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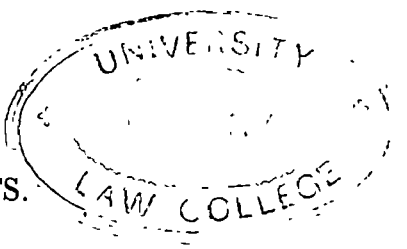

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THE
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II] JULY. [1948

AGRICULTURAL LEASES IN MALABAR—NOTICE TO QUIT.

BY

M. VELAYUDHAN NAIR, ADVOCATE.

A point of some importance in the tenancy law of Malabar fell to be decided by the High Court in the recent case in *Narayanan Nair* v. *Kunhan Mannadiar*[1]. The learned Judges (Gentle, C.J. and Rajamannar, J.) held in this case that section 14 of the Malabar Tenancy Act only mentions the grounds entitling the landlord to evict a cultivating verumpattomdar from the holding and that before the landlord sues for eviction, he must terminate the tenancy. That, the learned Judges observe, is done either by effluxion of time or by determination of a lease providing for forfeiture or by a notice to quit in accordance with law. In the case before them the lease deed did not contain a provision by which the lease became terminated or forfeited upon the lessee granting a sub-lease or upon rent falling into arrear. The landlord did not send a notice to quit before suit. There was only an allegation of an oral demand for surrender which was held to be insufficient and the suit was dismissed on the ground that the lease, which had become one from year to year by the tenant holding over, had not been determined by a notice to quit. It would seem that in their Lordships' view a notice such as is prescribed in section 106 of the Transfer of Property Act is necessary to determine all agricultural leases in Malabar, even cases falling under section 14 of the Malabar Tenancy Act. The learned Judges say at page 562 "Since the lease date is May 15th, a notice terminating the lease, which clearly was one from year to year must expire on that day, whatever period of notice was required, whether six months or a less period is necessary, in a notice to quit terminating an agricultural lease. No such notice was ever in fact given."

It is to be observed that the case before the learned Judges did not really fall under section 14 of the Malabar Tenancy Act, for, although eviction was claimed by the landlord on the ground of non-payment of rent (ground No. 3 of section 14) it was found as a fact that the 1st defendant who was the representative-in-interest of the lessee had sub-leased one of the four items of the property in suit to defendants 6 to 12 and as he was not cultivating the whole holding he was clearly not a "cultivating verumpattomdar" entitled to claim fixity of tenure under section 10. But section 14 relates only to suits for eviction of a "cultivating verumpattomdar" at the instance of his immediate landlord.

In view of the finding in the case that the 1st defendant was not a "cultivating verumpattomdar" to whom the provisions of sections 10 and 14 would not apply, it is clear that the suit did not fall under section 14 of the Tenancy Act and the observations of the learned Judges regarding the necessity of terminating the lease by a notice to quit before suit should therefore be understood as applying only to suits for eviction which do not come under section 14 of the Act.

Two points arise for consideration. (1) Whether a notice conforming to the requirements of section 106 of the Transfer of Property Act has to be sent to determine an agricultural lease in Malabar? (2) Whether in cases falling under clauses (1) to (4) and (7) of section 14 of the Malabar Tenancy Act the landlord is entitled to claim eviction even before the end of the agricultural

1. (1947) 2 M.L.J. 559.

year and whether in such cases a notice to quit has to be sent before a suit for eviction is filed?

