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PRESUMPTION OF LEGITIMACY. THE MEANING OF " ACCESS "

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The presumption of legitimacy of a child born in wedlock, provided in section 112 of the Evidence Act, is rebuttable on proof that the husband and wife had no " access " to each other at the time when the child could have been begotten. The expression "access " was interpreted in Indian judicial decisions up to 1934 as meaning sexual intercourse A new trend started from that year, beginning with the decision of the Privy Council in *Karapaya* v. *Mayandi*[1], to interpret it as " opportunity of intercourse." The Supreme Court in 1954 followed this trend.[2] The purpose of this article is to show that the former interpretation is more consistent with principle and the trend of English decisions than the latter. On the other hand, the latter, though *ex facie* appears to be supported by a strong line of judicial authority, is not so firmly established as to preclude a departure. And in fact it is more rational to adopt the first meaning rather than the second.

It may be noted, however, that we are on the threshold of dramatic changes in this branch of the law in view of recent advances in the realm of science. In the University of Copenhagen, a new blood test—the haptoglobin test—has been developed which enables the establishment of the paternity of a child almost infallibly, and this test has been accepted by Courts in Denmark and England as reliable[3]. Eventually scientific proof is likely to take the place of presumption from marriage and circumstantial evidence as means of establishment of paternity.

1. (1934) 66 M L J 288 I L R 12 Rang 243 · A I R 1934 P C 49

2. *Venkateswarlu* v *Venkatanarayana*, (1954) S C J 84 (1954) 1 M L J 152 . A I R 1954 S C 176.

3. See *Stocker* v *Stocker*, (1966) 2 All E R (P D A) 147 Speaking about the ordinary blood tests and this new test, Karminski, J said, "what I may call the ordinary tests, which were performed by taking blood samples from the husband, the wife and the baby, did not exclude the husband as the father , nor as Dr Grant explained, did it exclude about sixty per cent of the male population of these islands , he used a new, or comparatively new, test which in Dr Grant's view is very nearly infallible This is a comparatively recent development in medical science, originating at the University of Copenhagen. It seems to have been accepted by the scientific world and, indeed, by forensic medical science and the Courts in Denmark as a standard test—though

Until such time, the presumption and proof of access or non-access are bound to continue to be important.

The discussion that follows is divided into three parts : in the first part, we shall examine the law in England to find out the meaning given to " access " there ; in the second , we shall observe the trend of the Indian decisions prior to 1934 ; and in the third, we shall discuss the decisions subsequent to 1934.

I

The rule of presumption of legitimacy was developed, partly, as a particular application of the legal principle that fraud and covin are never to be presumed; and partly, on the ground of public policy demanding that the status of illegitimacy should not be imposed on a person without clear and proper justification. In early times in England, the presumption of legitimacy was only *praesumptio juris*, but later it was elevated to the level of a conclusive presumption, to be applied if the husband was shown to be within the four seas at any time during the pregnancy of the wife. The pendulum later swung back and the presumption was relaxed, making it rebuttable by proof of absence of sexual intercourse between the husband and wife at the time when the child could have been begotten.[4]

The law in this regard was discussed at length in the *Banbury Peerage case*[5]. In that case, the House of Lords put six questions to the judges of the Court of Common Pleas on the law relating to presumption of legitimacy, and the judges gave their unanimous opinion, which, because of the light it throws on the present issue, may be quoted *verbatim* here :

" That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when, by such intercourse, the husband could, according to the laws of nature, be the father of such child.

That the presumption of legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and wife, at any time, when, by such intercourse the husband could, by laws of nature, be the father of such child. Where the legitimacy of a child, in such a case, is disputed, on the ground that the husband was not the father of such child, the question to be left to the jury is, whether the husband was the father of such child ? and the evidence to prove that he was not the father must be of such facts and circumstances as are sufficient to prove, to the satisfaction of a jury, that no sexual intercourse took place between the husband and wife

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I confess that it is new to me. Dr Grant established to my complete satisfaction on the haptoglobin tests that the husband could not have been the father of this child, so that I am satisfied beyond any doubt that, at the time of the marriage, the wife was pregnant by some person other than the husband " P 148.

4. *See* W M. Best, *The Principles of the Law of Evidence,* (11th Edition, 1911), Pages 353, 354.

5. 1 Sim. & St. 154 (1811) : 57 E R. 62, 64.

at any time, when, by such intercourse, the husband could, by the laws of nature, be the father of such child.

The non-existence of sexual intercourse is generally expressed by the words 'non-access of the husband to the wife'; and we understand those expressions as applied to the present question, as meaning the same thing, because in one sense of the word 'access', the husband may be said to have access to his wife as being in the same place or the same house ; and yet, under such circumstances, as instead of proving, tend to disprove that any sexual intercourse took place between them "

It may be noted that three points emerge from this statement : There is a rebuttable presumption that sexual intercourse took place between the wife and the husband at the time when the child could have been begotten. That presumption can be rebutted only by the proof that no sexual intercourse did take place at the time when the child could have been begotten. " Access " in this context means " sexual intercourse ", and the fact that the husband and wife are in physical proximity of each other, and in that sense have access to each other, does not necessarily establish that sexual intercourse took place, and that instead it might tend to prove that it did not take place.

Not only did the House of Lords act upon these principles in the *Banbury Peerage Case*[6], but discussed and affirmed them in 1837 in *Morris* v. *Davies*[6-a] In that case the husband and wife separated under an agreement and lived at a distance of fifteen miles from each other. But there was evidence that he was in her house several times and both of them were found walking together. She became pregnant four years after separation and gave birth to a male child. One of her servants, the alleged father of the child, took the child away secretly to his parents. The child was registered there as a 'base-born child.' The husband knew nothing of the birth of this child, and when on one occasion he questioned her about the rumour of her having given birth to a child, she flatly denied it. The case involving the issue of legitimacy of the child was tried thrice by the jury, and on the last occasion the jury was unable to return a verdict. Lord Lyndhurst, L. C , with the agreement of the parties, gave a decision on the basis of the record. He posed the issue before him as, " whether sexual intercourse took place in the spring of the year 1792 " between the husband and wife, and said that " in the absence of all evidence, either on the one side or on the other, the law would presume that sexual intercourse did take place "[7] From the circumstances of the adulterous connection between the wife and the servant, her strong dislike for her husband, the absence of communication of the pregnancy to her husband, and concealment of the birth of the child, he came to the conclusion that no sexual intercourse took place between the husband and wife at such period as the child could have been the offspring of the husband.

On appeal to the House of Lords his decision was confirmed. Lord Cottenham, then Lord Chancellor, referred to the proposition that " no evidence is admissible to disprove sexual intercourse having taken place, where the opportunity is proved to have existed, the husband and wife being proved to have been within the same house ", advanced on behalf of the appellant, and characterised it as " very like attempting to establish a doctrine of *intra quatuor muros*, instead of the exploded doctrine of *quatuor maria*." He examined the *Banbury Peerage Case*[6], closely to show

6 57 E R 62
6-a 5 Cl & Fin 163 47 Rev. Rep 50 (1837).
7. *Ibid* P 60.

that the case negatived such a proposition He referred to some decisions subsequent to *Banbury Peerage Case* [8], as confirming the proposition that personal access affording opportunity of sexual intercourse raises a presumption that there has been such intercourse, but that such presumption stands only until repelled by satisfactory evidence that there was not such sexual intercourse. On the evidence before the House, he considered that it was fair and reasonable to infer that sexual intercourse did not take place between the husband and wife at the relevant time.

Lord Lyndhurst, now participating in the decision as a member of the House, found no reason to differ from his earlier conclusion In support of his stand, he quoted a passage from the speech of Lord Elden in *Banbury Peerage Case*[8-a], in the House of Lords, which merits restatement here :

" He decided (speaking of Lord Hale, in *Hospell* v. *Collins*), that the issue for, the jury was, as to the fact of access, or, as I understand him to mean, sexual intercourse. For the access in question is of a peculiar nature, not being access in the ordinary acceptation of the word, but access between a husband and wife viewed with reference to its result, namely, the procreation of children. It is true that the proof of access of another sort is a ground for inferring sexual intercourse, but the inference is only a highly probable and strong one A jury (and your Lordships here perform the functions of a jury) ought to be told, that where the husband and wife have had the opportunity of sexual intercourse, a very strong presumption arises that it must have taken place, and that the child in question is its fruit, and your Lordships ought to be told, that this is but a very strong presumption, and no more ; that a strong presumption may be rebutted by evidence, and that it is the duty of a jury and your Lordships to weigh the evidence against the presumption, and to decide according as, in the exercise of free and honest judgment, either may appear to preponderate."[9]

It is clear that " access " in the context of the relationship between husband and wife has two meanings: access in the sense of sexual intercourse and access in the sense of personal access affording opportunities of sexual intercourse. Access of the latter type gives rise to a strong presumption that there was access of the first type (sexual intercourse). But this presumption is rebuttable by evidence showing that sexual intercourse did not take place. This presumption is different from, and additional to, the presumption of sexual intercourse between husband and wife, referred to in the *Banbury peerage Case*[8], at the relevant time, to legitimize the child until the absence of sexual intercourse is proved

It is also instructive here to note how Sir Harris Nicolas in his *Treatise on the Law of Adulterine Bastardy*, published in 1836, summed up the position[10] :

" Sexual intercourse between man and wife must be presumed, and nothing except that the husband did not have such intercourse at the period of conception can illegitimize a child born in wedlock If the husband could, from the circumstances of time, place and health, have had nuptial intercourse with his wife, and

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8 *Head* v *Head*, 24 Rev. Rep. 1 (1823) , *Bury* v. *Phillpot*, 39 Rev. Rep. 221 ; *Clarke* v *Maynard*, 6 Mad 264 (1822)

8-a 57 E R 62

9 47 Rev Rep 50 at P 81

10 Cited in *Gordon* v. *Gordon*, (1903) P 141

there be no evidence to prove that he did not have such intercourse, he must be considered the father of her child, even if she had committed adultery with one two or twenty other men"

In subsequent cases,[11] we find the Courts not treating the existence of opportunity as conclusive to legitimize the child, but proceeding to examine the evidence to find out whether absence of sexual intercourse was proved to illegitimize the child

Before leaving the English cases, two other points should be noted : Illegitimacy can be established only by strict proof of absence of sexual intercourse at the material time In the words of Lord Lyndhurst in *Morris* v. *Davies*,[11-a] "the Court which is to be satisfied that sexual intercourse did not take place, must be so satisfied, not upon a mere balance of probabilities, but upon evidence which must be such as to exclude all doubt, that is, of course, all reasonable doubt in the minds of the Court or jury, to whom that question is submitted"[12] Secondly, when once it is shown to the satisfaction of the Court or jury that sexual intercourse took place, the presumption of legitimacy becomes conclusive, and will not be allowed to be rebutted by the proof that other men had also sexual intercourse with her. In the words of Alderson B. in *Cope* v *Cope*[13], " The Law will not, under such circumstances, allow a balance of the evidence as to who is most likely to have been the father."[14] Recent developments in science might affect this rule in future.

II

We may start our examination of the cases prior to *Karapaya's case*[14], with *Jagannatha Mudali* v *Chinnaswami*[15], which was cited before the Privy Council in the former case In that case, the husband discarded the wife five years after their marriage, due to suspicion of her chastity. She left for a neighbouring village and led an immoral life She gave birth to two sons, one ten years after separation and the other seventeen years. Some time after their birth, the husband purchased for the wife some property and settled in her favour and " her sons " some other property. For some time he took interest in the children and allowed them to visit him. Subsequently, on the occasion of his marrying another wife, he executed a deed repudiating the children, and the deed was attested by the first wife's brother. On the issue of the legitimacy of these children Venkatasubbarao, J., after referring to the *Banbury Peerage case*[15-a] and the *Aylesford Peerage Case*[15-b], held that " access " meant sexual intercourse and not merely opportunity of sexual intercourse, and found the children to be illegitimate.

About the same time was decided another case by Wallace, J., in the same High Court, but not cited before the Privy Council, the case of *Mayandi Asari* v *Sami Asari*[16]

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11 See *The Aylesford Peerage case*, (1886) 11 A C p 1 (P C) , *Cotton* v *Cotton*, (1954) 2 All E R 105 (C A) , *Francis* v *Francis*, (1959) 3 All E R. 206 (P D A) , *Knowles* v. *Knowles*, (1962) 1 All E R 659

11-a 5 Cl & Fin 163 47 Rev Rep 50 (1837)

12 *See also* the remarks in *Cotton* v *Cotton*, and other cases cited in note 11

13 (1833) 5 C & P 694

14 Cited in note 1

15 (1931) 61 M L J 878 (1932) I L R 55 Mad 243

15-a 57 E R 62

15-b (1886) 11 A C 1

16 (1931) 61 M L J 874 (1932) I.L R 55 Mad 292

In that case the wife lived with a paramour in a village nine miles away from the husband's place, but there was evidence to show that the husband used to visit that village for buying cattle. It was contended that there was opportunity of sexual intercourse and hence a child born to her must be regarded as legitimate. This contention was rejected. Such a rule, it was pointed out, would amount to saying that " non-access cannot be proved so long as the parties are within reasonable distance of each other, unless there is the evidence of a witness available who can account for every minute of the party's time, which is of course practically impossible."[17] It was further pointed out that in this country, as Hindu marriages were not dissoluble (under the then law), there was every reason not to accept such a rule. The judge held that the defendants proved, so far as they reasonably could, non-access.

In *Sivakami Ammal* v *Koolyandi Chettiyar*[18], Venkatasubbarao, J had another occasion to examine the law on the same point. The judge referred to the dictum of Blackstone that during coverture access of the husband shall be presumed, and pointed out that the basis of the presumption of legitimacy was the presumption of sexual intercourse. He raised the question whether, in order to prove non-access, it was necessary to prove the absence of opportunities of access, apart from the absence of actual intercourse, and answered in the negative. He pointed out that in several English decisions, even though opportunities were present, the judges held that non-access was made out In *Samuel* v *Annammal*[19], he took the same position The Lahore High Court in *Umar-ud-Din* v *Ghulam Mohammad*[20] following *Jagannatha Mudali's case*[20-a] and *Samuel's case*[19] held that "access" meant sexual intercourse. In *Saroo* v *Yeshwant*,[21] the Judicial Commissioners' Court at Nagpur took the same view, and Vivian Bose, A J C (as he was then) rejected the contention that impossibility of access, that is, absence of opportunities, must be proved.

III

In the *Karapaya's case*[22] a person had two wives, and the sons by the second wife disputed the legitimacy of the son by the first wife The husband and first wife lived separately for some time. In 1911, he executed an agreement in her favour in which there was no suggestion of personal hostility between them or unchastity on her part. He was then living with his second wife ; the first wife also wanted to live with him, but the second wife refused to permit. So the first wife lived with a relative in a nearby village, and at this time gave birth to the son. Speaking for the Privy Council, Sir George Lowndes observed[22] :

" The only question is whether it has been shown that Karapaya and Karapayi had no access to each other at any time when the respondent could have been begotten The burden of showing this was, in their Lordship's opinion, rightly laid on the appellants (who disputed the legitimacy of the respondent). It was suggested by Counsel for the appellants that 'access' in the (section 112, Evidence Act) implied actual cohabitation, and a case from the Madras reports was cited in support of this contention. Nothing seems to turn upon the nature of the access

17. (1931) 61 M L J 874, 875
18 (1934) 66 M L J 283 A I R 1934 Mad 318
19 A I R 1934 Mad 310 (1934) 66 M L J 279
20 A I R 1935 Lah 628
20-a (1931) 61 M L J 878 : I L R 55 Mad. 243
21. A I.R 1934 Nag 124
22. (1934) 66 M L J. 288 A I R. 1934 P C 49 at p 50.

in the present case, but their Lordships are satisfied that the word means no more than opportunity of intercourse."

He made no other comment on the decision of Venkatasubbarao, J. in *Jagannatha Mudali's case*[23] cited before the Board. He referred to the absence of hostility between the parties, the proximity of the places of their stay, evidence of some personal contacts between them, and concluded,

"It would, their Lordships think, be quite impossible for any Court to hold on the evidence that the appellants had proved non-access in December, 1911. The one person who might have been able to give useful evidence in this question was Viyani Maistry, in whose house Karapayi was staying at the time, but he was not examined."[23-a]

It may be noted that in the first passage quoted above the Privy Council was replying to the argument that "access" meant "actual cohabitation", that is, living together as husband and wife. In this case the husband and wife never lived together. In order that the presumption of legitimacy may apply, it is not necessary that the parties should have lived together, but it is sufficient if they have had opportunities of intercourse, for from such opportunities a presumption of intercourse would arise. But Sir George was careful to point that the nature of the "access" was not important in the case on hand.

On the other hand, the Board did not take the position that the existence of opportunities was conclusive. Opportunities, or the occasions for intercourse which circumstances may present, may not be utilized by the parties because of their dislike towards each other. So the Privy Council referred to the absence of personal hostility between them, in addition to the proximity of the places of their stay. The Privy Council was prepared to carry investigation further to find out whether the proximity element was or was not actually used by them. The Privy Council noted that the one person who could have given useful evidence in the case, the relative with whom she stayed, was not examined. But, since there was the presumption of legitimacy, the Privy Council reached the conclusion that non-access was not established to dislodge the presumption.

Let us assume that the evidence of the relative was that the husband visited his place once and the husband and wife spent the night together. The result would not have been different. On the other hand, if the evidence were that the husband visited only once, but a meeting with her was not possible as he had to return immediately, it is doubtful whether the result would have been the same. It is apparently necessary, when considering whether the presumption of legitimacy ought to be regarded as rebutted, to pose the issue thus : is it established beyond reasonable doubt that the husband and wife did not have intercourse at the time when the child could have been begotten ? In that context, it is reasonable to give "access" the meaning "intercourse", and not merely opportunity of it.

Indeed intercourse may be proved—and in most cases it is—by circumstantial evidence and from the presumption or inference drawn from the existence of opportunities. In some cases, the circumstantial evidence available may fortify the presumption drawn from opportunities, and in others, it may weaken the presumption to the point that it should be rejected. Far from suggesting that the evidence should

23 (1931) 61 M L J 878 · I L R. 55 Mad 243

23-a. (1934) 66 M.L J. 288: A I R 1934 P C at page 51.

be limited to the existence or otherwise of opportunities, the Council was ready to admit inquiry into the attitudes of the parties towards each other. In any event, in this particular case, the result would not have been different if the word "access" was taken to mean "actual intercourse." As a matter of fact, the issue before the Council was not between the two meanings of "access."

The Supreme Court referred to the dictum of the Privy Council with approval in *Venkateswarlu* v. *Venkatanarayana*[24]. In that case the plaintiff's mother (second defendant) and the first defendant were married for ten years, but as she had by then no issue and was sick, the first defendant married again the third defendant. The second defendant, living in her parent's house, filed a suit for maintenance. In that suit the first defendant did not plead unchastity. The claim was settled out of Court, he agreeing to give her maintenance and a house for residence. He was then living in that house and intended to move to another house, but did not actually do so. He and his two wives lived in the same house. At this time the second defendant conceived the plaintiff. Sometime after the birth of the plaintiff, the first defendant sued for cancellation of the maintenance and the settlement of the house, alleging unchastity on the part of the second defendant. In the plaintiff's present suit for partition of joint family properties, the first defendant disputed the former's legitimacy. The Supreme Court remarked, "Access and non-access again connote, as has been held by the Privy Council : Vide '*Karapaya* v. *Mayandi*[24-a] existence and non-existence of opportunities for marital intercourse." The Court concluded, " on the evidence, as it stands, we are clearly of opinion that the defendant No 1 did not succeed in proving that there was no opportunity for intercourse between him and defendant No. 2 at the time when the plaintiff was conceived."[25]

It may be noted, even if " access" was understood as " intercourse", the decision of the Supreme Court could not have been different. The Court did not at all discuss which of the two meanings of "access" in section 112 was the right one.

The difficulty that would arise if " access" is understood as " opportunity of intercourse" was faced in *Kasiammal* v. *Ramasami*[1]. In that case, shortly after the marriage between plaintiff-1 and the defendant, plaintiff-1 attained puberty, and ever since she led, in the same village as the husband's an unchaste life successively with two persons. Plaintiff-2 was born to her. On the issue of legitimacy of plaintiff-2, it was contended on the basis of *Karapaya's case*[24-a] that the presumption under section 112 could be dislodged only by proof that the husband had no opportunity of intercourse. The trial Court found that, even though she lived in the same village as her husband's, " she is an unchaste wife with whom the defendant had nothing to do." Satyanarayana Rao, J. was forced to adopt a tortuous reasoning to reach the only rational decision under the circumstances, that the child was illegitimate. He said, " The one method of proving that a man had no opportunity of intercourse is to conclusively establish that he had no intercourse with the woman." This is certainly putting the cart before the horse. He proceeded to say,

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24. (1954) 1 S.C.J. 84 : (1954) S.C.R. 424 : (1954) 1 M.L.J. 152 : A.I.R. 1954 S.C. 176.
24-a. (1934) 66 M.L.J. 288 : A.I.R. 1934 P.C. 49.
25. A.I.R. 1954 S.C. 176 at page 178.
1. (1949) 1 M.L.J. 426 : A.I.R. 1949 Mad. 881.

"If he is able to establish to the satisfaction of the Courts that he had no intercourse with the woman I fail to see why it should be incumbent upon him to prove further that he had no opportunity of an intercourse. .....There is no warrant for the conclusion urged on behalf of the appellant that if a man proves non-access in the sense that he never had intercourse with the woman he should prove further that he had no opportunity of having intercourse."

He went on,

"He might have had an opportunity, but if he proves that he had no actual cohabitation with the woman during the period, in my opinion he discharges the burden of proving non-access within the meaning of section 112, Evidence Act."

This is quite the reverse of the Privy Council's statement of the law, unless the judge meant by cohabitation sexual intercourse. He concluded,

"If he had an opportunity of intercourse, but notwithstanding such opportunity, if the husband proves to the satisfaction of the Court that he had no intercourse, in my opinion, he establishes thereby non-access within the meaning of section 112, Evidence Act.",

These statements are nothing but an argument against giving the expression "access" the meaning of "opportunity of intercourse."

The difficulty found by this judge is bound to be encountered in any case in which the parties live at close proximity to each other, but their personal relations are such as would render intercourse between them quite unlikely. And the way in which it can be avoided is to give the word 'access' the meaning "actual intercourse", and to infer or presume access from opportunity. In *Krishnappa* v. *Venkatappa*[2], the difficulty, involved was avoided by placing the burden of proof in the wrong quarter. In that case, the plaintiff's partition suit against the fourth defendant and others was resisted on the ground that the plaintiffs were illegitimate children of their mother, a wife of the fourth defendant. The wife was proved to be living in her parents' house, leading an immoral life. But the parents' house was only a few yards away from the fourth defendant's house. The plaintiff's claim was dismissed on the basis of the District Munsif's finding that there was nothing to show that the husband had access to her at the time when the plaintiffs could have been begotten. But surely, it is for those who allege illegitimacy to prove non-access, and not for plaintiffs to prove access to establish their legitimacy.

We find also a tendency on the part of the Courts not to take the existence of opportunity as conclusive, but to seek confirmation of the presumption of inference that can be drawn therefrom from other evidence. This we find in *Karapaya's Case*[3], and in *Venkateswarlu's Case*[4]. In *Hanumantha Rao* v. *Ramachandraiah*[5], the husband pleaded that, though he lived with his wife in one house at the time when the child was conceived, he did not have sexual intercourse with her. Instead of treating the existence of opportunity as precluding this contention, the Court examined the evidence and then disbelieved it. It was pointed out that the idea

2. (1943) 2 M.L.J. 108 : A.I.R. 1943 Mad 632
3. (1934) 66 M.L.J. 288 : I.L.R. (1934) 12 Rang. 243 A.I.R 1934 P.C 49.
4. (1954) S.C.J 84 : (1954) 1 M.L.J. 152 (1954) S.C.R 424 A.I.R 1954 S.C 176.
5. I.L.R. (1945) Mad. 53 : (1944) 1 M.L.J 285 : A.I.R. 1944 Mad. 376.

that the child was illegitimate was an after-thought of the father, and that he did not deny paternity on the earliest occasion. In *Maina* v. *Deorao*[6], the Court was concerned with an application for maintenance under section 488, Criminal Procedure Code, by the mother against the alleged putative father of the child. The husband was living in the neighbourhood while the wife was with her mother, and they had opportunities of meeting. The respondent denied paternity of the child. The Court invoked the presumption under section 112, and also pointed out the facts that the respondent was aged sixty and had two wives and five children, to disbelieve his paternity.

IV

On principle, it should have been clear by now that the meaning of opportunity of "intercourse" cannot be sustained. The existence of opportunity cannot be conclusive ; it may not have been utilized, or the parties may not be well disposed towards each other to do so. The Courts seem to have been, rather under a misapprehension that if ' access " were to mean actual intercourse, to establish legitimacy actual intercourse must be proved. This is not necessary because there is the presumption under section 112 On the other hand, it is for those that deny legitimacy to prove non-access or absence of intercourse at the material time. In none of the cases the Courts appear to have a precise notion of the role which opportunities of intercourse play in the determination of the issue of legitimacy. Non-existence of opportunities, and embittered relations which make utilization of the available opportunities improbable, help to establish absence of intercourse and to dislodge the presumption of legitimacy. On the other hand, existence of opportunities gives rise to because of the special relation between husband and wife, a presumption (under section 114, Evidence Act) that they were utilized, and this presumption will reinforce the presumption under section 112. The conclusion that should be finally reached as to whether non-access has been proved, so as to dislodge the presumption, should be on the basis of all the evidence showing the existence of opportunities, and the personal relations subsisting between the spouses, creating in them a disposition either to use those opportunities or not to use.

If existence of opportunities of intercourse is taken as conclusive, in this age of the jet plane we will virtually be substituting the doctrine of four seas with a new doctrine of the four corners of the world. If, for instance, the wife of a person, who frequents a city like New York, quarrels with her husband, goes to that place, picks up a job and a lover, and gives birth to a child, the husband will have to own it, the existence of opportunities being conclusive. The status of illegitimacy should not, no doubt, be imposed on a person without clear justification, but it is equally important that nobody should be compelled to own a child that is clearly not his.

CONCLUSION.

In conclusion we can say that "access" has two meanings ; in general parlance it means personal access ; and in the context of the relationship of husband and wife, sexual intercourse. Access in the former sense affords opportunity of access in the latter sense. In English law, in connection with the presumption of legitimacy of

6. A.I.R. 1942 Nag. 96.

children born in wedlock, " access " is given the latter meaning. In India, too, until the Privy Council dropped its casual observation in 1934, the same situation prevailed. But ever since "access" in section 112 is understood as " opportunity of intercourse." This has occasioned certain difficulties in some cases, especially when the environment afforded opportunities, but the parties were in such situation that they were not disposed to make use of them for intercourse. These difficulties can be avoided if " access " is understood as " actual intercourse ". There is a fair scope to interpret the decisions of the Privy Council and the Supreme Court in such a way that they may not be taken to have definitely given the meaning of " opportunity of intercourse " to the expression " access." If the meaning " actual intercourse " is given, the difficulty encountered can be avoided without facing any new one.

If the haptoglobin test comes to be widely used in this country, too and accepted by Courts as reliable, a very significant amendment to section 112 will become necessary. That section will have to be amended to make the presumption of legitimacy rebuttable by blood test.

AN UNHEALTHY FEATURE.

By

V. R. NAGANATHAN, B.SC., B.L.

In most of the Criminal Courts a diffrential treatment is shown often towards the legal profession engaged in defending the accused persons in criminal cases. The Police Officers attend the Court at their own convenience as against the practice of lawyers who strictly adhere to the rule and present themselves at the stroke of 11 A.M. If at the time when the case is taken up the lawyer is absent or is represented to be engaged in other Courts, the Court begins to examine the witnesses in their absence. But if the Police Officer is absent lawyers are made to wait to suit his convenience. The Courts also grant repeated adjournments to the prosecution on representation of the absence of witnesses. On the other hand if more than one adjournment is asked by the accused on *bona fide* grounds, then the 2 months old pendency rule is sought to be applied and adjournment is refused. Such practices, which are certainly outside the scope and purview of the Criminal Procedure Code, does not seem to be a healthy feature in a democratic judicial set up. It is high time that necessary administrative directions are given to remedy this.

POWERS OF THE SPEAKERS TO ADJOURN THE HOUSE.

