall not apply to any policy of life insurance to which section 6 of the Married Women's Property Act, 1874 applies or has at any time applied:

Provided that where a nomination made whether before or after the commencement of the Insurance (Amendment) Act, 1946, in favour of the wife of the person who has insured his life or of his wife and children or any of them is expressed, whether or not on the face of the policy, as being made under this section, the said section 6 shall be deemed not to apply or not to have applied to the policy.”

5.6. The combined effect of section 39(7) and the proviso quoted above, is to create a wall between a nomination under the Insurance Act and a trust under the Married Women's Property Act.

Object of section
39(7).

The scheme is intended to avoid, as far as possible, disputes arising as to whether the arrangement made in a particular case falls under the Insurance Act or under the Married Women's Property Act. Of course where (i) the arrangement is in the form of a “nomination”, but (ii) it is not expressed as made under section

¹A.I.R. 1935 Rangoon 211, 212.

²A.I.R. 1955 Mad. 459, 460.

(Chapter 5.—Cognate Provisions in Other Acts.)

39 of the Insurance Act, such a controversy can still arise. This situation could not be dealt with by a mandatory provision and the decision would, therefore, depend on the circumstances of each case.¹

III. TRANSFER OF PROPERTY ACT

Section 10—Transfer of Property Act—Restraint on anticipation.

5.7. The next important provision for our purpose is contained in section 10 of the Transfer of Property Act, 1882, which deals with what is commonly known as a "restraint on anticipation". The section reads as follows:—

"10. Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lesser or those claiming under him:

Provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Budhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein."

The general rule is that conditions in a transfer of property which restrain alienation are null and void. This is in the main paragraph of section 10. To this, the proviso is an exception. It should be recalled that at common law, by reason of the doctrine of unity, the wife could have no power of disposition over her property for her separate benefit, independently of her husband. Equity, however, allowed property to be given to trustees *in trust* for the wife separately. Property so given to trustees for the *separate use* of the wife could be dealt with by her in equity as if she were a *feme sole*, that is, as if she were unmarried.

Position in equity.

5.8. But the wife could still be "morally influenced"² by the husband to dispose of her properties as he pleased. To avoid the exercise of such an influence the Courts of Equity allowed property which had been settled for the separate use of married woman to be so tied down for her own personal benefit that she should have no power during coverture to "anticipate" or assign her income. This is the origin of the restraint on anticipation.

In *Tullett v. Armstrong*³, Lord Langdale, M.R., in discussing the validity of a clause in restraint of anticipation, observed as follows:

"The estate for separate use, as sanctioned by Courts of Equity, has its peculiar existence only in the married state. It operates as a protection to a married woman, against the legal power over the wife's property which is vested in her husband. It acts in contravention and control of the legal right of the husband, and, as against his legal power, it is a sufficient protection; but the power of alienation remaining in the wife, the separate estate, unfettered, is no protection against the *moral influence of the husband*, and many instances have occurred and daily occur in which the wife under the persuasion or influence of her husband, has been and is induced to exercise his power of alienation in his favour or for his benefit, and thus defeat the protection intended for her."

¹For certain recommendations as to the Insurance Act, see para 8.42, 8.53, 8.54 and Chapter 15, *infra*.

²See *Tullett v. Armstrong*, *infra*.

³*Tullett v. Armstrong*, (1839) 49 R.R. 280, 281.

(Chapter 5.—Cognate Provisions in Other Acts.)

"But, as the separate estate itself owed its origin and support to the Courts of Equity, it was understood, that the same Courts might so modify it, as to secure the protection which was intended; and accordingly it was intimated by Lord Thurlow that if a gift clearly expressed that the separate estate should be incapable of assignment in anticipation or of alienation, that intention should be carried into effect; and his Lordship being "of that opinion, himself set the example in a case in which he personally took an interest; and from that time, now nearly half a century ago, it has been usual to introduce into wills and settlements a clause giving to women real and personal estate for their separate use, independently of their husbands, without power of assignment, by way of anticipation or of alienation; and such clauses, though their operation has been considered to be, as undoubtedly, it is, anomalous and irreconcileable with the ordinary legal rules affecting the limitations of estates, and the legal incidents of property, have been repeatedly approved and carried into effect by this Court and settlements and provisions for family to a very great extent have been framed in reliance upon them.

"And, in *Jackson v. Hobhouse*¹, Lord Elden emphatically declared that it was too late to contend against the validity of a clause in restraint of anticipation."

5.9. The concept of a restraint on alienation was, thus, complementary to that of the separate property of the *married* woman. Separate estate in equity did much to mitigate the harshness of the common law rule. But there was nothing to prevent a married woman from *assigning her beneficial interest* to her husband and thus vesting in him the interest which *the separate use* had sought to keep out of his hands, and the temptation presented to a grasping, spend-thrift or insolvent husband was real. It was to circumvent this, that equity developed the restraint upon anticipation.² This restraint could be imposed only if property was conveyed, devised or bequeathed to a woman's *separate use*, and, once it attached, it prevented her from anticipating and dealing with any income until it actually fell due. A restraint could be, and usually was, attached to the corpus too, in which case the whole fund became completely inalienable during *coverture*.

Concept of restraint complementary.

The restraint on anticipation was designed to protect not only the wife but also the members of her family who would be entitled to the property on her death.

5.10. A restraint on anticipation could even be attached to the separate property of *an unmarried woman*. But, in this case, she could deal with the property as if there were no restraint, and could also totally remove the restraint by executing a deed poll to this effect. A woman to whose separate property a restraint had been attached before or during *coverture* could do the same after the marriage was terminated by her husband's death or by divorce. But, in the absence of any such deed, as soon as she married or remarried, the restraint became operative as regards any property not alienated whilst she was a *feme sole*.

Position regarding unmarried woman.

¹*Jackson v. Hobhouse*, (1817) 2 Mer 483; 16 R.R. 200, 203.

²See Hart, "The Origin of the Restraint upon Anticipation", 40 L.Q.R. 221.

(Chapter 5.—Cognate Provisions in Other Acts.)

Relaxation of the restraint—Act of 1881.

5.11. Whilst the restraint effectively kept the property out of the hands of the husband and his creditors, it had one obvious drawback. There might be a number of occasions on which it might be in the wife's interest to deal with property subject to a restraint, but nothing short of a private Act of Parliament could remove it. It was in order to overcome this difficulty that the Conveyancing Act, 1881 gave the court in England power to bind her interest in such property, provided that this was for her benefit¹. But the court could render only a *specific disposition*, binding; it had no general power to remove the restraint *altogether*.

Abolition of the restraint—Acts of 1935 and 1949.

5.12. The restraint on anticipation was abolished for the future by the Law Reform etc. Act, 1935. However, the Act did not affect the validity of restraints already imposed. Since the pre-existing restraint acted as undue fetters on the wife's power of alienation unless the restraint was removable by the order of the court², there was some hardship in practice, particularly because the restraint was not now needed by the wife for whose protection it was designed, nor was it needed by the members of her family who would be entitled to the property on her death. Ultimately, by the Married Women's (Restraints upon Anticipation) Act, 1949, all restraints, whenever imposed upon anticipation, were removed.³

IV. TRUSTS ACT

Provisions in the Trusts Act.

5.13. So much as regards the history of the restraint on anticipation and the developments in England relevant to the subject matter of proviso to section 10 of the Transfer of Property Act. Provisions relating to the restraint on anticipation occur also in sections 56 and 58 of the Indian Trusts Act, 1882. In view of our recommendation later in this Report to amend section 10 of the Transfer of Property Act, 1882⁴, it is necessary to amend these two sections of the Trusts Act⁵ also, and we recommend accordingly. The two sections, as they now stand, are quoted below:

Right to specific execution.

"56. The beneficiary is entitled to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interest;

Right to transfer of possession.

and, where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries and they are competent to contract and all of one mind, he or they may require the trustee to transfer the trust-property to him or them, or to such person as he or they may direct.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in the second clause of this section applies to such property during her marriage." (Illustrations not quoted).

Right to transfer of beneficial interest.

"58. The beneficiary, if competent to contract, may transfer his interest, but subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of such interest."

¹Section 39, Conveyancing Act, 1881 replaced by section 7, Conveyancing Act, 1911, replaced by the Law of Property Act 1925, section 169.

²Section 169, Law of Property Act, 1925.

³Appendix 4.

⁴See discussion as to section 10, Transfer of Property Act, 1882 (Chapter 15).

⁵Sections 56 and 58, Indian Trust Act, 1882.

(Chapter 5.—Cognate Provisions in Other Acts. Chapter 6.—Extent and application of Act of 1874.)

"Provided that when property is transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in this section shall authorise her to transfer such interest during her marriage."

They will require suitable amendment, as already stated.

CHAPTER 6

EXTENT AND APPLICATION OF ACT OF 1874

6.1. We now discuss the Act of 1874 in detail. Sections 1 and 2 of the Act deal with the application and extent of the Act and other preliminary matters. Of these, the only provision which requires consideration here is section 2, second paragraph, which reads—

Sections 1 and 2—
Extent and applica-
tion.

"But nothing herein contained applies to any married woman, who, at the time of her marriage, professed the Hindu, Mohammedan, Buddhist, Sikh or Jain religion, or whose husband, at the time of such marriage, professed any of those religions."

6.2. We would like to point out that this provision is too widely expressed, inasmuch as, by virtue of section 6(2), section 6 of the Act applies to the persons excluded by section 2, second paragraph, as from the date mentioned in section 6(2) in that behalf. This is the position after the amendment of section 6 in 1959. It is, therefore, desirable that in the second paragraph of section 2, the opening portion should be revised so as to read—

Recommendations
to amend section
2.
Second paragraph.

"But, except as otherwise provided by sub-section (2) of section 6, nothing herein contained applies. . . ."

We recommend that the second paragraph should be amended as above if the present structure is to be maintained.

6.3. The second paragraph of section 2, which we have already quoted¹, excludes from the Act, cases where only one party is governed by the Act. Thus where a spouse belongs to the excluded community, the Act does not apply even if the other spouse belongs to a community to which it applies. For example, a Christian wife marrying a Hindu would be excluded from the operation of the Act by virtue of this paragraph. The assumption seems to be that the personal law would apply to the husband in such a case and that the Hindu husband would not acquire common law rights merely by marrying a Christian woman.

Case of inter-mar-
riage where one
party is governed
by the Act.

On the above hypothesis, the English common law does not apply and there is no need to apply the 1874 Act to such a situation. Moreover, section 20, Indian Succession Act would be attracted by virtue of the specific provision in the Special Marriage Act², which enacts that if the parties marry under the Special Marriage Act, the Indian Succession Act will apply. We do not think that there is any need to change the position in this respect.

¹Para. 6.1, *supra*.

²Section 21, Special Marriage Act, 1954.

(Chapter 6.—Extent and Application of Act of 1874. Chapter 7.—Married Women's Wages and Earnings.)

Section 2, third paragraph.

6.4. We notice that in section 2, the third paragraph gives a wide power to the State Government to grant exemption from the provisions of the Act to certain sections of the community both prospectively and retrospectively. It appears that in so far as these communities are concerned, because of their peculiar customs and habits, it may not be advisable to extend the whole or some part of the Act to them, and it will also appear that where exemption has not already been granted, it may be discovered later that if the operation of the Act in respect of these communities is not modified with retrospective effect, some hardship may arise. Apparently, having regard to these reasons, the legislature has given the wide power mentioned above. In the absence of any controversy or objections in this regard, we do not think it proper to disturb it.

CHAPTER 7

MARRIED WOMEN'S WAGES AND EARNINGS

Section 4.

7.1. Section 4 deals with the wages and earnings of married women and is in these terms:

"*4. Married women's earnings to be their separate property.*—The wages and earnings of any married woman acquired or gained by her after the passing of this Act, in any employment, occupation or trade carried on by her and not by her husband,

and also any money or other property so acquired by her through the exercise of any literary, artistic or scientific skill,

and all savings from and investments of such wages, earnings and property, shall be deemed to be her separate property, and her receipts alone shall be good discharges for such wages, earnings and property."

Separate property
—History of.

7.2. It may be noted that the section uses the expression "separate property", which has now been abolished in England¹. The expression has a history. In England, by the end of the 16th century², it was established that if property was conveyed to trustees to the *separate use* of a married woman, then the married woman retained in equity the same right of holding and disposing of it as if she were a *feme sole*. She could, therefore, dispose of it during her life or by will like any other beneficiary of full age who was absolutely entitled, and, like such beneficiary, she could call upon the trustees to convey the legal estate. Only if she died intestate in respect of her "separate estate" did the husband obtain an interest in her equitable property which he would have got had it not been settled to her separate use. This is the origin of the concept of "separate property".

Act of 1935.

7.3. This concept has become out-of-date in modern times, and that is why, in England³, the legislature, in 1935, recognised the reality and abolished the concept of separate estate, and gave to the wife the same rights and powers as were already possessed by other adults of full capacity. We have discussed the history of English legislation in an earlier Chapter⁴.

¹Para 7.3, *infra*.

²Holdsworth, History of English Law, Vol. 5, pages 310-315.

³Law Reform (Married Women and Tort-feasars) Act, 1935.

⁴Chapter 2, *supra*.

(Chapter 7.—Married Women's Wages and Earnings. Chapter 8.—Insurance by Wives and Husbands.)

7.4. The expression 'separate property' in section 4 is unnecessary at the present day, since now there is no "joint" property by law from which "separate" property may need to be distinguished. The word "separate" should, therefore, be removed, and we recommend accordingly.

Recommendation
to amend s. 4 by
removing the word
"separate".

CHAPTER 8

INSURANCE BY WIVES AND HUSBANDS

I. INTRODUCTORY

8.1. In this chapter, we propose to deal with the provisions of the Act relating to insurance by wives and husbands, contained in sections 5 and 6. Section 6 is of considerable practical importance as it applies to persons of all communities and has raised numerous questions of interpretation and application.

Introductory.

II. SECTION 5

8.2. Section 5 reads—

Section 5.

"5. Any married woman may effect a policy of insurance on her own behalf and independently of her husband; and the same and all benefit thereof, if expressed on the face of it to be so effected, shall ensue as her separate property, and the contract evidenced by such policy shall be as valid as if made with an unmarried woman."

8.3. We have already explained the significance of the section¹ and how it modifies the rules previously prevalent. We are of the view that in this section, the word "separate" is unnecessary.²

We are also of the view³ that the requirement that the policy should be "expressed on the face of it to be so effected", should be deleted as unnecessary, if the section is retained in its present form.

We recommend that the section should be so revised.

III. SECTION 6

GENERAL

8.4. We now come to section 6, which reads—

Section 6.

"6. Insurance by husband for benefit of wife.—(1) A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall ensue and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate.

¹Para 4.2, *supra*.

²See also Chapter 14, *infra*.

³See also Chapter 14, *infra*.

(Chapter 8.—Insurance by Wives and Husbands.)

"When the sum secured by the policy becomes payable, it shall, unless special trustees are duly appointed to receive and hold the same, be paid to the official Trustee of the State in which the office at which the insurance was effected is situate, and shall be received and held by him upon the trusts expressed in the policy, or such of them as are then existing.

"And in reference to such sum he shall stand in the same position in all respects as if he had been duly appointed trustee thereof by a High Court, under Act No. XVII of 1864 (to constitute an office of Official Trustee), section 10.

"Nothing herein contained shall operate to destroy or impede the right of any creditor to be paid out of the proceeds of any policy of assurance which may have been effected with intent to defraud creditors.

"(2) Notwithstanding anything contained in section 2, the provisions of sub-section (1) shall apply in the case of policy of insurance such as is referred to therein which is effected—

- (a) by any Hindu, Muhammadan, Sikh or Jain—
 - (i) in Madras, after the thirty-first day of December, 1913, or
 - (ii) in any other territory to which this Act extended immediately before the commencement of the Married Women's Property (Extension) Act, 1959, after the first day of April, 1923, or
 - (iii) in any territory to which this Act extends on and from the commencement of the Married Women's Property (Extension) Act, 1959;

Provided that nothing herein contained shall affect any right or liability which has accrued or been incurred under any decree of a competent court passed—

- (i) before the first day of April, 1923, in any case to which sub-clause (i) or sub-clause (ii) of clause (a) applies; or
- (ii) before the commencement of the Married Women's Property (Extension) Act, 1959, in any case to which sub-clause (iii) of clause (a) or clause (b) applies."

