

# THE LAW OF SUCCESSION ACT, 1972

## No. 14 of 1972

*Date of Assent: 13th November, 1972*

*Date of Commencement: By Notice*

### ARRANGEMENT OF SECTIONS

#### PART I—PRELIMINARY

##### *Section*

- 1—Short title and commencement.
- 2—Application of Act.
- 3—Interpretation.
- 4—Law applicable to succession.

#### PART II—WILLS

##### *Capacity*

- 5—Persons capable of making wills and freedom of testation.
- 6—Appointment by will of executor.
- 7—Wills caused by fraud, coercion, importunity or mistake.

##### *Formalities*

- 8—Form of wills.
- 9—Oral wills.
- 10—Probate of oral wills.
- 11—Written wills.
- 12—Incorporation of papers by reference.
- 13—Effect of gift to attesting witness.
- 14—Witness not disqualified by being executor.
- 15—Existing wills.
- 16—Formal validity of other wills.

##### *Revocation, Alteration and Revival*

- 17—Will may be revoked or altered.
- 18—Revocation of will.
- 19—Revocation of will by testator's marriage.
- 20—Effect of obliteration, interlineation or alteration in will.
- 21—Revival of will.

##### *Construction*

- 22—Construction of wills.

##### *Failure of Dispositions*

- 23—Failure of testamentary dispositions.

##### *Election*

- 24—Election.

##### *Perpetuities, Remoteness and Accumulations*

- 25—Rules against perpetuities, remoteness and accumulations.

## ARRANGEMENT OF SECTIONS—(Contd.)

*Section*

## PART III—PROVISION FOR DEPENDANTS

- 26—Provision for dependants not adequately provided for by will or on intestacy.
- 27—Discretion of court in making order.
- 28—Circumstances to be taken into account by court in making order.
- 29—Meaning of dependant.
- 30—Limitation of time.

## PART IV—GIFTS IN CONTEMPLATION OF DEATH

- 31—Characteristics.

## PART V—INTESTACY

- 32—Excluded property.
- 33—Law applicable to excluded property.
- 34—Meaning of intestacy.
- 35—Where intestate has left one surviving spouse and child or children.
- 36—Where intestate has left one surviving spouse but no child or children.
- 37—Powers of spouse during life interest.
- 38—Where intestate has left a surviving child or children but no spouse.
- 39—Where intestate has left no surviving spouse or children.
- 40—Where intestate was polygamous.
- 41—Property devolving upon child to be held in trust.
- 42—Previous benefits to be brought into account.

## PART VI—SURVIVORSHIP

- 43—Presumption of survivorship.

## PART VII—ADMINISTRATION OF ESTATES

- 44—Application of Part.

*Protection*

- 45—No intermeddling with property of deceased person.
- 46—Duties of officers in relation to protection, etc., of deceased's property.

*Jurisdiction*

- 47—Jurisdiction of High Court.
- 48—Jurisdiction of Magistrates.
- 49—Territorial jurisdiction of Magistrates.
- 50—Dispute to include applications.

## ARRANGEMENT OF SECTIONS—(Contd.)

## Section

*Application for Grant*

- 51—Application for grant.
- 52—Wilful and reckless statements in application for grant.

*Forms of Grant*

- 53—Forms of grant.
- 54—Limited grants.
- 55—No distribution of capital before confirmation of grant.

*Persons Entitled to a Grant*

- 56—No grant to certain persons.
- 57—Grant to corporate body.
- 58—Number of administrators where there is continuing trust.
- 59—Renunciation of executorship.
- 60—Probate where there are several executors.
- 61—Discovery of codicil after grant of probate.
- 62—No grant of administration until citation issued to executor.
- 63—Grant of administration to universal or residuary legatee.
- 64—Right to administration of representative of deceased residuary legatee.
- 65—Grant of administration where no executor nor residuary legatee nor representative of such legatee.
- 66—Preference to be given to certain persons to administer where deceased died intestate.

*Procedure on Grants*

- 67—Notice of application for grant.
- 68—Objections to application.
- 69—Procedure after notice and objections.
- 70—Power of courts.

*Confirmation of Grants*

- 71—Confirmation of grants.
- 72—Grants not to be confirmed in certain circumstances.
- 73—Duty of court to give notice to holder of grant to apply for confirmation.

*Alteration and Revocation of Grants*

- 74—Errors may be rectified by court.
- 75—Procedure where codicil discovered after grant.
- 76—Revocation or annulment of grant.

*Sealing of Commonwealth and Foreign Grants*

- 77—Sealing of Commonwealth and Foreign grants.
- 78—Duplicate or copy of foreign grant to have same effect as original.

## ARRANGEMENT OF SECTIONS—(Contd.)

*Section**Powers and Duties of Personal Representatives*

- 79—Property of deceased to vest in personal representative.
- 80—When grant takes effect.
- 81—Powers and duties of personal representatives to vest in survivor on death of one of them.
- 82—Powers of personal representatives.
- 83—Duties of personal representatives.
- 84—Personal representatives to act as trustees in certain cases.
- 85—Assent necessary to complete legatee's title.
- 86—Debts to be paid before legacies.
- 87—Personal representatives not bound to pay legacies without indemnity.
- 88—Abatement and refunding of legacies.
- 89—Insolvent estates.
- 90—Investment of funds to provide for legacies and interest on legacies.
- 91—Transfer of assets from Kenya to personal representatives in **country of domicile of distribution**.
- 92—Protection of persons acting on representation.
- 93—Validity of transfer not affected by revocation of representation.
- 94—Neglect or misapplication of assets by personal representatives.
- 95—Offences by personal representatives.

## PART VIII—MISCELLANEOUS

- 96—Sane murderer not to share in victim's estate.
- 97—Rules.
- 98—Transitional.
- 99—Repeal.
- 100—Amendments.
- 101—Saving.

FIRST SCHEDULE—Construction of Wills.

SECOND SCHEDULE—Failure of Testamentary Dispositions.

THIRD SCHEDULE—Election.

FOURTH SCHEDULE—Perpetuities, Remoteness and Accumulations.

FIFTH SCHEDULE—Forms of Limited Grant.

SIXTH SCHEDULE—Abatement and Refunding of Legacies.

SEVENTH SCHEDULE—Investment of Funds to Provide for Legacies and Interest on Legacies.

EIGHTH SCHEDULE—Laws Repealed.

NINTH SCHEDULE—Laws Amended.

**An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto**

ENACTED by the Parliament of Kenya, as follows:—

#### PART I—PRELIMINARY

1. This Act may be cited as the Law of Succession Act, 1972, and shall come into operation on such date as the Minister may by notice in the Gazette appoint.

Short title  
and commence-  
ment.

2. Except as otherwise expressly provided in this Act, or by any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have **universal application to, all cases of intestate or testamentary succession to the estates of persons dying after the commencement of this Act, and to the administration of estates of such persons.**

Application  
of Act.

3. (1) In this Act, except where the context otherwise requires—

Interpretation.

“active service” means service with the armed forces or merchant marine on a field of military operations or at sea, or proceeding to or from such field or sea, or under orders to proceed to such field or sea, or in being in some place for the purpose of proceeding to such field or sea;

“administrator” means a person to whom a grant of letters of administration has been made under this Act;

“agricultural land” means any land used for agricultural purposes which is not within a municipality or a township or a market, but does not include any land registered under the provisions of any written law;

“authorized investment”, with reference to the investment of any fund, means an investment of such type as is authorized for investment of that fund by any will applying thereto, or as is for the time being authorized by any written law for the investment of trust funds;

“charitable purpose” includes the relief of poverty, the advancement of education, the advancement of religion, and any other purpose of a public nature and capable of administration by a court of law which benefits the community at large or the inhabitants or any particular class of inhabitants of any particular locality;

“codicil” means a testamentary instrument made in relation to a will, explaining, altering or adding to its dispositions or appointments, and duly made and executed as required by this Act for the making and execution of a will;

“competent witness” means a person of sound mind and full age;

“court” means any court having jurisdiction under this Act in the matter in question;

“demonstrative legacy” means a testamentary gift which is in its nature general but which manifests an intention that such gift shall be primarily satisfied out of a specified fund or a specified part of the property of the testator, but shall, upon failure of such fund or property, be met from the general estate;

“estate” means the free property of a deceased person;

“executor” means a person to whom the execution of the last will of a deceased person, is, by the testator’s appointment, confided;

“free property”, in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death;

“full age” means having attained the age of eighteen years;

“general legacy” means a testamentary gift, whether specific or general, of property described in general terms to be provided out of the general estate of the testator, whether or not also charged on any specific part of his estate;

“general power of appointment” means an unfettered power of appointment to such object or objects as the appointor may think fit;

“general residuary bequest” means a testamentary gift of all the property of the testator not otherwise disposed of;

"house", in the case of a deceased person who has married under any system of law allowing polygamous marriages, means a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of such wife;

"income" includes rents and profits;

"independent witness" means a witness who is not a beneficiary under a will or the spouse of any such beneficiary;

"limited residuary bequest" means a testamentary gift which, but for some specific limitation therein expressed or implied, would constitute a general residuary bequest;

"minor" means any person who is not of full age;

"net estate" means the estate of a deceased person after payment of reasonable funeral expenses, debts, expenses of obtaining probate or letters of administration, other reasonable expenses of administration and estate duty, if any;

"net intestate estate" means the estate of a deceased person in respect of which he has died intestate after payment of the expenses set out under the definition of "net estate", so far as such expenses are chargeable against that estate;

"particular residuary bequest" means a testamentary gift of all of a particular property not otherwise disposed of;

"pecuniary legacy" includes an annuity, a general legacy, a demonstrative legacy so far as it is not discharged out of the specified fund or property, and any other general direction by the testator for the payment of money, including all death duties free from which any gift is made to take effect;

"personal and household effects" means clothing and articles of personal use and adornment, furniture, appliances, pictures, ornaments, food, drink, utensils and all other articles of household use or decoration normally to be associated with a matrimonial home, but does not include any motor vehicle or any other thing connected with the business or profession of the deceased;

"personal representative" means the executor or administrator, as the case may be, of a deceased person;

"portion" means provision by a parent or person *in loco parentis* to establish a child in life;

"power of appointment" means power vested in some person to determine the disposition of property of which such person is not the owner;

“probate” means the certificate of a court of competent jurisdiction, that a will, of which a certified copy is attached in the case of a written will, has been proved a valid will, with a grant of representation to the executor in respect of the estate;

“purchaser” means a purchaser for money or money’s worth;

“representation” means the probate of a will or the grant of letters of administration;

“special legacy” means a testamentary gift of a particular part of the property of the testator, which identifies such part by a sufficient description, whether in specific or in general terms, and manifests an intention that such part shall be enjoyed or taken in the state and condition indicated by that description;

“special power of appointment” means power of appointment to such object or objects within a special description or class as the appointor may think fit;

“trust corporation” means any incorporated banking or insurance or guarantee or trust company having a subscribed capital of not less than five hundred thousand shillings or any body corporate which has a subscribed capital of not less than five hundred thousand shillings and which is for the time being empowered (by or under any written law, its charter, memorandum of association, deed of settlement or other instrument constituting it or defining its powers), to undertake trusts, but for so long a time only as such body corporate shall not, by any prospectus, circular, advertisement or other document issued by it or on its behalf, state or hold out that any liability attaches to the Public Trustee or to the Consolidated Fund in respect of any act or omission of such body corporate when acting as an executor or administrator:

Provided that a body corporate which would be a trust corporation but for the fact that its subscribed capital is less than five hundred thousand shillings may act as executor or administrator in any case with the leave of the court on giving such security as the court may determine, and thereupon for the purpose of so acting as executor or administrator such corporation shall have all the rights and privileges conferred on a trust corporation by this Act;



"wife" includes a wife who is separated from her husband and the terms "husband" and "spouse", "widow" and "widower" shall have a corresponding meaning;

"will" means the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, and duly made and executed according to the provisions of Part II of this Act, and includes a codicil.

(2) References in this Act to "child" or "children" shall include any child conceived but not yet born (so long as that child is subsequently born alive), any child expressly recognized or in fact accepted by the father as a child of his own, and any child for whom the father has in his lifetime voluntarily assumed responsibility.

(3) Nothing in the provisions of subsection (2) of this section shall affect the relationship of the mother of such child to that child, but, subject thereto, such child shall have relationship to other persons through the father as though such child were his natural issue.

4. (1) Except as otherwise expressly provided in this Act or by any other written law—

Law applicable  
to succession.

(a) succession to immovable property in Kenya of a deceased person shall be regulated by the law of Kenya, whatever the domicile of such person at the time of his death;

(b) succession to the movable property of a deceased person shall be regulated by the law of the country of the domicile of such person at the time of his death.

(2) A person who immediately before his death was ordinarily resident in Kenya shall, in the absence of proof of domicile elsewhere, be presumed to have been domiciled in Kenya at the date of death.

## PART II—WILLS

### *Capacity*

5. (1) Subject to the provisions of this Part and Part III of this Act, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may by such will declare that succession to his estate shall be governed by any law he chooses.