By

G. RANGARATHNAM, *Advocate*, MADRAS.

There is so much talk in the air about the powers and the role of a Speaker to adjourn the House over which he presides. This matter has been discussed recently at the Conference of Presiding Officers of Legislatures held at Delhi on 6th April, 1968. The crucial question posed at the Conference was whether the Speakers had an unlimited and unfettered right to adjourn the House and prevent it from functioning for whatever the period they like, and on whatever grounds they might deem fit in the exercise of their discretion. The question of the Speaker's powers is not a question of politics, but a question of public and national importance especially in the wake of a ministry being formed consisting of ministers belonging to a particular political party and the Speaker who is elected belonging to a different political persuasion. But once a member of the House of Legislature is elected as the Speaker, he must shed his political complexion, and become the guardian of the privileges and the rights of the House and its spokesman. But having been elected by the members of the House to regulate the proceedings and conduct of the House and deriving authority and jurisdiction from it, he can't so exercise his powers as to exceed his jurisdiction and deprive the House of its effective functioning under the pretext of adjourning the House. He is not merely literally the master of the House but also its first servant.

Moreover every member including the Speaker of the House before entering upon his duties takes on oath whereby he is required not to subvert the Constitution. By exercising the power of adjournment, he cannot make the House impotent or functionless for an unusually long period or an unresonable time. Healthy conventions if possible and effective amendment of the Constitution if necessary can be thought of to define the powers and delimit the privileges and powers of the Speaker.

If we study, for instance, the status and the position occupied by the Speaker of the House of Commons in U. K., we find that he is regarded as the representative of the House in its powers, proceedings and *dignity*. On the one hand he is the mouth or representative of the House in its relation with the Crown, the House of Lords and other authorities and persons outside Parliament. On the other hand he presides over the debates of the House of Commons, and enforces the observance of all rules for preserving order in its proceedings. If this status of the Presiding Officer of the Legislature is understood, it will be easy to appreciated as to whether he could do anything to bring the institution of his office into contempt. That does not mean that the Presiding Officer of a House of Legislature has no power to adjourn it for a reasonably long period. The basic guidelines can be laid down and followed as conventions instead of rigid rules. In conducting the proceedings of a meeting the desire of the majorities must be carried out. The rights of the minority must be protected. Business must be accomplished and human feelings must be respected *vide* John E. Baird's remarks in his thesis on conducting meetings.

SUSPENSION OF SENTENCE OF IMPRISONMENT TILL FILING OF APPEAL BY A PERSON CONVICTED AND SENTENCED IN A PRESIDENCY TOWN, UNDER SECTION 426 (2-A), CRIMINAL PROCEDURE CODE, 1898.

By

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Section 411, Criminal Procedure Code deals with the right of Appeal of a convicted person in Presidency towns It is as follows ·

411. Any person convicted on a trial held by a Presidency Magistrate may appeal to the High Court, if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees.

There is no other right of appeal for a person convicted and sentenced in a Presidency town (section 404, Criminal Procedure Code) Such right of appeal is unrestricted under section 407 (Madras Amendment) sections 408 to 410, Criminal Procedure Code outside it, but in the Presidency towns it is restricted. In re *Raju* alias *Idli*[1] this restriction was challenged on the ground of differentiation and violation of the rights of equality before the law and equal protection of the laws guaranteed under Article 14 of the Constitution On a charge under section 379, Indian Penal Code (pick-pocketing) read with section 75 Indian Penal Code the accused was convicted and sentenced to six months rigorous imprisonment by a Presidency Magistrate and therefore he could only file a Revision against the judgment and sentence Sadasivam, J held that it was not so for the following reasons —

" There is no substance in this contention. There are separate civil and criminal Courts in the City of Madras with separate jurisdiction and they differ widely from the civil and criminal Courts in the mofussil The reasons for the difference could be understood only by a person having knowledge of legal history. It could not be said that the existence of such difference in the Constitution and jurisdiction of the Courts in the mofussil and the City is a violation of the principle of equality before the law embodied in Article 14 of the Constitution. Such difference may be justified as one of reasonable classification based on geographical division. It should be noted that the petitioner would have been tried by a Second Class Magistrate in the mofussil, but he was tried in the City by a Presidency Magistrate who should at least be of the cadre of Sub-Divisional Magistrate. In fact, in this case, the petitioner was tried by the Third Presidency Magistrate who was District Magistrate before he came as the Third Presidency Magistrate. "

In this context it may be noted that in *Sri Kishan Singh and others* v. *State of Rajasthan*[2], with referene to the purpose of legislation on a territorial basis it was observed thus :—

1. (1962) M.L J. (Cr) 676 (1962) 2 M L J 537 A I R 1963 Mad 82
2. (1955) 2 S C.R 531 at 535 . A I R. 1955 S C 795

"What Article 14 prohibits is the unequal treatment of persons similarly situated, and therefore before the petitioners can claim the protection of that Article, it is incumbent on them to establish that the conditions which prevail in other areas in the State of Rajasthan are similar to those which obtain in Marwar But of this, there has been neither allegation nor proof. On the contrary, it is stated by the respondents in para. 10 of their statement that the tenants in the jagirs of Marwar were paying much more by way of rent and cesses than those in the Khalsa area of the State, that with a view to remove the inequality between the two classes of tenants within the State, a law was passed in 1943 providing for settlement of rent, and that again on 10th January, 1947 another law was passed abolishing all cesses (lags) and fixing the maximum share of rent payable in kind. These special features, it is argued, form sufficient justification for a separate legislation for this area It is also stated that the other States had their own rent laws suited to their conditions. There are no materials on which we could hold that the impugned Act is discriminatory in character and we cannot strike down merely on the ground that it does not apply to the whole of the State of Rajasthan."

A similar question arose for decision in *Bowman* v. *Lewis*[3]. There some of the areas in the State of Missouri were governed by a judicial procedure different from that which prevailed in others. Repelling the contention that this differentiation offended the equal protection clauses of the Fourteenth Amendment, the Court observed :—

Each State has the right to make political sub-divisisons of its territory for municipal purposes and to regulate their local Government. As respects the administration of justice it may establish one system of Courts for Cities and another for rural districts ; one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right.

If a Mexican State should be acquired by a treaty and added to an adjoining State or part of a State in the United States, and the two should be erected into a new State, it cannot be doubted that such new State might allow the Mexican laws and judicature to continue unchanged in the one portion and the common-law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited in any fair construction of the Fourteenth Amendment. It would not be based on any respect of persons or classes, but on municipal considerations alone and a regard to the welfare of all classes within the particular territory or jurisdiction.

This Court has also repeatedly held that classification might properly be made on territorial basis if that was germane to the purposes of the enactment. Having regard to the fact that the conditions of tenants vary from locality to locality, we have no hesitation in holding that a tenancy legislation restricted to a portion of a State cannot be held on this ground alone to contravene Article 14."

How far would this ruling in *Sri Kishan Singh* v. *State of Rajasthan*[4] support section 411 in view of section 426 (2-*A*), Criminal Procedure Code in classification for purpose of legislation on a territorial or historical basis ?

Section 411, Criminal Procedure Code thus creates a problem in applying section 426 (2-*A*), Criminal Procedure Code by which a valuable right is given for a

3 (1870) 101 U S 22 25 Law Ed 989
4. (1955) 2 S.C.R. 531 A I R 1955 S C 795

convicted person *viz*, the right to be outside the prison till he files the appeal. The section reads as follows :—

426 (2-*A*) : When any person other than a person convicted of non-bailable offence is sentenced to imprisonment by a Court, and an appeal lies from that sentence, the Court may, if the convicted person satisfies the Court that he intends to present an appeal, order that he be released on bail for a period sufficient in the opinion of the Court to enable him to present the appeal and obtain the orders of the Appellate Court under sub-section (1) and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

The applicability of section 426 (2-*A*), Criminal Procedure Code in favour of convicted persons in a Presidency town is very much circumscribed by section 411, Criminal Procedure Code, that is, only those persons convicted and sentenced for more than six months imprisonment in bailable offences can get suspension of sentence at the time when the sentence is pronounced in Court or immediately thereafter. For persons convicted and sentenced to 6 months and less of imprisonment even in bailable offences in Presidency towns a Revision only can be preferred against the sentence. So much so, Advocates who appear for persons convicted for bailable offences and sentenced to undergo imprisonment naturally wish and many of them do request the Magistrate to give an appealable sentence of imprisonment for their convicted clients not only to get the valuable right of Appeal but also to have the sentence suspended till the appeal is filed. On the other hand, in the mofussil, a person convicted and sentenced for any term of imprisonment for a bailable offence will be entitled to get the sentence suspended immediately when it is passed by the Court. It can be said that the right to get the sentence suspended as provided in section 426 (2-*A*), Criminal Procedure Code is as important to a convicted person as the right of appeal. This can be better appreciated if the purpose of passing section 426 (2-*A*), Criminal Procedure Code, is studied.

Section 426 (2-*A*), Criminal Procedure Code was enacted by Act II of 1945 (Central Act). The objects and reasons given in the Bill were as follows :—

" The fourth clause relates to the granting of bail to persons convicted of bailable offences. After a Magistrate passes an order convicting a person charged with an offence, then under the law as it stands today he has no jurisdiction to grant bail. Similar is the condition of the Court of Appeal after the judgment is passed by it. In cases of this type, the convicted persons ordinarily get bail from the Appellate or Revisional Courts established from the former but have to undergo considerable amount of trouble and expense before the order granting bail is obtained. In many a case they have actually to pass some days in prison before they can get the desired order. In case of bailable offences, a provision of this type suggested by the proposed amendment would go very much to soften the rigour of the present practice, and be helpful in advancing the interest of justice (page 190 of *Gazette of India*—15th November, 1941—Part V, L.A. Bill No. 37/41 dated 20th September, 1941)."

The original Bill was meant to be a proviso to section 496, Criminal Procedure Code and it was as follows :—

" Provided further that when a person has been convicted and sentenced to imprisonment and desires to file an appeal from the order of his conviction and is prepared to give bail or in case of the dismissal of his appeal from a conviction and sentence of imprisonment wants to file a Revision from the appellate order and is pre-

pared to give bail he may be released on bail by the Court passing the order of conviction or dismissing the appeal respectively

Provided that such an order may be confirmed or cancelled by the Appellate or Revisional Court.[3]

After reference of the Bill to the Select Committee, the object and reasons remained the same though somewhat modified in its extent of applicability. It was as follows —

" We think that a provision empowering the Court convicting a person accused of a bailable offence to release him on bail for the period required to enable him, in a case where an appeal lies, to make his application to the Appellate Court, is a salutary one Such a provision, however, can more appropriately be made in section 426, which deals with suspension of sentence pending appeal and the release on bail of appellants "

(Report of Select Committee dated 27th March, 1944, page 76 of Part V, *Gazette of India*, 1944)

The Bill was shaped into the present section 426 (2-*A*), Criminal Procedure Code and passed as an Act.

It is to be seen whether these objects and reasons for enacting section 426 (2-*A*) by way of an Amending Act is being fulfilled in the application of this provision of law with reference to Presidency Towns or whether the objects and reasons of the enactment are defeated or qualified to any extent by section 411, Criminal Procedure Code In other words, apart from the ruling made In Re *Raju* alias *Idli*[5], mentioned above, the constitutional validity of section 421 Criminal Procedure Code has to be further considered.

The question will therefore be whether section 411, Criminal Procedure Code unreasonably restricts the applicability of section 426 (2-*A*), Criminal Procedure Code.

The principle of reasonable classification and if necessary the doctrine of severability *i e.*, of section 411, Criminal Procedure Code in applying section 426 (2-*A*), Criminal Procedure Code, may have to be considered and examined in this connection having in view the Fundamental Right of Equal Protection of Laws guaranteed under Article 14 of the Constitution. The basic reason for limiting the right of appeal in Presidency Towns under section 411, Criminal Procedure Code is mainly historical and it may be analysed under the following sub-heads :

(1) Criminal law, particularly the procedural part of it was more advanced in the Presidency Towns of India than in the mofussil ever since the British rule.

(2) The Presidency Magistrate is an experienced Judicial Officer and an appeal against his judgment and sentence of conviction can lie direct to the High Court provided the sentence of imprisonment is above six months or fine above Rs 200 It may be noted that a First Class Magistrate of the moffusil also should have the same experience and same powers as a Presidency Magistrate (*See* proviso to section 30, Criminal Procedure Code and section 32 (1) (*a*), Criminal Procedure Code

(3) Where therefore a sentence is less than 6 months imprisonment passed by a Presidency Magistrate even in a bailable offence there is no necessity for any appeal against the sentence but a revision will do.

5 (1962) 2 M L J 537 (1962) M L.J. (Cr) 676

Whatever may be the reason, the object of section 411, Criminal Procedure Code seems to be to limit the number of appeals from the judgment and sentence of Presidency Magistrates to the High Court. All appeals from the Judgment of Presidency Magistrates will lie only to High Court. Though the object is achieved, it appears to be overdone when section 411, Criminal Procedure Code practically limits the operation of section 426 (2-*A*).

The principle of reasonable classification for purposes of legislation was explained in *Budhan Chowdhry and others* v *The State of Bihar*[6]. It was stated that the reason for classification should be disclosed and should be definite. After referring to all the relevant rulings of the Supreme Court it was observed at page 193 thus :—

" It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure. "

This observation was adopted in *Dalmia case*[7] and at page 548, it was observed :

" That while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the Law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation

The above principles will have to be constantly borne in mind by the Court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws."

It was further observed in the same judgment,

" In determining the validity or otherwise of such a statute the Court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute. . . Where the Court finds that the classification satisfies the tests, the Court will uphold the validity of the law."

So for the purpose of determining the reasonableness of a classification and whether a statute is discriminatory or not, the object and reason for passing the same can be referred to by the Courts The object and reason for enacting section 426

6. (1955) S C J 163 (1955) 1 S.C R 1045 A I R 1955 S C, 191

7. (1959) S C.J. 147 (1959) S C R 279 (1059) 1 M L J (S C) 67 (1959) 1 An W R. (S.C.) 67 : A I R 1958 S.C 538

(2-*A*) as Act II of 1945 have been sufficiently explained above for the purpose of appreciating this principle.

In *Kangshari Haldar and another* v. *State of West Bengal*[8], the Supreme Court had to consider whether the West Bengal Tribunals of Criminal Jurisdiction Act XIV of 1952 and the special procedure to be followed by constituting Special Courts under section 2-*B* and section 4 (1) proviso contravened Article 14 of the Constitution or not on the ground of discrimination. At page 660 the majority judgment *i.e.*, of 3 Judges was to the following effect :—

" In considering the validity of the impugned statute on the ground that it violates Article 14 it would first be necessary to ascertain the policy underlying the statute and the object intended to be achieved by it. In this process the preamble to the Act and its material provisions can and must be considered. Having thus ascertained the policy and the object of the Act the Court should apply the dual test in examining its validity ; Is the classification rational and based on intelligible differentia ; and, has the basis of differentiation any rational nexus with its avowed policy and object ? If both these tests are satisfied the statute must be held to be valid ; and in such a case the consideration as to whether the same result could not have been better achieved by adopting a different classification would be foreign to the scope of the judicial enquiry. If either of the two tests is not satisfied the statute must be struck down as violative of Article 14. Applying this test it seems to us that the impugned provisions contained in section 2 (*b*) and the proviso to section 4 (1) cannot be said to contravene Article 14. As we have indicated earlier, if in issuing the notification authorised by section 2 (*b*) the State Government acts *mala fide* or exercises its power in a colourable way that can always be effectively challenged ; but, in the absence of any such plea and without adequate material in that behalf this aspect of the matter does not fall to be considered in the present appeal."

The other two judges *i.e.*, Sarkar, J., and Subba Rao, J , were of the view that the impugned provisions violated Article 14 of the Constitution, Sarkar, J., observed that,

" By permitting a declaration classifiying offences committed in the past the Act makes a classification which may not stand the well known test which I have read from *Ramakrishna Dalmia's case*[9]. "

On this reasoning their Lordships came to the following conclusion :—

" Section 2 (*b*) of the Act in so far as it permits an area which was a disturbed area for the purposes of the Act, offends Article 14 of the Constitution and is therefore unconstitutional and void. The declaration in the present case was made under that portion of section 2 (*b*) and it cannot be sustained."

Hence they were of the view that that portion of the Act and the relevant notification for setting up Special Courts were void.

As seen above, the majority of the Judges held that under certain circumstances special procedure and special Courts can be constituted without contravening Article 14 of the Constitution. However the view of the other two judges who dissented from the majority view is worth noting in this connection.

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8 1960 (6) Cr L J 654 (1960) M L J (Cr) 349 (1960) 2 S C R 627 (1960) S C J 584 · A.I.R. 1960 S.C 457

9. (1959) S C J. 147 (1959) S C.R. 279 (1959) 1 M L.J (S C) 67 (1959) 1 An.W R (S.C.) 67 A I R 1959 S C 533.

Whether the right of getting a sentence suspended under section 426 (2-*A*), Criminal Procedure Code is substantive in nature or procedural it is certainly a right adjutant to the right of appeal The question will arise as to whether this right or privilege can be limited by the provisions contained in section 411, Criminal Procedure Code. The validity of geographical and historical reasons as such for classification were also considered in *Kangshari Haldar's case*[10] From this aspect also this judgment is important

Reasonableness of restrictions and violation of fundamental right can be considered not only in regard to the substantive part of the law but also in regard to the procedural part of the enactment—*N. B. Khare* v. *State of Delhi*[11] and *Bhuwhan Chowdhry* v. *State of Bihar*[12], *Chanan Singh* v. *Union of India*[13], *Jialal* v *Delhi Administration and Bhagwana* v *State of Uttar Pradesh*[14], the Supreme Court gave a comprehensive judgment after discussing all aspects of the subject. At page 4 it was observed thus .—

Section 29 (of the Arms Act, 1878) provides that for prosecution for offences committed within the areas to which section 32 of the Arms and Ammunition Act, 1860 (repealed) applied, no sanction was required but such sanction was required for a prosecution for the same offence when committed in other areas. This differentiation came to be made as a result of the political situation during 1857 *i.e.*, during the British regime.

Their Lordships held that there may be a valid classification based on a *geographical differentiation* but even then that differentiation must be pertinent to the object of the legislation. Section 29 was held to be severable from other portions of the Act and that its invalidity did not affect the validity of section 19 and section 29 could not be regarded an essential ingredient to the offence under section 19 and their Lordships observed :—

"This differentiation came to be made as a result of the political situation during 1857 and has reference to the fact that the largest opposition to the British Government came from the Talukdars to the North of Jamuna and Ganga but more than a century has since elapsed and the conditions are so radically changed that it is impossible now to maintain any distinction between territories North of Jamuna and Ganga and other territories on any ground pertinent to the object of the letter in question and on the well-known principles applicable to the matter it must be held that the differentiation is discrimination repugnant to Article 14."

The view of the two dissenting Judges in *Kangshari Haldar's case*[15] appears to have gained ground.

It is obvious that since 1898 *i.e.*, the year of the passing of the Criminal Procedure Code, means of communication, transport and other facilities have made vast strides and with such speed that the Metropolitan spirit has lost its significance. If

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10 (1960) Cr L J 654 (S C) (1960) M L J (Cr.) 349 . (1960) 2 S C R 627 . (1960) S C J. 584 : A I R. 1960 S.C 457

11 (1950) S C J. 328 ; (1950) S C R 519 A I R 1950 S C 211

12 (1955) S C J 163 (1955) 1 S C R 1045 A I R. 1955 S C 191: 1961 (1) Crl L J 851, (Punjab)

13. 63 Punj L R 51 A I R 1961 Punj 272

14. 1963 (1) Crl L J (S C) 1 (1963) 2 S C R. 864 64 Punj. L R 1051 : A.I.R. 1962 S.C. 1781.

15. 1960 Cr.L.J. 654.

so, there can be no legal discrimination as between persons convicted for offences committed inside Presidency Towns and persons convicted for offences committed outside.

It was further observed in *Jialal* v *Delhi Administration and Bhagwana*[16] as follows:—

" It is this that the appellant has to establish before he can succeed, and the policy behind section 29 is only one element in the decision of it Now it appears to us that what is really determinative of the question is that what has been already stated, that section 19 is a substantive provision, whereas section 29 is an adjectival one, and in general, the invalidity of a procedural enactment cannot be held to affect the validity of a substantive provision It might be possible to conceive of cases in which the invalidity of a procedural section or rule might so react on a substantive provisions, as to render it ineffective. But such cases must be exceptional. And we see nothing in the present statute to take it out of the general rule. On the other hand, the paramount intention behind the law is to punish certain offences No doubt section 29 was enacted with a view to give some measure of protection to the subjects. But if the Legislature had been told that section 29 would be bad, can there be any doubt as to whether it would have enacted the statute without section 29? The consequence of withdrawing the protection of that section is only that the accused will have to take up his trial in a Court, but there ultimately justice will be done. Therefore if the choice was given to the Legislature between allowing an offence against the State to go unpunished, and failing to give protection to a subject against frivolous prosecution, it is not difficult to see where it would have fallen. We cannot be mistaken if we conclude that the intention of the Legislature was to enact the law, with section 29 if that was possible, without it, if necessary. And that is also the inference that is suggested by the provision in section 29, exempting certain areas from its operation. "

Incidentally the doctrine of severability of a portion of a statute in applying another portion of the statute, for reasons of violation of Article 14 may be noted. A seven point formula was pointed out with reference to this doctrine in the *R.M.D.C case*[17]. This principle also has been elaborately explained and illustrated in *Jialal* v. *Delhi Administration and Bhagwana*[18] where it is observed :

" In general the invalidity of a procedural enactment cannot be held to affect the validity of a substantive provision. It might be possible to conceive of cases in which the invalidity of a procedural section or rule might so react on a substantive provision, as to render it ineffective But such cases must be exceptional There is nothing in the Arms Act to take it out of the general rule. On the other hand, the paramount intention behind the law was to punish certain offences No doubt section 29 was enacted with a view to give some measure of protection to the subjects. The consequence of withdrawing the protection of that section is only that the accused will have to take up his trial in a Court, but there ultimately justice will be done. Therefore if the choice was given to the legislature between allowing an offence

16 (1963) (1) Crl L J (S C) at page 8 · (1963) 3 S C R 412 . A I.R 1962 S C 1788

17. (1957) S.C.J 593 (1957) S C R 930 (1957) 2 An W R (S C) 76 (1957) M L J. (Crl.) 547 · (1957) 2 M.L J. (S.C) 76 A I R 1957 (S C) 628

18. (1963) 1 Crl.L J (S.C) at page 2 (1963) 2 S.C R 864 64 Punj L R. 1051 A I.R. 1962 S.C. 1781.

against the State to go unpunished, and failing to give protection to a subject against frivolous prosecution, it is not difficult to see where it would have fallen The contention that the intention of the Legislature was to enact the law, with section 29 if that was possible, without it, if necessary will not be mistaken

It has sometimes been stated that a distinction should be made in the matter of severability between Criminal and Civil laws, and that a penal statute must be construed strictly against the State But there are numerous decisions in which the same rules of construction have been applied in deciding a question of severability of criminal statute as in the case of a Civil Law, and on principle it is difficult to see any good ground for the distinction In the present case the fact that section 29 is a procedural and not a substantive enactment is sufficient to turn the scale heavily in favour of the State "

At page 8 it is observed as follows :—

" On a consideration of the scheme of the Act, and its provisions, we are of opinion that section 29 is severable from the other portions of the Act, and that its invalidity does not affect the validity of section 19 "

In *R M D C case*,[19] it was further indicated thus :—

" On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest then it will be upheld notwithstanding that the rest has become unenforceable."

So far as a Presidency Town is concerned, section 426 (2-A) depends upon section 411, Criminal Procedure Code and it is doubtful whether according to the doctrine of severability mentioned above, section 411, Criminal Procedure Code can be severed for the purpose of applying the provision contained under section 426 (2-A), Criminal Procedure Code

On a reading of sections 407 to 411, Criminal Procedure Code it appears as though there is a lacuna in the right of appeal, for persons convicted and sentenced to imprisonment in Presidency Towns.

Therefore it may have to be considered whether section 411, Criminal Procedure Code can be amended so as to bring the operation of section 426 (2-A), Criminal Procedure Code in the Presidency Town in line with the mofussil so that the purpose of section 426 (2-*A*), Criminal Procedure Code can be better fulfilled

The amendment proposed may be as hereunder :

"*Section* 411 Any person convicted on a trial held by a Presidency Magistrate may appeal to the High Court, if the Magistrate has sentenced him to imprisonment or to fine exceeding two hundred rupees "

It may also be noted that according to sections 405, 406 and 406-A, Criminal Procedure Code there are absolutely no restrictions on the right of appeal from orders passed by Presidency Magistrates

The recent ruling of the Constitution Bench of the Supreme Court in Writ Petitions, declaring Rule 8 of the Madras State Medical Colleges admission rules as unconstitutional may also be noted in this connection. The reasoning given therein is as hereunder :

19 (1957) S C J 593 (1957) S C R 930 (1957) 2 An W R (S C) 76 (1957) M L J (Crl.) 547 (1957) 2 M L J (S C) 76 A I R 1957 S C 628 at page 637

"Rule 8 of the admission rules violated Article 14 of the Constitution, by providing for allocation of seats among the various districts of the State on the basis of the ratio of the population of each district to the total population of the State. Whether the selection is from the socially and educationally backward classes or from the general pool, the object of selection must be to secure the best possible talent from the two classes. If that be the object, it must follow that that object would be defeated if seats are allocated district by district.

If that is so, the classification even if reasonable, would result in discrimination inasmuch as better qualified candidates from one district may be rejected, while less qualified candidates from other districts may be admitted from either of the two sources. The allocation of seats on a district-wise basis was, therefore, a violation of Article 14."

The same reasoning, *i.e.*, for discouraging discrimination on territorial or divisional basis can also be adopted to abolish the distinction between a convicted person in a Presidency Town and one outside the Presidency Town in getting the sentence of imprisonment suspended on conviction.

FUNDAMENTAL RIGHTS AND FREEDOMS.

By

JOSEPH MINATTUR, PH.D , LL D., *Barrister-at-Law.*

The unwritten and undying laws of God·
Not of today nor yesterday, the same
Throughout all time they live, and whence they came
None knoweth. **Sophocles**[1]

A quotation from Sophocles may have no persuasive influence on lawyers trained to value judicial precedents and revel in quoting judges' quotations; but it will persuade them to realise that the concept of basic human rights has an unquestioned antiquity and that even during those early days in the history of mankind it was believed that those rights would live for ever.

An opinion expressed by Cicero, a fellow-lawyer and jurist may be accorded better reception by lawyers He said about natural law which enshrines the concept of human rights —"True law is right reason in agreement with Nature, it is of universal application, unchanging and everlasting .... It is not allowable to alter this law nor deviate from it, nor can it be abrogated. Nor can we be released from this law, either by the Senate or by the people. And there will not be different laws at Rome and at Athens or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times."[2]

What has been believed and acted upon in ancient Greece and Rome has come down to us through the centuries.

The Virginia Bill of Rights, 1776, declared in Article 1:

That all men are by nature equally free and independent, and have certain **inherent rights,** of which, when they enter into a state of society, they cannot, by any compact, **deprive or divest** their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety. (emphasis added.)

The Universal Declaration of Human Rights speaks of the recognition of the inherent dignity and of the equal and **inalienable** rights of all members of the human family.[3]

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1. *The Antigone,* (translated by Gulbert Murray), vv 455-58
2. *De Republica,* III, xxii, 33, quoted in d' Entreves, *Natural Law* (1960) pp. 20-21 and in W. Friedmann, *Legal Theory,* 5th Edition (1967) p. 102
3. Preamble of the Universal Declaration of Human Rights, (U.N O) 1948.

Inviolable basic rights.

It would appear that there is nothing strange in treating basic human rights as eternal and not subject to changing moods of special parliamentary majorities.

Gajendragadkar, C.J., observed in **Sayyan Singh** v. **State of Rajasthan**[4] that:

".... unless it is assumed that the relevant power (to amend the fundamental rights provisions in Part III of the Indian Constitution) can never be included in Article 368 (which sets out the procedure for amendment) it would be unrealistic to propound the theory that the fundamental rights are eternal, inviolate and not within the reach of any subsequent constitutional amendment".[5]

Framers of Constitutions have sometimes given expression to such a theory, in concrete terms, and constitutional lawyers have frequently asserted that as the provisions enshrining fundamental rights are super-positive law, they are unamendable, irrespective of whether their inviolability is expressly provided for or not in the Constitution.