Section 6—Origin. **8.5.** This is the most important section of the Act, and a policy of insurance by the husband for the benefit of the wife or children, carries certain important consequences. This provision was considered necessary because it was thought that in the absence of such a provision, the transaction would be considered a "voluntary settlement" on the lines of the position in English law as unmodified by statute¹.

According to the old doctrine of the English Courts, such a policy, by the husband for the wife's benefit, would only be in the nature of a voluntary settlement,^{1-a} and hence would be liable to the dangers to which such settlements are exposed. It is wellknown that the legislature wanted to encourage those life insurance policies which made provisions for wife and children and not to subject such policies to the dangers to which they were subjected under the English decisions, Judges of the English Courts being bound down by technicalities and precedents. In introducing the Bill, Mr. Hobhouse said:² "Some

¹For statutory provision see para 8.7, *infra*.

^{1-a}. Para 8.6, *infra*.

²See extra supplement of 2nd August, 1873 of the Gazette of India.

(Chapter 8.—Insurance by Wives and Husbands.)

gentlemen connected with Insurance Offices in this country appealed to the Government a short time ago stating that those provisions," (i.e., the provisions of the English statute which over-ruled the English decisions), "were found exceedingly beneficial and they did not see why they should not be applied to India. We now propose, therefore, to introduce an Act which will embody for India the same provisions as those which had been thought fit for the people of England."

8.6. As regards voluntary settlements,—that is to say, settlements made without consideration,—there were certain special rules in equity. In the first place, where the trust is not completely constituted by reason of the ineffectual method of its creation, the maxim that equity will not assist a volunteer applied. Apart from the fact that specific performance would not be allowed in favour of volunteers, there was the other aspect, namely, that under a statute¹ of 1571, a voluntary settlement could be set aside even if the beneficiaries were entirely ignorant of the settler's intent to defraud the creditors.² The Act of 1571 was, in England, later replaced by section 122 of the Law of Property Act, 1925. In addition, a voluntary disposition of land, made with intent to defraud a *subsequent purchaser* is voidable at the instance of that purchaser; this was provided in England, by an Act of 1585.³

Voluntary settlements.

Again, under the Bankruptcy law,⁴ a voluntary settlement may, in certain cases, be avoided on the subsequent bankruptcy of the settler, even if it is not fraudulent.⁵

Section 6 was intended to avoid all these complications. Before discussing it in detail, it will be convenient to note the English Statutory provision on the subject.

IV. ENGLISH LAW

8.7. In England, under section 11 of the Married Women's Property Act, 1882 (Eng.),⁶ a policy of assurance effected by any man on his own life and expressed to be "for the benefit of" his wife and children or any of them (and similarly by a woman for her husband and children), creates a trust in favour of the "objects". Certain propositions emerge from the case law relating to this section.

Section 11, Mar-
ried Women's Pro-
perty Act.

- (a) So long as any "object of the trust" remains unperformed, the policy moneys do not form part of the estate of the insured.⁷ They are not subject to his (or her) debts, except where the policy was effected and premiums paid with intent to defraud creditors, in which case the creditors will be entitled to a sum out of the policy moneys equal to the premiums so paid.
- (b) The section has been liberally construed, so as to include (i) endowment⁸ policies, and (ii) accident insurance policies.⁹

¹13 Eliz. 1, Ch. 5 (1571).

²Snell, Equity (1966), page 141.

³27 Eliz. 1, Chapter 4, later replaced by 173(1), Law of Property Act, 1925.

⁴Now section 42, Bankruptcy Act, 1914 (Eng.).

⁵Re Macadam, (1950) 1 All Eng. Reports 303.

⁶See Appendix 3 for the text.

⁷Re Clay's Policy of Assurance, (1937) 2 All E.R. 548.

⁸(a) Re Loakimidis's Policy Trusts, (1925) Ch. 403;

⁹(b) Re Fleetwood's Policy, (1926) Ch. 48.

¹⁰Re Gladitz, (1937) Ch. 588.

(Chapter 8.—Insurance by Wives and Husbands.)

The vagueness of the phrase "for the benefit of" in section 11 of the English Act of 1882 has created certain questions which have, in course of time, received judicial construction.

- (i) Thus, a policy effected under the section by a man for the benefit of his wife (unnamed)¹ and children, enures for the benefit of a *second wife* and the children of a second marriage;² and, unless the policy provides otherwise, the beneficiaries will take jointly.³
- (ii) But, subject to any contrary intention, a *named wife* forthwith takes an absolute vested interest in the policy, so that if she predeceased her husband, it forms part of her estate;⁴ her husband, however, has a lien for any premiums which he pays after her death, as being payments made by a trustee to preserve the trust property.⁵
- (c) Even if the person for whose sole benefit the insurance was effected is guilty of the murder or manslaughter of the insured, the policy moneys will nevertheless be payable by the insurance company. However, as it would be against public policy to allow the beneficiary to take the moneys, they will form part of the insured's estate.⁶

Section 5, Married Women's Property Act, 1874 and section 11, Married Women's Property Act, 1882 (English Act).

8.8. The important differences between the English and the Indian Act⁷ could be summarised as follows—

- (1) The Indian Act is confined to a policy taken out by the *husband*. The English Act covers policies taken out by either spouse.
- (2) The Indian Act provides that the benefit for the wife and children in the policy has to be expressed "on the face of it". These words "on the face of it", which were present in section 10 of the Married Women's Property Act, 1870 (English), were dropped in section 11 of the English Act of 1882.
- (3) The words "shall enure and be deemed to be a trust" appear in section 6 of the Indian Act⁸ (which are the same as what appeared in section 10 of the English Act of 1870). The words in section 11 of the English Act of 1882 are different. The English Act now contains the words "*shall create a trust in favour of* the objects therein named." The English Act of 1882 would, therefore, make the trust more definite than merely "deeming" it to be a trust as in section 6 of the Indian Act.
- (4) Section 6 of the Indian Act makes the sum payable to special trustees or to the Official Trustee of the State (in cases where there are no special trustees), who shall hold the amount upon trusts expressed in the policy. Under section 11 of the English Act of 1882, there are no such special trustees or Official Trustees for these purposes.⁹ In England, the *husband holds the sum in trust* in the absence of appointment of trustees.

¹See, generally, (1952) 96 S.J. 720.

²Re Browne's Policy, (1903) 1 Ch. 188. See also Re Parker, (1906) 1 Ch. 526 and contrast Re Griffith's Policy, (1903) 1 Ch. 739.

³Re Daview's Policy, (1892) Ch. 90.

⁴Cousins v. Sun Life Assurance Society, (1933) Ch. 126; and see Re Kilpatrick's Policies Trusts, (1966) 2 W.L.R. 1346.

⁵Re Smith's Estate (1937) Ch. 636.

⁶Cleaver v. Mutual Reserve Fund Life Association, (1892) 1 Q.B. 147. See para 8.19, *infra*.

⁷Section 11, Married Women's Property Act, 1882 (Eng.) (Appendix 3.).

⁸Section 6 (Para 8.4, *supra*).

⁹Lalithambal v. Guardian of Indian Insurance Co. A.I.R. 1937 Mad. 645.

(Chapter 8.—Insurance by Wives and Husbands.)

(5) In India, the creditors have, in cases of fraud a right against the (entire) proceeds of any such policy—though the word “entire” is not used. Under the English Act, the creditors are entitled to receive, out of the moneys payable under the policy, a sum equal to the premium so paid. Therefore, the creditors would be entitled to a lesser amount under the English Act than they would get in India.

(6) Under the Indian Act, the beneficiaries of the trust are to be the wife, or the wife and children or any of them. The English Act uses the words “for the benefit of his wife, or of his children, or his wife and children, or any of them.” Therefore, under the English Act, the trust can be made solely for the benefit of the children without adding the mother.

(7) It is specifically mentioned in the Indian Act that so long as the trust remains, it is not subject to the control of the husband. These words are absent in the English Act of 1882.

V. ACTIONABLE CLAIMS

8.9. We shall have a number of points¹ of detail to consider with reference to section 6. But, at the outset, certain fundamental matters may be dealt with, as the section deals with the transfer of an actionable claim, broadly corresponding to the chose in action as known to English law.

Section 6 and actionable claims.

8.10. There are four conceivable reasons for which the assignment of a chose in action may bind the assignor : (a) it transfers his whole interest to the assignee ; (b) it transfers his equitable interest to the assignee and thereby converts the assignor into a trustee ; (c) it effectively constitutes other persons trustees of the chose in action ; or (d) the assignor is bound by contract to the assignee to aid him to recover the ‘chose’.² What is known in England as chose in action is, broadly speaking, known to Indian lawyers as an actionable claim. This difference in terminology makes no difference to the legal position. The operation of a device adopted to effectuate assignment of an actionable claim will, therefore, depend on which of the above reasons applies to the device adopted.

Modes of assignment.

8.11. In India, the general subject of the transfer of an actionable claim is governed³ by section 130 of the Transfer of Property Act, 1882. However, the Exception to that section provides, *inter alia*, that “Nothing in this section..... affects the provisions of section 38 of the Insurance Act, 1938.” Hence the assignment of the benefit of an insurance policy, is governed now by the Insurance Act.⁴ The second illustration to section 130 of the Transfer of Property Act shows that, but for the provisions of the Insurance Act, section 130 of the Transfer of Property Act would have governed assignments of life policies also.

Transfer of actionable claims.

At common law, a chose in action was not assignable. But, in equity, it was assignable, subject to certain requirements of notice. As Rankin J. observed,⁵ the legislature has, in section 130 of the Transfer of Property Act, composed a new scheme, which has some of the features of both the systems.

¹See para 8.20, *infra*.

²See (1932) 48 L.Q.R. 550.

³For section 130 see para 8.13, *infra*.

⁴Sudasook v. Hoare Miller, A.I.R. 1923 Cal. 719, 722 (Rankin J.).

(Chapter 8.—Insurance by Wives and Husbands.)

VI. SIGNIFICANCE OF SECTION 6

Assignment of policy essentially assignment of an actionable claim bearing of contract.

8.12. In order to understand the significance of section 6 of the Act of 1874, it is desirable to examine the law which would be otherwise applicable. Apart from statutory provisions of a special character, the right to claim moneys under a life insurance policy could, before 1938, be assigned by complying with the formalities required¹ by section 130^{1-a} of the Transfer of Property Act, 1882. The assignment may be direct or by way of trust, but, in either case, so far as the *formalities* are concerned, compliance with section 130 of the Transfer of Property Act was required. This is because, in its essence, such assignment is an assignment of the benefit of a contract which is a species of 'actionable claim' within the meaning of the Transfer of Property Act. It was therefore well-settled that before the enactment of section 38 of the Insurance Act, 1938, the transfer of a life insurance of Property Act² which deals with the assignment of actionable claim. The assignment created an immediate vested interest in the assignee; it was not revocable and operate completely to divest the assignor³ of all rights under it.⁴⁻⁶⁻⁸

The assignment could be conditional or unconditional. Difficulty was experienced only in relation to Muslim policy holders, because, under the rules of the Muslim law, conditions attached to gifts were generally void, except where the assignment of the policy is made to the wife by way of dower. The gift was valid, but the condition was void.⁷

Section 130—
Transfer of property Act.

8.13. Section 130 of the transfer of Property Act is as follows—

"130. (1) The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer is hereinafter provided be given or not:

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings, and without making him a party thereto.

¹Para 8.9 and 8.11, *supra*.

^{1-a.} Para 8.13, *infra*.

²(a) *Mool Raj v. Vishwanath*, (1913) I.L.R. 37 Bombay 198; 24 M.L.J. 60 (P.C.);

(b) *Balamba v. Krishnayya*, I.L.R. 37 Mad. 483; A.I.R. 1914 Mad. 595 (P.B.).

³Cf. *Ravner v. Proston*, (1881) 18 Ch. Div. 1.

⁴*Mool Raj v. Vishwanath*, (1913) I.L.R. 37 Bombay 198; 24 Mad. L.J. 60 (P.C.).

⁵*Laxmi Kutty v. Vishnu Nambisan*, A.I.R. 1939 Mad. 411.

⁶*Bai Laxmi v. Jaswantlal*, A.I.R. 1947 Bom. 369.

⁷See—

(a) *Sham Das v. Savitri Bai*, A.I.R. 1937 Sind 181;

(b) *Sadiq Ali v. Zahida Begum*, A.I.R. 1939 All. 744.

(Chapter 8.—Insurance by Wives and Husbands.)

"Exception.—Nothing in this section applies to the transfer of a marine or fire policy of insurance or affects the provisions of section 38 of the Insurance Act, 1938 (4 of 1938).

Illustrations

- (i) A owes money to B, who transfers the debt to C. B then demands the debt from A, who, not having received notice of the transfer, as prescribed in section 131, pays B. The payment is valid, and C cannot sue A for the debt.
- (ii) A effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If A dies, the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of A's executor, subject to the proviso in sub-section (1) of section 130 and to the provisions of section 132."

8.14. The effect of section 38 of the Insurance Act, 1938, which is referred to in section 130. Exception,¹ was to amend the law as to assignment of life insurance policies for persons of all communities.² After the enactment of that section, assignment of life insurance policies is governed by that section, so far as the formalities are concerned, instead of section 130 of the Transfer of Property Act. We are not primarily concerned with the details of these formalities.

Effect of section 38, Insurance Act, 1938.

8.15. If the assignment is in the form of a trust, it would be necessary to comply also with sections 5 and 6 of the Indian Trusts Act, 1882. It is not necessary to set out in detail the formalities required by these provisions.

Question of trust considered.

The question of creation of a trust, however, requires some discussion. In its essence, an insurance policy represents the benefit of a contract.³ Now, a trust can certainly be created in respect of the benefit of a contract. The position in this respect is briefly as under:—

First of all, it may be useful to see what is the principle which is involved in a claim by a wife that her husband is a trustee for her, and this has been well expressed by Sir George Jossel, M. R., in *Richards v. Delbridge*,⁴ as follows:—

"The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning: for, however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meanings."

¹Para 8.13, *supra*.

²For section 38, Insurance Act, see para 5.5, *supra*.

³See para 8.12, *supra*.

⁴*Richards v. Delbridge*, L.R. 18 Eq. 11.

(Chapter 8.—*Insurance by Wives and Husbands.*)

The position may be thus elaborated:

- (a) A person entitled to the benefit of a contract may create a trust of that benefit for third parties¹, either by declaring himself a trustee of it or by assigning it to trustees for them.
- (b) In addition, a person may initially contract as trustee for a third party, so that in equity the third party is entitled to the benefit of the contract *ab initio*.

If the contract is not preferred, the trustee can take proceedings in his own name² to enforce it for the benefit of the third party, and if the trustee refuses to do so, the third party can sue, joining the trustee as a defendant³.

Difficulties in determining existence of trust.

8.16. The main difficulty in these cases, however, is to discover what test the courts will apply in deciding whether or not the party intended to contract as trustee. The inquiry plainly involves the construction of the contract and the special circumstances in which it is entered into. This will be evident from the cases where the court found a trust⁴, in contrast with the cases where it did not⁵.

The courts do not readily find that a party intends to constitute himself a trustee.

Significance of section 6—Statutory trust.

8.17. It is obvious that section 6 avoids these difficulties to a large extent by bringing into existence what is conveniently described as a 'statutory trust'. The significance of section 6 lies in the fact that it renders unnecessary a compliance with formalities required—

- (i) for an assignment, by section 38 of the Insurance Act⁶, or
- (ii) for the creation of a trust, by the Indian Trusts Act, 1882⁷.

Section 6 to be regarded as providing simpler mode of assignment.