Persons  
capable of  
making wills  
and freedom  
of testation.

(2) For the avoidance of doubt, it is hereby declared that any female person, whether married or unmarried, has the same capacity to make a will as does a male person.

(3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section, unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.

(4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.

Appointment  
by will of  
executor.

6. A person may, by will, appoint an executor or executors.

Wills caused  
by fraud,  
coercion,  
importunity  
or mistake.

7. A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake, is void.

### *Formalities*

Form of wills.

8. A will may be made either orally or in writing.

Oral wills.

9. (1) No oral will shall be valid unless—

(a) it is made before two or more competent witnesses; and

(b) the testator dies within a period of three months from the date of making the will:

Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.

(2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of such oral will, and which has not been revoked as provided by sections 18 and 19 of this Act.

Probate of  
oral wills.

10. If there is any conflict in evidence of witnesses as to what was said by the deceased in making an oral will, such oral will shall not be valid except so far as its contents are proved by a competent independent witness.

**11. No written will shall be valid unless—****Written wills.**

- (a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;
- (b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;
- (c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

**12. If a testator, in a will or codicil, refers to another document then actually written, and expressing any part of his intentions, such document, provided it is clearly identified as the document to which the will refers, shall be considered as forming part of the will or codicil in which it is referred to.**

**Incorporation of papers by reference.**

**13. (1) A will shall not be considered as insufficiently attested by reason of any benefit thereby given, either by way of bequest or by way of appointment to any person attesting it, or to his or her spouse.**

**Effect of gift to attesting witness.**

**(2) A bequest to such attesting witness (including any direction as to payment of costs or charges) or a bequest to his or her spouse shall be void, unless the will is also attested by an additional independent witness, in which case the bequest shall be valid.**

**14. No person, by reason of his being an executor of a will, shall be disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.**

**Witness not disqualified by being executor.**

**15. Notwithstanding the provisions of this Part, any written will executed before the commencement of this Act shall, whether the testator dies before or after the commencement of this Act, be treated as properly executed if it was executed according to the requirements of the law in force at the date of such execution.**

**Existing wills.**

Formal validity of other wills.

16. Notwithstanding the provisions of this Part, every will whether of movable or immovable property, and whether executed before or after the commencement of this Act, shall be treated as properly executed, if its execution conformed either at the time of execution or at the time of the testator's death, to the law in force—

- (a) in the state where it was executed; or
- (b) in the state where the property is situated; or
- (c) in the state where, at the time of its execution or the testator's death, he was domiciled; or
- (d) in a state of which the testator was a national either at the time of its execution or on his death.

#### *Revocation, Alteration and Revival*

Will may be revoked or altered.

17. A will may be revoked or altered by the maker of it at any time when he is competent to dispose of his free property by will.

Revocation of will.

18. (1) Save as provided by section 19 of this Act, no will or codicil, or any part thereof, shall be revoked otherwise than by another will or codicil declaring an intention to revoke the same, or by the burning, tearing or otherwise destroying of the will with the intention of revoking the same by the testator, or by some other person at his direction.

(2) A written will shall not be revoked by an oral will.

Revocation of will by testator's marriage.

19. A will shall be revoked by the marriage of the maker:

Provided that a will expressed to be made in contemplation of marriage with a specified person shall not be revoked by the marriage so contemplated.

Effect of obliteration, interlineation or alteration in will.

20. (1) No obliteration, interlineation or other alteration made in a written will after the execution thereof shall have any effect unless such alteration is signed and attested as a written will is required to be under section 11 of this Act:

Provided that a will as so altered shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or on some other part of the will opposite or near to such alteration, or is referred to in a memorandum written at the end or some other part of the will and so signed and attested.

(2) Where a typewritten or printed will purports to have been executed by the filling in of any blank spaces, there shall be a presumption that such will has been duly executed.

21. (1) No will which has been in any manner wholly revoked, shall be revived otherwise than by the re-execution thereof.

Revival of will.

(2) Where only part of a will has been revoked, that part shall not be revived otherwise than by the re-execution thereof or by a subsequent will or codicil showing an intention to revive the same.

#### *Construction*

22. Wills shall be construed in accordance with the provisions of the First Schedule to this Act.

Construction of wills.

#### *Failure of Dispositions*

23. Testamentary gifts and dispositions shall fail by way of lapse or ademption in the circumstances and manner and to the extent provided by the Second Schedule to this Act.

Failure of testamentary dispositions.

#### *Election*

24. Beneficiaries under testamentary gifts or dispositions shall be put to election in the circumstances and manner and to the extent provided by the Third Schedule to this Act.

Election.

#### *Perpetuities, Remoteness and Accumulations*

25. Testamentary gifts or dispositions shall be void if and so far as they offend the rules against perpetuities, remoteness, or accumulations set out in the Fourth Schedule to this Act and with effect as provided therein.

Rules against perpetuities, remoteness and accumulations.

#### **PART III—PROVISION FOR DEPENDANTS**

26. Where a person dies in Kenya after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of such will, gift and law, is not such as to make reasonable provision for such dependant, order that such reasonable provision as the court thinks fit shall be made for such dependant out of the deceased's net estate.

Provision for dependants not adequately provided for by will or on intestacy.

Discretion  
of court in  
making order.

**27.** In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.

Circumstances  
to be taken  
into account  
by court in  
making order.

**28.** In considering whether any order should be made under this Part, and if so, what order, the court shall have regard to—

- (a) the nature and amount of the deceased's property;
- (b) any past, present or future capital or income from any source of the dependant;
- (c) the existing and future means and deeds of the dependant;
- (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;
- (e) the conduct of the dependant in relation to the deceased;
- (f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;
- (g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependants.

Meaning of  
dependant.

**29.** For the purpose of this Part of this Act, "dependant" means—

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

Limitation  
of time.

**30.** No application under this Part shall be brought after a grant of representation in respect of the estate to which such application refers has been confirmed as provided by section 71 of this Act.

## PART IV—GIFTS IN CONTEMPLATION OF DEATH

**31.** A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, if—

Characteristics.

- (a) the person making the gift is, at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger; and
- (b) a person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will; and
- (c) there is delivery to the intended beneficiary of possession or the means of possession of such property or of the documents or other evidence of title thereto; and
- (d) a person makes a gift in such circumstances as to show that he intended it to revert to him should he survive the same illness or danger; and
- (e) the person making such gift dies from any cause without having survived the same illness or danger; and
- (f) the intended beneficiary survives the person who made the gift to him:

Provided that—

- (i) no gift made in contemplation of death shall be valid if the death is caused by suicide;
- (ii) the person making the gift may, at any time before his death, lawfully request its return.

## PART V—INTESTACY

**32.** The provisions of this Part shall not apply to—

Excluded property.

- (a) agricultural land and crops thereon; or
- (b) livestock,

situated in such areas as the Attorney-General may, by notice in the Gazette, specify.

**33.** The law applicable to the distribution on intestacy of the categories of property specified in section 32 of this Act shall be the law or custom applicable to the deceased's community, tribe, religion or sect as the case may be.

Law applicable to excluded property.

Meaning of  
intestacy.

34. A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.

Where intestate  
has left one  
surviving  
spouse and  
child or  
children.

35. (1) Subject to the provisions of section 40 of this Act, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

- (a) the personal and household effects of the deceased absolutely; and
- (b) a life interest in the whole residue of the net intestate estate:

Provided that if the surviving spouse is a widow, such interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1) of this section, have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but such power shall not be exercised by will nor in such manner as to take effect at any future date.

(3) Where any child considers that the power of appointment under subsection (2) of this section has been improperly exercised or withheld, he or, if a minor, his representative, may apply to the court for the appointment of his share, with or without variation of any appointment already made.

(4) Where an application is made under subsection (3) of this section, the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether such order shall be made and if so, what order, shall have regard to—

- (a) the nature and amount of the deceased's property;
- (b) any past, present or future capital or income from any source of the applicant and of the widow;
- (c) the existing and future means and needs of the applicant and the widow;
- (d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;



- (e) the conduct of the applicant in relation to the deceased and to the widow;
- (f) the situation and circumstances of the deceased's other beneficiaries and heirs; and
- (g) the general circumstances of the case including the widow's reasons for withholding or exercising the power in the manner in which she did, any other application made under this section.

(5) Subject to the provisions of sections 41 and 42 of this Act and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one or shall be equally divided among the surviving children.

**36.** (1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to—

Where intestate has left one surviving spouse but no child or children.

- (a) the personal and household effects of the deceased absolutely; and
- (b) the first ten thousand shillings out of the residue of the net intestate estate, or two per centum thereof, whichever is the greater; and
- (c) a life interest in the whole of the remainder:

Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to any person.

(2) The Minister may, by order in the Gazette, vary the amount specified in paragraph (b) of subsection (1) of this section.

(3) Upon the determination of a life interest created by subsection (1) of this section, the property subject to such interest shall devolve in the order of priority set forth in section 39 of this Act.

**37.** A surviving spouse entitled to a life interest under the provisions of section 35 or 36 of this Act, with the consent of all co-trustees and all adult children, or with the consent

Powers of spouse during life interest.

of a court shall, during the period of such life interest, have the power to sell any of the property subject to such interest if such is necessary for his own maintenance:

Provided that in the case of immovable property, the exercise of such a power shall always be subject to the consent of a court.

Where intestate has left a surviving child or children but no spouse.

38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42 of this Act, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

Where intestate has left no surviving spouse or children.

39. (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority--

- (a) father; or if dead
- (b) mother; or if dead
- (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
- (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
- (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1) of this section, the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.

Where intestate was polygamous.

40. (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38 of this Act, as the case may be.

41. Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain such age or so marry in which case such issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.

Property devolving upon child to be held in trust.

42. Where—

- (a) an intestate has during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act,

Previous benefits to be brought into account.

such property shall be taken into account in determining the share of the net intestate estate finally accruing to such child, grandchild or house.

#### PART VI—SURVIVORSHIP

43. Where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall, for all purposes of this Act be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder:

Presumption of survivorship.

Provided that in the case of spouses who died in such circumstances, the spouses shall be presumed to have died simultaneously.

#### PART VII—ADMINISTRATION OF ESTATES

44. The provisions of this Part shall not, in cases of intestacy, apply to those types of property mentioned in section 32 of this Act.

Application of Part.

#### Protection

45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

No intermeddling with property of deceased person.

Duties of officers in relation to protection, etc., of deceased's property.

(2) Any person who contravenes the provisions of this section shall—

- (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
- (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

**46.** (1) Whenever it becomes known to any police officer or administrative officer that any person has died, he shall, unless aware that a report has already been made, forthwith report the fact of such death to the sub-chief of the sub-location or to the chief or administrative officer of the area (as the case may be) where the deceased had his last known place of residence.

(2) Any person to whom a report is made under subsection (1) of this section shall—

- (a) at the request of any person who appears to have a legitimate interest in the estate of the deceased; or
- (b) if no application for representation in respect of the estate has been made within one month after the date of the death of the deceased,

forthwith proceed to the last known place of residence of the deceased, and take all necessary steps for the protection of his free property found there, for ascertainment of his other free properties (if any), for ascertainment of all persons appearing to have any legitimate interest in succession to or administration of his estate, and for the guidance of prospective executors or administrators as to formalities and duties.

(3) If any person to whom a report is made under subsection (1) of this section finds that there is any free property of the deceased, or that the person appearing to have the greatest legitimate interest in succession to or administration of his estate are resident in any other sub-location or area he shall forthwith report those facts to the sub-chief, chief or administrative officer of such other sub-location or area, who shall thereupon take, in respect of such property or persons, all such steps as are prescribed by subsection (2) of this section.

(4) Any sub-chief, chief or administrative officer becoming aware that there is in his sub-location or area any free property of a deceased person, or that there are resident in his sub-location or area any persons appearing to have the greatest legitimate interest in succession to or administration of the estate of a deceased person, but that no grant of representation in respect of that estate has yet been made, shall, at the request of any person who appears to have any legitimate interest in that estate, and without waiting for a report under this section, forthwith, take, in respect of such property or persons, all such steps as are prescribed by subsection (2) of this section.

#### *Jurisdiction*

47. No court other than the High Court shall make any grant of representation, or determine any dispute, in respect of any estate the gross value of which exceeds one hundred thousand shillings:

*Jurisdiction  
of High Court.*

Provided that, in any case where there is no dispute as to the person or persons entitled to such grant, the High Court may for the purpose of such grant, be represented by a District Delegate appointed by the Chief Justice, with or without limitation of the territorial jurisdiction of such District Delegate.

48. Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49 of this Act, a Resident Magistrate or a District Magistrate shall have jurisdiction to grant representation in respect of any estate the gross value of which does not exceed one hundred thousand shillings:

*Jurisdiction  
of magistrates.*

Provided that, if and whenever a District Magistrate finds that there is any dispute as to the person or persons entitled to such grant, or otherwise in respect of any such estate, such dispute shall be referred to and determined by a Resident Magistrate, from whom an appeal shall lie to the High Court.

