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CONTENTS.

ARTICLES.

SUPPLEMENT.

SUMMARY OF ENGLISH CASES.

BOOK REVIEWS.

NOTES OF INDIAN CASES.

CASES CITED IN NOTES OF INDIAN CASES.

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It is a ticklish question : "If salt itself should lose its saltness wherewith shall ye season it?" Likewise, "If the judgments delivered merely sketch the course of decided cases and relay the last case on the facts found whereto will serious students of law turn for a large treatment of fundamental concepts and a felicitous, but not the less, precise extension of principles?" Fortunately there continue to be rendered every year a certain number of judgments which in a real sense constitute a broadening of the law from precedent to precedent. During the last year, there have been 37 decisions of the Judicial Committee, eight rulings of the Federal Court besides a large number of other cases reported in the columns of this journal. An attempt is here made to indicate the changes effected in some branches at any rate of the law.

THE HIGH COURT AND ITS POWERS.—Though in England an order of discharge by the High Court on the return to a writ of *habeas corpus* is regarded as final, it is pointed out in *King-Emperor* v. *Vimalabhai*[1] that an appeal will lie to the Privy Council from such an order passed by the High Courts in India under section 491 of the Criminal Procedure Code, since appeals from decisions of the High Court are heard under the Royal prerogative and there is no Act of Parliament prohibiting or authorising the prohibition of an appeal to the King in Council in such matters. In In re *Mariyappan*[2], it is explained that under section 205 of the Constitution Act, a duty is cast on the High Court in every case, of its own motion, to consider whether a substantial question of law as to the interpretation of the Act is involved and to give or withhold a certificate accordingly and that when the High Court is silent about a certificate it means that in its opinion no such certificate should issue. *Govinda Rao*, In re[3], expresses the view that the provision in clause 15 of the Letters Patent that it is only if the Judge who has passed the judgment in second appeal certifies it as a fit case for appeal that an appeal under that clause may lie is not in any manner affected by clause 44. The ruling of the Privy Council in *Kumar Singh Chhajor* v. *King-Emperor*[4] considers the power of interference of the High Court with orders of the Special Magistrates under the Special Criminal Courts' Ordinance, 1942, read with Ordinance 19 of 1943, and lays down that the High Court has power in revision only to review the sentences passed by the Special Courts, to enhance or to reduce them but not to set the conviction aside or to order a re-trial.

THE BAR—ITS RIGHTS AND DUTIES.—The desirability of framing a rule prohibiting a legal practitioner from bidding in his own name or in the name of another person at a Court-sale held in execution of a decree obtained by his client in view of the possibility of his interest coming into conflict with his duty is strongly suggested

1. (1946) 2 M.L.J. 10 (P.C.).
2. (1946) 2 M.L.J. 128.
3. (1946) 2 M.L.J. 165.
4. (1946) 2 M.L.J. 299 (P.C.).

in In the matter of *a Pleader*[1], which recognises that rule 17 of the rules framed by the High Court under the Legal Practitioners Act does not cover such a case. The decision in In re *a Pleader, Gudivada*[2], emphasises that though a legal practitioner has his duty towards his client, he has other duties and responsibilities as well and that he should not on the instructions of the client make a charge of fraud against another in an affidavit without satisfying himself that there are reasonable grounds for the allegation. In *A Pleader*, In re[3], it is recognised that though defamation of a police officer by a legal practitioner is an offence involving moral turpitude, still it does not involve such a degree of turpitude as to warrant the Court in imposing the penalty of suspension from practice and that a reprimand would be sufficient in the circumstances.

CONSTITUTIONAL LAW.—The competence of the Indian Legislature to legislate with extra-territorial effect is adverted to by the Federal Court in *Mohammad Mohyuddin.* v. *King-Emperor*[4], where it is stated that though it is true that every statute is to be so construed so far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law, there is no rule of international law or comity of nations which is inconsistent with a State exercising disciplinary control over its own armed forces, when those forces are operating outside its own territorial limits and that section 41 of the Indian Army Act of 1911 purporting to confer such jurisdiction on a Court Martial was *intra vires* the Indian Legislature by reason of section 73 of the Government of India Act, 1833, which had conferred on the Indian Legislature the power to legislate with such extra-territorial effect. In *Venkatarama Naidu* v. *Province of Madras*[5], it is held that the provisions of section 240 of the Constitution Act regarding notice and opportunity to show cause before an official is dismissed are mandatory but that according to the proviso to the section they do not apply where a person is dismissed on the ground of conduct which had led to his conviction on a criminal charge. *Governor-General in Council* v. *Krishnaswami Pillai*[6] states that when an action is brought under section 240 (3) the only relief which the Court can grant is a decree for damages for wrongful dismissal but not a declaration that the dismissal is inoperative. The ruling in *Bisvanath Khemka* v. *King-Emperor*[7] makes it clear that the direction in section 256 that "no recommendation shall be made for the grant of magisterial powers or of enhanced magisterial powers to or the withdrawal of magisterial powers from any person save after consultation with the district magistrate of the district in which he is working is only directory and not mandatory and non-compliance with it would not render an appointment otherwise regularly and validly made ineffective and inoperative. The decision in *Sarjoo Prasad* v. *King-Emperor*[8] lays down that since the prohibition of proceedings without the sanction of Government contained in section 270 (1) is against the institution of the proceedings itself, the applicability of the section must be judged at the earliest stage of institution. The scope and effect of section 298 directed against discrimination on ground only of religion, place of birth, colour, etc., was examined by the Privy Council in *Punjab Province* v. *Daulat Singh*[9] and it was held that sub-section (1) of the section confers a personal right on every subject of His Majesty domiciled in India, that the general legislative powers conferred on the Federal and Provincial Legislatures by section 99 (1) are subject *inter alia* to the provisions of section 298 and that the proper test as to whether there is a contravention of sub-section (1) is to ascertain the re-action of the impugned Act on the personal right conferred by the sub-section and if the effect of the Act so determined involves an infringement of such right the object of the Act however laudable will not obviate the prohibition laid down. In *Munikka-sundara Bhattar* v. *R. S. Naynar*[10], the Federal Court points out that in considering the scope of the legislative powers of the Provincial Government little assistance can be derived from a consideration of such powers prior to the Act of 1935 in view

1. (1946) 1 M.L.J. 218 (F.B.).
2. (1946) 2 M.L.J. 79 (F.B.).
3. (1946) 1 M.L.J. 95 (F.B.).
4. (1946) 2 M.L.J. 23 (F.C.).
5. (1946) 1 M.L.J. 253.
6. (1946) 1 M.L.J. 267.
7. (1946) 1 M.L.J. 155 (F.C.).
8. (1946) 1 M.L.J. 157 (F.B.).
9. (1946) 1 M.L.J. 486 (P.C.).
10. (1946) 2 M.L.J. 17 ((F.C.).

of the basic conception of the earlier Act being a unitary state while the scheme of the present Act is utterly dissimilar with its structure for a federal state and its strict provisions for exclusive legislative powers in the Central and Provincial Legislatures in certain subjects and concurrent legislative powers of both in others. It also decides that the Madras Legislature had power by virtue of entry 34 in list 2 to schedule 7—charities—to legislate in respect of religious institutions within the Madras Presidency in the manner in which it purported to legislate by the Madras Temple Entry Authorisation and Indemnity Act, 1939. In *Thakur Jagannath Baksh Singh* v. *The United Provinces*[1], the Privy Council holds that the Crown cannot deprive itself of its legislative authority by the mere fact that in the exercise of its prerogative it makes a grant of land within the territory over which such legislative authority exists, that entry 21 in list 2 of schedule 7—land and land tenures—covers legislation like the United Provinces Tenancy Act, 1939, which undoubtedly cut down the absolute rights claimed by the taluqdars to be comprised in the grants of their estates as evidenced by their sanads and that the general words of section 3 of the Crown Grants Act do not affect the relations between a sanadholder and his tenants. In re *Nagalingam*[2] states that section 2 (3) of the Defence of India Act is not restrictive of the powers of sub-section (1) and rule 121 of the Defence of India Rules is not *ultra vires* the Central Government.

CRIMINAL LAW.—The scope of the Privy Council decision in *Mahbub Shah* v. *Emperor*[3] was considered in *Nachimuthu Goundan*, In re[4], and it has been held that the former decision does not rule out the possibility of a common intention developing in the course of events or of such intention being inferred from the conduct of the assailants. Both according to section 34 of the Penal Code and the Privy Council, the section involves two elements, namely, a prior common intention and a subsequent act in furtherance of it. The Privy Council stresses that same intention or similar intention is not the same thing as common intention and that the latter is the result of a pre-arranged plan or concert or pre-meditation and that it cannot be deemed to arise from the very act which is alleged to constitute the crime. If the decision of the High Court carries with it the suggestion that the overt act and the common intention could be synchronous it may be pointed out that that is the very thing negatived by the Privy Council decisively. In In re *Subramania Aiyar*[5], it is held that when persons charged with the same substantive offence have been acquitted it is not competent to the Court to punish another, alleged to have screened them from legal punishment, as having harboured offenders within the meaning of section 216-A. The ruling in *Govinda Reddi* v. *Lakshmi Reddi*[6] holds that the voluntary obstruction of a vehicle in which persons were travelling amounts to the wrongful restraint of the persons in the vehicle and it is no defence that the persons could have got down and proceeded unmolested. In reaching this conclusion the learned Judge treated as *obiter* a suggestion to the contrary found in *Maharani of Nabha* v. *Province of Madras*[7]. In In re *Ramaswami*[8], it is pointed out that mere recovery of certain property from the house of certain persons is not by itself sufficient to attribute guilty knowledge to them and cannot warrant a conviction under section 411. The interesting position is elucidated in In re *Vellai Mudali*[9], that waylaying a girl and tying a *tali* round her neck will not amount to going through the ceremony of being married within the meaning of section 496.

CRIMINAL PROCEDURE.—A principle often not sufficiently appreciated is recalled in *Elaya Pillai* In re[10], which points out that it is the duty of the magistrate conducting the preliminary inquiry to see whether it is reasonably clear that upon the evidence

1. (1946) 2 M.L.J. 29 (P.C.).
2. (1946) 2 M.L.J. 403.
3. (1945) 2 M.L.J. 144 (P.C.).
4. (1946) 2 M.L.J. 137.
5. (1946) 2 M.L.J. 482.
6. (1946) 2 M.L.J. 281.
7. I.L.R. (1942) Mad. 696.
8. (1946) 2 M.L.J. 495.
9. (1946) 2 M.L.J. 428.
10. (1946) 1 M.L.J. 449.

the accused persons stand a chance of being convicted and to discharge the accused if he finds the evidence not reliable. *Abdul Rahim* v. *King-Emperor*[1] is an important pronouncement of the Privy Council on the effect of mis-reception of evidence in a jury trial. In a murder reference and appeal and in an appeal from conviction for murder it is open to the High Court after excluding such evidence to maintain the conviction, provided the admissible evidence remaining is in its opinion sufficient to establish the guilt of the accused. Likewise if there is a serious misdirection or non-direction the High Court can act similarly. The fact that in some cases an appeal would lie both on fact and on law while in others an appeal would lie on law only is neither an important distinction nor a determining feature for this purpose. In *Kwaku Mensah* v. *The King*[2], the Privy Council points out that if in a murder trial with the aid of a jury there is non-direction, when there is evidence on which the jury could return a verdict of manslaughter, the trial would irrespective of whether the defence relied on such evidence or not, stand vitiated. One of the cardinal principles in regard to criminal trials is emphasised in In re *Pichu Pillai*[3], namely, that if there is a lacuna in the prosecution evidence the accused is entitled to the benefit of the same and a re-trial should not be ordered even if the offence was a serious one affecting the public interest. *Ramarathnam*, In re[4], points out that though an offence under section 124-A is not exclusively triable by a Court of Session, still if the matter objected to is in a vernacular paper enjoying a wide circulation, it would be desirable both from the point of view of the accused and from the point of view of the prosecution to have it tried with the aid of a jury. *Thippayya*, In re[5], points out that where an officer who has given evidence in the case succeeds the trying magistrate he is not competent to continue the trial and even the consent of the accused cannot cure the impropriety of such action. In re *Nara Parvathamma*[6] emphasises the desirability of giving to a person against whom a preliminary order is passed under section 133, Criminal Procedure Code, sufficient opportunity to meet the charge, before the order is made absolute. *Manikyala Rao* v. *Venkatappayya*[7] points out that parties in proceedings under section 145 cannot be compelled to appear in Court or to execute bonds for appearance. *Vempatti Satyanarayana Sastri*, In re[8] holds that without taking evidence and holding an inquiry it is not competent to a magistrate straightaway on a complaint by the petitioner that the counter-petitioner has no right to do certain acts and there is a likelihood of a breach of peace if such acts were done, to direct the police to warn the counter-petitioner not to create a breach of the peace by doing those acts. Two valuable decisions of the Judicial Committee concerning section 164 are to be found in *Brij Bhushan Singh* v. *King-Emperor*[9] and *Mamand* v. *King-Emperor*[10]. They lay down categorically that a statement made under section 164 can be used to cross-examine the person who made it and the result may be to show that the evidence of the witness is false but that does not establish that what he stated out of Court under section 164 is true and it would be an improper use of such statements to treat them as substantive evidence of the truth of the facts stated in them. In *Palaniswami Goundan* In re[11], it is held that it would be competent to a police officer after he has laid a charge, on receipt of fresh information to lay further charge sheets. In re *Bommareddi Satyanarayana Reddi*[12] points out that section 227 empowers the Court at any time before judgment is pronounced to alter or add to any charge and the sections that follow section 227 show that what the Legislature intended was that the Court may add a new charge at any time before judgment is pronounced provided that the safeguards mentioned in section 225 are observed. In re *Valli Ammal*[13] makes it clear that there is nothing in section 237 read with section 236 to suggest

1. (1946) 2 M.L.J. 1 (P.C.).
2. (1946) 1 M.L.J. 212 (P.C.).
3. (1946) 1 M.L.J. 331.
4. (1946) 1 M.L.J. 237.
5. (1946) 2 M.L.J. 280.
6. (1946) 2 M.L.J. 271.
7. (1946) 1 M.L.J. 443.
8. (1946) 1 M.L.J. 458.
9. (1946) 1 M.L.J. 147 (P.C.).
10. (1946) 1 M.L.J. 211 (P.C.).
11. (1946) 1 M.L.J. 406.
12. (1946) 2 M.L.J. 364.
13. (1946) 2 M.L.J. 351.

that when a person is charged with murder that person cannot be convicted of an offence under one of the property sections. In *Reference from Tinnevelly Sessions*[1], it is pointed out that section 240 only applies to charges containing more heads than one against a person and that when there is a mixed charge of murder and offence against property the proper course is for the Sessions Judge to take the charge framed by the Committing Magistrate and adopt it or in case he wishes to change the charge to include in the modified charge all the various heads found in the Committing Magistrate's charge. In *Latchanna* v. *Kannayamma*[2], it is ruled that if a magistrate begins a trial as a summons case and then after taking evidence finds that an offence triable only under warrant case procedure has been committed he is entitled to apply warrant case procedure thenceforward and it cannot be said that under sections 245 and 246 the magistrate was bound at that stage to acquit the accused of the offence triable under the summons procedure and not entitled to register the case as a warrant case and proceed under chapter 21. *Narayana Singh* v. *Seetharatnamma*[3] holds that a magistrate has no power to pass an order of discharge under section 253 (1) until he has examined all the witnesses. *Ramaswami Naicker* v. *Rangaswami Naicker*[4] rules that in a warrant case where a charge has been framed and the case thereafter transferred to another magistrate who grants a *de novo* trial it is not competent to that magistrate in the absence of the complainant to pass an order of discharge under section 259 ignoring the charge already framed. *Ramanugrah Singh* v. *King-Emperor*[5] is an important decision of the Privy Council pointing out that requirements of the ends of justice must be the determining factor both for the Sessions Judge in making a reference and for the High Court in disposing of it under section 307. In general, if the evidence is such that it can properly support a verdict of either guilty or not guilty according to the view of the trial Court and if the jury takes one view and the Judge thinks that they should have taken the other, the view of the jury must prevail. If, however, the High Court considers that on the evidence, no reasonable body of men could have reached the conclusion arrived at by the jury, the ends of justice would require the verdict to be disregarded. The test of reasonableness on the part of the jury may not be conclusive in every case as where in the light of further evidence placed before the High Court the verdict is shown to be wrong. Otherwise the High Court will interfere only where the verdict is perverse, manifestly wrong or against the weight of evidence. In re *Pattan Ali Khan*[6] holds that section 367 does not authorise a succeeding Sessions Judge to pronounce a judgment of his predecessor who had heard the case. The former becomes *functus officio* as soon as he has handed over charge and has no jurisdiction to write a judgment; nor has the successor any jurisdiction to base a judgment on evidence recorded by his predecessor and a conviction by him would be illegal. In In re *Kunju Iyer*[7], it is pointed out that where an appellate Court set aside a conviction under section 409, Indian Penal Code, but directed the papers to be sent to the lower Court for a charge being framed under section 420, the provisions of section 403, Criminal Procedure Code, cannot apply and the proceedings cannot be quashed. In In re *Thiagaraja Bhagavathar*[8], it is held that in an appeal under section 411-A (1) (*b*) on a matter involving a question of fact the Court has power to set aside the verdict of the jury if on a consideration of the facts and all the circumstances of the case, it is convinced that the verdict is unreasonable. It is further held that the fact that the trial Judge agreed with the majority verdict of the jury is a matter which the appellate Court can take into consideration in considering the reasonableness of the jury's findings. In re *Neeladri Appadu*[9] declares that the practice of the Madras High Court has been for not allowing a jail appeal by counsel on a matter already disposed of under section 421 as the Court is *functus officio* where an appeal has been so disposed of and cannot hear it again. In *Ex-Rana Birpal Singh* v. *King-Emperor*[10], the Federal Court has held that once the Court is satisfied that a person

1. (1946) 2 M.L.J. 243.
2. (1946) 2 M.L.J. 279.
3. (1946) 1 M.L.J. 435.
4. (1946) 2 M.L.J. 251.
5. (1946) 2 M.L.J. 200 (P.C.).
6. (1946) 2 M.L.J. 195.
7. (1946) 1 M.L.J. 372.
8. (1946) 1 M.L.J. 42.
9. (1946) 2 M.L.J. 169.
10. (1946) 1 M.L.J. 322 (F.C.).

is detained under the Bengal State Prisoners Regulation (III of 1818) there is no jurisdiction under section 491 which the Co[illegible]ercise in the matter.

EVIDENCE.—An interesting point of [illegible] evidence was decided by the Privy Council in *Natha Singh* v. *King-Emperor*[1], where it is held that however improbable an alleged motive may be the prosecution is entitled to call evidence in support of it and none the less so because such evidence may suggest that the accused had committed some crime other than that with which he is charged. In In re *Mayilvahanam*[2], it is held that an Assistant Inspector of Customs is not a police officer within the meaning of section 25 of the Evidence Act and that the section cannot be extended to any class of officers merely because of similarity of function. The Privy Council decision in *Jagadish Narain* v. *Nawab Sayid Ahmad Khan*[3] makes it clear that the statement of a person admissible under section 32 has little evidential value where the source of his information as to the matters which occurred before his birth or in early youth are not disclosed. *Chainchal Singh* v. *King-Emperor*[4] is another ruling of the Privy Council which holds that where it is desired to have recourse to section 33 for the admission of the previous statement of the witness on the ground that he is incapable of giving evidence, that fact must be proved and proved strictly and the fact of the counsel for the accused consenting to the evidence of the witness being read under section 33 cannot do away with the necessity of the Court being satisfied by strict proof. The conditions to be fulfilled for the admission of secondary evidence fell to be considered in *Anand Behari Lal* v. *Dinshaw & Co.*[5], by the Judicial Committee and it is laid down that where the principal of a power of attorney is not produced and the disappearance or the impossibility of producing it is not satisfactorily proved secondary evidence cannot be let in under section 65. The admissibility of evidence relating to a statement of fact and request for assistance by a certain person, where the person that made the statement is not identified and called as a witness, was held by the Privy Council to be permitted on a reading of sections 3, 59, 60 and 114 where the fact could be made a relevant fact by the trial Judge drawing the presumption under the terms of section 114, see *Bibhabati Debi* v. *Ramendra Narain Singh*[6]. In *Manna Lal* v. *Mst. Kashibai*[7], it is laid down by the Privy Council that where a will is more than 30 years old and is produced from proper custody, the presumption under section 90 would extend to the testamentary capacity of the testator in addition to its actual execution and attestation. *Mutyalu* v. *Veerayya*[8] holds that the prohibition in section 92 is only as regards evidence sought to be adduced for the purpose of contradicting, varying, adding to or subtracting from the terms of a contract and that so long as the passing of consideration is not a term in the contract, evidence adduced to show that it did pass is not within the scope of such prohibition. In *Ramdhandas Jhajharia* v. *Ramkisondas Dalmia*[9], it is pointed out by the Privy Council that where in a case oral testimony is of an unreliable and untrustworthy character, the safest policy would be to let the documents speak for themselves but that would not mean that when the question is whether a transaction is a sale or a mortgage, form is to be preferred to substance. Whether the Full Bench decision in *Ramayya* v. *Atchamma*[10] is still good law after the decision of the Privy Council in *Ram Rattan* v. *Paramanand*[11] was raised but not decided in *Koyatti* v. *Imbichi Koya*[12] which held that where a final decree for partition was not drawn upon non-judicial stamp paper and not registered and was therefore not admissible in evidence for any purpose whatsoever, the partition itself can be found on other evidence.

HINDU LAW.—The decision in *Thimma Reddi* v. *Chinna Ranga Reddi*[13] lays down that the re-marriage of a Hindu male cannot be regarded as essential, that the reli-

1. (1946) 2 M.L.J. 297 (P.C.).
2. (1946) 2 M.L.J. 480.
3. (1946) 2 M.L.J. 98 (P.C.).
4. (1946) 1 M.L.J. 125 (P.C.).
5. (1946) 1 M.L.J. 123 (P.C.).
6. (1946) 2 M.L.J. 442 (P.C.).
7. (1946) 2 M.L.J. 453 (P.C.).
8. (1946) 1 M.L.J. 346.
9. (1946) 2 M.L.J. 457 (P.C.).
10. (1944) 2 M.L.J. 164 (F.B.).
11. (1946) 1 M.L.J. 295 (P.C.).
12. (1946) 1 M.L.J. 454.
13. (1946) 2 M.L.J. 213.

gious rites which are required to be performed in the married state can be performed by a widower by virtue of his former marriage, that it mattered not whether the parties were Sudras or Dwijas and that if a widower wishes to re-marry the expenses incurred will not bind the joint family estate. An interesting question, namely, whether a marriage between two Hindus contracted under the Special Marriage Act could be dissolved by one of the spouses becoming converted to Islam and by having recourse to the Islamic law, was answered in the negative in *Andal Vaidyanathan* v. *Abdul Allam Vaidya*[1]. The approval accorded to the observation of Swinfen-Eady, L.J., in *Rex* v. *Superintendent, Registrar of Marriages*: Ex parte *Mir Anwaruddin*[2] that "the marriage is not a marriage in the Muhammadan sense, which can be dissolved in the Muhammadan manner," coupled with the approval of the decision in *Noor Jehan* v. *Eugene Tiscenko*[3] would suggest that it would make no difference even if the marriage had been contracted according to the Hindu rites. In *Thirumalai Naick* v. *Ethirajamma*[4] a ceremonial mode of contracting a widow re-marriage among Naickers by tying what is called "*nadu veetu thali*" was upheld in the absence of evidence to suggest that such form in invalid. *Bangaru Reddi* v. *Mangammal*[5] decides that section 2 of the Hindu Widow Re-marriage Act has no effect on property belonging to the widow absolutely on the date of her re-marriage. The decision in *Annapurnamma* v. *Manikyamma*[6] holds that where, as in the case of Sudras, no religious ceremony is essential or necessary for adoption there is no rule of Hindu law which prevents a widow having her husband's authority, adopting a son to him even if she were unchaste at the time of the adoption. In *Navaneethammal* v. *Kamalammal*[7], it is found that it is common ground that the adoption of a sister's son is recognised in the case of all Dwijas in the Madras Presidency as valid. The rights of an invalidly adopted son came up for consideration in *Venkatanarasimha Rao* v. *Varaha Narasimhaswami*[8], where it is observed that an invalidly adopted son is "a perfect stranger to the adoptive family" and as such he can have no rights, not even the right of maintenance in the adoptive family and that in such a case the rights of the adopted son in his natural family remain unaffected.

Two important rulings on the scope of the Hindu Law of Inheritance (Amendment) Act of 1929 have been given in the course of the year. In *Mahalakshmamma* v. *Suryanarayana*[9], it is held that the Act only applies to the separate property of a Hindu male who dies intestate and cannot operate in regard to properties which had become a woman's stridhanam. In *Lala Duni Chand* v. *Mst. Anar Kali*[10], the Judicial Committee has held that the Act applies not only to the case of a Hindu male who died intestate on or after the 21st February, 1929, but also to the case of such a male dying intestate before that date, if he was succeeded by a female heir who died after that date. The Privy Council further held that the words "dying intestate" in the Act are a mere description of the status of the deceased and have no reference to the time of the death of a Hindu male and that they only mean, in the case of intestacy of a Hindu male. *Thirumalai Naicker* v. *Ethirajamma*[4] points out that the requirement that "*dasi*" should be an unmarried woman does not mean that she should not have been married at any time before, and therefore an illegitimate son born to a widow kept as a continuous concubine is entitled to inherit as *dasi-putra*. An important decision on the rights of an illegitimate son is that in *Thangavelu* v. *Court of Wards*[11], which holds that the illegitimate son of a Sudra is not a coparcener with his putative father and cannot succeed to him by survivorship, that in the case of succession to an impartible estate the widow is to be preferred to him, that his right to maintenance as against the estate is well

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1. (1946) 1 M.L.J. 402.
2. (1917) 1 K.B. 634, 639.
3. (1941) 45 C. W.N. 1047.
4. (1946) 1 M.L.J. 438.
5. (1946) 2 M.L.J. 377.
6. (1946) 1 M.L.J. 108.
7. (1946) 2 M.L.J. 380.
8. (1946) 1 M.L.J. 351.
9. (1946) 1 M.L.J. 196.
10. (1946) 2 M.L.J. 291 (P.C.).
11. (1946) 2 M.L.J. 143.

recognised and no proof of any special custom is necessary to entitle him to maintenance from the estate but that he will not be entitled to any allowance for his marriage expenses from the impartible estate. In *Chinnathayi* v. *Kulasekharapandiya*[1], it is laid down that a member of a joint family owning an impartible estate can on behalf of himself and his heirs renounce his right of succession but the surrender must be to all the branches of the family or to the head of the family as representing all its members. The law applicable to the succession to the property of a dancing girl was examined in *Brahadeswara Mudaliar* v. *Rajagopal Pillai*[2], where it is held that the general rule of succession to the estate of a dancing girl is that daughters are preferred to the sons, her property being regarded as stridhanam, and the custom by which among dancing girls, sons and daughters were allowed to share the inheritance equally, in *Chandranna* v. *Nagamma*[3], cannot be deemed to apply beyond the Vizagapatam district.