8.18. Dispensing with the various formalities required for the assignment of a policy under section 38 of the Insurance Act, section 6 provides, what was considered to be a simpler mode of assignment. The "assignment" need not be as elaborate and express as under the Insurance Act. The essence of the section lies in the words "expressed for the benefit of" (the wife or children). If an intention to benefit the wife or children is apparent that benefit is secured on the mere basis of the expression of the intention in the policy, and without the need for other formalities. That is the governing principle and object of the section. To carry into effect this object, the section provides a machinery

¹Corbin "Contracts for the benefit of third persons", (1930) 46 L.Q.R. 12 and J.G. Starke, (1948) 21 Australian L.J. 382, 422, 455; 22 Aust. L.J. 67; and Samuel Williston, "Contracts for the benefit etc." (1901) 15 Harv. L.R. 767.

²(a) *Gregory and Parker v. Williams*, (1817) 3 Mor. 582;

²(b) *Lloyd's v. Harper*, (1880) 16 Ch. D. 290;

²(c) *Les Affreuteurs Reunis Societe Anonyme v. Leopold Walford (London) Ltd.*, (1919) A.C. 801.

³(a) *Vandepitte v. Preferred Accident Insurance Corporation of New York*, (1933) A.C. 70, 79.

³(b) *Harmer v. Armstrong*, (1934) Ch. 65.

⁴(a) *Re Webb* (1941) Ch. 225;

⁴(b) *Re Forster's Policy* (1966) 1 W.L.R. 222.

⁵*Re Foster* (No. 1) 1938 3 All. E.R. 357; *Green v. Russell*, (1959) 2 Q.B. 226; *Re Cook's S. T.* (1965) Ch. 902; and *Beswick v. Beswick* (1966) 3 All. E.R.

⁶Para 8.14, *supra*.

⁷Para 8.15, *supra*.

(Chapter 8.—Insurance by Wives and Husbands.)

whereunder either the trustee appointed in this regard by the husband, or failing such appointment, the official trustee, is to receive the money on the policy from the insurance company. No formal trust is required. In this respect, the section dispenses with compliance with sections 5-6, Indian Trusts Act, 1882.

Thus, the section not only overrides the provisions of section 38 of the Insurance Act, 1938, relating to the assignment of life policies, but also modifies the provisions of the Indian Trusts Act, 1882 in their application to the policies to which the section applies. By virtue of this section, what can be conveniently described as a "statutory trust" comes into being as we have already stated¹.

8.19. In the absence of any provisions contained in that behalf in the Married Women's Property Act, a term contained in the policy itself that the money shall be payable to the wife of the assured if she survives him, is, as between the executors and administrators of the estate of the assured and the wife, of no effect. This point is dealt with by Esher, M. R. in *Cleaver v. Mutual Reserve Fund Life Association*,² thus:

"Apart from the statute, what would be the effect of making the money payable to the wife? It seems to me that as between the executors and the defendants, it would have no effect. She is no party to the contract; and I do not think that the defendants could have any right to follow the money they were bound to pay and consider how the executors might apply it. It does not seem to me that, apart from the statute, such a policy would create any trust in favour of the wife; James Maybrick might have altered the destination of the money at any time, and might have dealt with it by will or enactment. If he had done so, the defendants could not have interfered. I think that, apart from the statute, no interest would have passed to the wife by reason merely of her being named in the policy; and, if the husband wishes any such interest to pass to her, he must have left the money to her by will or settled in upon her during his life, otherwise it would have passed to his executors or administrators."

It was held in a Madras case³ that where the assured does not, in his lifetime, create a trust for the benefit of any person, such money, in cases where the provisions of the Married Women's Property Act do not apply, forms part of his estate and is recoverable by his legal representatives. A contract between the company and the assured gives no right of action to the beneficiary named. Where the company refuses payment to the beneficiary on the death of the assured, the legal representatives, and not the beneficiary, will be entitled to enforce the contract.

In England, before 1870, the difficulty was sometimes overcome by getting the insurance company to declare themselves trustees for the wife.⁴ In India, before the passing of the Insurance Act, 1938, the assured could divest himself of his beneficial interest under the policy only by assignment in writing under section 130 of the Transfer of Property Act, or by signing a declaration of trust under section 5 of the Trusts Act. Where neither course is adopted, the policy, on his death, forms part of his estate, and no trust arises in favour of his wife as against his executors or other representatives.⁵

Section 6 provides an alternative course, and that shows its significance.

¹Para 8.17, *supra*.

²*Cleaver v. Mutual Reserve Fund Life Association*, (1892) Q.B. 147.

³*Oriental Government Security Life Assurance Limited v. Ammiraju*, (1911) I.L.R. 35 Mad. 162.

⁴*Shankar v. Umabai*, (1913) I.L.R. 37 Bom. 171, 479, citing *Bunyan on Insurance*, page 463.

⁵Para 8.18, *supra*.

Effect of term in
policy without sta-
tutory provision.

(Chapter 8.—Insurance by Wives and Husbands.)

VII. POINTS FOR CONSIDERATION CONCERNING SECTION 6

Points of detail.

8.20. After this discussion of the significance of section 6, we shall proceed to examine certain matters concerning the section which require consideration. It should be pointed out, that the section has led to numerous points of controversy. Certain other points also arise out of the section. It will be convenient to enumerate important points which require consideration, either because of these controversies or otherwise:—

- (a) Does the section apply to endowment policies ?¹
- (b) What is the meaning of the words "expressed on the face of it" in the section ?²
- (c) (i) What formula should be used in the policy to attract the section?³
(ii) What is the meaning of the words "for the benefit of his wife or of his wife and children or any of them", which occur in the section; can there be a policy for the benefit of children only ?⁴
- (d) What is the effect of a nomination made under section 39, Insurance Act, 1938 ?⁵
- (e) If a nomination under section 39, Insurance Act, brings a case within this section, can the nomination be cancelled ?⁶
- (f) Can there be a contingent provision under this section ?⁷
- (g) Can the statutory trust under this section be cancelled ?⁸
- (h) Who can sue under this section ?⁹
- (i) Can the widow for whose benefit the policy is expressed to be made, sue in her own name, without resorting to the official trustee ?¹⁰
- (j) Relationship of this section with section 39(7), Insurance Act—What happens if there is a trust and also a nomination, in respect of the same policy ?¹¹
- (k) Can a trust be created under the section after the policy is issued ?¹²
- (l) Verbal change needed in respect of the "deeming" provision¹³ as to creation of trust.
- (m) Rights of creditors¹⁴ when a trust is created.
- (n) Interpretation of the words referring to "object".¹⁵

¹Para 8.21 and 8.22.

²Para 8.23 to 8.28.

³Para 8.29 and 8.30.

⁴Para 8.31 to 8.33.

⁵Para 8.34 to 8.42.

⁶Para 8.43.

⁷Para 8.44 to 8.46.

⁸Para 8.47 and 8.48.

⁹Para 8.49 and 8.50.

¹⁰Para 8.51 and 8.52.

¹¹Para 8.53 and 8.54.

¹²Para 8.55.

¹³Para 8.56.

¹⁴Para 8.57.

¹⁵Para 8.58.

(Chapter 8.—Insurance by Wives and Husbands.)

We shall deal with these points seriatim.

8.21. The first question that has arisen is whether the word "policy" in section 6 includes an endowment policy. To some extent, this question is connected with the other question whether a contingent provision is permissible under section 6; but the question has also an importance of its own. In a Calcutta case² reported in 1970, there are dicta to the effect that the section does not apply to endowment policies whereunder the amount was not payable on death. On the other hand, there is a Bombay ruling³ of 1967, taking a different view, and there are judgments of other High Courts also⁴ which place a wide construction on the section.

Point (a)—endowment policies.

It should be noted that endowment insurance is also an insurance of life. In *Gould v. Curtis*,⁵ it was stated—

"What then is the true meaning of the words 'insurance on his life'? There would, to my mind, be a significant difference if the proposition were 'of' and not 'on'. I can agree that the phrase 'insurance of the life' may, as a matter of English mean a guarantee of a sum to be paid if the life drops. Insurance 'on' it is, to my mind, a different thing. It means the insurance of a sum dependent upon it. The life is mentioned as a contingency upon which the insurance is to be paid. The contingency is death or no death—death or life. Insurance 'on' life is an insurance of a sum payable or not payable according as the contingency of life or death is answered one way or the other. Regarded thus, it is plain that an insurance 'on' life includes as much an obligation to pay a sum of money if life continues at a date, as an obligation to pay a sum of money if life ceases. An insurance 'on' life expresses an obligation to pay a sum of money on an event dependent upon the contingency of human life. If that be sound, it follows that the whole of this premium is deductible, because this is altogether an insurance 'on' life."

8.22. We are of the view that having regard to the beneficial object of section 6, the matter should be placed beyond doubt, by expressly providing that the section applies to an endowment policy. Adding an Explanation is one possible device for achieving this object. We recommend accordingly.

Recommendation as to endowment policies.

8.23. A general matter calling for comment arises from the words "on the face of it", which appear in section 6 and in the earlier English Acts prior to 1882, though not in section 11 of the English Act⁶ of 1882. In a Calcutta case⁷, it was observed by Ameer Ali J. with reference to these words:—

Point (b)—Meaning of the words "on the face of it".

"I think they were omitted from the later English Acts as being superfluous. Mr. Ghose interprets them as meaning 'unconditionally', absolutely, or something of that kind. To my mind, they mean nothing more than 'expressly expressed', the antithesis being to implied trust or a secret trust."

²See discussion in Para 8.44, *infra*.

³L.I.C. v. United Bank, A.I.R. 1970 Cal. 513, 516 (B. C. Mitra & S. K. Mukherjee, JJ.).

⁴M. A. Rodrigues v. B. R. Baliga, A.I.R. 1967 Bom. 465.

⁵See discussion under point (f), *infra*, para 8.44 to 8.46.

⁶Gould v. Curtis, (1913) 3 K.B. 84, 94.

⁷For section 11 of the English Act, see Appendix 3.

⁸In re Ashalata, A.I.R. 1940 Cal. 217, 218 (Ameer Ali, J.).

(Chapter 8.—Insurance by Wives and Husbands.)

Intention should
be expressed in the
policy.

8.24. It would appear that the intention to benefit the wife and children must be expressed in the policy, and not in the proposal. In one Madras case¹, in the insurance policy, against the column "to whom payable", appeared the words "to the person or persons legally entitled thereto". It was contended by the defendants that a trust arose under section 6 of the Married Women's Property Act. It was, however, held by the High Court that the requirements of section 6 had not been fulfilled. There was no mention in the policy of the wife and children, but there was a statement *in the proposal form* that the object of the policy was "for the maintenance of the family". It was held:

"Although, where the intention clearly appears that a trust is to be created, the law does not require that the words used should be identical with those occurring in the statute, it is impossible to hold in the present case that the requirements of the section have been fulfilled S. 6 enacts that the trust should appear "expressed on the face" of the document, that is to say, that the words used should be plain and unambiguous. For whatever purpose the policy may be governed by the terms of the application that preceded it, for the purpose of the Married Women's Property Act the only document that can be looked at is the policy".

No trust was, therefore, held to have been created in favour of the wife.

Madras cases.

8.25. Following the Madras case² referred to above, it was again held in 1938³ by the same High Court that although for certain purposes, in cases of dispute between the insurer and the insured, it may be necessary to look into the proposal or prospectus or even to construe the prospectus as though it were a part of the policy, the terms of section 6 of the Married Women's Property Act were clear and unambiguous. The expression "policy of insurance" in that section is to be taken in the ordinary meaning of those words, and does not mean the proposal as well as the company's prospectus. In this case, on the face of the policies themselves, there was no expression of intention that they were for the benefit of the wife or children. In the column in the policy headed "to whom payable", the words used were, "The proposer's assigns or his proving executors or administrators or other legal representatives.....". It was held that there was no trust created under section 6 in favour of the wife of the assured.

Other cases.

8.26. In a Nagpur case⁴, there was in the policy no statement that it was intended for the benefit of his wife or children. However, it was stated in the policy that *the proposal and declaration of insurance should be the basis of the assurance*, and, in the proposal form, where there was a question "What is the object of the proposed assurance", the assured wrote, "Family provision". The Nagpur High Court held that the words used,— "family provision"—were very vague, and there was no indication that the assured intended that his wife and children should get the whole interest in the policy. In the circumstances, the Court held that even assuming that the statement in the *proposal form could be said to be a statement expressed on the face of the policy*,—which it doubted—this statement was no sufficient to bring the policy within the ambit of section 6 of the Act, as it was vague.

¹Krishnamurthy v. Anjayya, A.I.R. 1936 Mad. 635.

²Krishnamurthy v. Anjayya, A.I.R. 1936 Mad. 635, *supra*.

³Venkatasubramania v. United Planters Association, A.I.R. 1938 Mad. 234, 236.

⁴Rabibai v. Ratanlal, A.I.R. 1938 Nag. 321.

(Chapter 8.—Insurance by Wives and Husbands.)

8.27. In one sind case¹, it was held that before section 6(1) of the Married Women's Property Act can apply, the insurance policy must be "expressed on the face of it to be for the benefit of his wife". In this case, it was an admitted position that the policy of insurance was not produced before the trial court. But the appellant widow had received the sum due under the policy from the Insurance Company, and the Court assumed that the policy had been surrendered by her to the Company. The question arose whether the insurance money would have to be deducted from the appellant's share in partition. It was held that:

"If the appellant then wished to rely upon s. 6(1), Married Women's Property Act, she should have called for the surrendered policy to satisfy the Court that it was expressed on the face of it to be for her benefit. A mere assignment of a policy in favour of the wife does not bring the policy within the terms of section 6(1), Married Women's Property Act."

From the evidence of the appellant, the Court said that the policy *had been assigned to her* by her husband 2 years before his death, and later, that he had taken out policy in her name. In these circumstances, the Court held that the policy did not come within section 6(1). Therefore, it was held that the insurance money would have to be deducted from the appellant's share in the partition.

8.28. These cases would show that on this point, the courts have taken a narrow view of the wording. We have considered the question whether any provision should be made to the effect that the intention to benefit the wife or children can be expressed in the proposal also. However, such a provision may create problems, and it would be inconvenient to expect the parties concerned to go through the proposal that may have been deposited long ago in the records of the insurer.

Whether amendment feasible.

8.29. We now proceed to the next question pertaining to the formula to be used for conferring the benefit contemplated by section 6. From the decided cases, to which we have referred above, a few salient points arise—

Point—(c)(i)—Question as to formula to be used.

- (a) The mere use in the proposal of the words "for family provision" does not² bring the policy within section 6(1).
- (b) Mere assignment in favour of the wife does not also bring³ the policy within section 6(1).
- (c) At the same time, the policy need not copy the phraseology used in the section. In one Madras case⁴, the High Court has held, (with reference to section 6):

"That section states that the policy shall, on the face of it, express that it is to be for the benefit of the wife and if it is so expressed, then it says the policy shall be deemed to be a trust for the benefit of the wife. There is nothing in the language of the section to show that the words "for the benefit of his wife" or others corresponding to these should appear in the policy to enable us to infer a statutory trust in favour of the wife within the meaning of the section. If, on

¹Manibai v. Bhimji Lalaji, A.I.R. 1946 Sind 171, following Shamdas v. Saviribai, A.I.R. 1937 Sind 181.

²Rabibai v. Ratanlal, A.I.R. 1938 Nag. 321, para. 8.26, *supra*.

³Manibai v. Bhimji, A.I.R. 1946 Sind 171, 175, para 8.27 *supra*.

⁴Abhiramavalli v. Official Trustee, A.I.R. 1932 Mad. 220, 222.

(Chapter 8.—Insurance by Wives and Husbands.)

reading the words in the policy, it appears that the assured has intended in the event of his death, that the policy should enure to the benefit of his wife, then I think the policy may be deemed to be a trust for her benefit."

In this case, in the schedule to the insurance policy taken by the petitioner's husband, it was provided that the sum was payable to "the assured or his wife Abhiramavalli if he predeceases her". It was held that this was a policy of assurance expressed "to be for the benefit of his wife", though the express words "for the benefit of his wife" did not appear in the terms of the policy. In this case, it was held that a statutory trust in favour of the wife had been created.

The High Court, however, pointed out that in order to avoid difficulties, the insurance companies should, in drawing up the terms of the policy in cases where the assured intended to create a trust in favour of his wife in the event of his death, adopt the words used in the statute¹.

Whether amendment feasible in regard to the formula to be used.