49. (1) The Resident Magistrate or District Magistrate within whose territorial jurisdiction a deceased person had his last known place of residence shall, if the gross value of the estate of such deceased does not exceed one hundred thousand shillings, have in respect of that estate the jurisdiction conferred by section 48 of this Act.

*Territorial  
jurisdiction  
of magistrates.*

Provided that—

- (i) any such magistrate may, with the consent or by the direction of the High Court, transfer the administration of an estate to any other such magistrate where

it appears that the greater part of such estate is situate within the territorial jurisdiction of that other magistrate or that there is other good reason for such transfer;

(ii) if the deceased had his last known place of residence outside Kenya, the High Court shall determine which magistrate shall have jurisdiction under this section;

(iii) every Resident Magistrate and District Magistrate shall have jurisdiction, in cases of apparent urgency, to make a temporary grant of representation, limited to collection of assets situate within his territorial jurisdiction and payments of debts, regardless of the last known place of residence of the deceased.

(2) The Resident Magistrate to whom a dispute shall be referred pursuant to section 48 of this Act shall be such Resident Magistrate as the Chief Justice has appointed for that purpose in respect of the area of jurisdiction of the District Magistrate concerned:

Provided that any Resident Magistrate may, by direction or with the consent of the High Court, transfer the determination of such dispute to any other Resident Magistrate, if and whenever it appears that there is good reason for such transfer.

Dispute to  
include  
applications.

**50.** For the purpose of sections 47, 48 and 49 of this Act a "dispute" shall include any case where there has been an application under section 26 or subsection (3) of section 35 of this Act.

#### *Application for Grant*

Application  
for grant.

**51.** (1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) Every such application shall include information as to—

- (a) the full names of the deceased;
- (b) the date and place of his death;
- (c) his last known place of residence;
- (d) the relationship (if any) of the applicant to the deceased;

- (e) whether or not the deceased left a valid will;
- (f) the present addresses of any executors appointed by any such valid will;
- (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased; and
- (h) a full inventory of all the assets and liabilities of the deceased;
- (i) such other matters as may be prescribed.

(3) Where it is alleged by any such application that the deceased left a valid will—

(a) if it was written, the original will shall be annexed to the application, or if it is alleged to have been lost, or destroyed otherwise than by way of revocation, or if for any other reason the original cannot be produced, then either—

(i) an authenticated copy thereof shall be so annexed; or

(ii) the names and addresses of all persons alleged to be able to prove its contents shall be stated in the application;

(b) if it was oral, the names and addresses of all alleged witnesses shall be stated in the application.

(4) No omission of any information from an application shall affect the power of the court to entertain the application.

**52.** Any person who, in any application for representation, wilfully or recklessly makes any statement which is false in any material particular shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment.

Wilful and reckless statements in application for grant.

### *Forms of Grants*

**53.** A court may—

(a) where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which such will applies, either—

(i) probate of the will to one or more of the executors named therein; or

Forms of grant.

(ii) if there is no proving executor, letters of administration with the will annexed; and

(b) if and so far as there may be intestacy, letters of administration in respect of the intestate estate.

Limited grants.

54. Any court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.

No distribution of capital before confirmation of grant.

55. No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until such grant has been confirmed as provided by section 71 of this Act.

#### *Persons Entitled to a Grant*

No grant to certain persons.

56. (1) No grant of representation shall be made—

(a) to any person who is a minor, or of unsound mind, or bankrupt; or

(b) to more than four persons in respect of the same property.

(2) No grant of letters of administration, with or without will annexed, shall be made to any body corporate other than the Public Trustee or a trust corporation.

Grant to corporate body.

57. No grant of representation shall be made to any syndicate or nominee on behalf of a body corporate:

Provided that, where a body corporate applies for a grant of probate or (in the case of a trust corporation) letters of administration, the application may be signed, and any necessary affidavits may be sworn, by an officer authorized in that behalf by such body corporate or the directors or governing body thereof.

Number of administrators where there is continuing trust.

58. Where a continuing trust arises, no grant of letters of administration may be made to one person alone except—

(a) where that person is a trust corporation; or

(b) where the application is for the grant of letters of administration with the will annexed, and in that will the testator has appointed one or more trustees for the continuing trust who are willing and able to act.



**59.** Any person who has been appointed by a will as an executor thereof may, either by oral declaration before the court or by writing under his hand, renounce executorship, and shall thereafter be finally precluded from applying for any grant of probate of that will.

Renunciation  
of executorship.

**60.** When several executors are appointed, probate may be granted to them all simultaneously, or at different times.

Probate  
where there  
are several  
executors.

**61.** (1) If a codicil is discovered after the grant of probate, a separate probate of that codicil may be granted to the executor, if it in no way repeals the appointment of executors made by the will.

Discovery of  
codicil after  
grant of  
probate.

(2) If different executors are appointed by the codicil, the probate of the will shall be revoked, and a new probate granted of the will and the codicil together.

**62.** When a person who has been appointed by a will as an executor thereof has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon such executor to renounce his executorship or to apply for a grant of probate of such will:

No grant of  
administration  
until citation  
issued to  
executor.

Provided that—

- (i) when one or more of several executors have proved a will, the court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved; and
- (ii) there may be such limited grants of letters of administration in accordance with the provisions of section 54 of this Act as may, in the opinion of the court, be necessitated by any special circumstances.

**63.** When a deceased has made a will, but—

- (a) he has not appointed an executor; or
- (b) the only executors appointed are legally incapable of acting, or have renounced their executorship, or have died before the testator or before receiving a grant of probate of such will, or have failed within the time limited by a citation to apply for probate thereof; or

Grant of  
administration  
to universal  
or residuary  
legatee.

- (c) all proving executors have died before completing administration of all the property to which such will applies,

a universal or residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered.

Right to administration of representative of deceased residuary legatee.

**64.** When a residuary legatee who has a beneficial interest survives the testator, but dies before the estate has been fully administered, his representative shall have the same right to administration with the will annexed as such residuary legatee.

Grant of administration where no executor nor residuary legatee nor representative of such legatee.

**65.** When there is no executor, and no residuary legatee or representative of residuary legatee, or if every such person declines or is incapable of acting, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.

Preference to be given to certain persons to administer where deceased died intestate.

**66.** When a deceased has died intestate, the court shall, save as otherwise expressly provided have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to such discretion, accept as a general guide the following order of preference—

- (a) widow or widows, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V of this Act; and
- (c) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

#### *Procedure on Grants*

Notice of application for grant.

**67.** (1) No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for

such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.

(2) Every such notice shall be exhibited conspicuously in the court-house, and also published in such other manner as the court directs.

68. (1) Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow.

Objections  
to application.

(2) When notice of objection has been lodged under subsection (1) of this section, the court shall give notice to the objector to file an answer to the application and a cross-application within a specified period.

69. (1) When a notice of objection has been duly lodged under subsection (1) of section 68, or no answer or no cross-application has been filed as required under subsection (2) of that section, a grant may be made in accordance with the original application.

Procedure  
after notice  
and objections.

(2) When an answer and a cross-application have been duly filed under subsection (2) of section 68 of this Act, the court shall recognize that there is a dispute as to the grant, and shall (if necessary) refer the same to the High Court or to a Resident Magistrate as provided by sections 47 and 48 of this Act.

70. Whether or not there is a dispute as to the grant, every court shall have power, before making a grant of representation—

Power of  
courts.

(a) to examine any application on oath or affirmation; or

(b) to call for further evidence as to the due execution or contents of the will or some other will, the making of an oral will, the rights of dependants and of persons claiming interests on intestacy, or any other matter which appears to require further investigation before a grant is made; or

(c) to issue special citations to any persons appearing to have reason to object to the application.

*Confirmation of Grants*

Confirmation  
of grants.

71. (1) After the expiration of a period of six months, or such shorter period as the court (under subsection (3) of this section) may direct, from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of such grant, in order to empower the distribution of any capital assets.

(2) The court to which application is made, or to which any dispute in respect thereof is referred, may—

- (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
- (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 (inclusive) of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or
- (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or
- (d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed, such grant shall specify all such persons and their respective shares.

(3) The court may, on the application of the holder of a grant of representation, direct that such grant be confirmed before the expiration of six months from the date of the grant if it is satisfied—

- (a) that there is no dependant, as defined by section 29 of this Act, of the deceased; and
- (b) that it would be expedient in all the circumstances of the case so to direct.

**72.** No grant of representation shall be confirmed until the court—

Grants not to be confirmed in certain circumstances.

- (a) is satisfied that no application under Part III of this act is pending; and
- (b) has received a certificate from the Estate Duty Commissioner that he is satisfied that all estate duty payable in respect of the estate concerned has been or will be paid, or that no estate duty is payable in respect thereof; or
- (c) is itself satisfied that no estate duty is payable in respect of the estate concerned.

**73.** It shall be the duty of the court, within one year from the date of any grant of representation to give notice to the holder of such grant to apply for confirmation thereof.

Duty of court to give notice to holder of grant to apply for confirmation.

#### *Alteration and Revocation of Grants*

**74.** Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.

Errors may be rectified by court.

**75.** If, after the grant of letters of administration with the will annexed or after confirmation thereof, a codicil be discovered, it may be added to the grant on due proof and identification, and the grant altered and amended accordingly.

Procedure where codicil discovered after grant.

**76.** A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

Revocation or annulment of grant.

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that such allegation was made in ignorance or inadvertently;

- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
- (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
  - (ii) to proceed diligently with the administration of the estate; or
  - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 of this Act or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.

*Sealing of Commonwealth and Foreign Grants*

Sealing of  
Commonwealth  
and foreign  
grants.

77. (1) Where a court or other authority, having jurisdiction in matters of probate or administration in any Commonwealth country or in any other foreign country designated by the Attorney-General by notice in the Gazette, has, either before or after the commencement of this Act, granted probate or letters of administration, or an equivalent thereof in respect of the estate of a deceased person, such grant may, on being produced to, and a copy thereof deposited with the High Court, be sealed with the seal of that court, and thereupon shall be of like force and effect, and have the same operation in Kenya, as if granted and confirmed by that court.

(2) Before sealing a grant under subsection (1) of this section, the High Court—

- (a) shall satisfy itself as to the payment of estate duty as provided by section 72 of this Act;
- (b) may require such evidence (if any) as it thinks fit concerning the domicile of the deceased person;
- (c) may, on the application of any creditor of the estate, require that adequate security be given for the payment of debts due from the estate to creditors residing in Kenya.

**78.** For the purposes of this Act, a duplicate of any grant sealed with the seal of a court or other authority in a Commonwealth or foreign country, or a copy thereof certified as correct by, or duly on behalf of, such court or authority, shall have the same effect as the original.

Duplicate or copy of foreign grant to have same effect as original.

*Powers and Duties of Personal Representatives*

**79.** The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, and all the property of the deceased shall vest in him as such personal representative.

Property of deceased to vest in personal representative.

**80.** (1) A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom such grant is made consistent with his or their duties as such.

When grant takes effect.

(2) A grant of letters of administration, with or without will annexed, shall take effect only as from the date of such grant.

**81.** Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of such executors or administrators shall become vested in the survivors or survivor of them:

Powers and duties of personal representatives to vest in survivor on death of one of them.

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.

**82.** Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

Powers of personal representatives.

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and



- (ii) no immovable property shall be sold before confirmation of the grant;
- (c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;
- (d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation:

Provided that except so far as otherwise expressly provided by any will—

- (i) no appropriation shall be made so as to affect adversely any specific legacy;
- (ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.

Duties of  
personal  
representatives.

**83.** Personal representatives shall have the following duties, namely—

- (a) to provide and pay, out of the estate of the deceased, the expenses of a reasonable funeral for him;



- (b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;
- (c) to pay out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);
- (d) to ascertain and pay, out of the estate of the deceased, all his debts;
- (e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of such account;
- (f) subject to section 55 of this Act, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;
- (g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of such completed administration.

**84.** Where the administration of the estate of a deceased person involves any continuing trusts, whether by way of life interest or for minor beneficiaries or otherwise, the personal representatives shall, unless other trustees have been appointed by a will for the purpose of such trust, be the trustees thereof:

Personal representatives to act as trustees in certain cases.

Provided that, where valid polygamous marriages of such deceased person has resulted in the creation of more than one house, the court may at the time of confirmation of the grant, appoint separate trustees of the property passing to each or any of such houses as provided by section 40 of this Act.

Assent  
necessary to  
complete  
legatee's  
title.

**85.** (1) The assent of the executor shall be necessary to complete the title of the legatee to a specific legacy.

(2) Such assent may be verbal, and either express or implied from the conduct of the executor, and shall be sufficient to divest his interest as executor therein, and (subject to any registration required by any other written law) to transfer the subject of the bequest to the legatee.

(3) When the executor is a legatee, his assent to his own specific legacy shall be necessary to complete his title thereto as legatee.

(4) The assent of the executor to a specific legacy shall give effect thereto from the death of the testator.

Debts to be  
paid before  
legacies.

**86.** Debts of every description enforceable at law and owed by or out of an estate shall be paid before any legacy.

Personal  
representatives  
not bound to  
pay legacies  
without  
indemnity.