In *Kesava Pandithan* v. *Govindan*[4], a Full Bench has held that a congenitally deaf and dumb male member of a joint Hindu family who on that account is disqualified from enjoying his share in the family estate is nevertheless a member of the coparcenary and as such is entitled to take and enjoy the whole estate when he becomes the sole surviving member of the family. In *Sellamani Ammal* v. *Thillai Ammal*[5], it is recognised that the property inherited by a person from his adoptive mother is not ancestral or joint family property. *Kuppuswami Mudaliar* v. *Thangavelu Mudaliar*[6] explains that the right which the two sons of a daughter acquire in the maternal grandfather's property is a joint right because they take the property with rights of survivorship but not a coparcenary right and the elder brother cannot give a valid discharge on behalf of his younger brother. *Rattamma* v. *Narayana Rao*[7] lays down that a business carried on by a Hindu joint family in partnership with strangers cannot be regarded as a new business when after the dissolution of the partnership it is carried on by the family itself and that it is quite open to a Hindu joint family to discontinue trading in partnership with others or to take new persons into partnership, provided however the nature of the business remains the same. The decision in *Krishnamurthi* v. *Chidambaram Chettiar*[8] is that where a Hindu father sues as the manager of a joint family the junior members are bound by the decree in the suit and the principle that a minor can sue to set aside a decree passed against him on the ground of gross negligence of his guardian only concerns property held by the minor in his own right and cannot cover the case of a decree against a father as manager of joint family property. A similar ruling is that in *Lakshmayya* v. *Venkateswarlu*[9] holding that in the case of contracts entered into by a manager on behalf of the family the contract could be specifically enforced even against the minor members of the family. An important aspect of the law relating to reunion was dealt with in *Venkanna* v. *Venkatanarayana*[10] where it is held that reunion does not require the present possession of family property by all parties to an agreement to reunite and the fact that a reuniting member had dissipated the whole of his share of the family estate did not prevent an agreement between him and his father to reunite and the father treating his property as joint family property.

Swaminatha Aiyar v. *Krishnaswami Aiyar*[11] decides that where a suit is brought by the payee against the maker of a promissory note and the decree is sought to be enforced against the judgment-debtor's sons to the extent of their interest in the family property, the distinction between the liability on the instrument and the liability for the consideration thereof has no significance and it is not the form of the decree or the frame of the suit but the nature of the debt that determines the sons' liability. Another aspect of the son's liability for his father's debts is dealt

1. (1946) 1 M.L.J. 164.
2. (1946) 2 M.L.J. 173.
3. (1923) 45 M.L.J. 228.
4. (1946) 1 M.L.J. 259 (F.B.).
5. (1946) 2 M.L.J. 408.
6. (1946) 2 M.L.J. 214.
7. (1946) 2 M.L.J. 485.
8. (1946) 1 M.L.J. 58.
9. (1946) 2 M.L.J. 207.
10. (1946) 2 M.L.J. 193.
11. (1946) 2 M.L.J. 307.

with in *Kumbakonam Mutual Benefit Fund Ltd.* v. *Ramaswami*[1], which holds that it is only where the dismissal of the suit or from the suit or application amounts to a decision by the Court that his interest in the family property is not liable for the debt, the pious obligation rule cannot be applied against him in execution of the decree obtained against the father but not in any other case. In *Bugga Reddi* v. *Yerrikala Reddi*[2], it is held that where the endorsee of a debt sued the father alone without impleading the sons and subsequently there was a partition the decree-holder cannot proceed thereafter against the interests of the sons. In *Mst. Dan Kuer* v. *Mst. Sarla Devi*[3], the Privy Council points out that so long as the obligation to provide maintenance to the widows of the family from the joint family estate has not taken the form of a charge on the family property the obligation to pay the binding debts of the family will have precedence, as for instance in the course of the administration of the estate, over mere claims of female members for maintenance. *Dorai Raj* v. *Lakshmi*[4] is an interesting pronouncement on the guardianship rights of a putative father over his illegitimate son, among Sudras. It holds that his right to the custody of the person of the illegitimate son by a continuously kept concubine does not necessarily flow either from the duty to maintain the son or from the fact that the son has a limited right of inheritance to the putative father and that though the illegitimate son is regarded as a member of the family for all purposes, albeit of a somewhat inferior grade to an ordinary son, where the association between the parents was only for a period of four years after which time it was completely broken off the father will not be entitled to the guardianship of the boy. In *Govindu* v. *Venkatapathi*[5], it is recognised that where owing to the lapse of time it is impossible to produce evidence of necessity in support of an alienation by a Hindu widow or evidence of inquiry by the alienee and there is no ground for suspecting abuse by the widow of her power to alienate for a necessary purpose, the Court can disregard the ordinary rule of Hindu law as to onus of proof and draw an inference in favour of the validity of the alienation, but that where a reasonable doubt exists the Court should refuse to draw the presumption. *Veluswami Goundan* v. *Dandapani*[6] deals with the validity of a gift for the "worship of God". It holds that though there are various deities worshipped by Hindus holding different tenets they are personifications of what are believed to be the various attributes or cosmic manifestations of the one Supreme Being and that a gift for the "worship of God" is not invalid as it in any case discloses a general charitable intention and the Court can apply the doctrine of *cypres* upholding the gift as a public trust even where it is not possible to ascertain with any degree of certainty how the donor intended the trust to be carried out. It further holds that the performance of gurupuja at the samadhi or tomb of a person, however pious, is not a public charitable object recognised by Hindu law.

An important aspect of stridhana law, was considered by the Privy Council in *Chhatrapati Pratap Bahadur* v. *Lachmidhar Prasad Singh*[7]. It is there pointed out that no special rules relate to the succession to a maiden's property beyond the heirs specially enumerated in the several texts and such succession is governed by the rules which relate to the succession of a woman married in an unapproved form. It is also pointed out that in default of husband in the case of a woman married in the approved form and in default of father in other cases the heirs of the husband or father succeed in the order laid down in Yagnavalkya's text—Ch. II, 135, 136—relating to the succession to the property of a male. It is further stated that the test of funeral oblations as a test of preference is inapplicable where the rival claimants are not of the same class of sapindas. In *Official Receiver, Ramnad* v. *Lakshmanan Chettiar*[8], it is held that in the Nattukottai Chetti community, the children do not have a joint interest with the mother in the stridhanam fund given to her

1. (1946) 1 M.L.J. 344.
2. (1946) 1 M.L.J. 307.
3. (1946) 2 M.L.J. 420 (P.C.).
4. (1946) 2 M.L.J. 318.
5. (1946) 1 M.L.J. 407.
6. (1946) 1 M.L.J. 354.
7. (1946) 2 M.L.J. 411 (P.C.).
8. (1946) 2 M.L.J. 262.

at the time of her marriage, that the mother is solely entitled to the fund and when she lends it to her husband it cannot be said that the loan constituted a trust fund for the benefit of her children. In *Mooka Pillai* v. *Valavanda Pillai*[1], it is pointed out that where reversioners who were parties to a transaction by a limited owner also happen to be actual reversioners on the death of the limited owner it will not be open to them to urge that the transaction does not bind them.

INSOLVENCY.—In *Somasundaram Pillai* v. *Official Receiver*[2], it is held that an insolvent cannot after an absolute discharge move the Court under S. 5 of the Provincial Insolvency Act to stay the disbursement of the dividend claiming the benefits under section 21 of Madras Act IV of 1938. *Arunachalam Chettiar* v. *Krishnaswami Aiyar*[3] points out that the presentation *simpliciter* of an application for settlement of claims under the Madras Debt Conciliation Act does not amount to an intimation by the debtor that he had suspended or was about to suspend the payment of his debts within the meaning of section 6 (*g*) of the Provincial Insolvency Act. *Official Receiver of Vizagapatam* v. *Suryanarayana*[4] rules that according to the provisions of section 20 an *interim* receiver has such of the powers conferrable on a receiver appointed under the Civil Procedure Code as the Court may direct, and there is nothing in the Insolvency Act preventing the Insolvency Court from according sanction to an *interim* receiver to institute suits even against third parties for the vindication of the rights of the debtor in respect of whom an insolvency petition is pending. In *Hanumantha Gowd* v. *Official Receiver, Bellary*[5], it is held that when a member of a joint Hindu family is adjudged insolvent his status in the joint family remains unchanged and if by a death in the coparcenary the share of the insolvent is increased the benefit of it will accrue to the Official Receiver in whom that share is vested by reason of section 28 (4). *Ramanamma* v. *Official Receiver, Kistna*[6] rules that where a creditor files an affidavit before the Official Receiver stating that he had obtained a specified decree and mentioning the sum due to him up to the date of adjudication of the debtor he must be deemed to have proved his debt, though the affidavit is returned with a direction to file the decree copy and there was no representation and admission of the claim till after the approval of the schedule of creditors and dividend by the District Court. Also where during the pendency of an application by the decree-holder after representation requesting the Court to amend the schedule of creditors, dividend has been paid, the Court has ample power to direct the creditors who have so received dividends to bring back those amounts and then to pass an order directing a redistribution after including the decree-holder among the creditors. In In re *Srinivasa Rao*[7], it is pointed out that to constitute concealment within the meaning of section 103 (*b*) (*ii*) of the Presidency Towns Insolvency Act, there must be some act on the part of the insolvent whereby he can be shown to have wilfully kept some property away from the notice of the Official Assignee and if there was a duty on his part to disclose or if there was a call on him to disclose and he did not conform to it or gave incorrect particulars there would be a case of concealment within the meaning of the statute.

TRANSFER OF PROPERTY ACT.—In *Ankamma* v. *Narasayya*[8], it is pointed out that section 41 will not apply where a donor claims that a gift has been duly revoked by him on account of non-fulfilment of a certain condition laid down in the deed of gift. *Picha Mopanar* v. *Velu Pillai*[9] holds that if a partition between a Hindu father and his sons is unequal and the father is allotted a smaller share than would be his due, with intent to defeat the creditors, the latter can avoid the partition under section 53 and proceed against what would be the father's proper share in the family properties in execution of the decree against him ignoring the allotment of properties at the partition. *Jonnada Sayi* v. *Jonnada Subbanna*[10] decides that section 53-A applies also to leases of immoveable property. In *Venkatasubbarao* v.

1. (1946) 2 M.L.J. 462.
2. (1946) 2 M.L.J. 209.
3. (1946) 1 M.L.J. 2.
4. (1946) 1 M.L.J. 1.
5. (1946) 1 M.L.J. 246.
6. (1946) 2 M.L.J. 105.
7. (1946) 2 M.L.J. 333.
8. (1946) 2 M.L.J. 357.
9. (1946) 2 M.L.J. 404.
10. (1946) 1 M.L.J. 92.

Veeraswami[1], it is laid down that the effect of the proviso to section 58 (*c*) is that an ostensible sale with a stipulation for repurchase shall not be regarded as a mortgage unless the stipulation is contained in the same document as that which effects the sale. *Kadir Bibi* v. *Muniappa Pillai*[2] is a Full Bench ruling which holds that though section 60 is unqualified in its terms and contains no saving provision in favour of contracts to the contrary, it does not however mean that the parties to a mortgage are precluded from deciding for themselves what is reasonable notice. The ruling in *Nachappa Goundan* v. *Samiappa Goundan*[3] observes that the moment that one mortgagee gets in the rights of other mortgagees or charge-holders, the right of consolidation arises and the amended section 61 has no retrospective effect on accrued rights. In *Sundaram Aiyar* v. *Valiya Mannadiar*[4], it is pointed out that though section 63-A (1) does not speak of a contract to the contrary under which the mortgagor can be compelled to pay the mortgagee the costs of improvements, if there is however a contract under which the mortgagor will not be entitled to the improvements, it may reasonably be inferred that if the improvements are such as cannot be severed and taken away by the mortgagee, the mortgagor must be held liable to pay the cost of such improvements, as he will have the benefit of them. *Jagadeesa Ayyar* v. *Bavanambal Ammal*[5] recognises that the provisions of section 70 can apply to a charge created by a compromise decree. The decision in *Rajagopala Aiyar* v. *Karuppiah Pandithar*[6] points out that under section 76 (*i*) as amended in 1929, the mortgagee is not entitled to deduct any amount which he had paid towards taxes from the mesne profits ordered to be paid by him to the mortgagor who has already tendered the decretal amount under a redemption decree. *Nanjappa Goundan* v. *Pacha Goundan*[7] recognises that under section 82 it is not necessary that the owner of one of the mortgaged properties should pay the whole of the common debt before he can claim contribution and that where he is obliged to pay more than what is payable out of his property he is entitled to file a suit for the excess even though the debt is still undischarged. *Umar Pulavar* v. *Dawood Rowther*[8] makes it clear that section 111 (*g*) embodies a principle of justice, equity and good conscience and though not made applicable *proprio vigore* to agricultural leases for fear of unnecessarily interfering with settled usages, in the absence of special reasons, will apply even more forcefully to agricultural leases than to non-agricultural leases and a proper notice to quit by the landlord to the tenant is necessary before instituting a suit. In *Bridget Souza Bai* v. *Maria Louis Bai*[9], it is pointed out that notwithstanding section 117 the Court can grant relief against forfeiture and it is open to the Court to give such relief in the case of an agricultural lease when the notice of forfeiture is not in accordance with section 114-A.

LAND ACQUISITION.—In *Samiullah* v. *Collector of Aligarh*[10], the Judicial Committee holds that the Land Acquisition Officer in awarding the amount of compensation under section 11 of the Land Acquisition Act is performing a statutory duty, a duty the exercise of which, in cases where the land to be acquired is for a public purpose, concerns the public, since it affects the expenditure of public money, that in assessing compensation he is bound to exercise his own judgment as to the correct basis of valuation and his judgment cannot be controlled by an agreement among the parties interested and that on a reference under section 18, the District Judge must also exercise his own judgment and consider, among other things, whether the award of the Land Acquisition Officer was based on a correct principle. *Babu Kailash Chandra Jain* v. *The Secretary of State*[11] is a decision of the Privy Council concerning section 23 (3) as amended by the U. P. Town Improvement Act, 1919, and holds that a plot of land kept by the owner as a garden and a plot of agricultural land lying fallow at the relevant date cannot be regarded as not being put to any "use" on such date but ought to be valued as a garden in the one case and as

1. (1946) 1 M.L.J. 342.
2. (1946) 2 M.L.J. 82.
3. (1946) 2 M.L.J. 35.
4. (1946) 2 M.L.J. 322.
5. (1946) 1 M.L.J. 143.
6. (1946) 1 M.L.J. 392.
7. (1946) 2 M.L.J. 276.
8. (1946) 2 M.L.J. 229.
9. (1946) 2 M.L.J. 362.
10. (1946) 1 M.L.J. 333 (P.C.).
11. (1946) 2 M.L.J. 295 (P.C.).

agricultural land in the other case. *Chottikaran Keloth Mammad Keyi* v. *Province of Madras*[1] lays down that where after the issue of notifications under sections 4 and 6, on objection by the owner, the Government decides to withdraw from the acquisition but before the issuing of the notification under section 48, the Government changes its mind and seeks to proceed with the acquisition it is entitled to do so without re-notification under sections 4 and 6.

LAND TENURES AND ESTATES LAND ACT.—In *Lakshmi Naidu* v. *Someswara Rao*[2], it is held that in the case of an enfranchised pre-settlement minor inam, the onus lies on the tenant claiming occupancy right to prove that fact and mere long possession paying a uniform rate of rent is not by itself enough to prove that he had such rights. *Kadirvelsami* v. *Sultan Ahmed*[3] holds that the word "agriculture" implies something which is achieved with the aid of human agency and cardamom cultivation is therefore "agriculture" as human element plays an important part in the bringing of cardamom plants to fruition. *Venkanna* v. *Lakshmipathi Raju*[4] decides that the use of the word "agraharam" in a grant will not *per se* imply that the grant was of the whole village when there are other lands in the village not included in the grant and such lands have been described as "waste including the site of the village" and as reserved by the grantor, precluding the application of section 3 (2) (*d*) of the Estates Land Act as amended in 1945. *Jagadesam Pillai* v. *Kuppammal*[5] is instructive regarding the test of "private land" and holds that the definition in section 3 (10) of "private land" indicates clearly that the ordinary test is the test of retention by the landholder for his personal use and cultivation by him under his personal supervision and the mere fact of the landowner owning both the waram and letting the land from time to time on short term leases is not sufficient to warrant the land being treated as private land. In *Venkateswarlu* v. *Veeraswami*[6], it is pointed out that where by reason of relinquishment by the ryot the kudiwaram right has vested in the landholder there is a merger within the meaning of section 8 and consequently the landholder can only recover the rent for the previous fasli by a suit under section 77 and not otherwise and there could be no charge in his favour. *Tirupathi Naidu* v. *Krishnappa*[7] points out that a patta and muchilika cannot be enforced in respect of lands set apart for pasturage and the only possible exception is that by express language of section 51 (1) a sum payable by a ryot on account of pasturage fees may be mentioned in the patta. In *Rudrayya* v. *Maharajah of Pithapuram*[8], it is laid down that a sale of the entire holding in execution of a rent decree where some of the ryots had not been served with notice will be binding only against those that had notice and on their shares of the holding. *Rajah of Venkatagiri* v. *Atmakuri Ramaswami*[9] points out that the Estates Land Act contains a simplified law of procedure in execution of rent decrees which excludes the application of the execution provisions of the Civil Procedure Code. In *Veeramma* v. *Ramanna*[10] it is held that, where after the passing of a rent decree against the pattadar the lands covered by the patta were purchased by a stranger and notice of such sale was duly given to the landholder under section 145 (2), an attachment and sale of such lands in execution of the rent decree without notice to the purchaser is a nullity. *Annamalai Chettiar* v. *Kuttigan*[11] decides an important point, laying down that a suit to recover costs of repairs to a tank from a dasabandam inamdar by a person who had incurred them in accordance with a requisition of the Collector under section 14 of the Railway Protection Act can be laid only in the Civil Court and there is nothing in sections 140 and 189, *contra*.

CONTRACTS.—In *Narayandas Mundada* v. *New Mofussil Co., Ltd.*[12], the Judicial Committee recognises that in India an oral contract is valid and that when a party pleads that it was contemplated by them that the agreement was not to be considered as complete and binding until it was signed by the parties it is a question

1. (1946) 1 M.L.J. 337.
2. (1946) 2 M.L.J. 168.
3. (1946) 2 M.L.J. 371.
4. (1946) 1 M.L.J. 300.
5. (1946) 1 M.L.J. 23.
6. (1946) 1 M.L.J. 291.
7. (1946) 1 M.L.J. 80.
8. (1946) 2 M.L.J. 80.
9. (1946) 2 M.L.J. 476.
10. (1946) 1 M.L.J. 226.
11. (1946) 2 M.L.J. 268.
12. (1946) 2 M.L.J. 259 (P.C.).

of construction whether the execution of the further document is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. Another interesting pronouncement of the Privy Council is *Mst. Dan Kuer* v. *Mst. Sarla Devi*[1], which re-affirms that the rule that has prevailed in India that where a contract is intended to secure a benefit to a third party, as a beneficiary under a family arrangement, he may sue in his own right to enforce it, has been extended to cases where provision is made for the maintenance of the female members of a Hindu family on a partition of the joint family property between the male members. *Hairoon Bibi* v. *United India Life Insurance Co., Ltd.*[2], deals with the interesting question whether a direction to remit an amount includes remittance by post and holds that though the idea of a direct payment in person or by messenger might also be indicated, remittance by post should be taken to be one of the modes contemplated by the parties. *Mohammad Isack* v. *Sreeramulu*[3] lays down that even as an agreement to refrain from bidding at an auction is not opposed to public policy so also an agreement for the withdrawal of a tender is not unlawful within section 23 or section 27 of the Contract Act. In *Rangiah Chettiar* v. *Parthasarathy Iyengar*[4], it is pointed out that if there is no objection in law to the seller getting some one else on his behalf to deliver the goods to the buyer, there is equally no objection to his being authorised to file a suit as the seller's assignee, deputy, nominee or agent to enforce his rights and that is not a transfer of a mere right to sue for damages but is a transfer of a right under a contract which is still to be performed by both the sides and not after it was broken and a claim for damages had arisen. *Rahima Bibi* v. *Sherfuddin*[5] recognises that although the principle enunciated in section 68 would not apply to the expenses of the marriage of a minor under English Law, the principle has been extended in India to cover the marriage expenses of Hindu minors and it would make no difference if the girl is a Muslim. *Muthuswami Aiyar* v. *Velammal*[6] points out that one of the co-owners of a well executing repairs to it cannot recover contribution from the other co-owner under section 70, where the latter as a matter of fact was not enjoying the use of water from the well. In *Kuppan Chettiar* v. *Ramaswami Chettiar*[7], it is recognised that if the circumstances are such that the law imposes on any person any legal or equitable duty to indemnify, it will imply on his part a promise to do that which under the circumstances he ought to do. The decision in *Indo Union Assurance Co.* v. *Srinivasan*[8] brings out the difference between the relationship of master and servant and that of principal and agent, namely, that while a principal has only the right to direct what work the agent has to do a master has the further right to direct how the work is to be done and in the former case the agent would be entitled to damages in the event of the agency being wrongly terminated only if he had been successful in his agency.

SPECIFIC RELIEF.—The decision in *Singara Mudali* v. *Ibrahim Baig*[9] lays down that a contract by the natural guardian of a minor to convey property cannot be specifically enforced against a transferee from the minor of such property with notice, on the ground that what cannot be specifically enforced against the transferor cannot be enforced against his transferee either. In *Siddique & Co.* v. *Utoomal and Assudamal & Co.*[10], the Privy Council points out that the essential requisite to be proved for obtaining the relief of rectification of an instrument under section 31 of the Specific Relief Act is that it was through a mutual mistake of the parties that the instrument in question did not truly express the intention of the parties. *Sree Meenakshi Mills* v. *Provincial Textile Commissioner, Madras*[11], holds that section 45 cannot apply to a case where the petitioner who had been by an order of the Textile Commissioner given the right to deliver yarn to persons of specified categories delivered them to certain others and thereupon the Textile Commissioner seized the goods for contravention of the order.

1. (1946) 2 M.L.J. 420 (P.C.).
2. (1946) 2 M.L.J. 253.
3. (1946) 1 M.L.J. 187.
4. (1946) 2 M.L.J. 401.
5. (1946) 2 M.L.J. 305.
6. (1946) 2 M.L.J. 273.
7. (1946) 1 M.L.J. 383.
8. (1946) 2 M.L.J. 67.
9. (1946) 2 M.L.J. 103.
10. (1946) 1 M.L.J. 74 (P.C.).
11. (1946) 2 M.L.J. 188.

COMPANY LAW.—In *Krishna* v. *Indo Union Assurance Co., Ltd.*[1], the Privy Council points out that where under its articles of association, a company was empowered to appoint and in their discretion to remove or suspend managers, secretaries, etc., and the company had appointed the appellant as secretary in 1939 for five years and in 1941 appointed a general manager to which the secretary objected, the secretary being only a servant of the company and bound to carry out the duties assigned to him cannot in the circumstances of the case object to the appointment of the general manager. In In re *Kalyanasundara Goundar*[2], it is ruled that where on the resignation of the liquidators appointed on a voluntary winding up of a company, the name of the company was struck off the register under section 247 (5) of the Companies Act and later on another person was appointed liquidator and on his application the company was restored to the register, a refusal by the original liquidators to submit statement of information required by the official liquidator would be an offence and section 177 would apply. In *Sankaran Nambiar* v. *Kottayam Bank*[3], it is held that there is nothing in section 198 to indicate that the powers of the Court with regard to the estate of a contributory or a debtor can be exercised in a summary proceeding under section 235 and a proceeding under section 235 against a director cannot be continued against his heirs after his death during the proceedings.