Point No. 1.—It would seem that according to the learned Judges who decided the recent case in *Narayanan Nair* v. *Kunhan Mannadiar*[1], a notice to quit such as is prescribed in section 106 of the Transfer of Property Act is necessary to determine an agricultural lease in Malabar and a notice conforming to the requirements of that section has to be sent before a suit for eviction is filed even in cases arising under section 14 of the Malabar Tenancy Act. This view is not, however, reconcilable with the law laid down in the earlier decisions where the point directly fell to be decided. In the case of ordinary agricultural leases it has been held that a six months' notice cannot be insisted upon and that the exact synchronising of the date fixed for surrender in the notice with the date of the termination of the period of the lease is also not necessary, and all that is required is only a reasonable notice. (Vide *Gangadharan Pattar* v. *Manavikraman*[2] and *Jaru Pujari* v. *Somakke*[3]. "What is reasonable notice", says Fielding, J., in the case in *Jagut Chunder Roy* v. *Rup Chand Chango*[4], "is a question of fact which must be decided in each case according to the particular circumstances and the local customs as to reaping crops and letting the land". In the case in *Gangadharan Pattar* v. *Manavikraman*[2], which was an ordinary verumpattom lease in Malabar, the lease was dated 9th March. The notice was dated 16th January 1913 and the notice called upon the tenant to quit on or before the 26th February 1913. Under the contract of lease the entire rent was payable before the end of Makaram which is prior to 26th February and both dates were clearly after the end of the cultivation season. It was held that the notice to quit was reasonable and valid. In the case of *Jaru Pujari* v. *Somakke*[3], the defendant held the property under a Chalgeni Chit dated 30th May, 1915. He held over and the landlord sent a notice of eviction on 27th November 1917 asking the tenant to surrender by the following Vishu-Samkrama (12th April 1918). It was held that Vishu-Samkrama is the customary day for termination of agricultural leases in South Canara and the notice to quit was reasonable and in accord with the custom of the country. It is to be observed that a notice to quit, such as is prescribed in section 106 of the Transfer of Property Act has to be sent to determine even leases governed by that Act only in the absence of a contract or local law or usage to the contrary. Section 117 of the Transfer of Property Act excludes the provisions of sections 105 to 116 of that Act from application to agricultural leases, but the principles, embodied in those sections are applied to agricultural leases as rules of justice, equity and good conscience. (Vide *Krishna Setty* v. *Gilbert Pinto*[5] and *Umar Pulavar* v. *Dawood Rowther*[6]. In the case in *Jaru Pujari* v. *Somakke*[3], His Lordship Mr. Justice Madhavan Nair points out that the dictum of the Full Bench in *Krishna Setty* v. *Gilbert Pinto*[5], that the Legislature wisely refrained from making those sections (105 to 116 of the Transfer of Property Act) applicable *proprio vigore* to agricultural leases for fear of unnecessarily interfering with settled usages which it is undesirable to disturb, shows that the existence of usages and customs would be a special reason for not applying the provisions of the Act (Transfer of Property Act) and the rules of the English Law to agricultural leases. In *Achuthan Nair* v. *Madhavan Nair*[7], the landlord who claimed eviction of the holding for his own cultivation under section 14, clause (5) of the Malabar Tenancy Act, sent a notice of eviction calling upon the tenant to vacate the land by the 11th of March, whereas section 14, clause (5) of the Act permits the landlord to have the land only from the end of an agricultural year. His Lordship Mr. Justice Horwill observes that it is only a small matter and that although the landlord cannot have the land on the 11th of March his

1. (1947) 2 M.L.J. 559.
2. (1917) 33 M.L.J. 512.
3. A.I.R. 1925 Mad. 346.
4. (1882) I.L.R. 9 Cal. 48.
5. (1919) 36 M.L.J. 367 : I.L.R. 42 Mad. 654 (F.B.).
6. (1946) 2 M.L.J. 229.
7. (1945) 2 M.L.J. 13.

demand can be complied with on the 30th March. It would seem that the date "30th March" in the judgment is a mistake for 14th or 15th March for according to the definition in section 3, clause (*a*) of the Malabar Tenancy Act, "agricultural year" means "the year commencing with the 15th of March in any calendar year and ending with the 14th of March of the following calendar year ....."

Point No. 2.—Section 14 of the Malabar Tenancy Act provides that no suit for eviction of a cultivating verumpattomdar shall lie at the instance of his landlord except on the grounds mentioned therein.