**87.** If an estate is subject to any contingent liabilities, a personal representative shall not be bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due.

Abatement and  
refunding of  
legacies.

**88.** Legacies shall abate and be refunded according to the provisions of the Sixth Schedule to this Act.

Insolvent  
estates.

**89.** (1) Where any application for a grant of probate or letters of administration shows by the inventory therein that the estate the subject thereof will, after payment of funeral and other expenses, be insolvent, the court shall of its own motion order the administration of such estate in bankruptcy as provided by section 121 of the Bankruptcy Act.

(2) If and so soon as any personal representative knows or has reason to believe that the estate in respect of which probate or letters of administration have been granted to him will prove to be insolvent, he shall forthwith petition for administration thereof in bankruptcy as aforesaid.

(3) This section shall have effect notwithstanding anything contained in the Bankruptcy Act.

Investment of  
funds to  
provide for  
legacies and  
interest on  
legacies.

**90.** Personal representatives shall invest funds to provide for legacies in the manner and according to the provisions set out in the Seventh Schedule to this Act; and legacies shall carry interest in accordance with those provisions.

91. Where a person not having his domicile in Kenya has died leaving assets both in Kenya and in the country in which he had his domicile at the time of his death, and there has been a grant of representation in Kenya with respect to the assets there, and a grant of representation in the country of domicile with respect to the assets in that country, the personal representatives in Kenya, after having given such notices as are required by paragraph 5 of the Sixth Schedule to this Act and after having discharged, at the expiration of the time therein named, such lawful claims as have come to their notice, may, instead of themselves distributing any surplus or residue of the deceased's property to persons residing out of Kenya who are entitled thereto, transfer, with the consent of the personal representatives in the country of domicile, the surplus or residue to those personal representatives for distribution to those persons.

Transfer of assets from Kenya to personal representatives in country of domicile for distribution.

92. (1) Every person making or permitting to be made any payment or disposition in good faith under a grant of representation shall be indemnified and protected in so doing, notwithstanding any defect or circumstances whatsoever affecting the validity of the grant.

Protection of persons acting on representation.

(2) Where a grant of representation is revoked or varied, payments and dispositions made in good faith to a personal representative under that grant before the revocation or variation thereof shall be a valid discharge to the person making the same, and a personal representative who has acted under the revoked or varied grant may retain and reimburse himself in respect of any other person to whom representation is afterwards granted might have properly made:

Provided that any personal representative who so acted shall account for all payments, dispositions, retentions or reimbursements made by him to the person or person to whom representation is afterwards granted.

93. (1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

Validity of transfer not affected by revocation of representation.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts,

liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.

Neglect or misapplication of assets by personal representatives.

94. When a personal representative neglects to get in any asset forming part of the estate in respect of which representation has been granted to him, or misapplies any such asset, or subjects it to loss or damage, he shall, whether or not also guilty of an offence on that account, be liable to make good any loss or damage so occasioned.

Offences by personal representatives.

95. Any personal representative who, as regards the estate in respect of which representation has been granted to him—

- (a) wilfully or recklessly neglects to get in any asset forming part of such estate, misapplies any such asset, or subjects any such asset to loss or damage; or
- (b) wilfully fails to produce to the court any such inventory or account as is required by the provisions of paragraphs (e) and (g) of section 83 of this Act; or
- (c) wilfully or recklessly produces any such inventory or account which is false in any material particular; or
- (d) knowing or having reason to believe that such estate will prove to be insolvent, continues to administer the same without petitioning for administration thereof in bankruptcy,

shall be guilty of an offence, and shall be liable to a fine not exceeding ten thousand shillings, or to imprisonment for a term not exceeding one year, or to both such fine and imprisonment.

#### PART VIII—MISCELLANEOUS

Sane murderer not to share in victim's estate.

96. (1) Notwithstanding any other provision of this Act, a person who, while sane, murders another person shall not be entitled directly or indirectly to any share in the estate of the murdered person, and the persons beneficially entitled to shares in the estate of the murdered person shall be ascertained as though such murderer had died immediately before the murdered person.

(2) For the purpose of this section the conviction of a person in criminal proceedings of the crime or murder shall be sufficient evidence of the fact that the person so convicted committed the murder.

**97.** The Rules Committee may make rules of procedure generally for the carrying out of the purposes and provisions of this Act, and without prejudice to the foregoing generality, any such rules of procedure may prescribe—

Rules.

(a) the procedure to be followed by any court in determining applications under section 26 or subsection (3) of section 35 of this Act;

(b) the procedure to be followed by any court in granting probate or letters of administration;

(c) the procedure to be followed in the case of any dispute as to a grant;

(d) the form and manner in which applications under section 26 and subsection (3) of section 35 of this Act, and applications for grants are to be made, grants are to be issued, grants are to be limited, notices are to be given, or inventories or accounts are to be produced;

(e) the fees to be paid on any application or grant, or on any other procedure related thereto.

**98.** All proceedings commenced under any written law or part thereof repealed by this Act shall, so far as practicable, be continued under this Act.

Transitional

**99.** The laws set out in the Eighth Schedule to this Act are hereby repealed.

Repeal.

**100.** The Acts set out in the first column of the Ninth Schedule to this Act are hereby amended, in relation to the provisions thereof specified in the second column of that Schedule, in the manner specified in relation thereto in the third column of that Schedule.

Amendments

**101.** Except as otherwise expressly provided in this Act, nothing in this Act shall affect the provisions of—

Saving.

(a) the Trustee Act;

Cap. 167.

(b) the Public Trustee Act;

Cap. 168.

(c) the Trusts of Land Act;

Cap. 290.

(d) the provisions concerning estates of deceased soldiers contained in sections 218 to 222 of the Armed Forces Act, 1968.

No. 60 of 1968.



## FIRST SCHEDULE

(s. 22)

## CONSTRUCTION OF WILLS

*General Rules*

Wording of will.

1. It is not necessary, in order to give effect to any disposition, that any technical words be used in a will, but only that the wording be such that the intention of the testator can be known therefrom.

Meaning of clause to be collected from entire will.

2. The meaning of any clause in a will is to be ascertained from the entire instrument, and all the provisions of such will are to be construed with reference to each other; but where two clauses or provisions are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

Will speaks from death as to property comprised in it.

3. Every will shall be construed, with reference to the property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will:

Provided that, in respect of the subject of a specific legacy, there shall be a presumption that the will speaks as at the date of its actual execution.

Negative words insufficient to exclude person entitled on intestacy.

4. Merely negative words in a will shall not be sufficient to exclude a person entitled on intestacy and in order to effect such an exclusion there must be an actual gift to some other definite object.

Express gift cannot be controlled by reason assigned, etc.

5. Subject to the provisions of paragraph 2, an express and positive gift cannot be controlled by reason assigned, or by subsequent ambiguous words, or by inference and argument from other parts of the will, and is not affected by a subsequent inaccurate recital of, or reference to, its contents:

Provided that, in cases of ambiguity or doubt, recourse may be had to such reference in order to assist the construction.

Implication admissible only in absence of express disposition.

6. Implication shall be admissible only in the absence of an express disposition, and shall not be admissible to control an express disposition.

Words may be supplied, rejected, etc.

7. Words and limitations contained in a will may be transposed, supplied or rejected, where such a course is warranted by the immediate context or the general scheme of the will, but not merely on a conjectural hypothesis of the testator's intention, and obvious clerical errors may be corrected.

Technical words.

8. Technical words shall be presumed to be employed in their technical sense, unless the context clearly indicates the contrary.

Words in general.

9. Words in general shall be construed in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected from the will and that other sense can be ascertained.

Words occurring more than once.

10. Words occurring more than once in a will shall be presumed to be used always in the same sense unless the context clearly indicates the contrary or unless the words are applied to different subjects.

## FIRST SCHEDULE—(Contd.)

11. Where a testator uses an additional word or phrase, an additional meaning shall be presumed unless the context clearly indicates the contrary.

Additional words.

12. When a clause or disposition is capable of two meanings, according to one of which it has some effect, and according to the other of which it can have no effect, the former shall be preferred.

Words construed so as to make them operative.

13. Where for any reason effect cannot be given completely to the testator's apparent intention, effect shall nevertheless be given thereto so far as is possible.

Intention to be given effect to.

14. The rules of construction shall not be strained in order to bring a gift within the rules of law, but, where the will admits of two constructions, the construction which will render the gift valid shall be preferred:

Rules of construction not to be strained to validate gift.

Provided that where a gift, valid in the first instance, is modified by some subsequent clause in the same will or in a codicil thereto in such manner as to render such preceding gift void for remoteness, such modifying clause, if separable from the original gift, shall be rejected as if such will or codicil had never contained the same.

15. The inconvenience or absurdity of a gift, or the fact that the testator did not foresee all the consequences of his disposition, shall not be a ground for varying the construction of the will where the terms are unambiguous; but, where the terms of any gift or disposition are ambiguous, the more rational of two constructions shall be preferred.

Inconvenience or absurdity of gift.

16. The construction of a will shall not be varied by events subsequent to its execution, but in determining the meaning of particular expressions regard may be had to circumstances which, at the date of execution, were capable of arising subsequent to that date.

Construction not to be varied by subsequent events.

17. A testator shall be presumed to calculate against intestacy; and, subject to the provisions of paragraph 14 a construction avoiding intestacy shall be preferred.

Presumption against intestacy.

18. A testator shall be presumed to calculate on the dispositions in his will taking effect; and a gift over shall not, in the absence of clear intention be construed as providing exclusively for lapse or other initial failure of the original gift.

Presumption as regards gift over.

19. Unless a design to connect them appears from the will, independent gifts shall be construed separately and without relation to one another, notwithstanding that it may be conjectured from the circumstances that the testator had the same intention with regard to all such gifts.

Independent gifts.

20. Unless a contrary intention appears from the will, the term "child" shall be construed to include an illegitimate child, and the terms "son", "daughter", "grandchild" and "issue" and similar words shall similarly be construed to include persons of illegitimate descent.

References to child, etc., to include illegitimate child.

## FIRST SCHEDULE—(Contd.)

References to application of Islamic law to mean law of sect or school of testator.

Particular rules of construction.

Misnomer or misdescription of object.

Rejection of erroneous particulars in description of subjects.

Gift or disposition void for uncertainty.

Gift presumed to comprise whole interest of testator.

21. Unless a contrary intention appears from the will, where a testator declares that his property shall devolve according to Islamic law, the Islamic law applicable shall be the law of the sect or school of Islamic law to which the deceased belonged.

22. The several particular rules of construction provided by the following paragraphs shall apply if, and so far only, as a contrary intention is not expressed or implied in the will, and shall have effect subject to the terms of the will.

*Descriptions*

23. (1) Where the words used in a will to designate or describe a legatee, or a class of legatees, sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect, and it shall be sufficient for this purpose if the legatee, or class of legatees, is so designated as to be distinguished from every other person or class.

(2) A mistake in the name of a legatee may be corrected by a description of such legatee and a mistake in the description of a legatee may be corrected by the name of such legatee.

(3) Where the words used in a will to designate or describe a legatee are applicable to two or more persons or classes of persons, or partly to one and partly to another person or class, the legatee or class of legatees may be ascertained from the general context and the surrounding circumstances.

24. If the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the will, but some parts of the description do not apply, such parts of the description shall be rejected as erroneous, and the gift shall take effect:

Provided that, if a will mentions several circumstances as descriptive of the thing which the testator intends to bequeath, and there was any property in respect of which all those circumstances existed at the date of execution of the will, the gift shall be considered as limited to such property, and no part of the description shall be rejected as erroneous because the testator had at the date of his death other property to which such part of the description does not apply.

25. A gift or disposition not expressive of any definite intention shall be void for uncertainty:

Provided that—

- (i) no gift for charitable purposes shall be void for uncertainty of the object; or
- (ii) no gift whereby the legatee is expressly or impliedly given a right of selection, purchase or disposition shall be void merely by reason of the uncertainty arising from such right.

26. Where property is bequeathed to any person, the gift shall be presumed to comprise the whole interest of the testator in such property, unless it appears from the will that only a restricted interest was intended for him.



## FIRST SCHEDULE—(Contd.)

27. The object of a gift which refers to a person or persons as existing shall be construed as at the date of the will, unless a contrary intention clearly appears therein.

Construction of bequest which refers to person as existing.

*Residuary Bequests*

28. A general residuary bequest shall comprise all free property of the testator as at the date of his death, whether or not acquired after the date of the will, of which he has not otherwise disposed, and shall include all free property of which he may have attempted but failed to dispose, even though expressly excepted from the gift.

Effect of general residuary bequest

29. A limited residuary bequest shall have the same effect as a general residuary bequest, subject only to the specific limitation therein expressed or implied.

Effect of limited residuary bequest

30. A particular residuary bequest shall comprise all free property of the testator falling under the particular description as at the date of his death, of which he has not otherwise disposed, and shall include all such property of which he may have attempted but failed to dispose.

Effect of particular residuary bequest

31. The failure of any gift of a share in a residuary bequest, whether general, limited or particular, shall not result in such share accruing to the other shares therein, but, subject only to any subsequent residuary bequest, shall create an intestacy in respect of such share.