CIVIL PROCEDURE CODE.—The decision in *Venkatasubba Rao* v. *Jagannadha Rao*[4], makes it clear that a Hindu widow, with reference to the interest devolving on her under the Hindu Women's Rights to Property Act, would be her husband's legal representative within section 2 (11) of the Civil Procedure Code. *Balakotayya* v. *Nagayya*[5] recognises that the doctrine of *res judicata* applies also to decisions in proceedings which are not suits, as for instance, a proceeding under section 84 (2) of the Madras Hindu Religious Endowments Act. Failure by a person to object to a prior execution application of which he had notice, in respect of a maintenance decree against him, that such decree had become unexecutable consequent on resumption of cohabitation subsequent to the decree was held in *Palaniammal* v. *Arumugham Chetti*[6] to bring into operation the bar of constructive *res judicata*. *Ramarayudu* v. *Manikya Rao*[7] points out that the general rule is that a party to a suit cannot in a subsequent proceeding be heard to allege that a decree obtained against him in a former litigation was obtained by collusion between himself and the plaintiff. In *Sri Rajah Kotagiri Madhavarao* v. *Papayya Rao*[8], it is held that an appellate decree confirming a decree passed without jurisdiction can have no more validity than the decree of the first Court and cannot operate as *res judicata*. In *Kuppan Chettiar* v. *Ramaswami Chettiar*[9], it is decided that the doctrine of *res judicata* cannot apply where the earlier suit had been decreed in second appeal against a defendant who had remained *ex parte* in the trial Court after a co-defendant had been exonerated, and a suit is subsequently brought by such defendant who was compelled to pay the decree amount, for indemnity against the exonerated co-defendant. *Ramanani* v. *Basavayya*[10] makes it clear that in a partition action each defendant sharer is also in the position of a plaintiff and where one of the defendants in fact applies for a decree in respect of his share and the alienees are arrayed as co-defendants, the decision operates as *res judicata* and cannot be reopened in a subsequent suit between the particular defendant whose share was the subject of decision and the alienee defendants. *Appalaraju* v. *Venkatasubbarao*[11] lays down that under section 13 for a decree of a foreign Court to be conclusive there should have been a controversy and an adjudication thereon. In *Nemichand Sowcar* v. *Y. V. Rao*[12], it is made clear that a decree of a foreign Court against an absent defendant by consent of the plaintiff and the remaining defendant without hearing any evidence is not a decree given on merits. In *Nachiappa Chettiar* v. *Muthukaruppan Chettiar*[13], it is recognised

1. (1946) 1 M.L.J. 79 (P.C.).
2. (1946) 2 M.L.J. 241.
3. (1946) 1 M.L.J. 53.
4. (1946) 1 M.L.J. 159.
5. (1946) 1 M.L.J. 200.
6. (1946) 1 M.L.J. 277.
7. (1946) 1 M.L.J. 282.
8. (1946) 1 M.L.J. 287.
9. (1946) 1 M.L.J. 383.
10. (1946) 2 M.L.J. 321.
11. (1946) 1 M.L.J. 66.
12. (1946) 2 M.L.J. 16.
13. (1946) 1 M.L.J. 310.

that section 16 cannot apply where the immoveable property, the partition of which is sought, is not situate in British India. *Galley & Co.* v. *Appalaswami Naidu*[1] explains that under section 20, in suits arising out of contracts the cause of action arises either at the place where the contract was made or where it is to be performed or performance completed, or where in performance of the contract any money to which the suit relates was expressly or impliedly made payable. *Lakshmipathi Naidu* v. *Mohammad Ghani*[2] applies the above principle and holds that a suit for damages for breach of contract can be filed at the place where the goods were deliverable or at the place where the price was payable. In *Vastiram Manmal* v. *Ramaswami Iyer*[3], the principle is stated that a condition in a contract regarding forum should be strictly construed and that the restriction applies to the particular proceeding instituted should also be shown. In *Krishna Rao* v. *Gonti Bairagi*[4], it is held that a claim of the mortgagors to set off in execution a right to recover damages against the mortgagee decree-holder based on his failure to supply funds to the receiver appointed in the action for instituting suits for recovery of rents due by the mortgagor's tenants, is not one relating to the execution, discharge or satisfaction of the mortgage decree within the meaning of section 47. In *Nacharammal* v. *Veerappa Chettiar*[5], it is held that as the decree to be executed, where there has been an appeal, is that of the appellate Court of final jurisdiction, the period of 12 years under section 48 has to be computed only from the date of such appellate decree. In the case of partition decrees it is laid down by *Venkataraya Goundan* v. *Mallappa Goundan*[6] that though the decree may be engrossed on stamp paper on a later date, the date of the decree for the purposes of computing the period of limitation for execution has to be construed as that of the date of the judgment. *Venkata Lingama Nayanim* v. *Venkata Narasimha Rayanim*[7] decides that resistance to execution on legal grounds, however ill-founded, could not amount to preventing execution by fraud within the meaning of section 48 (2) (*a*). In *Venkataswami* v. *Tata Reddi*[8], it is laid down that where the sons of the maker of a promissory note are sued on the note after the death of their father the Court can pass a decree against them so as to render them liable not only to the extent of their father's separate property but also to the extent of his share in the joint family property in their hands. *Governor-General in Council* v. *Krishnaswami Pillai*[9] shows that the provision regarding notice in section 80 is express and explicit and admits of no implications or exceptions and imposes a statutory and unqualified obligation on the Court. Where, after a railway company had been taken over by the Government, a suit was instituted against the company for recovery of damages and subsequently leave was sought to amend the plaint and add the Governor-General as a second defendant, it was held in *Governor-General of India* v. *Raghunandan Shenoy*[10] that the suit was not maintainable without notice being served on the Governor-General in Council under section 80. The interesting point is decided in *Chem Abbheong* v. *Packiri Mahomed Rowther*[11] that an enemy army in temporary occupation of a foreign country cannot be said to be the government of that country so as to make a person residing in such country an alien enemy who is prohibited by section 83 from suing in British Indian Courts. In *Jainambukanni Ammal* v. *Ruthrapathy Pillai*[12], it is held that where a temple as well as its property are in British India no relief in respect of the property can be obtained except from the British Indian Courts. *Venkatanarasimham* v. *Nagoji Rao*[13] holds that where the effect of an order is to prevent an enquiry into the merits such an order would come within section 105. *Pethu Reddiar* v. *Rajamba Ammal*[14] rules that where a suit by the wife of the alienor to have alienations made by her husband in favour of different persons set aside on the ground of her husband having been insane at those times was decreed, the cause of action against all the aliences being common, a certificate

1. (1946) 1 M.L.J. 11.
2. (1946) 2 M.L.J. 255.
3. (1946) 2 M.L.J. 270.
4. (1946) 2 M.L.J. 85.
5. (1946) 1 M.L.J. 128.
6. (1946) 1 M.L.J. 163.
7. (1946) 2 M.L.J. 383.
8. (1946) 2 M.L.J. 361.
9. (1946) 1 M.L.J. 267.
10. (1946) 2 M.L.J. 65.
11. (1946) 1 M.L.J. 222.
12. (1946) 1 M.L.J. 181.
13. (1946) 1 M.L.J. 216.
14. (1946) 1 M.L.J. 245.

under section 110 can issue if the valuation of the suit taken as a whole on the date of the plaint was above Rs. 10,000. A Full Bench decides in *Gangadhara Ayyar* v. *Subramania Sastrigal*[1] that where the decree of the High Court was one of variation in so far as it had given the plaintiff four more items than had been decreed in the lower Court on a cross-objection preferred by him in the defendant's appeal, and the defendant wished to appeal in regard to all the items whose value was above Rs. 10,000 a certificate can be claimed. In *Lakshmanan Chettiar* v. *Thangam*[2], it is pointed out that the value of the subject-matter in dispute in an appeal to the Privy Council in a partition suit must be taken to be the value of the share in the joint family property in respect of which the appellant is claiming. An important practice point is elucidated in *Srinivasa Varadachariar* v. *Manavala Mahamunigal Temple*[3] that where a small cause suit is tried as an original suit not by mistake or wrong numbering but after the parties have joined issue and a finding is given that it should be tried as an original suit and there was an appeal wherein no question of jurisdiction was raised at all, it is not open to the plaintiff to contend in revision that the appellate Court had no jurisdiction. In *Subramania Vadiar* v. *Sreenivasa Vadiar*[4], it is held that O.1, r. 8 pre-supposes the existence of a right of suit in the plaintiff who instituted the suit and the grant of leave to a person not really interested may be recalled at a later stage in the suit or in appeal. In *Mahalakshmamma* v. *Kasina Mallayya*[5], it is laid down that where failure to sue in a representative capacity was due to a *bona fide* mistake the appellate Court can grant the necessary leave. *Mooka Pillai* v. *Valavanda Pillai*[6] decides that the provisions of O. 1, rule 8 apply to appeals as well as suits. *Kumaraswamiah* v. *Krishna Reddi*[7] emphasises that O. 7, r. 12 requires the Court to pass an order when it rejects the plaint, always giving reasons for doing so. In *Kunhikrishna Reddi* v. *Ramaraju*[8] it is pointed out that where an order on a petition filed under O. 9, r. 9 was passed without notice being issued to the opposite party the order is not one properly made under that provision. *Samankatha Nadar* v. *James*[9] holds that it is a well-settled rule of law in Madras that a minor is not bound by a decree which has been passed against him as the result of gross negligence of his guardian in the conduct of his suit and the same principle will apply to a case where a mother sues on behalf of her minor son and by her gross negligence allows the suit to be dismissed for default. An important practice point is dealt with in *Raghava Mannadiar* v. *Theyunni Mannadiar*[10]. It is explained that where the plaintiff asked for the establishment of his right to a share in lands, what is appurtenant to it, namely, a right to account need not be separately asked for and the absence of such prayer in a partition suit is no bar to the award of mesne profits and O. 20, r. 12 applies only to a bare suit for possession. *Atchayya* v. *Appalaraju*[11] seems to sound a somewhat different note. It points out that O. 20, r. 12 as amended in Madras in 1911 and 1941 does not say that, when there was no claim for future mesne profits in a suit to recover possession of land and the decree therefore did not award any, still the Court can, on an application proceed to ascertain such mesne profits and pass a final decree. It further holds that where the preliminary decree awards no future mesne profits there can be no final decree awarding the same. In *Official Receiver of Ramnad* v. *Muthiah Chettiar*[12], it is held that O. 21, r. 16 only applies to decrees passed by Courts to which the Civil Procedure Code applies and that after the separation of Burma from India in 1937 the decree of the Rangoon High Court becomes a decree of a foreign Court, and consequently O. 21, r. 16 cannot apply. *Chellamma* v. *Ramakrishna Rao*[13] explains that under O. 21, r. 72 when the decree-holder purchases without permission, the Court may, if it thinks fit, set aside the sale but is not obliged to do so and hence even if leave

1. (1946) 2 M.L.J. 69 (F.B.).
2. (1946) 2 M.L.J. 465.
3. (1946) 2 M.L.J. 112.
4. (1946) 2 M.L.J. 221.
5. (1946) 2 M.L.J. 432.
6. (1946) 2 M.L.J. 462.
7. (1946) 2 M.L.J. 190.
8. (1946) 1 M.L.J. 274.
9. (1946) 2 M.L.J. 382.
10. (1946) 2 M.L.J. 117.
11. (1946) 2 M.L.J. 233.
12. (1946) 2 M.L.J. 132.
13. (1946) 1 M.L.J. 17.

to bid obtained by the decree-holder before the first sale could not endure for the resale the purchase need not necessarily be set aside. Another interesting matter is elucidated in *Kalidasa Chetty* v. *Siddha Chetty*[1] which lays down that the responsibility for paying the correct amount into Court as required by O. 21, r. 89 lies with the payer who wishes to have the sale set aside and not with the clerk who receives the lodgment schedule. In *Swaminatha Iyer* v. *Krishnaswami Iyer*[2], it is recognised that though attachment is a necessary preliminary to a judicial sale, a sale without attachment is not a nullity but omission to attach is a material irregularity which renders the sale liable to be set aside under O. 21, r. 90 if substantial injury is proved. *Abdul Razack Rowther* v. *Mahomed Hanif Sahib*[3] emphasises that the terms of O 23, r. 1 (2) themselves make it clear that the Court must state either what the defect is or what are the other sufficient grounds which have moved it to grant permission to withdraw the suit with liberty to institute a fresh suit and hence failure to state them will amount to a material irregularity in exercising jurisdiction. In *Palaniappa Chettiar* v. *Narayanan Chettiar*[4], it is held that the issuing of a commission to examine a witness is a matter of discretion for the Court in the circumstances of each particular case and amongst such circumstances must be included the question whether that evidence cannot be adduced save through the particular witness concerned. *Chhabba Lal* v. *Kallu Lal*[5] is a pronouncement of the Privy Council that O. 32, r. 7 is imperative, that its terms must be strictly adhered to and that the rule applies to an agreement to refer matters in dispute to arbitration. *Venkataswami Naicker* v. *Balakrishna Naicker*[6] holds that where a minor's suit for partition after setting aside certain alienations was after the passing of a preliminary decree compromised out of Court without leave of Court being taken, such compromise is voidable by the minor as against all the parties. Apropos of the obtaining of leave, it is observed in *Rajeswara Rao* v. *Satyanarayana*[7] that it is difficult to hold that the guardian must obtain the Court's consent before the agreement to compromise is reached and all that is needed is that he must obtain such consent before the compromise is concluded, *i.e.*, when it is made a decree of Court. *Sarraju* v. *Venkataraju*[8] holds that a decree passed in a maintenance suit is a final decree which entitles the decree-holder to proceed directly in execution should the judgment-debtor fail to pay and O. 34, r. 5 has no application. In *Panchapagesa Aiyar* v. *Rajamani Aiyar*[9], it is pointed out that as regards sales in contravention of O. 34, r. 14 it is now settled that such a sale is not void but only voidable either by application or by suit where the latter is permissible, by the party affected within one year. *Narappa* v. *Chinnareppa*[10] holds that where an undertaking given by the plaintiff in obtaining an *interim* injunction was broken by him it does not matter whether the undertaking is regarded as an injunction issued by the Court or as a part of the *interim* injunction issued against the defendant and in either view it would be an injunction the breach of which is punishable under O. 39, r. 2 (3). In *Subbamma* v. *Madhavarao*[11], it is held that an order dismissing an appeal *in limine* under O. 41, r. 11 has precisely the same effect as an order dismissing the appeal after notice under r. 32 and an application for amendment of the decree must be made only to the Court which dismissed the appeal.

REGISTRATION.—In *Yanadamma* v. *Venkateswarlu*[12], it is held that where the award of an arbitrator in a dispute between the parties regarding the quantum of property and the terms on which it should be assigned in lieu of maintenance claims directed only the party being put in possession and enjoying a certain property but did not operate as a conveyance and the right to have a conveyance executed later on was also specified, the award stood on no higher footing than an agreement to transfer in future and did not require to be registered. An important decision is that in

1. (1946) 2 M.L.J. 110.
2. (1946) 2 M.L.J. 307.
3. (1946) 2 M.L.J. 113.
4. (1946) 1 M.L.J. 179.
5. (1946) 1 M.L.J. 339 (P.C.).
6. (1946) 2 M.L.J. 219.
7. (1946) 1 M.L.J. 249.
8. (1946) 2 M.L.J. 192.
9. (1946) 2 M.L.J. 121.
10. (1946) 2 M.L.J. 115.
11. (1946) 1 M.L.J. 393.
12. (1946) 2 M.L.J. 345.

Varadaraja Aiyar v. *Kailasam Aiyar*[1] which holds that the mistake of the registering officer in entering a charge in a wrong book could not render the registration invalid and the transaction would be binding provided it did not injure innocent third parties.

STAMP LAW.—In *Sethuraman Chettiar* v. *Ramanathan Chettiar*[2], it is held that sections 31 and 32 of the Stamp Act do not form one integrated procedure for adjudication as to stamps and the time limit referred to in the proviso to section 32 does not govern applications under section 31 and the Collector has jurisdiction to adjudicate as to the proper stamp duty payable although the document was not presented within one month of its execution. *Chidambaram Chettiyar* v. *Meyyappan Ambalam*[3] holds that section 34 only relates to the stamping of original documents and the fact that the document filed in Court before the trial was destroyed by the action of a mob will not put the plaintiff in a better position. A notable ruling regarding section 35 is that in *Ram Rattan* v. *Parmanand*[4] which decides that unstamped memoranda containing details of a partition could not be used to corroborate the oral evidence for determining the factum of partition, that the words "for any purpose" in section 35 should be given their full and natural meaning and the documents could not be admitted in evidence for any collateral purpose even.

COURT-FEES.—In *Ramanathan Chettiar* v. *Ramanathan Chettiar*[5], it is pointed out that while it is true that where the allegation was that a document was sham and nominal and had not effected a transfer of property the document could be ignored and a declaration of title asked for without setting aside the deed, in cases where a person who was himself a party to the document asks for a declaration in respect of the document, the relief prayed for should be cancellation and not a mere declaration in respect of it and court-fee should be paid under section 7, clause (*iv-A*) of the Court-Fees Act. *Kalianna Gounder* v. *Balasubramaniam*[6] decides that members of a joint Hindu family out of possession may ignore a voidable deed and seek to recover possession of their shares and hence the asking for a declaration in respect of such a transaction is in effect one for possession to which section 7 (*v*) applies. *Raja K.J.V. Naidu*, In re[7], holds that a suit for a declaration of plaintiffs' customary rights to graze cattle, cut wood, etc., free of charges from a forest belonging to the defendant with a prayer for injunction, not being for a relief involving possession of land will not be affected by the Madras amendment to section 7 (*iv*) (*c*) and court-fee will have to be paid under section 7 (*iv*) (*e*). In *Kuppuswami Pillai* v. *Taj Fraksha Thaikkal Estate*[8], it is held that where the kudivaram interest in certain inam lands is the subject of dispute and the net profits of the land have to be ascertained for purposes of section 7 (*v*) (*c*) the rent or melvaram admittedly payable on the land to the landholder should be deducted from the gross income. *Venkatasubba Reddy* v. *Ramadoss Reddy*[9] points out that though it is true that when the court-fee paid has been accepted the Court may be deemed to have decided that the fee paid was correct within the meaning of section 12 though no specific order to that effect has been passed, yet in a case which is still pending the acceptance by a ministerial officer of the court-fee paid or the registration of the case without objection cannot be deemed to be a final decision of the question of the fee to be paid. Hence in spite of a suit being registered and numbered it is open to the Court to decide the question of court-fee as an issue in the suit itself and the mere fact that some arguments on court-fee were heard before the suit was registered will not amount to a decision that the fee paid is correct. In *Ponnuswami Chettiar* v. *Mariappa Pannady*[10], the court-fee payable in a suit for declaration of the invalidity of a document alleged to be forged in regard to one of the sheets was considered and it was ruled that the suit need not be stamped as for cancellation of a document and that the plaintiff was entitled to pay court-fee under Article 17-A.

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1. (1946) 2 M.L.J. 355.
2. (1946) 1 M.L.J. 373.
3. (1946) 1 M.L.J. 64.
4. (1946) 1 M.L.J. 295 (P.C.).
5. (1946) 2 M.L.J. 114.
6. (1946) 2 M.L.J. 459.
7. (1946) 1 M.L.J. 61.
8. (1946) 1 M.L.J. 190.
9. (1946) 1 M.L.J. 459.
10. (1946) 1 M.L.J. 239.

LIMITATION.—In *Ramkotayya* v. *Seetharamaswami*[1], it is decided that section 5 of the Limitation Act is inapplicable to a case of an application for a final decree under O. 34, r. 5, Civil Procedure Code, and the Court has no power to condone the delay in filing such an application. *Venkataramayya* v. *Venkatasubbayya*[2] points out that inasmuch as in section 25-A of Madras Act IV of 1938 though a right of appeal is given no period of limitation different from that prescribed by the first schedule to the Limitation Act is indicated, the provisions of section 29 (2) of the Limitation Act cannot operate so as to preclude the applicability of section 5. In *Nagabhushanayya* v. *Kotayya*[3], it is held that where an order of a magistrate passed under section 145 (6), Criminal Procedure Code, is not modified by the High Court in revision, it becomes the final order within the meaning of Article 47. *Venugopal and Brother* v. *Gopala Chettiar*[4] holds that where there was an attachment before judgment of a sewing machine and vital parts thereof having disappeared while in the custody of the sureties the owner declined to take delivery of the machine on the raising of the attachment, and sued for the return of the machine in the condition in which it originally was, limitation should be computed under Article 48 or 49 and not under Article 29. *Nagayya* v. *Penukonda Co-operative Town Bank, Ltd.*[5], decides that a claim by an auction purchaser for return of the purchase money where the sale had been set aside on the ground of mistake is governed by Article 96. *Karanamurthi Thevar* v. *Ramanatha Thevar*[6] holds that Article 62 is inapplicable to a claim founded on an equitable basis and therefore a claim against one alleged to be a benamidar in respect of moneys received and held by him being an equitable one will fall under Article 120. In *Official Receiver of South Arcot* v. *Alagappa Chettiar*[7], it is held that a suit by the Official Receiver to have a mortgage executed by the insolvent declared as sham and nominal is governed by Article 120 and the same article will apply even if in such a suit an alternative claim is made under section 53, Transfer of Property Act. *Venkat Rao* v. *Sathiraju*[8] holds that where a decree is amended and the same is in regard to an arithmetical error and is not the reason for the grievance against the decree, limitation will start from the date of the original decree itself; but if the grievance is by reason of the amendment the time for the appeal would run from the date of the amended decree. In *Gutti Nukamma* v. *Mansa Bansayya*[9], it is held that where a decree in a suit filed *in forma pauperis* contained a direction to pay court-fee to government and execution applications were filed by the latter but were not proceeded with and thereafter the decree-holder applied for execution the applications filed by government will enure for the decree-holder's benefit for purposes of Article 182.

SUMMARY OF ENGLISH CASES.

SIMPSON, *In re*: FOWLER *v.* TIMLEY, (1946) 1 Ch. 299.

Will—Bequest for charity—Bequest to vicar of named church for work in the parish —Validity.

A gift to a vicar of a named church for his work in the parish means that it is to be used for the purposes of such part of his work (*viz.*, functions connected with the cure of souls in the particular district) as lies within the parish. Such work is sufficiently definite and charitable, and a gift for such work is valid.

SMITH'S ESTATES, LTD. *v.* BOLLAND, (1946) 2 All.E.R. 284 (K.B.D.).

Income-tax—Computation of assessable profits of business—Expenses of litigation— When deductible.

1. (1946) 1 M.L.J. 192.
2. (1946) 1 M.L.J. 271.
3. (1946) 1 M.L.J. 398.
4. (1946) 1 M.L.J. 241.
5. (1946) 2 M.L.J. 231.
6. (1946) 1 M.L.J. 140.
7. (1946) 1 M.L.J. 113.
8. (1946) 1 M.L.J. 198.
9. (1946) 2 M.L.J. 303.

Out of the profits of a company remuneration paid to an employee was allowed to be deducted only to some extent and the company had to carry the matter on appeal as the same question would arise in future years and if they did not get the remuneration ascertained they could not pay any higher amount to the employee who may therefore leave them.

Held, the expenses of the litigation was an allowable expenditure in computing profits of the business. An expenditure for retaining somebody who is vital to the business is an expenditure which is incurred for the purpose of earning profits.

MEACHER *v.* MEACHER, (1946) 2 All.E.R. 307 (C.A.).

Divorce—Past cruelty on the part of husband—Ground for divorce.

It cannot be said that Courts will only intervene to protect the parties to a divorce suit from what they expect to happen. A divorce can be granted on the ground of cruelty already suffered by the petitioner. Where a wife who is given an unreasonable order by her husband disobeys it and the husband then violently assaults her, courts will intervene and grant a decree for divorce.

Quære.—Whether, and to, what extent, provocation amounts to a defence against a charge of cruelty.

R. *v.* WICKS, (1946) 2 All. E.R. 529 (C.C.A.).

Crimes—Offence under statutes which have since expired—Liability to conviction after expiry of statute.

Interpretation of statutes—Solution difficult—If can be doubtful, the benefit of which is to go to the subject.

Sub-section (3) of section 11 of Emergency Powers (Defence) Act, 1939, provided that the expiry of the Act shall not affect the operation thereof as respects things previously done or omitted to be done. There is nothing unreasonable in a person being punished for a breach of the law which was in existence at the time he offended, though Parliament had put an end to it by the time the prosecution was launched. It cannot be said that there is any ambiguity or doubt which should be resolved in favour of the subject and against the Legislature. Though a problem may prove difficult, it by no means follows that the result is either doubtful or ambiguous. Courts and juries exist for the purpose of among other things of solving difficulties both of law and of fact and it cannot be said, that, if the solution is difficult the result must be doubtful.

HOUSEHOLD MACHINES, LTD. *v.* COSMOS EXPORTERS, LTD., (1946) 2 All.E.R. 622 (K.B.D.).

Sale of goods—Contract for—Failure to deliver—Damages—Chain contracts—Practice—Indemnity as to future claims against buyer from their own buyers—Declaration.

Whether or not there has been a repudiation of a contract for sale of goods, depends on the facts of each case.

Where the buyers say "you have not delivered, and we are, therefore, not going to pay on the nail" it does not constitute a repudiation by the buyers of the contract.

Where the buyers to the knowledge of the sellers were buying with a view to resale, the disappointed purchaser is entitled to recover loss of profits which he would have made by the resale. Where there is no market in which similar goods can be obtained, the Court allowed 10 per cent. over the contract price of the goods contracted for.

A declaration of indemnity was also given in favour of the buyer in respect of any future claim for damages for breach of contract which may be adjudged by a Court of law in respect of re-sales to third persons.

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LEGAL PROFESSION IN ANCIENT INDIA

By

PILGRIM.

It has sometimes been remarked that in the history of ancient India, there are no glimpses even, of the existence of the legal profession. While it may be true that advocacy as now understood was probably not known in ancient India it would, however, be incorrect to assume that law as a profession was altogether unknown to the dharma-sastra writers. The Mrichchakatika—a composition of the 3rd century A.D.—contains an interesting description of an ancient trial. Though it mentions that the Judge is assisted at the trial by various persons including a लेखक or scribe who writes down the charges and the evidence, and that the audience may take an active part in the proceedings, there is no reference to any lawyer as such having a place at the trial. This becomes intelligible if the background in which an ancient court functioned and justice was administered is clearly borne in mind. In early Hindu literature as well as in social life the concept of law was expressed by the term "dharma." The law-givers regarded "dharma" as derived from *loka dharana*. The Taittiriya Samhita remarks : धर्मो विश्वस्य जगतः प्रतिष्ठा. It is called "dharma" because it sustains the people. The Mahabharata too conveys the same idea when it observed :

धारणाद्धर्म इत्याहुः धर्मो धारयते प्रजाः ।
यत्स्याद्धारणसंयुक्तं स धर्म इति निश्चयः ॥

The King was not above the law but had to administer it. Transgression would draw on him punishment. In the Manu Smriti it is said : "It (punishment) strikes down the King who swerves from his duty together with his relatives."[1] Kautilya lays down a similar principle in the Arthasastra and states that the Court could punish even the King as the latter could punish the subject.

उत्तमापरमध्यत्वं प्रदेष्टा दण्डकर्मणि ।
राज्ञश्च प्रकृतीनां च कल्पयेदन्तरान्वितः ॥

It was therefore vital that in the administration of justice there should be no flaw or miscarriage. To ensure this the early texts provide that in the *sabha*—which was the most important body that administered justice in early times—the King should do his work surrounded by Brahmins, Ministers, etc.