8.30. We have given deep thought to the case-law referred to above. It appears to us that an amendment of the section would not be of much use in avoiding controversies of the nature discussed above. The assured has to be his own conveyancer. *At the same time, we are of the view that the Life Insurance Corporation should consider the suggestion made by the High Court of Madras² in the judgement³ to which we have already referred⁴.*

Point (c) (ii)—Policy for benefit of children.

8.31. Another equally important question also arises from the words—"for the benefit of his wife or of his wife and children or any of them". Does a policy for the benefit only of *children* fall within the section? This situation arose in a Bombay case⁵, and we may quote the facts and the point decided, from the judgement of the High Court.

"I have already quoted section 6 to the extent relevant for the purposes of this appeal. A policy of insurance, in order that section 6 should apply, should be effected by any married man on his own life. The other requirement is that the policy, on the face of it, must be for the benefit of his wife, or of his wife and children, or any of them⁶. The present policy is on the life of respondent No. 3. That it is not for the benefit of his wife, or of his wife and children is apparent. It is for the benefit of his children, i.e., the appellant and her sister. It was contended by Mr. Abhyankar, appearing for the respondents, that a policy which is for the benefit only of a child or children is not contemplated by section 6 of Act III of 1874. According to "his contention, the expression for the benefit of his wife or of his wife and children, or any of them" means that the policy is either for the benefit of the wife or for the benefit of the wife and children or for the benefit of the wife and any one of the children. It cannot be, he says, for the benefit *only of the children without the wife*. This contention raised on behalf of the defendants found favour with the learned Judge. The contention is that "any of them" has reference to any of the children along

¹Emphasis added.

²See *Abiramavalli v. Official Trustee*, A.I.R. 1932 Mad. 222.

³See para. 8.29, *supra*.

⁴See also para. 8.42, *infra*.

⁵M. A. Rodrigues v. B. R. Baliga, A.I.R. 1967 Bom. 465, 467, paragraph 6 (Gokhale, J.).

⁶M. A. Rodrigues v. B. R. Baliga, A.I.R. 1967 Bom. 465, 467, para. 5.

⁷Emphasis added.

(Chapter 8.—Insurance by Wives and Husbands.)

with the wife and not *any of the children without the wife*. On a plain interpretation of the section, I do not find it possible to accept this construction suggested by Mr. Abhyankar. The expression "of his wife and children" referred to more than one child because the word "children" would include one child. According to the construction suggested by Mr. Abhyankar, the expression 'of his wife and children' must refer to a policy for the benefit of the wife and more than one child and not the benefit of the wife and only one child. The reasonable construction would be that when the word 'children' is used, it includes one child also. Only, if it were not so, then the further expression 'any of them' would have been necessary to provide for the case of a policy for the benefit of the wife and child. Looking to the language employed, it does not seem to me that a policy, which was not for the "benefit of the wife but was for the benefit only of children, was not contemplated by section 6".

8.32. It could be noted that on this point, section 11, (which contains the analogous provision) in the English Act—the Married Women's Property Act, 1882,—is more clear. The material part of the section is as follows:—¹

Section 11 of the English Act of 1882.

"A policy of assurance effected by any man on his own life, and expressed to be for *the benefit of his wife, or his children or of his wife and children, or any of them*, or by any woman or her own life, and expressed to be for the benefit of her husband or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named":²

The wording in the English section is, thus, more specific on this point.

8.33. We recommend that the section in the Act of 1874 should be clarified and widened so as to permit the benefit being conferred on children, (as in the English Act), that is to say even if the wife is not a beneficiary. No doubt, the objection could be raised that in legislation dealing with married women, a provision meant only for children is out of place. However, we are of the view that practical convenience justifies such an amendment. To frame a separate law to deal with policies for children will mean duplication of provisions.

Recommendation to amend section 6 in relation to children.

8.34. The next question pertains to the effect of a nomination under section 39 of the Insurance Act, 1938³. Some difficulty in this regard is created by the words in section 6—"for the benefit of". Do these words mean that a nomination under section 39 of the Insurance Act would satisfy the formula? The High Courts have taken the view that a nomination under section 39 of the Insurance Act, 1938, does not satisfy the requirements of section 6. This is the Allahabad⁴, Andhra Pradesh⁵, Calcutta⁶ and Madras⁷ view. We shall refer to some of the reported decisions.

Point (d)—Nomination made under section 39, Insurance Act, 1938.

In one Allahabad⁸ case it was held that section 6(1) clearly shows that the policy has to be effected for the benefit of the wife. The language was not that a policy effected for the benefit of another person may be considered to have

¹Section 11, Married Women's Property Act, 1882 (Eng.) (See Appendix 3).

²Para 8.32, *supra*.

³Para 5.5, *supra*.

⁴A.I.R. 1958 All. 569, 572 (see *infra*), para 8.34.

⁵A.I.R. 1957 Andhra Pradesh 757, 758 (see *infra*), para 8.35.

⁶A.I.R. 1956 Cal. 275, 276 (see *infra*), para 8.36.

⁷A.I.R. 1957 Mad. 105 (see *infra*), para 8.38.

⁸Shanti Devi v. Shri Ram Lal, A.I.R. 1958 All. 569.

(Chapter 8.—Insurance by Wives and Husbands.)

been effected for the benefit of the wife by a subsequent nomination. The making of a subsequent nomination in favour of the wife is merely authorising her to receive the money and is not the "effecting" of a policy for her benefit. A policy cannot be effected twice. Where, therefore, the wife was not made beneficiary *ab initio*, the policy was not effected by the husband "for the benefit of his wife" within section 6(1), and the mere fact that he had made a *subsequent nomination* such as he was empowered to make under section 39 of the Insurance Act, does not make the policy a policy to which section 6(1) applies because of such nomination.

The court held that the equitable and beneficial interest, whether immediate or contingent, must be created at the very inception of the policy. It was held: "It must be created *ab initio* in the wife or the children or any of them if it is to attract section 6(1) of the Married Women's Property Act. Otherwise if a trust is to be created later in favour of any person after the policy has been effected, then it cannot be created under section 6(1) of the Married Women's Property Act, but must be created as any other trust is created It seems to us clear that section 39 of the Insurance Act and section 6(1) of the Married Women's Property Act are not complementary, and that the right of nomination which is bestowed on a policy-holder under section 39 of the Insurance Act cannot be read into section 6(1) of the Married Women's Property Act so as to vary the clear intention of the latter Act."

The wife's appeal was dismissed on the above ground.

Illustrative cases from Andhra.

8.35. The facts in one Andhra case¹ were as follows:—

A debtor, executed a promissory note in favour of the appellant in 1950. A decree was obtained by the appellant in 1952 against the widow and son of the debtor, who had died during the pendency of the suit. In execution of the decree, the appellant sought to attach a life policy taken by the debtor on his own life. The widow raised an objection that having been nominated under section 39 of the Insurance Act, 1938, she was entitled to the proceeds thereof and her husband's creditor had no right. This objection was accepted by the courts below. The decree-holder appealed to the High Court.

The High Court held that under section 39 of the Insurance Act, 1938, the holder of the policy continues to have an interest in the policy notwithstanding the nomination made by him. The nomination does not divest him of the rights in the policy, and he retains disposing power over it. The title does not pass to the nominee by reason of the nomination. Consequently, the nominee gets the property in the policy subjects to all the liabilities of the policy-holder. It was also held that under section 39(2) and 39(4) "it is competent for the holder of the policy to bequeath to somebody or make an assignment of it, and this automatically cancels the nomination, which implies that a nominee has no vested right in the document.....

"It is not necessary for me to consider whether section 6 of the Married Women's Property Act could apply to a nomination under section 39 of the Insurance Act, in view of the proviso to sub-section (7). It is manifest that it does not apply to a nomination.....".

Therefore, section 6 did not apply in this case, and the nominee's right was subject to the discharge of any liability of her husband.

¹Brahmamma v. Venkatramana Rao, A.I.R. 1957 A.P. 75.

(Chapter 8.—Insurance by Wives and Husbands.)

8.36. In one Calcutta case¹, the nomination in the endowment insurance policy of the deceased was as follows: "I nominate my wife and my son-in-law, the survivor or survivors, as the persons to receive the moneys under the above policy in the event of my prior death."

Calcutta case.

It was argued by the widow that moneys payable to her under the terms of the above nomination did not form part of the estate of the deceased judgment-debtor. The Calcutta High Court held that section 39, Insurance Act, conferred on the nominee the right to receive the insurance money as between such nominee and the Insurance Company, but it did not provide for the title of ownership of that money in general. It was held:

".....such insurance moneys really belonged to the estate of the assured and continued to do so. It only provided, in the event of the death occurring before the period of endowment was over, who should receive the money in place of the assured. The title to receive the money does not necessarily create a title *in rem* to that money which can be said to be good as against the whole world."

It was also held that the terms of nomination in this case did not show that the policy was expressed on the face of it to be for the benefit of the wife within the meaning of section 6, Married Women's Property Act. The terms of nomination here were held to be *nomination simpliciter*, which comes under section 39, Insurance Act. Here the nomination was not for wife and/or children, but joint nominee, one being the wife and the other the son-in-law.

The court explained why section 39, Insurance Act, did not apply to trusts created under section 6, Married Women's Property Act. Such trusts are expressly said to be beyond the control of the policy-holder, and are expressly said not to form part of the estate of the policy-holder. But the policy-holder cannot have the best of both the worlds, namely—on the one hand, the policy-holder to have full right of disposition in spite of the "nomination" and, at the same time, the nominee to have title to the money. The court, therefore, dismissed the application of the widow, who was a mere nominee.

8.37. A nomination under section 39, Insurance Act, like a testamentary disposition, speaks only after death; but the analogy ends there. No title to the policy moneys passes,—*in praesenti* or in future,—by the nomination. If the title passed to the nominee on the death of the policy-holder, his legal status would have been indistinguishable from that of an assignee, or a legatee, the assignment or legacy taking effect on the death of the policy-holder.² In the contemplation of the statute, the right of a nominee is a mere right to collect the proceeds of the policy, and the right has been given only to obviate the inconvenience of obtaining representation to the estate of the deceased policy-holder or a succession certificate.³

Effect of nomination.

¹Rambaloy v. Gangadhar, A.I.R. 1956, Calcutta 275.

²L.I.C. v. United Bank, A.I.R. 1970 Cal. 513, 516 (B.C. Mitra & S. K. Mukherjee, JJ.).

³L.I.C. Limited v. United Bank, A.I.R. 1970 Cal. 513, 516.

(Chapter 8.—Insurance by Wives and Husbands.)

Madras case.

8.38. A Division Bench of the Madras High Court in *Mohanavelu Mudaliar v. The Indian Insurance and Banking Corporation Ltd.*,¹ while noticing that disposition of life insurance can be classed as (1) assignment, (2) nomination and (3) creation of a trust by reason of the provisions of the Married Women's Property Act, 1874, observed as follows:—

"If, by nomination, a trust is created, then the nominee becomes the beneficiary, but the difficulty is to find out, from the exact words used, what the intention was, because the terms 'nomination' and 'nominee' are not, strictly speaking, terms of art. 'Nominate' means only to name and it is in every instance a question of mixed law and fact as to what the intention is. Thus, by the expressions used it has to be found out whether the nomination merely creates *a payee or a beneficiary for whose protection a trust is thereby created*.² If the construction placed upon the declaration is that a trust has been created under the provisions of the Married Women's Property Act, the beneficiary would take the assured amount free of all the liabilities of the insured and if it is construed as a *mere nomination*, the nominee would have no more right than to receive the amount subject to all the liabilities as if the disposition was by means of a testamentary instrument."

"We may add that it is not every nomination that will have the effect of creating a trust and it is necessary to make a distinction, as has been made in Macgillivray's Insurance Law, between the creation of a trust and a simple contract between two persons for the benefit of a third. Such a simple contract cannot, by itself, be interpreted as creating a trust."

"Though the dividing line between the two classes of cases is thin, it is nevertheless real."

The facts of the case are of interest.³ The deceased M had taken out two life insurance policies of Rs. 5000 each. He had also become indebted to the I.I. & B. Corporation. The deceased had nominated his wife as the person entitled to receive the moneys due under the policies. The Corporation had, in a suit against M, attached the policies. The wife had also died, and the daughters of the couple had filed a petition that the policy moneys had become the assets of their mother, and were not liable for the decree debt against M. It was held by the Madras High Court that the nomination could only be construed as a testament which would be subject to all the liabilities which the assured had to discharge and the claim of the daughter was dismissed.

Another Calcutta case.

8.39. In a Calcutta case⁴, the nomination made by assured in an insurance policy, was in these terms, "The wife, the nominee, if she be alive on the death of the assured and this nomination shall be still in force which failing to the assured or his executors, administrators, assignees or other nominees." The High Court held that the "only reasonable interpretation is that the husband intended to preserve his right to cancel the nomination. In these circumstances, section 6, Married Women's Property Act, can have no application."

¹*Mohanavelu Mudaliar v. The Indian Insurance and Banking Corporation Ltd.*, (1956) 2 M.L.J. 476 ; I.L.R. (1957) Mad. 326 ; A.I.R. 1957 Mad. 115.

²Emphasis added.

³*Mudaliar v. I.I. & B. Corporation*, A.I.R. 1957 Mad. 115, 118.

⁴*Sarojan Bewa v. Hem Chandra*, A.I.R. 1946 Cal. 44.

(Chapter 8.—Insurance by Wives and Husbands.)

8.40. So much as regards a nomination in a policy. The result of this discussion is that a nomination confers on the nominee only a right to collect the amount, and confers no title.

Assignment standing on different footing.

An assignment of a policy, on the other hand, stands on a different footing. Under section 38(5) of the Insurance Act, 1938, the effect of an assignment is that the assignee is the only person entitled to benefit under the policy, and such a person shall also be subject to all liabilities and equities to which the assignor was subject at the date of assignment. But a "nomination", as already stated¹ and as appears from section 39(1) of the Insurance Act, merely means that the person nominated is the one to whom moneys payable under the policy shall be paid in the event of the death of the assured. Unlike an assignment—which is irrevocable,—a nomination may, at any time before the policy matures for payment, be cancelled or changed. In the event of the policy maturing during the lifetime of the assured, the nomination will have no effect and the policy money will, in that event, be payable to the assured. It follows that while an assignee is not merely entitled to receive but has a right to the policy-money itself, a nominee is no more than a person who is competent to receive the money if the assured did not survive the maturity of the policy. He has no title to the money due under the policy.

8.41. The meaning of the word "object" of the trust in section 6 is interesting. In a Madras case,² the effect of a family arrangement and the consequent execution of a release deed by the defendants who executed it, was considered. It was contended that such a release is invalid and inoperative, having regard to the fact that the express language of section 6 provides that *so long as the object of the trust remains*, it can never become the property of the plaintiff. A query was raised if the expression "object" in the section means the beneficiary or the purpose. The query was not answered, as there was revocation of the arrangement by the beneficiaries.

Meaning of "object" of trust

8.42. On a careful consideration of all aspects of the matter, we have come to the conclusion that while the present statutory scheme as contained in the various provisions mentioned above, may be complex, the complexity is primarily due to legislative anxiety to provide for the variety of results which, in actual life, persons taking out a life insurance may desire to achieve. The insured may wish merely to avoid a controversy as between his heirs and the insurer, without more. For him, nomination is a suitable device. He may desire to go further, and decide to transfer all rights under the policy. He can then resort to assignment. Or, he may prefer the less elaborate machinery of section 6, if he wishes to create a trust governed by that section.

Recommendation to amend the Insurance Act.

The statutory provisions are, thus as varied as the intentions of the insured. Hence the apparent complexity. Essentially, then, this complexity is unavoidable, for the reasons mentioned above. However, it is possible to make one improvement whereby it will be easier than at present to decide, in a particular case, whether the arrangement falls or does not fall under section 6. We have in mind the suggestion made in a judgment of the Madras High Court,³ to which we have already made a reference. We reiterate our recommendation⁴ to carry out that suggestion.

¹Para 8.37, *supra*.

²Enayatullah v. Jeelanee, A.I.R. 1942 Mad. 136, 138, 139.

³Abhiramavalli v. Official Trustee, A.I.R. 1932 Mad. 222 (Para 8.29, *supra*).