Let us consider two Constitutions to which the members of the Constituent Assembly and particularly those of the Drafting Committee occasionally referred, the Constitutions of Japan and Ireland.

The Constitution of Japan provides:

The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and **future generations** as **eternal** and **inviolable** rights.[6]

The Constitution of the Republic of Ireland which undoubtedly had a great impact on the Directive Principles of State Policy in the Indian Constitution speaks on the family as "a moral institution, possessing **inalienable** and **imprescriptible** rights, **antecedent** and **superior** to all positive law"[7]. It also declares that "man, in virtue of his rational being, has the **natural rights, antecedent** to positive law, to the private ownership of external goods."[8] The exercise of these rights, however, ought in civil society to be regulated by the principles of social justice.[9]

A number of Constitutions adopted in recent years have declared in express terms that the provisions relating to basic human rights are unamendable.

The Constitution of Lybia provides that—

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4 AIR 1965 S C 845 (1965) 1 M L J (S C) 57 (1965) 1 S C J 377 (1965) 1 An W R (S C) 57

5 *Ibid* at p 859

6. Article 11, emphasis added

7. Article 41, emphasis added In *Ryan* v *Attorney-General*, (1965) *Irish Reports* 294, it was explained that 'inalienable' means that which cannot be transfered or given away while 'imprescriptible' means that which cannot be lost by the passage of time or abandoned by non-exercise (at p. 308).

8. Article 43, emphasis added

9. Article 43, 2 (1).

No proposal may be made to review the provisions relating to the monarchic form of Government, the order of succession to the throne, the representative form of Government or **the principles of liberty and equality** guaranteed by this Constitution.[10]

In the Constitution of Somalia it is provided that the procedure for amendment cannot be applied for the purpose of modifying the republican and democratic form of the State nor for restricting the fundamental rights and freedoms of the citizen and of man sanctioned by the Constitution.[11] The democratic principles which rule the Republic are exempted from the purview of constitutional amendment in Ruanda [12] In the Constitutions of Madagascar[13], Dahomey[14], Sengal[15], Niger[16], Tunisia [17] Ivory Coast [18] Guinea [19] and Gabon [19a] (to cite a few examples) the republican form of Government is not subject to amendment The 'basic articles' in the Constitution of Cyprus cannot be amended or repealed.

British Conventions in India.

It may be asked why the Indian Constitution does not expressly state so in so many words if the provisions relating to fundamental rights are conceived as being beyond the purview of amendment. The explanation is to be found in the history of Indian independence and India's constitution-making The fundamental rights enshrined in Part III of the Constitution are certain rights which, in the main, remained unformulated in the constitutions of the Commonwealth, but recognized in judicial decisions The provisions in Part III may have been thought of as being merely declaratory.

It is familiar learning that in spite of its great length and its various provisions made in abundant caution, the Indian Constitution took for granted a number of things, for instance, a few of the British constitutional conventions. When the Pakistan Constitution of 1956 and the Malayan Constitution of 1957 made clear provisions regarding who should be appointed Prime Minister, the Indian founding fathers seemed to have assumed that India would follow the conventions of the British Constitution. It is not doubted that they envisaged a parliamentary form of Government. Though ministerial responsibility to the House of the People is emphasised[20], one finds the following constitutional provisions:

(i) The executive power of the Union shall be vested in the President [20-a]

(ii) There shall be a Council of Ministers . to aid and advise the President.[20-b]

(iii) The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister.[20-c]

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10 Article 197 , emphasis added.
11 Article 105
12 Article 107 *See also* Constitution of the Central African Republic, Article 37
13 Article 65
14 Article 99
15 Article 89.
16 Article 73
17 Article 60
18 Article 73
19 Article 50.
19-*a* Article 70.
20 Article 75 (3)
20-*a*. Article 53 (1).
20-*b*. Article 74 (1).
20-*c*. Article 75 (1).

(iv) The Ministers shall hold office during the pleasure of the President [20-d] These provisions have not been interpreted as envisaging a presidential regime for India.

The Constitution of Malaya, adopted a few years later, provided in very clear terms that the Yang di-Pertuan Agong (Head of State) shall first appoint as Perdana Mentri (Prime Minister) to preside over the Cabinet a member of the House of Representatives who in his judgment is likely to command the confidence of the majority of the members of that House [21] In Commonwealth Constitutions adopted in recent years one finds that the British constitutional conventions when 'received', are usually set out in some detail.[21-a].

The omission to mention these conventions in the Indian Constitution has not been seriously considered to have detracted from the general assumption that India adopted a parliamentary form of Government modelled on Westminster.

Most of the provisions in Part III were, as we have mentioned already, known in judicial decisions in the Commonwealth They were decisions fortified by the rule of **stare decisis.** It is therefore improbable that the members of the Constituent Assembly could have conceived the principles found in Part III as being merely playthings of a special majority of Parliament (to borrow Hidayatullah, J's phrase). If any member had any doubts about the permanent character envisaged for these principles as set out in the Constitution, they may have been allayed by Article 13 It is of interest to note in this connection that Dr Deshmukh introduced an amendment[22] in the Constituent Assembly with a view to making the provision regarding property unamendable, but on 19th September, 1949, he withdrew the amendment [22-a] It is unlikely that between the introduction of the amendment and its withdrawal, his concept of right to property underwent a phenomenal change. His withdrawal of the amendment may have been induced by his own reflection or by a private communication received from a member of the Drafting Committee that as the provision was in Part III of the Constitution, it was already made unamendable Probably most members of the Constituent Assembly had the same attitude to property as the one voiced by Sirdar Patel when he said that the State might acquire land as well as many other things, but would acquire them after paying compensation, but would not expropriate them[23].

The Report of the Nehru Committee (1928) stated very clearly that " . . . our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances "[24]

It is not surprising if the Constituent Assembly accepted and acted upon the views expressed in this Report. This is especially the case if, as Bhagwati, J , considers, the genesis of the declaration of fundamental rights is to be traced to this report.[25]

Minority rights.

One of the reasons why fundamental rights are sought to be provided for in constitutions is the fear of minorities that their rights would be ignored by majo-

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20-*d* Article 75 (2)

21 Article 43 (2) (*a*) Similar provisions are found in the Constitutions of Nigeria (Article 87) Uganda (Article 61), Kenya (Article 75), Sierra Leone (Article 58)

21-*a* *See* note 21

22 Amendment No 212

22*a*- *See* Constituent Assembly Debates, IX, 37, p 1665

23 Constitutent Assembly Debates, Vol 1, p 517, quoted by Hidayatulla, J in *Golaknath* v *State of Punjab*, (1967) 2 S C J 486 A I R 1967 S C 1643 at p 1710

24 Quoted by Bhagwati, J in *Basheshwar Nath* v *Commissioner of Income-tax*, (1959) S C J 1207 A I R 1959 S C 149 at 160 (emphasis supplied).

25. *Ibid*

rity groups If the members of the Constituent Assembly who belonged to some minority group or other felt that the fundamental rights could be easily amended or repealed by a special majority of Parliament, they would have, in all probability, insisted on some better method of entrenchment, say, for instance, the consent of a fairly large number of States. If they did not even consider the question of including Part III in the proviso to Article 368 which stipulates the consent of half the number of States for amendments of certain provisions, and willingly acquiesced in the adoption of Article 368 as it is, this could only have been on the understanding that the provisions relating to fundamental rights were unamendable, in case a proposed amendment sought to take away or abridge any of these rights The fact that their voice would not have probably prevailed against the majority groups could not be considered a sufficient explanation for their silence.

Property rights.

A word about property rights may not be out of place here.

As Hidayatullah, J (as he then was) said, the provision regarding the right to property should have been placed in a different chapter[1] Sirdar Patel who appeared to provide for adequate compensation if land or other property was acquired may have thought that the provision should be placed in a chapter which contained guaranteed rights incapable of curtailment.

Among basic human rights, right to property appears to be the weakest[2]

At least according to one interpretation, St Thomas Aquinas considers "the right to the acquisition of property as one of the matters left by natural law to the State as a proper agency for the regulation of social life "[3] According to another interpretation[4], St Thomas does not refer to the legal theory of acquisition, but in the view of the Angelic Doctor "The ruler was bound by natural law to maintain the general system of private ownership and direct it for the common good, but he was not bound to respect as a natural right the property of any one man"[5]. The State, while protecting private property, ought to regulate it for the common good

Suarez appears to have to an extent agreed with St Thomas when he argued that neither division nor community of property was postulated by natural law: "just as, conversely, the advantages which show that a division of property is better adapted to man's nature and the fallen state, are proof, not that this division of ownership is a matter prescribed by natural law, but merely that it is adapted to the existing state and condition of mankind."[6]

One may also refer to what Jacques Maritain has to say about right to property.

"The right to the private ownership of material goods pertains to natural law, in so far as mankind is naturally entitled to possess for its own common use

1 *Golaknath* v *State of Punjab*, op cit, (1967) 2 S C J 486 A I R 1967 S C 1643 at p 1710.

2 Hidayatullah, J, in *Golaknath Case*, (1967) 2 S C J 486 A I R 1967 S C 1643 at p 1710

3 W Friedmann, *Legal Theory*, Fifth Edition (1967) pp 110-111

4 Richard Schlatter, *Private Property*, (1951) p 50

5 *Ibid*

6 *Ibid*, p 181 where Friedmann quotes Suarez, *Treatise on Laws and God the Law Giver*, (1612) Book, II, Chap. XIV,

the material goods of nature, it pertains to the law of Nations, or **jus gentium,** in so far as reason necessarily concludes in the light of the conditions naturally required for their management and for human work that for the sake of the common good these material goods must be privately owned. And the particular modalities of the right to private ownership, which vary according to the form of a societey and the state of development of its economy, are determined by positive law."[7]

After having pointed out that the right to the private ownership of material goods is rooted in natural law, Maritain adds in a footnote

"The right to the private ownership of material goods relates to the human person as an extension of the person itself, for enmeshed in matter and without natural protection for its existence and its freedom, it must have the power to acquire and possess in order to make up for the protection which nature does not afford it On the other hand, the use of private property must always be such as to serve the common good, in one fashion or another, and to be advantageous to all, for in the first place it is to man, to the human species generally, that material goods are granted by nature.[8]

What prompted the people of Ireland to enact in their Constitution the following provisions regarding the right to property and the exercise of the right of this awareness that the use of the property should serve the common good.

The Constitution of Ireland, after having stated that the State guarantees to pass no law attempting to abolish the rights of private ownership or the general right to transfer, bequeath or inherit property says that

"The State recognizes, however, that the exercise of the rights mentioned ... ought, in civil society, to be regulated by the principles of social justice".[9] and that.

"The State, accordingly, may as occasion requires delimit by laws the exercise of the said rights with a view to reconciling their exercise with exigencies of the common good."[10]

The Indian Constitution which followed in the footsteps of the Irish Constitution in adopting a social policy which should guide the State in the governance of the country, could have also "received" these provisions It did not adopt the provisions of the Japanese Constitution either. Whatever reasons there may have been in not adopting the provisions from the Irish or the Japanese Constitution, the provision relating to property rights could have been left in a less entrenched position But it may be that Sirdar Patel was of the view that the provision should be so thoroughly entrenched as to be practically unamendable, and his view appeared to have prevailed [11]

Opinion of jurists.

Let us now look at some of the opinions expressed by jurists in recent years in relation to the inclusion of basic rights in constitutions.

7 J Maritain, *Man and the State,* (1954) p 91

8 J Maritain, *The Rights of Man and Natural Law,* (1944) p 40.

9 Article 43, 2 (1)

10. Article 43, 2 (1).

11. *See* Granville Austin, *The Indian Constitution : Cornerstone of the Nation,* (1966) pp. 87 ff.

The basic Law of the Federal Republic of Germany states in its first article that the German people acknowledges inviolable and inalienable human rights as the basis of every human community, of peace and of justice in the world. After listing a number of basic rights, it provides that "In no case may a basic right be affected in its basic content "[12] It also provides that

"An amendment to this basic Law by which the organisation of the Federation into Laender, the basic co-operation of the Laender in legislation or the basic principles laid down in Articles 1 and 20 are affected, shall be inadmissible."[13]

The prevalent juristic opinion in Germany appears to be that even if the basic rights were not set out in the Constitution, they would be regarded as valid and enforceable as being comprised in super-positive law.[14]

A number of German jurists consider that constitutional provisions relating to basic human rights are merely declaratory[15]. If they are declaratory only, it would mean that they were valid before. And the question arises whether they would remain valid in future and whether they would be binding on a future constituent power. Nipperdey is of the view that a future constituent power is bound by the principles of natural law.[16]

In an opinion[17] handed down by the Constitutional Court of the Federal Republic on 23rd October, 1951, it was declared that a constituent assembly is bound by the super-positive fundamental legal principles which take precedence over any written law. The Court also stated that it recognised the existence of a super-positive law and that its competence extended to measuring the written law against such super-positive law. It quoted with approval the following passage from a decision of the Bavarian Constitutional Court:

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12. Article 19 (2).

13 Article 79 (3) Article 1 reads : (1) The dignity of man shall be inviolable To respect and protect it shall be the duty of all state authority

(2) The German people therefore acknowledges inviolable and inalienable human rights as the basis of every human community, of peace and of justice in the world

(3) The following basic rights shall be binding as directly valid law on legislation, administration and judiciary

Article 20 provides :

(1) The Federal Republic of Germany is a democratic and social federal state

(2) All state authority emanates from the people It shall be exercised by the people in elections and plebiscites and by means of separate legislative, executive and judicial organs.

(3) Legislation shall be limited by the constitution, the executive and the administration of justice by legislation and the law

14 W Friedmann, "Ubergesetzliche Rechtsgrundsatze" *Archiv fur Rechtsund Sozialphilosophie*, B XLI, pp 34 8 "ff , H Mitteis, *Uber das Naturrecht*, pp 30-43, H von Mangoldt, Das Bonner Grundgesetz, 2 Aful B 1 pp 70-71 , Wurtemberger, Das Naturrecht und die Philosophie der Gegenwart" *Juristenzeitung*, 1955, pp 1 ff *See* F " Castberg, *Freedom of Speech in the West, pp* 347 ff whomentions these jurists

15 *See* Castberg , *op cit* , who cites O Bachof, "Verfassungswidrige Verfassungsnormen, " *Recht und Staat in Geschichte und Gegenwart*, p 30, A Hamann, Das Grundgesetz fur die Bundesrepublik Deutschland vom 23 Mai 1949, p 65

16 H C Nipperdey, Die Wurde des Menschen, in *Die Grubdrevhte*, II hrsg von F L. Neumann H C Nipperdey, U Scheunder, pp 22

17. B. Verf. G E. 1, 14, at pp. 17 and 18. *See* Castberg, *op. cit.*, p. 359.

"There are fundamental constitutional principles which are so essential and are such an emphatic expression of a law which precedes the constitution that they bind even the constituent body and can cause other constitutional provisions which are not of the same level of importance to be void on account of the latter coming into conflict with the former.[18]"

It is this super-positive law which has been contemplated in Article 19 (2) of the Bonn Constitution when it refers to the basic content of the basic rights.

And it is this super-positive law which Antigone had in mind when in answer to Ismene's suggestion.

"When Creon hath forbid? 'Tis lawlessness."
She said:

"What right hath he to bar me from mine own?"[19]

18. B Verf. G E 1, 14, at p. 32
19. Sophocles, *The Antigone*, vv. 46-47, Gilbert Murray's translation.

INDUSTRIAL ACTIONS.

(A Socio-legal Study.)

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Trade Union movement in India started in the last quarter of the 19th Century. The first labour agitation dates back to the year 1875 when the social reformers led a movement against the prevalent deplorable working conditions of women and children in the factories at Bombay The earliest strike that is recorded was in 1877 when the workers of the Empress Mills at Nagpur struck work over the question of wage-rates. This was followed by strikes in other establishments. But the nature and character of the strikes in the early decades of the trade union movement in India were quite different, for it was only that either individual workers or their groups used to abandon that particular undertaking and migrate to other industrial centres. There was no attempt to obtain redress through concerted action.[1]

Strikes were recognised as a legitimate weapon of the working-class to demonstrate solidarity and press their demands from the very beginning of the trade union movement in India. The association and participation of Trade Unions in the political movement of the country could be seen as from 1908.[2] Through the decades of its growth and development the Trade Unions in India developed other and more effective weapons to demonstrate and protest, motivated by redress of grievances rather than merely abandoning the work when they resort to strike. Boycott and Picketing came as handy weapons, either accompanying or following the strike to coerce the employers to concede the demands. In recent years 'Mass-Casual Leave' has been invented as a peaceful weapon of the trade unions to protest. The newest and the most controversial of the present-day Industrial action is the 'Gherao' which is widely used as a coercive method in India and in other countries too.[3]

Industrial actions: Legal aspect.—Strikes, Picketing, Boycott, Mass-Casual leave and Gherao are methods of agitation and forms of 'Direct Action'. In the present-day context, these various kinds of Industrial actions as the term refer to, in its practice, take on an added connotation to emphasise a 'defiance of the

1. V.V. Giri . Labour problems in Indian Industry p. 1-2. Dufty: Industrial relations in India. Chapter 2

2 *Ibid* : fn 1 A six day political mass strike was organised by the Bombay workers to protest against the sentence of imprisonment on Lokamanya Tilak.

3. It is reported that in London the students of the University Colleges and in Paris in the recent upheavals, and in other European and American Capitals Trade unions have begun widely using ' Gherao' as a weapon against the employers and Governmental authorities.

employer's order' than 'a willing suspension or voluntary cessation of work', so much so, a strike has become more often coercive than persuasive. Picketing as employed has come to demonstrate the occupation of a plant or store or shop or any premises by the striking employees barring entry and exit even to the employers and third parties, so as to obstruct the normal flow of business which constitutes an unlawful interference with the freedoms guaranteed to the individual

Where a strike is not fraught with violence and is not accompanied by picketing, it is a voluntary action on the part of each employee, acting in combination, to deny their labour to the employer. To that extent it is justified The judicial recognition of a strike and its theoretical justification as a lawful means is the existence of **"Just Cause"**. The legitimacy of the method has to be tested with the existence of "Just Cause" in the circumstances of each strike The strikers may plead the existence of just cause as a defence for the adoption of a coercive method The question of just cause in a particular set of circumstances and its limits is a justiciable issue But the absence of just cause necessarily vitiates the legal character of the strike Since law imposes duties for the purpose of upholding rights, torture in whatever form gives rise to a right of action in law, and a claim for damages on that score is recognised by law In all these collective actions which are intended to persuade the opposite party to accede to the demands and come to terms, there is, if not a certain amount of torture manifest, at least some degree of coercion resulting from the action itself As between persuasion and coercion, law draws a definite distinction. But very often, under certain set of conditions persuasion would amount to coercion. Whether persuasion as used in a particular case amounts to coercion is a matter of reasonable inference from the facts of the case and the position of the parties in the whole of the circumstances.[4] In every such circumstance the question of the rights of the parties involved is necessarily the consideration. It is generally the right of one group acting in combination versus the other or individuals, and more often it is the group versus the individual, that comes up as the main question

The constitutional rights of the individual and the statutory or Common Law right of the **group** for concerted effort and collective action to sponser and seek their interest is every now and then before the Courts of law Statutory regulation of the rights of both the individual and the group has become of necessity the function of the legislature and to read them harmoniously, so as to eliminate friction and discord has become the task of the judiciary in the emerging industrial societies Gherao as a form of 'direct action' affects more directly the individual's right to freedom of movement and profession which is constitutionally protected and guaranteed How so ever mild Gherao be, as far as the incidence of Gherao in its relation to those Gheraoed is concerned, it is impossible to conceive the action as devoid of the elements of restraint, detention and confinement and the consequent duress and coercion To the extent one is encircled and pressurised by constant slogan shouting and not permitted to move unless he accedes to their demands it is undoubtedly duress and harrassment by workers acting in combina-

4. Astbury J in *Valentine* v *Hyde*, (1919) 2 Ch. 129.

tion causing agony to the individual It is a denial of his freedom which he till that time enjoyed. Thus from all angles, Gherao, besides being an unconstitutional act infringing the fundamental right of the individual or individuals gheraoed and unlawful interference with the freedom of the individual, it is also an offence within the law of **nuisance** though it may not exactly fall within the realm of extortion and criminal trespess

In this regard it would be of interest to note the Common Law development in this field. Early Common law, as guardian of the liberty of the subject guaranteed two inter-related freedoms

(a) a freedom to contract with others as to services or things,

(b) a freedom in the exercise of one's right from the unlawful interference by others

The rights and duties of the individual **vis a vis** that of the Groups and combination of individuals had always been the concern of law and judicial determination The process of Common Law in the field of Labour relations had been that while recognising the individual's right it also recognised the limitations imposed by law on that right For quite some time the judicial tendency was to place employees on duty rather than on right The statutory modifications made from time to time on these rights had been approved of succinctly under the canon of expediency and practical necessity Thus Astbury, J , in **Valentine** v **Hyde**[5] stated that the common law of right of every man to dispose of his labour as he will, subject to the limitations recognised by law, is too well established to be now questioned.

Regarding an individual's right, the Common law rule is that "A person is at liberty to earn his living in his own way provided he does not violate some special law prohibiting him from doing so, and provided he does not infringe the right of others". An individual may persuade another not to enter into a contract but he must not as a rule use coercive means to such an end [6] As regards rights and duties of social groups, it was recognised at common law that individuals should have a legally recognised right to combine for lawful objects, and workmen' may combine in furtherance of their interests At the same time it was also realised that combinations may be potent as instruments, not merely for realising, but also for crushing the freedom of the individuals[7], and so cannot be absolved of its liability for the disregard of the rights of others. Thus Lord Lindley observed "Numbers may annoy and coerce where one may not Annoyance and coercion by many may be so intolerable as to become actionable and produce a result which one alone could not produce" . ."A combination in the nature of trade or professional union cannot escape the responsibility for a disregard of the rights of others "[8] Similarly Lord Atkinson stated that the fact that the members of a trade union are merely acting in obedience to a rule of their union believed by them to be for their benefit is no defence for an action for the

5. (1919) 20 Ch 1 at 137
6 *Quinn* v *Leathem*, (1901) A C 495 at p 534
7 *Mogul S S Co* v *Mc Gregor*, (1892) A C 25
8 *Ibid* Fn 6 at 538.

breach of any contract they have entered into[9]. .. "and still less is it a defence to the wilful and malicious infringements in combination of that legal right of personal freedom of action which they claim for themselves but to which others are entitled quite as fully as they are."[10] So also McCardie, J., in **Pratt v. British Medical Association**[11] explained that "every person has a right under the law, as between himself and his fellow-subjects, to full freedom of disposing of his own labour or his own capital according to his own will." But that right is subject to the rights of others. . ... But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so Any interference with their liberty to deal with him affects him." Thus the trend at common law on the question of individaul **versus** the group in the early part of the 20th Century could be summarised in three propositions

1. The right of the individual to combine for a common purpose is an essential element in the liberty of the subject.

2. The right cannot be denied merely because other individuals may suffer

3. The right must not be exercised in such a way as to amount to coercion of others without "just cause" and to their personal damage.

Referring to strike as an Industrial action Lord Lindley stated that "A combination not to work is one thing, and is lawful A combination to prevent others from working by annoying them if they do is a very different thing, and is **prima facie** unlawful Again, not to work oneself is lawful . .but to order men not to work when they are willing to work is another thing "[12]

Prof. J. Brown[13] summarising the early decisions at common law formulated four clear propositions.

1. A strike is, or may be, a form of unlawful interference with the right of an employer to the free exercise of his occupation or calling.

2. While the element of combination is essential to constitute the common law concept of strike it is not essential to constitute the common law concept of unlawful interference.

3. While interference is not **per se** actionable, it may become an important element for legal purposes if it is unlawful, **i e.,** tainted with some such circumstance as procuring a breach of contract, or the use of such means as fraud, threat, coercion, or personal violence. The line between interference and "unlawful interference" though some times obvious is often difficult to draw.

4. Assuming unlawful interference, an employer has a right of action for damages, unless there exist a 'just cause'.

The element of 'just cause' in certain cases cannot be disentangled from the element of unlawful interference. In other cases it is distinct. Whether it exists in fact, is to be decided, as a rule, by reference to all the circumstances of the case.

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9. (1955) A.C. 814 at 830.
10 Lord Atkinson in *Read* v. *Friendly Society of Operative Stone Masons*, (1902) 2 K.B. 88.
11. *Quoting Sir Williams Erle* (1919) 1 K B. 244.
12 In *Quinn* v *Leathem*, (1901) A.C. 495 at p 534.
13 Jethro Brown : "Statutory prohibition of strikes", (1920) 36 L.Q.R 378 at 368.

Prof. Brown concludes that "The employee **prima facie** has a right to accept employment, refuse employment, to give notice of cessation of employment, to change his employer, to change his employment and generally to combine with other employees for common purposes provided he respects the rights of others. In considering whether a combination in the nature of strike ... can be regarded as such an infringement of the rights of others as to give rise to a right of action , several elements require to be taken into account. The purpose of the combination may be coercive. But, assuming that the object is merely to force an employer to agree to certain terms of employment, without any attempt (other than persuasive) to prevent others from taking up the work in the place of those who go out on strike, it may be difficult to show that the coercion of the employer gives rise to a right of action All the circumstances of the case should be considered—for **e.g.,** whether the intent be malicious in a legal sense or be merely in protection of the interest of those who strike, the methods of coercion adopted and the justification alleged "[14]

A strike is legitimate unless it is illegal, picketing is permissible where it is not unlawful, mass casual leave is a lawful right if it does not fall within the ambit of illegal strike; where as gherao could neither be legal nor permissible. While there is all justification for declaring gherao to be illegal under the Indian constitutional law, inasmuch as both picketing and gherao stand on identical grounds in their **modus operandi,** casual connection and the resulting factors, it is only a very thin line that demarcates them as violent or peaceful actions. Further, as far as the presence of the elements of restraint and coercion are involved, it is doubtful whether gherao and picketing could be easily distinguished so as to differentiate the former as illegal and the latter as legal

If one considers the extent of restraint in these industrial actions, the greatest is to be found in a gherao, as comparatively there is no element of restraint imposed on any individual as such in a strike or a pocketing Therefore two propositions come up for consideration

(1) In the event, if it could be accepted that gherao could be conducted peacefully and as such the element of restraint in it becomes condonable, could gherao become justifiable as a trade union weapon, as much legitimate as a strike or picketing ?

(2) In the event, if the criminal element in gherao could be individualised, would it be possible to equate it to an action of strike coming within the legitimate ambit of trade union actions and so permitted ?

Even in a strike for specific acts, the individual is liable either for misconduct or for criminality. In the former he is taken to task by disciplinary proceedings and in the latter he becomes punishable under the Penal Code.

Industrial actions: Socio-economic aspect.—On the sociological plane the justification made out for such industrial action as that of strike, gherao, etc., is that it is directed against the recalcitrant employer who does not care to meet the just demands of the employees or to implement the awards, that it is retaliatory in nature for the unjustified action of retrenchment dismissals and victimisa-

14. *Ibid* fn 13 at 387.

tions, and a palliative to the delaying tactics of the employer, so as to yield quick results and speedy remedy Further it is also maintained that these are peaceful methods.

Perhaps it is arguable that gherao, "if done in a manner that suits the Indian tradition of non-violence" and in an orderly way, would be as though adding one more weapon to the forms of industrial actions, to bring home and high-light a right cause and at the same time fight it out in a peaceful manner—an Indian contribution. Such a proposition stands on doubtful premises Firstly, is it feasible to demonstrate a gherao without infringing the corresponding right of the gheraoed and without inflicting a kind of mental torture and agony or even without imposing restraint—in that sense violence? Secondly, what will be the psychological consequences and repurcussions of such action in the society as a whole? Would it be without any demoralising tendency? On the one side the effect of industrial actions such as gherao is the speed of the fear psychology in the executive and administrative heirarchy that every individual who is placed in the position of decision-making would feel that he may be subject to such mob violence if he takes any decision that is not welcome to one or the other group that is likely to be affected by the decision. This in turn, demoralises the administrators if not to shelve, their decision at least to shift responsibility, which factor ultimately affects the executive and administrative efficiency of the concern

On the other side, strikes, picketing and gheraoes are industrial actions that necessarily result in work-stoppages. Even mass casual leave, implies stoppage of work in actual effect. These industrial actions are very often more particular or sectional than general in their operation Still for however short a period it may be for however small a section it be, it has an impact on the industry as a whole with reference to production and the productive capacity of the plant. In terms of man-hours, and industrial out-put, it is tremendous loss.[15] The loss in

15. *No. of disputes resulting in work-stoppages, workers involved, and man-days lost for all India.* 1950-59.