व्यवहारान् दिदृक्षुस्तु ब्राह्मणैस्सह पार्थिवः ।
मन्त्रज्ञैर्मन्त्रिभिश्चैव विनीतः प्रविशेत् सभाम् ॥

"A King desirous of investigating law cases must enter his Court of justice preserving a dignified demeanour together with Brahmanas and with experienced councillors."[2] The Brahmins were to be associated, for, the administration of justice was part of

1. VII, 28. 2. Manu VIII, 1.

the moral order to be maintained which was to be according to the Vedas. And the Brahmins alone had the requisite vedic knowledge. Whatever may have been the practice in the vedic period itself, during the sutra period at any rate, the only community associated with justice was the Brahmin. This is borne out by an observation of Gautama : द्वौ लोके धृतव्रतौ राजा बहुश्रुतश्च ब्राह्मणः ।

" There are in the world two dedicated to the upholding of morals, the King and the learned Brahmin."[1] In course of time the King's place in the Court was taken by the प्राड्विवाक or the judge, who was a Brahmin.[2] The function of the Brahmins present in Court is particularly pointed out by a text of Gautama, namely, that he was to interrogate the witnesses : राजा प्राड्विवाको ब्राह्मणो वा बहुश्रुतः[3] ।

In fact any Brahmin learned in the law could assist the Court whether appointed or unappointed. It was the belief that one who practises the law speaks with a blessed voice. Narada states[4] :

अनियुक्तो नियुक्तो वा धर्मज्ञो वक्तुमर्हति ।
दैवीं वाचं स वदति यः शास्त्रमुपजीवति ॥

But unless one knew the dharma one cannot practise, in the absence of an appointment. This is clear from a text of Narada that in a litigation one who has no appointed position should say nothing and he who has such a position should speak without bias.[5]

नानियुक्तेन वक्तव्यं व्यवहारे कथञ्चन ।
नियुक्तेन तु वक्तव्यमपक्षपतितं वचः ॥

One versed in law and attending the Court is enjoined if occasion arises to give his opinion to prevent a perversion of justice, for to preserve silence under the circumstances would be to commit a sin. Manu has said[6] :

सभार्यां न प्रविशेद्व्यं वक्तव्यं वा समञ्जसम् ।
अब्रुवन् विब्रुवन् वापि नरो भवति किल्बिषी ॥

The non-mention in the Mrichchakatika of the lawyer has in the circumstances no significance.

That persons versed in the law and attending Court could derive remuneration for the services rendered is clear from a text of Manu[7] :

त्रयः परार्थे क्लिश्यन्ति साक्षिणः प्रतिभूः कुलम् ।
चत्वारस्त्वर्चायन्ते विप्र आढ्यो वणिक् नृपः ॥

" Three suffer for the sake of others, witnesses, a surety and judges ; but four enrich themselves, a Brahmana, a money-lender, a merchant and a king." The enrichment of the विप्रः or Brahmin can only be by his receiving remuneration for the assistance that he afforded. It would thus seem that though confined to the Brahmins, law as a profession had come into vogue during the time of the Manu Dharmasastra. This view receives some support from the sastraic provisions in regard to self-acquired property. That *vidyadhana* may be retained by the acquirer and not shared is recognised by Gautama[8], who says : स्वयमार्जितमवेद्येभ्यो वेद्यः कामं न दद्यात् ।

1. Gautama, XI, 19.
2. Manu VIII, 9.
3. Gautama XIII, 26.
4. Narada III, 2.
5. See also Asahaya on Narada II, 1, 2.
6. Manu VIII, 13.
7. Manu VIII, 169.
8. Gautama XXIX, 30.

" a learned one may not, if he likes, give his self-acquisition to the unlearned ones." The acquisition through *vidya* of a Brahmin can only be by way of payments or honoraria or prizes obtained through a display of talents in debates, forensic contests, etc. This is borne out by a text of Katyayana[1], which says : "What is gained by proving superior in learning after a prize has been offered must be considered as acquired through learning and is not included in partition among co-heirs. What has been obtained from a pupil or by officiating as a priest or for answering a question or for determining a point in dispute or for the display of knowledge or by success in disputation or for reciting the vedas with transcendent ability, the sages have declared to be the gains of learning and not subject to partition. What is gained through skill by winning from another a stake at play, Brihaspati ordains as gains of learning not liable to partition. What is obtained by the boast of learning, what is received from a pupil or for the performance of a sacrifice, Bhrigu calls the acquisition of science. The same rule likewise prevails in regard to artists and in regard to what has been gained in excess of the prescribed hire. What has been gained by superiority in learning and what has been acquired in a sacrifice or from a pupil, sages have declared to be the acquisitions of science. What is otherwise acquired is the joint property." The Smriti Chandrika explains " success in dispute " in the above context as getting the better of another " in an ostentatious and argumentative discussion."[2] The Dayakrama Sangraha gives a similar interpretation. Mr. Javaswal finds confirmation of the existence of professional lawyers at the time of the Manu Smriti in the reference to "*dhammapanikkas*" or traders in law, in the Milinda Panho, where they are described as persons " who according to the spirit and according to the letter, according to justice and according to reason, according to logic and by illustrations explain and re-explain, argue and re-argue."[3] Mr. Jayaswal also mentions in this connection the case of *Sridhara* v. *Mahidhara* set out in Asahaya's commentary on Narada I, 6.[4] In that case the question at issue was whether a great-grandson would be liable to repay a debt incurred by his great-grandfather. One Sridhara had lent money to a trader Mahidhara with a stipulation for payment of interest at 2 per cent. per mensem. Shortly after the incurring of the loan the debtor died leaving a great-grandson Mahidhara, who denied his liability to pay. In the action that ensued in the Courts at Pataliputra, one Smarta Durdhara is stated as appearing for the defendant but as being eventually confuted by Smarta Sekhara. The later works of Hindu jurists place the matter of the existence of a legal profession in ancient India beyond doubt. The Sukra Niti, in particular, affords a flood of light. The engagement of a प्रतिनिधि or proxy to conduct and argue a case is specifically provided for[5] :

व्यवहारानभिज्ञेन ह्यन्यकार्याकुलेन च ।
प्रभार्थिनार्थिना तज्ज्ञः कार्यः प्रतिनिधिस्तदा ॥

" A plaintiff or a defendant who is unacquainted with legal practice and who is overburdened with other work may employ an experienced substitute or proxy." The person so appointed नियुक्त may make a claim or make a defence.[6] One knowing dharma and vyavahara alone should be employed.[7] One not employed cannot speak and is liable to be punished[8] :

यो न भ्राता न च पिता न पुत्रो न नियोगकृत् ।
परार्थवादी दण्ड्यः स्यादृव्यवहारेषु विब्रुवन् ॥

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1. Cited in Smriti Chandrika (Sethur's A Complete Collection of Hindu Law Books on Inheritance, I, 245-246).
2. *Ibid.*, 245.
3. See Rhys Davis. Sacred Books of the East, Vol. XXXVI, 296.
4. *Ibid.*, Vol. XXXIII, pp. 43-44.
5. Sukra Niti IV, 5, 108.
6. *Ibid.*, IV, 5, 109.
7. *Ibid.*, IV, 5, 114.
8. *Ibid.*, IV, 5, 116.

The acts of the advocate will be binding on the principal. It is stated[1]:

यः कश्चित् कारयेत् किंचिन्नियोगाधेन केनचित् ।
तत् तेनैव कृतं ज्ञेयमनिवार्यं हि तत् स्मृतम् ॥

"Where any one causes anything to be done by any one appointed by him, such act is regarded as being done by him (the appointer) and it must be regarded as binding on him." The appointer will not be bound where the acts done by the lawyer are prejudicial to him.[2] As to the remuneration, rules are prescribed. It is to be 1/16, 1/20, 1/40, 1/80 or 1/160 of the value of the dispute. The Sukra Niti states[3]:

नियोगितस्यापि भृतिं विवादात् षोडशांशिकीम् ।
विंशत्यंशां तदर्धां वा तदर्धां च तदर्धिकाम् ॥

The fee will be computed at reduced rates proportionately as the value of the suit increases. If a number of lawyers are engaged then the fee is to be regulated by special engagements. It is stated[4]:

यथा द्रव्याधिकं कार्यं हीनाहीना भृतिस्तथा ।
यदि बहुनियोगी स्यादन्यथा तस्य पोषणम् ॥

"The fee must be lessened proportionately to the amount of dispute being large. Where there are many Niyogis their fee ought to be otherwise specially arranged." Punishment is provided for the lawyer who misbehaves with reference to the case which he is engaged to conduct either by taking a bribe or through avarice. *Cf*:

अन्यथाभृति गृह्णन्तं दण्डयेच्च नियोगिनम्[5] ॥

"A Niyogi receiving fee otherwise (than according to rule) shall be punished." The foregoing authorities make it fairly clear that advocacy as a profession was known even during relatively early times under the sovereignty of Hindu rulers.

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1. Sukra Niti IV, 5, 111.
2. Narada II, 1, 2: Sukra Niti, IV, 5, 23.
3. Sukra Niti IV, 5, 112.
4. *Ibid.*, IV, 5, 113.
5. *Ibid.*, IV, 5, 114.

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AN INQUIRY INTO THE SOURCE AND AUTHORSHIP OF THE MANU SMRITI.

Scholars have, in the past, in their investigations into the origin and date of the Manu smriti, generally started from premises and landmarks set up on this side of the Christian era and tried to carry the smriti into the past in the light of linguistic and literary evidence afforded and sidelights thrown by other Sanskrit works of a later period. A serious handicap under which they all laboured was that, in India unlike in other countries and civilisations of the past, there has been no regular or continuous record in the form of inscriptions, monoliths, tablets or other monuments of ancient institutions and their development. Historical and archaeological researches of recent times suggest that a different method of approach may yield result of a more satisfactory character in regard to questions like the source and authorship of the dharmasastra of Manu. Excavations in India and elsewhere have revealed the existence of considerable similarities between the code of Manu on the one side and the codes of Hammurabi and Assyria on the other, in regard to the injunctions concerning the social and business aspects of life. There seems to exist a large measure of parallelism between these codes suggesting a possible common origin. As has often been said "light seeking light doth light of light beguile". An attempt is made in the following pages to give a brief review of the theories propounded by eminent scholars and pioneers, like Buhler, Jayaswal and Mahamahopadhyaya P. V. Kane in regard to the Manu smriti and to mention certain other considerations which seem to throw further light on the matter.

The Manava Dharmasastra is the most esteemed and illustrious of all the works of that class. No name is mentioned by the Hindu lawgivers so often or with so much veneration as that of Manu. It is therefore somewhat surprising that not much information is to be found enabling us to trace the source of the smriti or to identify its author. The version that is now extant has been the subject of a large number of commentaries. The most prominent among them are the Mambhashya (मनुभाष्य) of Medhatithi, the Manutika (मनुटीका) of Govindaraja, the Manvarthavivriti (मन्वर्थविवृति) of Sarvajnanarayana, the Manvarthamuktavali (मन्वर्थमुक्तावलि) of Kulluka, the Manvarthachandrika (मन्वर्थचन्द्रिका) of Raghavananda and the Manuvyakhyana (मनुव्याख्यान) of Nandana.

Manu's name goes back to the vedic times. Three Manus are spoken of—Manu Vaivasvata, Manu Apsava, and Manu Samvarana. Divine as well as human attributes are said to characterise Manu. The Rig Veda mentions him along with other sages[1]. Reference is made to "father Manu"[2]. He is said to be the progenitor of the "pancha janas."[3] At one place there is a reference to him

1. I, 80, 16; I, 112, 16.
2. I, 80, 16; I, 114, 2; II, 33, 13.
3. III, 24, 3; *Cf.*, Tait. Sam. I, 5, 1, 3; I, 5, 6, 1; III, 4, 3, 7; Sat. Brah., XIII, 4, 3, 3.

as a king[1]. In the Yajur Veda he is invoked at sacrifices as Prajapati[2]. He is also stated to have invented sacrificial rites[3]. The Atharvana Veda, the Brahmanas and the Nirukta allude to his being born to Vivasvat by Saranyu[4]. He is at another place mentioned as the son of the self-existent Brahman[5]. He is also regarded as a deity[6]. In the Valakhilya he is mentioned as the son of Samvarana[7]. The Satapatha Brahmana refers to his following the customs of men[8]. Whoever and whatever he was, that he was looked upon as a guide and law-giver even during the vedic times is clear. One of the prayers in the Rig Veda is that the votary should not be led away from the path of Manu—

मा नः पथः पित्र्यान्मानवादधि दूरं नैष्ट परावतः ।[9]

Reference is also made to Manu dividing his property among his sons—

मनुः पुत्रेभ्यो दायं व्यभजत् ।[10]. The extant Manu smriti also attributes to Manu human as well as divine characteristics and mentions him as the first promulgator of laws. He is described as the son of Brahman[11], as a king who through humility achieved sovereignty[12], and as a law-giver[13]. Mention is made of six other Manus, descendants of Manu Svayambhuva[14] and their names are mentioned[15]. The same characteristics are attributed to Manu by the commentators as well. While Kulluka calls Manu an incarnation of the Supreme Soul, Govindaraja speaks of him as a maharishi (महर्षिः) and Medhatithi describes him as an individual perfect in the study of many branches of the Vedas, etc.,—मनुर्नाम कश्चित् पुरुषविशेषः. Thus right from the Vedic period there has been a halo around Manu but his personality has remained altogether baffling.

Another notable feature is that Manu's teachings have always been regarded as authoritative and paramount. According to the Vedas whatever Manu said was like medicine—यद्वै किं च मनुरवदत्तद्भेषजम् । (Tait. Sam. II, 2, 10, 2); मनुर्वै यत्किंचावदत्तद्भेषजं भेषजताये । (Tand. Brah. XXIII, 16, 7; *Cf.* Kathaka XI, 5, and Mait. Sam. I. 1, 5.) The same primacy is recognised by Parasara[16], though in respect of Kritayuga only—

कृते तु मानवाः प्रोक्ताः त्रेतायां गौतमाः स्मृताः ।
द्वापरे शङ्खलिखिताः कलौ पाराशराः स्मृताः ॥

Brihaspati, a much later law-giver, is equally clear on the matter[17]—

वेदार्थोपनिबन्धृत्वात् प्राधान्यं तु मनुस्मृतौ ।
मन्वर्थविपरीता या स्मृतिः सा न प्रशस्यते ॥

The tradition has been consistently kept up and cannot therefore be lightly dismissed. The very unanimity in the matter would suggest that at some time there existed such a promulgator of dharma. But who he is has mainly remained a matter for conjecture. As already mentioned, the Vedas refer to three Manus and Katyayana's Sarvanukramani of the Rig Veda attributes five suktas to Manu

1. Rig. Veda, I, 112, 8; *Cf.* Sat. Brah., XIII, 4, 3, 3 and also to Ait. Brah., VIII, 8 alluding to Prajapati as formerly anointing Indra, Soma, Yama, Varuna and Manu.
2. Tait. Sam., III, 2, 8, 1; Vaj. Sam., XI, 66; Mait. Sam., II, 7, 7.
3. Tait., Sam., I, 7, 1, 3; II, 5, 9, 1; III, 3, 2, 1; V, 4, 10, 5, etc.
4. Ath. Veda, VIII, 10, 24; Sat. Brah., XIII, 4, 3, 3; Nirukta, XII, 10.
5. *See* Sloka cited in Nirukta, III, 4.
6. Nirukta, XII, 33, 34.
7. III, 1.
8. *Cf.*, I, 8, 1.
9. VIII, 30, 3.
10. Tait., Sam., III, 1, 9, 4; Ait. Brah., V, 14.
11. Manu, I, 33; I, 63; VI, 54.
12. *Ibid.*, VII, 42.
13. *Ibid.*, I, 102; I, 119; II, 7.
14. *Ibid.*, I, 61.
15. *Ibid.*, I, 62.
16. I, 24.
17. Cited by Kulluka on Manu, I, 1, and by Aparaka on Yajnavalkya, II, 21.

Vaivasvata, and but a few verses to each, Manu Apsava and Manu Samvarana. The vedic tradition however is that the rules of dharma were propounded by Manu Svaymbhuva[1]. The extant version of the Manu smriti maintains that tradition. In other works there are references to a Manu Prachetasa, and Vriddha Manu and Brihan Manu. In the circumstances, the reference to Manu in *Ramachandra* v. *Vinayek*[2], as "the ancient sage whose identity is lost in he mist of ages but whose word is regarded as divine" seem to correctly sum up the position.

Various theories have been propounded as to the source of the present version of the Manu smriti. According to Max Muller it is a recast and versification of the dharmasutra of the Manava charana. He observed: "There can be no doubt, however, that all the genuine dharmasastras which we possess now are without exception nothing but more modern texts of earlier sutra works on kula-dharmas belonging originally to certain vedic charanas."[3] Buhler was drawn to this theory mainly because "it substituted a rational theory of historical development for the fantastic fables of the Hindu tradition and for the hopeless uncertainty which characterised the earlier speculations of European scholars concerning the origin of the so called Indian codes of law."[4] Buhler developed Max Muller's theory and suggested that the composition of the Manu smriti was due to the establishment of special law schools which were independent of any particular sakha of the vedas and which supplanted the vedic charanas as far as the teaching of dharma was concerned[5]. According to him the Manu smriti is "a conglomerate of the Manava dharmasutra and of floating sayings"[6] and the conversion was effected between 200 B.C. and 200 A.D[7]. Dr. Jolly also agrees with the view that the Manava dharmasastra originated from an earlier Manava dharmasutra[8].

Jayaswal has put forward the view that the Manu smriti was the work of a historical person, composed between 150 B.C. and 100 A.D. during the days of the Sunga empire[9], to mark the triumph of Brahminism over Buddhism and other non-orthodox forces and that the name Manu was adopted as a symbol of conservatism and not because he was the real author[10]. He has further suggested that the smriti was composed to supplant the civil and criminal laws of the country which were to be found in the Arthasastras[11] and that in the Manava dharmasastra for the first time the dharmasastra invaded and appropriated the province of the artha law making the latter an appanage to its own system[12]. Jayaswal denies the existence of any Manava dharmasutra and suggests that the true source of Manu's code is to be sought in the Arthasastra[13].

Mr. Kane has propounded another view. According to this learned scholar: "Long before the fourth century B.C. there was a work on dharmasastra composed by or attributed to Svayambhuva Manu. This work was most probably in verse. There was also another work on rajadharma attributed to Prachetasa Manu which was also prior to the fourth century B.C. It is not unlikely that instead of there being two works there was one comprehensive work embodying rules on dharma as well as politics. This work was the original kernel of the Manu smriti."[14]

The internal evidence afforded by the extant Manu smriti makes it clear that its author was not the first law-giver. For one thing it contains a number of references to the views of other law-givers. In discussing the degree of respect to be accorded to the father and the acharya respectively the existence of the two views is mentioned[15]. On the question of the forms of marriages permissible to the sveral

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1. *See* Sloka cited in Nirukta, III, 4.
2. (1914) I.L.R. 42 Cal. 384 at 402 (P.C.).
3. History of Ancient Sanskrit Literature, pp. 134-135.
4. Sacred Books of the East Series, vol. 25, Int., pp. xix-xx.
5. *Ibid.*, p. xlvi.
6. *Ibid.*, p. xcl.
7. *Ibid.*, p. cxvii.
8. Hindu Law and Custom, p. 2.
9. Manu and Yajnavalkya, T. L. L. pp. 25-26.
10. *Ibid.*, p. 44.
11. *Ibid.*, p. 13.
12. *Ibid.*, p. 17.
13. *Ibid.*, p. 46.
14. History of Dharmasastra, vol. I, pp. 155-156; *cf.*, Ibid., p. 97.
15. Manu, III, 145-146.

castes three views are alluded to, the siddhanta being indicated at the end[1]. Likewise with reference to the order of ceremonies at a sraddha and the disposal of the cakes two views are set out[2]. On the question whether in the case of a son procreated by niyoga the child belongs to the begetter or the husband of the woman, the Manu smriti refers at one place to "the discussion by the ancient sages"[3] and alludes at another place to the views on the matter held by "some sages"[4]. In regard to the effect of penance, the Manu smriti states that "some" declare that penance may be performed even where an offence had been committed intentionally.[5] Another feature that falls to be noted is that the present Manu smriti often refers to dharmasastras thereby recognising the existence of that class of literature prior to it. It defines 'smriti' as meaning dharmasastra (धर्मशास्त्रं)[6]. In dealing with the constitution of a parishad, it refers to the reciter of the dharmasastras (धर्मपाठक)[7]. Express reference to dharmasastras (धर्मशास्त्राणि) is made in the prescription relating to what the guests at a sacrifice in honour of the manes should hear[8]. It is also significant that the extant Manava dharmasastra refers to individual law-givers like Atri, Gautama, Saunaka and Bhrigu[9], to Vasishtha[10] and to Vikhanas[11] and cites opinions held by them. The allusions cannot obviously be to the existing versions of the works of these authors as they are either not to be found in such works or are found there only as quotations.

The opinion that the Manu smriti is a versified version of an ancient Manava dharmasutra rests on slender foundations. One argument is that the smriti is in continuous anushtub metre and should therefore be considered to be later than the sutras. Another consideration is the analogy afforded by certain metrical editions of dharmasutras affiliated to sutra charanas and the existence of certain passages in the works of Vasishtha in particular probabilising the existence of a Manava dharmasutra. It is pointed out that the rule of Panini—चरणेभ्यो धर्मवत्[12] suggests that the vedic charanas had their dharma books and that it is now proved that in addition to Apasthamba in the cases of Baudhayana and Hiranyakesin also the dharmasutras are found linked up with the Grihyasutras of particular charanas.[13] Though the theory is attractive it is to be noted such a connection has not been established in any other case. Nor, as Mr. Kane points out has any other charana of any of the Vedas other than Krishna Yajur Veda an extant dharmasutra ascribed to the founder of the sutra. Mr. Kane has cited Viswarupa[14] as stating that there was no Manava charana at all—"न च मानवादिचरणोपलब्धिरस्ति". It is true that there is a Grihyasutra of the Manavas. But the latter differs from the Manu smriti on a number of important points, such as, the age for the performance of samskaras like tonsure, upanayana, etc.,[15] the period of studentship[16], the rules to be observed by householders[17]. Mr. Kane points out further, that two things dealt with in the Grihyasutra, namely, the Vinayaka santi[18] and the tests prescribed for the selection of bride[19] have no corresponding references in the smriti[20]. Buhler has tried to explain the differences by suggesting that the author of the Manava dharmasutra might be different from the author of the Grihyasutra[21]. He has also suggested that the real connecting link is to be found in the Sraddha Kalpa of the Manava school. He relies on the fact that the first of the two verses in the second khanda describing the sraddha ceremony corresponds literally with what is found

1. Manu, III pp. 23-25.
2. *Ibid.*, III, 261.
3. *Ibid.*, IX, 31-35.
4. *Ibid.*, X, 70, 71.
5. *Ibid.*, XI, 45.
6. *Ibid.*, II, 10.
7. *Ibid.*, XII, 111.
8. *Ibid.*, III, 232.
9. *Ibid.*, III, 16.
10. *Ibid.*, III, 51.
11. *Ibid.*, VI, 21.
12. IV, 2, 46.
13. S.B.E., series, vol. 14, p. xxxi, vol. 2, p. xxiii, pp. xlv-xlviii, etc.
14. History of Dharmasastra, vol. I, p. 85.
15. Manu, II, 34-36; *Cf.*, G.S., I, 20, 1; I, 21, 1; I, 22, 1.
16. Manu, III, 1; *Cf.*, G.S., II, 12, 1-2.
17. Manu, III, 84-86.; *Cf.*, G.S. II, 12, 1-2.
18. G.S., II, 14.
19. *Ibid.*, I, 7-9.
20. History of Dharmasastra, vol. I, p. 80.
21. Sacred Books of the East series, vol. 25, p. xl.

in the smriti[1], and that the statement in the smriti—त्रयाणामुदकं कार्यं त्रिषु पिण्डः प्रवर्तते appears in the same terms in the Sraddha kalpa. Buhler has also claimed that a number of other verses in the kalpa are in agreement either partly or wholly with the smriti. It has, however, been pointed out that though there is parallelism between individual verses of the two works there is a considerable divergence between them in the treatment of important matters like funeral ceremonies, the differences more than counterbalancing whatever resemblances exist in regard to some points. It is also to be noted that according to Bhasa[2], the Sraddha kalpa is distinct from the smriti and is a work of Manu Prachetasa—"प्राचेतसं श्राद्धकल्पम्". Jayaswal invites attention to the fact that the adoption of the Sraddha kalpa by the Yajur Veda Manavas is not invariable[3]. The main basis of Buhler's theory as to the existence of a Manava Dharmasutra rests on the following verses in Vasishtha[4]. They are :

पितृदेवतातिथिपूजायामप्येव पशुं हिंस्यादिति मानवम् ।

"The Manava states : only when worshipping the manes and the gods or when honouring guests he may certainly do injury to animals." (IV, 5.)

मधुपर्के च यज्ञे च पितृदैवतकर्मणि ।
अत्रैव च पशुं हिंस्यान्नान्यथेत्यब्रवीन्मनुः ॥

"On offering the honey mixture (to a guest) at a sacrifice and at the rites in honour of the manes, but on these occasions only, may an animal be slain ; that (rule) Manu proclaimed" (IV, 6).

माकृत्वा प्राणिनां हिंसां मांसमुत्पद्यते क्वचित् ।
न च प्राणिवधः स्वर्ग्यस्तस्मात्परागे वधोऽवधः ॥

"Meat can never be obtained without injury to living beings and injury to living beings does not procure heavenly bliss : hence (the sages declare) the slaughter (of beasts) at a sacrifice not (to be) slaughter in the ordinary sense of the word." (IV, 7).

अथापि ब्राह्मणाय वा राजन्याय वाभ्यागताय महोक्षं वा महाजं वा पचेदेवमस्मा आतिथ्यं कुर्वन्तीति ॥

"Now he may also cook a full grown ox or a full grown he-goat for a Brahmana or Kshatriya guest ; in this manner they offer hospitality to such a man" (IV, 8).