Effect of failure of share of residue.

*General Legacy of Property not Possessed*

32. Notwithstanding the provisions of paragraphs 8 to 14 of the Second Schedule to this Act, where a general legacy is in the form of a gift of a specified type of property which is not at the time of the testator's death included in his estate, the value of such gift shall, if it can be ascertained, be met from the testator's general estate, but if the value thereof cannot be ascertained the gift shall fail.

General legacy of property not in testator's possession.

*Annuities*

33. Where an annuity is created by will, the legatee shall be entitled to receive it for his life only, unless a contrary intention appears by the will, notwithstanding that the annuity is directed to be paid out of the income of a specified fund or specified property.

Annuity created by will payable for life only, unless contrary intention appears by will.

34. Where there is the gift of an annuity for the maintenance and education of the beneficiary, such annuity shall be deemed to be given for the life of the beneficiary.

Annuities for maintenance and education.

35. Where a will directs that an annuity shall be provided for any person out of the proceeds of property generally, or where money is bequeathed to be invested in the purchase of an annuity for any person, the legatee may either have an annuity purchased for him or to receive forthwith the money appropriated for that purpose by the will.

Where will directs that annuity be provided out of property or where money bequeathed to be invested in purchase of annuity.

## FIRST SCHEDULE—(Contd.)

Relation of  
annuity to  
residuary  
estate.

36. (1) Where there is a direct gift of an annuity, or where a will manifests an intention that an annuity shall be charged on the capital of the testator's residuary estate, the annuity shall constitute a charge upon such capital.

(2) In all other cases, in default of specific provision, the annuity shall be payable only out of the income of the residuary estate.

(3) In default of provision to the contrary, an annuity payable only out of the income of the residuary estate, or of a specified fund or of specified property, shall constitute together with all arrears thereof, a continuing charge on the whole of such income.

Commencement  
of annuity and  
time for pay-  
ment when no  
time fixed by  
will.

37. When an annuity is given by will, and no time is fixed for its commencement, it shall commence from the testator's death, and the first payment shall be made at the expiration of one year after that event:

Provided that, where there is a direction that the annuity shall be paid quarterly or monthly, the first payment shall be due at the end of the quarter or month, as the case may be, immediately after the testator's death; and shall, if the personal representatives think fit, be paid when due but the personal representatives shall not be bound to pay it until the expiry of twelve months after the testator's death.

Dates of suc-  
cessive payments  
directed to be  
made within  
given time or on  
day certain.

38. Where there is a direction that the first payment of an annuity shall be made within any specified period of time after the death of the testator, or on a day certain, the next payment to be made, and subsequent payments shall be made accordingly.

Apportionment.

39. If an annuitant dies in the interval between the times for payment of his annuity, an apportioned share of the annuity shall be paid to his personal representatives.

*Gifts of Income*

Gift of  
income for  
indefinite  
period.

40. Where the income of any fund, property or residuary estate is bequeathed to any person, and the will affords no indication of an intention that the enjoyment of the gift should be of limited duration, the principal, as well as the income, shall belong to the legatee.

*Gifts for Special Purposes*

Effect of  
gift for  
special  
purpose

41. Where a gift is bequeathed solely for the benefit of the legatee, then, notwithstanding that words are added to the gift expressing a purpose for which the gift is made, the legatee shall be entitled to claim the gift without applying it to that purpose, whether or not the purpose be expressed in obligatory terms:

Provided that—

- (i) where the gift is made subject to a gift over of any surplus remaining after the purpose has been fulfilled, the provisions of this paragraph shall apply only to so much of the gift as is necessary for such purpose;

## FIRST SCHEDULE—(Contd.)

- (ii) the provisions of this paragraph shall not apply where the purpose specified is so expressed as to create a condition or a discretionary trust with gift over, nor where the legatee is a minor.

42. Where a gift of a sum of money is directed to be applied solely for the benefit of a person in a certain way, but the time within which the gift is to be expended is left in the discretion of the personal representatives or of trustees, the beneficiary shall not, so long as the personal representatives or the trustees properly exercise their discretion, demand payment of the money, but if he dies before the money is so applied, his personal representatives shall be immediately entitled to the money.

Effect of discretion as to time.

*Conditional Gifts*

43. No precise form of words shall be necessary to create a condition in a will, and any expression disclosing such an intention of the testator shall have that effect.

Express words unnecessary.

44. Any condition shall be void which—

Void conditions

- (a) requires the performance of an illegal act, or is not legally enforceable; or
- (b) is contrary to law, morality or public policy; or
- (c) is uncertain, or is too vague to be enforced; or
- (d) offends against any law as to accumulations, remoteness, or perpetuities; or
- (e) is impossible *ab initio*, or becomes impossible by the act or default of the testator, or by an act of any court; or
- (f) is repugnant to the gift to which it is annexed; or
- (g) is in total restraint of the marriage of any person other than a widow; or
- (h) is attached to a gift of capital to a widow, in total restraint of her marriage, without providing for any gift over on default; or
- (i) forbids dispute of the will, without providing for any gift over on default; or
- (j) restrains alienation, voluntary or involuntary, of the subject of the gift:

Provided that nothing in this subparagraph shall affect or render void any discretionary trust with gift over, or any life estate made determinable on bankruptcy.

45. (1) A condition shall be either precedent, in that the performance thereof is made to precede the vesting of a gift in interest, or subsequent, in that the non-performance thereof is made to determine a gift antecedently vested in interest.

Condition either precedent or subsequent.

(2) In case of doubt, construction of a condition as a condition subsequent shall be preferred to construction as a condition precedent.

## FIRST SCHEDULE—(Contd.)

Effect of  
void condition.

46. (1) Where a gift is made upon a condition subsequent which is void, the gift shall be absolute.

(2) Where a gift is made upon a condition precedent which is void, the gift shall be void if—

- (a) the void condition is the sole motive of the bequest; or
- (b) the impossible nature of the condition was unknown to the testator; or
- (c) the condition is illegal as involving the performance of an unlawful act,

but in all other cases such gift shall be absolute.

Effect of  
impossibility  
supervening.

47. (1) Where a gift is made upon a condition subsequent which was valid *ab initio*, but which has, for any reason, become impossible before being performed, the gift shall be absolute.

(2) Where a gift is made upon a condition precedent which was valid *ab initio*, but which has, for any reason other than the act or default of the testator or an act of any court, become impossible before being performed, the gift shall be void.

Legatee bound  
by legal  
conditions.

48. Where a legatee has taken a gift subject to a valid condition, he shall be estopped by his act of taking the gift from subsequently insisting on rights which, by the terms of the conditions, he is bound to release, or from declining a duty which he is required by the condition to perform.

One or two  
separate and  
independent  
bequests to same  
person may be  
accepted and the  
other refused.

49. Where a will contains two separate and independent gifts to the same person, the legatee may take one of them, and may refuse the other, although either or both of such gifts was made upon condition.

Time in which  
conditions  
must be  
performed.

50. Where a gift is made upon a condition, and no time is specified for its performance, the legatee shall perform the condition within a reasonable time:

Provided that—

- (i) where the condition is for the benefit of another person, then, in the absence of any specified time in which the condition is to be performed, the legatee shall perform the condition upon demand being made by such other person;
- (ii) where the condition is the happening of a specified uncertain event beyond the control of the legatee, the gift shall take effect if that event happens before the gift is payable or distributable, but not thereafter.

Performance  
generally

51. The performance of a condition shall be such as to constitute a substantial compliance with the terms of the condition:

Provided that, in respect of time, there shall be strict compliance where there is any express gift over.

## FIRST SCHEDULE—(Contd.)

52. Where a gift is made upon a valid condition, ignorance of that condition shall not protect the legatee from the consequences of his default, unless such ignorance is attributable to the act or default of some person who benefits by breach of that condition.

Ignorance of condition.

*Gifts to Executors*

53. If a gift is bequeathed to a person who is named an executor of the will for his own benefit, and is not given independently of the office of executor, there shall be a presumption that he is not intended to take the gift unless he proves the will or otherwise unequivocally manifests an intention to act as executor.

Legatee named as executor cannot take unless he shows intention to act as executor.

*Vesting and Divesting of Gifts*

54. (1) A gift shall vest in the legatee in interest when his entitlement to such gift, whether in possession or reversion, or to be enjoyed in possession at some future time, becomes certain.

Meaning and effect of vesting.

(2) Where the legatee dies before receiving possession of a gift already vested in him in interest, such gift, unless divested by his death, shall pass to his personal representative.

(3) Where the legatee dies before a gift vests in him in interest, such gift shall have no effect:

Provided that a gift over which is contingent only upon a collateral event, irrespective of the legatee attaining a specified age or surviving a specified period, shall vest in the personal representatives of the legatee if that event happens after his death.

55. A direction that a gift shall vest at any given time shall, unless it appears from the will to refer to vesting in possession, be construed as referring to vesting in interest.

Direction for vesting.

56. If a gift be made in general terms, without specifying any particular time for the vesting thereof, the legatee shall have a vested interest therein from the day of the death of the testator, or so soon thereafter as he comes into existence or the terms of the gift may otherwise permit.

Time of vesting of general terms.

57. If a gift be made in terms which clearly indicate that the interest of the legatee shall be contingent upon the happening of some uncertain event (other than the performance of a void condition not itself avoiding the gift), such interest shall not vest in the legatee until such event has happened.

Vesting of contingent gifts.

58. A gift may be made to vest immediately on the testator's death or on the happening of a specified event, notwithstanding that, by the terms of the will, it is subject to subsequent divesting on the happening or not happening of some uncertain event.

Gift may vest subject to subsequent divesting.

59. Where a substantive gift is made subject only to a direction that it shall not be paid or delivered to the legatee until the happening of some future event, the legatee shall acquire an immediate vested interest, although vesting in possession shall be postponed in accordance with the direction:

Absolute gift with enjoyment postponed.

Provided that a mere direction that the legatee attains an age exceeding full age shall be inoperative after he attains full age.

## FIRST SCHEDULE—(Contd.)

Direction for  
payment without  
substantive gift.

60. Where the gift consists solely in a direction to pay or distribute at a future age, or upon the happening of some future event (other than performance of a void condition not itself avoiding the gift) without any substantive gift, the gift shall not vest in interest until such future age is attained or such future event occurs:

Provided that when the payment or distribution appears to be postponed merely for the convenience of the fund or the property, as the case may be, the vesting shall not be deferred as provided in this paragraph.

Gift subject to  
attaining certain  
age or marrying.

61. Where a gift is made to a legatee and the attainment of a certain age or marriage is introduced into and made a constituent part of the description or character of the legatee, the vesting of the gift in interest shall be postponed until the attainment of that age or marriage, as the case may be.

Effect of  
interim direction  
for maintenance

62. Where, under the terms of any gift the vesting thereof purports to be postponed to a given age and the gift is accompanied by a direction that the intermediate income shall be applied for the maintenance of the legatee, the gift shall vest in interest immediately, whether or not he attains that age:

Provided that this rule shall not apply to the gift of an entire fund to be distributed among a class of persons equally on attaining a given age.

Ambiguity of  
vesting  
contingency or  
divesting.

63. Where the terms of a will are ambiguous in respect of the vesting, contingency or divesting of a gift, it shall, subject to all other rules of construction, be so construed as to give the legatee a vested rather than a contingent interest.

## Satisfaction

Presumed  
satisfaction of  
debt.

64. Where a debtor bequeaths a gift to his creditor, and the gift is equal to or greater than the debt, there shall be a presumption that the gift is intended to satisfy the debt, and not to be taken in addition to payment of the debt:

Provided that this presumption shall arise only in respect of a debt contracted before the date of execution of the will.

Presumed  
satisfaction of  
portion.

65. Where a person who is under an obligation by contract to provide a portion for his child, or for some other person to whom he stands *in loco parentis*, fails to do so, but makes a gift to such child or other person by will, there shall be a presumption that such gift is intended to satisfy such portion, so far as such gift extends.

No presumed  
satisfaction of  
gift made  
previously in  
contemplation  
of death.

66. A gift made by will shall not of itself raise any presumption that such gift is intended to satisfy or to take the place of a gift, whether or not of equal amount, previously made to the same person by the testator in contemplation of death.

## FIRST SCHEDULE—(Contd.)

*Additional and Substituted Gifts*

67. Where a testator has purported to make two gifts to the same person, and a question arises whether he intended to make the second gift instead of or in addition to the first, and if there is nothing in the will or wills to show what he intended, the following rules shall have effect in determining the construction to be put upon the will or wills—

Two gifts to same person.

- (a) if the same specific thing is bequeathed twice to the same legatee by the same will, or by separate wills, he shall be entitled to receive that specific thing only;
- (b) where one and the same will purports to make, in two places, a gift to the same person of the same quantity or amount of anything, he shall be entitled to one such gift only;
- (c) where two gifts of unequal amount are given to the same person by the same will, the legatee shall be entitled to both gifts;
- (d) where two gifts, whether equal or unequal in amount, are given to the same legatee by separate wills, the legatee shall be entitled to both gifts.