Year	No. of disputes.	No. of workers involved.	No. of Man-days lost.
1950	814	719883	12806704
51	1071	691321	3818928
52	963	809242	3336961
53	772	466607	3382608
54	840	477138	3372630
55	1166	527767	5697848
56	1203	715130	6992040
57	1430	889371	6429319
58	1524	928566	7797585
59	1523	692914	5606079

N B—This statistical chart is prepared from the statistics supplied by the Indian labour statistics publication.

man-hours and the consequent loss in the production capacity, affects the national economy in terms both of price structure and **per capita** income, besides the income on the capital and margin of profit for each industry. Apart from this, it is a great strain on the employee too Every industrial action has to maintain itself, and meet its expenses out of the trade union funds or special collections for the purpose The funds that could be directed and applied for the welfare of the employees has to be spent out for meeting the exigencies of industrial action This in its turn is a constant drain on the actual wages of the employees, who are taxed by the union for every industrial action

Besides, a strike action affects the employees' service conditions as well (may be continuity of service, or other fringe benefits or even loss in wages) Though the employees who were directly affected by loss in wages, do so, in the hope of recouping themselves later on with higher wages and improved conditions of labour, in the ultimate analysis it is the average earning capacity of the employee that is affected. It may be argued that the loss of wages to the employee or the loss in business to the employer is too remote to be reckoned. All the same, it is certain that the effect of an industrial action on the community as a whole is adverse For, it is nothing but natural that whether the employer pays higher wages or suffers losses as a result of any industrial action, in order to make good, he passes on the burden of such increased cost to the consumer and thereby to the society as a whole (which includes the very same industrial employees), who pay in fact in terms of enhanced prices Thus, the resultant of every industrial action is the reduction in the net earning and actual spending capacities of the employee which affects him and his family in their standard of life, in spite of the increased wages and other service conditions he gained I would argue that whatever marginal benefits the employees could derive through precipitated industrial action of the nature of strike, picketing, gherao and the like, in the final analysis, they are wiped out in terms of price fluctuation and increased cost of living caused by the loss in production and its impact on national economy. Besides these hardships on the individual and the society, an industrial action of the kind, breeds animosity which affects the smooth employer-employee relationship impairing staff co-operation at all levels plant as well as industry.

Every dislocation of industrial production finds some reflex in the prices of commodities When the economic machine is thrown out of gear, it is difficult to say how far or in what directions the consequences may extend Industrial stability is essential to hte efficient action of those who direct the enterprise. Whether the owners of the enterprise are in the private sector or in the public sector of the economy, conditions of industrial unrest hampers the progress at every turn.

In fact, no such action would transform our industrial system in accordance with the ideals of a socialistic pattern of society, which would enable the community to maintain a higher real wage except that warranted by the conditions of financial stability of the country as a whole Hence, in the present conditions of our national economy, even granting that there is maldistribution of national wealth, the supreme effort should be, whatever be the section of society concerned to maintain and create conditions of a minimum of industrial peace, steady and

increased production to boost the national economy, so as to stabilise the price structure and arrest the increasing cost of lying. India cannot afford to be otherwise if it is to repair its disrupted and depleted economy.

Industrial action versus **Industrial relation.**—In the plane of industrial relation many a machinary had been devised and procedures laid down for the removal of the causes of conflicts and redress of grievances at the appropriate levels. If they could not be resolved at that proper stage and disputes emerge, authorities are provided by law for quick and early settlement of it. Unfortunately the circuitous way in which matters move and the inordinate delay that happens where speedy remedies were envisaged, defeat the very purpose of law and its machinery. Very often the unredressed grievance transgress the 'grievance procedure' and failing at the Conciliation Machinery or by-passing it, crystalises in a dispute, when the Government steps in as the matter has to be "referred", and the Governmental apparatus, so slow-moving, in its normal course takes its own time to refer the dispute for adjudication After an irksome adjudication process, an 'award' and its implementation follow Finally, the provisions of appeal are all exploited as the last resort by the parties involved Thus it takes a long and tedious way, perhaps a number of years, to see that a simmering dispute at one stage gets finally settled. Even at this last stage, when everything has been settled by the law and legal process, the cantankerous employer would still have room to evade the liability under the compulsion of law, by his dilatory tactics and often successfuly puts off the employees by the non-implementation of the award

Every precipitated action is a strain on the employer-employee relationship It could be argued either way that these industrial actions impair the amicable employer-employee relationship or **vice versa,** that they are the result of already estranged relations In whichever way it is argued, the fact remains that strikes, picketing, gherao, etc , are industrial actions that embitter the established relationship, which could only be worsened to react badly on the prevailing harmony in the industry, by such actions.

Where the machinery contemplated by any legal system fails to achieve the purpose or lacks in its efficacy to meet the needs of changing conditions, law should step in to re-set the machinery or, make a re-statement of the law to assure progress. Under Indian conditions, collective bargaining in the sphere of industrial relations had not received the necessary impetus to establish good employer-employee relationship and ensure industrial peace and harmony. This may be partly due to the nature and pattern of the role of trade unions in under-developed economies, with outside and top-infiltrated leadership which while functioning on the trade union front are drawn into political motives instead of looking purely to the welfare of the union and the workers. Secondly it is due to the psychological antipathies of the employer community with maximum profit motive and fiscal handicaps which the industrial units suffer, coupled with a lack of understanding and proper forum for the employer and employee organisations to meet, discuss and negotiate on issues, like the standing councils, arbitration boards and other bodies which offer their services. Thirdly, the unsatisfactory state of the present law—**i.e.,** the failure of the existing set of laws, the statutory regula-

tions and their judicial application to offer speedy remedies is also a contributory factor.

This nature and pattern of industrial actions in India suggest that by and large they are methods of pressure, coercion and intimidation which yield nothing of material benefit either for the 'labour' or 'industry'. Nor is there any positive good to the community as such. The opinions expressed from different quarters—members of Parliament, trade union leaders, economists and men in authority—show that while some are in favour of gherao as an Industrial action, a good majority are not in favour of supporting it as a weapon of industrial workers, for fear of misuse and abuse It is undeniable that those who represent social and political groups have to cater to and nurse the group interest and therefore, support their actions. All the same, it is an indisputable fact that if they choose to encourage and give fillip to such an unhealthy movement merely because they have to cater to their group interest with ulterior political motives, responsible Government in this country would be at stake and anarchy would be the resultant. For, in these movements there is scant respect for the 'Rule of Law', orderly behaviour and the sufferings of others.

Where these industrial actions have grown to menacing proportions transgressing the strict confines of trade union activities and the premissible limits of law, affecting social security and individual liberty, retarding both economic prosperity and Industrial growth, neither the society nor the Government could afford to be idle spectators permitting organised groups to ransack national interest. If Indian society is to survive on its democratic moorings from this threatening the of organised force in the form of a trade union action demonstrating itself from a consciousness of the capacity for organised might, these actions should be legally and socially controlled

It can only be concluded that (1) the increased complexity of modern industrial societies tends to constitute a srike or 'gherao' or other similar 'industrial actions' which have an undeniable disruptive impact on the social and economic life, an offence against any organised community. (2) While strike and other novel weapons of trade unions may not as yet be labelled as crime, where the community is sufficiently advanced to have constituted proper authorities for the regulation of industrial relations and conditions of labour, the social trend is in the direction of suggesting that it will be so labelled either by statutory enactment or by developing the law through the judicial process (3) Where such legislation is made making such 'industrial actions' a criminal offence, the statute should be regarded not as a subversion of the principles of justice relating to the freedom of the individual and liberty of the subject, but as an expansion or an adaptation of them to changing conditions.

The fact that the legal system is in default and the laws lag behind to meet the changing social conditions is no argument to suggest that lawlessness is the way to change the legal order. Where the pursuit of social betterment by direct action substitutes force for law, violence for right, coercion for education by persuasion and enlightenment, sectional domination for self-government of the community, it should be deemed that the society is on the verge of some social cataclysm Hence the legal system has to find a way to control these 'industrial actions"

within permissible bounds by framing a system of new rights and duties and imposing fresh liabilities upon individuals and groups, which would restrain their disruptive and damaging propensities, so that the community may not be held to ransom and the individual's rights are not infringed without being answerable in law.[16]

I would suggest that the remedy lies in re-shaping the whole machinery of industrial relations by more comprehensive legislation Further, the principles of law relating to unlawful interference, nuisance and constitutional rights and fundamental liberties should be re-emphasised In the context, in the interest of industrial peace and social security and for the sake of establishing healthy employer-employee relationship in India, **Compulsory Collective Bargaining** with suitable arbitration or adjudication machinery should be introduced as is found in Australia and Singapore The legislation should enforce collective bargaining for every industry and for every unit and section of employment, guided by law and legal sanction so as to ensure the maximum of industrial peace with social justice and accelerated trade union movement.

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16 It may be stated that at Common Law, the doctrine of unlawful interference has given a right of action for damages to the employer against the strikers. I would suggest that in the case of 'gherao' at least unless some such doctrine is evolved or it becomes a punishable offence under the law of *Nuisance*, in India '*Gherao*' would become a sort of vexed problem defying all solutions in a legal manner denying all remedies.

"MOTHER-IN-LAW v. DAUGHTER-IN-LAW": A HINDU LAWYER'S OPINION OF THE EARLY NINETEENTH CENTURY.

By

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We have spoken before about the usefulness of legal history It is particularly useful in these days when people are wondering what to do with Hindu Law. Shall it be scrapped altogether ? What function shall it have for the future ? Shall it serve as a model for new laws for other communities, as for example in the Christian Marriage Bill, or the Adoption of Children Bill? Or should it rather be thrown into the melting-pot, along with the other systems of personal law, should we give it a good stir, and pour out the product and enjoy it as something truly Indian? These problems have prove to be extremely teasing, and a great deal of fundamental research has still to be done

Even so simple and everyday a problem as to how a man's property is to be enjoyed by his immediate relations after his death is one which seems to defeat us The basic reason, I suppose, is that quite a number of different methods will work, and that there is no intrinsic advantage in any When the British started administering Hindu law, giving to it a certainty it had not previously known, it was one critical period in Hindu legal history, and the way family property was made available (to use no more precise word)' for the survivors when their chief earner died was one of the signs of that new method's vitality and decision. When the Hindu law was reformed in 1956, it was yet another critical period, and the curious way in which property of a male was, under the Schedule to the Hindu Succession Act of that year, split (if he died intestate) between a host of relations competing in Class 1, astonished many observers. Previously the heirs were ranged in series, a grotesquely long and involved series, now the tendency is for relatives to succeed by groups It is difficult to say what change in social conditions has called for that particular amendment of the ancient law If Parliament had given the whole estate to the surviving spouse and left the other relatives to bargain with her, that might have been a more modern, and perhaps a more feasible solution If we go back to the early nineteenth century we can see some traces of discussions of this problem Up to the present we have not had a Sastri's viewpoint on the matter We have had only poor quality reports of early cases, some pandits' replies in very brief terms, and a very interesting Travancore case[1]—and that was all Recently I rediscovered a South Indian Sastri's opinion called by the quaint title **Svasru-snusha-dhana-samvada.** The text has now been published (in the Adyar Library Bulletin, 1968, Raghavan Felicitation, Volume, pp 538-553) preceded by a short introduction and accompanied with some notes on the text, locating the citations and otherwise commenting on the material It would have been possible to write a little history of Hindu law, especially its experiences at the hands of the British, around this little text But there is no point in doing this, seeing that what is really important is the learned Sastri's method, outlook, and recommendations

The text belongs, so far as we can tell, to about 1815 It could conceivably be a little later The British methods of administering justice are reflected in the concern for the actual case in hand, and the reference to a Bengal work (which was not available until the beginning of the nineteenth century in the Madras

1 *Ramal Koopoo Ammal* v *Ammani Rukmani Ammal,* (1887) 5 Trav L.R 45 (F B) is of so much better quality than the leading case in British India, *viz., Peddamuttu Viramani* v. *Appu Rao,* (1864) 2 M H.C.R. 117.

Presidency) makes it plain that the new role of the **sastra** was already established. There is no sign that the parties to the dispute were actually litigating in a British Court. They could have been important members of the Tanjore Maharaja's Court, and might have agreed to submit their problem for the Court Sastri's decision. Our work is not a pandit's answer to a problem posed as such by any zillah Court or the High Court, because its tone and the lack of final decisive quality are inconsistent with such a production. And as we can see it was intended to be a substantive contribution to (then) modern **dharmasastra** studies, tricked out, as it is, with little verses, and other embellishments.

The translation which follows is intended to interest and amuse students of the vicissitudes of Hindu law, as a warning to those who would too hastily take the hammer once again to the personal law, and as proof that the sastris of 150 years ago were by no means the rigid obscurantists they are sometimes imagined to have been. They used their archaic techniques, but by no means always in order to achieve entirely predictable ends The author (who, as so often, remains anonymous) had his **Mitakshara,** his **Vyavahara-mayukha** (because of the Maratha element in Tanjore ?), and his **Smriti-chandrika** in front of him but as we can see he did not copy what they said, and regarded himself as quite free to offer a new solution. His concern to keep within reach of customary practices is important, especially when we remember how Mr Nelson, not so long after this period, argued that the population of Madras, by and large, was innocent of knowledge of the **sastra** and by no means apt to have it applied to them. I think our author's attitude to custom is extraordinarily interesting, and could conceivably be utilised even today Anyone who wishes to peruse the original will find it fairly cleanly edited in the Adyar Library Bulletin (referred to above) and can enjoy the learned author's particular virtues in their proper garb What follows is offered in the hope that it will stimulate a wider interest in the methods in use at the period.

"A Debate about Property between a Mother-in-law and her Daughter-in-law".
Obeisance to Lord Ganesa

The Lord Nrisimha's compassion has filled my vision with its essence and I have attained from it a lastingly spotless composure of mind I pay homage to my teachers and, according to my humble opinion, set out here what will enlighten the darkness of the dispute about property between a mother-in-law and her daughter-in-law -1

A particular problem in the chapter of law called "Daya-vibhaga" (Partition of Heritage) is handled here for it unfortunately happened that a man died separated and unreunited

—and there survives his mother and his childless widow who is in need of property, and a great dispute broke out between the two of them due to a desire for gain

This must be resolved by good men who are skilled in the way of the world and in the sastra (**kusalair loka-sastrayoh**) -4.

For the present we must discuss certain texts which are well known, to support the argument on behalf of the daughter-in-law -5

I. 1 Yajnavalkya says who shall be the heirs in the absence of the twelve types of sons commencing with the **aurasa** (II 135-6),

"The wife, the daughters also, the two parents and likewise the brothers, their sons, members of the **gotra,** a **bandhu,** a pupil, and fellow-students, in the absence of the previous of these each successively is entitled to the estate of a sonless man who has gone to heaven This is the law in all **varnas.**"

Vriddha Manu likewise:

"Sonless, preserving the bed of her husband, firm in her vow (of chastity), the wife alone shall give his **pinda** and take his entire share."

Brihaspati likewise (really Vishnu XVII 4–7)

"The property of a sonless man goes to his wife. In her absence to his daughter. In her absence to the father. In his absence to the mother."

Katyayana likewise (v 926)

"The wife is successor to her husband if she is free from misconduct. But in her absence the daughter, provided she be unmarried "

In another **smriti** (Katy 927)

"(The heirs) of a sonless man are proclaimed to be his wife born in the family (**kula-ja**), or even his daughters, in their absence the father, brothers, and brothers' sons."

Brihaspati likewise says (XXVI 94)

"Even when there are members of the family, such as the father and full brothers, it is the wife of a deceased sonless man who takes his share."

From these and other texts it is understood that even in the presence of the deceased's mother the widow alone takes the property So indeed it is said in the Mitakshara (II.1, 39), "therefore the married wife, provided she is chaste, takes the entire property of an unreunited sonless man who has died, and that is the conclusion " And in the Chandrika (Setlur, p 275 XI 1, 3ff), it is concluded that the widow alone takes the estate, relying upon the text of Brihaspati (XXVI 92) which says

"In the tradition and the system of the **smriti** and in the custom of the world the wife has been declared the wise to be a half of the body, equal in the fruit of that which is auspicious and that which is in auspicious"—

a text which clarifies the propinquity of the wife in comparison with all others on account of her connection with her husband in point of serving him in "seen" and in "unseen" contexts, and also upon the text of Prajapati,[2] which says,

"A wife who dies before her husband takes away his **agnihotra**; but when her husband predeceases she takes his property if she is faithful to him: this is eternal **dharma.**"

And in the Mayukha these same texts are cited and the same conclusion is arrived at, namely that the chaste widow takes the estate The same is the case with the work of Varadaraja Consequently this much is certain, after reviewing the opinions of many digest-writers, that the wife alone takes the estate of a son who is unreunited and separated

However it appears from the following text of Narada (XVI 25–6)—

"If among brothers one childless should die or become a wandering ascetic, the others should divide his property, excepting the **stridhana.**

"And they must provide a maintenance for his women until they die, if they keep the bed of their husband In the case of others they must cut that off "

—that even in the presence of the wife the brothers take the estate but the wives take only maintenance. Likewise one gathers from the text of Manu (IX 185), "The father should take the estate of a sonless man, or even his brothers", that the estate belongs to the father or the brothers Likewise there is another text of Manu (IX 217)—

2 Really Brihaspati (G O. Ser), XXVI. 95. It is the Smriti-chandrika which attributes it to Prajapati.

"The mother should obtain the **daya** of a childless son, and if the mother has died the mother of the father should take the property",
which teaches us that the mother has the first right to the inheritance and in her absence the paternal grandmother Likewise Katyayana[3] says,

"Assets go to the brother when a sonless man goes to heaven, in his absence the two parents may take it, or the senior wife", from which it appears that the brothers, the parents, and the senior wife in order are entitled to the property. There is a passage in the verse—Katyayana.

"When a separated man dies the father should take his assets in the absence of a son, or the brother, or the mother or the mother of his father, in order."

This shows that the property is inherited in order by father, brother, mother and paternal grandmother.

2 Therefore, since a number of texts are repugnant to it, how can one establish the proposition we have already propounded ? One might hazard the proposition that property should be recognised optionally in favour of whichever of the two, the wife or the brothers, might happen to have possession (or not as the case may be) of the estate, relying upon the texts of both sorts ! But this would be wrong, because such an option would be subject to the eight faults[4] and because in a matter of mere fact there can be no alternative

3 One might suggest that, though property is no action, property may well be subject to an option by way of the fact that there is an option whether or not to make a partition, which has the form of an action of a mental character giving rise to property, just as the greater part of its effect lies in possession of the assets But this is not true, for property is created by birth and therefore it cannot be produced by partition Consequently since we cannot have recourse to an option (**i.e.,** the conflict between the texts cannot be side-stepped) it is necessary to state some resolution of the difficulty

4 What pronouncement can we make ? We should commence by stating the resolution which previous teachers offered Thus —the text "The wife, the daughters also " relates to the wife of a brother who was divided and unreunited, but the text "if among brothers" relates to one amongst a number of brothers who are undivided or reunited [5] Thus Brihaspati says (XXVI 99)

"Whatever divided assets of any kind, even pledges or other various assets are traditionally known, these, excluding immovables, the wife, whose husband has died, should take."

The author of the Chandrika says that this in the clearest manner shows that the wife takes the assets of a divided brother, while the brothers and the rest take the assets of an undivided brother The word "divided" is intended to imply also the assets of one who is unreunited Similarly the text "Among brothers" relates to undivided or reunited brothers, and the case before us relates to a brother who was divided and unreunited The text of Yajnavalkya makes it clear that in the absence of each preceding claimant each succeeding claimant takes the assets, and in that text the wife has the first place consequently the **prima facie** view must be that while the wife is present she alone is entitled to take the estate, and not the deceased's mother

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3 The Mitakshara attributes this prose passage to Sankha It does not appear to belong to Katyayana ?

4 The eight faults of a *vikalpa* (option) are that one accepts one to the exclusion of the other accepts the other whilst denying what one has already accepted, and so forth (see Ganganatha Jha, Purva-mimamsa in its sources, 1st edn , 1942, pp 353 ff)

5. This is the solution adopted originally in Anglo-Hindu law, modified as a result of the *Second Shivagunga case*.

II. 1. We proceed to our conclusion.

Such being the situation we make a statement—may the learned listen to it removing envy and all partiality a far off [illegible] -6

Is it true that when two texts are in conflict an authority settling the matter is necessary ?[6] When it was uncertain which of the cups was to be used first among those dedicated to Indra-Vayu, etc , which are mentioned in that section of the Srauta-sutra, an authority was available to make it certain which was to be used first Just as in the sentence (Apastamba-srauta-sutra XII 14 1–2), "If the Soma (–sacrifice) has the Rathantara as its Sama he should take first the cups dedicated to Indra-Vayu, if it has the Brihat as its Sama he should take first those dedicated to Sukra, if it has both as its Sama he should take the **manthi**–vessels first", if there is some qualification (**anubandha**), this can be, but not otherwise. If when the whole of that section is carefully examined no such statement is obtained, then there would be the difficulty of having to supply something as in the statement, "If the sacrificer has no desire he should pour out the water with a cup, if he is desirous of cattle he should pour it with the milking-pot".[7] But in this section (of the śāstra) such a statement (**i.e.** such a text) does exist, as Katyayana says (v 923) .

"She should enjoy the share allotted to her, devoted to obedience to her senior, but if she does not perform obedience he should order food and raiment for her."

And this is explained in the Chandrika and the Mayukha The 'senior" is the father-in-law, etc , and she may enjoy her share at his pleasure. Otherwise she has maintenance, that is the meaning "Share allotted", we have to understand that she takes it, because the words "he should order food and raiment" have laid down an allotment of trifling assets sufficient to secure her mere subsistence How little this amounts to is explained by Nārada :

"Yearly the faithful wife whose husband is dead should take 34 **adhakas** and 40 **panas.**"

"**Adhaka**" means a heap of grain amounting to 192 handfuls, the **pana** is the **karshapana** In a certain region this is current in place of the eightieth part of a current **nishka**, therefore where the **pana** is not current the eightieth part of a current **nishka** is taken in lieu of it Thus the Mayukha says as follows —The text of Katyayana is quoted,

"When her lord has gone to heaven the woman takes maintenance, where he was undivided, and she takes a share of the assets until her death "

Then he says that the word "undivided" implies also reunited, and the word "and" must be taken in the sense of "or" Thus there are two alternatives The conclusion adopted by Madana (see Madana-ratna-pradipa, p 362) is quoted, which explains these alternatives as follows the gift of a share applies to the wedded wife, but the awarding of maintenance applies to kept concubines. The author (Nilakantha) then considers the basis of this conclusion and rejects the latter and himself gives the correct conclusion, basing it upon the text "She should

6 For the translation of this paragraph I am indebted to Prof T Burrow (Oxford) I take the opportunity of acknowledging the help of Pt K P Aithal, then of the Adyar Library, for editorial work on my draft transcript of the text Some corrections to the text will be noted below.

7 This text requires to be supplemented, but it is not clear to me exactly why It is a paraphrase of Apastamba-srauta-sutra I 16 3, and it may be that the supplementation is included in the paraphrase The general point is that many rules which appear at first sight to be straightforward options are in fact parallel rules, because a condition has to be imported (as was not necessary in the case of the immediately previous quotation which was complete with its conditions), under which, if the condition was present one rule would apply, but if not then the other Our author's point is that we cannot read the texts without the condition which is stated in another smriti in the same chapter of the law.

enjoy the share " Thus his conclusion is that a wife may take the estate provided certain conditions are fulfilled, and not otherwise, and these are (i) that she is devoted to obedience to her seniors, namely her mother-in-law and father-in-law and so on, (ii) that she has their permission, (iii) that she is chaste, and (iv) that she desires to inherit.

However it may be objected that this conclusion, depending as it does upon obedience to the mother or father-in-law, or its absence, or upon her desire, or its absence, is improper The reason alleged is that in the books written under the name of Madhava, the Chandrika, the Mayukha, the Mitakshara, and the work of Varadaraja a conclusion has been propounded upon the footing that the texts "Whatever divided asset of any kind", "If among brothers.. " and so on, when carefully considered, relate solely to the alternatives of a divided or undivided, decedent, and that one must conclude accordingly But this objection cannot be accepted, because the point being based, as it is, upon texts there is no room for deciding the question by human ingenuity, and because of the unanimity which we find amongst the digest-writers

2 In order that all the texts should speak with one voice, and that all texts should be in harmony, the wife who is qualified with every one of these qualifications may take the estate but not a wife who is lacking in any single one of them! Indeed that is so ! This is what is actually accepted by the authors of the Chandrika and the Mayukha, and others The following is what is said in the work of Varadaraja (p. 450), though in another section

"2,000 **panas** must be given to the woman as **daya** out of the assets, and whatever was given to her by her husband she may obtain at her option."

This is a text of Vyasa It is explained as saying that where nothing was given by the husband the widow may take 2,000 **panas,** but not more Thus where at the time of his death the husband gave **all** his property to his wife she has a right in all the property. Otherwise, the author's intention emerges, one should give her 2,000 **panas.**

3 Therefore in this instant case there is no possible way in which the daughter-in-law can be entitled to all the property, even though she be equipped with the various qualities of being the devoted widow of a divided and unreunited man, because (i) a daughter-in-law can inherit only when she is obedient to her mother-in-law as every secular and sastric consideration confirms, her mother-in-law being her "senior", and competition with her mother in-law in that case would be a hare's horn (or mare's nest), and because (ii) at the time of his death her late husband did not convey his share to her In the second rank stands the daughter but there is no daughter in our instant case. In the third rank stands the mother It is more correct to give her the whole share, and so let us make an end of the discussion!

Let the learned, who are oceans of compassion, pay attention there is a distinction to be noticed in this context which has the approval of all -7

4 Your violent objection to the mother's inheriting—in this case is it to her taking **all** the property, or is it only to her taking a mother's share ? If the latter one must point out that that alternative is not in point because no mother's share has been set aside for her according to the rule established in several texts of Yajnavalkya and others,

"If he makes theshares equal his wives must be made equal sharers "(Yajn. II 115), and

"After the death of the father, if the brothers divide the property the mother too should take a share" (Yajn.II,123),

such a share would be available at a partition whether in the father's lifetime or after his death.

5. You may object that though the mother's share is established under the **sastra,** the mother has no property in such a share because no share was given to her at the partition. That might well be true, if property were to be produced by partition. However, it is not, but it ought to arise from birth, according to the text of Gautama (see Mitakshara I 1 23), "ownership in wealth is taken by birth, alone, so the teachers say".

6 You may object that property cannot arise from birth, since it is non-secular,[8] like the sacrificial post and the **ahavaniya** fire though they be qualified by a combination of numerous seen and unseen "perfections" (**Samskaras**) such as the felling of the timber, carpentry, and the fire-laying ceremony. For it is not by birth alone that the **khadira** or other wood or the ignited fire acquires the character of being a sacrificial post or an **ahavaniya.** Nevertheless even prior to the completion of the series of "perfections" one finds the wooden object and the ignited fire called by the actual names of "sacrificial post" and **"ahavaniya".** Consequently the sastric writers are in the habit of dealing with matters on the footing that these things bear the names appropriate to .that perfection because the completed series of perfections is the real cause of the currency of those names Gautama indeed (see Mitakshara I 1 8, 12) says "An owner is by inheritance, purchase, partition, occupation, and finding, for a Brahmin acquisition is an additional mode, for the Kshatriya conquest, and wages for the Vaiśya and Śūdra He shows that property is ascertainable only from the **sastra** and therefore makes it abundantly clear that property is non-secular. Moreover if property were established by worldly knowledge, like gold and silver,[9] there could never be any doubt as to whether something was this man's or another's

7. If one claims "therefore property is non-secular, and so how could it be obtained by birth" we state the answer, that it is solely secular -8

Because it is the cause of actions which serve secular purposes, like rice, barley, etc , the capacity to achieve cooking, etc , arises from its function of being ignited, and not from its unseen function and consequently there is no embarrassment left -9

For what achieves purchases[10] and so forth is the nature of gold as one's own, consequently one must insist that property is secular only -10

When there is a doubt about purchases and so on[11] which have property as their cause there is a doubt about property, therefore property is obtained by birth and is not produced by partition -11.