Buhler remarks that the occurrence of the particle इति at the end of sutra 8, and the identity of verse 6 with what is found in the Manu smriti[5] and the close resemblance of verse 7 with the verse corresponding to it in the smriti[6] make it clear that the quotation is not over with sutra 5, and that such inference is in consonance with the usual sutra arrangement, namely, first to state the prose rule, thereafter the verses in confirmation and finally the vedic authority on which both the rule and the verses depend. Buhler proceeds to argue that the allusion here cannot be to the Manu smriti inasmuch as the latter frequently refers to Vasishtha and also because there are other quotations in Vasishtha which either do not occur in the smriti or stand contradicted. He therefore concludes that the passage under-discussion could have been taken only from an older Manava dharmasutra. A number of considerations exist which show that the inference drawn is of a debatable character. Jayaswal points out that if the words "इति मानवम्" in sutra 5 are intended to

1. Manu, III, 274.
2. Pratima, p. 179, Trivandrum edn.
3. Manu and Yajnavalkya, T. L. L. p. 24.
4. IV, 5-8.
5. Manu, V, 41.
6. *Ibid.*, V, 48.

indicate the opinion of Manu it would mean that the opinion of Vasishtha is nowhere expressed. And Buhler's argument founded on the hypothesis that the sutrakara invariably mentions his opinion at the beginning would then fail[1]. Jayaswal also mentions that the text of the 5th sutra is given differently in the Anandasrama edition[2]. According to the Smriti-samuchaya the version is पितृदेवतातिथिपूजायां पशुं हिंस्यात्, where the particle इति is not found at the end at all. It is further stated by Jayaswal that it is significant that if there was in fact a Manava dharmasutra it has not been cited by either Apastamba or Baudhayana. The latter has enumerated all the dharmasutras of his veda[3], but there is no mention of any sutra by Manu. Again the word इति is found both in sutra 5 as well as in sutra 8 which would indicate a quotation within a quotation, which in the context will not fit, inasmuch as the last portion seems to have been taken from vedic literature. Mr. Kane has suggested[4] that probably the true explanation is that sutra 5 is only a summary of Manu's view as can be gathered from the verses in the smriti V. 41, and V. 48. Buhler's contention that the non-existence or contradictions in the smriti of the views in Vasishtha attributed to Manu would negative any theory of the references being to the the smriti would not, however amount to proof of the existence of the Manava dharmasutra. It is quite possible that an earlier version of the smriti contained such views.

Buhler has also referred to the fact that Kamandaka cites certain opinions of Manu which are not borne out by what is found in the present Manu smriti and which therefore may be attributed to the Manava dharmasutra. In regard to the sciences which a king must learn, Kamandaka mentions that according to the Manavas, they are three —the vedas, the theory of professions and trades and dandaniti[5]. The Manusmriti states :

त्रैविद्येभ्यस्त्रयीं विद्यां दण्डनीतिं च शाश्वतीम् ।
आन्वीक्षिकीं चात्मविद्यां वार्तारम्भांश्च लोकतः ॥

" From those versed in the three vedas, let him learn the threefold (sacred sciences), the primeval science of government, the science of dialectics, and the knowledge of the (supreme) soul ; from the people, (the theory of) the trades and professions"[6]. The suggestion is that the Manu smriti treats the number of sciences to be learnt as four. In regard to the number of ministers a king should have, the Nitisara states[7] that Manu had fixed the number at twelve. The Manu smriti has laid down at one place[8] that it is to be no more than seven or eight. According to Jayaswal, the references in the Nitisara are really not to the Manava dharmasastra but to the Manava rajasatra, an altogether separate work[9]. Mr. Kane points out that in both the cases referred to, the Nitisara is only " paraphrasing " statements made by Kautilya[10]. He also points out that while the first reference[11] is to *manavah* (मानवाः) the second[12] is to Manu and it is thereby clear that what is referred to is a work. He further points out that in the first case there is no conflict between the view attributed to the manavas and the statement in the smriti, inasmuch as the smriti does not say that the vidyas are four but merely states from whom they can be learnt. As to the contradiction in regard to the number of ministerships, Mr. Kane points out that the verse in the smriti should be taken along with another verse[13] therein which provides for the appointment of a larger number, if needed. There is thus very little support available for Buhler's theory of the Manu smriti being founded upon a prior dharmasutra of Manu.

1. Manu and Yajnavalkya, T. L. L. pp. 47-48.
2. P. 194.
3. Baudhayana, V, 9, 14.
4. History of Dharmasastra, vol I, p. 83.
5. Nitisara, II, 3.
6. Manu, VII, 43.
7. Nitisara, XI, 67.
8. Manu, VII, 54.
9. Manu and Yajnavalkya, T. L. L. pp. 21-22.
10. Arthasastra, I, 2, and I, 15.
11. Nitisara, II, 3.
12. *Ibid.*, XI, 57.
13. Manu, VII, 60.

Jayaswal's views that the Manu smriti was the first to invade the field of secular law, that the object of such invasion was to refashion the secular laws of the arthasastras which were till then being administered on lines acceptable to Brahminism and that such recasting was done during the Sunga period are also not free from criticism. Two remarks fall to be made. It is indisputable that some secular matters had in fact been dealt with in the dharmasutras which are considered to belong to a period earlier than that of the extant Manu smriti. It is equally indisputable that a Manu and his work have been referred to in the dharmasutras. Any argument built upon the scantiness of the secular law to be found in the dharmasutras may be explained by the fact that at the time when the latter were composed, secular law cannot have been as fully developed as in later times. Further the assumption that the extant Manu smriti took root in the arthasastra cannot explain the fact that the references in the sutras are to a dharmasastra of Manu. Nor is there anything to show that it was the law of the arthasastra that was being actually administered. Again, even if the Manu smriti was composed for the purpose of recasting the laws in a manner that would favour the Brahmins, it may well be that such recasting had been done on some earlier occasion when the influence of Brahmins had been in the ascendant as for instance when Parasurama was reputed to have annihilated the Kshatriyas or at the time when Vasishtha's influence had prevailed over that of Viswamitra. It may also be noted that Brahminism did not acquire power just at the time of the Sungas. It was a vigorous force even before the advent of Buddhism. The reference to "senapatya" (सेनापत्य) in the Manu smriti[1] need not lead to Pushyamitra. It may be mentioned that a Brahmin taking to arms or leading an army in field as the commander-in-chief had not been unfamiliar in early Aryan society. Parasurama and Drona afford such instances. The rule enunciated in Apastamba[2]—

परीक्षार्थोऽपि ब्राह्मणः आयुधं नाददीत ।

should therefore be understood as presenting an ideal rather than a prohibition. Jayaswal also mentions that the Mahabashya makes no reference to the Manu smriti. The Mahabashya was written sometime about 188 B.C. and it would therefore look as if the smriti was composed subsequently, lending support to the view that it was a work of the Sunga period. The Mahabashya has specifically referred to dharmasastra—धर्मशास्त्रं च तथा—and contains also a verse found in the Manu smriti[3].
The verse is

ऊर्ध्वं प्राणा ह्युत्क्रामन्ति यूनः स्थविर आयति ।
प्रत्युत्थानाभिवादाभ्यां पुनस्तान् प्रतिपद्यते ॥

It is now generally accepted that the dharmasutras may be assigned to a period ranging between 600 B.C. to 300 B.C. whatever differences there may exist in regard to the place therein of individual sutra writers. Purely legal questions, such as, whether the daughter would be excluded by a son, what rights the appointed daughter's son would have, etc., seem to have been matters of controversy even before 600 B.C. The discussion in the Nirukta[4] indicates this. It also suggests that such controversies had found mention in "formal works" as Mr. Kane calls them. It also affords evidence that Manu had long before then been regarded as a law-giver. In adverting to the view held by some that sons and daughters should share equally, Yaska gives a reference which is remarkable. He quotes a sloka and distinguishes it from a rik. He says :

1. Manu, XII, 100.
2. I, 10, 29. 6.
3. Manu, II, 120.
4. Nirukta, III, 4, 5.

अविशेषेण मिथुनाः पुत्रा दायादा इति । तदेतदृक् श्लोकाभ्यामुक्तम् ।

अङ्गादङ्गात् संभवसि हृदयादधिजायसे ।

आत्मा वै पुत्रनामासि स जीव शरदः शतम् ॥ इति ।

अविशेषेण पुत्राणां दायो भवति धर्मतः ।

मिथुनानां विसर्गादौ मनुः स्वायंभुवोऽब्रवीत् ॥

According to Mr. Kane the juxtaposition of the sloka to the rik shows that the former is smriti and not sruti. This feature renders it likely as pointed out by him that works on dharma in continuing slokas or in the sloka metre existed before the time of Yaska thereby showing the high antiquity of the dharmasastras. This inference is borne out by the references contained in dharmasutra works to dharmasastras. Gautama refers to dharmasastras

तस्य च व्यवहारो वेदो धर्मशास्त्राण्यङ्गानि उपवेदाः पुराणम्[1] ।,

and mentions Manu by name : त्रीणि प्रथमान्यनिर्देश्यानि मनुः[2].

In Baudhayana there is a reference to dharmapathaka at one place[3] and in the fourth prasna Manu's name occurs twice[4] but in view of the fact that the fourth prasna is suspected of being an interpolation the references therein may not be helpful. Apasthamba alludes to Manu as the founder of the institution of sraddhas.[5] The Purva Mimamsa also refers to dharmasastras, as for instance, in the statement :[6]

शूद्रश्च धर्मशास्त्रत्वात् ।

In passing it may be mentioned that Max Muller's view that works in continuous anushtub have always followed the sutras[7] does not seem to be correct inasmuch as the sutras of Apastamba and Baudhayana even in their earlier versions contain plenty of quotations in sloka metre.

Valuable support regarding the existence of a Manava dharmasastra from very early times is afforded by the references in the Mahabharata to Manu. There is no doubt difference of opinion on the question as to which of the two is earlier in point of time. The considerations set out by Mr. Kane coupled with certain materials afforded by recent archaeological research would seem to prove definitely that the smriti was the earlier production. It is significant that while the Mahabharata contains many references to Manu or to his work there is nowhere in the Manu smriti any reference to the Mahabharata. This feature is consistent with the Mahabharata being a later work. The dharmasastra of Manu contains references to various personages who figure in sacred literature. In stating that it is knowledge that makes one great, Manu gives the example of the son of Angiras[8]. The story occurs in vedic literature also[9]. Reference is made in the dharmasastra to what Agastya did, in support of the rule that a Brahmin can slay for sacrifices, birds and beasts recommended for consumption[10]. As instances where want of humility resulted in destruction, allusion is made to Vena, Nahusha, Sudas and Nemi[11]. In the next sloka the names of Prithu, Kubera and Gadhi are cited as instances of persons who were elevated through humility. In laying down the rule that oaths are permissible to prove matters in doubt, the Manu smriti refers to the oath taken by Vasishtha before King Sudas[12]. This story is mentioned in vedic literature also[13]. In support of his statement that on marriage the wife would take on the qualities of the husband, the instances of Akshamala who married

1. Gautama, IV, 21.
2. *Ibid.*, XXI, 7.
3. Baudayana, I, 1, 9.
4. *Ibid.*, IV, 1, 14 and IV, 2, 16.
5. Apastamba, II, 7, 16, 1.
6. Purva Mimamsa, VI, 7, 6.
7. History of Ancient Sanskrit Literature, p. 68.
8. Manu, II, 151-152.
9. Tand. Brah., XIII, 3, 24.
10. Manu, V, 22.
11. Manu, VII, 41.
12. Manu, VIII, 110.
13. Rig. Veda, VIII, 104, 15.

Vaishtha and Sarangi who married Nandapala are cited[1]. In the discussion relating to appointed daughters, the name of Daksha is mentioned[2]. Allusions are made in other contexts, to Ajigarta[3], a personage mentioned in the Aitareya Brahmana[4], to Vasudeva[5], to Bharadwaja[6], and to Viswamitra[7]. Most of these names occur in the Mahabharata also but there is no indication in the Manu smriti of any borrowing in the matter from the Mahabharata. This no doubt would be of negative value only but would not militate against the opinion that the Mahabharata is a later work. Likewise stands another fact. The Manu smriti enjoins that gambling is an evil[8] and states how in a former kalpa it had led to great enmities. The words पुराकल्पे in the context mean according to the commentator, Narayana, "in the ancient stories." It is likely that such stories as those relating to Nala and other personages who suffered through gambling are impliedly alluded to. The Mahabharata also refers to the evils of gambling but in view of the fact that the evil effects of gambling are mentioned in the Rig veda itself[9] it would be a mistake as Mr. Kane points out to treat the rule in Manu as having any connection with what is stated in the Mahabharata.

Turning to the Mahabharata, it may be stated at once that the references therein to Manu and his views are not always borne out by what is found in the dharmasastra of Manu. Only some quotations are found either in identical terms or in substantially similar terms. Another point that may be noted is that some references are simply to Manu[10], some to Manu Svayambhuva[11] and some to Manu Prachetasa[12]. The Anusasanaparva speaks in terms of the Manu dharmasastra : मनुनाभिहितं शास्त्रं यच्चापि कुरुनन्दन । [13]. The rajadharmas of Manu are referred to in the Vanaparva[14] : आभाषीस्त्वं राजधर्मान्यथा वै मनुरब्रवीत् ।

The Dronaparva mentions Manu's name with reference to arthavidya[15] : वेदं षडङ्गं वेदार्थमर्थविद्यां च मानवीम् । From the copiousness of the references to Manu in some form or other—according to Buhler there are about 260 verses in the Santiparva, Anusasanaparva and Vanaparva alone which could be identified with slokas in the Manu smriti—from their occurrence not in any one part of the Mahabharata but all over it, from the fact that the references are never to a dharmasutra of Manu but always either to the dharmasastra or rajadharmas, it would not be unfair to infer that a Manu smriti was in existence even before the composition of the Mahabharata started. It is also quite likely as Mr. Kane has pointed out that at that time the dharmasastra had come to be associated with Manu Svayambhuva and the rajadharmas with Manu Prachetasa. That they might have formed a single work at an earlier period is suggested by certain features in the Manu smriti and the recorded traditions. Mr. Kane points out that a saying attributed to Manu Prachetasa in the Mahabharata is more or less identical with a sloka found in the Manu smriti[16].

The statement in the Mahabharata is :—

प्राचेतसस्य वचनं कीर्तयन्ति पुराविदः ।
यस्याः किंचिन्नाददते ज्ञातयो न स विक्रयः ।
अर्हणं तत्कुमारीणामानृशंस्यतमं हि तत् ॥

1. Manu, IX, 23.
2. *Ibid.*, IX, 128.
3. *Ibid.*, X, 105.
4. Ait. Brah., VII, 13-16.
5. Manu, X, 106.
6. *Ibid.*, 107.
7. *Ibid.*, 108.
8. *Ibid.*, IX, 227.
9. Rig. Veda, X, 34.
10. Santiparva, 78, 31 ; 88, 14-16; 121, 10-12 ; 152, 14 ; 152, 30: AnusasanVanaparva, 44, 18 ; 65, 1 ; 67, 19 ; 68, 31 ; 88, 4 : parva, parva, 32. 39 : Udyogaparva, 40, 9-10.
11. Santiparva, 21, 12 : Anusasanaparva, 37, 1-6 : Adiparva, 73, 9.
12. Santiparva 57, 43-45 ; 58, 2.
13. 47-35.
14. 33, 21.
15. 7,1.
16. Manu, III, 54.

The extant Manu smriti states that the laws were originally taught to Manu by the Creator, that he in his turn taught them to Marichi and others and that the present version was given by Bhrigu[1]. The tradition has never varied that in the beginning the laws were revealed to or composed by Manu though there are discrepancies as to their later development and transmission to succeeding generations. In the Mahabharata it is stated[2] that the Supreme Being (पुरुषोत्तमः) originally composed a hundred thousand slokas on dharma, that Manu Svyambhuva proclaimed them to the world and that Usanas and Brihaspati based their works on Manu. A different account is however given at another place in the same parva[3], namely that Brahma composed a work in one hundred thousand chapters dealing with Dharma, Artha and Kama and that these were successively abridged by Visalaksha, Indra, Bahudantaka, Brihaspati and Usanas. Manu's name is not mentioned but in view of his being generally identified with or treated as sprung from the creator the discrepancy is to some extent rendered innocuous. The Kamasutra of Vatsyayana mentions[4] that a work in one hundred thousand chapters on the three divisions of life, dharma, artha and kama was composed by Prajapati and the first two of these were next taken up by Manu and Brihaspati respectively :

तस्यैकदेशं स्वायंभुवो मनुः धर्माधिकारिकं पृथक् चकार । बृहस्पतिरर्थाधिकारिकम् ।

The Kamasutra, bears out, at any rate, the tradition that Manu was the first law-giver on dharma and that all departments of life were originally covered by a single work.

The prose introduction to the Narada smriti also accepts Manu as the first law-giver. There are however two versions of the statement. As cited by Medhatithi, it reads :

नारदश्च स्मरति । शतसाहस्रो ग्रन्थः प्रजापतिना कृतः स मन्वादिभिः क्रमेण संक्षिप्त इति ॥

In the other version it is said that Manu composed a dharmasastra in one hundred thousand verses arranged in 1080 chapters which was successively reduced by Narada to 12,000, by Markandeya to 8000, by Bhrigu's son Sumati to 4000 verses. The claim that Narada was the first to abridge Manu's composition might well have been made with a view to ensure higher antiquity for his work. Be that as it may, the Puranas support the view that Manu was the first law-giver and Bhrigu's recension was the first. The Bhavishya Purana as quoted by Hemadri states :

भार्गवी नारदीया च बार्हस्पत्याङ्गिरस्यपि ।

स्वायंभुवस्य शास्त्रस्य चतस्रः संहिता मताः ॥

The Skanda Purana also contains the same account. It also states :

भार्गवी नारदीया च बार्हस्पत्याङ्गिरस्यपि ।

स्वायंभुवस्य शास्त्रस्य चतस्रः संहिता मताः ॥

Thus according to the accepted traditions, Bhrigu's version is the earliest rendering of the Manava dharmasastra. Such is the evidence afforded by the classical and puranic works.

The excavations at Tello in lower Babylonia carried on from 1877 to 1900 have brought to light a big city of about 3100 B.C., of the earliest civilised non-semitic people of Mesopotamia, known as the Sumerians. The discoveries made there and at Susa have shown that the laws of the Sumerians formed the basis of Hammurabi's code. The excavations at Harappa and at Mohenjo Daro have

1. Manu, I, 58-59.
2. Santiparva, 336, 38-46.
3. *Ibid.*, 59, 80-85.
4. I, 6-8.

produced evidence suggesting a close resemblance between the objects found in the Indus valley and the antiquities of Mesopotamia. A seal identical with that found at Harappa and Mohenjo Daro has been discovered beneath a temple of Hammurabi's time,—about 2,100 B.C.—at Kish in Mesopotamia. Dr. Waddell, an enthusiastic Assyriologist has identified a number of seals found in the Indus valley as inscribed in the Sumerian language and as pertaining to vedic and epic rulers and rishis such as Divodasa, Sushena, Parasurama, Galava and others. That the original abode of the Aryans was in Central Asia probably near the rivers Jaxertes (Yakshavarta) and Oxus (Uksha) and that in course of time due to increasing population and religious and social quarrels they spread themselves out and one section came to India are generally accepted. There would be therefore nothing surprising in the existence of resemblances between the features noticed in the Indus valley discoveries and those in Babylonia and Mesopotamia. The Rig Veda mentions for instance fortified towns and fortifications with iron materials[1]. The excavated Babylonian city has exhibited a similar feature[2]. Parallelism has been established also in regard to implements, jewels, etc. It is remarked by Dr. Waddell, apropos of the Indus valley discoveries : " About the many vedic priests and kings whose historic personalities and in part bodily relics, seals and jewellery are thus recovered and identified, are ' Ausija ' (Kakshivan), Kanwa, possibly Goutama Rishi himself, and certainly the slave girl ' Usij ', the reputed concert of the latter in the epic romance. Among the kings whose historic identities, dates and monuments are now recovered are—Haryaswa with his father and grandfather and his descendants of the Panchala or Phoenician dynasty, including specially Mudgala with his Indus valley seal and famous stone maces, Bhadhryswa and Divo Daso, the Emperor Sakuni or Sagara, the priest kings Gadhi, Jamadhagni, Sushena and the truculent Parasurama . . . . . And with these are recovered for the first time the actual dates and reigns in which they lived four to five thousand years ago. We also recover through their identifications the authentic portraits of many of them from their contemporary seals and monuments portraying their features and dress. All educated Hindus will be glad to know the first hand scientific proofs for the veracity of their vedas and ancient epics and to learn that their ancestral vedic kings and sages were famous historical emperors, kings and priest-kings in Mesopotomia with multitudinous monuments, still existing there to the present day. It must also be gratifying to the modern Hindus to find that the vedic and epic traditions which their ancestors preserved and handed down through the centuries and in which they have steadfastly believed, are now proved substantially true and have become a chief means of identifying as Aryans, the Sumerians, the Phoenicians and the Britons."[3] The excavations at Susa have disclosed a monolithic slab in three pieces on which is found inscribed in cuneiform characters, the code of King of Hammurabi, whose ascent to the throne is fixed at 2123 B.C. by Kugler. An examination of the contents of the code show many features which are presented by the dharmasastra of Manu. Thus the code claims to be revealed . It discloses that Babylonian society stood divided more or less on the same lines as in Manu on a functional and occupational basis. There were three classes, the *amelu*, the *mushkenu* and the *wardu*, the first being a combination of the attributes of a Brahmin and a Kshatriya. A second point of resemblance is the grading of punishment according to the social position of the offender. Another noteworthy similarity is the principle that punishment should be appropriate to the nature of the offence, such as an organ for an organ, loss for loss and so on. The topics of secular law dealt with in the code of Hammurabi also display a great similarity to those found in Manu. An analysis of the 282 sections of Hammurabi's code—of which however 35 are found erased—shows that the code deals with the following subjects : witchcraft (ss. 1-2), witnesses and judges (ss. 3-5), theft (ss. 6-8), receipt of stolen property

1. Rig. Veda, I, 58, 8 ; II, 20, 8 ; IV, 27, 1 ; VII, 3, 7.
2. Balkie, *Life of the Ancient East*, p. 234.
3. L. A. Waddell, Indo-Sumerian Seals Deciphered, preface, pp. 12-14.

(ss. 9-13), kidnapping (s. 14), fugitive slaves (ss. 15-20), burglary (ss. 21-25), duties of gangers, etc., (ss. 26-41), landlaws, boundary marks and cultivation laws (ss. 42-56), responsibility of herdsmen (ss. 57-58), gardeners (ss. 59-65), merchants and agents (ss. 100-107), wine merchants and price of wines (ss. 108-111), debt and deposit (ss. 112-126), slander (s. 128), adultery and sexual offences (ss. 129-132), separation of spouses (ss.133-143), taking a second wife or concubine (ss. 144-148), women's property (ss. 150-152), unchastity (ss. 153-158), bride-price and dowry (ss. 159-164), inheritance (ss. 165-184), adoption (ss. 185-194), responsibility for death, assault etc., (ss. 194-214), honorarium to doctors, etc., (ss. 215-225), branding of slaves (ss: 226-227), responsibilities of builders (ss. 228-233), and of boatmen (ss. 234-240), oxen, their care, hire, wages of labourers, artisans, etc. (ss. 241-274), prices and hiring of boats (ss. 275-277), buying of slaves, etc. (ss. 278-282)[1]. Of these heads, those not found in Manu are witchcraft, doctors, gangers, gardeners, builders, wine merchants and slaves. The attention paid to these topics in Hammurabi's code may be due to local circumstances and causes. There is however one feature present in Manu which is conspicuous by its absence in the code of Hammurabi, namely, religious influence. This may be due to the fact that though the origin of the codes was Sumerian, Manu's dharmasastra was compiled earlier at a time when the religious influence was more active. This is rendered likely by the fact that the Assyrian code which is also of the Sumerian stock but is older than the code of Hammurabi has given prominence to the religious element. The penalties prescribed therein point to a time when the sanction of law was derived from religious beliefs and faith. It would be rather curious if the code of Hammurabi could be fixed to about 2100 B.C. and the Assyrian code to an even earlier date, but the dharmasastra of Manu which has features in common with them should be attributed to a far later date. The deciphering of the Indo-Sumerian Seals shows that Manu's work also is more or less of the same period. The seals deciphered by Dr. Waddell show according to him that in or about the time of Hammurabi, there were two Bhrigus. He identifies seal No. V as that of King Sushena and seal No. XI as that of Ghalava Rishi, both being described by him as Bhrigus. According to Dr. Waddell, King Gadhi identified by him as King Gudea of Lagash (about 2450 B.C.)—had two children Viswamitra and Satyavati. The latter married a priest king Richika and he was succeeded by Jamadhagni Bhrigu, Bhrigu being an appellation borne by priests and priest-kings. Jamadhagni had four sons of whom Sushena was the eldest and Parasurama the youngest. Sushena who became king is according to Dr. Waddell, Prince Sussain, and Parasurama Prince Bura Sin of the Ur dynasty of Lagash, who then ruled over the Sumerian colony in the Indus valley. At that time certain Brahmins formed themselves into a group with Vasishtha as leader. A contest ensued between him and Viswamitra in which the latter was discomfited. Bitterness thereafter existed between the Brahmins and the Kshatriyas and when Viswamitra forcibly carried away King Jamadhagni's cow, open hostility broke out between the two classes and eventually Parasurama practically extirpated the Kshatriyas. This story is borne out by the account in the Mahabharata of Parasurama's exploits and of how the Kshatriya women perpetuated the class by having children through Brahmins and of how in that way the caste system was re-established. Society being so re-organised, a new set of laws had to be provided and it may well be that Parasurama promulgated a code. The Mahabharata refers to Parasurama in the Santiparva as a son of Bhrigu and the promulgation of the code as Manu's code is also intelligible as the name of Parasurama had created considerable bitterness. It was in this wise that the code came to be represented as Bhrigu's version of the laws of Manu. If the reading of the Indus valley seals is correct, then it is not merely the mystery regarding the authorship of the Manava dharmasastra but also the approximate time when it was composed that dispapear. It would mean that the real author was Parasurama and the dharmasastra was composed before 2000 B.C.

"A. MANAVA."

1. The Laws of Moses and Hammurabi's Code, by S. A. Cook. pp. 8-10.

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APOSTASY AND ITS EFFECT ON PRIOR HINDU MARRIAGE.

