

WILLS (INTERESTED WITNESSES) BILL.

NOTES ON CLAUSES.

Clause 1 contains the usual short title, citation of Commencement provisions.

Clause 2 substitutes a new section 13 in the *Wills Act 1958*, (herein called "the Principal Act").

The provisions of the sub-sections of the new section 13 are as follows :

Sub-section (1) defines a number of expressions used in the section.

Sub-section (2) gives an extended meaning to the expression "a person claiming through an interested witness".

Sub-section (3) makes provision for the case where a will is attested by an interested witness.

Paragraphs (a) and (b) do not differ in principle from the existing section 13 and provide that—

(a) the interested witness is competent to prove the execution of the will or its validity or invalidity—this has the same effect as part of the existing section 13 ;

(b) subject to paragraph (c) of the sub-section, the will has the same effect as if neither the interested witness nor the spouse of the witness had been given anything under the will.

Paragraph (c) of the sub-section limits the effect of paragraph (b).

Sub-paragraph (i) has the effect that, where there are more than two attesting witnesses and at least two of them are given no benefits under the will, a gift in a will to an attesting witness or spouse of an attesting witness will not be invalidated.

Sub-paragraph (ii) provides that instead of a gift to a witness, or to his spouse, being wholly defeated, he or she will be entitled to take such proportion of the gift as is equal in value to the interest (if any) to which he or she would be entitled if the testator died wholly intestate.

Sub-paragraph (iii) provides that where a will is not witnessed by at least two witnesses who are given no benefits under the will, and an interested witness or spouse would not be entitled to any share in the estate upon a total intestacy, neither he nor any person claiming through him shall take any benefits under the will.

Sub-paragraph (iv) deals with the case where a will has not been witnessed by at least two disinterested witnesses, and an interested witness or spouse would be entitled upon a total intestacy to a share less than the entitlement under the will. The effect of the provisions of this paragraph is that the interested witness or spouse shall take only a gift of the share to which he would have been entitled upon a total intestacy.

Paragraphs (d) and (e) of sub-section (3) are machinery provisions in relation to the assessment of the entitlement of a person under paragraph (c).

Clause 3 proposes amendments of the *Administration and Probate Act 1958* as follows :

Paragraph (a) amends section 1 of the Act in consequence of the new sections proposed in paragraph (b).

Paragraph (b) proposes the insertion of new sections 100 and 101.

Proposed section 100

Sub-section (1) enables a person who is precluded from taking a benefit under a will by proposed section 13 (3) (c) of the *Wills Act* to apply to the Supreme Court for an order that he is entitled to take under the will.

Sub-section (2) limits the time for an application under sub-section (1) to six months after the grant of probate of the will or letters of administration with the will annexed but subject to sub-section (3).

Sub-section (3) enables the Court or a Judge to extend the time for an application under sub-section (1), provided that final distribution of the estate has not been effected, but no order under the section is to affect any distribution prior to the making of an application.

Sub-section (4) requires notice of an application under the section to be served on the personal representative within the time prescribed by the rules.

Proposed section 101

Sub-section (1) enables an order to be made declaring that section 13 (3) (c) of the Wills Act does not apply to the applicant in respect of the relevant will, where the Court is satisfied that the entitlement of the applicant under the will was known to and approved by the testator and did not result from any undue influence.

Sub-section (2) provides that upon a copy of an order under sub-section (1) being served on the personal representative the will will have effect as if section 13 (3) (c) did not apply to the applicant in relation to the will.

Sub-section (3) provides that an applicant shall not be entitled to rely on any evidentiary presumption in proving that the testator knew and approved the contents of the will i.e. there must be affirmative proof to this effect.

Paragraph (c) proposes the addition of a further proviso to section 99. This proviso has the effect that the time for making an application for family provision under Part IV. of the Administration and Probate Act should not run while an application under proposed section 100 is pending.

Clause 4 substitutes a new section 16 in the Principal Act.

Sub-section (1) is taken from the existing section 16, but the exception in the present provision in relation to a marriage in contemplation of which the will is expressed to be made has been re-enacted in the new sub-section (2).

Sub-section (2) re-enacts in paragraph (a) the present exception in section 16. Paragraphs (b) and (c) provide for further exceptions. The first is an exception from invalidation where it appears from the will, read in the light of the surrounding circumstances, that the testator had in contemplation the possibility that he might marry and intended the will to take effect notwithstanding subsequent marriage. The second is an exception insofar as the will confers a benefit or power of appointment upon the person whom the testator marries.

Sub-section (3) is designed to supplement the provisions of sub-section 2 (c). The premise upon which those provisions are based is the preservation of the will *insofar as* it confers a beneficial interest in, or power of appointment over real or personal property upon, the person whom the testator later marries. This leaves untouched any other property disposed of by the will, and sub-section (3) requires that such property be deemed to be property in respect of which the testator died intestate.

Clause 5 applies the provisions of the Bill to wills of persons dying after the commencement of the legislation, irrespective of when the wills were executed.