Therefore, when a [11]partition does not take place property is not destroyed, and so the mother's share survives, and that option certainly remains valid. -12

III 1 Now the wife's right in any ritual characterised by the relinquishment of assets is establishde in the section ,of the Mimamsa-sūtras which commences (VI 1 6 3), "On account of the use of the particular gender, only men are entitled–so says Aitishayana" The text which says "The wife, the son

8. The MS actually reads alaukikatvat, which was in error transcribed and printed at p 548 as laukikatvat.

9 This seems to be a misunderstanding of the Mitakshara's argument, which is that even in the "world" a science is needed for identifying metals-one does not rely upon mere appearances *See* Mitakshara I 1 8.

10 The MS reads kriyadin, *i e* , "actions", "transactions", etc. But apparently this is a corruption for krayadin, "purchases", etc.

11. See the remark in the last foot-note.

and the slave (have no property) "(Manu, VIII.416) is directed only to their want of independence.[12] However, your first alternative does not arise, because the mother does not wish to possess herself of the entire estate.

2. Although it is understood from the Chandrika, the Mayukha, and others, with reference to the text of Katyayana, "She should enjoy the share allotted to her", that the mother is entitled to the whole estate when the daughter-in-law is excluded from entitlement to the whole property by reason of her not being obedient to her mother-in-law and father-in-law, nevertheless, whether because public opinion would blame her, or for some other reason the mother does not want the whole estate, but only her own share—and that is why the first alternative does not arise.

3. Nor does the second arise, because there is no authority for excluding the mother from her share.[13]

4 There is no basis for suspecting that her share has perished either because her son enjoyed it, or because he has died subsequently, for there would be no end to the inconvenience which would result if it could be supposed that when one person's clothes or ornaments are merely enjoyed by another through affection or otherwise they thereupon become the latter's property!

This is what the Samgrahakara says in the Chandrika :,

"A man is not owner of that which happens to be in his hand surely the property of one man may be in the hands of another through theft or other means!" The word "other" implies affection. The author goes on to say "therefore ownership is according to the **sastra** and not derived from enjoyment"—indeed saying that property is to be ascertained only from the **sastra,** yet he does not contend that it is produced by partition and so does not conflict with what was said before. For the author of the book is certain that property is not capable of being produced by partition. Nor would it be proper for the share to be lost because her son died. Such an idea would conflict both with actual usage and with the **sastra** Therefore there is no means whereby the mother's share can be annulled.

5 You may object that there seems to be a custom **not** to give mothers their shares No Such a custom would have no authority, because it is repugnant to the **smriti.**

6 It may be objected that the **sastra** dealing with litigation is, like that of grammar, founded upon popular custom, and that it cannot be authoritative in any context where it is opposed to custom especially where it offends against people's livelihoods But this is incorrect, because the **sastra** is, that book, founded upon majority customs, and the custom of a single locality cannot have that degree of authority.

7. Nor is the authority of a custom determined with reference to distinctions between localities, for that would conflict with the principle first mentioned[14]

8. One may well ask why this mother's share, which is established according to popular practice and the **sastra** was not furnished at the time of the parti-

12 The Mimamsa establishes that the wife has a right of property in her husband's wealth for religious purposes The text of Manu often relied upon to prove that the wife has no property during her husband's lifetime, in fact means only that she is dependant So the Mitakshara II 1. 16, and also Jimutavahana in his Dayabhaga, I 1 16

13. You cannot object to her taking a share, because the mother is entitled to a share (a partition having occurred) according to the sastra

14 The text says prathamika-nyaya-virodhat, the meaning of which is not entirely clear to me Apparently your author says that if the opposition to smriti comes from the side on custom, on the ground that after all smriti itself is founded on custom, the effect would be that smriti would never have any authority more than its local coincidence with custom would allow—which would remove the authority of smriti totally in these secular (vyavahara) contexts.

tion ? We suppose it happened (i) because of the mother's abundant affection for her son (or sons) or (ii) because (at that time) she did not want a share, or (iii) because the family followed the custom of law of the people (**pamaranas**) The **sastras** recognise that a share may not be taken where she is not desirous of having one A text says (Yajn II.116),

"To one who is able and does not desire (a share) something may be given and his separation can be effected."

And so, now, her son having died, while she herself is desirous of a share, it is impossible to annul her rights whether from the point of view of popular usage or the **sastra.**

IV 1 Nor would it be so absurd for her to have a share equal to a son out of the estate which was owned by the sons of her co-wife and her own son (jointly), on the alleged ground that this would be less than a half-share in the property owned by her own son (alone) There is no harm in this if it is what she wants On the facts of the case, there is no evidence that she wants this at all[15].

2 There is no question of setting aside the partition which took place originally, because the sons of her co-wife are members of her own family and are responsible for the welfare of the line Therefore she wants to please them and does not want to insist on her rights (**tad-anujighrikshaya anicchaya upapattes ca**)

V 1 Therefore in respect of the disputed property the mother-in-law is owner by reason of her being the mother of the deceased male owner and the daughter-in-law is owner by reason of her having been his wife. According to the maxim, "It should be equal where revelation is silent"[16] both of them should take equal shares, a proposition in which the customs of all localities and all the **sastras** are agreed.

2 Now Manu says (IX 217),

"The mother should obtain the **daya** of her son who left no issue, but after the death of the mother the father's mother should take the property "

And this is explained in (Raghavananda's) Manvartha-chandrika·

"He has mentioned the mother's property in the case of a son who died without issue "who left no issue" The mother should take because as between the two parents the mother is more worthy, due to her having carried him in the womb and nourished him But if the mother is dead the father's mother should take the estate " After giving this explanation he doubts whether there is a conflict between this explanation and the texts of Yajnavalkya and Vishnu which we have already cited, he shows how there is no conflict in the explanation provided in the commentary made by the commentator on the Manu-smriti called Kulluka, **viz.,** "the mother and the father should both take, sharing the property between them", nevertheless he is not satisfied with the result and reveals another method of removing the difficulty with his own suggestion, which is as follows "The member of the disjoined couple, mother and father, arises even in a case where the

15 What seems to have happened was this a partition took place between her son, B-3 and the sons of her (deceased) co-wife, B-1 and B-2. Since there were three sons the property was divided into thirds In the Tamil country the mother's share is generally ignored Had she had her rights under the Benares School of Hindu law she would have shared equally with the sons, and taken one-fourth of the whole Now she is entitled to (so we are told) one half of the deceased son s share *i e* , one-sixth of the whole Thus she claims less than her due What harm is there is that, our author asks ? We cannot take the view that either she asks for the limit or she must keep quiet !

16. Kane, History of Dharmasastra, Vol. 5, 1330-1, 1350, Mitakshara on Yajnavalkya II, 265

wife is involved.[17] Therefore when all three are present the triad is entitled to the property, for there is no choice between those who are (equally) associated (with each other) in the absence of another (**i.e.,** the deceased's son)."

VI 1. Now the Aitareya-brahmana reveals the sin involved in not delivering the share which the **sastra** has prescribed [18] "Him who extrudes a sharer from his share he destroys, or if he does not destroy him he destroys his son or he destroys his son's son " The meaning of this is explained by Vidyāranya (**i.e.,** Madhavacharya) in his Vedarthaprakasika "He who, **i.e.,** the man who, extrudes, **i.e.,** cuts off, a sharer, **i.e ,** a person entitled to a share, from his share, **i.e.,** from his own share, he is destroyed Him, **i.e.,** the extruder, he destroys, **i.e.,** ruins If he does not ruin him, he ruins his son or son's son—that is what is meant

2. Consequently that argument which claims an equal share in the inheritance for both claimants, mother-in-law and daughter-in-law, is the better. This is the answer which the learned ought to consider with their subtle percipience. This is how the matter should be dealt with.

After considering the dharmaśāstras and extracting their essence attentively, this is the conclusion which is plainly reported for the delight of the good -13

Thus the explanation of the equal sharing of the property between mother-in-law and daughter-in-law is finished

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17 This curious way of putting it conceals the meaning, which is that Manu has singled out the mother in his anomalous way because he has a competition with the wife in mind All these texts give different claimants when no son survives hence all should share !

18 This interesting quotation from the Brahamana is used by the Mitakshara in a different connexion (I, *ix*, 6-7) along with a commentary which Colebrooke does not translate quite perfectly It is a commentary or explanation which agrees substantially with that of Madhava, and one wonders whether they used a common source The point is that the extruder or usurper is destroyed, infected with sin, by the deprived person, and if the wrongdoer himself is not affected his descendant will be Thus it is spiritually dangerous to usurp the shares of others

VISIT TO THE SOUTH OF THE CHIEF JUSTICE OF INDIA.

The visit of the Chief Justice of India to the Southern States has been quite welcome and stimulating. According to the Press Reports of his speeches* at the numerous functions in which he participated, he has given expression to many valuable thoughts and ideas. The reports afford ample testimony that "he thought things and not mere words." According to the Chief Justice, it would not be a healthy sign to have a society that was compelled to challenge the laws every now and then He called for a little restraint in action and less meddling by legislators in law. There will be general and respectful agreement with his sentiment that with less and less of executive orders and less litigation society could be happier. On the question of a separate Bench of the Supreme Court for the South, conceding that it was a ticklish problem and a matter of high policy, the Chief Justice seems to have felt that he could not express any opinion except to say that he believed in the unity of the highest Court in the land and that a diluted Supreme Court is bad. As the statement of an ideal, this is unexceptionable A separate bench for the South will cut across the unity of India There can be also no doubt that if the Supreme Court could sit together it would conduce to its high efficiency, since individual differences whenever they manifested could be smoothened out in the process of administering justice. Differences in approach could be minimised and the decisions would carry greater weight and prestige It is true that in Australia, the highest Court—the High Court—was having circulating sittings in the different States of that Dominion, but according to the Chief Justice of India the current thinking on the matter in that Dominion is one in favour of reverting to permanent sittings at one place. These are no doubt weighty considerations against a separate Bench for the South. Even in the case of the High Courts, the maintenance of separate Benches within the State sitting at different centres as in Kerala, Maharashtra, Madhya Pradesh etc has been only to satisfy local sentiment and there could be no question of affecting State integrity or perpetuating differences within the State. The demand however, for a separate Bench for the South or even a full Supreme Court will grow apace and gather momentum *pari passu* with growth of linguistic intolerance and the impatience of Hindi enthusiasts to push Hindi into the precincts of the Supreme Court. The Chief Justice of India cannot be unaware of the phenomenon. Hence his caution, that English must be retained in the Supreme Court and the High Courts for an indefinite period of time as the language of record, argument and judgment though statements of witnesses and accused in trial Courts may be recorded in the language in which they were given Few will dispute that translations of statutes could never take the place of the original and might not possibly convey the true import and content of the original. In the matter of the language of the Supreme Court, former Chief Justices, like Sri Subba Rao and Sri Gajendragadkar, also have been equally outspoken The voice of sanity and realism is seldom heard in this country at the present time It is unfortunate, nay, even disquieting, that advice given by eminent men dispassionately remains unheeded and becomes even suspect. Not national integration but distintegration is being achieved either wittingly or unwittingly. Of sober thinking there is but little evidence. Leaders instead of moulding public opinion on correct lines often seem to be concerned more with capturing votes or

*The "Indian Express", 23-10-1968

retaining power. Values have become topsy turvy and priorities seem to be regulated not with reference to the relative urgency and importance of problems awaiting solution but with reference to sentiment and mass appeal.

On other matters also the views expressed by the Chief Justice are equally significant and merit close study. At the meeting held at the Madras University Auditorium in connection with the celebration of the International Year on Human Rights he deplored the growth of groupism in legislatures and felt that it was the greatest danger to the maintenance of the rule of law in the country and that the display of " politics of bad conscience " inside the legislature had created a climate of tension in several State Governments. There is no denying that *ad hoc* parties not based on any principles and opportunist groups tend to spring into existence whenever a chance to pick up power emerges. The phenomenon of crossing the floor in the Legislatures after getting elected on party tickets flouting the pledges to the concerned party without scruple or principle has become all too familier, jeopardising effective functioning and the stability of duly formed Governments Legislative proceedings also are not now what they used to be in the past. The atmosphere inside the legislative chamber has changed It is no longer the case of a relatively small body of experienced administrators, eminent intellectuals, lawyers, leaders of thought and specialists discussing seriously and solemnly the provisions of a Bill in a calm atmosphere Legislators now are the representatives of various cross-sections of the common folk and are in comparatively large numbers. Their discussions tend to be charged with emotion and guided by party loyalities rather than by dispassionate consideration of the merits Rules of procedure and decorum do not command the respect which they did in earlier days

In inaugurating the Madras Branch of the Indian Commission of Jurists, the Chief Justice of India is said to have observed that probably ours is the only country in the world where human rights are enforced in the sense that such rights stand enshrined in the Fundamental Rights and Directive Principles of State policy under the Constitution. While it is true that there is a measure of parallelism between the Human Rights declared in the Charter and the rights declared in Part III and Part IV of the Constitution there is no gainsaying that the rights granted by Part III have become attenuated by restrictions imposed under the guise of "reasonable restrictions" the imposition of which, subject to specified conditions, is permissible under that very Part, and that the declarations in Part IV are non-justiciable. There is also the further fact that recent trends in Parliament indicate that every part of the Constitution including Part III might be amended notwithstanding the decision in *Golak Nath's case* [1]

It was a happy thing that the Chief Justice of India expressed his views on these important matters It will be a happier thing still, if the persons concerned ponder over them and there is a healthy response on their part Further deterioration in the country cannot be arrested and a sense of national unity and integration cannot be promoted except by jettisoning all ' isms ' preventing all ' schisms ' and eschewing all types of fanaticism The opinions of eminent competent persons who could view things dispassionately and in the proper perspective free from fleeting passions and emotions adverting to the larger interests of the country and the total situation should be properly heeded and disruptive forces and elements in the Centre and States should be put down particularly the over-enthusiasm of the protagonists of Hindi.

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1. (1967) 2 S C J 486· A I R. 1967 S C 1643

"SNIPPETS"

AGENCY COUPLED WITH INTEREST . (1968) 2 M. L. J. 74.

By

MAHALINGA PADMANABHAN.

One of the cases in which the authority of an agent cannot be revoked at will (by the principal) is the case of what in English Law is known as "Agency coupled with interest" The same kind of agency is contemplated in our law and section 202 of the Indian Contract Act provides for the same

The section reads "Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest". Illustration (b) to the section which mentions the case where a consignor of goods desires the consignee who has advanced moneys to sell the goods and repay himself out of the prices the amounts advanced by him, is shown as a case of agency coupled with interest, and is of particular interest to us in this random review. The difference in phraseology used between the Indian Act and the English law of agency coupled with interest matters little as the English authorities still form the basis of our law and have not been overruled by any Indian decision so far

The English doctrine is best defined in **Smart** v **Sanders**[1], as "where an agreement entered into on a sufficient consideration (or, by deed), whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable" The doctrine is explained in the same decision thus. "We think that the doctrine applies only to cases where the authority is given for the purpose of being a security or . as a part of the security, not to cases where the authority is given independently, and the interest of the donee of the authority arises afterwards, incidentally only as, for instance, in the present case the goods are consigned to a factor for sale This confers an implied authority to sell Afterwards the factor makes advances. This is not an authority coupled with interest, but an independent authority, and an interest subsequently arising. The making of such an advance may be a good consideration for an agreement that the authority to sell shall be no longer revocable, but such an effect will not, we think, arise independently of agreement"

This decision is practically the source of the doctrine. According to it the authority should not be later in point of time For, the authority is to be given for the security of an interest or part of an interest and there cannot be any security for an interest if the interest was not in existence at the time of the creation of the authority The authority is intended only for the purpose of securing the interest The Indian decisions closely follow this ruling But it is clear that the decisions do not lay down that the law requires the agency should be contemporaneous with the interest and must be in the same document The interest, no doubt should not arise after the authority comes into existence It is not interest coupled with agency but agency coupled with interest

That the creation of the agency should be contemporaneous, twins as it were, in writing and must be in one and the same document, seems to be the effect of the decision in **Muthuarasu Thevar** v **Mayandi Thevar**[2].

The power in that case arose out of the employment of one who appears to be a law agent, though not necessarily so, and the power ran thus· "In view of the fact that we are unable to unitedly manage and improve the income of the said properties which is now insufficient for the family and to conduct the litigation with reference to the properties and set them aright, we requested you to conduct

1. (1848) 5 C.B 895.
2. (1968) 2 M.L J. 74: A I.R. 1968 Mad. 333.

our litigation and manage the properties We have accordingly given you this general power In C C No. 3 of 1960 on the file of the Revenue Divisional Officer, which were section 145 proceedings, we were counter-petitioners In the said proceedings you helped us and it went against us It is urgent and necessary that the civil proceedings have to be taken for setting aside that order We have not got the necessary funds and do not know all the details. Besides conducting the said proceedings, in view of the fact you need "uruthi" **for repaying to you the amount which you have hitherto spent for the said proceedings** (antiques mine) and for spending in future, we have executed this power For the purpose of recouping yourself all the expenses, we authorise your to mortgage or sell our family properties"

The criticism of this agreement in the decision as to how it does not create an agency coupled with interest is: "The agent has been appointed only to expend for the litigation to be and already sponsored by him and to have the right in future to mortgage or sell the property of the principals for reimbursement of expenses incurred by him This in my opinion cannot create an interest in the subject-matter, which is the **sine qua non** to make the power an irrevocable one If any such interest were to be created for the benefit of the agent, it should be contemporaneously provided for in the instrument of agency itself and should not only be express but also explicit. It should not give any room for doubt, nor could it be a matter of interpretation. In my opinion, an agency to be irrevocable should therefore create in the agent an interest in the subject-matter contemporaneously with the document wherein such agency is created and it cannot be left to chance or guess or inference Unless such a thing is available in the document itself, all such other powers given to the agent mainly for the purpose of reimbursement of moneys spent by him for and on behalf of the principals, even if such reimbursement should be by way of mortgage or sale of the properties, would, in my opinion, create **only a right incidental to such agency and would not amount to the creation of any interest in the agent over the subject-matter** of the litigation or subject concerned".

The language of the section is "where the agent has himself an interest in the subject-matter" which must mean that the interest in the subject-matter must be subsisting when the agency is created and should not be incidental to the agency created Therefore it must necessarily be antecedent and not subsequent The wording of the definition found in **Smart** v **Sanders**[3] is also to that effect But it would appear from the explanation of the doctrine quoted earlier from the decision in **Smart** v **Sanders**[3] that there could be such subsequent interest but the only thing is that it would require an agreement for which the interest will be good consideration Pollock and Mulla in discussing the application of the doctrine to the case of factors observe "Where the factor is expressly authorised to repay himself the advances out of the sale-proceeds, as in Illustration (b), he has an 'interest' in the goods consigned to him for sale, and the authority to sell cannot be revoked In such a case "an interest in the property" is expressly created But the "interest" need not be so created, and it is enough to prevent the termination of the agency that the "interest" could be inferred from the language of the document and from the course of dealings between the parties". All that is necessary is that the agency should be for the securing of the interest and that will not be possible if the interest does not exist at the time when the agency is born. But even where it is subsequent the object can be achieved if there is an agreement to relate it to the power.

Further, in the decision under notice the agency has also been for "repaying to you the amount **which you have hitherto spent"** (antiques mine) and that should make it an agency coupled with interest, and in regard to the future, the agreement could enure to their benefit The 'interest' in this case cannot strictly be

3 See note 1 on p. 53.

said to arise incidentally For, the parties not only appear to have created the agency for the specific purpose of conducting the litigation but the consideration has been the advancing of moneys and the same had already been advanced. The written power has been only to confirm or as is said there to give an assurance that the principals would not change their mind as they seem to have done there. The core of the contract had already come into being. The document merely records a concluded agency coupled with interest, the interest having been created already as the agent had spent money for the litigation.

One of the possible effects of the decision will be to rule out any evidence of an oral understanding creating such an agency on the ground that the decision lays down that it must be in writing and that the creation of the interest and the agency should be in one and the same document.

Reliance is placed on two decisions of our High Court and they are: **Venkanna** v. **Achutharamanna**[4] and the other **Palanivannan** v. **Krishnaswami**[5]. The agreement in **Venkanna** v. **Achutharamanna**[4] has not been set out in full in the decision and the portion quoted in the judgment reads: "If we should come out successful finally in the High Court, we both parties should take an equal shares and should execute documents necessary therefor". An argument seems to have been advanced though not accepted by the Court, that the agreement in the case could not be construed as power of attorney. Much less helpful is the case of **Palanivannan** v. **Krishnaswami**[5]. There the agreement ran thus: "You shall yourself bear the cost of executing the said decree, and, if money has to be realised by filing a suit against the said 'S' the cost of filing the suit also. We shall take accounts at the end take the amount of cost due to you out of the amount realised and you shall take one half and I the other half of the amount that remains. As in respect of the said amounts having to be realised by me in respect of the said decree amount and in respect of my having obtained assignment **I have made you incur expenses and** (antiques mine) take trouble and realise, I shall not in respect of the said documents, receive without your permission anything from any person in any manner, either amicably or through a Court " "I shall not for any reason whenever cancel without your permission this authority which I have given to you, without paying **the amount expended by you** (antiques mine) and without giving the aforesaid relief for your trouble " Mr. Justice Mockett delivering the judgment of the Bench observed "My view of the document is as follows, 'I think its primary object was to recover on behalf of the principal the fruits of the decree. It contained incidentally a provision for employment of the agent, Vedavysachar, in order to realise that decree ..... But the object of the power-of-attorney is not for the purpose of protecting or securing any interest of the agent. I think that part of the agreement is purely incidental There is, however, another feature of this document which seems to me to be conclusive against the appellant' " The last words "I shall not for any reason whatsoever, cancel without your permission this authority which I have given to you without paying the amount expended by you and without giving the aforesaid relief for your 'trouble' seem to me to make express provision for the revocation of the above power". In that case also the agent had already expended money and the power contemplated making compensation for the 'trouble' which term was intended to cover money and time spent by the agent. The last and final clause might well form, if any, a contract whereby the power is related back to the interest created by the advances already made and to be made. There is no room at all to infer the requirement of contemporaneity and the interest and agency being in one document.

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4. (1938) I M.L J. 610 A.I.R 1938 Mad 542
5. I.L.R. (1946) Mad. 121. (1945) 2 M L J 303

MEANING OF THE EXPRESSION "SHARE CAPITAL" INVOLVED IN REDUCTION OF CAPITAL UNDER SECTION 100 OF THE INDIAN COMPANIES ACT, 1956.

(*Re* : Panruti Industrial Co.)[1]

By

SURENDRA NATH*

The Madras High Court decision in "Re. **Panruti Industrial Co.**"[1], has raised the important questions as to the meaning of the expression "share capital", and as to the type of capital which could be reduced under section 100 The decision, on the whole, is commendable; but as far as it deals with the type of capital which can be reduced under section 100 can be criticised and cannot be accepted as good law.

Section 100 of the Indian Companies Act, 1956 (which corresponds to section 66 of the English Companies Act, 1948) permits a limited company to reduce, if so authorised by its articles, its 'share capital' in any way by special resolution The word 'share capital' is used in a special sense in company law and especially in this section The share capital can be classified in two ways depending upon the nature of the share capital and the types of the shares issued Section 86 of the Companies Act, 1956, deals with the kinds of share capital which can be issued by a company after the commencement of the Act of 1956. According to the first classification the share capital may be classified into the following nominal capital, issued and unissued capital, called up and uncalled capital, paid-up and unpaid capital In the present case, the paid-up capital of the company was reduced to wipe off the loss sustained by the company and the petitioner contended that since the reduction did not involve either a diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the creditors of the company were not entitled to object to the reduction under the provisions of section 101 (2) of the Act. The contention was, however, not accepted by Mr Justice Ramaswami and he explained the word 'capital' involved in a reduction of capital in the broadest sense His view was[2]

"The word 'capital' involved in 'reduction of capital' includes nominal shares-capital, **whether issued or un-issued** and if issued, whether fully paid or not, and 'share' includes 'stock', so that a company may reduce its stock See Re **Allsopp and Sons Ltd.**[2]-a Every reduction of capital must reduce the nominal capital, and the reduction of unissued capital may be combined with a reduction of issued capital, while issued capital may be reduced, whether fully paid or not. Re **Anglo-French Exploration Co.**[2]-b

This interpretation has given rise to one problem does reduction of the unissued capital also come under the scope of section 100 ? According to the present judgment, the reduction of unissued capital will be considered as a reduction of capital, and at this point we disagree

The learned Judge recognised that the Indian 'case-law is thoroughly sparse'[3] on section 100 of the Companies Act, and, therefore, he based his judgment on the point on two English cases Re **Allsopp and Sons, Ltd.**[2]-a and **Re Anglo-French Exploration Co.**[2]-b.

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1 A I.R. 1960 Mad. 537.

2. *Ibid*, p 538

2-*a* (1903) 51 W R. 644.

2-*b* (1902) 2 Ch 845, 852 : 18 T.L.R. 751.

3. *Ibid*, p. 538, para. 1.

It is true that in these two cases views similar to the views of Mr Justice Ramaswami were given In the latter case it was observed[4] —

"In speaking of reduction of capital the word 'capital' must be understood as meaning neither nominal capital to the exclusion of paid-up nor the latter to the exclusion of the former The nominal capital (A) of every company limited by shares (that is to say, the amount stated in the memorandum of association or as modified by subsequent increase) must always be represented by (B) capital called and paid upon shares issued, and (C) capital uncalled upon shares issued, and (D) the amount of unissued shares, or by some one or more of those. **Every reduction of capital must reduce (A) that is, the nominal capital and must reduce some one or more or all of (B), (C) and (D).**" (Emphasis added)

Mr Justice Ramaswami relied upon the last line mentioned above and formed his opinion, and concluded that every reduction of capital must include reduction of nominal capital which may be of issued or unissued capital. However, it seems that the attention of the learned Judge was not drawn to the next paragraph of the same decision where it was said[5]

" .. If the reduction be by reducing (A) and (D), or in other words by the cancellation of unissued shares, this may be effected without coming to the Court at all. . . To such a case the provisions of the Act of 1867 do not apply. The statute excludes this case, because unissued capital is a thing to which the creditor has no right to look "

In the above-mentioned paragraph it is clearly stated that the reduction of unissued capital should not be considered as a reduction of capital in the strict sense This has also been supported by statutory provisions in India and England. Section 94 (1) (e)[6] authorises a limited company to "cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled" Section 94 (3)[7] further provides that "a cancellation of shares in pursuance of this section shall not be deemed to be a reduction of share capital within the meaning of this Act " By these two statutory provisions, the reduction of nominal capital by cancelling the unissued capital is treated differently and is excluded from the scope of section 100. Had Mr Justice Ramaswami considered the meaning of the expression "reduction of capital" in the light of the statutory provisions or the second paragraph of the decision in Re **Anglo-French Exploration Company**[7-a], he would not have concluded that 'reduction of capital includes nominal share capital whether issued or unissued', he should have excluded the case of reduction of nominal capital by cancelling unissued share capital from the operation of section 100 of the Indian Companies Act, 1956 The reasons for this omission are unknown, but the decision makes the law appear contrary to the statutory provisions and the well-established principle of law[8].

The exclusion of the case of cancellation of unissued share capital from reduction of share capital can also be justified on other grounds The reasons for stringent conditions in the case of reduction of share capital are to protect the

4. *Ibid*, p 752
5 *Ibid*
6. (Indian) Companies Act, 1956 : (English) Companies Act, 1948, section 61 (1) (*e*).
7. *Ibid* section 61(3)
7-*a*. (1902) 2 Ch. 845, 852 . 18 T.L R 751.
8. See R. R Pennington, *Principles of Company Law* (London, 1959), pp. 121, 122, Palmer, *Company Law*, 20th Edn , pp. 272-273, Griffith, O and Miles Taylor, E, *Principles of Company Law* Harpenden 1962) 7th Edn , p. 141.