Christianity and Islam are the two proselytizing religions in India. Recent trends recognise conversions to Hinduism as well, *Muthuswami* v. *Masilamani*[1], *Ratansi Morarji* v. *Administrator-General of Madras*[2], *Durga Prasada Rao* v. *Sundarsanaswami*[3]. According to one learned Judge the religion of a person is what the person professes and does not require recognition by the other persons belonging to that religion[4]. In the cases of spouses resident in India, their personal status and what is frequently termed the status of marriage is not solely dependent on domicile but involves the element of religious creed[5]. Where after marriage, the spouses or any of them change or changes his or her faith, its effect on the rights incident to their prior marriage, particularly as regards its continuation, is not always clear, where the tenets of the new religion in regard to the matter are in conflict with those of the religion under which the marriage had taken place. It is also possible that the prior marriage was a civil marriage or that it had been solemnised outside India. The marriage might be of the monogamous or polygamous type. It might be of the indissoluble or dissoluble pattern. Again, different considerations may operate according as both spouses or only one of them have or has given up the original faith. It is settled that where a Hindu or a Christian changes his faith, the conversion *per se* does not destroy the prior marriage but leaves it subsisting—see *Government of Bombay* v. *Ganga*[6], In the matter of *Ram Kumari*[7], *Gul Mahomed* v. *Emperor*[8], *Hope* v. *Hope*[9]. Interesting questions may arise as to whether a convert who had belonged to a faith permitting polygamy and had a plurality of wives in that faith can on becoming a Christian live with all his wives. It is also clear that if there is any statute providing for annulment of marriage on change of faith by either spouse there would be no difficulty.

The only statute providing for dissolution of marriage on a change of faith by either spouse is the Native Converts Marriage Dissolution Act (Act XXI of 1866). That Act however affords relief only in cases of conversion to Christianity. Also the party concerned should, prior to becoming a Christian, have been a married person of British Indian domicile and shall not be a Christian, Muhammadan or Jew. The Act cannot apply where the conversion is to any other faith, or where the conversion is to Christianity from Judaism or Muhammadanism. Where a married Muslim becomes a Christian, the marriage contracted under the Islamic law would according to that law *ipso facto* stand annulled—see *Amir Beg* v. *Saman*[10], *Abdul Gani* v. *Azizul Huq*[11], *Karan Singh* v. *Emperor*[12], *Resham Bibi* v. *Khuda Baksh*[13], *Iqbal Ali* v. *Mt. Halima*[14]. After the passing of the Dissolution of Muslim Marriages Act (Act VIII of 1939), the position is different where it is the wife that gives up

1. (1909) 20 M.L.J. 49 : I.L.R. 33 Mad. 342.
2. (1929) 55 M.L.J. 478 : I.L.R. 52 Mad. 160.
3. (1940) 1 M.L.J. 800 : I.L.R. 1940 Mad. 653.
4. Per Ramesam J., in *Pakkiam Solomon* v. *Chellish Pillai*. (1923) 45 M.L.J. 208 : I.L.R. 46 Mad. 899 (F.B.).
5. *Skinner* v. *Skinner*, (1897) L.R. 25 I.A. 34, 41 : I.L.R. 25 Cal. 537 (P.C.).
6. (1880) I.L.R. 4 Bom. 330 (conversion from Hinduism to Islam).
7. (1891) I.L.R. 18 Cal. 264 (conversion from Hinduism to Islam).
8. (1947) Nag.L.J. 73 (conversion from Hinduism to Islam).
9. A.I.R. 1938 Sind 162 (conversion from Christianity to Islam).
10. (1910) I.L.R. 33 All. 90.
11. (1912) I.L.R. 39 Cal. 409.
12. (1933) All.L.J. 733.
13. I.L.R. (1938) Lah. 277.
14. I.L.R. (1939) All. 296.

Islam. In such a case, section 4 provides that apostasy shall by itself not dissolve her prior marriage but she can move for its dissolution on any of the grounds specified in section 2. If it is the husband that has become an apostate to Islam, the old law will continue to apply and his marriage with his Muslim wife will stand dissolved and he will be free to marry again as a Christian.

In the case of conversion to Hindusim from Islam, the provisions of Islamic law set out above will operate equally in the matter of the extinguishment or subsistence of the previous marital tie. If the convert was originally a Christian and had married according to the tenets of that religion, the apostasy will not put an end to the marriage. If the apostate is the husband, he could under the Hindu law marry again even during the lifetime of his Christian wife. The wife may then under section 10 of the Divorce Act (Act IV of 1869) seek an annulment of the prior marriage as soon as the husband in his new religion has gone through a form of marriage with another woman. If the wife becomes a Hindu while her husband remains a Christian she can obtain freedom only if the husband becomes guilty of marital infidelity.

Where the conversion is to Islam from other faiths and the convert is already married, Muslim law provides a special procedure to get the prior marriage dissolved. The spouse who is not in Islam is to be offered that faith, and in case the offer is rejected, dissolution of the marriage can be granted by the Kazi. The only difference between an Islamic and non-Islamic country in regard to this matter is that in the latter case the convert should wait for a period of three months before relief can be had. It will be recognised that, in affording relief to its own adherent, the rules of Islam trench upon the rights which had attached to the marriage when it was contracted. Thus if the prior marriage had been a Hindu marriage, from the point of view of the spouse continuing in Hinduism, the relationship can under no circumstances be extinguished. If the previous marriage had been a Christian marriage the spouse remaining in Christianity might well insist that the sanctity attaching to a monogamous union should not be defeated by mere change of religion. A real problem thus arises where Muslim law cuts across the incidents that had already attached to the prior marriage, whether under the law under which the marriage had been contracted or under the tenets of the religion to which the spouses had originally belonged. The law of India is not Muhammadan law any more than it is Hindu law or the eccleciastical law of the Christians. By what right then can Muslim law-givers control the incidents of a marriage contracted outside Islam? The clash becomes apparent if regard is had to the outlook in regard to marriage of Christianity, Hindusim and Islam respectively.

Christians regard marriage as "the voluntary union of one man and one woman to the exclusion of all others," *Hyde* v. *Hyde*[1]. It is not a mere contract but a contract affecting status or a status arising out of a contract, *Sottomayer* v. *De Barros*[2]. Under the Common law it was not constituted by a mere contract followed by *concubinatus*. There must be some religious solemnity. The contract *per verba de presenti* should be accompanied by some religious ceremony, *Reg* v. *Mills*[3]. Since the Marriage Act of 1836, various enactments have recognised marriage as a civil contract. Though ever since the Matrimonial Causes Act, 1857, definitely, and prior to that by private Acts of Parliament dissolution of marriages became possible, it could be done only on certain grounds. Change of religion has not been one of the recognised causes either then or now justifying dissolution. Though marriage has ceased to be a lifelong union, the element of exclusiveness has continued to be of its essence and marriage is strictly monogamous.

Among Hindus, marriage is regarded as a relationship created by dharma धर्मादि संबन्धः[4]. It is a samskara. As soon as the homa and saptapadi are completed it becomes indissoluble. Degradation of either spouse cannot undo it. If the husband becomes a *patita*, the wife will not be subject to his control during

1. (1866) 1 P. & M. 130.
2. (1879) 5 P.D. 94.
3. (1844) 10 Cl. & Fin. 534.
4. Apastamba, II, 6, 13, 11.

the period[1]. If however, he performs penances and is restored to his status the control revives. Even the gravest sins admit of expiation by penances[2]. Marital infidelity of the wife does not annul her wifehood. Infidelity is ordinarily an उपपातक and the penance is गोव्रत or चान्द्रायण[3]. Catamenia removes her sin व्यभिचारे ऋतौ शुद्धिः and repentence restores her rights[4]. Even where she has not undergone penance she will be eligible for "starving allowance." Neither degradation, nor desertion, nor infidelity can destroy the marital tie. In *Subbaraya* v. *Ramaswami*[5], it was observed: "Under the Hindu Law a person who lost caste by being expelled therefrom for specified reasons, forfeited whatever rights he might have had if he had remained in caste. That loss of caste created in him a disability to enjoy the rights incident to his relationship with those who remained within the caste. *But it never broke that relationship.* Whether the relationship be one of husband and wife or any other it *was too sacred to be dissolved*, be the disabilities imposed on the outcaste few or many" (italics ours). In regard to the effect of adultery it was stated in the *Government of Bombay* v. *Ganga*[6], that it would not operate as a divorce though the woman had by her own act destroyed her right to claim domestic and marital rights. There is very little in the Hindu sacred literature on divorce. Apasthamba declares that there can be no separation between the spouses as they have to perform religious acts jointly:

जायापत्योर्नविभागोविद्यते । पाणिग्रहणाद्धि सहत्वं कर्मसु ।[7]

Manu is emphatic that neither by sale nor by repudiation can wifehood be terminated: न निष्क्रय विसर्गाभ्यां भर्तुः भार्या विमुच्यते ।[8] Brihaspati conveys the idea even more forcibly when he states that of him whose wife is not deceased half his body survives. The text is:

यस्य नोपरता भार्या देहार्धं तस्य जीवति ।
जीवत्यर्धशरीरेऽर्थं कमन्यः समाप्नुयात् ॥[9]

The provision for supersession or abandonment of a wife under certain circumstances[10] does not imply the dissolution of the marriage. As regards the text:

नष्टे मृते प्रव्रजिते क्लीबे च पतिते पतौ ।
पञ्चस्वापत्सु नारीणां पतिरन्यो विधीयते ॥[11]

different explanations have been suggested. In commenting on Manu, V, 157, Medhatithi states that पति in the above text should be understood as पालक or guardian. According to some the text is intended to operate only where the bridegroom dies before saptapadi. Others suggest that it will apply where the first marriage has not been consummated. According to certain others a second marriage would be permissible if the girl had not attained puberty. According to some others the first marriage should not have resulted in conception[12]. The Parasara Madhaviya holds the text inapplicable in the kali yuga. It is in any event fairly clear that the text has not been followed in current practice. Among Hindus, marriage is thus, though not monogamous, at any rate altogether indissoluble.

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1. *See* Mitakshara on Yajnavalkya, I, 77.
2. Manu, XI, 89, 92, 101, 105-106.
3. Manu, XI, 118.
4. Gautama, XXII, 35; Vashistha, XXI, 12; Yajnavalkya, I, 70-72.
5. (1899) I.L.R. 23 Mad. 171.
6. (1880) I.L.R. 4 Bom. 330.
7. Apastamba, II, 6, 13, 16-17.
8. Manu, IX, 46.
9. Cited by Apararka on Yajnavalkya, II, 136.
10. Manu, IX, 77—85; Yajnavalkya, I, 80.
11. Narada, XII, 97; Parasara, IV, 30.
12. History of Dharmasastra by P. V. Kane, Vol. II, p. 611.

The Muslim conception of marriage is radically different. Regarded as a social institution marriage under the Muhammadan law is essentially a civil contract. It rests on the same footing as other contracts. It is constituted by *ijab wa kabul* or declaration and acceptance[1]. The invariable presence of dower (either agreed upon or implied by law), the absence of religious ceremonies, the possibility of the relationship being confined to a stipulated term as in muta marriages, the provision for dissolution by talak, etc., serve to emphasise the contractual element and its dominance in marriage.

It may not unfairly be contended that when persons belonging to a particular faith marry according to the tenets of that faith, they may be deemed to have subscribed, at any rate, in the eye of the law, to the distinctive characteristics of marriage as understood in that faith. It may also be remembered that even at the present time divorce is not recognised either by Roman Catholics or by Hindus. If therefore the procedure prescribed by Muslim law could be availed of by a person on becoming a Muslim to have his prior Christian or Hindu marriage dissolved it would be tantamount to assisting the party to set at naught the obligations he had incurred under this prior marriage as against the other party, for instance, to keep the tie intact.

It would seem that conversion of both spouses to Islam would render the incidents of their prior marriage alterable by Muslim law. In *Skinner* v. *Skinner*[2], the question was touched upon but not decided. In that case, one Stuart Skinner had, in May 1855, married Charlotte Skinner according to Christian rites at a Protestant church. The spouses were originally adherents of Islam but prior to the marriage had become Christians. Subsequent to their marriage they reverted to Islam and continued in the practice and profession thereof until the death of Stuart Skinner. It was found that after their reversion to Islam the parties had gone through a form of marriage a second time according to Muhammadan law. Disputes arose as to the succession to the property of Stuart Skinner. There was a suggestion that the deceased had divorced Charlotte Skinner according to Islamic law. The alleged divorce was not proved. Lord Watson remarked : " Whether a change of religion, made honestly after marriage with the assent of both spouses, without any intent to commit a fraud upon the law, will have the effect of altering rights incidental to the marriage, such as that of divorce, is a question of importance and, it may be of nicety." The observation suggests that where both parties change over to Islam, they may be taken to have agreed to subject their prior marriage to be controlled by the Islamic laws, provided the change of faith was not for ulterior reasons, and that where one of the spouses alone becomes a Moslem the incidents of the prior marriage would remain unaffected. In *Khambatta* v. *Khambatta*[3] a Scotchwoman, Christian by religion, contracted in 1906, at Edinburgh, a civil marriage with one Ibrahim, a Moslem with a British Indian domicile. The parties subsequently came to reside in India, and in 1912, the wife was admitted into Islam. In June, 1922, the husband divorced her by talak and a fortnight later she married a Parsi, Khambatta, under the provisions of the Special Marriage Act, 1872. In May 1933, in a suit by her for dissolution of her marriage with Khambatta on the ground of the latter's misconduct, it was contended that the suit was not maintainable as her first marriage with Ibrahim could not be dissolved by talak and was therefore subsisting. It was held that when the wife became a Muslim, both spouses had, as adherents of Islam, placed themselves under that law and the incidents of their marriage could therefore be controlled by Muhammadan law and the divorce by talak was therefore effective. It would make no difference whether the marriage was a religious marriage or a civil marriage.

Where one of the spouses alone becomes a Muslim, the convert thereafter is governed by Muslim law but the other spouse will continue to be subject to the law to which he or she was all along subject in regard to the incidents of marriage. In such circumstances can the former have the prior marriage annulled by recourse to the provisions of his or her own law? As remarked by Blagden, J., in *Robasa*

1. *See* Ameer Ali, Mahommedan Law, 5th edn., 1929, Vol. II, p. 272.
2. (1897) L.R. 25 I.A. 34: 25 Cal. 537 (P.C.).
3. (1934) I.L.R. 59 Bom. 278.

Khanum v. *Khodadad Bomanji Irani*[1], *prima facie*, to hold that one spouse can by changing his or her religious opinions force his or her newly acquired personal law on a party to whom it is alien and who does not want it is so monstrous an absurdity that carried its own refutation with it. If the apostate seeks the assistance of the Court which law is to govern the matter? Queen Victoria's Proclamation of 1857 states: "We declare it to be Our Royal will and pleasure that none be anywise favoured, none molested or disquieted, by reason of their religious belief and observances but that all shall alike enjoy the equal and impartial protection of the law and we do strictly charge and enjoin all those who may be in authority under Us that they abstain from all interference with the religious belief or worship of any of Our subjects on pain of Our highest displeasure." It is provided by section 223 of the Constitution Act, 1935, (*Cf.* section 112 of the Government of India Act, 1915) that "in matters of contract and dealing between party and party when the parties are subject to different personal laws" the decision should be "according to the law or custom to which the defendant is subject." On the question whether a suit for dissolution of marriage could be regarded as included within the scope of the expression "contract and dealing between party and party," Chagla, J., said in *Robasa Khanum* v. *Khodadad Bomanji Irani*[2]: "It is difficult to believe that Parliament wanted to include matrimonial matters in the compendious expression 'matters of contract and dealing between party and party.' If Parliament intended to invest the High Court with matrimonial jurisdiction, Parliament would have made use of a more appropriate expression. Therefore in our opinion it is not possible to obtain any guidance as to the law which we should administer from section 112 of the Government of India Act of 1915. Mr. Justice Crump in *Benjamin* v. *Benjamin*[3] also expressed a doubt whether the words used in section 112 of the Government of India Act of 1915 cover a matrimonial suit." In passing, it may also be noted that the Supreme Court charters contain a general direction that Courts should give judgment according to "justice and right" and likewise the Letters Patent provide that in the exercise of its ordinary original civil jurisdiction the High Court should apply to each case such "law or equity" as would have been applied by the High Court if the Letters Patent had not been passed. The question is what is meant by "justice and right." That expression would signify that where there is no statutory provision of law the Court should decide the matter according to the principles of justice, equity and good conscience, and that in cases like the present it is such principles that would govern—see *Budansa* v. *Fatima*[4], *Noor Jehan Begum* v. *Eugene Tiscenko*[5], *Robasa Khanum* v. *Khodadad Bomanji Irani*[1]. There is nothing *prima facie* in 'justice and right' or 'justice and equity' that a marriage once validly celebrated should be judicially dissoluble or otherwise capable of being terminated except by death. Turning to the judicial decisions, it has already been noticed that Lord Watson's observations in *Skinner* v. *Skinner*[6] cast a doubt whether a valid Christian marriage could be dissolved on the conversion of one of the spouses to Islam under his new law. The decision of the Judicial Committee in *Skinner* v. *Orde*[7], seems to suggest definitely that dissolution cannot be had that way. There one Helen Skinner, a Christian had married a Christian husband according to Christian rites and there was a daughter born of the marriage. On the death of her husband, Helen Skinner started living with one John Thomas John, also a Christian who was a married man and whose Christian wife was living. The parties became converts to Islam and purported to marry according to Muhammadan law. In considering the question whether Mrs. Skinner by her acts had become unfit to continue as the guardian of her daughter, the Privy Council had to consider an argument that in spite of John Thomas John's conversion to Islam he could not marry Mrs. Skinner as his previous Christian wife was still alive and the marriage with her would continue to subsist notwithstanding anything to the contrary in the law applicable to Mr. John. James, L.J., observed: "The house of the widow (Helen Skinner) became the house of one John Thomas John, a clerk of inferior grade

1. (1946) 48 Bom.L.R. 864.
2. *Ibid* at 878.
3. (1925) 28 Bom.L.R. 328.
4. (1913) 26 M.L.J. 260.
5. A.I.R. 1941 Cal. 582.
6. (1897) L.R. 25 I.A. 34 : 25 Cal. 537 (P.C.).
7. (1871) 14 Moo.I.A. 309 (P.C.).

in the Judge's Court, and they lived and cohabited together as husband and wife, John Thomas John being already the husband in Christian marriage of a living Christian wife. It is suggested that this union was sanctified and legalised in this way—that the widow became a Mahommedan, that John Thomas John became a Mahommedan, and that having thus qualified himself for the enjoyment of polygamous privileges, he contracted in Mahommedan form a valid Mahommedan marriage with the widow, the appellant. The High Court expressed doubts of the legality of this marriage ; which their Lordships think they were well warranted in entertaining." An instructive case on this matter is the decision in *Rex* v. *Hammersmith Superintendent Registrar of Marriages, Mir Anwaruddin* Ex parte[1]. In that case *A*, an Indian Muslim, contracted in 1913 a civil marriage in England with an English girl-*R*, a Christian. A couple of months later, *R* left him and *A* returned to Madras, where he obtained a decree for restitution of conjugal rights which *R* did not obey. At the same time, *R* commenced a suit in England against *A* for judicial separation alleging cruelty. *A* contested the suit and it was not pressed. *A* who was then in England purported to divorce *R* by a talaknama and sought a declaration in the Divorce Court that his marriage with *R* was at an end or alternatively for dissolution on the ground of adultery. Justice Bargrave Deane dismissed the petition on the ground that it was incompetent inasmuch as the petitioner's place of domicile was not England. He however expressed the opinion that, on account of what had happened, *A*'s marriage with *R* was at an end. In August 1916, *A* applied to the respondent for a license to marry another lady. The Registrar declined to issue a license, whereupon, *A* applied to the King's Bench Division for a writ of mandamus, his argument being that the license was wrongfully denied, his prior marriage with *R* having come to an end as remarked by Bargrave Deane, J., in the earlier litigation. The King's Bench refused to issue the writ. They held that the forum, if any, competent to dissolve the marriage would be that of the husband's place of domicile. That procedure not having been adopted the marriage with *R* was subsisting. Two of the three learned Judges cited also an observation of Lord Brougham in *Warrender* v. *Warrender*[2] as showing that where the parties adopt the form and solemnities of a particular country, where they are, in making a particular contract (such as marriage), the laws of that country afford the only safe criterion of their intention in making that contract and are resorted to by the Courts of the country where the question arises, not *ex comitate* but *ex debito justitiae*. If considerations of justice are the test, then could it not with fair plausibility be contended that where marriage is between members of different religions and domiciles, inasmuch as the woman knows that on marriage she will take the domicile of the husband she might be deemed to have agreed to subject the incidents of their marriage to the law of her husband's domicile. In any event, where members of the same religious persuasion marry in their faith there could be no difficulty in treating the parties as having agreed to have the incidents of their marriage controlled by the laws of the faith to which they belonged. Nor does any difficulty arise where parties, whether belonging to the same or different religious persuasions, contract a civil marriage in India. In such a case the Special Marriage Act, 1872 under which alone the marriage could be contracted provides that it could be dissolved only under the Divorce Act. In the latter case, therefore, dissolution of the marriage by one of the spouses resorting to Islam or by having recourse to any customary procedure cannot be had—see *Andal Vaidyanathan* v. *Abdul Allam Vaidya*[3], *Gnanasoundari* v. *Nallatambi*[4]. The question whether a marriage contracted by parties according to the tenets of the religion to which they belonged could be dissolved by one of them subsequently becoming a Muslim and invoking the provisions of that law has frequently come up for consideration. Judicial opinion is conflicting. One of the earliest cases is the decision in In the matter of *Ram Kumari*[5], where a Hindu woman after her marriage with a Hindu husband according to Hindu rites became a Muslim, and without taking the steps prescribed by Muhammadan law to get her marriage dissolved, married a Muslim according to Islamic

1. (1917) 1 K.B. 634.
2. (1835) 2 Cl. & Fin. 488, 530 : 6 E.R. 1239.
3. (1946) 1 M.L.J. 402.
4. (1945) 2 M.L.J. 80.
5. (1891) I.L.R. 23 Cal. 164.

rites. In holding her guilty of bigamy, the Calcutta High Court expressed the view that if she had resorted to the procedure indicated by Muhammadan law she might have had her first marriage dissolved. The opinion was *obiter*. In *Budansa* v. *Fatima*[1], where the facts were similar, the Madras High Court held that it is the Hindu law that should be applied in such cases to ascertain whether the marriage with the Hindu husband was subsisting despite the wife having become a Muslim. *Chelimutnessa Bibi* v. *Surendranath Sen*[2], *Mussamat Ayesha Bibi* v. *Bireshwar Ghosh Mazumdar*[3], *Mussamat Ayesha Bibi* v. *Subodh Chakravarty*[4] form an interesting trilogy of cases where Hindu women married according to Hindu rites to Hindu husbands had experienced unhappy married lives, got themselves converted to Islam and invoked the provisions of Muslim law to obtain a dissolution of their marriages with their Hindu husbands. The first two cases were not contested and dissolution was granted. The third case followed the other two decisions. Referring to these cases,Blagden, J., remarked in *Robasa Khanum* v. *Khodadad Bomanji Irani*[5], that a Judge should be " very much on his guard against allowing hard cases to make bad law, which, Judges being but human, is very likely to happen, and which, I cannot help feeling did happen in Ayesha Bibi's case." To put it in less picturesque language, *Blagden, J.*, does not agree with the view taken in the aforementioned three cases. Two other decisions of the Calcutta High Court are sometimes cited as lending colour to the view that the marriage contracted in the original faith could be dissolved by one of the spouses becoming a Muslim and following the procedure indicated by Muhammadan law. In *John Jiban Chandra Datta* v. *Abinash Chandra Sen*[6], one Dukhiram, a Christian, had married according to Christian rites a Christian woman, Sudakshina. He subsequently became a Muslim and married a Muslim woman, Alfatunnessa, according to Muhammadan law. The latter marriage was considered to be valid by Henderson and Latifur Rahman, JJ. Referring to the doubt cast by Lord Watson in *Skinner* v. *Skinner*, it was remarked : " In view of this pronouncement it might be difficult to say whether Dukhiram could have divorced Sudakshina by talak, but there is no suggestion that his marriage to Alfatunnessa was not valid." In *Haripada Roy* v. *Krishna Benode Roy*[7], the suit was one for restitution of conjugal rights. Haripada had married according to Hindu rites a Hindu woman, Saroj Nalini, in 1918. The parties lived as husband and wife till 1929 and there were three children of the marriage. The wife went to Calcutta in 1930, her married life proving unhappy, stayed there for a few years receiving education and later on went to Puri as a school mistress. In May 1933, she embraced Islam, offered it to her husband who made no reply. In June 1933, she filed a suit in the Court of the first Munsiff at Alipore for dissolution of her marriage. The husband did not contest the suit. On 15th September, 1933, an *ex parte* decree dissolving the marriage was passed. Sometime later she was reconverted to Hinduism and on that very day she married Krishna Benode Roy, the first defendant, under the Special Marriage Act as amended in 1923. Thereafter Haripada sued for restitution of conjugal rights. It was held that the decree dissolving the marriage with the plaintiff having been allowed to become final and conclusive the present suit would not lie. The observations on the merits were therefore *obiter*. One novel argument which was urged in the case but was repelled may be noted. It was suggested that the decree granting dissolution could be operative only so long as the spouse remained in Islam but that as soon as she reconverted herself to Hinduism the rights of the first husband would revive. In rejecting the argument, B. K. Mukherjea, J., observed : " The proposition is against common sense . . . . . The marriage is . . . . in my opinion dissolved for all the time to come and a suit for restitution of conjugal rights must fail."