⁴See discussion as to point (c) (i), Para 8.29 and 8.30, *supra*.

(Chapter 8.—Insurance by Wives and Husbands.)

To give statutory effect to the suggestion which we have referred to above, it would be convenient if a suitable provision is added in the Insurance Act, 1938, so that the number of controversies as to whether section 6 applies or does not apply, will be reduced to the minimum. We are recommending insertion¹ of a new section² in the Insurance Act.

Point (e)—Revocation of nomination and surrender of policy.

8.43. Reverting to section 6 of the Act of 1874, we may state that the next question relates to the effect of revocation of nomination of a policy. It has been held in Calcutta³ that a nomination by the husband on the insurance policy preserving the husband's right to cancel the nomination, takes the case out of section 6. There is also a Calcutta⁴ ruling to the effect that the policy cannot be surrendered after a trust is created under section 6.

These rulings do not seem to necessitate any amendment of section 6.

Point (f)—Whether contingent provision permissible.

8.44. Another question that has arisen is whether there can be a *contingent* provision for the benefit of the wife and children under section 6.

On this question there is a conflict of views. A Nagpur case⁵ and an earlier Bombay case⁶ take a narrow view on the question, namely, that section 6 does not apply if the benefit is contingent.

The contrary view has been taken by the Calcutta⁷ and Madras⁸ High Courts, and also in a later Bombay case,⁹ namely, that section 6 applies even if the benefit is made contingent,—as, for instance, upon the death of the husband before the wife. The earlier Bombay case was not cited before the High Court in the later case.

8.45. In the Calcutta case¹⁰, it was observed that all life policies, by their very nature, operate upon a contingency. In endowment policies, two contingencies are involved, life of the assured at a certain point of time, or death before that time, "An endowment policy is wholly a contract of life insurance; a double contract of life insurance, the event in one case being death and the event in the other case being life." An English¹¹ case was relied on, for this conclusion. The policy was held to be "on the life of the husband", and for the benefit of the wife, it being regarded as immaterial that it was an endowment policy.

¹For another point concerning the Insurance Act, see para 8.53, *infra*.

²See Para 15.7, *infra*.

³Sarejan v. Kemchander, A.I.R. 1946 Cal. 44.

⁴Ishani Dass v. Gopal Chand, A.I.R. 1915 Cal. 9, 10.

⁵Rabibai v. Ratnmal, A.I.R. 1938 Nagpur 321.

⁶Dinbai v. Bamansha, A.I.R. 1934 Bom. 296, 299.

⁷In re Ashalata Dasi, A.I.R. 1940 Cal. 217, para 8.45, *infra*.

⁸(a) Abhiram Valli v. Official Trustee, A.I.R. 1932 Mad. 220, see para 8.30.

(b) Bengal Insurance Co. v. Velayamwal, A.I.R. 1937 Mad. 571, 574 (Follows Fleetwood's Policy—[1926], 1 Ch. 48);

(c) Krishnan Chettiar v. Velayee Ammal, A.I.R. 1938 Mad. 604, 607.

⁹M. A. Rodrigues v. B. R. Baliga, A.I.R. 1967 Bom. 465.

¹⁰In re Ashalata Dassi, A.I.R. 1940 Cal. 217, 218. (Para 8.44, *supra*).

¹¹Gould v. Gurtis, (1913) 3 K.B. 84, 95, 97.

(Chapter 8.—Insurance by Wives and Husbands.)

A Madras case,¹ takes an intermediate view, holding that until the event happens, the husband can assign the policy. This interpretation, with respect, may defeat the section in many cases. On this particular point, we prefer the view taken in a later Madras case,² namely, that a trust is impressed from the very beginning.

8.46. Having considered all aspects of the matter, we have come to the conclusion that the wider view should be codified, by an express amendment of the section. We recommend that the section should be so amended as to cover contingent trusts.

Recommendation.

8.47. The next question arising out of section 6 is this. Can the statutory trust arising under Section 6 be revoked?

(g) Cancellation of statutory trust.

In a Sind case,³ it has been observed that the trust under section 6 cannot be revoked. The case⁴ was, however, one of assignment. The Court observed:

"This section is borrowed from the provisions of the English Act (Section 10, Married Women's Property Act, 1870), and there is a conflict in English law as to what the expression 'object' means. According to one view, the expression 'object' means beneficiary; according to another view, it means purpose *vide* (1930) 2 Ch. 37 and (1933) Ch. 126.⁵"

"It seems to us that it is not necessary to deal with this conflict in the view I am taking of the effect of the deed of release. Section 6, Married Women's Property Act, provides that the policy money should not form part of the estate of the insured only so long as the object of the trust remains. But if the performance of the trust becomes impossible or the trust fails or otherwise is satisfied or comes to an end, the policy money will form part of the estate of the insured. In (1933) Ch. 126⁶ Romer L. J., in construing section 11, Married Women's Property Act, 1882,—corresponding to section 6 of the Indian Act—observed that the proviso meant that the policy money's shall not form part of the estate of the insured or be subject to his or her debts until the trusts have come to an end."

"Therefore, the trust can come to an end by revocation of it. Section 78(a), Trusts Act, provides that a trust can be revoked where all the beneficiaries are competent to contract by their consent. It was, therefore, perfectly competent to the several defendants to revoke the trust created by the policies in their favour. Under section 58, Trusts Act, it is also clear that it is competent for a beneficiary to transfer his interest. The interest taken by the several defendants under the policies, though contingent, can be transferred, because the right created under the policies is not in the nature of a mere right to sue: *vide* 8 Range 8⁷. If the beneficiary is capable of transferring his interest, he can also release it."

¹Lalithambal v. Guardian Ins. Co., A.I.R. 1937 Mad. 645, 647.²Kannavalal v. Subbaraya, A.I.R. 1938, Mad. 413.³Shamdas v. Savitribai, A.I.R. 1937 Sind. 181, 188.⁴In re Collier, (1930) 2 Ch. 37: 39 L.J. Ch. 241, 143 L.T. 329.

• For this point, see para 8.58.

⁵Cousins v. Sun Life Assurance Society, (1933) Ch. 126: 102 L.J. Ch. 114.⁶Cousins v. Sun Life Assurance Society, (1933) Ch. 126.⁷Mayait v. Official Assignee, A.I.R. 1930 P.C. 17: 8 Range 8: 57 IA 10 (P.C.).

(Chapter 8.—Insurance by Wives and Husbands.)

Recommendation
—No change.

8.48. We do not think that there is any need for amendment of the law as laid down in the rulings cited above.

(ii) Person who can sue.

8.49. Then, there is some difficulty as to the person who can sue when the policy falling within section 6 matures, and there are no specific trustees :—

- (i) One view on the subject is that only the Official Trustee can sue.¹ Unless the Official Trustee disclaims the trust, the widow cannot sue, according to this view.
- (ii) The second view is that to enforce the provisions of this section, the trustee must be appointed either by the deed by the husband in his life-time or by the court under the Indian Trusts Act, and the court is not bound to appoint the Official Trustee.² This view seems to be based on the principle that the Official Trustees Act, 1913, which was passed later than the Married Women's Property Act, 1874, overrides section 6.
- (iii) The third view is represented by a Madras judgment³ and a Calcutta case⁴, which hold that the trustee referred to in section 6 is not the corporation sole created by the Official Trustees Act, 1913.

Recommendation
to make the policy-holder a trustee.

8.50. It seems to us that this is a vital matter, on which uncertainty should be avoided. Apart from the question of uncertainty, there is a matter of substance which should be considered. Is it necessary to bring in the Official Trustee at all? At the time when the Act was enacted (1874), the Indian Trusts Act, 1882 had not been passed, and the rights and liabilities of the trustees and beneficiaries had not been codified.

The position is different now, and it will be more convenient to make the policy-holder or his heirs a trustee, in cases where the policy-holder does not appoint a person as a trustee. Such a provision exists in England,⁵ and this part of the English provision does not appear to have created any serious difficulty. We, therefore, recommend that the section should be amended on the lines indicated above.

Point (i), suit by widow without recourse to the Official trustee.

8.51. We notice that the question has arisen whether the widow can sue without recourse to the Official Trustee. In Hari Dassi's case,⁶ Lord Williams J. of the Calcutta High Court observed :—

"At first sight I was under the impression that the Official Trustee could not refuse a trust apparently imposed by section 6 upon him, but, after further consideration, it seems to me obvious that there are inconsistencies between the provisions of section 6, Married Women's Property Act and the Official Trustees Act of 1913. Under section 7 of the latter Act, the consent of the official Trustee is required before any trust can be imposed upon him. He may act as a trustee only if he thinks fit, and under sub-section (iii) he may decline any trust either absolutely or accept on such conditions as he may impose. Sub-section

¹*Laxmi v. Sun Life Ass. Co. Ltd.*, A.I.R. 1934 Madras 264, 265.

²*Hari Dassi v. Canadian Insurance Co.*, A.I.R. 1937 Cal. 379, 380 (*infra*).

³A.I.R. 1955 N.U.C. (Madras) 3895.

⁴*In re Ashalata*, A.I.R. 1940 Cal. 169, 170.

⁵Section 11, Married Women's Property Act, 1882 (Tng.) (Appendix 3).

⁶*Hari Dassi v. Canadian Insurance Co.*, A.I.R. 1937 Cal. 380.

(Chapter 8.—Insurance by Wives and Husbands.)

(vii) provides that he shall be the sole trustee. These provisions obviously are inconsistent with the provisions of section 6, Married Women's Property Act, because those provisions are mandatory, and with reference to any such sum as is the subject of the present suit, it is provided that he shall stand in the same position as if he had been duly appointed trustee thereto by the High Court under Act 17 of 1864, section 10; that is to say, his consent is to be assumed, because it is to be assumed that he has been duly appointed trustee."

He also said that the Official Trustee Act referred to in section 6 was the Act of 1864, whereunder the position of the Official Trustee was different from the position under the 1913 Act. Hence, the reference to the Act of 1864 could not be read as a reference to the Official Trustees Act of 1913.

8.52. We have already made a recommendation to revise that portion of section 6 which refers to the Official Trustee. In view of this recommendation, the controversy just now referred to will not survive.

Recommendation
as to official
trustee.

8.53. We may now³ refer to section 39(7), Insurance Act, which reads :

Point (g) Section
39(7)—Insurance
Act.

"(7) The provisions of this section shall not apply to any policy of life insurance to which section 6 of the Married Women's Property Act, 1874, applies or has at any time applied:

Provided that where a nomination made whether before or after the commencement of the Insurance (Amendment) Act, 1946, in favour of the wife of the person who has insured his life or of his wife and children or any of them is expressed, whether or not on the face of the policy, *as being made under this section* the said section shall be deemed not to apply or not to have applied to the policy."

8.54. The proviso to section 39(7), Insurance Act, quoted above⁴ may create hardship in certain cases.⁵ Where, by mistake, a person creates both a trust under section 6 of the Act of 1874, and a nomination under section 39 of the Insurance Act, the question may arise, which of the two should prevail. Obviously, as a matter of policy, the trust should prevail, being more beneficial and effective so far as the wife and the children are concerned. In regard to such a situation, the rule enacted in the present proviso to section 39(7) should not apply, and we are recommending the addition of a suitable proviso to section 39(7), in a later chapter⁶ of this Report.

Recommendation
to add another
proviso to s. 39(7),
Insurance Act.

8.55. We now take up the next point concerning section 6. Where the insured has not created a trust in favour of his wife or children, it should be open to him to create it at any time subsequently during the subsistence of the policy. At present, section 6 does not seem to allow such a course, but we are of the opinion that it should be allowed, having regard to the fact that by reason of a change of circumstances since the issue of the policy, it may be necessary for the insured to think about the matter again.

Recommendation
to amend section
6 to authorise
creation of trust
subsequently.

³See discussion under point (h), para 8.50, *supra*.

⁴See also para 5.5., *supra*.

⁵Para 8.53, *supra*.

⁶This point is in addition to the point in paragraph 8.42, *supra*.

⁷Paragraph 15.6, *infra*.

(Chapter 8.—Insurance by Wives and Husbands.)

Such necessity may arise not only where the insured was a bachelor at the time of the policy, but also where, though married, he did not avail himself of the beneficial provisions of the section.

We recommend that this should be provided.

Point (l)—Section 6—Creation of trust—Recommendation for verbal change in place of deeming provision.

Point (m)—Right of creditors—Amendment recommended.

Point (n)—Section 6(1)—Words referring to "object"—Amendments recommended.

8.56. We have already noted¹ that the English Act contains the words "*shall create a trust in favour of* the objects therein named." These words make the trust more definite than merely "deeming" it to be a trust as in section 6 of the Act of 1874. We are of the view that this wording should be adopted, and we recommend accordingly.

8.57. The next point concerns the rights of creditors. We have noted² that under section 6, creditors would be entitled, in case of fraud, to a right against the (entire) proceeds of any such policy, though the word "entire" is not used. Under the English Act, the creditors are entitled to receive, out of the moneys payable under the Policy, a sum equal to the premiums so paid. Therefore, in England the creditors would be entitled to a lesser amount than they would get in India.³ We think that the English provision should be followed, being fair to both the creditors and the beneficiaries, and we recommend accordingly.

8.58. It would appear that in section 6(1), the words "so long as any object of the trust remains" are ambiguous. The corresponding words in the English Act⁴ have also been commented upon, as was noticed in a sind case.⁵ We think that opportunity should be taken of stating the position more definitely, in this regard. The re-draft which we are recommending in section 6(1) will, it is hoped, solve the problem.⁶

One result of the amendment which we are proposing will be that, subject to any contrary intention, a named wife takes an absolute vested interest in the policy so that, if she dies before her husband, it forms part of her estate.⁷ This position was established in England after some controversy.⁸

However, the husband of the woman would have a lien on premiums paid by him after her death, being payments made by a trustee to preserve the trust property.⁹

Section 6(2)—Various periods.

8.59. This concludes our discussion of section 6(1). Section 6, sub-section (2), may appear to be complicated in view of the various periods mentioned in that sub-section; but it should be remembered that this has a history. The question whether section 6 applied or did not apply to Hindus, Muslims, etc., came up, in 1913, before a Full Bench of the Madras High Court; and, by its judgment dated 1st April, 1913,¹⁰ it answered the question in the affirmative. It appears that in 1923, the legislature took a decision as a matter of policy to extend the section to Hindus, Muslims, etc. and while taking that decision, the legislature recognised the fact that in the Presidency of Madras (as it then existed), this

¹Para 8.12, point (2), *supra*.

²Para 8.12, *supra*.

³Section 11, Married Women's Property Act, 1882, (Appendix 3).

⁴Shamdas, Para 8.47.

⁵See para 8.61, *infra*.

⁶Cousins v. Sun Life Assurance Society, (1933) Chancery 126.

⁷Re Kipatrick's Policy Trust (1966) 2 W.L.R. 1346.

⁸Re Smith's estate, (1937) Chancery 636.

⁹Balamba v. Krishnayya, I.L.R. 37 Mad. 483; A.I.R. 1914 Madras 595 (Full Bench)

(Chapter 8.—Insurance by Wives and Husbands.)

had already been the position since 1913, i.e., after the Full Bench decision. Accordingly, when section 6(2) was amended in 1923, it was provided that the provisions of sub-section (1)—that is, the substantive provision—shall apply, in the case of a policy of insurance such as is referred to therein which is effected by any Hindu, Mahomedan, etc. after the specified date. The period specified was, in relation to Madras, “after the 31st day of December, 1913” and in relation to other areas, “after the first day of April, 1923”. In 1959, the Married Women's Property (Extension) Act, 1959, effective as from 1st March, 1960, was enacted to extend the Act to the whole of India except the State of Jammu and Kashmir. Consequently, it became necessary to amend section 6(2) again, by specifying a period for the operation of section 6 in regard to the territories to which the Act previously did not extend. Accordingly, the section was amended in 1959, not by mentioning any specific date as such in this context, but by using a formula referring to the commencement of the Extension Act of 1959. Thus, with reference to the application of the provisions of section 6 in various areas, three periods are now material, as follows:

- (i) Period after the 31st day of December, 1913—in relation to Madras;
- (ii) period after the 1st day of April, 1923—in relation to other parts of British India;
- (iii) period on or after the 1st March, 1960—in relation to the rest of India except the State of Jammu and Kashmir.