*Liabilities Incidental to Gifts*

68. (1) Where the free property of any deceased person includes any interest in property which at the time of his death is charged with the payment of money, whether by way of mortgage, charge, lien (including a lien for unpaid purchase money), pledge or otherwise, and the deceased has not by will, deed or other document signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for such payment and every part of the said interest, according to its value, shall bear a proportionate part of such payment.

Liability for charges.

(2) Any contrary or other intention shall not be deemed to be signified by a general direction for payment of debts out of any residuary estate, or by a charge of debts upon any residuary estate, unless such intention is further signified by words expressly or by necessary implication referring to the payment so charged.

(3) A periodical payment in the nature of land revenue or in the nature of rent in respect of any period prior to the death of the testator, shall not be such a payment as is contemplated by this rule.

69. Where anything is to be done to complete the testator's title to the thing bequeathed, other than a payment with which that thing is charged at the date of his death, it shall be done at the cost of his estate.

Completion of testator's title to things bequeathed to be at cost of his estate.

## FIRST SCHEDULE—(Contd.)

Exoneration of legatee's immovable property for which land revenue or rent payable periodically.

Exoneration of specific legatee's securities.

Order of payment when legacy directed to be paid out of fund the subject of specific legacy.

Expenses to be borne by legatee.

Gifts to such of certain persons as shall be surviving at some period not specified.

Execution of power of appointment by general legacy or residuary bequest.

70. Where there is a gift of any interest in immovable property, in respect of which payment in the nature of land revenue or in the nature of rent has to be made periodically, the estate of the testator shall (as between such estate and the legatee) make good such payments or a proportion of them, as the case may be, up to the day of his death.

71. In the absence of any direction in the will, any call or other payment due from the testator at the time of his death in respect of any securities, of which there is a specific legacy, if the same is not then charged upon those securities by way of lien or otherwise, shall, as between the testator's estate and the legatee, be borne by such estate, but if any call or other payment becomes due in respect of such securities after the testator's death, the same shall, as between the testator's estate and the legatee, be borne by the legatee, if he accepts the gift.

72. Where a portion of a fund is specifically bequeathed and a legacy is directed to be paid out of the same fund, the portion specifically bequeathed shall first be paid to the legatee thereof, and the demonstrative legacy shall be paid out of the residue of the fund, and, so far as the residue shall be deficient, out of the general assets of the testator, in exoneration of the specific legacy.

73. The costs of preservation, transfer or delivery of the subject of a specific legacy shall be borne by the legatee.

*Gifts to Survivors*

74. (1) Where a gift is in effect made to such of certain persons as shall be surviving at some period, but the exact period is not specified, it shall go to such of them as shall be alive at the time of payment or distribution and capable of taking.

(2) The provisions of this paragraph shall apply whether the gift is to vest in possession immediately on the death of the testator, or at some time subsequent thereto upon the termination of a prior interest:

Provided that, where the time of payment or distribution depends upon the happening of two events, one of which is personal, and the other of which is not personal, to the legatee, the gift shall subject to all other rules of construction, be construed as referring to the happening of the former event exclusively.

*Exercise of Powers*

75. Unless a contrary intention is clearly expressed or implied in the will—

- (a) a general legacy or limited residuary bequest shall be construed to include any property falling within the general description of such legacy or bequest over which the testator may have a general power of appointment by will and shall operate as an execution of such power as regards such property; and



## FIRST SCHEDULE—(Contd.)

- (b) a general residuary bequest shall be construed to include any property over which the testator may have a general power of appointment by will and shall operate as an execution of such power:

Provided that, unless an intention in that behalf is clearly expressed or implied in the will, no such gift shall in either event be construed as an exercise of any power of revocation and new appointment.

76. No general legacy or general residuary bequest shall be construed as an execution of any special power of appointment, unless an intention in that behalf is clearly expressed or implied in the will.

Execution of special powers.

77. No particular residuary bequest shall be construed as an execution of any general or special power of appointment, unless an intention in that behalf is clearly expressed or implied in the will.

Particular residuary bequests.

78. Where by a will any special power of appointment is given over property, but no provision is made in the event of default of such appointment, such property shall, in default of any such appointment or so far as the same may not extend, belong to all the objects of such power in equal shares, subject to all appointments made thereunder being brought into account.

Implied gifts to objects of special power in default of appointment.

## SECOND SCHEDULE

(s. 23)

## FAILURE OF TESTAMENTARY DISPOSITIONS

*By Lapse*

1. (1) Save as is provided in this Schedule no gift or disposition shall confer any benefit on any person who predeceases the testator, and where a gift or disposition fails on this account it is said to "lapse".

Principle of lapse.

(2) Subject to the provisions of section 43 of this Act, the burden of proving that a legatee or appointee under a will has survived the testator shall lie upon the person alleging such survivorship.

(3) A statement in a will that there shall be no lapse shall have no effect, except and so far as a further legatee or appointee, capable of taking, is designated.

2. (1) Unless a contrary intention appears in the will, there shall be no lapse in either of the following cases—

Exceptions

(a) where the gift or disposition is made in discharge of a moral obligation recognized by the testator; or

(b) where the gift or disposition is in favour of any child or other issue of the testator, for any estate or interest not determinable at or before the death of such child or other issue and such child or other issue, as the case may be, leaves issue surviving the testator,

but in either such case the gift or disposition shall take effect as if the deceased legatee had died immediately after the testator.

## SECOND SCHEDULE—(Contd.)

(2) Where a gift or disposition is in favour of a described class of persons, notwithstanding that one or more of the class is named, and any member of that class survives to take a vested interest, there shall be no lapse but the survivor or survivors shall take the whole:

Provided that, if property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but the vesting of their interest is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise, the property shall at that time go to such of them capable of taking as are then alive and to the personal representatives of any of them otherwise capable of taking who have died since the death of the testator.

Gift to several  
named persons.

3. Where there is a gift or disposition to several named persons, who do not constitute a class for the purpose of the will, and one or more of such persons predecease the testator, then—

(a) if an intention appears from the will that such persons should take as joint tenants, or that only the survivors of them should take, there shall be no lapse, if any of them survives the testator and is capable of taking the whole; but

(b) if an intention appears from the will that such persons should take as tenants in common, and no intention appears therefrom that only the survivors of them should take, there shall be a lapse in respect of the share or shares of any of such persons predeceasing the testator, subject only to the provisions of paragraph 2.

Charges of gifts  
on gifts.

4. Where one gift is charged on the subject of another gift—

(a) if the encumbered gift lapses, the charge shall continue to have effect notwithstanding such lapse;

(b) if the encumbering gift lapses, the legatee of the encumbered gift shall take the whole subject thereof free of the charge, unless a contrary intention is expressed or implied in the will.

Lapse of limited  
interests.

5. The lapse of a limited interest shall accelerate the interests in remainder expectant on the determination of such limited interest.

Effect on gifts  
over.

6. Where a gift or disposition is made to one person with a gift over to another person in such circumstances that the gift over would fail if the original legatee survived the testator, the lapse of the original gift or disposition shall result in the gift over taking effect.

General effect  
of lapse.

7. Subject only to the foregoing provisions of this Schedule, if a gift or disposition lapses, the property or interest in the subject thereof shall pass under any residuary bequest which, but for such gift or disposition, would have applied to such property or interest:

Provided that, if there is no such residuary bequest, or if the lapsed gift or disposition is itself a share of such residuary bequest and there is no ulterior residuary bequest under which it can pass, then there shall be intestacy in respect of such property or interest.

## SECOND SCHEDULE—(Contd.)

## By Ademption

8. (1) If property which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the gift cannot take effect, by reason of the subject thereof having been withdrawn from the operation of the will; and where a gift fails on this account, it is said to be "adeemed".

Principle of  
ademption.

(2) There must be a substantial change in the subject of a specific legacy to cause ademption and a merely nominal change shall not have that effect.

9. Where property specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change is caused by a wrongful conversion, the gift shall not be adeemed, but where the change is caused by the authority of any written law, whether or not approved by the testator, there shall be ademption unless the written law effecting such conversion provides otherwise.

Change of  
subject without  
testator's  
consent.

10. The gift of an interest in a fund shall not be adeemed by any sale or change of investment of such fund by the persons having control thereof, nor shall it be adeemed by the testator receiving the same before his death, whether or not thereafter sold or re-invested by him, if it can at his death be followed and distinguished.

Gift of  
interest in fund.

11. A demonstrative legacy shall not be adeemed by reason that the property on which it is charged by the will does not exist at the time of the death of the testator, or has been converted into property of a different kind, but it shall, in such case, be paid out of the general estate of the testator.

Non-ademption  
of demonstrative  
legacy.

12. The revival of a will shall not revive an adeemed gift, so as to give the legatee any interest in any property then representing the original subject of the adeemed gift.

Revival of will  
does not revive  
adeemed legacy.

13. Apart from any intention which may be expressed or implied in the terms of the will itself, there shall be no presumption of intention that ademption shall or shall not in any particular circumstances result:

No presumption  
of intention.

Provided that the intention of the testator, to be ascertained according to the ordinary rules of construction, shall always be relevant to determine the precise subject of the gift.

14. Where a testator makes a gift by will to any person for a specific purpose, or to any child or other person to whom he stands *in loco parentis* by way of portion, and after the date of execution of that will provides by deed of settlement or otherwise for the same purpose or by way of portion for the same child or other person, there shall be a presumption that such gift is adeemed by the subsequent provision, so far as such subsequent provision extends.

Ademption by  
subsequent  
provision.

## THIRD SCHEDULE

(s. 24)

## ELECTION

Principle of election.

1. (1) Where a person, by a will validly made in accordance with Part II of this Act, purports to dispose of any property which is not his own, and bequeaths a gift to the person to whom that property belongs, the legatee accepting the gift so bequeathed to him may elect to give effect to the testator's attempted disposition or to enforce his proprietary rights against that disposition.

(2) If a legatee elects under this paragraph to enforce proprietary rights, he shall make compensation, out of the gift bequeathed to him, to the person whom he has thereby disappointed, and the amount of such compensation shall be assessed on the value of the attempted disposition as at the date of the testator's death, but shall not exceed the value of the gift bequeathed to the person electing to enforce his proprietary rights.

Where property belongs to more than one person.

2. Where a testator purports to dispose of property which belongs to more than one person, every such person, if also a beneficiary under the will of that testator, shall have the right of election provided by paragraph 1, to the extent of his interest in such property.

Testator's ignorance immaterial.

3. It shall be immaterial to any case of election whether the testator, in purporting to dispose of property which is not his own, was aware of his lack of title, or proceeded on the erroneous supposition that he was exercising a power of disposition which belonged to him.

Legatee's ignorance material.

4. A person shall not be bound to elect until all circumstances which may influence his election are known to him, and, if a person elects in ignorance of any material facts, he shall not be bound by such election.

Implied election.

5. Where there is no express election, it may be implied or inferred from acts, or from failure to dissent, but such an inference shall not arise unless the legatee actually knows of his right to elect.

Postponement in case of disability.

6. In case of any disability of a legatee entitled to elect, the election shall be postponed until the disability ceases, or until the election shall be made by some competent authority or representative.

Extrinsic evidence inadmissible to prove intention.

7. In order to raise a case of election the intention of the testator to dispose of the property not belonging to him must be apparent on the face of the will, and extrinsic evidence shall not be admissible.

Cases to which doctrine does not apply.

8. The principles of election set out in this Schedule shall not apply—

(a) to creditors; or

(b) to legatees who hold the property of which the testator has attempted to dispose in some capacity other than that in which the gift is made to them; or

## THIRD SCHEDULE—(Contd.)

- (c) where the property of which the testator has attempted to dispose does not belong either to the testator or to the legatee, nor to any case where the legatee cannot by his own lawful act give effect to that disposition; or
- (d) where the legatee, although subsequently becoming the owner of the property of which the testator has attempted to dispose, is not the owner of such property at the date of the testator's death; or
- (e) to persons who, although taking no direct gift under the will, derive an indirect benefit therefrom.

9. The principles of election set out in this Schedule shall apply to cases of invalid appointments under powers, but not where—

Application to appointments under powers.

- (a) the testator clearly shows he is aware that the appointment is of doubtful validity;
- (b) the appointment is made to objects of the power absolutely, with merely a condition or proviso in favour of strangers to the power; or
- (c) the appointment is void for remoteness.

## FOURTH SCHEDULE

(s. 25)

## PERPETUITIES, REMOTENESS AND ACCUMULATIONS

## 1. (1) In this Schedule—

Interpretation.

“disposition” includes the conferring of a power of appointment and any other disposition of an interest in or right over property, and references to the interest disposed of shall be construed accordingly;

“in being” means living or *en ventre sa mère*;

“power of appointment” includes any discretionary power to transfer a beneficial interest in property without the furnishing of valuable consideration.

(2) For the purposes of this Schedule a disposition contained in a will is deemed to be made at the death of the testator.

## (3) Property or any interest in property vests—

- (a) when the person to whom it is given is ascertained and in existence; and
- (b) when the property or the amount of the interest is ascertained; and
- (c) when all other events have happened to enable the interest to come into possession at once subject to the determination at any time of any prior interests.