A number of decisions have definitely taken the view that the marriage contracted in the original faith cannot be dissolved by one of the parties adopting Islam

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1. (1919) 26 M.L.J. 260.
2. Referred to in (1929) 33 Cal.W.N. ccxxix.
3. (1929) 33 Cal.W.N. ccxxix.
4. (1945) 49 Cal.W.N. 439.
5. (1946) 48 Bom.L.R. 864, 875-876.
6. I.L.R. (1939) 2 Cal. 12.
7. A.I.R. 1939 Cal. 430.

and having recourse to the principles of Muslim law. In *Khambatta* v. *Khambatta*[1] the view has found favour though by way of *obiter* only. *Noor Jehan Begum* v. *Eugene Tiscenko*[2], is another such decision. In that case, two Christians, having a Russian domicile, contracted a civil marriage at Berlin in May 1931. A son was born of the marriage. The spouses separated in 1938 and the wife came to India. The husband went to study medicine at Edinburgh. In June 1940 the wife was living in Calcutta. On 27th June, she became a Muslim and next day sent her husband a cable offering Islam to him. On his refusal, she brought a suit for a declaration of dissolution of her marriage. Inasmuch as the domicile of the parties was not Indian the suit was held to be incompetent as the Court could not exercise jurisdiction. It was, however, observed by Edgley, J., that the principles of Islamic law invoked by the wife were obsolete, and opposed to principles of justice, equity and good conscience. He also held that the prior marriage could be dissolved only under a law to which both parties to the marriage are subject or by statute. The latest decision of the Calcutta High Court is *Sayeda Khatoon* v. *M. Obediah*[3]. In that case the parties who were jews had married according to Jewish rites. Afterwards the wife became a convert to Islam and sought to have her marriage-dissolved in the manner provided by Muhammadan law. The relief was refused. Lodge, J. followed the decision of Edgley, J., in *Noor Jehan Begum's case* and held that there is no authority for the view that a marriage solemnised according to one personal law could be dissolved according to another personal law simply because one of the two parties had changed his or her religion. The latest decision relating to this matter is that of the Bombay High Court in *Robasa Khanum* v. *Khodadad Bomanji Irani*[4]. The plaintiff in the case was a Zoroastrian woman who had married in Iran a member of the same community according to Zoroastrian rites. Two sons were born of the marriage. The parties had adopted India as a domicile of choice. The wife became a Muslim and invited the husband also to adopt the religion. On his declining the offer she brought a suit for a declaration that her marriage with him stood dissolved according to the principles of Muhammadan law. Blagden, J., the trial Judge and on appeal Stone, C.J., and Chagla, J., held that the case was one which fell to be decided in accordance with the principles of justice and equity, as stated by the Madras High Court in *Budansa* v. *Fatima*[5], and there was no reason to hold that the prior marriage could be dissolved by a law which was not of general application to both spouses. The view as expressed in this line of cases is of general application. It would make no difference if the first marriage had been contracted in Hinduism, Judaism or Christianity. It is also immaterial whether such prior marriage was monogamous in character or not. It is by the law to which the parties were subject when they married that the subsistence of the marriage even after the apostasy of one of the spouses would fall to be decided. Any dissolution of the previous marriage could be had only by having recourse to the provisions of a law of general application or to a personal law to which both parties to the marriage are subject which has been adopted as the *lex fori* of the country. These conclusions seem to be supported by what is found in books on Anglo-Muhammadan Law.[6] According to Blagden, J., in *Robasa Khanum* v. *Khodad Bomanji Irani*[4], if the prior marriage was a monogamous marriage and one of the spouses had subsequently become a convert to Islam and proposed to marry again under the Islamic law, the spouse remaining in the original faith could by applying in time have the second marriage restrained by an injunction and in any event there would be a remedy in damages available to such person.

S. VENKATARAMAN.

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1. (1934) I.L.R. 59 Bom. 278.
2. A.I.R. 1941 Cal. 582.
3. (1945) 45 Cal.W.N. 745.
4. (1946) 48 Bom.L.R. 864, 870.
5. (1913) 26 M.L.J. 260.
6. Ameer Ali Mahommedan Law, 5th edn., 1929, vol. ii, pp. 383, 384 and Tyabji, Mahommedan Law, section 194-A.

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HINDU MARRIAGES AND JURISDICTION OF FOREIGN COURTS TO ENTERTAIN NULLITY PROCEEDINGS.

The interaction of English law and foreign systems of private International law have sometimes produced bizarre situations. The decision of the Probate Court in *Mehta* v. *Mehta*[1] has brought to light one such situation. In that case, Mehta, a Hindu, with an Indian domicile, in the course of his sojourn in England for purposes of study met in September, 1938, one Miss Kohn, a British woman, Christian by religion, domiciled in England and employed as a teacher in London. In the words of the learned Judge " apparently they became fond of one another, and there was some talk between them of marriage." They however apprehended objection from the parents of Mehta due to her being a Christian. In due course the respondent returned to India, and shortly afterwards the petitioner also came to India along with a mutual friend. She met the respondent and early in 1940 it was suggested that she should be converted to Hinduism to facilitate their marriage, to which she agreed. For five days before the conversion, she and the respondent stayed at a hotel in Bombay and on February 15, 1940, she was not merely converted to the Hindu faith but also married to the respondent according to the Arya Samaj rites. The present proceedings were brought in England for a declaration of the nullity of the marriage on the ground that when the ceremonies were being performed the petitioner was all along under the impression that she was only being converted and had no idea that she was also being married. One of the questions which the Probate Court had to consider was whether it had jurisdiction in the matter. Barnard, J., observed : " But the case does raise certain difficulties including the question of jurisdiction. I am not in the least troubled by the fact that the respondent was at all times domiciled in India. As the law now stands and as it really always has stood I think the fact that the petitioner was at all material times domiciled in England gives this Court jurisdiction to deal, so far as nullity is concerned, with the marriage she went through with the respondent". Barnard, J., has thus held that in nullity proceedings the original domicile of the petitioner is the test of jurisdiction, no matter where or according to what rites or in what faith the marriage may have been performed. He seems also to have assumed, as the decision would suggest, that the validity of the marriage need not be tested by the law applicable to the parties at the time of the solemnisation but according to ordinary contractual law. Two questions arise : first, what gives jurisdiction in nullity proceedings and second, what is the law to be applied in granting the relief.

As stated by Lord Westbury in *Shaw* v. *Gould*[2] : " Marriage is the very foundation of civil society, and no part of the laws and institutions of a country can be of more vital importance to its subjects than those which regulate the manner

1. (1945) 2 All.E.R. 690.
2. (1868) L.R. 3 H.L. 55, 83.

and conditions of forming, and, if necessary, of dissolving the marriage contract." The British Courts give various types of relief in regard to marriages, such as divorce, divorce a *mensa et thoro*, nullity, restitution of conjugal rights, jactitation, etc. Of these, however, divorce could be obtained till 1857 only by private Acts of Parliament and it was only thereafter that it became available through judicial processes for stated causes. Other matrimonial reliefs were however available from very early times. According to English law, divorce jurisdiction rests on domicile only. " The domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve the marriage"—*Le Mesurier* v. *Le Mesurier*[1]. Divorce granted by a Court other than the Court of domicile will not be valid, *Dolphin* v. *Robins*[2], *Harvey* v. *Farnie*[3], unless it is recognised by the law of the domicile, *Armitage* v. *Attorney-General*[4], or by statute. A statutory modification introduced by the Indian and Colonial Divorce Jurisdiction Act, 1926, permits persons domiciled in England to obtain divorces in India on the basis of their residence in India. As to the system of domestic law to be applied in such cases, various possibilities have been discussed and most of them have been rejected. It cannot be the *lex loci contractus* inasmuch as marriage is not a mere contract but a contract conferring status or status arising out of contract. It cannot be the *lex loci celebrationis*, since mode of celebration by itself cannot regulate future status. It cannot be the *lex loci delicti* since the place of matrimonial offence is often accidental merely. It cannot be the *lex patriae*, for though favoured by some systems of continental laws British jurisprudence has definitely rejected nationality as a basis of jurisdiction in matrimonial matters. Nor can it be the law of the place of residence, since residence may be characterised by impermanence. It is the *lex fori* that is held applicable. The rule is also absolute that a wife cannot in any circumstances, not even after the parties are judicially separated, acquire or retain a domicile of her own, *Cook* v. *Attorney-General for Alberta*[5], *H.* v. *H.*[6] It would therefore follow that divorce could be granted only on grounds available under the domestic law applicable to the husband, usually the husband's law of domicil. In England this principle has been subjected to two statutory exceptions. The Matrimonial Causes Act, 1937, provides one modification. Under that Act, in the case of desertion by the husband, if prior to that he was domiciled in England or Wales, the Court shall have jurisdiction for the purpose of any proceeding in divorce, annulment, judicial separation and restitution of conjugal rights whatever domicile he may have at the time of the actual proceedings. The other statutory modification is made by the Matrimonial Causes Act, 1944, which is a purely temporary measure. According to that Act, if a marriage had been celebrated on or after September 3, 1939, between a husband domiciled outside the United Kingdom at the time of the marriage and a wife who immediately prior to the marriage was domiciled in the United Kingdom, the High Court shall have divorce and nullity jurisdiction. So far as divorce is concerned it is thus clear that jurisdiction is founded on domicile except where there is relaxation of the rule by statute or by the law of the domicile, and the law applicable in granting the relief is the *lex fori*.

Does jurisdiction regarding nullity stand differently? It is submitted, not. It is true that while divorce was not available ordinarily prior to 1857, other matrimonial reliefs could be had. Ecclesiastical courts were granting such reliefs. Residence was the basis of jurisdiction in such matters. An appeal from such Courts lay originally to the Pope. Since the Reformation, these Courts became national Courts and the appeal lay to the King. The passing of the Matrimonial Causes Act, 1857 (20 and 21 Vic., c. 85) resulted in provision being made for divorce and in the transfer of matrimonial jurisdiction to the secular Courts. The practice and procedure of the Divorce Court are governed by statute and rules made thereunder and where they are silent the principles and practice of the ecclesiastical Courts must be followed in proceedings other than for dissolution. Jurisdiction in nullity suits is therefore exercised in accordance with the principles and rules

1. (1895) A.C. 517 (P.C.).
2. (1859) 7 H.L.C. 390.
3. (1882) 8 A.C. 43.
4. (1906) P. 135.
5. (1926) A.C. 444.
6. (1928) P. 206.

as nearly as may be conformable to the principles and rules on which the ecclesiastical Courts acted. To assume that the jurisdiction of the High Court in regard to nullity proceedings was altogether an inherited jurisdiction would not be quite correct. Nor is there anything in that Act to warrant the making of a complete distinction between divorce jurisdiction and jurisdiction in nullity proceedings. The Matrimonial Causes Acts of 1937 and 1944 treat them alike. It is therefore reasonable to argue that the earlier Act of 1857 could not have intended differently. Proceedings in nullity, though technically different, are in substance akin to divorce proceedings, for, both involve a question of status. There is *prima facie* no reason to employ in the case of nullity proceedings a different test as to jurisdiction. Eminent jurists have recognised that residence alone will not be sufficient to confer jurisdiction in nullity cases, *see* Cheshire's Private International Law[1]; Read's Recognition and Enforcement of Foreign Judgments[2]. That the test is the same, namely, domicile in regard to nullity proceedings also has been judicially recognised, *Salvesen* v. *Administrator of Austrian Property*[3], *Inverclyde* v. *Inverclyde*[4]. But recent decisions both in England and Scotland have propounded a different doctrine and have recognised residence as sufficient to confer jurisdiction, see *White* v. *White*[5], *Easterbrook* v. *Easterbrook*[6], *Hutter* v. *Hutter*[7], *Lendrum* v. *Chakravarti*[8], *Macdougal* v. *Chitnavis*[9], *Mangrulkar* v. *Mangrulkar*[10]. In *Salvesen's case*[11], Lord Phillimore had observed : " In my opinion the Wiesbaden Court was the only competent Court for the parties." The observation has been sought to be explained away in one of two ways. In Rayden on Divorce[12], it is suggested that the observation only means that " the Court of the domicile has a superior claim in questions of status to other Courts and is therefore the only Court competent to pronounce a decree which is conclusive everywhere and not that the jurisdiction of the Court of the domicile is exclusive of all other Courts". In *Mason* v. *Mason*[13], it seems to have been considered that Lord Phillimore's observation was probably due to the fact that in the *Salvesen case*[11] neither party had a residence outside their domicile to give jurisdiction for nullity proceedings. It may, with all respect to the propounders of these lines of distinction, be stated that the observation of Lord Phillimore is too emphatic to be distinguished on the lines suggested. A more important argument in favour of residence being the test of jurisdiction in nullity proceedings is that " where an Englishman by will leaves property to the child of a foreigner, Re *Paine*[14] or where one accused of bigamy pleads that his first marriage is void, *R.* v. *Naguib*[15] or where the wife sues for judicial separation or for restitution of conjugal rights and the husband pleads that the marriage is void, *Chetti* v. *Chetti*[16], *Nachimson* v. *Nachimson*[17] or where the wife sues for maintenance in a Summary Court and the husband contends that the marriage is not valid, *Papadopoulos* v. *Papadopoulos*[18], in all such cases the Courts in England have considered themselves competent to determine the validity of the marriage even when the parties had been domiciled abroad and the marriage had been celebrated abroad and hence it would be inconsistent to deny such jurisdiction when the issue is raised fairly and squarely in nullity proceedings". It is true that British Courts have for many years been deciding as incidental matters questions relating to the validity of marriages. That, however, is only as ancillary to some other question of which the Court was directly seised and to whose solution such a decision was necessary. That would not however mean that where the issue is directly raised whether a marriage is valid or not a Court which will not normally have jurisdiction in the matter could assume jurisdiction. Also it may be noted that in Halsbury's Laws of England (2nd edition, Vol. X, p. 640),

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1. 2nd edition, pp. 337-339.
2. Pp. 232-252.
3. (1927) A.C. 641.
4. (1931) P. 29.
5. (1937) P. 111.
6. (1944) P. 10.
7. (1944) P. 95.
8. (1929) Sc.L.T. 96.
9. (1937) Sc.C. 390.
10. (1939) Sc.C. 239.
11. (1927) A.C. 641.
12. 4th edition, p. 15.
13. (1944) N.I. 134.
14. (1940) Ch. 16.
15. (1917) 1 K.B. 359.
16. (1907) P. 67.
17. (1930) P. 217.
18. (1930) P. 55.

it is stated that the Courts entertain a nullity suit *if the respondent was within the jurisdiction at the institution of the suit*, whatsoever the ground of the suit and wheresoever the marriage was celebrated.

In the *Mehta case*[1], Barnard J., speaks of the petitioner having a British domicile which gave him jurisdiction in the matter. It is not clear whether what Barnard, J., meant was that the petitioner had the requisite residence which according to the later decisions of the British Courts would give jurisdiction in nullity matters. If, however, the learned Judge was applying the same test as is applied in divorce cases to determine jurisdiction, it is difficult to perceive how the petitioner could be deemed to have a British domicile at the material time. The petitioner no doubt had such a domicile prior to her marriage. She had left England avowedly with the object of marrying the respondent. And a marriage was in fact gone through at Bombay. That, in law, meant that she had *prima facie* acquired British Indian domicile, the domicile of her husband. How then could she have at the same time a British domicile? Till the marriage is actually set aside it is to be presumed to be valid, and the Courts will have to start with the presumption that the domicile of the petitioner is that of her husband. Obviously the assumption of jurisdiction could not be correlated to the eventual result of the suit. Jurisdiction cannot rest on so doubtful a foundation. It is therefore difficult to follow the learned Judge's conclusion on this matter. Again the policy of the Indian Law in regard to the matter may be gathered from section 2 of the Divorce Act (IV of 1869) according to which solemnisation of marriage in India and residence are requisite for conferring jurisdiction.

Even assuming that by reason of her residence at all material times in England, the Probate Court would have jurisdiction to entertain the nullity proceedings notwithstanding that the respondent was not at that time within its jurisdiction the question still remains by what law the nullity or otherwise of the marriage would fall to be determined. The marriage was according to the Hindu rites and in India. The validity has therefore to be tested by the principles of that law only. The latter system no doubt recognises cases where in spite of an apparent marriage the status of wifehood does not arise, as for instance where a person marries a girl who is within the prohibited degrees of relationship or is a sagotra or has identity of pravara. The Mitakshara[2] has stated :

सपिण्डासु समानगोत्रासु समानप्रवरासु भार्यात्वमेव नोत्पद्यते ।

In a case where both parties had originally an Indian domicile and as Hindus had married in India according to the Hindu rites, it can hardly be contended that mere residence of one of the spouses in England at the material time would give jurisdiction to the English Courts in regard to nullity proceedings or that the validity of the marriage will fall to be determined by any system of law other than Hindu law. How then can the fact that at an earlier point of time one of the spouses had a British domicile affect the position in regard to either matter? The analogy afforded by section 2 of the Indian Divorce Act suggests that the British Court will not have jurisdiction if the marriage has not been celebrated within Britain. The rule in Halsbury would deny jurisdiction if the respondent was not at the time of the institution of the proceedings resident in Britain.

In the *Mehta case*[1], the willingness of the parties to marry each other, the petitioner's journey to India shortly after the respondent's return to this country, the petitioner's willingness to be converted to Hinduism to overcome the parental antipathy to the marriage, their staying together for five days in Bombay prior to the conversion, all these circumstances show that the petitioner had not come to India as a tourist or for any other purpose than to marry the respondent. And a marriage was in fact gone through according to the learned Judge's finding. It is the law of this country that a marriage actually celebrated will be presumed to

1. (1945) 2 All.E.R. 690.

2. *Cf.* Baudhayana II, 1-1-37.

be valid and in accordance with law till the contrary is established, *Indiran* v. *Ramaswami*[1], *Ramamani* v. *Kulandai Nachiar*[2], *Fakirgouda* v. *Gangi*[3], *Appi Bai* v. *Khimji*[4]. Even a duly performed marriage could be set aside no doubt if there is force or fraud, *Venkatacharyulu* v. *Rangacharyulu*[5], *Mulchand* v. *Bhudhia*[6]. In the *Mehta case* there was no use of force at any stage; nor was any fraud alleged. What was set up was a unilateral mistake as to the nature of the ceremony that she went through. It was not suggested that the respondent was aware of her mistake and kept quiet or that he had misled her. In the circumstances the mistake as to the nature of the ceremony performed would hardly be material, particularly in view of the fact that she had agreed to marry the respondent and for that purpose was ready to adopt Hinduism. Barnard, J., observes: "I have also heard the evidence of Sir Alfred Wort, who was for some fourteen years a Judge of the High Court in British India, and I am quite satisfied, from his evidence, that the ceremony which the petitioner went through with the respondent was a valid marriage according to the law of British India." On this finding it is submitted that the prayer should have been rejected. The learned Judge however went on to remark: "I am equally satisfied, from the evidence that the petitioner never had any intention to contract a valid marriage *at the time*." (Italics ours.) The importance of the last expression is rather difficult to realise. If intention to marry was present and had been expressed before, the fact that the idea of marriage was not associated by her with the ceremony in which she was participating, at that time, can have no force in the absence of any suggestion of fraud or other ulterior purpose. So even on principles of contractual law the conclusion of the learned Judge would not seem to be justified. The case however serves to emphasise that the English law in regard to the award of matrimonial relief is not either in accordance with the policy expressed in the Indian Divorce Act or with the principles of private International law. In all such matters there should be reciprocity and uniformity in the principles to be applied by the tribunals of the different countries if anomalous results are to be avoided.

S. VENKATARAMAN.

SUMMARY OF ENGLISH CASES.

JOHN LANCASTER RADIATORS, LTD. *v.* GENERAL MOTOR RADIATOR CO., LTD, (1946) 2 All.E.R. 685 (C.A.).

Practice—Pleading—Denial of allegations in plaint—Specific denial of each item—If essential.

It is not necessary for the pleader to copy out each allegation in the statement of claim which he denies. A pleading in defence which alleges in effect, that the statement of claim and every allegation of fact in it is incorrect from beginning to end, cannot be said to be obscure or evasive. To compel the defendants to set out the denials in a longer form would merely lead to unnecessary expense. The plaintiffs may serve a notice to admit facts or make use of interrogatories.

If at the hearing of the action the Court thinks that the statement of defence in that form has involved the plaintiffs in unnecessary expense, the Court can deal with the matter by way of costs. There is no defect in the form of the defence warranting a striking out of the defence.

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1. (1869) 13 Moo.I.A. 141, 158.
2. (1871) 14 Moo.I.A. 345, 366.
3. (1898) I.L.R. 22 Bom. 277, 299.
4. (1938) I.L.R. 60 Bom. 455.
5. (1891) 1 M.L.J. 85: I.L.R. 14 Mad. 316.
6. (1898) I.L.R. 22 Bom. 812.

SOPHAN *v.* CLIFFORD AND SON, (1946) 2 All.E.R. 733 (C.A.).

Bankruptcy—Petition based on judgment debt as act of bankruptcy—Order for payment by instalments of the judgment debt—If can be made without notice to creditor so as to interfere with the creditor's right to proceed with the bankruptcy petition.

Where a creditor has presented a petition in bankruptcy based on a judgment debt as an act of bankruptcy, the judgment debt ought not without notice to the petitioning creditor to be ordered to be paid in instalments so as to interfere with the creditor's right to proceed with the bankruptcy petition.

Quaere.—Whether the Court which passed the judgment had jurisdiction after commencement of bankruptcy proceedings to make an order for payment by instalments ?

IN THE ESTATE OF OATES, CALLOW *v.* SUTTON, (1946) 2 All.E.R. 735 (P.D.A.).

Will—Alterations in—Presumption and onus—Intention of testator—Evidence as to —Admissibility to rebut presumption.

Alterations apparent on the face of a will are to be presumed to have been made after the will was executed, until evidence to the contrary is adduced. The declarations of the testator made before the execution of the will are admissible evidence from which a jury might draw the inference as to the alterations having been made before the execution of the will, since the alterations were made in furtherance of an intention shown to have existed before the execution of the will.

J. (otherwise S.) *v.* J., (1946) 2 All.E.R. 760 (P.D.A.).

Husband and wife—Husband sterilised surgically before marriage to knowledge of wife —Wife if entitled to decree of nullity on the ground of wilful refusal to consummate marriage.

The act of a husband in having an operation performed which made him completely sterile, although able to achieve penetration and emission (the wife being thus artificially prevented from having a child by him) amounts to wilful refusal to consummate the marriage. However, where the wife knew before her marriage that the husband had been made irremediably sterile, she must be held to have acquiesced in the circumstances of the marriage and a decree of nullity cannot be granted in her favour on the ground that by reason of the operation the husband is unable to consummate the marriage.

MERSEY DOCKS AND HARBOUR BOARD *v.* COGGINS AND GRIFFITH LTD., (1947) A.C. 1 (H.L.).

Tort—Master and servant—Negligence of servant causing injury to stranger—Liability—Servant, a driver of a crane which was hired out to another along with driver—Master liable—Hirer or permanent employer—Test.

A mobile crane was hired out along with its driver to stevedores for the purpose of loading a ship. As a result of the negligence of the driver in working the crane a third party was injured and claimed damages. On the evidence it was found that the accident happened because of the negligent way in which the crane driver worked his crane and that the stevedores had no control over how he worked the crane as distinguished from telling him what he was to do with the crane. In the circumstances,

Held : The general employers and not the hirers must be liable for the negligence. The burden of proof rests on the general employer to shift the *prima facie* responsibility for the negligence of servants engaged and paid by such employer so that this burden in a particular case may come to rest on the hirer who for the time being has the advantage of the service rendered.

COLMAN *v.* ISAAC CROFT AND SONS, (1947) 1 K.B. 95.

Tort—Master and servant—Negligence of servant (a lorry driver) causing death to person employed for doing other work volunteering to go in the lorry and help in loading and unloading—Doctrine of common employment—Not applicable.

Where a person employed as bricklayer travelled in a lorry belonging to his employer volunteering his assistance in loading and unloading and was injured and killed as a result of an accident due to the negligence of the driver of the lorry and the former's wife sued for damages,

Held : The doctrine of common employment is not applicable. To-day the Court leans against the doctrine of common employment and it is possible to take the view that the deceased man volunteered to help with the loading and unloading of the lorry, and undertook the risks of the negligence of the lorry driver when both were engaged in doing this but he did not volunteer to undertake the risks of the negligence of the lorry driver while driving him from one place to another at which loading or unloading was to be done.

COUTTS AND CO. *v.* BROWN LECKY, (1947) 1 K.B. 104.

Guarantor—Infant's loan with bank—Guarantor if can be made liable.

The guarantors to a bank of an infant's loan, where all the parties know the facts, cannot be sued ; because the loan guaranteed is absolutely void.

GRAHAM *v.* GLASGOW CORPORATION, (1947) 1 All.E.R. 1 (H.L.).

Tort—Master and servant—Injury to employee—Liability—Defence of common employment—Sustainability—Electric trams—Collision—Injury to servant—Master if liable.

A tramcar belonging to the respondents collided, owing to the negligence of the driver employed by them (by failing to apply the brakes) with another of their tramcars on which the appellant was employed by them as a conductress, with the result that the appellant sustained injuries. The appellant sought reparation from the respondents.

Held : The crews of the two tramcars were carrying out a common work. From the circumstances that tramcars cannot avoid an impending collision by lateral movement and that a common path is prescribed by them by the rails on which they both travel necessarily creates a great risk, the employee's contract must be regarded as including the implied term exonerating the respondent from liability for the negligence of the appellant's fellow-servant.

Radcliff v. *Ribble Motors Services, Ltd.*, (1939) 1 All.E.R. 637 : (1939) A.C. 215 (H.L.) explained and distinguished.

DOUDIE *v.* KINNEIL CO. LTD., (1947) 1 All.E.R. 6 (H.L.).

Workmen's Compensation Act (1925), *Section* 9 (1), *proviso* (*c*)—*Accident resulting in total incapacity—Claim for maximum compensation for total incapacity—Compensation for partial incapacity in respect of earlier accident—If to be included in the maximum.*

A workman who is in receipt of compensation under the Workmen's Compensation Act for partial incapacity resulting from a first accident should continue to receive this compensation in addition to further weekly compensation in respect of the total incapacity resulting from a second accident. The proviso to Section 9 (1) of the Workmen's Compensation Act which provides that " the weekly payments shall in no case exceed 30-s " will not apply to the case. The proviso only limits the compensation in respect of the injury caused by the particular accident and not the total compensation payable to an individual. The

words " In no case " mean " in the case of no given accident" and not " in the case of no individual."

(1935) 2 K.B. 90 approved.