Mr. Shah, in his book "Lectures on Company Law" has quoted the decision of *Panruti ndustrial Co.*, without any addition, substraction or explanation The comments made in this paper are also applicable to that part of his book, see at page 96 (14th Edn).

interests of the creditors as well as to ensure that no injustice is caused between the different classes of members The protection of the creditors' interest is the paramount reason for the enactment of section 100 which prescribes different and stringent requirements to be fulfilled if the nominal capital is altered by reduction of issued capital It was said by Lord Watson in **Trevor** v **Whitworth**[9]

"One of the main objects contemplated by the legislature, in restricting the power of limited companies to reduce the amount of their capital as set forth in the memorandum, **is to protect the interests of the outside public who may become their creditors.** (Emphasis added)[10]

His Lordship further observed —

"In my opinion, the effect of these statutory restrictions is to prohibit every transaction between a company and a shareholder by means of which the money already paid to the company in respect of his shares is returned to him, unless the Court has sanctioned the transaction[11].

As was pointed out by Lord Watson, the protection of the interests of the creditors is the main reason in restricting the power of limited companies to reduce the amount of share capital. The creditors have a right to look to and rely upon the issued capital which may be fully paid or may remain unpaid for the satisfaction of their debts. However, by cancelling the unissued share capital the real capital of the company, **i.e.,** the money already paid to the company or the money being promised to be paid to the company by the shareholders, is unaffected In the case of reduction of nominal capital by reducing the unissued capital, only shareholders withdraw the authority which they have given to the directors as regards the issuance of shares. In such a case neither creditors nor shareholders are affected, because they do not have any claim or right relating to this type of capital The creditors cannot rely upon the unissued share capital, because this may not be issued at all by the company Therefore, the different treatment to this type of reduction of nominal capital under the Companies Act is logical and justified, there is no need for stringent conditions similar to those applicable in the case where the reduction of nominal capital is made by cancelling or reducing the issued capital.

The reduction of unissued capital can only be considered as a reduction of capital under section 100 when it is combined with the reduction of issued capital[11-a] because then the resolution is already passed by the special resolution. Even if the Court does not confirm the reduction, the reduction of unissued capital will be held valid.

It may also be interesting to note that from the wording[12] of section 94 (1) (e) of the Indian Companies Act, 1956 [section 61 (1) (e) of the English Companies Act, 1948], one gets the impression that this provision deals only with that type of capital which has been issued but not subscribed by the investors, **i.e.,** the unsubscribed capital If we adhere to the strict interpretation of the provision, we come to the same conclusion, therefore, it can be said that the reduction of unsubscribed capital is also excluded from the operation of section 100, and can be done by ordinary resolution However, it does not mean that the wording of section 94 (1) (e) excludes the reduction of unissued capital, because the unissued capital will always be unsubscribed Hence, one should read section 94 (1) (e) thus

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9 (1887) 12 App Cas 409

10. *Ibid,* p 423.

11. *Ibid,* p 423

11-*a*. Re Castigleone Erksin & Co., (1958) W L.R. 688

12 "Cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agree to be taken to any person.. " section 94 (1) (*e*) of the (Indian) Companies Act, 1956.

"cancel shares which, at the date of the passing of the resolution in that behalf, **have not been issued, or have been issued but not taken** or agreed to be taken by any person . "[13]

We do not find this kind of controversy under English law, nor has it been mentioned by any English text-writer. According to Palmer, the term 'diminution of capital' is defined "as a cancellation of the authorised but not issued capital, or, as section 61 (1) (e) expresses it, the 'cancellation of shares which at the date of the passing of the resolution in that behalf have not been taken or agreed does not constitute a reduction within the meaning of the Act[15] In England, the to be taken by any person' "[14] Further, according to Palmer, the diminution question of cancelling unsubscribed capital does not arise because it is the common presumption that as soon as the capital is issued, it is subscribed either by investors or underwriters Therefore, no English writer has said that section 61 (1) (e) deals with the unsubscribed capital, everyone is of the view that it deals with the unissued capital of the company. The practice of underwriting the entire issue is not very much prevalent in India, but the recent tendency is to sell shares either through banks or private underwriters who underwrite the entire issue However, we may depart from the English interpretation and enlarge the scope of section 94 (1) (e) of the (Indian) Companies Act, 1956, by including the unsubscribed capital too, in other words we may say that section 94 (1) (e) deals with the unissued as well as unsubscribed capital of a company

If it is so, then the meaning of the expression "reduction of share capital" in section 100, given by Mr Justice Ramaswami should be read with two exceptions, **i.e.,** the reduction of that part of nominal capital which is unissued and/or that part which is issued but not subscribed will not come under the purview of section 100, in such a case the reduction will be made under section 94 (1) (e) of the Indian Companies Act, 1956 The expression "reduction of share capital" means only the reduction of issued and subscribed capital or reduction of unissued capital combined with the subscribed capital In other words, section 100 is only applicable to those cases where there is a reduction of that part of nominal capital which has been subscribed If the above interpretation is correct, then, why not, in place of the words "reduce its share capital" in section 100, substitute the words "reduce its nominal share capital which has been issued and subscribed" or "reduce its subscribed share capital ?" This change seems to be sensible as it would define the scope of section 100 more clearly, and the ambiguity of the provision will be removed The Jenkins Committee in England was also of a similar view when it stated in its report that

" limited company must not reduce its 'capital' by which we mean (to use the nomenclature appropriate to par shares) the **aggregate of the issued capital** of the **company and the share premium** account and capital redemption reserve fund (if any).[16] (Emphasis added.)

This recommendation has not so far been written into the law in England, because there is no urgency for it However, the decision of the Madras High Court, especially the part which deals with the type of capital which can be reduced under section 100, has enhanced the necessity for the amendment of section 100 on the lines suggested above Although it is possible that the Supreme Court might overrule the Madras High Court decision on this point, yet in order to remove the ambiguity in section 100 (1) and section 94 (1) (e), further legislation is called for

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13 Words in antique are amended words and are added

14 Palmer, *Company Law*, 20th ed , p 272

15 *Ibid* , p. 272.

16. *Report of the Company Law Committee*, London : 1962, 1749, para. 157.

BOOK REVIEW.

THE LAW OF INDUSTRIAL DISPUTES IN INDIA : by *R F. Rustamji* (Publishers : Asia Publishing House, Bombay). Second Revised and Enlarged edition, 1964. Price Rs 45.

Labour Legislation and decisions thereunder have developed a special feature in jurisprudence. Hence, though Industrial Law is yet in its infancy in this country, it has already become a subject of specialised study. A proper appreciation and use of the leading decisions will be possible only if there is comprehension of the basic ideas governing the relationship of employer and employee Though the book under notice is mainly a commentary on the provisions of the Industrial Disputes Act, 1947, the Author has, in the Introductory Part of his work, given a brilliant account of the evolution of such ideas touching *en passant* in an arresting manner topics like Social Justice, Collective Bargaining, Ideas which inspire social Legislation, Indiscipline in Industry etc. The commentary on the sections of the Industrial Disputes Act takes note of all the important judicial pronouncements examining the underlying principles It is not a hackneyed type of commentary but one sustaining one's interest and original as well Each section has a synopsis, full notes of the legislative department concerning it, and the law as stated in the decisions, up to 1964 It is interesting to note that the Author has made out a cogent plea that, in any fresh enactment in the place of the present Act, the bar against legal practitioners representing parties in industrial disputes should not be included The Author also suggests that there is great need for the establishment of Appellate Tribunals in industrial matters The book is a thought-provoking study of the subject and is bound to appeal to all interested in the study of industrial relations

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FUNDAMENTAL RIGHTS AND AMENDMENT OF THE INDIAN CONSTITUTION' by *S P Sathe* (Published by the University of Bombay, Bombay-1). 1968. Price Rs 4.

In this monograph, Mr. Sathe examines the various issues arising out of the majority judgment of the Supreme Court in *Golak Nath* v. *State of Punjab*, A I R 1967 S C 1643 A lot has been said or written about the decision which has served only to reveal the sharp difference of juristic opinion on the matter. Naturally, Mr Sathe has marshalled all the main lines of reasoning adopted both by the majority as well as the minority Judges in that case and endeavoured to evaluate their merits. There are a number of considerations to render plausible the majority view concerning the scope of Articles 368 and 13 of the Constitution which have not been adequately appreciated If with full knowledge of the circumstances under which certain rights came to be written into the U S Constitution and of the anxiety of the makers of that Constitution to render those rights inalienable, the framers of the Indian Constitution declared certain rights as fundamental and put them in a special Part of the Constitution would it not be reasonable to suggest that the rights were so declared deliberately with a view to make them inalienable and transcendental in this country ? Article 32 (4) speaks of the right *guaranteed* by that Article Against what is such guaranee given ? Is it only against executive encroachment and ordinary legislation tending to affect fundamental rights or does it operate as a bulwark against constitutional amendments also by Parliament yielding to the pressures of the party in power for the time being ? If Article 32 itself is liable to be repealed will it not be a mockery of the guarantee and a travesty of the protection affordable by the Supreme Court ? Has not the Constitution itself indicated the limits within which fundamental rights can be affected and the modes in which it can be done ? Has not the Constitution expressly provided for laws being made imposing "reasonable" restrictions on the exercise of the various fundamental rights, in Article 19 for "modification" in the application of such rights, in Article 33, for "restrictions" in the application of such rights, in Article 34, or for the "sus-

pension" of the provisions of Article 19, in Article 358? When limits have been so set regarding interference with fundamental rights would they not suggest that the rights are to remain untouched and are untouchable otherwise? Again it cannot be denied that the Constitution itself is "law" It may not be an ordinary law but a paramount or superior type of law. Any amendment of the Constitution also will be law in that sense. The fact that the amendment is achieved not by the exercise of ordinary legislative power but by the exercise of constitutional power is consistent with its superior status None the less it is "law" recognised and enforced in the administration of justice And, there being no definition of the term "law" in Article 13 restricting it to ordinary laws only could it not be said that Article 13 would cover constitutional amendments as well? It may not be easy to agree with Mr Sathe that the ideals alone of the Constitution as stated in the Preamble are intended to be permanent and abiding but not the rights stated in Part III. Mr Sathe stands on firmer ground in his criticism of the American doctrine of prospective overruling being applied not merely to maintain executive action taken prior to the decision of the Supreme Court holding the impugned Constitutional Amendments to be void and unconstitutional but also to sustain them in regard to the future. It is good that academic men who could make a detached and dispassionate approach are taking interest in the study of momentous problems like those brought to the fore in *Golak Nath's case*

THE ESSENTIALS OF AN IDEAL LEGAL SYSTEM. by *M J Sethna* (Published by the University of Bombay, Bombay-1). 1968. Price Rs 3

The monograph carries an attractive title If the reader conjures up the vision of a comparison and weighing by the Author of the ideals of the law, such as the Hindu ideal of law being an instrument for achievement of welfare here and hereafter, or the Benthamite ideal of the utility of law for the greatest number, or the Soviet ideal of law being an instrument for serving the ends of the State etc., he will not find it in the book The Author has set himself a more restricted task, namely, to state what an ideal legislation should be The Author quotes profusely the views and theories of the great thinkers in the field of jurisprudence, particularly American. His frequent references to Dean Roscoe Pound show his predilection for the American schools of thought on the subject Law is neither wholly logic nor wholly experience A good law is a just combination of both To state that law is a powerful instrument for the procuring of the materialistic welfare of the people would be to ignore its moral and ethical aspects The Author has suggested at more than one place that the function of law is the fulfilment of the materialistic welfare of the people (see pp 2, 1). His final conclusions however are that ideal legislation should be based on certain well-settled postulates like the jural postulates of civilisation propounded by Pound and that in substance the law must be based on good reason, healthy morals of the people, legitimate customs and conventions and on the wants of the people. One would wish that the exposition of the subject was simpler The use of high-sounding expressions like "the methodology and the epistemology of law" (p. 1), "synthetic disposition of mind" (p 3), "pin-sharp or pigeonhole discrimination" (p. 22) etc, has not made understanding easy The Author's conclusion that in the methodology of legislation, equal importance should be assigned to experience and reason, will find general acceptance.

A. C GANGULY'S CIVIL COURT PRACTICE AND PROCEDURE; by *Shambudas Mitra* (Publishers. Eastern Law House Private, Limited, Calcutta) Eighth edition, 1968 Price Rs 25

The precise objectives underlying the work are not clear as the preface to the first edition of the work has not been incorporated in this volume The book seems to be designed, in special for the benefit of legal practitioners in Bengal The book is divided into five parts. Part I concerns itself with a number of topics like appointment of pleaders; civil suits, proceedings in civil suits from institution to decree;

drawing up of pleadings and issues; documents, interrogatories and citing of witnesses; commissions; injunction; receiver; attachment before judgment, compromise and withdrawal of suit; arbitration; procedure at the hearing of a suit; examination and cross-examination of witnesses; proceedings after decree and execution of decree; appeals; review; revision; records of pending cases and copies. Part II is a conglomeration of various matters and provides some notes on relevant statutory provisions affecting civil Court practice and procedure like the Civil Procedure Code, the Constitution, the Transfer of Property Act, the Provincial Small Cause Courts Act, the Indian Succession Act, the Guardians and Wards Act, the Lunacy Act, the Provincial Insolvency Act, the Land Acquisition Act, the Legal Practitioners Act, Hindu Law, Mahomedan Law, Limitation Act, Stamp Act, Court Fees Act, Suits Valuation Act, Registration Act, Bengal Money-lenders Act, Calcutta Thika Tenancy Act, West Bengal Non-agricultural Tenancy Act, West Bengal Land Reforms Act, West Bengal Premises Tenancy Act, Process Fees and Extracts of Rules framed by the different High Courts Part III provides model Forms of plaints, written statements, issues, applications, petitions and affidavits and hints relating to them. Part IV furnishes model Forms of Deeds and Notices Part V contains important rulings, glossary of important law terms etc.

In view of the present Advocates Act the references to the Legal Practitioner Act provisions in Chapter X of the book may no longer be of much use Also, in a book of 1968, there is not much point in setting out the former Hindu law of succession and the law of stridhana particularly as it is recognised on p 346 "The above rules of succession are no longer in force" The references at different places to Hindu widow and the reversioner are also superfluous A novel feature in the book is the attachment of a chronological table for the period 1933 to 1967 giving the English dates which correspond to the Bengal year, Fasli year, Mussalman year and Sambat of Hindi year and a chart with hints for using the table. The book will prove useful in many directions particularly to the junior practitioners at the Bar having regard to the diverse types of materials presented

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COMMENTARY ON THE CODE OF CIVIL PROCEDURE: by *R D. Agarwal* (Publishers: Hind Publishing Books, Allahabad) Third edition, 1968 Price Rs. 27.50

There are in the field already quite a number of standard books on the Civil Procedure Code. The justification for the work under notice is sought in the fact that it serves as a "handy book" on the subject (first edition), a "path finder" (3rd edition) and that it is "written for the purpose of helping a busy lawyer" The book gives a brief businesslike section by section commentary on the provisions of the Code The amendments made in the Code from time to time as well as the amendments to the rules contained in the several orders by the different High Courts are mentioned A number of Appendices, A to H, have been attached bearing on Pleadings, Process; Discovery and Inspection, Decrees Execution; Supplemental Proceedings; Appeal, reference and review, and Miscellaneous matters The notes are pointed and analytical. It would have been very helpful if matters like the applicability of the provisions of the Code to writ petitions, and what is meant by "civil proceedings" referring to leading decisions like (1965) 2 S.C.J. 359 : A I R. 1965 S C. 1818. (1966) 2 S C J 762 . A I R 1966 S C 1445 had also been considered The decision in (1963) 2 S C J 680 A I R. 1966 S C 1061 holding that a wrong decision by a Court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeal to higher tribunals or other procedure which the law provides does not seem to have been noticed In the notes to section 34 the decision of the Supreme Court in (1966) 1 S C J. 350. A.I R 1966 S C 395 dealing with the question as to when interest for the period up to the date of the suit may be allowed does not seem to have been touched There is no Table of Cases attached to the book. Notwithstanding these the book is bound to prove helpful to busy lawyers as well as to the students preparing for the degree examinations in law.

THE CENTRAL SALES TAX LAWS : by *K Chaturvedi*, Vols I and II. (Publishers : The Eastern Law House Private Limited, Calcutta) Second edition, 1968. Price Rs. 40 per set of Volumes I and II

Madras was the pioneer State to introduce sales tax legislation Between 1939 and 1950 almost every State had recourse to this novel method of augmenting its revenues and sales tax was looked upon as a *kamadhenu*. The application of the nexus theory to sales tax laws had led often to the same transaction being subjected to tax by the different States producing great hardships and complications. Article 286 sought to put a check on the phenomenon But the interpretation of the Article itself was by no means easy or clear In 1956 the Sixth Amendment to the Constitution was made separating the power to tax inter-State sales from the State List and putting it into the Union List In exercise of the powers so conferred on the Union by the Sixth Amendment, the Central Sales Tax Act, 1956, was passed. In the introduction to the volume under review, the author has traced the tangled history of the laws linked with the levy of taxes on sales and purchases. Volume I *inter alia* gives the text of the Central Sales Tax Act, 1956, as amended up to May 1968, the historical background to the Act, and a section by section commentary on the provisions of the Act. Appendices B, C, D gather respectively the Notifications, about authorised officers for purposes of section 8 (4) (*b*), and other Notifications issued by the Central Government. Volume II covers miscellaneous matters like Sales Tax Geography, The Central Sales Tax (Registration and Turnover) Rules, 1957, the Rules framed by or for the various States and Union territories. A study of the rules shows only too clearly the dependence almost completely of the Centre on the machinery of the States in the matter of the levy and collection of the Central sales tax. In sooth it is tantamount to an admission by the Centre of defeat in its attempt to have control begun as early as 1948 when it called for a Conference of the regional ministers to curb State dominance in the matter.

The author's comments on the sections are fairly analytical and lucid. It would have enhanced the utility of the work if the laws of India had been compared with the sales tax laws of the western democracies. Of equal benefit would have been a reference to the regulatory aspect of inter-State commerce as exemplified by the development of the law in the United States of America. The book under notice is a welcome addition to the literature on the subject.

THE INDIAN CONVEYANCER ; by *P C Mogha* (Publishers : The Eastern Law House Private, Limited, Calcutta). Seventh edition, revised by *Shri Ambika Prasad Srivastava*, retired Judge, Allahabad High Court, 1968 Price Rs. 24.

Mogha's book was the first of its kind in India Within 30 years of its first publication it has run into seven editions Its aim is to introduce a systematic method of conveyancing in this country. Conveyancing as an art was little known or practised till recently in India. Deeds were drawn up unscientifically by persons unversed in that art and with no special qualification or training in that behalf. In England, solicitors having been trained to undertake such type of work attended to conveyancing In our country even lawyers had no special qualification in the field and it is only now that attempts are being made to include subjects like conveyancing and drafting as part of law studies It was till recently the practice to make use of the English forms and precedents without any precise idea as to the technical jargon often employed and occurring in such forms with the result that the deeds failed to convey what was actually intended by the parties and gave rise years later to litigation. When the Author first published his work he was careful to adapt the English precedents to suit the Indian conditions of life stripping them of the technical terms and expressions which, however appropriate to the feudal and archaic forms of property-holding, were altogether unsuited in regard to our country. The Author expressed the forms and precedents so adapted in an easily understandable form The precedents are arranged in groups topicwar and prefatory notes

are appended to the precedents relating to different subjects The law concerning each of them to the extent necessary for purposes of conveyancing has been also briefly stated.

In the preliminary notes, though carefully revised, some inaccuracies are found. On page 711, in line 17, the words "could dispose" should be "could not dispose". Lower down on the same page, it is stated that a bequest to a person not in existence at the time of the testator's death is void under the Hindu and Muhammadan laws but the rule so far as it relates to Hindus has been altered in Madras by legislative enactment. If this is a reference to the Madras Act 1 of 1914, it has to be noted that the Privy Council held the Act to be *ultra vires*, the Madras Legislature to the extent it affected the High Court's Original jurisdiction but the principle underlying the Act was made applicable throughout India by Central legislation— the Hindu Disposition of Property Act, XV of 1916—and later enactments.

Mogha's book removed a long felt want of the legal profession and proved to be a source of immense practical help This feature continues in all the subsequent editions, and has sustained its popularity.

CONVEYANCING PRECEDENTS AND FORMS WITH NOTES . by *Shiva Gopal* (Publishers; Eastern Book Company, Lucknow) Fourth Edition, 1968 Price Rs. 14.

The book under review is intended to be just a guide and not a treatise or encyclopaedia on the subject of conveyancing Its aim is to assist the practising conveyancer and the public It provides not only conveyancing precedents but also forms of petitions to Courts Each chapter and sub-chapter is prefaced by a brief discussion of the legal aspect of the subject which follows and short explanatory notes of the law involved are also given at places The prefatory statements have taken note of the relevant statutes down to date and the statements are generally concise and helpful. More than 270 precedents have been given. A small point may be mentioned however. On page 477, there is no point in referring to the Anand Marriage Act, 1909, in view of the Author recognising that "The Act now is of no practical value, as the Hindu Marriage Act governs the relationship of husbands and wives professing the Sikh faith" The book is a useful addition to the works in this country on Conveyancing.

JUSTICE VENKATADRI'S RETIREMENT.

Justice Venkatadri has retired after a tenure of about eight years as a Judge of the High Court having gone to the Bench straight from the Bar. It was his good fortune in the early days of his career at the Bar to work in the Chambers of Sri P. Venkataramana Rao which was then a nursery of budding talent with a band of brilliant and rising stars like Sri Rajamannar, Sri K Subba Rao, Sri Vaidialingam and others His association with them afforded an excellent background for success in the profession and for his acquiring intimate knowledge of many branches of the law When, in course of time, Sri Venkatadri was appointed Judge of the High Court, it was in the natural order of things and gave general satisfaction. The administration of justice is the foremost and firmest pillar of Government and judicial work has to be all the time both satisfying and satisfactory It is not so much brilliance that marks a good Judge as sobriety and a passion to do justice Justice should not only be done but should seem manifestly to be done To listen to arguments from both sides with courtesy and patience is an essential quality and, as has rightly been said, Judges must be more advised than confident. However much one may boast that

> The net of law is spread so wide,
> No sinner from its sweep may hide
> Its meshes are so fine and strong,
> That take in every child of wrong.,

it is an admitted fact that law abounds in lacunae and technicalities which may tend to defeat justice. It is therefore a wonderful albeit awe-inspiring responsibility of Judges to get over such obstacles in administering justice. It was heartening to hear Justice Venkatadri state that the work of a Judge was to him a constant wrestling along with the members of the Bar to ascertain truth in the maze of complex and complicated problems and facts. Since the advent of independence the pattern of work in the High Court has undergone great changes A large bulk of the work lies today in the writ jurisdiction of the High Court. Justice Venkatadri has been engaged in large measure with writ work and second appeals. In his judgments he has shown an awareness of the need for law being applied conformably to the spirit of the times He has not also hesitated to express himself strikingly on occasions when there was need for it An instance of the former is to be found in his judgment in (1968) 2 M L J 157, 164, where, in regard to mirasi rights in the Chingleput District, he observed "The system of mirasi tenure in Chingleput District is an obscure, obsolete and archaic one In view of the complexity of the mirasi rights, in view of the doubtful rights of the mirasdar and the tenants, in view of the liberalised legislation conferring benefits on the occupants of the soil, and in view of the continuous and uninterrupted possession by the tenants of the land, I am of the opinion that the mirasi tenure has to be interpreted according to the present state of affairs and according to the present day needs of the society". The learned Judge's observations **apropos** of the Public Service Commission in (1968) 1 M L J 348, 351, is striking He said "The Public Service Commission have a distinct and distinguished status under our Constitution The Public Service Commission cannot and should not identify themselves with the Governmental authorities When once the Commission express their opinion that the petitioner is entitled to the post as Head of the Section of Sound Engineering, they cannot afterwards concur with the view of the Director of Technical Education and say that the petitioner is not a fit person for the post. If

the Commission is to change their opinion from time to time to suit the occasion, they would be placing themselves in a ridiculous situation and would be liable to public criticism. Once they give a considered opinion, they must stick to it and their decision must be final at least so far as they are concerned. Their approval is the last word in the selection of a particular candidate for a distinct post". We are sure that Justice Venkatadri carries with him in his retirement the good wishes of the Bar.

THE LAW OF INDUSTRIAL DISPUTES by *Malhotra* (Publishers : N.M. Tripathi, Private Limited, Princess Street, Bombay-2). 1968. Price Rs. 60.

Today Industrial Law occupies a prominent place in the legal system of the country but is little known to the public at large. About one-sixth of all the litigation pending before the Supreme Court covers Industrial Law matters. This is the result of the advent of large scale industry carrying with it new and large problems. Industrial Law is not and cannot be *strictum jus*, for it is half law and half sociology, economics and politics Industrial Law has given rise to a new jurisprudence making drastic departures from the traditional and accepted theories of law. Thus while the orthodox principle is that a contract is born of the free consent of both the parties thereto and is therefore binding and enforceable, today it is possible for a workman to flout the contract and where a dispute goes to an Industrial Tribunal that body can make the unwilling employer submit to its jurisdiction. Curiouser still, the Tribunal can by its award *make* a contract which will be binding on both the parties *imposing new rights and new obligations* ignoring the contract made by the parties themselves and the ordinary law applicable to them In a classic passage in the *Bharat Bank case*, (1950) Lab L J. (S C) 921, 948-9, Mukherjea, J., observed : " In settling the disputes between the employers and the workmen, the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace." An Authority *making* a contract and *imposing* it on the parties who are bound by it is indeed a novel idea. Various types of benefits are now secured to the employees and they are now claimed and won by the workmen as their due not on account of any contract but on account of their *status*. These features have cut across the old notions and theories of the law of contracts and the law of master and servant. The Industrial Law in this country has drawn freely from the principles operating in the field in England, the U S A. and Australia. There is no comprehensive Labour Code as such so far, and the Industrial Disputes Act, 1947, fills that role meanwhile providing for procedure and machinery of adjudication. The Act is only skeletal and has been filled with flesh and blood by industrial adjudication. (*See* 1949 Lab. L. J. 258). There are no provisions in the Act for appeal or revision. The decision of the Supreme Court in the *Bharat Bank case* that Article 136 of the Constitution is wide enough to give jurisdiction to the Supreme Court to entertain applications for Special Leave to appeal from the awards of the Tribunal since in making the awards it discharges a quasi-judicial function and the constitutional remedies through writs have provided the necessary scope for moulding the industrial law development on healthy lines

The focus of the book under review is judge-made law which now is spread over two decades. The book is laid in five divisions Division I gives a section—war commentary on the Industrial Disputes Act Division II deals with the Payment of Bonus Act, 1965. Division III covers the subject of General Disputes taking within its sweep topics like Wages, Dearness Allowance, Gratuity, Non-statutory bonus and Miscellaneous Service Conditions Division IV is devoted to Disciplinary Action Division V discusses the constitutional remedies against defective and arbitrary awards and orders of adjudication available by way of appeals by Special Leave under Article 136 and writs under Articles 226 and 227. In spite of the working of the Act for well nigh twenty years and judicial expositions a number of controversial topics continue to remain such as the scope and extent of the definition of industry, the relationship of employment and the tests to be applied in determining it, implications of lock-out, retrenchment, unfair labour practices etc The Author has not by-passed controversies but has endeavoured to deal with all such questions in a scholarly and analytical manner expressing his own views wherever necessary. The discussions throughout are balanced and well-informed. The book presents an able analysis of fundamental legal principles relating to labour law in India. Under

the Payment of Bonus Act the only important decision of the Supreme Court apart from that in the *Jalan Trading Co. case*, (1966) 2 Lab L J. 546—seems to be that in the *National Engineering Industries Ltd case*, A I R 1968 S C 538—explaining the distinction between 'modernisation' and 'expansion' and the principles of estimating rehabilitation cost The book under review is sure to prove very useful alike to lawyers, industrialists and others concerned with or interested in Industrial Law, as a learned and accurate exposition of the subject.

COMMENTARIES ON EMPLOYEES' STATE INSURANCE ACT, 1948, by *Kirpa Dayal Srivastava*. (Publishers Eastern Book Company, Lucknow and Delhi), 1968, Price Rs. 30.