As the learned Judges point out in the recent case in *Narayanan Nair* v. *Kunhan Mannadiar*[1], section 14 only specifies the grounds which will justify eviction of a cultivating verumpattomdar upon whom fixity of tenure is conferred by section 10. Section 10 expressly provides that the fixity of tenure conferred by it is subject to eviction "as provided in this Act." In other words, whereas before the enactment of the Malabar Tenancy Act the landlord could evict all kinds of tenants arbitrarily, without assigning any grounds or reasons whatsoever, a "cultivating verumpattomdar" cannot now be evicted by his immediate landlord on any grounds other than those mentioned in section 14. Tenants who are not "cultivating verumpattomdars" within the meaning of the Act are, however, liable to be evicted as before without assigning any grounds therefor.

The grounds of eviction mentioned in section 14 fall under 2 categories. (1) Those that involve misconduct or default on the part of the tenant. (2) Those that are personal to the landlord. The grounds mentioned in clauses (1) to (4) and (7) of section 14 fall under the 1st category and those mentioned in clauses (5) and (6) fall under the 2nd category. In cases falling under the second category [clauses (5) and (6)] it is clear that a notice claiming surrender of the holding by the end of the agricultural year is necessary before the landlord files a suit for eviction, although the exact synchronising of the date fixed for surrender in the notice with the date of the termination of the agricultural year is not strictly necessary. (Vide *Achuthan Nair* v. *Madhavan Nair*[1].) In cases falling under the 1st category [clauses (1) to (4) and (7)] such a notice (to quit by the end of the agricultural year) cannot be considered to be necessary. For, the grounds mentioned in clauses (1) to (4) and (7) are really grounds entitling the landlord to treat the lease as forfeited. They are in fact cases of determination of the lease by forfeiture. In the unreported case S.A. No. 376 of 1942 (*Kochunny Nair* v. *Chimmukutty Ammal*[3]), where the landlord claimed eviction on the ground of non-payment of rent (ground No. 3 of section 14) His Lordship Mr. Justice Happel held that no notice of termination of lease before suit is necessary. It is to be observed that in cases falling under clauses (3) and (7) of section 14 (non-payment of rent and failure to furnish security for fair rent) the landlord cannot get an absolute or indefeasible right to evict the tenant by sending a notice showing his intention to determine the lease, for in those cases the forfeiture is treated as a mere security for the due payment of rent and is relievable by the deposit of the arrears of rent and costs and by the deposit of one year's fair rent or by furnishing security for the same and by the deposit of the cost of the suit as provided in clauses (3) and (4) of section 15. Sending of such a notice in such cases is unnecessary and would be altogether otiose. In the case, however, of forfeiture of the lease incurred by the tenant doing any of the acts mentioned in clauses (1), (2) and (4) of section 14, the forfeiture is not relievable and the landlord is entitled to insist that he should be given a decree for eviction. In such cases no relief against forfeiture is available and the legal forfeiture takes effect. The acts mentioned in clauses (1), (2) and (4) of section 14 constitute breaches of some of the fundamental obligations of the lessee which are implicit in the relationship of landlord and tenant and upon the tenant doing any of those acts the landlord would be entitled to treat the tenancy as at an end and claim immediate eviction—even be-

1. (1947) 2 M.L.J. 559.
2. (1945) 2 M.L.J. 13.
3. (1943) 1 M.L.J. (S.N.) 8.

fore the end of the agricultural year. If the tenancy would thus determine *ipso facto* (by forfeiture) by the tenant doing any of the acts mentioned in clauses (1), (2) and (4) of section 14, it would appear to be a contradiction in terms to say that the lease must be determined by a notice to quit by the end of the agricultural year or a notice to quit conforming to the requirements of section 106 of the Transfer of Property Act. On forfeiture the lessor has the same right of ejectment as he would have if the lessee's term had been otherwise determined. It has been held in the case in *Provat Chandra Syam* v. *Bengal Central Bank, Ltd.*[1] that a forfeiture clause can be availed of even before the end of the agricultural year and no particular form of notice is necessary to terminate a tenancy forfeited according to a covenant in the lease. Determination of the lease furnishes no doubt, the cause of action for a suit in ejectment. Sending of a notice to quit is, however, only one of the modes of determining a lease. [clause (*h*) of section 111 of the Transfer of Property Act]. A lease determines by forfeiture also and the amended section 111, clause (*g*) of the Transfer of Property Act provides for the sending of a notice by the landlord showing his intention to determine the lease in cases where the lease determines by forfeiture as mentioned in the section. It will be observed, however, that the notice insisted upon in section 111, clause (*g*) is quite different from the notice to quit mentioned in clause (*h*) which must conform to the requirements of section 106. The notice mentioned in clause (*g*) of section 111 is only an intimation by the landlord of his election to determine the tenancy. It need not comply with the requirements of section 106. All that is necessary is that the landlord should unequivocally express his intention to determine the lease. (Vide *Manavikraman Thirumalpad* v. *Noor Muhammad Sait*[2].)