SEARLEE *v.* WALLBANK, (1947) 1 All.E.R. 12 (H.L.).

Tort—Horse escaping through gap in fence and colliding with cyclist on highway—Owner of field if liable for failure to maintain fences to prevent escape of animals on highway.

The respondent's horse got on to the road from his field as the fence was defective and as a result of its collision with the appellant, a cyclist he was injured. In an action for damages,

Held : The road side owner who sets up no fence would not be under any duty to passersby on the roads as regards horses and cattle. Nor will such owner, who with a view to keeping out trespassers, or in an endeavour to prevent his cattle and horses from straying, be liable for failure to maintain such fences to prevent the escape of his horses or cattle.

COUCHMAN *v.* HILL, (1947) 1 All.E.R. 103 (C.A.).

Sale of goods—Auction—Catalogue describing " heifers " as " unserved "—Clause in catalogue excluding liability of auctioneers from liability for errors in description—Effect—Affirmation by auctioneer in reply to oral inquiry by bidder that heifer was unserved—Warranty—Liability for breach.

The plaintiff purchased at an auction a heifer which was described as " unserved " in the printed catalogue which also stated *inter alia* that the auctioneers will not be responsible for the correct description and were not giving any warranty whatever. The plaintiff however enquired of the auctioneer if he would confirm that the heifer was unserved and the auctioneer verbally confirmed the same. The heifer had a miscarriage shortly after and died as a result and of the strain of carrying a calf at too young an age for breeding. The plaintiff claimed damages for breach of warranty,

Held : In so far as the plaintiff relied on the statement in the catalogue to support his claim for damages for breach of warranty he necessarily failed. But there was an unqualified condition (on the oral assurance) which on its breach the plaintiff was entitled to treat as a warranty and receive damages. The printed condition that the vendor will take no responsibility for errors of description of things offered for sale on inspection is reasonable for visible defects, but for qualities or attributes which are invisible it is not reasonable.

LOEWENTHAL *v.* VANHOUTE AND ANOTHER, (1947) 1 All.E.R. 116 (K.B.D.).

Lease—Notice to quit—New tenancy if can be implied by issue of subsequent notice to quit.

A tenancy was determined on September 21, 1946, the notice to quit having been given on September, 14. The rent offered on 23rd September, was refused. A solicitor then gave a notice to recover possession.

Held : When a valid notice has been given, a new tenancy can be created only by an express or implied agreement. A subsequent notice to quit is of no effect unless other circumstances form the basis for inferring a new tenancy having been created after the expiry of the first notice. In this case no such agreement for next tenancy can be inferred.

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PLANNING FOR THE PROFESSIONS : LAW—DISCUSSION *

Participants : (1) Hon'ble Mr. Justice V. Govindarajachari,
(2) Sir Alladi Krishnaswami Iyer, and
(3) Mr. S. Govindarajulu, *Vice-Principal, Law College, Madras.*

JUSTICE V. G.—Don't you, gentlemen, think that the impression which is generally prevalent that the Bar is over-crowded and that there is no scope for real talent is altogether wrong ? A distinguished judge of the Madras High Court was remarking to me a short time ago that he did not find a sufficient number of clever young men coming up, as they should, if the Bar is to retain its position. I said, I thought so too and I added that it is partly due to the discouraging talk which is indulged in very often by members of the Bar themselves, perhaps well meaningly. Sir Alladi may tell us how he feels about it.

SIR A.—I entirely agree with you, Judge. I have been of the same opinion myself for a considerable time. That, of course, is not to say that all is right with the Bar and that there are not several things which the Bar can do for itself, to improve its own position. I definitely hold that we should encourage bright young talent to take to law. For our expanding public life we will need a large number of young men of means with a good legal background. Our diplomatic and ambassadorial services will require and will absorb a fair number of lawyers with a good working knowledge of constitutional and international law, economics and political science. Professor Govindarajulu will be able to tell us whether our Law Colleges are manufacturing too many law graduates.

S. G.—The average number of persons obtaining a law degree, taking the figures for the last three years, is below 200 and I am informed that the average number of enrolments per year is about 160. If the total number of legal practitioners in this Province, advocates and pleaders included, is put at something between 7,800 and 7,900 which, I believe, is a fairly correct figure and assuming that the normal duration of a lawyer's professional career is 25 years, the number needed for replacement alone is 4 per cent. or about 315, which is nearly double the present number of enrolments. Further, there is an increasing volume of work for lawyers, before several kinds of administrative Tribunals like Textile Licensing Authorities, Road Boards and so on. There should, in my opinion, be no curtailment of opportunities in the matter of legal education and on the other hand, we should improve upon the present system of legal education and adjust it to suit the growing needs of society.

V. G.—There has been, Professor, considerable controversy in recent times as to the stage at which legal education may be imparted. Sir Alladi and myself

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have always held the view that the Intermediate examination is too early a stage for commencing law studies. I suppose you agree.

S. G.—I think so too, Judge. The boy's mind is not adequately mature at that stage. But I should think with a preparatory course of one year after the Intermediate examination, legal instruction can usefully start.

V. G.—I suppose you would leave it open to young men to join the law course after their graduation, if they like.

S. G.—Certainly. The mental discipline and culture acquired in preparing for a degree in arts or science will be of the greatest use to the lawyer. But it is not necessary to compel one to spend two or three years for taking a degree, before joining a law college. Many people take a degree in science, expecting to make a living thereby but since the country is not able to asborb all of them or find useful work for them I am not for placing any embargo against their taking to law at that stage, if they wish to. They would no doubt have lost a year or two, but that is their lookout.

SIR A.—Are you, Professor, for the continuance of the two year academic course in law or are you for a three year course? This again, as you know, has been the subject of acute controversy.

S. G.—I am for a three year course, particularly as the scope of studies has necessarily to be enlarged in view of the needs of the times. There need not be any serious objection to it on the ground of cost, because if the one year's preparatory course suggested by me is accepted, a student can, as at present, get his law degree four years after the Intermediate examination.

V. G.—If the course is to continue to be a two year course, do you suggest any material changes in the curriculum?

S. G.—No. I would not. There are no subjects which can be taken out and none can be added without making the course unreasonably heavy.

V. G.—If it is to be a three year course, what subjects would you add, assuming, as I suppose we must, that all the present subjects for the F.L. and B.L. studies are retained?

S. G.—I would include in the three year curriculum a general study of the Civil and Criminal Procedure Codes, and the attendant rules of practice and procedure and the law of limitation. This part of it, which you may call practitioners' subjects, would be compulsory but in addition to it, I would ask the student to select two out of four optional groups which would be somewhat on the following lines:

(1) International Law, public and private, principally public,

(2) Mercantile Law including Company Law and the Law of Income tax,

(3) Constitutions of specified countries other than India which is already included in the Law Course as a compulsory subject, and

(4) Law of Insolvency and Law of Wills and the Law of Intestate Succession among communities other than Hindu and Mahommedan.

V. G.—If we have a three year course, Professor, would it not be rather burdensome to have a University examination at the end of each year?

S. G.—It would be. Even now a University examination at the end of the first year law course and again at the end of the second year law course, coming as they do, after several University examinations at a prior stage, puts a great strain on our students.

V. G.—What would you suggest?

S. G.—I would not have any University examination at the end of the first year. There would be only two University examinations for the three year course, one at the end of the second year, and the other at the end of the third year.

SIR A.—Would you, Professor, retain the M.L. studies?

S. G.—I would, Sir Alladi. There must, I think, be adequate recognition of and support for a higher knowledge of law. Whether a M.L. Degree would have any remunerative value is more than I can say, but the Universities should, it seems to me, encourage higher studies in law by continuing to provide for a Master's degree and a Doct rate in law. The academic branch of the law has its part to play along with the Bench and the Bar. Don't you think so, Judge?

V. G.—I agree. In fact I have been wondering whether it is not high time that we have a University Law Chair.

S. G.—I am glad to tell you, Judge, that the idea is on the tapis and the Board of Studies in Law has put up proposals for a Department of Law in the University. It is proposed to make a start with Constitutional Law and International Law. But there is always the problem of Finance. I hope the Government and the public will help the University to achieve its object ere long.

V. G.—There is then, I suppose, the vexed question of making apprenticeship at law really useful and effective. I am sure Sir Alladi will have something enlightening to tell us.

SIR A.—This is one of those things which are mostly dependent upon the human factor. The problem can only be solved if masters and pupils are both enthusiastic, I would say particularly the masters. The problem can be satisfactorily solved only if there is a genuine enthusiasm among senior practitioners that our young men should get the best training during their apprenticeship, so that they may keep up the efficiency of the Bar.

V. G.—I do not know if the Professor could not help us.

S. G.—I am just thinking whether, apart from such benefits as they may get, by attending the master's chambers and the Courts, apprentices could not be given some practical coaching under properly selected tutors in Madras and a few moffusil stations in the matter of drafting pleadings and memoranda of appeals, preparing briefs and witness's proofs. What I mean is, a clever young lawyer with fair experience could make the apprentices do a certain number of draft plaints and so on and point out the defects and how they should be remedied. I do not, of course, deny that these have got to be learnt in the stern school of experience but the technique of a lawyer's professional work admits of a systematic preliminary instruction.

V. G.—It is a suggestion which should be seriously considered by the Bar Council. There is, of couse, the question of cost.

S. G.—This work of the Bar Council is entirely educational and Government should give a grant on that basis either from enrolment fees, which the Government is collecting or from general revenues. Also, if the teaching of the processual law is part of the University course, it would relieve the Bar Council of some of its present expenditure.

V. G.—What about the reconstitution of the Bar? There are particularly two questions so often discussed but on which no conclusions have ever been reached, tentative or otherwise. Firstly whether it is desirable to have the double agency and secondly whether we should not have differentiation between senior advocates and junior advocates somewhat on the lines of the silks and the stuff gownsmen in England.

Do you advise, Sir Alladi, the introduction of the double agency system in the moffusil?

SIR A.—I am definitely against it. The double agency which compels every litigant to engage two practitioners, an advocate and a solicitor, is in my opinion, too costly for our people having regard to their economic condition. It would be the height of oppression, for instance, to say that a litigant who has a criminal

case in the Magistrate's Court or a small cause suit in the District Munsiff's Court, should have to engage two legal men.

V. G.—I suppose your objection holds good even if we should have a fixed scale of fees for the solicitor also.

SIR A.—Yes it would.

V. G.—How about the High Court?

SIR A.—I am against the introduction of the double agency on the appellate side of the High Court or in the City Civil Courts or in the Small Cause Courts or in the Presidency Magistrate's Courts for the same reason. I am not however prepared to rule it out altogether, so far as the Original Side is concerned, but I would suggest that the Chambers of Commerce and other concerned bodies may first be consulted.

V. G.—Don't you think, a differentiation between senior and junior advocates would be salutary and helpful?

Sir A.—I agree. While a minimum standing of 10 years should be insisted upon for enrolment as a senior advocate, it should not be open to every practitioner of 10 years' standing to claim, as of right, that he should be enrolled as a senior advocate, as it happens for instance, in the Federal Court. The High Court must be satisfied that the advocate deserves to be so enrolled by the extent of his practice, and his ability and his integrity. In the case of moffusil practitioners also the High Court must be similarly satisfied though, it must for that purpose, depend to a certain extent upon the opinion of the District Judge.

V. G.—I presume you would recommend the differentiation of senior and junior practitioners both for Madras and the Moffusil.

SIR A.—Yes.

V. G.—Am I also right in thinking, Sir Alladi, that you would impose upon a senior advocate the disability of not being permitted to appear without being instructed by a junior advocate, just in the same way as a King's Counsel, who cannot appear without being supported by an utter barrister?

SIR A.—I would impose the same restriction. Don't you think, Judge, this differentiation between senior and junior advocates would put more money into the pockets, particularly of our junior advocates?

V. G.—I fully agree, Sir Alladi. But what would you say about the proportion between the senior's fee and the junior's fee. Don't you think—1/3rd is rather low?

SIR A.—You may perhaps put it at a half but more than that would press harshly upon the litigant and would only lead to evasion and friction.

V. G.—Have you, Sir Alladi, any suggestion to make about helping our young lawyers to develop into good advocates?

SIR A.—One thing I can immediately suggest. In very many cases it should be easy for a senior to open the case and map it out, so to say, and then do some specified portions himself, leaving the other points to his junior.

V. G.—I do not see why it could not be done, provided of course, there is no overlapping. It would certainly give many more opportunities of learning Court craft to our young men. I suppose, you suggest, in substance, that two counsel should be heard in support of the same side whenever they claim to be so heard.

SIR A.—Exactly. The difficulty as to repetition, which you suggested, Judge, may easily be avoided if the junior is present throughout the hearing, that is to say, even when his senior is arguing.

V. G.—I think what you suggested, Sir Alladi, is actually happening in some cases though certainly not so frequently as you would have it. But, I suppose, you would like to have it almost as an invariable practice.

Now, do you think, Sir Alladi, the State could be helpful to our legal men in any way?

SIR A.—I think it could. Recruitment for instance to the registration department or the magistracy or to any other department, for which a knowledge of law would be useful may be confined to law graduates.

V. G.—Is there not a good deal that the Bar can do for itself? I realise, of course, that that would mean a general change in the attitude and conduct of the several sections of the legal profession.

SIR A.—There too I agree with you, Judge. Junior lawyers must be more ambitious and hard-working, while senior lawyers must not only be more friendly and helpful to the junior lawyers but must, so to say, realise the duty that rests on them of seeing that the succeeding generation of lawyers is at least as good as themselves. The whole thing, of course, requires a fresh orientation.

V. G.—Is there not an impression for which, I think, there is substantial foundation that senior lawyers go on accepting briefs irrespective of their magnitude or the lack of it and that in the matter of fees a minimum worthy of their status is not insisted on? No doubt there have been and are others who rightly insist upon a proper fee.

SIR A.—I cannot deny that there is such an impression as you have outlined. Nor can I say that there is no foundation for it. But these are things which can only be remedied by the Bar generally adopting a proper attitude and there is no way of compelling them to do so.

V. G.—If seniors strictly adhere to their minimum fee, the opportunites of juniors will undoubtedly increase. There is no need to fear that the total earnings of a senior would suffer by this. But they will be relieved of a mass of miscellaneous work. It would be both enlightened self-interest and performance of a duty to the profession, if they adopt this course.

SIR A.—Quite so.

V. G.—Don't you think a sort of trade union spirit without its attendant evils should grow up in the Bar?

SIR A.—I agree it should.

V. G.—Could you account, Sir Alladi, for what, I suppose, is a fact that the Bar is taking less and less interest in public life?

SIR A.—Partly it is due to the present day conditions of public life. Public life, particularly in the political field is a whole time job and cannot therefore be clubbed with the practice of the lawyer's profession.

V. G.—But don't you think that lawyers could guide public opinion on important matters particularly on the several legislative measures that may be in contemplation.

SIR A.—I agree, Judge, that they could, but that would mean a thorough and painstaking study of the problems as they arise without starting with any partisan or preconceived notions. If questions are studied in the manner I suggest by our young lawyers in their study circles, I do agree with you they can play a quiet but important part in shaping public opinion without which democratic institutions will be a failure.

V. G.—The solution of some of the problems we have been discussing would require the co-operation of many persons and let us conclude with the hope that such co-operation will be forthcoming for the common good of the Bar and the Country.

SUMMARY OF ENGLISH CASES.

THE JULIA, (1947) 1 All.E.R. 118 (K.B.D.).

Sale of goods—C.I.F. Contract—Payment made against delivery order—Ship unable to reach destination owing to enemy occupation—Buyer if entitled to recover the price paid as on failure of consideration.

Where under a C.I.F. contract payment has been made against delivery order but the ship is unable to reach the destination owing to enemy occupation and had to be diverted elsewhere where the goods were sold at a lower price by the seller, the buyer is not entitled to recover as money paid on a consideration which had wholly failed. Though the goods were not appropriated and property in it did not pass to the buyer the risk passed to the buyer.

A. G. OF ONTARIO *v.* A. G. OF CANADA, (1947) 1 All.E.R. 137 (P.C.).

British North America Act (1867), *sections* 91, 92 *and* 101 *and Statute of Westminster*, 1931—*Power of Canadian Parliament to establish Supreme Court of Appeal with final jurisdiction—Legislation excluding appeals to Privy Council—Constitutional validity.*

The Canadian Parliament has since the Statute of Westminster 1931, power, to enact that the jurisdiction of its Supreme Court shall be ultimate. The Dominion Parliament is therefore competent to exclude appeals to His Majesty in Council in all cases which can be brought before any Provincial Court in Canada. A proposed Act to so amend the Supreme Court Act is *intra vires* of the Parliament of Canada. Section 101 of the British North America Act confers a legislative power on the Dominion Parliament which by its terms (notwithstanding anything in this Act) overrides any power conferred by section 92 on the Provinces or preserved by section 129 and since the Statute of Westminster, 1931, the power conferred by section 101 stands unqualified and absolute, even to the extent of abrogating the sovereign power of the Imperial Parliament.

R. *v.* COLLINS, (1947) 1 All.E.R. 147 (C.C.A.).

Criminal trial—Sentence—Conviction on two charges of receiving a stolen motor car and stolen suit case and its contents—Outstanding charge of driving a motor car while under the influence of drink—If can be taken into consideration in awarding sentence.

Offences under the Road Traffic Act (*e.g.*, driving a motor car while under the influence of drink) which on conviction might involve disqualification for driving or the indorsement of the licence are not proper cases to be taken into account when sentencing a prisoner for a different class of offence (*e.g.*, receiving a stolen motor car and suit case with its contents). Only if the outstanding charge is for the same class of offence, the Court might take that into account in passing sentence.

ROUTH *v.* JONES, (1947) 1 All.E.R. 179 (Ch.D.).

Contract—Covenant in restraint of trade when valid—Covenant by medical practitioner employed as assistant by a partnership (carrying on business of general medical practitioners) not to practice within 10 *miles for five years after termination of employment—If enforceable.*

A doctor employed as an assistant by a partnership carrying on business of general medical practitioners covenanted *inter alia* as follows :

" The assistant agrees with the principals that he will not during this contract of service save in the employ of the principal nor within the space of 5 years thereafter practice or cause or assist any other person to practise in any department of medicine, surgery or midwifery nor accept nor fill any professional appointment whether whole time or otherwise whether paid by fees, salary or otherwise or whether honorary within a radius of 10 miles from *X* (the business premises). And if the assistant shall so practise or cause or assist any other person to practise within the radius aforesaid or in any way violate this provision, he shall forthwith pay to the

principals or as they shall direct or to their successors in title the sum of £ 100 for every month or part of a month during which he shall violate or continue to violate this provision as ascertained as liquidated damages and not by way of penalty and without prejudice to the right of the principals, or their successors in title to obtain an injunction to restrain such violation . . . . . ."

The appointment was terminable at a month's notice. After the termination of the appointment the assistant who began to practice in the area was sought to be restrained by an injunction.

Held, (after stating the principles) that the covenant even if severable was too wide to be enforced and the restriction could not be justified.

WILLS *v.* BROOKS, (1947) 1 All.E.R. 191 (K.B.D.).

Tort—Defamation—Libel against Trade Union of "rigging" a ballot—Union if can sue.

An article appeared in a newspaper with regard to a ballot in a particular trade union headed, "True to Type? . . . . . Long and successful practice in the manipulation of the undemocratic "block vote" has made trade unions experts in devising ballots guaranteed always to give a desired result." In an action for damages for libel by the secretary of and by the Trade Union itself against the editor, publishers and printers of the newspaper it was contended that the Union as a whole had no cause of action since the article in question was an accusation not against the Union but against its officers.

Held, that the action by the trade union is sustainable. There is no difference between a trade union and a limited company in this respect and a trade union cannot be divided into different parts consisting of various of its members so as to deprive it of its right to sue if it is libelled.

Manchester Corporation v. *Williams*, (1891) 1 Q.B. 94, not followed. Fraser on Libel and Slander, 7th edition, p. 90, approved.

National Union of General and Municipal Workers v. *Gillian*, (1946) 1 K.B. 81, applied.

GODWIN *v.* STORRAR, (1947) 1 All.E.R. 203 (K.B.D.).

Costs—Consent order with provision for "Taxation as between solicitor and client" —Scope—R.S.C., Order 22, rule 14 (11).

"Taxation as between solicitor and client" means an inquiry as to the costs which a client ought properly to pay to his own solicitor as distinct from "taxation between party and party" which is an inquiry as to the costs which he should recover from the opposite side. It cannot be construed to mean only an inquiry as to the costs to be paid to the solicitor out of a common fund in which the client and others are interested, and is substantially a taxation between party and party but on a more generous scale.

WICKS *v.* DIRECTOR OF PUBLIC PROSECUTIONS, (1947) 1 All.E.R. 205 (H.L.).

Emergency Powers (Defence) Act (1939)—Offence under temporary statute—Provision that expiry of Act shall not affect the operation thereof as respects things previously done or omitted to be done—Effect on trial of offence after expiry of Act—Regulation validly made under Act—Scope.

The provision in section 11 (3) of the Emergency Powers (Defence) Act, 1939, providing "The expiry of this Act shall not affect the operation thereof as respects things previously done or omitted to be done" preserved the right to prosecute

for offences under the Act even after the date of the expiry of the Act. When a statute like the Emergency Powers (Defence) Act, 1939, enables an authority to make regulations a regulation, validly made under the Act should be regarded as though it were itself an enactment. *Willingdale* v. *Norris*, (1909) 1 K.B. 57, approved. (1946) 2 All.E.R. 529, affirmed.

APLEY ESTATES CO. *v.* DE BERNALES, (1947) 1 All.E.R. 213 (C.A.).

Tort—Joint tort-feasors—Agreement by plaintiff not to sue one—Effect on liability of others to be sued.

A release granted to one of two joint tort-feasors or joint debtor, operates as a discharge of the other joint tort-feasor or other joint debtor, the reason being that the cause of action, which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released. But a covenant not to sue one of two joint debtors or joint tort-feasors does not operate as a release of the other.

WILKIE *v.* LONDON PASSENGER TRANSPORT BOARD, (1947) 1 All.E.R. 258 (C.A.).

Tort—Negligence of conductor—Injury to free pass holder attempting to board bus which started before he could get in—Clause in pass excluding liability for any damages—Effect on right of injured to damages—Road Traffic Act, section 97—Applicability.

The plaintiff was the holder of a free pass issued to him as an employee of the defendants, the London Transport Board. While attempting to board a bus he was thrown off because of the conductor who sounded the bell and thereby gave notice to the driver to proceed without taking due care to see that every intending passenger was safely on the bus. In an action for damages for injuries sustained,

Held : The giving or receiving of the pass will not constitute a contract for the conveyance of the plaintiff. It merely made the plaintiff a licensee and the condition in the pass excluding all liability for negligence, is a term or condition of the licence and if any one makes use of the licence he can only do so by being bound by the condition. Accordingly, section 97 of the Road Traffic Act will not apply to make the term invalid. By attempting to board the bus the plaintiff was using the pass and it cannot be said that he was an ordinary passenger till he showed the pass to the conductor or was seated in the bus.

LEAN *v.* ALSTON, (1947) 1 All.E.R. 261 (C.A.).

Practice—Collision between motor car and motor cycle causing death of motor cyclist and injury to pillion rider—Claim by pillion rider against car owner for damages—Claim to contribution from estate of deceased motor cyclist—Power of Court to appoint representative and implead him as third party—R.S.C. O. 16 *r.* 46.

In a collision between a motor cycle and a motor car the motor cyclist was killed and the pillion rider injured. In an action by the pillion rider for damages against the owner of the motor car who claimed right to contribution from the estate of the deceased motor cyclist,

Held, that the Court can appoint a representative of the deceased and add him as third party to the action though the deceased was not a party to the original action.

SUMMARY OF ENGLISH CASES.

BRIERLEY *v.* PHILIPS AND ANOTHER, (1947) 1 All.E.R. 269 (K.B.D.).

Control orders—Eggs (Control and Prices) Order, 1946—*Sale of eggs to "consumers" at above a maximum price made an offence—Purchaser for purpose of hatching—If "consumer"—Sale of eggs for hatching at above control prices—If offence—Necessity for clarity in the orders creating criminal offences pointed out.*

The scheduled price at which eggs could be sold to consumer was 2*s*. a dozen according to the Eggs (Control and Prices) Order, 1946. In a charge against the seller as well as purchaser in respect of sale of some eggs at 10*s*. a dozen for hatching it was contended that the purchaser was a "consumer" and both purchaser and seller were guilty of a criminal offence.

Held, that the ordinary meaning which would attach to the word "consumer" in relation to eggs is "a person who is going to eat the egg or to use the egg in the process of cooking in his own house". A person buying eggs to put a hen on it to hatch is not a "consumer" and the charge must therefore fail.

Courts will not be prepared to support orders and find people guilty of criminal offences when the orders which they are charged with violating are couched in language which is open to all sorts of meanings and causes all sorts of difficulties, so that the unfortunate people cannot know whether they are acting legally or not, unless possibly they get counsel's opinion or at any rate a solicitor's advice. It is desirable that orders creating offences should be stated in language which the persons who may commit the offences—in this case, humble people like cottagers—can understand.

Re DIXON, LTD., (1947) 1 All.E.R. 279 (Ch.D.).

Companies Act (1929), *section* 294—*Avoidance of dissolution—Form of order for revesting property in the company.*

The words in section 294 that the Court had power to declare "the dissolution to have been void" must be read as enacting that the Court is given power effectively to declare the dissolution to have been void. If the Court makes a declaration to the effect that the dissolution is void, the declaration is not that dissolution was void at the date of the order, or that it is to be deemed to be so void, or that it is to become void, or anything of that kind. The declaration is that the dissolution was void at the time when the company was supposed to have been dissolved and all the consequences under the statute or otherwise which flow from that arrest themselves and are avoided. Any property assumed to have vested under section 296, did not so vest, the vesting being avoided by the order.

CALVERT (INSPECTOR OF TAXES) *v.* WAINRIGHT, (1947) 1 All.E.R. 282 (K.B.D.).

Income-tax—Taxicab driver—Tips received by—If assessable to income-tax.

Tips received by a taxicab driver in the ordinary way are assessable to income-tax as such tips arose out of his employment and were given as a reward for services, though such payments may be voluntary.

[END OF (1947) I M.L.J.]