Freedom from economic fear is a great freedom indeed Social security legislation is designed to attack this fear and eradicate it as far as possible. The Employees' State Insurance Act is one such piece of social legislation. It is intended to confer certain specified benefits on workmen to whom it applies. Though in the beginning the area of its operation may appear restricted, in course of time it is bound to cover a very wide field. The Employees' State Insurance Act replaces the Workmen's Compensation Act, 1923, in the fields where the Insurance Act has been made applicable. It will be of interest to note that the Universal Declaration of Human Rights proclaims that every one, as a member of Society, has the right to social security and that the Directive Principles of State Policy in Part IV of the Constitution have bestowed considerable attention to social security and social justice. A book on the subject of Employees' State Insurance, therefore, is always to be hailed. The book under review provides a section by section commentary on the provisions of the 1948 Act

The Author has felt that case-law on the Act has not yet developed much during the two decades of its existence and so he has quoted decisions on the parallel law found in other enactments It is strange, therefore, that Indian decisions on the provisions of the Act like *Bank Silver Co , Bombay* v *Employees' State Insurance Corporation, Bombay*, A I R 1965 Bom 111, holding that partners or proprietors of the Establishment are also 'persons' within the meaning of section 2 (12); *M S Abdullah Basha & Co* v *Employees' State Insurance Corporation, Madras*, I L R. (1965) 1 Mad. 203, stating that unless power was directly used for purposes of manufacture the concerned premises would not be a factory, (*Workmen of Rohtas Ltd* v. *Choudhuri*, A I R 1965 Pat 127, holding that customary benefits or concessions which a worker gets from the management amounting to conditions of service are not barred even where the Employees' State Insurance Scheme is introduced unless the statute expressly provides to the contrary, etc , seem to have escaped notice Again, though now-a-days it is perhaps too much to expect the enunciation of principles in grammatical or correct English, it should be certainly possible with some care to eliminate obvious printing mistakes particularly in regard to names and words It is not happy reading that Mangalmurti, J should appear as Maralmurti, J (p 40), Hawkin, J as Hawkings, J (p 42), Lord Hewart, C J , as Lord Hewart, C I M (p 60), Mack, J , as Maik J (pp. 140, 141), Farwell L J as Farewell, L J (p 156), or Glanville Williams as Clanwills Williams (p 270) Similarly 'melting pot' should not be made 'moulting pot' (p 4), 'defiance of mandatory provisions' should not read as 'defence of mandatory provisions' (p 38), 'an appeal' as 'no appeal' (p 47), 'in the course of its exercise' as 'in the Courts of its exercise' (p 48), 'when' as 'which' (p 52), etc. These are only random specimens The book will be useful notwithstanding these shortcomings to those who are interested in the subject.

THE LAW OF HINDU RELIGIOUS AND CHARITABLE ENDOWMENTS by *V. K. Varadachari* (Publishers. Eastern Book Company, Lucknow and Delhi), 1968. Price Rs 30.

The Hindu Law of Religious Endowments formed the subject of the Tagore Law Lectures delivered by eminent scholars like Pran Nath Saraswati and J C. Ghose P R Ganapathi Aiyar's scholarly work on Hindu and Muhammadan Religious Endowments is as it were, a source book on the subject Bijan Kumar Mukherjee's book is, perhaps, the most outstanding contribution on the subject in recent times Lewin on Trusts and Tudor on Charities are the leading English authorities frequently pressed into service in this country The Author of the book under review has drawn inspiration from all these works.

The sneering reference to Hindu Religious Endowments, by an Englishman, as the death-bed gifts of moribund sinners has not prevented legislative interference touching them from as early as 1863 The provisions in the Constitution relating to religious and cultural rights distinguish between matters wholly religious and matters though associated with religions are primarily economic and social activities. Though Hindu Religious and Charitable Endowments and the offices associated with them are creatures of Hindu law evolved over a period of centuries legislation concerning them and their administration has been made by a number of States from time to time The Author has taken due note of the impact of such legislation on the older Hindu theories and beliefs Similarly in his references to English law principles the Author has endeavoured to mention the similarities as well as differences between English law and Hindu law on the concerned points. The Author has dealt with the subject analytically and lucidly. Case-law has been taken note of generally up to 1968

One or two points open to criticism or suggestion may be stated. The summary of the law relating to the powers of a female donor on pages 73-74 could have been put in a sentence or two in view of the Author's recognition that the position in regard to the matter has changed by reason of section 14 of the Hindu Succession Act Though the Author has stated on the strength of the decisions in A I R 1951 Mad 473 and (1964) 2 An W R 457 that the presence of an idol, though an invariable feature of Hindu temples, is not a legal requisite he might have stated that, in the eye of law, there cannot be a math without a mathadhipathi as its spiritual head as pointed out in (1966) 2 S C J 220 A I R 1966 S C 1011 (though the decision is cited for another purpose on p 112) The Author could have cited I L R (1966) 1 Mad. 157 for the view that the mere installation on the gadi would not give a person in the case of a mourasi math title if he had not been nominated and initiated or duly installed according to the usage of the math. There are a number of printing mistakes which should have been avoided On p 4, f n 9, I L R 1940 (2) 285 should be I L R (1940) 2 Cal 285, on p 104 line 13 "personal hairs of the mahant" should be "personal heirs of the mahant", on p 141, f n 24, 1959 S C 293 should be 1951 S C 293 It is not necessary to multiply examples Despite these points of criticism it can be said justifiably that the book is a welcome addition to the literature on the subject.

THE INDIAN SUCCESSION ACT by *B B Mitra* (Publishers: Eastern Law House, Private Limited, Calcutta) Ninth Edition by Sudhindra Kumar Palit, 1968. Price Rs. 26

Though more than a century has passed since the enactment of the original Indian Succession Act and more than forty years since its re-enactment in 1925 the Act remains essentially what it was, namely, a law providing the rules of succession with regard to Christians and Parsis leaving Hindus and Muslims outside its purview.

Its ambitious name is a misnomer in the sense that it does not provide for the intestate succession of a majority of the people in India Despite the Directive in Article 44 of the Constitution that the State shall endeavour to secure for the citizens a uniform civil code throughout the territories of India no progress whatever has been made in that direction. It is also a fact that quite a large part of the Act, namely, that dealing with testamentary succession has been devoted to subjects which are of little use to testators in this country. B B Mitra's book is a well-known and popular commentary on the Indian Succession Act A new edition of the work keeping it up-to-date is always welcome At page 14 the statement based on A I R 1964 Mad. 291 that under Hindu Law it is not competent to a member of a joint family to execute a will in regard to his share in joint family properties, is bound to be incomplete without a reference to the present position resulting from the provision in section 30 of the Hindu Succession Act, 1956 It is rather strange that the comments on the provisions in Part II of the Act do not explain anywhere what precisely 'domicile' is. A reference to Chitty, J.'s definition in *Craignish* v. *Craignish*, (1892) 2 Ch. 180, 192, that " that is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom", and to the decision of the Supreme Court in *Central Bank* v. *Ram Narain*, (1955) 1 S C R. 697, 703 would have been happy So also in noting the difference between domicile and nationality a reference to the decision of the Supreme Court in the *State Trading Corporation case*, A I R. 1963 S C 1811—would have been helpful There are as usual in present day publications some printing mistakes On p. 4, A I R 1355 Lah 646 should be A I R 1935 Lah 646 In Appendix A some model forms are given and in Appendix B the text of the Hindu Succession Act, 1956, is furnished. The book under review is sure to be helpful to lawyers and law-students alike.

PRINCIPLES OF DISTRICT ADMINISTRATION IN INDIA by *Dr K N V Sastri* (Publishers: Metropolitan Book Co , Private Ltd 1, Faiz Bazar, Delhi) First Edition, 1957. Price Rs 5.

This is a scientific treatise on the subject of District Administration in India and is probably the first of its kind The book is divided into five chapters Chapter I contains an Introduction to the subject discussing the Theory of the Indian Republic and ancillary matters Chapter II deals with Structure and Functions of the State and Chapter III with Principles of Administration Chapter IV discusses Standard and Technique and Chapter V contains a Critical Review. Appendix A covers the Practice of District Administration in India Appendix B deals with Land Tenure and Appendix C enumerates the Problems in District Administration.

The public administration of India with its diverse population, religions, castes and creeds, differences of language and culture, etc is a complex and complicated business. District Government does not find a place in the Constitution though the district still continues to be the unit of administration. This is presumably because district administration is a matter of administrative convenience only The district is without doubt the best area for geographical and functional aggregation of units and branches of administration and bears a logical relation to total area, wealth and population During the British regime the Collector was the most powerful figure in the District and formed part of the " steel frame "—the I C S —in the language of the then Prime Minister of England, Mr. Lloyd George. In the Chapter entitled Critical Review the Author brilliantly analyses the impact of the changed conditions in the country on the role of the Collector in the modern set-up and reaches the conclusion that he is still needed. He remarks " India still needs one strong man as the head of the District " (p 71). The Author hopes that separation of powers would become universal before long, And he sets forth certain ideals before the adminis-

tiatois of districts to be pursued in the changed conditions The Author's treatment of the subject is scholarly and interesting. The book constitutes a genuine contribution on the subject.

WAKF LAWS AND ADMINISTRATION IN INDIA by S *Athar Husain and S. Khalid Rashid* (Publishers. Eastern Book Company, Lucknow and Delhi) 1968. Price Rs 20.

It is estimated that at the present time there are more than a lakh of wakfs valued at more than a hundred crore of rupees and that a further fifty crore of rupees worth of wakfs would come to light on further investigation Since many of the wakfs are in support of educational institutions, libraries, charitable dispensaries, etc , and constitute, as it were, a national asset, the maintenance and proper administration of wakfs becomes a matter of great public importance Though from the days of the Muslim rulers large scale creation of wakfs and governmental supervision are to be found, it is only during the last five or six decades that legislation relating to supervision of the administration of wakf properties has come to the fore Article 26 of the Constitution confers freedom to every religious denomination to establish and maintain its religious and charitable institutions subject to public order, morality and health Wakf stands related to Entry 10 'Trusts and Trustees' and Entry 28 'Charities and Charitable Institutions,' in the Concurrent List in Schedule VII Supervision of the proper administration of wakfs has in this wise become the responsibility of the Government The Wakfs Act of 1954 enacted by the Centre is a notable piece of legislation in this respect and there are a number of State enactments as well

The book under notice is divided into two Parts Part I deals with wakf administration and Part II is devoted to the substantive law on Wakfs The Appendices furnish the text of the various Acts relating to Wakfs passed from 1913 onwards both by the Centre as well as the States Chapter VI of Part I contains a striking analysis of the difficulties arising in Wakf administration and gives practical suggestions for improving the administration The impact of other laws like the Income-tax Act, the Estate Duty Act, etc, has been carefully examined The exposition of the Muslim law principles relating to wakfs in Part II is lucid and adequate The book can be read profitably by those interested in the subject.

T R DESAI'S CONTRACT ACT WITH SALE OF GOODS ACT AND PARTNERSHIP ACT (Publishers S C Sarkar & Sons Private Limited, Calcutta-12). Seventeenth Edition, March, 1968. Price Rs. 20.

The book under review is now in its Seventeenth Edition amply testifying to its popularity with all those concerned with the Law of Contracts After an introductory chapter, the book provides a section by section commentary of the three Acts The attached Appendix furnishes summaries respectively of the Contract Act, the Sale of Goods Act and the Partnership Act , a statement of the Differences between English and Indian laws ; a statement of Technical Terms with their meaning and finally, an Explanation of Maxims come across in the law of Contracts.

The book under review as a commentary on the three Acts is quite good as far as it goes. It is said however that no commentary on any legal subject can be accurate unless it is exhaustive. To achieve that quality one may legitimately expect in a modern book that either in the Introduction or at other appropriate places

the present day theories in relation to contract would be adverted to as also questions like whether a contract springs really and always from the free consent of the parties or when exactly a contract becomes complete, etc Though generally case law up-to-date has been taken into account there does not seem to be any reference to decisions like *Bhagwandas Goverdhandas Kedia* v. *Girdharilal Purushottamdas*, A I R. 1966 S C 543, relating to the question when the contract becomes complete where the telephone, etc , is used as a means of personal conversation between the parties separated in space and whether the Contract Act admits of acceptance of the view of the Court of Appeal in England in (1955) 2 Q B 327 , or to *General Assurance Society Ltd* v *L I C India*, (1964) 1 S C J 12 A I R 1964 S C 892 deciding that when a party makes a composite offer, each part thereof being dependent on the other, the other party cannot be accepting a part of the offer compel the former to confine the dispute to the part not accepted , or to *Sitaram* v *Kunj Lal*, A I R. 1963 All 206, holding that a contract entered into in defiance of a legal provision continues to be illegal even after the legal provision ceases to be effective. Notwithstanding these, the book is a useful and welcome publication

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PRINCIPLES OF CRIMINOLOGY, CRIMINAL LAW AND INVESTIGATION by *R Deb*. (Publishers S C Sarkar & Sons, Private, Limited, Calcutta-12) Second Edition 1968 Volume I Price Rs 17

This is a purely professional book It is the outcome of practical experience and study of case law It is often remarked in a jocular vein that in this country there is statutory distrust of the policemen and his methods The emergence of the rule of law as a basic principle of the Constitution, the constitutional protection against testimonial compulsion, the separation of the judiciary from the executive make a profound impact on police methods and investigation Much of the criticism of police investigation is due to the failure of the officers to be conversant with modern trends in regard to crime detection, treatment of offenders, punishment of criminals, etc , as well as with important rulings of Courts Various scientific methods are now extensively employed like chemical analysis, blood test, photography, microscopy, finger-prints, footprints, lie detectors, etc The volume under notice written by a votary devoted to the subject covers both the scientific and legal aspects of investigation The volume is divided into nine chapters dealing with topics like Criminology, Lie Detector, *Modus operandi*, Interrogation of Witnesss, Suspects, Employment of Sources etc The Author could have referred to the decision of the Supreme Court in *Jhingan* v *State of U P* , (1966) 2 S C J. 742 A I R. 1966 S C 1762 in regard to the presumption and essentials to be proved in corruption cases in the notes on page 381 *et seq* The book is written interestingly and will be highly helpful to members of the police forces, law students and lawyers alike. It makes fascinating reading throughout

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NEGLIGENCE AND OTHER TORTS IN ENGINEERING by *B D Viramani* (Publishers: Engineering Law Publications of India, 308, Rajendra Nagar, Lucknow-4) 1968. Price Rs 18.

Ignorance of law is no excuse The Engineer or Architect engaged in construction should be conversant *inter alia* with the principles of the Law of Torts so far as they may be relevant to him, as, more than any other branch of Law, it is directly related to his work When a person engages the services of an engineer or architect he buys both skill and judgment and there is a warranty that the person engaged would exercise reasonable degree of care, skill and knowledge in carrying out his task Liability would therefore attach if there is a failure in this respect Chapter I of the book deals with Torts generally Chapters II and III cover the topic of

negligence of the Engineer or Architect. Chapter IV is devoted to Nuisances and Chapter V to Hazards of Construction, Injuries and Safety Chapter VI considers Fraud, Deception and Misrepresentation and Chapter VII Trespass, Conversion and Detinue Chapter IX explains the principles relating to Easements and Chapter X refers to the rest of the Torts The book gives a lucid exposition of the subject and is nicely got up

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COMPANY LAW SIMPLIFIED by *Mrs Khorshed D P Madon* (Publishers : Progressive Corporation Private Ltd , Bombay). Second Edition, 1968 Price Rs. 6.

The Companies Act is a lengthy and complicated enactment. The book under review sets out the principles in a simple and assimilable form, in outline. Important and relevant case law, both English and Indian, is also given. The book has been written essentially to enable a rapid revision of the course covered by the syllabus on Company Law for examinations like B Com , LL B , C A , etc The fact that the first edition of the work was sold out within a year of its publication testifies to its popularity. The law is stated accurately and the book is a useful and welcome publication.

PERSONNEL MANAGEMENT AND INDUSTRIAL RELATIONS IN INDIA Edited by *T. N. Kapoor.* (Publishers . N. M. Tripathi Private Limited, Bombay), 1968. Price Rs 25

The book *inter alia* is a compilation of the papers contributed by twenty-four academic men and practitioners in the field of personnel management and industria relations, which formed the basis of discussion at a Seminar on the subject sponsored by the University Grants Commission held in February, 1965. With increasing industrialisation of the country and opening up of large scale industries, the relations between labour and management are tending to become more and more strained and acrimonious Strikes, Lock-outs, Gherao, Demonstrations of various types, not always peaceful, etc have become a usual feature of industrial life. There is much force in what Justice Bind Basni Prasad observed at the Seminar that the root of industrial conflict lies often in the employers' emphasis on excessive profits and employee's demands for excessive wages Unless both the parties think in terms of the nation and their mental outlook and approach show a genuine transformation mutual distrust and animosity are bound to grow and paralyse the prosperity of the country There is a considerable volume of opinion of persons with large experience who have made a special study of the subject that collective bargaining and negotiation between the parties themselves, free from the baneful interference of politicians and persons accustomed to fish in troubled waters for various reasons, rather than compulsory adjudication or arbitration would afford better and more lasting solutions The former method would promote a " give and take " attitude whereas the latter would often leave a trail of bitterness and dissatisfaction in both parties A study of the papers presented at the Seminar, though it reveals diverse views and differences in outlook, makes profitable reading The various suggestions made deserve careful consideration

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LAWS RELATING TO NOTICES WITH MODEL FORMS by *A B Majumdar*. (Publishers. Eastern Law House Private Limited, Calcutta). Second Edition, 1968. Price Rs. 14.

It is a principle of natural justice that notice should be given to a party before he is called upon to defend himself. Under several statutes notices are imperative. (*See* for instance, section 80, Civil Procedure Code; section 78-B, Railways Act; section 106, Transfer of Property Act). and unless there is meticulous compliance with the requirements in that behalf a suit will not be entertained. In view of the serious consequences resulting from defective notices, the law relating to them becomes highly important and knowledge of it necessary The present work deals with the matter in three books Book I states the law relating to notices generally, their definition and purpose, their classes and requirements, their service and similar matters Book II is devoted to notices coming under different enactments of the Union Government with reference to the laws governing them. Book III contains Model Forms. Throughout his exposition the Author has adverted to relevant case law It is difficult to imagine a book more useful to the average legal practitioner in his every day practice than the book under notice

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ALSO RECEIVED : Our Sradha Mantras by *K Rama Iyer*, Hill View, Jayanagar, Mysore-4.

"CONTRACTS FOR THE BENEFIT OF THIRD PERSONS".

By

R C JAISWAL.*

The English Common Law on the subject of "Contracts for the benefit of third persons" was first considered in **Dutton** v **Poole**[1-2] The facts of this case were:—

"One **P** , who owned certain Timber trees, proposed to cut them down and sell them so as to give his daughter £1,000 on the occasion of her marriage But he refrained from doing so on the promise of his son (the defendant) to provide the money to the sister. He was sued for the amount."

It is clear that the promise was given to the father and he provided the consideration. The plaintiff was "not privy to the promise or consideration". But it is also clear that the main purpose of the agreement was that the daughter should get the stated amount. The Court, therefore, compelled the defendant to fulfil the promise, because he "hath the benefit of having of the wood, and the daughter hath lost her portion by this means."

About 200 years later in 1861, in **Tweddle** v. **Atkinson**[3] this principle was not followed.—

"The plaintiff's marriage was settled with the daughter of one **G** , who entered into a written agreement with the father of the plaintiff by which the latter promised to give a certain sum of money to the plaintiff **G** did not pay the amount and after his death the plaintiff sued his executors".

Wightman, J. said . "Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. . . . . But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit."[4]

This principle was affirmed by the House of Lords in **Dunlop Pneumatic Tyre Co. Ltd.** v. **Selfridge & Co., Ltd.**[5]

"Dunlop Co. sold certain motor tyres to Dew & Co. in consideration of a promise that the latter will not sell the tyres to any person at less than the list prices; and if they sell the tyres to another dealer, they will obtain from him a similar undertaking. Dew & Co. sold certain tyres to Selfridge & Co. and took the undertaking. Selfridge & Co. sold certain tyres on less than the price listed. Hence

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* LL M Lecturer in Law, Lucknow University The writer is indebted to Mr Avtar Singh B Com , LL M , Lecturer in Law, Lucknow University, for guidance.

1-2. 83 E R 523 See also *Tomlinson* v. *Gill*, (1756) 27 E.R. 221 ; *Gregory* v. *Williams*, (1817) 36 E R. 224.

3. 124 R R 610

4. *Ibid* at p. 613.

5. L.R (1915) A C. 847.

Dunlop Co. brought an action against Selfridge & Co. for compensation for the breach of contract".

It was held that Dunlop Co. could not sue because they were not a party to the contract with Selfridge & Co , nor did they give any consideration for the contract. Viscount Haldane observed.—

"My lords, in the Law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our Law knows nothing of a **jus quaesitum tertio** arising by way of a contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract **in pesonam.** A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it, consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognised in the same fashion by the jurisprudence of certain continental countries or of Scotland, but here they are well established."[6]

The rule of "privity of contract" has thus taken firm roots in the English Common Law. But the principle has been generally criticised.[7] In 1937, the Law Revision Committee, under the Chairmanship of Lord Wright, also criticised the rule and recommended its abolition. In its Sixth Interim Report the Committee stated:—

"Where a contract by its express terms purports to confer a benefit directly on a third party, the third party shall be entitled to enforce the provision in his own name, provided that the promisor shall be entitled to raise against the third party any defence that would have been valid against the promisor....."

Lord Justice Denning has also criticised the rule in a number of recent cases[8], in one of which his Lordship observed[9].—

"That argument (**i.e.,** a stranger to contract cannot sue) can be met either by admitting, the principle and saying that it does not apply to this case, or by disputing the principle itself. I make so bold as to dispute it. The principle is not nearly so fundamental as it is sometimes supposed to be. It did not become rooted in our law until the year 1861 (**Tweddle** v. **Atkinson**[10]) and reached to its full growth in 1915 (**Dunlop** v. **Selfridge**[11]). It has never been able entirely to supplant another principle whose roots go much deeper. I mean the principle that a man who makes a deliberate promise which is intended to be binding, that is to say, under seal or for good consideration, must keep his promise; and the Court will hold him to it, not only at the suit of the party who gave the consideration, but also at the suit of one who was not a party to the contract, provided that it was made for his benefit and that he has a sufficient interest to entitle him to enforce it, subject always, of course, to any defences that may be open on the writs."

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6. at p 853.

7. Prof Corbin · *Contracts for the benefit of third persons,* (1930) 46 L Q R 12. See also (1933) 49 L Q R 474 This is a critical note on a decision of the P C in which the doctrine of privity defeated a just claim

8. See *Smith & Snipes Hall Farm Ltd.* v. *River, Doughlas Catchment Board,* (1949) K.B. 500 and *Drive Yourself Hire Co , (London) Ltd* v. *Strutt,* (1954) 1 Q.B. 250.

9 In first of the above stated cases , at pp. 514-515

10. 124 R R. 610.

11. L.R. (1915) A.C. 847.

In the recent case of **Beswick** v. **Beswick**[12], the Court of Appeal adopted the same attitude."

In that case:—

"**B** was a coal merchant. The defendant was assisting him in his business. **B** entered into an agreement with the defendant by which the business was to be transferred to the defendant. **B** was to be employed in it as a consultant for his life and after his death the defendant was to pay to his widow an annuity of £5 per week, which was to come out of the business. After **B's** death, the defendant paid **B's** widow only one sum of £5. The widow brought an action to recover the arrears of the annuity and also to get specific performance of the agreement."

The Court of Appeal held that she was entitled to enforce the agreement. Thus the plaintiff was allowed to enforce the agreement in her personal capacity, although she was not a party to it and it was considered not necessary to infer a trust in favour of the plaintiff.

Lord Denning, M.R. concluded with the words:—

"The general rule undoubtedly is that 'no third person can sue, or be sued, on a contract to which he is not a party', but at bottom that is only a rule of procedure. It goes to the form of remedy, not to the underlying right. Where a contract is made for the benefit of a third person who has a legitimate interest to enforce it, it can be enforced by the third person in the name of the contracting party or jointly with him or, if he refuses to join, by adding him as a defendant. In that sense, and it is a very real sense, the third person has a right arising by way of contract. He has an interest which will be protected by law. The observations to the contrary . are in my opinion erroneous. It is different when a third person has no legitimate interest, as when he is seeking to enforce the maintenance of prices to the public disadvantage, as in **Dunlop Pneumatic Tyre Co.** v. **Selfridge & Co., Ltd.**[13], or when he is seeking to rely not on any right given to him by the contract, but on an exemption clause, seeking to exempt himself from his just liability."[14]

The case shows that a reform as was recommended by the Law Revision Committee in 1937, is long overdue and if Parliament takes any step in this respect that would hardly be revolutionary.

In India, there has been great divergence of opinion in the Courts as to how far a stranger to a contract can enforce it There are many decided cases which declare that a contract cannot be enforced by a person who is not a party to it and that the rule of **Tweddle** v. **Atkinson**[15] is as much applicable in India as it is in England. The Privy Council applied the rule in **Jamuna Das** v. **Ram Autar**[16]:

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12. (1966) 3 All E R 1.

13 (1915) A C 857.

14 Per Lord Denning, M R at p 9.

15. 124 R R 610

16 (1911) 21 M L J 1158 · (1911) 39 I A 7 See also *Iswaram Pillai* v *Sonivaveru Taragan*, I L R (1913) 38 Mad 7.3 26 M L.J 127, *Nanku Prasad Singh* v *Kamta Prasad Singh and others*, A I R 1923 P C 54 (1) *Achuta Ram and others* v *Jai Nandan Tewary and others*, A I R 1926 Pat 474, *Ganesh Das* v *Mt. Banto*, I L R (1935) 16 Lah 118 and *Babu Ram Budhumal and others* v *Dhan Singh Bishan Singh and others*, A I R 1957 Punj 169 In the last mentioned case the first mortgagee was not allowed to recover the money retained by the second mortgagee under the agreement between the owner and the second mortgagee.

"**A** borrowed Rs. 40,000 by executing a mortgage of her Zamindari in favour of **B.** Subsequently she sold the property to **C** for Rs. 44,000 and allowed **C,** the purchaser to retain Rs 40,000 of the price in order to redeem the mortgage if he thought fit **B** sued **C** for the recovery of the mortgage money, but he could not succeed because he was no party to the agreement between **A** and **C.**

Lord Macnaughtan, in his very short judgment said that the undertaking to pay back the mortgage was given by the defendant to his vendor. "The mortgagee has no right to avail himself of that He was no party to the sale The purchaser entered into no contract with him, and the purchaser is not personally bound to pay this mortgage debt."[17]

Thus where all that appears is that a person transfers property to another and stipulates for the payment of money to a third person, a suit to enforce that stipulation by a third party will not lie[18] Similarly, where on a lease of certain **Muafi** land, the lessees undertook, as between themselves and their lessor, to be responsible for the payment to the zamindar of certain sums which the muafidar was primarily bound to pay, it was held that the zamindar could not enforce this covenant by a suit against the lessee[19]. In still another case[20], the plaintiff could not get a decree against the appellant for his salary on the basis of an agreement entered into by the plaintiff with another person[21].

In the opinion of Rankin, C J. this seems to be the effect of the provisions of the Contract Act. In **Krishna Lal** v. **Promila Bala**[22], he observed.—

"Clause (d) of section 2, Contract Act widens the definition of 'Consideration' so as to enable a party to a contract to enforce the same in India in certain cases in which the English law would regard that party as a recipient of a purely voluntary promise and would refuse to him a right of action. Not only, however, is there nothing in section 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract but this notion is rigidly excluded by the definition of 'promisor' and 'promisee' .. In my judgment, it is erroneous .... to suppose that in India persons who are not parties to a contract can be admitted to sue thereupon ....."[23].

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17. at p 9.

18 *Subbu Chetty* v *Arunachalam Chettiar,* I L R (1930) 53 Mad 270 58 M L J 420.

19 *Mangal Sen and others* v *Muhammad Hussain and others,* I L R (1915) 37 All 115. See also *Itti Panku Menon* v *Dharman Achan,* I L R (1917) 41 Mad 488 34 M L J 193; *Jiban Krishna Mullick* v *Nirupama Gupta and another,* A I R 1926 Cal 1009

20 *The State of Bihar* v *Charanjit Lal Chadha and another,* A I R 1960 Pat 139 *See* also *Kasturamma* v *Venkatasurayya Garu,* (1915) 29 M L J 538

21 This line of thinking has been followed in insurance cases also See, for example, *Shanka Vishwanath* v *Umabai,* (1913) I L R 37 Bom 471, where the beneficiary of an insurance policy could claim no right under the contract between the assured and the Insurance Co , because there was nothing to show that the plaintiff was either the promissor or the promisee and therefore, a party to the agreement See also *Oriental Government Security Life Insurance Ltd* v *Venteddu Ammuraju,* (1911) 35 I L R Mad 162 where it was held that the contract between the company and the assured gives no right of action to the beneficiary named Other cases on the point are *Alice Vanderpitte* v *Preferred Accident Insurance Co , New York,* 64 M L J 133 A I R. 1933 P C 11 , *Desraj Pahwa* v *The Concord of India Insurance Co Ltd* , A I R 1951 Punj 114 , *Ram Narain Chaudhary* v *Pan Kuer and others,* (1934) 62 I A 16 . 68 M L J 139 . A I R 1935 P C 9.