2. (1) Where a disposition is subject to a condition or limitation absolutely restraining the beneficiary or any person claiming under him from charging or disposing of his interest in the property the condition or limitation is void.

Condition restraining alienation.

## FOURTH SCHEDULE--(Contd.)

(2) This rule does not apply to a disposition for charitable purposes.

Restriction  
repugnant to  
interest.

3. Where a disposition creates an interest absolutely in favour of any person but the terms of the disposition direct that such interest shall be applied or enjoyed by him in a particular manner he is entitled to receive and dispose of such interest as if there were no such direction.

Duration of  
perpetuity  
period.

4. The perpetuity period is—

- (a) where the instrument by which the disposition is made so provides, such number of years not exceeding eighty as is specified in that behalf in the instrument; which failing
- (b) the lives in being and eighteen years thereafter; which failing
- (c) eighteen years.

Remoteness of  
vesting.

5. Subject to the provisions of this Schedule, no disposition is valid which must postpone the vesting of the interest disposed of beyond the perpetuity period.

Uncertainty as  
to remoteness.

6. (1) Where, apart from the provisions of this paragraph and paragraphs 8 and 9, a disposition might not vest the interest disposed of within the perpetuity period, the disposition shall be treated, until such time (if any) as it becomes established that the vesting must occur, if at all, beyond the perpetuity period, as if the disposition were not subject to this Schedule, and its becoming so established shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application for interim income or otherwise.

(2) Where a disposition consists of the conferring of a general power of appointment which might not become exercisable within the perpetuity period, the disposition shall be treated, until such time (if any) as it becomes established that the power will not be exercisable within the perpetuity period, as if the disposition were not subject to this Schedule.

(3) Where a disposition consisting of the conferring of any power, option or other right might be exercised beyond the perpetuity period, the disposition shall be treated as regards any exercise of the right within the perpetuity period as if it were not subject to this Schedule, and shall be void only if, and so far as, the right is not fully exercised within the perpetuity period.

Ascertainment  
of lives in  
being.

7. (1) Where paragraph 6 applies and the duration of the perpetuity period is not determined by paragraph (a) or (c) of paragraph 4, it shall be determined as follows:—

Where any person falling within subparagraph (2) of this paragraph are individuals in being and ascertainable at the commencement of the perpetuity period the duration of the period shall be determined by reference to their lives and no others, but

## FOURTH SCHEDULE—(Contd.)

so that the lives of any description of persons falling within paragraph (b) or (c) of that subparagraph shall be disregarded if the number of persons of that description is such as to render it impracticable to ascertain the date of death of the survivor.

(2) The said persons are as follows—

- (a) a person expressly selected by the instrument creating the disposition to be a life in being;
- (b) a person to whom or in whose favour the disposition was made, that is to say—
  - (i) in the case of a disposition to a class of persons, any member or potential member of that class;
  - (ii) in the case of an individual disposition to a person taking only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;
  - (iii) in the case of the exercise of any power, option or other right, the person on whom the right is conferred;
- (c) a person having a child or grandchild within subparagraphs (i) or (ii) of paragraph (b) or any of whose children or grandchildren, if subsequently born, would by virtue of his or her descent fall within either of those subparagraphs;
- (d) any person on the failure or determination of whose prior interest the disposition is limited to take effect;
- (e) any person on whose death any disposition is limited to take effect;
- (f) any person who is a life in being for the purpose of any other disposition created by the same instrument.

8. (1) Where a disposition is limited by reference to the attainment by any person or persons of a specified age exceeding eighteen years, and it is apparent at the time the disposition is made or becomes apparent at the time the disposition is made or becomes apparent at a subsequent time—

- (a) that the disposition would, apart from this paragraph, be void for remoteness, but
- (b) that it would not have been void if the specified age had been eighteen years, the disposition shall be treated for all purposes as if, instead of being limited by reference to the age in fact specified, it had been limited by reference to the age nearest to that age which would, if specified instead, have prevented the disposition from being so void.

(2) Where in the case of any disposition, different ages exceeding eighteen years are specified in relation to different persons—

- (a) the reference in subparagraph (a) of subparagraph (1) of this paragraph to the specified age shall be construed as a reference to all the specified ages, and
- (b) the said subparagraph (1) shall operate to reduce each such age so far as is necessary to save the disposition from being void for remoteness.

Reduction of age and exclusion of class members to avoid perpetuity.

## FOURTH SCHEDULE—(Contd.)

(3) Where the inclusion of any persons, being potential members of a class or unborn persons who at birth would become members or potential members of the class, prevents the foregoing provisions of this paragraph from operating to save a disposition from being void for remoteness, those persons shall thenceforth be deemed for all purposes of the disposition to be excluded from the class, and the said provisions shall thereupon cease to have effect accordingly.

(4) Where, in the case of a disposition to which subparagraph (3) of this paragraph does not apply, it is apparent at the time the disposition is made or becomes apparent at a subsequent time that, apart from this subparagraph, the inclusion of any persons, being potential members of a class or unborn persons who at birth would become members or potential members of the class, would cause the disposition to be treated as void for remoteness, those persons shall, unless their exclusion would exhaust the class, thenceforth be excluded from the class for all the purposes of the disposition.

(5) Where this paragraph has effect in relation to a disposition to which paragraph 6 applies, the operation of this paragraph shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise.

Condition relating to death of surviving spouse.

9. Where a disposition is limited by reference to the time of death of the survivor of a person in being at the time of the commencement of the perpetuity period and any spouse of that person, and that time has not arrived at the end of the perpetuity period, the disposition shall be treated for all purposes, where to do so would save it from being void for remoteness, as if it had instead been limited by reference to the time immediately before the end of that period.

Saving and acceleration of expectant interests.

10. A disposition shall not be treated as void for remoteness by reason only that the interest disposed of is ulterior to and dependent upon an interest under a disposition which is so void, and the vesting of an interest shall not be prevented from being accelerated on the failure of a prior interest by reason only that the failure arises because of remoteness.

Powers of appointment.

11. For the purpose of this Schedule, a power of appointment shall be treated as a special power unless—

- (a) in the instrument creating the power it is expressed to be exercisable by one person only, and
- (b) it could, at all times during its currency when that person is of full age and capacity, be exercised by him so as immediately to transfer to himself the whole of the interest governed by the power without the consent of any other person or compliance with any other condition, not being a formal condition relating only to the mode of exercise of the power:

Provided that for the purpose of determining whether a disposition made under a power of appointment exercisable by will only is void for remoteness, the power shall be treated as a general power where it would have fallen to be so treated if exercisable by deed.



## FOURTH SCHEDULE—(Contd.)

12. (1) In the case of a general power of appointment the perpetuity period commences at the time of the exercise of the power.

Validity of powers of appointment.

(2) In the case of a special power of appointment the perpetuity period commences at the date the disposition creating the special power takes effect.

13. This Schedule shall not operate to invalidate a power conferred on trustees or other persons to sell, lease, exchange or otherwise dispose of any property for full consideration, or to do any other act in the administration (as opposed to the distribution) of any property, and does not prevent the payment to trustees or other persons of reasonable remuneration for their services.

Administrative powers of trustees.

14. (1) Where there arises on this Schedule a question which turns on the ability of a person to have a child at some future time, then—

Presumptions and evidence as to future parenthood.

(a) subject to paragraph (b), it is presumed that a male can have a child at the age of fourteen years or over, but not under that age, and that a female can have a child at the age of twelve years or over, but not under that age or over the age of fifty-five years; but

(b) in the case of a living person evidence may be given to show that he or she will or will not be able to have a child at the time in question.

(2) Where any question is decided by treating a person as unable to have a child at a particular time, and he or she does so, the High Court may make such order as it thinks fit for placing the persons interested in the property comprised in the disposition, so far as may be just, in the position they would have held if the question had not been so decided.

(3) Subject to subparagraph (2) of this paragraph, where any such question is decided in relation to a disposition by treating a person as able or unable to have a child at a particular time, then he or she shall be so treated for the purpose of any question which may arise on this Schedule in relation to the same disposition in any subsequent proceedings.

(4) In the foregoing provisions of this paragraph references to have a child are references to begetting or giving birth to a child, but those provisions (except subparagraph (1) (b)) shall apply in relation to the possibility that a person will at any time have a child by adoption, legitimation or other means as they apply to his or her ability at that time to beget or give birth to a child.

15. (1) No person may, by will settle or dispose of any property in such manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period than one of the following, namely—

General restriction on accumulation of income.

(a) the term of eighteen years from the date of the making of the disposition; or

(b) the duration of the minority or respective minorities of any lives in being at the death of the testator; or

## FOURTH SCHEDULE—(Contd.)

- (c) the duration of the minority or respective minorities only of any person or persons who, under the limitations of the will directing the accumulations, would for the time being, if of age, be entitled to the income directly to be accumulated; or
- (d) the duration of the minority or respective minorities of any persons in being at the date of the making of the disposition.

(2) In every case where any accumulation is directed otherwise than in accordance with the provisions of subparagraph (1) of this paragraph, the direction shall (save as hereinafter mentioned) be void; and the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to the said provisions, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed.

(3) This paragraph does not apply to any provision—

(a) for payment of the debts of the testator or of any other person; or

(b) for raising portions for—

(i) any child, children or remoter issue of the testator; or

(ii) any child, children or remoter issue of a person taking any interest under the will directing the accumulations or to whom any interest is thereby limited.

Accumulations  
during minority.

16. When accumulations of surplus income are lawfully made during a minority, the period for which such accumulations are made shall not (whether the trust was created or the accumulations were made before or after the commencement of this Act) be taken into account in determining the periods for which accumulations are permitted to be made by paragraph 15 and accordingly an express trust for accumulation for any other permitted period shall not be deemed to have been invalidated or become invalid, by reason of accumulation also having been made as aforesaid during such minority.

Restriction on  
accumulation for  
the purchase of  
immovable  
property.

17. (1) No person may dispose by will of any property in such manner that the income thereof shall be wholly or partially accumulated for the purchase of immovable property only, for any longer period than the duration of the minority or respective minorities of any person or persons who, under the limitations of the will directing the accumulation, would for the time being, if of full age, be entitled to the income so directed to be accumulated.

Cap. 290.

(2) This paragraph shall not apply to accumulations to be held as capital money for the purpose of the Trusts of Land Act, whether or not the accumulations are primarily liable to be laid out in the purchase of immovable property.

Terminations of  
accumulations.

18. (1) The foregoing paragraphs shall not affect the right of a beneficiary of full age and capacity who has an absolute vested and indefeasible interest in property at any time to require the transfer of the property to him and the termination of any accumulation.

(2) Paragraph 14 shall apply to any question under this paragraph

## FIFTH SCHEDULE

(s. 54)

## FORMS OF LIMITED GRANT

*Grant Limited in Duration*

1. When a will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident, and not by any act of the testator, and a copy or the draft of the will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it be produced.

Probate of copy or draft of lost will.

2. When a will is in the possession of a person residing out of Kenya, who has refused or neglected to deliver it up, but a copy has been transmitted to the executor, and it is necessary for the interests of the estate that probate should be granted without waiting for the arrival of the original, probate may be granted of the copy so transmitted, limited until the will or an authenticated copy of it be produced.

Probate of copy where original exists.

3. Where no will of a deceased is forthcoming, but there is reason to believe that there is a will in existence, letters of administration may be granted, limited until the will or an authenticated copy of it be produced.

Administration until will produced.

*Grants for the Use and Benefit of Others having Right*

4. When any executor is absent from Kenya and there is no executor within Kenya willing to act, letters of administration with the will annexed, may be granted to the attorney of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself.

Administration, with will annexed, to attorney of absent executor.

5. When any person to whom, if present, letters of administration, with the will annexed, might be granted, is absent from Kenya, letters of administration, with the will annexed, may be granted to his attorney, limited as above mentioned.

Administration with will annexed, to attorney of absent person, who if present would be entitled to administer.

6. When a person entitled to administration in case of intestacy is absent from Kenya, and no person equally entitled is willing to act, letters of administration may be granted to the attorney of the absent person, limited as before mentioned.

Administration to attorney of absent person entitled to administer in case of intestacy.

7. When a minor is sole executor or sole residuary legatee, letters of administration, with the will annexed, may be granted to the legal guardian of such minor, or to such other person as the court shall think fit until the minor shall have attained full age, at which period, and not before, probate of the will shall be granted to him.

Administration during minority of sole executor or residuary legatee.

## FIFTH SCHEDULE—(Contd.)

Administration during minority of several executors or residuary legatees.

8. When there are two or more minor executors, and no executor who has attained majority, or two or more residuary legatees, and no residuary legatee who has attained majority, the grant shall be limited until one of them shall have attained full age.

Administration for use and benefit of person of unsound mind.

9. If a sole executor or a sole universal or residuary legatee or a person who would be solely entitled to the estate of the intestate according to the rules for the distribution of intestates' estates, be a person of unsound mind, letters of administration, with or without the will annexed, as the case may be, shall be granted to the person to whom the care of his estate has been committed by competent authority, or, if there be no such person, to such other person as the court may think fit to appoint for the use and benefit of the person of unsound mind until he shall become of sound mind.