VIII. SUMMARY OF RECOMMENDATIONS IN THIS CHAPTER

8.60. We may summarise the recommendations made in this Chapter as follows:—

Summary of recommendations in this chapter.

- (i) Endowment policies should be brought within section 6 by a clarificatory amendment.¹
- (ii) The insurers should adopt, in the policy of life insurance, the formula used in section 6, where the assured intends that² section 6 should be attracted. Further, the insurance Act should be amended for the purpose.³
- (iii) Children⁴ should be brought within the benefit of section 6.
- (iv) Section 6 should be extended so as to allow contingent trusts.⁵
- (v) The policy-holder or his heir should be the trustee,⁶ where no one is appointed as a trustee.
- (vi) Where, in respect of the moneys payable under the policy of insurance, the insured has created a trust under section 6 of the Married Women's Property Act, 1874, and also made a nomination, then, the nomination, whether or not it refers to section 39, shall be disregarded.⁷ The Insurance Act should be amended for the purpose by adding a second proviso to section 39(7) thereof.

¹Para 8.22, *supra*.

²Para 8.30, *supra*.

³Para 8.42, *supra*.

⁴Para 8.33, *supra*.

⁵Para 8.46, *supra*.

⁶Para 8.50, *supra*.

⁷Para 8.54, *supra*.

(Chapter 8.—Insurance by Wives and Husbands.)

- (vii) Where the policy effected by a person is not, at the time when it is effected, expressed on the face of it to be for the benefit of any of the persons mentioned in sub-section (1), the insured should have a right too at any time subsequently during the subsistence of the policy, to create the trust.¹
- (viii) The English Act contains the words "*shall create a trust in favour of*, the objects therein named." These words make the trust more definite than merely "deeming" it to be a trust as in section 6. This wording should be adopted.²
- (ix) Under section 6, creditors would be entitled, in case of fraud, to a right against the (entire) proceeds of any such policy, though the word "entire" is not used. Instead, the creditors should be entitled to receive, out of the moneys payable under the Policy, a sum equal to the premiums so paid.³
- (x) In section 6(1), the words "so long as any object of the trust remains" are ambiguous. Opportunity should be taken of stating the position more definitely, in this regard. A re-draft is recommended.⁴

One result of the amendment recommended will be that, subject to any contrary intention, a named wife will take an absolute vested interest in the policy so that, if she dies before her husband, it will form part of her estate.⁴

Re-draft of section 6(1).

8.61. In the light of the above discussion, we recommend⁵ that in place of section 6(1), the following sub-sections should be substituted:

"(1) A policy of insurance effected by any married man on his own life, and expressed to be on the face of it for the benefit of his wife, or of his children, or of his wife and children, or any of them, *shall create a trust for the benefit of his wife, or of his children or of his wife and children, or any of them, according to the interest so expressed, and the moneys payable thereunder shall not, so long as any object of the trust can be performed and remains unperformed, form part of the estate of the insured or be subject to his debts:*

of s. 11 English
Act of 1882.

Provided that if it is proved that the policy was effected *and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the Policy, a sum equal to the premiums so paid.*

(1A) *Where the policy effected by a person is not, at the time when it is effected, expressed on the face of it to be for the benefit of any of the persons mentioned in sub-section (1), the insured may, at any time during the subsistence of the policy⁶, intimate to the insurer in writing his decision that the policy should be for the benefit of his wife or of his children or of his wife and children or any of them; and, on receipt of such intimation by the insurer, the provisions of this section shall, as far as may be, apply as they apply to a policy to which sub-section (1) applies.*

¹Para 8.55, *supra*.

²Para 8.56, *supra*.

³Para 8.57, *supra*.

⁴Para 8.58, *supra*.

⁵As to Insurance Act, see Chapter 15, *infra*.

⁶Some alternative wording to be borrowed from the Insurance Act can be employed instead of the word "subsistence", if found to be more appropriate.

(Chapter 8.—Insurance by Wives and Husbands. Chapter 9.—Legal Proceedings.)

(1B) *The insured may, by the policy or by any memorandum under his hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provisions for the appointment of a new trustee or new trustees thereof and for the investment of the moneys payable under any such policy.*

(1C) *In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his legal representative, in trust for the persons aforesaid.*

(1D) *If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or a new trustees, a new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Indian Trusts Act, 1882.*

(1E) *The receipt of a trustee or trustees duly appointed, or in default of any such appointment, or in default of notice to the insurer, the receipt of the legal representatives of the insured, shall be a discharge to the insurer for the sum secured by the policy, or for the value thereof, in whole or in part, as the case may be.*

(Explanations to be added).

Explanation 1.—For the purposes of this section, an endowment policy is a policy of insurance on life.

Explanation 2.—The provisions of this section shall apply whether or not the benefit conferred in the manner specified in sub-section (1) is contingent.

Explanation 3.

[This should ensure that policies under the present Act also get the benefit of the new section].

CHAPTER 9

LEGAL PROCEEDINGS

9.1. Legal proceedings by and against married women are dealt with in section 7, which reads:—

"7. A married woman may maintain a suit in her own name for the recovery of property of any description which, by force of the said Indian Succession Act, 1865, or of this Act, is her separate property; and she shall have, in her own name, the same remedies, both civil and criminal against all persons, for the protection and security of such property as if she were unmarried, and she shall be liable to such suits, processes and orders *in respect of such property* as she would be liable to if she were unmarried."

This section follows section 11 of the Married Women's Property Act, 1870 (33 & 34 Vict., c. 93), that section was repealed by the Married Women's Property Act, 1882 (44 and 45 Vic. Chapter 75).

(Chapter 9.—Legal Proceedings.)

Verbal changes recommended.

9.2. It would be convenient to indicate, at the outset, certain verbal changes that are required in the section. In the first place, the reference in the section to the Succession Act, 1885, should be replaced by a reference to the Indian Succession Act, 1925. Secondly, the mentioning of "separate" (property) should be deleted, having regard to the changed scheme which we are recommending in this report. These changes will be required even if the present structure of sections 7 to 10 is maintained. However, we may mention that we are separately recommending¹ complete redrafts of sections 7 to 10 and if those redrafts are accepted, the section will appear in a different form altogether—without, of course, affecting the substance except as indicated below.

Section 7, latter half.

9.3. A difficult problem is presented by the latter half² of section 7 which begins with the words "and she shall be liable to such suits, processes and orders in respect of such property as she would be liable to if she were unmarried". This part of the section raises a problem of construction.

Does it limit the property liable? Or does it limit the suit, order or process to which the married woman is to be subject? Presumably, the first construction was intended, but the wording could, in that case, be made more clear by avoiding repetition of the word "such".

Such case law as is available under section 7 has been examined³⁻⁶, but it does not discuss this aspect at length, since the point was not material.

Recommendation to make section 7 comprehensive as to liability.

9.4. Whatever be the true construction of the section as it is now worded, we are of the view that a married woman should, in respect of the matters dealt with in the section, be placed on the same footing as an unmarried woman, and that the section should be revised for the purpose. It is true that no woman has ever been debarred from suing or being sued, but it is desirable to make the statement of the law comprehensive. The obsolete theory of unity of the spouses should be put an end to, by an express provision. A married woman should, in all respects, be placed on the same footing as an unmarried woman.

In coming to this conclusion, we have been impressed by the consideration that the common law concept of merger, on which the requirement about the joinder of the husband to litigation against the wife is based, is out of date. The principle of unity of the spouses has been modified by the Act, but what remains of that principle, should be put an end to. That is our main reason for recommending a change as above.

Recommendation to extend section 7 to Hindu and Muslim women.

9.5. We now come to another point concerning section 7. It is obvious that section 7 and also sections 4 and 5—provide for exceptions to the concept of the common law that the personality of the married woman merges with that of her husband on her marriage and that, as such, she cannot sue or be sued without impleading her husband even in respect of her separate property. The latter, part of section 2 of the Act, however, provides that these provisions (sections 4, 5 and 7) do not apply to certain married women specified in section 2—e.g., Hindu and Muslim women.

¹Chapter 14, *infra*.

²Chapter 9.1, *supra*.

³*Harris v. Harris*, (1875) I.L.R. 1 Cal. 285.

⁴*Allamuddi v. Brahan*, (1877) I.L.R. 4 Cal. 140.

⁵*In re : Manel*, (1895) I.L.R. 18 Mad. 15.

⁶*Mrs. Goudoin v. Venkatesan*, (1907) I.L.R. 30 Mad. 378.

(Chapter 9.—Legal Proceedings. Chapter 10.—Wife's Liability for Post-Nuptial Debts.)

We are of the view that a statutory provision to the effect that the disability does not apply to *any married woman* in India should, in suitable language, be inserted in the Act.

9.5A. No doubt, section 2 of the Act of 1874 shows that Hindus and Muslims are, taken as governed by their personal law, which does not recognise the legal unity of the spouses. But, in our view, the principle incorporated in section 7 should be expressly extended to Hindus, Muslims etc. in order to avoid any arguments that women belonging to these communities are subject to the doctrine of unity.

Extension of principle of section 7 to Hindus, Muslims etc.

We think that opportunity should be taken of making the section comprehensive in this regard.

In short—

- (a) so far as women other than Hindu and Muslim women are concerned, the amendments recommended by us will make the provisions more comprehensive than at present;
- (b) so far as Hindu and Muslim women are concerned, the amendment recommended will re-state the position which is now accepted, not by virtue of the Act of 1874, but by general law.

The new provisions will, thus, avoid doubts in all respects as to the correct legal position in regard to the liability of married women in matters that could be raised in civil litigation.

CHAPTER 10.

WIFE'S LIABILITY FOR POST-NUPTIAL DEBTS

10.1. The liability of a wife for post-nuptial debts is dealt with in section 8. Section 8 which reads—

"8. *Wife's liability for post-nuptial debts*—If a married woman (whether married before or after the first day of January, 1866) possesses separate property, and if any person enters into a contract with her with reference to such property, or on the faith that her obligation arising out of such contract will be satisfied out of her separate property, such person shall be entitled to sue her, and, to the extent of her separate property, to recover against her whatever he might have recovered in such suit had she been unmarried at the date of the contract and continued unmarried at the execution of the decree:

"Provided that nothing herein contained shall:—

- (a) entitle such person to recover anything by attachment and sale or otherwise out of any property which has been transferred to a woman or for her benefit on condition that she shall have no power during her marriage to transfer or charge the same of her beneficial interest therein or
- (b) affect the liability of a husband for debts contracted by his wife's agency expressed or implied."

(Chapter 10.—Wife's Liability for Post-Nuptial Debts.)

Recommendation.

10.2. In this section, the following changes are required:—

- (i) removal of the word "separate" occurring before the word "property".¹
- (ii) deletion of proviso (a), which relates to restraint on anticipation.²

We recommend accordingly.

Section 8, proviso
—Case law.

10.3. The proviso to section 8 was revised in 1929, and its history is interesting. While section 10 of the Transfer of Property Act recognised the validity of a restraint on alienation in respect of married women belonging to certain communities, there was, previously, no statutory provision laying down the law as to whether property in respect of which such a restraint on alienation had been imposed could be attached in *execution of a decree* in satisfaction of liabilities of the married women. In England, it has been held³ that the property could not be attached. In India, because of the absence of a specific provision on this point, some High Courts—namely, Calcutta⁴ and Bombay⁵—held that a creditor of the married woman could enforce his claim against property which a married woman had been restrained from alienating. In doing so, these High Courts mainly relied on sections 7 and 8 of the Married Women's Property Act as they then stood. Under section 7, a married woman may sue or be sued in her own name in respect of her separate property, and under section 8 (as it then stood) a person entering into a contract with a married woman with reference to her separate property may sue and recover against her to the extent of that property. The Madras High Court, on the other hand, held that these two sections of the Married Women's Property Act did not come in the way of the restraint on alienation being enforced to the extent of preventing attachment also. Accordingly to the Madras High Court, the legislature had not shown any intention to ignore such conditions. This view was taken by the Madras High Court in two cases⁶⁻⁷. In taking this view, the Madras High Court relied also on the fact that after the Married Women's Property Act, 1874, the legislature had, in section 10 of the Transfer of Property Act, 1882, given statutory effect to the doctrine of restraint on anticipation. According to the Madras High Court, the restraint on anticipation is recognised and enforceable in India and its operation is not affected by section 8 of the Married Women's Property Act. Decrees passed in accordance with section 8 against a separate property, if any, of a married woman in respect of her contracts could not be operative against property which she was restrained from alienating because to hold otherwise would render the restraint upon anticipation absolutely inoperative. Procedural rules authorising attachments could not also be read as authorising the attachment of property which, by a rule of substantive law,—now embodied in section 10 of the Transfer of Property Act,—is incapable of being transferred or charged by the beneficiary. The second Madras case⁸ cites a number of English cases; but it is unnecessary to discuss them here. The principal consideration which weighed with the Madras High Court was that any other view would render the restraint inoperative.

¹See also Chapter 14, *infra*.

²See discussion as to "Restraint on anticipation", Chapter 15, *infra*.

³Chapman v. Biggs, (1883) 11 Q.B.D. 27.

⁴Hippolite v. Stuart, (1885) I.L.R. 12 Calcutta 522.

⁵Cersetji v. Rustomji, (1887) I.L.R. 11 Bombay 348.

⁶In re Mantal and Mantal (1895) I.L.R. 18 Madras 199.

⁷Goudoin v. Venkatasa Mudally, (1907) I.L.R. 30 Madras 377, 378.

⁸Goudoin v. Venkatasa Mudally, (1907) I.L.R. 30 Madras 377, 380.

(*Chapter 10.—Wife's Liability for Post-Nuptial Debts. Chapter 11.—Ante-Nuptial Debts. Chapter 12.—Husband's Liability for Wife's Breach of Trust or Devastation.*)

10.4. In view of this conflict of decisions, legislative action became necessary. In 1929, the Legislature, while amending the Transfer of Property Act, also amended section 8 of the Married Women's Property Act, by expressly providing that decrees passed against a married woman under section 8 could not be executed by attachment or sale of the property which she was restrained from alienating during marriage.

Amendment of
1929.

We have discussed this history to show the connection between section 8 of the Act of 1874 and section 10 of the Transfer of Property Act. We may state here that we are recommending deleting of the proviso to section 10 of the Transfer of Property Act.¹

CHAPTER 11

ANTE-NUPTIAL DEBTS

11.1. Section 9 provides that the husband is not liable for the ante-nuptial debts of the wife. It reads:

Section 9.

"9. *Husband not liable for wife's ante-nuptial debts.*—A husband married after the thirty-first day of December, 1865 shall not, by reason only of such marriage, be liable to the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and shall, to the extent of her separate property, be liable to satisfy such debts as if she had continued unmarried:

Provided that nothing contained in this section shall invalidate any contract into which a husband may, before the passing of this Act, have entered in consideration of his wife's ante-nuptial debts."

In this section, the expression "separate" should be deleted, and we recommended accordingly.² We are also recommending restructuring of Sections 7—10.

CHAPTER 12

HUSBAND'S LIABILITY FOR WIFE'S BREACH OF TRUST OR DEVASTATION

12.1. The fiction of the unity of the husband and wife led to several rules, and one of the rules pertained to the field of liability of the husband for the wrongs committed by the wife. A species of such (civil) wrongs, is breach of trust or devastation. It was considered necessary to deal specifically with such liability, in section 10. The section reads—

Section 10.

"10. Where a woman is a trustee, executrix or administratrix, either before or after marriage, her husband shall not, unless he acts or intermeddles in the trust or administration, be liable for any breach of trust committed by her, or for any misapplication, loss or damage to the estate of the deceased caused or made by her, or for any loss to such estate arising from her neglect to get in any part of the property of the deceased."

In a sense, the section constitutes a negation of the rule that the husband is liable for the wife's wrongs.

¹Chapter 15, *infra*.

²See also Chapter 14, *infra*.

(Chapter 12.—*Husband's Liability for Wife's Breach of Trust or Devastation.*

Chapter 13.—*Other Matters.*)

Recommendation.