22 A I R 1928 Cal 518.

23. At p 522 Rangnekar, J , of the Bombay High Court expressed the same opinion In the case of *National Petroleum Co , Ltd* v *Popat Mulji,* I L.R (1936) 60 Bom 954 at p 994 he observed "In my opinion, in spite of the decisions to the contrary the proposition remains good

Consequently, a Hindu assured's wife's action to recover the money due under her deceased husband's policy was rejected because she, though a nominee under the policy, was not a party to the contract between the deceased and the Insurance Company and no interest passed to her merely because she was named in the policy[24].

There is, however, another line of thinking also which is based mainly upon an observation of the Privy Council in **Khwaja Muhammad Khan** v. **Hussaini Begum**[25]. Their Lordships observed.

". . . . In India and among communities circumstanced as the Mahomedans, among whom marriages are contracted for minors by parents and guardians it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connection with such contracts"

This statement has been taken by some High Courts as laying down the rule that the Indian Courts are not bound by the rule in **Tweddle** v **Atkinson**[1]. Accordingly it was observed by the Madras High Court[2].

"There is ample authority for the proposition that in this country, and indeed in a certain class of cases in England, where a contract is made between **'A'** and **'B'** for the benefit of **'C'**, **'C'** is entitled to sue the defaulting party. It is unnecessary to cite authorities, but the principle is finally established for this country by the decision of the Privy Council in **Khwaja Muhammad Khan** v. **Hussaini Begum**"[3].

Similarly the Calcutta High Court observed[4]

"Nor is there anything in the Indian Contract Act, which prevents the recognition of a right in a third party to enforce a contract made by others, which contains a provision for his benefit.

In the United States of North America, this is frankly recognised..... And same is the Scots Law."

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in Indian Law that a person not a party to the Contract is not entitled to maintain an action for the breach of that contract and that seems to be clear from section 2 of the Indian Contract Act itself read as a whole, and in particular the sub-clauses (*a*) (*b*) and (*c*) The whole scheme of the section is that a promise comes into existence when one person signifies to another his willingness to do or abstain from doing anything, and the other person making the proposal is the promisor, the person accepting the proposal is the promisee and every promise and every set of promises, forming the consideration for each other is an agreement between those two persons In my opinion it is wrong to say that there is no provision in Indian Law in support of this principle which has been well established in England for very old times"

24 Other examples of the rules are *Protapmul Rameswar* v *State of West Bengal and others* (1957) 61 Cal W N 78, and *Chhangamal Harpal Das and another* v *Dominion of India and another* A I R 1957 Bom 276 In second case the Court held that a bare consignee, who is not a party to the contract of the consignment, and who is not the owner of the goods, cannot maintain a suit for compensation for loss or damage to the goods

25 (1910) 37 I A 152 20 M L J 614

1 124 R R 610

2 *Muniswami Naicken* v *Vedachala Naicken and another*, A I R 1928 Mad 23

3 (1910) 37 I A 152 20 M L J 614

4 *Kshrodebhari Datta* v *Mangobinda Panda*, I L.R (1932) 61 Cal 841, as per Lord Williams, J, at p. 857.

Again Jenkins, C J said in another important case[5]:—

"We now have ample authority for saying that the administration of justice in British India is not to be in any way hampered by the doctrine laid down in **Tweddle** v. **Atkinson**[6] That I take to be the result of the decision of the Privy Council in **Muhammad Khan** v **Hussaini Begum**"[7].

The privity rule often causes injustice and hardship as it results in a multiplicity of suits whereas the object of the Courts should be to do complete justice in one suit. In India, therefore, there are no reasons—"legal, historical or otherwise"—why we should follow the English rule which is based upon the now abolished common law forms of action and consequently which is under attack in its country of origin itself[8].

Exceptions.—However no legislative action has been taken in this regard. But, in course of time, the Courts have introduced a great number of exceptions in which the rule of privity of contract does not prevent a person from enforcing a contract which has been made for his benefit but without his being a party to it. Many of the exceptions are connected with the special branches of Law of Contract, such as Negotiable Instruments, Agency, Bill of Lading, Railway Receipts, etc. Some of the most commonly known exceptions may be considered here

1. Trust or Charge.—"A contract can create no legal right or liability in a person who is not a party to it, unless he can claim or be charged through a party, as in the case of a **cestui que trust** claiming through a trustee, or a principal claiming or being charged through an agent".[8]

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5. *Deb Narayan Dutt* v. *Chunni Lal Ghose*, I L R (1913) 41 Cal. 137.

6. 124 R R 610

7. (1910) 37 I A 152 20 M L J 614. The authorities on the point that the English rule is not applicable in India are .—

Shuppu Ammal v *Subramaniyan and others*, (1910) I L R 33 Mad 238 : 19 M L J 739 ; *Nehal Singh and another* v *Fateh Chand and another*, A I R 1922 All 426 ; *Arumuga Goundan* v *Chinnammal*, (1911) 21 M L J 918 and *Areti Singarayya* v *Areti Subbayya and others*, (1924) 47 M L J 517 , *Rose Fernandes* v *Joseph Gonslavas*, I L R (1924) 48 Bom 673 , *Sunderraja Aiyangar* v *Lakshmiammal*, I L R (1915) 38 Mad 788 *Rakhamabai* v *Govinda Moreshwar*, (1904) 6 Bom L R 421 , *Dan Kuer* v *Mt Sarla Devi*, (1946) 2 M L J 420 (1946) 73 I A. 208, *Veeramma* v *Appaya and another*, (1956) An W R 476 A I R 1957 Andh Pra 965 ; *Rana Umanath Baksh Singh* v *Jang Bahadur*, A I R 1938 P C 245 , *Chaudhri Amirullah and another* v *Central Govt (Indian Dominion) through the Secretary Indian Posts and Telegraphs Dept and another*, (1959) All L J 271 , *Post-Master General, Patna and another* v *Ram Kripal Sahu and another*, A I R 1955 Pat 442 , *Gaiudappa Peria Thiruvadi Ayyangar* v *Pokutti Janaki and others*, (1923) 45 M L J 693 , *G Ramaswami Aiyar* v *Deivasigamani Pillai and others*, (1922) 43 M L J 129 , *Dwarika Nath Asha* v *Priya Nath Malki*, (1917) 22 C W N 279 , *Torabaz Khan and another* v *Nanak Chand and another* A I R 1932 Lah 566 , *Gauri Shankar* v *Mangal and others*, A I R, 1933 Lah 178 , *Desraj* v *Ralli Ram*, A I R 1952 Mys 109 , *M K Rapai* v. *John and others*, A I R. 1965 Ker 203 , *Noratmal* v *Mohan Lal*, A I R 1966 Raj 89

8 Denning, L J , is the Chief Critique of the doctrine, *See* his Lordship's observations in *Drive Yourself Hire Co , London Ltd* v *Strutt*, (1954) 1 Q B 250 at pp 272-274, *Smith and Snippers Hall Farm Ltd* v *River Douglas, Catchment Board*, (1949) 2 K B 500 at p 514 and *Beswick* v. *Beswick*, (1966 1 All E R 1 at p. 9 See also a note by E J P on *Privity of Contract* in (1954) 70 L Q.R 467 and Prof Corbin, *Contracts for the benefit of the Third Persons*, (1930) 46 L Q R 12.

The Privy Council decision in **Khwaja Muhammad Khan** v **Hussaini Begum**[9-10] is illustrative of this principle. The facts of the case were.—

"The appellant executed an agreement with the respondent's father that in consideration of the respondent's marriage with his son (both being minors at the time), he would pay to the respondent Rs 500 a month in perpetuity for the betel-leaf expenses, and charged certain properties with the payment, with power to the respondent to enforce it. The husband and wife separated on account of a quarrel and the suit was brought by the plaintiff respondent for the recovery of the arrears of this annuity."

It was held by the Privy Council that the respondent, although no party to the agreement, was clearly entitled to proceed in equity to enforce her claim. "Hence the agreement executed by the defendant (appellant) specifically charges immovable property for the allowance which he binds himself to pay to the plaintiff (respondent), she is the only person beneficially entitled under it."[11]

An example of a Trust in favour of a third party is to be found in the facts of another Privy Council decision in **Rana Umanath Baksh Singh** v. **Jang Bahadur**[12].

U was appointed by his father as his successor and was put in possession of his entire estate. In consideration thereof, U agreed with his father to pay a certain sum of money and a village to J, an illegitimate son of his father, on his attaining majority.

It was held that in the circumstances mentioned above a trust was created in favour of J for the specified amount and the village. Hence he was entitled to maintain the suit[13].

Thus, where the Court comes to the conclusion that a trust is created for the benefit of a third party, relief is given to him. Such conclusion is perhaps always drawn where all the parties are before the Court[14], and this is mainly to avoid the multiplicity of suits. A constructive trust results in favour of an addressee of insured articles and he can claim compensation from the Central Government on non-delivery of the insured articles.[15]

2. Marriage Settlement, Partition or other family arrangements.—Where an agreement is made in connection with marriage, partition or other family arrangements and a provision is made for the benefit of a person, he may take advantage

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9-10. (1910) 37 I A 152 : 20 M L J 614.

11. Per Amir Ali, J , at pp 158-159 Another case on the point is *Shuppu Ammal* v. *Subramaniyan and others,* I L R. (1910) 33 Mad 238 19 M L J 739

12. A I R 1938 P C 245 (1937) 12 Luck 639.

13. In England, also, there have beeen a large number of cases in which trust has been applied as a divise for making the defendant to keep his promise In *Kshrodebehari Datta* v. *Mangobinda Panda,* I.L R (1933) 61 Cal 841, Lort Williams, J , has made an exhaustive study of such cases. For other Indian authorities see *Torabaz Khan and another* v *Nanak Chand and another,* A I.R. 1932 Lah 566 , *Gauri Shankar* v *Mangal Chand,* A I R 1933 Lah. 178, *Nehal Singh* v *Fateh Chand,* (1922) 20 All L J 708 , *Des Raj* v *Ralli Ram,* A I R 1957 J & K. 10 ; *M. K Rapai* v *John and others,* A I R 1965 Ker 203

14. See the cases of *Nehal Singh* v *Fateh Chand* , A I R 1922 All 426 ; *Areti Singarayya* v. *Areti Subbayya and others,* (1924) 47 M L J 517 ; *Garudappa Peria Thiruvedi Ayyangar* v. *Pokutt Janaki and others,* (1923) 45 M L J 693

15 *Chaudhari Amirullah* v *Central Govt* (1959) All L J 271 and *Postmaster-General* v. *Ram Kripal Sahu and another,* A.I.R 1955 Pat. 442.

of that agreement although he is no party to it In such a transaction the third person comes under the category of beneficiaries and the arrangement conferring benefits on him is in the nature of trust. Moreover, such agreements are enforced in India as exceptional cases For example in **Rose Fernandes v. Joseph Gonsalves**[16], where the girl's father entered into an agreement for her marriage with the defendant, it was held that the girl after attaining majority can sue the defendant for damages for breach of promise of marriage and the defendant cannot take the plea that she was not a party to the agreement It has been held in many cases[17] that "a person though not a party to a contract can sue to enforce the terms thereof if it be a family settlement by which some provision is made for him or her as a member of the family, for example, for maintenance or marriage, though the same is not made a charge upon the family properties." Thus where two brothers, on a partition of joint properties, agreed to invest in equal shares a certain sum of money for the maintenance of their mother, she was held entitled to require them to make the investment[18]. Similarly, where a daughter along with her husband agreed that she will maintain her mother if the property of the father is conveyed to them, the mother was held entitled to maintain a suit for specific performance although the agreement was between father, daughter and her husband only and the mother was not a party to it[19]. A very interesting case on this point is that of **Daropti v. Jaspat Rai**[20].

The defendant's wife left him because of his cruelty. He then executed an agreement with her father, promising to treat her properly, or, if he failed to do so, to pay her monthly maintenance and to provide her with a dwelling. Subsequently she was again ill-treated by the defendant and also driven out of the house. She was held entitled to enforce the promise made by the defendant to her father.

3. Acknowledgment or Estoppel.—Where by the terms of a contract a party is required to make a payment to a third person and he acknowledges it to that third person, a binding obligation is thereby incurred towards him. This acknowledgment may be express or implied. Such cases are also treated as exceptions to the general rule of privity.

This exception covers cases where the promisor, between whom and the third person no privity exists, creates privity by his personally agreeing with the third person to pay directly or becomes estopped from denying his liability to pay personally. This is a wider exception and covers cases where the promisor by his conduct, acknowledgment, or otherwise, constitutes himself an agent of the third party.

The exception has been applied in many cases. The case of **Devaraja Urs v. Ram Krishniah**[21] is a good example.

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16. I.L.R. (1924) 48 Bom 673.

17. See, for example, *Sundarraja Aiyangar* v *Lakchmiammal*, I L R (1915) 38 Mad 788 ; *Rakhma Bai* v *Govind Moreshwar*, (1904) 6 Bom L R 421 *Mst Dan Kuer* v *Mst Sarla Devi*, L R. 73 I A 208 . (1946) 2 M L J 420 A I R 1947 P C 8, *Shuppu Ammal* v *Subramaniayan*, (1910) I L R 33 Mad 238 19 M L J 729

18. *Shuppu Ammal* v *Subramaniyan*, I L R (1901) 33 Mad 238 19 M L J 739

19 *Veeramma* v *Appayya and another*, (1956) An W R 476 A I R 1957 Andh Pra 965. See also *Arumuga Goundan* v *Chunnammal*, (1911) 21 M L J 918

20 (1905) Punj Reports 171.

21. A.I R. 1952 Mys. 109.

"**A** sold his house to **B** under a registered sale deed and left a part of the sale-price in his hands desiring him to pay this amount to **C**, his creditor. Subsequently **B** made part payments to **C** informing him that they were out of the sale price left with him and that the balance would be remitted immediately **B**, however, failed to remit the balance and **C** sued him for the same".

The suit was held to be maintainable "Though originally there was no privity of contract between **B** and **C**, **B** having subsequently acknowledged his liability, **C** was entitled to sue him for recovery of the amount."

Another authority for this exception is the decision of Calcutta High Court in **Debnarayan Dutt** v **Chunnilal Ghose**[22]

"**A** lent to **B** a sum of money on the security of some immovable property. Subsequently **B** sold all his property movables and immovables, to **C**, and left in his hands a part of the consideration to enable him to pay the debt which **B** owed to **A**. **C** acknowledged his liability to pay in the transfer deed itself and also communicated the acknowledgment to the creditor who accepted it.

On these facts the Court quite naturally came to the conclusion that the liability, having been so clearly acknowledged, there could be no question of going back upon it[23].

This case was decided in 1913 and in 1917 the same Court made an unwarranted extension of this principle in **Dwarika Nath Ash** v **Priyanath Malki**[24] by holding that the liability to pay would arise even if the arrangement has not been communicated to the creditor, the Court being of opinion that such a distinction was immaterial. However, this extension has not been followed in later cases[25]. Therefore, the only principle warranted by the authorities is that some kind of express or implied acknowledgment or estoppel would be necessary to create a privity of contract. Thus, for example, in **Kshirodebihari Datt** v. **Mangobinda Panda**[1].

"The tenant and the sub-tenant of a land agreed that the sub-tenant would pay the tenant's rent direct to the landlord. The agreement was acted upon by all the parties interested".

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22 I L R (1913) 41 Cal 137

23 See the judgment of Jenkins, C J, who relied upon *Gregory* v. *Williams*, (1817) 36 E R 224, *Touch* v *Metropoliton Warehousing Co*, (1871) L R 6 Ch 671, *Candy* v *Candy*, (1885) 30 Ch. D 57, and certain other English cases The soundness of this decision has never been doubted but the sweeping statement of his Lordship that the rule in *Tweddle* v *Atkinson*, 124 R R 610 is not at all applicable in India, has been described to be too wide Per Beaumont, C J, at p 982 in *National Petroleum & Co Ltd* v *Popat Mulji*, (1938) 60 Bom 954 *See* also, the criticism of Ghose, J, in *Krishna Lal* v *Promula Bala*, A I R. 1928 Cal 518 and Shastri, J, in *Subbu Chetty* v *Arunachalam*, 58 M L J 420 I L R 53 Mad 270. A I R 1930 Mad 382

24 (1917) 22 C W.N 279 In this case the first two defendants borrowed on a promissory note a sum of money from the plaintiff they thereafter transferred their properties to the third defendant who executed an agreement in favour of his vendors expressly undertaking to pay to the plaintiff his dues out of the consideration money retained in his hands The plaintiff sued his debtors as also the third defendant for his money It was held that the plaintiff was entitled to enforce the agreement made between the third defendant and his vendors The Allahabad High Court has also allowed similar recovery in the case of *Nehal Singh* v *Fateh Chand*, (1922) 20 All L.J 708

25. *Jiban Krishna Mullick* v *Nrupama Gupta*, A I R 1926 Cal 1009

1. (1933) I L R 61 Cal. 841. *See* also *Noratmal* v *Mohan Lal*, A I R 1966 Raj 89.

Under these circumstances the landlord was allowed to obtain a decree for his rent direct against the sub-tenant. In other words, the sub-tenant was estopped from denying his liability to pay the tenant's rent on the ground that there was no such contract between him and the landlord. However, Lort-Williams, J., based his judgment on a wider principle that when all the parties, including the tenant, "were before the Court, neither commonsense nor convenience, equity nor good conscience require me to force the parties into further and unnecessary litigation." His Lordship also believed that there was nothing in the Indian Contract Act to prevent the enforcement of a contract by a person for whose benefit it is made.

HINDU MARRIAGE ACT, 1955 (XXV OF 1955), SECTION 13 (1-A)

By

SRI B. R. DOLIA, *Advocate, Madras*

Is there any 'wrong' in the spouse getting divorce by applying under section 13 (1-A) of the Hindu Marriage Act even though he or she was the respondent in the prior proceedings resulting in judicial separation or a decree for restitution of conjugal rights ? Prior to the passing of the Hindu Marriage Act in 1955 there was no provision in Hindu Law to apply and get divorce The marriage was considered to be a sacrament. The Hindu Marriage Act made certain inroads in the institution of marriage and it will not be correct to presume that the marriage is a sacrament after the passing of the said Act The Act provides the circumstances and the grounds on which either of the spouses could approach a Court and pray and get a decree for judicial separation, restitution of conjugal rights or divorce as the case may be.

It is true that section 23 of the said Act is an overriding provision controlling all the proceedings under the Act The Court must be satisfied in all proceedings under the Act, whether defended or not **inter alia** that the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief

In section 13 as it stood prior to the amendment by Act XLIV of 1964 there was provision for a party to pray for divorce on the ground that the other party has not resumed cohabitation for a space of 2 yeras or upwards after the passing of the decree for judicial separation against that party or that the other party has failed to comply with a decree for restitution of conjugal rights for a period of 2 years or upwards after the passing of the decree In other words the party against whom a decree for judicial separation or for restitution of conjugal rights had been passed could not avail and apply for divorce under section 13 (1) (viii) and (ix). It was held in various decisions rendered prior to the Amendment Act of 1964 that the "guilty" party, viz , the party against whom a decree for restitution of conjugal rights or judicial separation has been obtained could not avail of that right (Vide **Waryan Singh** v. **Pritpal Kaur**[1], **Mst Kamlesh Kumari, w|o Kartarchand** v. **Kartar Chand Diwan Singh**[2].

In this background Act XLIV of 1964 repealing the provisions of section 13 (1) (viii) and (ix) and introducing section 13 (1-A) in its place came into force with effect from 20th December, 1964 It was a bill which was moved by a private member. The Statement of Objects and Reasons for the said Bill read as follows —

"The right to apply for divorce on the ground that cohabitation has not been resumed for a space of 2 years or more after the passing of the decree for judicial separation, or on the ground that conjugal life has not been restored after the expiry of 2 years or more from the date of decree for restitution of conjugal rights should be available to both the husband and the wife, as in such cases it is clear that the marriage has proved a complete failure There is therefore, no justification for making the right available only to the party who has obtained the decree in each case."

1 A I R 1961 Punj 320
2. A I R 1962 Punj 156.

Section 13 (1-A) specifically provided that either party to a marriage could apply for a decree of divorce on the ground that there has been no resumption of cohabitation as between the parties to the marriage for a period of 2 years or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties or that there has been no restitution of conjugal rights as between the parties to the marriage for a period of 2 years or upwards after the passing of the decree for restitution of conjugal rights in a proceeding to which they were parties. In other words the ground is the factum of absence of resumption of cohabitation and absence of restitution of conjugal rights even after the passing of a decree by a Court. Absence of resumption of cohabitation or restitution of conjugal rights clearly shows that the marriage has proved a failure and the decree is only a paper decree. No doubt it is true that the Statement of Objects and Reasons could not be looked into for the purpose of construing or interpreting the provisions of the Act But as observed in **Heydons case**[3-4] which has been followed repeatedly by the Supreme Court of India and other High Courts, four things are to be considered for the same and the interpretation of all statutes in general:

(i) What was the common law before the making of the Act ?

(ii) What was the mischief and defect for which the common law did not provide ?

(iii) What remedy the Parliament hath resolved and appointed to cure the disease ? and

(iv) the true reason of the remedy

This ruling has been followed by the Supreme Court in Civil Appeals No 630 and 1721 of 1967 judgment dated 16th July, 1968 In the said judgment it has been held that the Statement of Objects and Reasons could also be legitimately used for ascertaining the object which the Legislature had in mind though not for construing the Act.

In the recent article published in the October 1968 issue of 70 Bom L R. 117-122—May a spouse who is in desertion obtain a divorce on the basis of his own "wrong" ? Professor J Duncan M Durrett has examined this topic and is of the opinion that the decision rendered by the Bombay High Court in **Laxmibai** v. **Laxmichand**[5] is correct The said judgment decides that a decree on this ground could not be granted to the guilty party in restitution proceedings, **i.e.,** the husband against whom the decree for restitution of conjugal rights has been passed earlier could not apply for divorce on the ground that there was no restitution of conjugal rights after the passing of the decree, as he did not take any steps to comply with the decree for restitution of conjugal rights

With great respect, to the learned Judge and Professor Duncan Derrett, the writer feels that the said decision, in his opinion, would frustrate the very object of the enactment of section 13 (1-A) inserted by Act XLIV of 1964

In the decision reported in **Shrimathi Ram Kali** v. **Gopaldas**[6], the Delhi High Court has taken the view that "the failure to perform the decree for restitution of conjugal rights **per se** without more would not disentitle the spouse to the relief. To hold otherwise will in most cases defeat the purpose of the amendment made in section 13 by the Hindu Marriage Amendment Act, 1964 (XLIV of 1964) whereby section 13 (1-A) was introduced The learned Judge stated·

"The decision of the question, whether a spouse, who has failed to comply with the decree of restitution of conjugal rights, and then applies for the dissolution of marriage by a decree of divorce, on the ground that there has been no restitution of conjugal rights for two years or upwards, is disentitled to the relief

3-4. (1584) 76 E R 637

5. (1968) 70 Bom L R 80 A I R 1968 Bom 332.

6. (1968) 4 Delhi Law Times 503.

asked for, under section 23 (1) (a) of the Act will depend on the facts and circumstances of each case."

In the said case, the husband pleaded that a hotly contested litigation was going on between the parties. The wife instituted a suit for maintenance and for recovery of dowry, and according to the husband, the relationship between them was strained. The learned Judge came to the conclusion that the husband in not complying with the decree for restitution of conjugal rights and then applying for a decree for divorce could not be said to be taking advantage of his own wrong His Lordship distinguished on facts the judgment reported in **Kishni Bai v. Dr. Bhola Nath**[7]. The Bombay High Court has taken the view that a husband who never told his wife after the decree for restitution of conjugal rights had been passed that she should come and live with him and who was not prepared to accept her even if she was willing to go back to him could not take advantage of his own "wrong" in not complying with the decree for restitution of conjugal rights and get divorce under section 13 (1-A), sub-clause (2).

The learned author in his article has given some imaginary dialogue between a wife and husband. The wife was telling the husband "moreover I am a dark girl and who will want to marry me. Perhaps you can find some rich man in Bombay, whose concubine I can become". With due respect to the learned author it is very difficult to imagine a Hindu woman who would tell the husband who has contracted a second void marriage that he should arrange concubinage for her Even in the second illustration of the learned author on page 121, a husband could apply for divorce on the ground that the wife is 'living in adultery' as the affair with the next door neighbour imagined by the learned author would amount to 'living in adultery'.

When the parties have not resumed cohabitation even for more than 2 years after the passing of a decree or have not restituted the conjugal rights for a similar period, the fact is clear that the marriage has proved a failure and there cannot be any further chance for reconciliation For whose benefit is the so-called marriage tie to be kept in force ? It will be living agony and death for both the parties The wife would not be put to any disadvantage as she would be entitled to maintenance or permanent alimony until she remarries To deny to the other party the right to obtain divorce on the solid fact of lack of resumption of cohabitation or restitution of conjugal right for a period of 2 years or upwards would be to perpetuate the already dead skeleton of marriage in the faint hope against hope that there might be reconciliation. This may lead to the husband being forced to have clandestine and illicit affairs merely on the ground that he is a "guilty" party. This would be defeating the very purpose of the introduction of section 13 (1-A). Section 13 (1-A), has prescribed the grounds without any reference to the guilty or innocent party. When inroads have been made into the institution of marriage by enacting Hindu Marriage Act, to deny a decree of divorce to a husband on the ground that he was not willing to resume cohabitation or restitute conjugal rights in spite of the decree having been passed against him would defeat the very purpose of the Amendment. The legislature would not have thought that the parties should be made to carry on their shoulders the dead weight of the empty skeleton of marriage which has proved a failure.

Judicial separation is granted under section 10 on various grounds and one ground is desertion for a continuous period of not less than 2 years, another ground is that the other party is suffering from a virulent form of leprosy or is sucering from venereal disease for a period of not less than 3 years. In such cases to deprive the husband of the right to apply for divorce under section 13 (1-A) sub-clause (i) would be to perpetuate and continue the marriage which had become an empty formality long ago, for nobody's benefit.

7. 1967 69 Punj. L.R. 59.

The husband against whom a decree for restitution of conjugal rights or judicial separation has been passed could not be said, it is submitted, to be taking advantage of his own wrong when he applies for divorce under section 13 (1-A), as the ground for divorce is the factum of failure of resumption of cohabitation or restitution of conjugal right for a stated period.

The further distinction made by the Bombay High Court that section 13 (1) specified conditions while section 13 (1-A) only provides for an application to be made, is, it is submitted also not correct, as section 13 (2) also is couched in similar language like section 13 (1-A).

Hence it is submitted with respect that the decision in **Laxmibai Laxmichand Shah** v **Laxmichand Ravji Shah**[8] places an unduly narrow construction on section 13 (1-A) of the Hindu Marriage Act.

The recent judgment of the Mysore High Court reported in **Someswara** v. **Leelavati**[9] is also distinguishable on facts.

The changed circumstances envisaged by the learned author, Prof. Derrett, it is submitted, could not cure the original wrong. The husband taking another wife who is innocent and is not aware of his first marriage cannot set up that fact and plead that his original wrong in deserting the wife is cured in view of the subsequent act of his taking an innocent woman and getting a child through her. It will be placing a premium on the husband to have another innocent woman to undergo the form of marriage and then ask for divorce under section 13 (1-A) The husband who sits idly by without luring an innocent woman could not according to the learned author, apply for divorce under section 13 (1-A), simply on the ground that he has not obeyed the decree passed against him for restitution of conjugal rights.

Section 13 (1-A) is, it is submitted, is based on the continuous absence of consortium. It is not making desertion a ground for divorce, but it is based on the solid fact that there is failure in the resumption of cohabitation or restitution of conjugal rights even after passing a decree for a period of 2 years or upwards

[END OF VOLUME (1968) II M L.J (JOURNAL)]

8 (1968) 70 Bom L R 80.
9. A.I.R. 1968 Mys 274.