Even a notice showing the landlord's intention to determine the lease on the analogy of section 111, clause (*g*) of the Transfer of Property Act does not seem to be necessary in a case falling under clause (3) of section 14 of the Malabar Tenancy Act (non-payment of rent within three months from the due date). Reference may be made in this context to the new section 114-A of the Transfer of Property Act the operative portion of which runs as follows:—

"Where a lease of immoveable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may, re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—

(*a*) specifying the particular breach complained of; and

(*b*) if the breach is capable of remedy, requiring the lessee to remedy the breach;

and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.".

As pointed out already, the forfeiture incurred by non-payment of rent is a forfeiture that is remediable and relievable (*vide* section 114 of the Transfer of Property Act and section 15, clause (3) of the Malabar Tenancy Act) and though under the terms of the operative portion of section 114-A extracted above, a suit in ejectment would not be maintainable unless the notice provided in the section is sent to the tenant the proviso to section 114-A shows that no such notice is necessary. The proviso is as follows:—

"Nothing in this section shall apply an express condition against the assigning, underletting parting with the possession, or disposing, of the property leased, or to an express condition relating to a forfeiture in case of non-payment of rent."

If it is not necessary to send a notice requiring the tenant to remedy the breach (*i.e.* to pay up the arrears of rent due) before a suit in ejectment is filed in a case where the lease determines by forfeiture for non-payment of rent, *ex-hypothesi* it would seem to be not quite logical to hold that a notice to quit in terms of section 106 of the Transfer of Property Act or by the end of the agricultural year or a notice showing the landlord's intention to determine the lease is necessary before the landlord files a suit in ejectment upon ground No. 3 of section 14 of the Malabar Tenancy Act.

1. I.L.R. (1938) 2 Cal. 434. 2. (1921) 41 M.L.J. 265.

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II] SEPTEMBER. [1948

THE PROPOSED ABOLITION OF THE ORIGINAL SIDE OF THE HIGH COURT

BY

N. SUBRAMANYAM, ADVOCATE.

It is disclosed from the proceedings of our local Legislative Council that there is a proposal to abolish the Original Side of the Madras High Court and that the matter is under consultation with the Honourable Judges. It is sad to contemplate that this institution with over eighty years of glowing history and tradition and which always has been inspiring the respect and confidence of the lawyer and the litigant should be thought fit to be lopped off as if it were an unnecessary or superfluous limb of the administration of justice. Under the Letters Patent of Queen Victoria, the three High Courts were established in Madras, Bombay and Calcutta with Original Side jurisdiction; it was even then recognised that the traditions, customs, manners, methods of business of big commercial organisations with direct contact with foreign firms with their own law merchant of an international nature and other conditions obtaining in these three important sea-coast capitals of the three big Presidencies needed a different manner of administration of justice from that of the other parts of the country. In recognition of this aspect we have in India, a Presidency Towns Insolvency Act, a Provincial Insolvency Act, a Presidency Small Cause Courts Act, a Provincial Small Cause Courts Act, a City Municipal Act and a District Municipalities Act. Even under the Transfer of Property Act, the mortgage by deposit of title deeds has been recognised in the City to meet business requirements. Things are not altered today to justify a levelling up of these two systems and on the other hand the attraction of the people being now more towards cities, the present system may have to be rigidly maintained and if need be extended to other growing cities. The Original Side of the High Court is a court of record. Besides its civil, criminal, testamentary, matrimonial, admiralty and ecclesiastical jurisdictions, it has an extraordinary jurisdiction by which it can transfer to itself any case from other parts of the Province when in the interests of justice it is found necessary, and within our memories such instances have taken place. Under the Original Side Rules the machinery is provided for cheap and expeditious disposal of commercial causes and procedure, such as Originating Summons, Garnishee Summons and Third Party Procedure, have been evolved to enable parties to obtain directions, without recourse to costly legal proceedings. It has practically an exclusive jurisdiction in Company matters and the applications of a complex nature such as writs disposed of by the Judges on the Original Side cannot be handled so effectively by inferior Courts. It has certain powers, privileges and prerogatives to issue writs in matters of *Habeas Corpus*, *Certiorari*, *Quo Warranto*, *Mandamus*, etc. There is a dignity and prestige about it which make the people confident of its inviolability and feel a sense of security of their rights. The framers of our Constitution have recognised this fact and they have preserved intact all the powers of