12.2. The principle of the section needs no change. However, we are recommending a restructuring of sections 7 to 10 of the Act¹, which will render retention of section in the present form unnecessary.

CHAPTER 13

OTHER MATTERS

Suits between spouses liability of wife to third parties and liability of husband for his wife's torts.

13.1. Apart from questions arising out of the provisions of the Act of 1874, there are certain other matters which indirectly relate to the proprietary aspect of marriage. We propose to mention here three of them, in order to make our discussion comprehensive, though it may not be feasible in this Report to recommend amendment of the law on all of them.

(1) *Suits between spouses.*

In England, statute now provides that each of the parties to marriage has the same right of action in tort against the other as if the parties were not married.² There is one restriction in this regard, namely, when an action in tort is brought by one party to the marriage against the other during marriage, the Court may stay the action if—

- (a) it appears that no substantial benefit³ would accrue to either party from continuance of the proceedings, or
- (b) the question could be more conveniently disposed of under section 17, Married Women's Property Act, 1882.

We do not propose to make any recommendation on the subject, as it is not concerned with the *property* of a married woman as such.

(2) *Liability of a wife to third persons.*

In England, under the Law Reform Act of 1935⁴, a married woman may be sued for her torts, and is subject to the law relating to bankruptcy and to the enforcement of judgments and orders in all respects as if she were a *teme sole*. Before that Act,—

- (i) any damages recovered against her would be levied only out of her separate property not restrained from anticipation, and
- (ii) she could not be made bankrupt unless she was carrying on a separate trade.

We are recommending the adoption of this section⁵ in another Chapter since we find the provision to be in harmony with modern notions.

(3) *Liability of a husband for his wife's torts.*

Another change made by the Law Reform Act of 1935⁶, may be noted. At common law, a husband was liable to be joined with his wife in all actions for torts committed by the wife during the subsistence of the marriage.

¹Chapter 14, *infra*.

²Section 1, Law Reform (Husband and Wife) Act, 1962. (Appendix 6).

³See 241 H.L. Debates, 5th Series, Col. 1104, for the meaning of "substantial".

⁴Section 1, Law Reform (Married Women's and Tortfeasors) Act, 1935. (Appendix 4).

⁵Chapter 14, *infra*.

⁶Section 3, Law Reform (Married Women and Tortfeasors) Act, 1935, (Appendix 4).

(*Chapter 13.—Other Matters. Chapter 14.—Recommended Amendments in the Act of 1874 by way of Simplification in a few Sections.*)

The House of Lords decided that this liability had not been taken away by the Act of 1882. Now, the 1882 Act had taken away the husband's interest in the wife's property, but he still remained liable for the wife's torts. This was unjust. In *Newton v. Hardy*,¹ for example, a woman plaintiff recovered damages from the defendant for the enticement of the plaintiff's husband by the defendant's wife. The Act of 1935 remedied this injustice.²

We are separately recommending³ the adoption of this provision, in another Chapter since we find it rational and in tune with modern notions.

CHAPTER 14

RECOMMENDED AMENDMENTS IN THE ACT OF 1874

BY WAY OF SIMPLIFICATION IN A FEW SECTIONS

14.1. We have, in the preceding Chapters, made certain specific recommendations for amendment of the Act. Besides the specific amendments recommended in each Chapter, we may mention here that the drafting of some sections of the Act, in respect of which we have suggested removal of the word 'separate', is capable of improvement and simplification, and opportunity should be taken of simplifying them. We recommend that the following new sections should be substituted in place of existing sections 7 to 10. In consequence, sections 4 and 5 can be deleted.

Recommendations
as to section 4
and 7 to 10.

Hence, our recommendations are as follows:

Existing sections 4 and 5

Existing sections 4 and 5 should be deleted, in view of the revised sections 7 to 10 recommended below.

Revised sections 7 to 10

7. Subject to the provisions of section 10, a married woman shall—
- be capable of acquiring, holding and disposing of, any property;
 - be capable of rendering herself, and being rendered, liable in respect of any *tort*, contract, debt or obligation;
 - be capable of suing and being sued, either in tort or in contract or otherwise; and
 - be subject to the law relating to bankruptcy and to the enforcement of judgments and orders;

Capacity of mar-
ried women (*Cf.*
section 1, English
Act of 1935).

in all respects as if she were a *feme sole*.

8. Subject to the provisions of section 10, all property which—
- immediately before the passing of this Act was the separate property of a married woman or held for her separate use in equity; or
 - belongs at the time of her marriage to a woman married after the passing of this Act; or
 - after the *passing of this Act* is acquired by or devolves upon a married woman, shall belong to her in all respects as if she were a *feme sole* and may be disposed of accordingly.

Property of mar-
ried women (*Cf.*
section 2, English
Act of 1935).

¹*Newton v. Hardy*, (1933) 149 L.T. 165.

²Section 3, Law Reform etc. Act, 1935.

³Chapter 14, *infra*.

(Chapter 14.—Recommended Amendments in the Act of 1874 by way of Simplification in a Few Sections.)

Abolition of husband's liability for wife's torts and antenuptial contracts, debts, and obligations, (*Cf.* section 3, English Act of 1935).

9. Subject to the provisions of section 10, the husband of a married woman shall not, by reason only of his being her husband, be liable—

- (a) in respect of any tort committed by her whether before or after the marriage, or in respect of any contract entered into, or debt or obligation incurred, by her before the marriage; or
- (b) to be sued, or made a party to any legal proceeding brought, in respect of any such tort, contract, debt or obligation.

Savings.

10. (1) Nothing in sections 7 to 9 shall—

- (a) during coverture which began before the day of affect any property to which the title (whether vested or contingent, and whether in possession, reversion or remainder) of a married woman accrued before that date, except property held for her separate use in equity;
- (b) affect any legal proceeding in respect of any tort if proceedings had been instituted in respect thereof before the passing of this Act;
- (c) enable any judgement or order against a married woman in respect of a contract entered into, or debt or obligation incurred, before the passing of this Act, to be enforced in bankruptcy or to be enforced otherwise than against her property.

2. For the avoidance of doubts it is hereby declared that nothing in sections 7 to 9—

- (a) shall render the husband of a married woman liable in respect of any contract entered into, or debt or obligation incurred, by her after the marriage in respect of which he would not have been liable if this Act had not been passed;
- (b) shall exempt the husband of a married woman from liability in respect of any contract entered into, or debt or obligation (not being a debt or obligation arising out of the commission of a tort) incurred, by her after the marriage in respect of which he would have been liable if this Act had not been passed;
- (c) shall prevent a husband and wife from acquiring, holding, and disposing of, any property jointly or as tenants in common, or from rendering themselves, or being rendered jointly in respect of any tort, contract, debt or obligation, and of suing and being sued either in tort or in contract or otherwise, in like manner as if they were not married;
- (d) shall prevent the exercise of any joint power given to a husband and wife.

¹Date of commencement of the Married Women's Property Act, 1874.

CHAPTER 15
AMENDMENTS IN OTHER ACTS

I. INTRODUCTORY.

15.1. In this Chapter, we shall discuss briefly the amendments that are required in Acts other than the Act of 1874, in consequence of our recommendations in this Report. The Acts to be considered are :

Introductory.

- (i) the Transfer of Property Act, 1882;
- (ii) the Indian Trusts Act, 1882;
- (iii) the Insurance Act, 1938;
- (iv) the Indian Succession Act, 1925.

In the last mentioned Act, we are not recommending any amendment, but we shall briefly consider the question whether any changes are needed.

II. TRANSFER OF PROPERTY ACT, 1882.

15.2. We have earlier¹ referred to the proviso to section 10 of the Transfer of Property Act, 1882, under which property can be transferred to a married woman who is not a Hindu or a Muslim, with a condition restraining her absolutely from alienating it during marriage. This provision is in derogation of the general rule enacted by section 10 in its main paragraph, prohibiting the imposition of an absolute restraint on alienation. In our view, the proviso is not justified, in view of the growing social consciousness in the country. Christians and Parsis—to whom the proviso primarily applies,—are not less educated than others. There is no such restriction for other communities. The proviso is linked up with section 8, Married Women's Property Act. In our new scheme, its deletion is unavoidable.

Section 10, Transfer of Property Act, 1882.

15.3. Having taken into account the social conditions of the present day and the considerations mentioned above,² we are of the view that in section 10 of the Transfer of Property Act, the proviso relating to restraint on alienation should now be removed, and we recommend accordingly.

Recommendation to amend section 10, Transfer of Property Act.

III. INDIAN TRUSTS ACT, 1882.

15.4. Provisions concerning restraint on alienation occur also in the Trusts Act. In an earlier Chapter,³ we have recommended amendment of sections 56 and 58 of the Indian Trusts Act, 1882.

Provisions in the Trust Act—Recommendation to amend.

We recommend that in section 56 of the Trusts Act, the last paragraph should be deleted, and in section 58 of that Act, the proviso should be deleted.

The revised sections will then read as under:

Revised sections 56 and 58, Indian Trusts Act, 1882.

"56. The beneficiary is entitled to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interest;

Right to specific execution.

¹Para 5.7, *supra*.

²Para 15.2, *supra*.

³See para 5.12, *supra*.

10—1 LAD/76

(Chapter 15.—Amendments in Other Acts.)

Right to transfer of possession.

and, where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries and they are competent to contract and all of one mind, he or they may require the trustee to transfer the trust-property to him or them, or to such person as he or they may direct.

(Last paragraph of section 56 to be deleted)

(Illustrations as at present).

Right to transfer of beneficial interest.

"58. The beneficiary, if competent to contract, may transfer his interest, but subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of such interest.

(Proviso to be deleted). . .

IV. INSURANCE ACT, 1938.

Section 39(7), Insurance Act, 1938.

15.5. In view of certain points discussed in this Report¹ in connection with section 6, a few changes are required in the Insurance Act, 1938. The first point concerns section 39(7) of that Act, which reads:

"(7) The provisions of this section shall not apply to any policy of life insurance to which section 6 of the Married Women's Property Act, 1874, applies, or has, at any time, applied:

Provided that where a nomination made, whether before or after the commencement of the Insurance (Amendment) Act, 1946, in favour of the wife of the person who has insured his life or of his wife and children or any of them is expressed, whether or not, on the face of the policy, as being made under this section the said section 6 shall be deemed not to apply or not to have applied to the policy."

Nomination and trust.

15.6. The point which arises out of the proviso to section 39(7) of the Insurance Act, quoted above,² may be thus stated. A person who decides to create a trust under section 6 may, by misunderstanding of the law or through slip or ignorance, enter also a nomination in the policy. In such a case, what should prevail is the trust under section 6, and not the nomination. However, as the proviso to section 39(7) now stands, it is possible to take the view that the nomination overrides the trust. In our opinion, it is desirable to prevent such a situation from arising, and an amendment to section 39(7), proviso, Insurance Act, on this point is, in our opinion, desirable.³

We are also of the view that it is desirable to insert, in the policy, a *specific note*, impressing it upon the insured that if he creates in trust under section 6, he shall not make a nomination under section 39 of the Insurance Act. We are proposing a suitable provision on this point in the new section 39A, Insurance Act⁴ which we are recommending.

Besides the points stated just now, section 39(7) of the Insurance Act will require another change so as to add a mention of 'children'. This change is consequential on our recommendation to expand the scope of section 6 of the Act of 1874 so as to authorise a trust for children.

¹Chapter 8, *supra*.

²Para 15.5, *supra*.

³See also para 8.54, *supra*.

⁴See para 15.7, *infra*.

(*Chapter 15.—Amendments in Other Acts.*)

To give effect to the above propositions, we recommend that sub-section (7) of section 39 of the Insurance Act should now be revised as follows:

"(7) The provisions of this section shall not apply to any policy of life insurance to which section 6 of the *Married Women's Property Act, 1874*, applies or has at any time applied:

Provided that where a nomination made whether before or after the commencement of the Insurance (Amendment) Act, 1946, in favour of the wife of the person who has insured his life or of his wife and children or his children or any of them is expressed, whether or not on the face of the policy, as being made under this section, the said section 6 shall be deemed not to apply or not to have applied to the policy."

*Provided, however, that where, in respect of the moneys payable under any policy of insurance, the insured has created a trust under section 6 of the *Married Women's Property Act, 1874*, and also made a nomination, then the nomination, whether or not it refers to this section, shall prevail be disregarded.*

15.7. So much as regards section 39(7) of the Insurance Act. There is another amendment needed in that Act. We have,¹ while dealing with section 6 of the Act of 1874, pointed out the need for inserting a specific provision in the Insurance Act as to life policies, in regard to the statement to be made as to whether the assured wishes to avail himself of section 6 of the Act of 1874. Accordingly, we recommend that a provision should be added in the Insurance Act, 1938,—say, as section 39A,—as follows:—

Section 39A, Insurance Act, 1938
(New section to be inserted).

Section 39A, Insurance Act, 1938

(to be added)

"39A. (1) Every policy of life insurance shall—

(a) contain a column or paragraph wherein a statement could be made as to whether the person insured has decided to avail himself of the provisions of section 6 of the *Married Women's Property Act, 1874*, and

(b) if the person insured has communicated to the insurer his decision to that effect, contain the following statement—

'This policy is for the benefit of and the following persons are the trustees for the purposes of section 6 of the *Married Women's Property Act, 1874*, and'

(c) if the person insured has not communicated to the insurer his decision to avail himself of the said section 6, contain a statement to that effect.

(2) To the column or paragraph referred to in clause (a) of sub-section (1), there shall be attached a foot-note indicating that where the insured fills up that column, by making the statement referred to in clause (b) of sub-section (1), he shall not make a nomination under section 39."

¹Para 8.42, *supra*.

*(Chapter 15.—Amendments in Other Acts.)***V. INDIAN SUCCESSION ACT, 1925.****Succession Act.**

15.8. We now deal with the question whether any changes are needed in the Indian Succession Act, 1925. Our recommendations in regard to the Act of 1874 raise certain questions relating to sections 20, 21 and 22 of the Succession Act. (All these sections are confined, practically, to non-Hindu and non-Muslims). The following points may be made in this connection.

(a) In theory, section 20 could be repealed, in view of the proposed comprehensive provisions relating to property of the married women; but the subject dealt with in section 20 is also dealt with in section 21 (see below).

(b) Repeal or transfer of section 21 creates some difficulties, because—

(i) it is itself referred to in section 22,—which deals with marriage settlements—of different topic ; and

(ii) section 21 contains a rule of private international law, more appropriate in the Succession Act.

(c) Section 22 deals with marriage settlements—which is a topic outside the scope of the present Report.

In view of the above considerations, we do not propose to disturb these sections of the Succession Act, and we have come to the conclusion that they need not be repealed or amended. The over-lapping, if any, between section 20, Succession Act and new section 2 of the proposed Act (replacing the 1874 Act), is a very minor one.

We would like to place on record our warm appreciation of the valuable assistance we have received from Shri Bakshi, Member-Secretary of the Commission in the preparation of this Report.

P. B. GajendragadkarChairman
P. K. TripathiMember
S. S. Dhav... varMember
P. Sen-VarmaMember
B. C. MitraMember
P. M. BakshiMember-Secretary.

Dated the 12th May, 1976
New Delhi

APPENDIX 1

THE MARRIED WOMEN (PROPERTY AND MISCELLANEOUS PROVISIONS) BILL, 1976

A Bill to declare and amend the law relating to married women, and for other purposes.

Whereas it is desirable to amend the law relating to the property, rights and liabilities of married women who do not profess the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion ;¹

And whereas it is desirable to declare the law relating to suits and other legal proceedings in respect of married women who profess the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion ;

And whereas it is desirable to re-state the law relating to policies of life insurance in relation to married women,

Be it enacted by Parliament in the² year of the Republic of India, as follows:

Short title and extent.

1. (1) This Act may be called the Married Women (Property and Miscellaneous Provisions) Act, 1976.

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

Capacity of married women. (Cf. section 1, English Act of 1935).

2. Subject to the provisions of section 5, a married woman shall³—
- (a) be capable of acquiring, holding and disposing of, any property;
 - (b) be capable of rendering herself, and being rendered, liable in respect of any tort, contract, debt or obligation;
 - (c) be capable of suing and being sued, either in tort or in contract or otherwise; and
 - (d) be subject to the law relating to insolvency and to the enforcement of judgements and orders;

In all respects as if she were unmarried.