Administration *pendente lite*.

10. Pending any suit touching the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration, the court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the court, and shall act under its direction.

*Grants for Special Purposes*

Probate limited to purpose specified in will.

11. If an executor be appointed for any limited purpose specified in the will, the probate shall be limited to that purpose, and, if he should appoint an attorney to take administration on his behalf, the letters of administration, with the will annexed, shall accordingly be limited.

Administration, with will annexed, limited to particular purpose.

12. If an executor appointed generally gives an authority to an attorney to prove a will on his behalf, and the authority is limited to a particular purpose, the letters of administration, with the will annexed, shall be limited accordingly.

Administration limited to property in which person has beneficial interest.

13. Where a person dies, leaving property of which he was the sole or surviving trustee, or in which he had no beneficial interest on his own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the person beneficially interested in the property, or to some other person on his behalf.

Administration limited to suit.

14. When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters

## FIFTH SCHEDULE—(Contd.)

of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the said cause or suit, and until a final decree shall be made therein, and carried into complete execution.

15. If, at the expiration of twelve months from the date of any probate or letters of administration, the executor or administrator to whom the same has been granted is absent from Kenya, it shall be lawful for any court to grant, to any person whom it may think fit, letters of administration, limited to the purpose of becoming and being made a party to a suit to be brought against the executor or administrator, and carrying the decree which may be made therein into effect.

Administration limited to purpose of becoming party to suit to be brought against administrator.

16. Where it appears to the court to be necessary or convenient to appoint some person to administer an estate or any part thereof other than the person who would in ordinary circumstances be entitled to a grant of representation, the court may, in its discretion and having regard to all the circumstances of the case, appoint such other person to be administrator and grant letters of administration, whether limited or otherwise, as it shall think fit.

Appointment of person not normally entitled to a grant.

*Grants with Exception*

17. Whenever the nature of the case requires that an exception be made, probate of a will, or letters of administration with the will annexed, shall be granted subject to such exception.

Probate or administration with will annexed subject to exception.

18. Whenever the nature of the case requires that an exception be made, letters of administration shall be granted subject to such exception.

Administration with exception.

*Grants of the Rest*

19. Whenever a grant, with exception, of probate, or letters of administration, with or without the will annexed, has been made, the person entitled to probate or administration of the remainder of the deceased's estate may take a grant of probate or letters of administration, as the case may be, of the rest of the deceased's estate.

Probate or administration of rest.

*Grants of Effects Unadministered*

20. If the executor to whom probate has been granted has died, leaving a part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate.

Grant of effects unadministered.

21. When a limited grant has expired by effluxion of time, or the happening of the event or contingency on which it was limited, and there is still some part of the deceased's estate unadministered, letters of administration shall be granted to those persons to whom original grants might have been made.

Administration when limited grant expired and still some part of estate unadministered.

## SIXTH SCHEDULE

(ss. 88 and 91)

## ABATEMENT AND REFUNDING OF LEGACIES

*Abatement*

Abatement of  
general legacies.

1. (1) If the assets, after payment of debts, necessary expenses, and specific legacies, are not sufficient to pay all the general legacies in full, the latter shall abate or be diminished in equal proportion, and the personal representative has no right to pay one legatee in preference to another nor to retain any money on account of legacy to himself or to any person for whom he is a trustee:

Provided that nothing contained herein shall prejudice or affect the priority of the remuneration to which any personal representative may be entitled under the will (including any general legacy which is expressly or impliedly conditional on his proving the will) or otherwise.

(2) For the purpose of abatement, a legacy for life, a sum appropriated by the will to produce an annuity, and the value of an annuity when no sum has been appropriated to produce it, shall be treated as general legacies.

Non-abatement  
of specific  
legacy when  
assets sufficient  
to pay debts.

2. Where there is a specific legacy, and the assets are sufficient for the payment of debts and necessary expenses, the thing specified must be delivered to the legatee without any abatement.

Right under  
demonstrative  
legacy when  
assets sufficient  
to pay debts  
and necessary  
expenses.

3. Where there is a demonstrative legacy, and the assets are sufficient for the payment of debts and necessary expenses, the legatee shall have a preferential claim for payment of his legacy out of the fund from which the legacy is directed to be paid until such fund is exhausted, and, if, after the fund is exhausted, part of the legacy still remains unpaid, he shall be entitled to rank for the remainder against the general assets as for a legacy of the amount of such unpaid remainder.

Rateable  
abatement of  
specific legacies.

4. If the assets are not sufficient to answer the debts and the specific legacies, an abatement shall be made from the latter rateably in proportion to their respective amounts.

Distribution after  
notice.

5. Where personal representatives have given such notice as may be prescribed for creditors and others to send in their claims against the estate of the deceased, the personal representatives shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets of the estate or any part thereof, in discharge of any lawful claims of which they have notice, and shall not be liable for the assets so distributed to any person of whose claim they have not had notice at the time of such distribution:

Provided that nothing herein contained shall prejudice the right of any creditor or claimant to follow such assets or any part thereof, in the hands of the persons who may have received the same respectively.

## SIXTH SCHEDULE—(Contd.)

*Refunding*

6. Where personal representatives have paid any legacy which, but for such payment, would have been liable to abatement in accordance with the foregoing provisions of this Schedule, they shall be entitled to call upon the legatee to refund the amount by which such legacy should have been abated—

Refund of legacy to personal representatives.

(a) if such legacy was paid under any order of the court; or

(b) if and so far as such abatement is rendered necessary by discovery of a debt of which notwithstanding compliance with the provisions of section 90 of this Act, the personal representatives had no notice at the time of voluntary payment of such legacy,

but not otherwise.

7. A creditor who has not received payment of his debt may call upon a legatee who has received payment of his legacy to refund the legacy whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies, and whether the payment of the legacy by the personal representatives was voluntary or not.

Creditors may call upon legatee to refund.

8. If the assets of a testator's estate were sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy, or who has been compelled to refund the legacy in accordance with the provisions of paragraph 7, cannot oblige another legatee who has received payment in full to refund his legacy, whether that legacy was paid to him with or without suit, although the assets have subsequently become deficient by waste on the part of the personal representatives.

When legatee not satisfied or compelled to refund, he cannot oblige one paid in full to refund.

9. If the assets of the testator's estate were not sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy shall, before he can call on a satisfied legatee to refund, first proceed against personal representatives, if they or any of them be solvent, but, if no personal representative be solvent or liable to pay, the unsatisfied legatee can oblige each satisfied legatee to refund in proportion:

When unsatisfied legatee must first proceed against personal representatives if solvent.

Provided that the refunding by one legatee to another shall not exceed the sum by which the satisfied legacy ought to have been abated if the estate had been properly administered.

10. Where the time prescribed by the will for the performance of a condition has elapsed, without the condition having been performed, and the personal representatives have thereupon, without fraud, distributed the assets of the testator's estate, in such case, if further time has for any reason been allowed by the court for the performance of the condition, and the condition has been performed accordingly, the legacy cannot be claimed from the personal representatives, but those to whom he has paid it shall be liable to refund the amount.

Refund when legacy has become due on performance of condition within further time allowed.

11. In all cases arising under this Schedule, any refunding shall be without interest.

Refunding to be without interest.

## SEVENTH SCHEDULE

(s. 90)

INVESTMENT OF FUNDS TO PROVIDE FOR LEGACIES AND INTEREST  
ON LEGACIES*Investment*

Investment of  
sum bequeathed  
where general  
legacy given for  
life.

1. Where a general legacy is given for life, the sum bequeathed shall, at or before the end of a year after the death of the testator be invested in any authorized investment:

Provided that, where an annuity is given and no fund is charged by the will with its payment or appropriated by the will to answer it, a sum sufficient to produce the annuity shall be invested in any authorized investment.

Investment of  
general legacy  
to be paid at  
future time.

2. (1) Where a general legacy is given to be paid at a future time, the personal representatives shall invest a sum sufficient to meet it in any authorized investment.

(2) The intermediate interest from such investment shall, unless expressly or by implication payable to the legatee or another, form part of the residue of the testator's estate.

Transfer to  
residuary legatee  
subject to  
contingent gift.

3. Where a gift is contingent, the personal representatives shall not be bound to invest the amount of the legacy, but may transfer the whole residue of the estate to the residuary legatee, if any, on his giving sufficient security for the payment of the legacy if and when it shall become due.

Investment of  
residue be-  
queathed for  
life without  
direction to  
invest in  
particular  
securities.

4. Where a testator has given any property to a person for life without any direction to invest it in any particular securities, so much thereof as is not at the time of the testator's death invested in an authorized investment, shall be converted into money, and invested in such an investment.

Interest payable  
pending  
conversion and  
investment.

5. Until conversion and investment are completed in accordance with the provisions of this Schedule, or with the terms of the will, as the case may be, the person who would for the time being be entitled to the income of the fund when so invested shall receive interest at the rate of six per centum per annum upon the market value (to be computed as at the date of the testator's death) of such part of the fund as shall not yet have been so converted and invested.

*Interest*

What contingent  
and future  
testamentary  
gifts carry the  
intermediate  
income.

6. (1) A contingent or future as well as an immediate specific legacy and a residuary bequest not contingent in its terms of property, whether immovable or movable, shall, subject to the provisions of section 25 of this Act and paragraph 5 of this Schedule, carry the intermediate income of that property from the death of the testator, except so far as such income, or any part thereof, may be otherwise expressly disposed of.



## SEVENTH SCHEDULE—(Contd.)

(2) In the case of any contingent or future gift, either specific or residuary, not falling under the provisions of subparagraph (1) of this paragraph, such bequest shall not comprise the intermediate income of the property or fund bequeathed between the death of the testator and the vesting of such bequest.

7. Where no time has been fixed for the payment of a general legacy, interest shall begin to run from the expiration of one year from the testator's death; but where a time has been fixed for such payment, interest shall begin to run from the time fixed; and, in either event, the interest up to such period shall form part of the residue of the testator's estate:

Interest on general legacy.

Provided that interest shall run from the death of the testator where—

- (i) the legacy is bequeathed in satisfaction of a debt; or
- (ii) the testator was a parent or more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, and the legatee is a minor, and no specific sum is given by the will for maintenance; or
- (iii) the legacy is bequeathed to a minor with a direction to pay for his maintenance thereout.

8. No interest shall be payable on the arrears of an annuity within the first year from the death of the testator, although a period earlier than the expiration of that year may have been fixed by the will for making the first payment of the annuity.

No interest on arrears of annuity within first year of testator's death.

9. Where a sum of money is directed to be invested to produce an annuity, interest shall be payable on such sum from the death of the testator until so invested.

Interest on sum to be invested to produce annuity.

10. The rate of interest payable under paragraphs 6 to 9 (inclusive), shall, unless otherwise expressly provided, be six per centum per annum.

Rate of interest

11. The provisions of paragraphs 6 to 9 (inclusive) shall apply in so far as a contrary intention does not appear from the will.

Application.

## EIGHT SCHEDULE

(s. 99)

## LAWS REPEALED

The Indian Succession Act of India .. .. .	Act X of 1865.
The Hindu Wills Act of India .. .. .	Act XXI of 1870.
The Probate and Administration Act of India .. .. .	Act V of 1881.
The Age of Majority Act .. .. .	Cap. 33.
The Hindu Succession Act .. .. .	Cap. 158.
The Administration of Estates by Corporations Act .. .. .	Cap. 163.
The Commonwealth Probates Act .. .. .	Cap. 166.
The Africans' Wills Act .. .. .	Cap. 169.
The Colonial Probates Act 1892 of England (as applied to Kenya).	

## NINTH SCHEDULE

(s. 100)

## LAWS AMENDED

The Evidence Act (Cap. 80).	s. 113	Delete.
	s. 114	Delete.
Insert after section 118--		
	Presumption of death.	118A. Where it is proved that a person has not been heard of for seven years by those who might be expected to have heard of him if he were alive, there shall be a rebuttable presumption that he is dead.
The Mohammedan Marriage, Divorce and Succession Act (Cap. 156).	s. 4	Delete.
The Workmen's Compensation Act (Cap. 236).	s. 3 (1)	Delete the definition of "member of the family" and substitute—  "member of the family" means any of the following, that is to say, husband, wife, parent, stepparent, grandparent, son, daughter, stepchild, grandchild, brother or sister, half-brother or half-sister, and includes also an adopted child and a child whom the workman had accepted as a member of his family.
The Registered Land Act (Cap. 300).	ss. 120 and 121	Delete.
The Estate Duty Act (Cap. 483).	s. 49 (1)	Delete "no grant of representation shall be made" in the second line and substitute "and save as provided in section 72 of the Law of Succession Act, 1971, no grant of representation shall be confirmed".
The Magistrate's Courts Act (Cap. 10).	s. 2	In the definition of "claim under customary law", delete paragraph (f) and substitute "(f) intestate succession and administration of intestate estates, so far as the same is not governed by any written law".