the High Courts and all its privileges and prerogatives as the High Courts are the guardians and protectors of the fundamental rights of the people. There seems to be no substantial reason to abolish the Original Side and such an attempt has been disapproved by eminent leaders of the Bar like Mr. T. R. Venkatarama Sastriar and Sir Tej Bahadur Sapru. The Madras Advocates' Association unanimously pleaded in one of the resolutions at a special meeting that the Government should at least defer this reform until all the High Courts discuss it on an All-India basis. It behoves our Honourable Judges, many of whom are from the Bar, and some with original side experience, also to bestow thought before they make their recommendations on this question.

It may be that the Government is prompted by a desire to effect reduction of expenses to the litigant or to economise the judicial administration. In view of the ever-increasing court-fees and stamps on documents, one is led to infer that the Government is not kind-hearted to the litigant. The *ad valorem* fee levied under the Court-Fees Act, especially in this Province, is shockingly excessive as pointed out by Sir Lionel Leach in his farewell address to the Madras Bar and to the several Bar Associations in the country. And again, the Stamp Act has been amended so as to step up the duty on transfers, although the avowed policy of the law is to encourage transfers of property to be made freely. One may venture to suggest that the object of the State should be to dispense justice on favourable terms to the litigant and not to rackrent the latter with a view to earning revenue for ideological experiments. The cost of litigation on the Original Side of the High Court is cheaper than in the other civil Courts. Let us take suits the values of the claims of which are Rs. 5,001, 10,000, 15,000, 20,000 and 50,000 respectively.. The fee on plaints payable are as follows :

Claim.	*Fee payable in O. S.*	*Fee in other Courts.*
Rs. 5,001	Rs. 240-0-0	Rs. 412-7-0
10,000	265-0-0	712-7-0
15,000	290-0-0	937-7-0
20,000	315-0-0	1,162-7-0
50,000	465-0-0	1,762-7-0

The court-fee in the muffassil is under the Court-fees Act and the fee payable in the High Court (O. S.) is Rs. 225 for the first sum of Rs. 2,500 and Rs. 5 for the remaining Rs. 1,000 or part thereof. About twenty years ago the fee in the Original Side on plaints of any value even a crore of rupees was a flat rate of Rs. 30 only. It was subsequently raised to Rs. 100, then to Rs. 150 and then to the present scale. The process and application fees are higher in the Original Side. The fee for each summons including lodgement in Sheriff's office is Rs. 4. On interlocutory applications, it is Rs. 5 for Judge's Summons and Rs. 10 for a Notice of Motion. There is also a first hearing fee of Rs. 10 for Settlement of Issues and the Hearing fee for each day of trial is Rs. 20. The fee on each exhibit filed is Rs. 2 but in the case of an agreed set of documents a fee of only Rs. 2 need be paid as on one exhibit and this is justified because the time of the Court is not taken in examining the documents in original. There is not much difference in the scale of battas paid to witnesses. If a suit is referred to the Official Referee for taking accounts as in Partnership or Partition actions a hearing fee of Rs. 20 should be paid each day. The fee allowed to the legal practitioners is now practically the same in the City as in the muffassil. The frightening itemised bills of the attorneys have now vanished. With all these higher scales the cost of litigation is cheaper in the Original Side than in the other Courts and the higher the claim, the cheaper it is in the former. A system of low filing fee and a graduated scale of hearing, and exhibit fees is likely to be less harsh on the litigant and will have some relation to the time and trouble taken by the Court in the disposal of cases.