Property of married women. (Cf. section 2, English Act of 1935).

3. Subject to the provisions of section 5, all property which—
- (a) immediately before the day of⁴ was the separate property of a married woman or held for her separate use in equity; or
 - (b) at the time of her marriage belongs to a woman married after the said date; or
 - (c) after the said date is acquired by or devolves upon a married woman, shall belong to her in all respects as if she were unmarried and may be disposed of accordingly.

Abolition of husband's liability for wife's torts and antenuptial contracts, debts and obligations. (Cf. section 3, English Act of 1935).

4. Subject to the provisions of section 5, the husband of a married woman shall not, by reason only of his being her husband, be liable—
- (a) in respect of any tort committed by her whether before or after the marriage, or in respect of any contract entered into, or debt or obligation incurred, by her before the marriage; or
 - (b) to be sued, or made a party to any legal proceeding brought, in respect of any such tort, contract, debt or obligation.

Savings. (Cf. English Act of 1935).

5. For the avoidance of doubts, it is hereby declared that nothing in sections 2 to 4—
- (a) shall render the husband of a married woman liable in respect of any contract entered into, or debt or obligation incurred, by her after the marriage in respect of which he would not have been liable if this Act had not been passed;

¹As to the word "Jaina", see Constitution, article 25, Explanation 2.

²Usual enacting formula to be used.

³As to the past the existing Act of 1874 will take care; see section 6, Central Clauses Act, 1897.

⁴Date of commencement of the new Act of 1976.

(Appendix 1.—The Married Women (Property and Miscellaneous Provisions) Bill, 1976.)

(b) shall exempt the husband of a married woman from liability in respect of any contract entered into, or debt or obligation (not being a debt or obligation arising out of the commission of a tort) incurred, by her after the marriage in respect of which he would have been liable if this Act had not been passed;

(c) shall prevent a husband and wife from acquiring, holding, and disposing of, any property jointly or as tenants in common, or from rendering themselves, being rendered liable jointly in respect of any tort, contract, debt or obligation, and being sued either in tort or in contract or otherwise, in like manner as if they were not married;

the exercise of any joint power given to a husband and

6. marriage proceedings of her husband at the time

to any married woman who at the time of her marriage professed any of those religions—

Application of sections 2 to 5.

(2) For the avoidance of doubt, at the time of her marriage, her religion or whose husband at the time

by declared that a married woman who professed any of those religions—

(a) shall be, and shall always to have been, capable of suing and being sued, either in tort or in contract or otherwise; and

(b) shall be, and shall be deemed always to have been, subject to the law relating to insolvency and to the enforcement of judgments and orders,

as if she were unmarried.

(3) For the avoidance of doubts, it is hereby also declared that the husband of any such married woman shall not, by reason only of his being her husband, be liable, or deemed ever to have been liable,—

(a) in respect of any tort committed by her whether before or after the marriage; or

(b) in respect of any contract entered into, or debt or obligation incurred, by her before the marriage; or

(c) to be sued, or made a party to any legal proceeding brought, in respect of any such tort, contract, debt or obligation.

7. (1) A policy of insurance effected by any married man on his own life, and expressed to be on the face of it for the benefit of his wife, or of his children, or of his wife and children, or any of them, shall create a trust for the benefit of his wife, or of his children, or of his wife and children, or any of them, according to the interest so expressed, and the moneys payable thereunder shall not, so long as any object of the trust can be performed and remains unperformed, form part of the estate of the insured or be subject to his debts:

Policies of insurance. (Existing section 6).

Provided that if it is proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premium so paid.

Cf. section 11, English Act of 1882.

(2) Where the policy effected by a person is not, at the time when it is effected, expressed on the face of it to be for the benefit of any of the persons mentioned in subsection (1), the insured may, at any time during the subsistence of the policy¹, intimate to the insurer in writing his decision that the policy should be for the benefit of his wife or of his children or of his wife and children or any of them; and, on receipt of such intimation by the insurer, the provisions of this section shall, as far as may be, apply as apply to a policy to which sub-section (1) applies.

(3) The insured may, by the policy or by any memorandum under his hand, point a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provisions for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy.

(4) In default of any such appointment of a trustee, such policy, immediately on being effected, shall vest in the insured and his legal representatives, in trust for the persons aforesaid.

(5) If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee or trustees, a new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Indian Trusts Act, 1882.

¹Some alternative wording to be borrowed from the Insurance Act can be employed instead of the word 'subsistence', if found to be more appropriate.

Married Women's Property Act, 1874

(Appendix 1.—The Married Women (Property and Miscellaneous Provisions) Bill, 1976.

Appendix 2.—Existing sections 20 to 22, Indian Succession Act, 1925. Appendix 3.—Section 11, Married Women's Property Act, 1882 (Eng.)

(6) The receipt of a trustee or trustees duly appointed, or in default of any such appointment, or in default of notice to the insurer, the receipt of the legal representative of the insured, shall be a discharge to the insurer for the sum insured by the policy, or for the value thereof, in whole or in part, as the case may be.

Explanation 1.—For the purposes of this section, an endowment of insurance on life.

Explanation 2.—The provisions of this section shall fit conferred in the manner specified in sub-section (1).

Explanation 3.—In relation to any policy of this Act to which this section would have application shall apply in substitution of section 7 of this Act.

Power to exempt.

8. (1) The State Government may, from the passing of this Act or prospect of the provisions of this Act the members of any sect or tribe, to whom it may consider it, order, either retrospectively or in the operation of all or any sect or tribe, or part of a race, inexpedient to apply such provisions.

(2) The State Government may also revoke any such order, but not so that the revocation shall have any retrospective effect.

(3) All orders and revocations under this section shall be published in the Official Gazette.

9. *Repeal of the Act of 1874*—(Section not drafted).

10. *Amendment of other Acts*²—(Amending section not drafted).

APPENDIX 2**EXISTING SECTIONS 20 TO 22, INDIAN SUCCESSION ACT, 1925****Interests and powers not acquired nor lost by marriage.**

20. (1) No person shall, by marriage, acquire any interest in the property of the person whom he or she marries or become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried.

(2) This section—

(a) shall not apply to any marriage contracted before the first day of January, 1866;

(b) shall not apply, and shall be deemed never to have applied, to any marriage one or both of the parties to which professed at the time of the marriage the Hindu, Muhammadan, Buddhist, Sikh or Jain religion.

Effect of marriage between person domiciled and one not domiciled in India.

21. If a person whose domicile is not in India marries in India a person whose domicile is in India, neither party acquires by the marriage any rights in respect of any property of the other party not comprised in a settlement made previous to the marriage, which he or she would not acquire thereby if both were domiciled in India, at the time of the marriage.

Settlement of minors' property in contemplation of marriage.

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

(2) Nothing in this section or in section 21 shall apply to any will made or tacy occurring before the first day of January, 1866, or to intestate or testamentary disposition to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jains.

APPENDIX 3**SECTION 11, MARRIED WOMEN'S PROPERTY ACT, 1882 (ENG.)**

"11. Moneys payable under policy of assurance not to form part of estate of insured. A married woman may effect policy upon her own life or the life of her husband for her (own benefit); and the same and all benefit thereof shall ensue accordingly.

²Existing word 'impossible' is considered unnecessary, and has, therefore, been deleted.

³Amendments to the Insurance Act, the Transfer of Property Act, Trusts Act etc. have been indicated separately. (Chapter 13 of the Report).

[Appendix 3.—Section 11, Married Women's Property Act, 1882 (Eng.). Appendix 4.—Law Reform (Married Women and Tortfeasors) Act, 1935 (Eng.)]

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not so long as any object of the trust remains unperformed, from part of the estate of the insured or be subject to his or her debts; Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision, for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid.

at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representatives of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part."

APPENDIX 4

LAW REFORM (MARRIED WOMEN AND TORTFEASORS) ACT, 1935 (ENG.)

Capacity of married women

Subject to the provisions of this Part of this Act [.....]¹, a married woman shall—

- (a) be capable of acquiring, holding and disposing of, any property; and
- (b) be capable of rendering herself, and being rendered, liable in respect of any tort, contract, debt, or obligation; and
- (c) be capable of suing and being sued, either in tort or in contract or otherwise; and
- (d) be subject to the law relating to bankruptcy and to the enforcement of judgments and orders, in all respects as if she were a *feme sole*.

Property of married women

2. (1) Subject to the provisions of this Part of this Act all property which—

- (a) immediately before the passing of this Act was the separate property of a married woman or held for her separate use in equity; or
- (b) belongs at the time of her marriage to a woman married after the passing of this Act; or
- (c) after the passing of this Act is acquired by or devolves upon a married woman,

shall belong to her in all respects as if she were a *feme sole* and may be disposed of accordingly;

[Proviso and sub-sections (2) and (3) repealed by Married Women (Restraint upon Participation) Act, 1949 (c. 78), s. 1, Sched. 2].

Limitation of husband's liability for wife in torts and ante-nuptial contracts, debts and obligations

Subject to the provisions of this Part of this Act, the husband of a married woman shall, by reason only of his being her husband, be liable—

- (a) in respect of any tort committed by her whether before or after the marriage, or in respect of any contract entered into, or debt or obligation incurred, by her before the marriage; or
- (b) to be sued, or made a party to any legal proceeding brought, in respect of any such tort, contract, debt, or obligation.

¹Words repealed by Law Reform (Husband and Wife) Act, 1962 (c. 48), s. 3(2), Sched.

(Appendix 4.—*Law Reform (Married Women and Tortfeasors) Act, 1935 (Eng.). Appendix*5.—*Married Women (Restraint upon Anticipation Act, 1949 (Eng.)**Savings*

4. (1) Nothing in this Part of this Act shall—

(a) during coverture which began before the first day of January eighteen hundred and eighty three, affect any property to which the title (whether vested or contingent, and whether in possession, reversion, or remainder) of a married woman accrued before that date, except property held for her separate use in equity;

(b) affect any legal proceeding in respect of any tort if proceedings had been instituted in respect thereof before the passing of this Act;

(c) enable any judgment or order against a married woman in respect of a contract entered into, or debt or obligation incurred, before the passing of this Act, to be enforced in bankruptcy or to be enforced otherwise than against her property.

(2) For the avoidance of doubt it is hereby declared that nothing in this Part of this Act—

(a) renders the husband of a married woman liable in respect of any contract entered into, or debt or obligation incurred, by her after the marriage in respect of which he would not have been liable if this Act had not been passed;

(b) exempts the husband of a married woman from liability in respect of any contract entered into, or debt or obligation (not being a debt or obligation arising out of the commission of a tort) incurred, by her after the marriage in respect of which he would have been liable if this Act had not been passed;

(c) prevents a husband and wife from acquiring, holding, disposing of, any property jointly or as tenants in common, or from rendering themselves, or being rendered, jointly liable in respect of any tort, contract, debt, or obligation and of suing and being sued either in tort or in contract or otherwise, in like manner as if they were not married;

(d) prevents the exercise of any joint power given to a husband and wife.

Consequential amendments and repeals

5. (1) The enactments mentioned in the first column of the first Schedule to this Act shall have effect subject to the amendments specified in the second column of the Schedule.

[Sub-section (2) repealed by S.L.R. 1950.]

APPENDIX 5

MARRIED WOMEN (RESTRAINT UPON ANTICIPATION ACT, 1949 (ENG.).

(12, 13 & 14 Geo. 6, c. 78)

An Act to render inoperative any restriction upon anticipation or alienation attached to the enjoyment of property by a woman.

(16th December 1949).

Abolition of restraint upon anticipation, and consequential amendments and repeals

1. (1) No restriction upon anticipation or alienation attached, or purported to be attached, to the enjoyment of any property by a woman which could not have been attached to the enjoyment of that property by a man shall be of any effect after the passing of this Act.

(2) The preceding sub-section shall have effect whatever is the date of the passing, execution or coming into operation of the Act or instrument containing the provision by virtue of which the restriction was attached or purported to be attached, and accordingly in section two of the Law Reform (Married Women and Tortfeasors) Act 1935, the proviso to sub-section (1) and sub-sections (2) and (3) (which make provision differentiating as to the operation of such a restriction between an Act passed before the passing of that Act or an instrument executed before the date mentioned in the said proviso on the one hand and an instrument executed on or after that date on the other hand) are here repealed.

(3) The enactments mentioned in the first column of the First Schedule to this Act shall have effect subject to the amendments specified in the second column of that Schedule.

[Sub-section (1) repealed by S.L.R. 1953]

Short title and extent

2. (1) This Act may be cited as the Married Women (Restraint upon Anticipation) Act, 1949.

(2) This Act shall not extend to Scotland or to Northern Ireland.

6.—*Law Reform (Husband and Wife) Act, 1962 (Eng.)*

SCHEDULES

FIRST SCHEDULE

Consequential Amendments

the Married Women's Property Act, 1882
(45 & 46 Vict. C. 75).

In section nineteen, the words from "or shall interfere" to "before marriage" shall be repealed, and the word "but" shall be substituted for the word "and" where it occurs immediately after the said repealed words.

[Paragraph repealed by Matrimonial Causes Act 1950 (c. 25), s. 34, Sched.]

SECOND SCHEDULE

[Repeated by S.L.R. 1953]

APPENDIX 6

LAW REFORM (Husband and Wife) ACT, 1962 (ENG.)

(10 & 11 ELIZ. 2, C. 48)

An Act to amend the law with respect to civil proceedings between husband and wife.

(1st August 1962)

Actions in tort between husband and wife

(1) Subject to the provisions of this section, each of the parties to a marriage shall have the like right of action in tort against the other as if they were not married.

(2) Where an action in tort is brought by one of the parties to a marriage against the other during the subsistence of the marriage, the court may stay the action if it appears—

- (a) that no substantial benefit would accrue to either party from the continuation of the proceedings; or
- (b) that the question or questions in issue could more conveniently be disposed of on an application made under section seventeen of the Married Women's Property Act, 1882 (determination of questions between husband and wife as to the title to or possession of property);

and without prejudice to paragraph (b) of this sub-section the court may, such an action, either exercise any power which could be exercised on an application under the said section seventeen, or give such directions as it thinks fit for the disposal under that section of any question arising in the proceedings.

(3) Provision shall be made by rules of court for requiring the court to consider at an early stage of the proceedings whether the power to stay an action under sub-section (2) of this section should or should not be exercised; and rules under the County Courts Act, 1959 may confer on the registrar any jurisdiction of the court under that sub-section.

(4) This section does not extend to Scotland.

Proceedings between husband and wife in respect of delict

2. (1) Subject to the provisions of this section, each of the parties to a marriage shall have the like right to bring proceedings against the other in respect of a wrongful or negligent act or omission, or for the prevention of a wrongful act, as if they were not married.

(2) Where any such proceedings are brought by one of the parties to a marriage against the other during the subsistence of the marriage, the court may dismiss the proceedings if it appears that no substantial benefit would accrue to either party from the continuation thereof; and it shall be the duty of the court to consider at an early stage of the proceedings whether the power to dismiss the proceedings under this sub-section should or should not be exercised.

(3) This section extends to Scotland only.

Short title, repeal, interpretation, saving and extent

(1) This Act may be cited as the Law Reform (Husband and Wife) Act, 1962.

The enactments described in the Schedule to this Act are hereby repealed to the specified in the third column of that Schedule.

(3) The reference in sub-section (1) of section one and sub-section (1) of section two of this Act to the parties to a marriage include references to the persons who were parties to a marriage which has been dissolved.

(4) This Act does not apply to any cause of action which arose, or would but for the subsistence of a marriage have arisen, before the commencement of this Act.

(5) This Act does not extend to Northern Ireland.

SCHEDULE**ENACTMENTS REPEALED**

Session and Chapter	Short Title	Extent of Repeal
45 & 46 Vict, c. 75	The Married Women's property Act, 1882	Section twelve, except so far as it relates to criminal proceedings Section twenty-three.
25 & 26 Geo, c. 30	The Law Reform (Married Women and tortfeasors Act, 1935.	In section one, the words "and subject, as respects actions in tort between husband and wife to the provisions of section twelve of the Married Women's property Act, 1882."