Suppose in the suits referred to above there are two defendants in each, that each trial lasts two days, that ten exhibits are filed in each suit by one party and there

are four Judges' Summons and one Notice of Motion. The total cost of all these will be about Rs. 100. Even so the litigant pays less here than in the muffassil. Let us also suppose that these suits being either Partnership or Partition actions, are referred to the Official Referee and that the trial in each case lasts five working days. The fee payable to this Court will be Rs. 100 in each case and even in the muffassil a party has to pay a commissioner who may be appointed for this purpose. The fee allowed to the advocate in the above suits will be Rs. 350, Rs. 650, Rs. 850, Rs. 1,050 and Rs. 1,650 respectively in the High Court, Original Side and in the muffassil Rs. 350, Rs. 600, Rs. 800, Rs. 1,000 and Rs. 1,600. If all these items are added up it will be seen that the litigation in the Original Side of the High Court is cheaper than in other Courts of the Province and more so where the claim is higher. Further, on the Original Side of the High Court there is this advantage, namely, as cases are once posted in the final list they are tried day by day and the clients can be sure when their cases will be heard and when they will be over instead of going to Courts on several adjourned days only to be told of further adjournments which are usually in the intervals of one or two months.

The Original Side of the High Court has on its files even after the jurisdiction of the City Civil Court was raised to Rs. 5,000 about 500 to 600 civil suits per year on the average and in addition to this there are suits in its Testamentary, Matrimonial and other jurisdictions and as usual very heavy matters under Insolvency and Company Law and other Special Acts which require special handling. There is also the criminal jurisdiction and in every quarterly sessions about 12 to 15 calendar cases are disposed of. If all this volume of work is delegated to an inferior Court or Courts there will be a need for not two but four or more judges to cope with the work which will undoubtedly increase as time goes on owing to the extension of the city, its ever growing population and ever expanding business and industrial enterprises.

On the question whether the Government can effect any economy in the judicial administration by this reform, it is difficult to say anything until the proposed machinery to take over the functions of the Original Side of the High Court is known. A District Court has to be created in any case under the Civil Courts Act and if this Court is to exercise all the several jurisdictions of the Original Side there must be at least two judges on the higher cadre and also two or three in the lower to cope with the work now done by the Master and the two Registrars which are applications on procedural matters, settlement of issues, stamp references, passing of accounts of receivers and and liquidators, taking security, execution matters, taxations, etc. It may be found necessary to create more than one Subordinate Judge's Court as in any other District and divide the work between the District and Subordinate Courts, invest them with different pecuniary jurisdictions and in other ways to see that all the work that is now done by the Original Side of the High Court is fully carried out. In that case the question arises as to what is to be done with the existing City Civil Court. Is it to be made a Subordinate Judge's Court or abolished ? Probably the substituted machinery may not be effective but more complicated. It is worthwhile to point out that after careful investigation the Bombay Ministry has constituted City Civil Courts in Bombay modelled on the Madras Act and have vested them with original jurisdiction up to Rs. 10,000. If ours is a model, why should it be destroyed ?

In the event of the proposed reform being implemented, the staff of the Origina Side may be entirely assimilated in the new Court or Courts and the only saving effected may be in the salaries paid to the judges and other officers. In the Original Side of the High Court, the salaries of the two judges, the Master, the Official Referee, the Crown Prosecutor and the two Assistant Registrars come to about Rs. 11,500 a month and the salaries of the new judges in the District and Subordinate Courts, the sheristadars and the additional officers may be between Rs. 6,000 to Rs. 7,000 and it may be that after all this trouble, the Government may be saving the salary of one High Court Judge.

The only substantial advantage to the Government may be an increase in Court-fee revenue by the *ad valorem* scale of the Court-Fees Act coming into operation but it cannot be said that this is economising. It rather looks like profiteering and one may venture to ask is not revenue from litigation as obnoxious as that from drink according to our idealogies? So it was to advanced thinkers in the West, and it is well to remember that both in Conservative England and Communist Russia there is nothing like this rackrenting of the litigant in the name of court-fees. If the scale of court-fees prevalent in the Original Side is considered low it may be slightly levelled up, while at the same time the taxation of the moffussil litigant is lightened. Similarly, if it is considered that the work of the High Court is increasing on the Original Side that may be a good ground for raising the jurisdiction of the City Civil Court to Rs. 10,000 as in Bombay. But the Original Side should be preserved as a model and inspiration to the Judges, lawyers, and litigants alike. It is hoped that the Government and the High Court will consider this question in all its aspects, bearings and repercussions and drop it as it is an unnecessary measure.

"AGRICULTURAL LEASES IN MALABAR—NOTICE TO QUIT"

BY

V. P. G. NAMBIYAR, B.A., M.L., ADVOCATE.

May I, with respect, point out a misconception that seems to linger in the mind of the writer under the above caption in (1948) 2 M.L.J. (Jour.) 1 in regard to one aspect of the decision in *Narayanan Nair* v. *Kunhan Mannadiar*[1].

In the 2nd paragraph of his article the learned writer observes "It is to be observed that the case before the learned judges did not really fall under section 14 of the Malabar Tenancy Act, for although eviction was claimed by the landlord on the ground of non-payment of rent (ground No. 3 of section 14) it *was found as a fact* that the first defendant who was the representative-in-interest of the lessee had sub-leased one out of the four items of the property in the suit to defendants 6 to 12, and as he was not cultivating the whole holding, *he was clearly not a 'cultivating verumpattomdar'* entitled to claim fixity of tenure under section 10."

If by this statement it is meant to suggest that the finding italicised above was accepted by the Division Bench which decided the Letters Patent Appeal, I beg leave to point out, with respect, that it is a misconception. A perusal of the judgment of the Division Bench would show that it did not address itself at all to the main question whether a cultivating verumpattomdar does or does not cease to be such on sub-leasing a portion of his holding. As one who had something to do with the conduct of the case, may I say that the *ratio decidendi* of the Division Bench ruling was this: assuming, but not deciding, that a cultivating verumpattomdar ceases to be such on sub-leasing a portion of his holding, a suit for eviction of such a person cannot be maintained under the Malabar Tenancy Act; but only under the general law of landlord and tenant, and under that law a notice to quit is indispensable. This reasoning of their Lordships had direct relation to a specific ground about notice to quit which was for the first time raised in Letters Patent Appeal, as will appear from the judgment. No doubt, in considering the question, their Lordships made observations that even a suit for eviction under section 14 must be preceded by a notice to quit. But it is not to be supposed that the main question that called for determination in the case, namely whether a cultivating verumpattomdar does or does not cease to be such on sub-leasing a portion of the holding, has behind it the warrant of a Division Bench ruling. Their Lordships did not address themselves at all to this question which had been fully considered by Shahabuddin, J., from whose judgment the letters patent appeal was preferred, and which was decided only on the question of the need for a notice to quit.

1. (1947) 2 M.L.J. 559.

SUMMARY OF ENGLISH CASES.

Re MILES AIRCRAFT, LTD., (1948) 1 Ch. 188 : (1948) 1 All.E.R. 225 (Ch.D.).

Companies Act (1929), *section 173—Pendency of petition for winding up—Application for order that certain dispositions of property of the company made on the day after the presentation of winding up petition be not void—Sustainability.*

The object of section 173 of the Companies Act (1929) is that if a winding up order is made, any transaction which has been entered into since the commencement of the winding up (the date of the presentation of the petition) is subject to review by the liquidator. On general principles unless there is in progress a winding up by the Court, the Court cannot make any order under section 173 of the Companies Act as to the validity of any disposition of the company's property made after the presentation of the winding up petition. The matter must be left to the liquidator after his appointment. It cannot be said that there is a winding up in progress when the winding up petition is not yet disposed of. For, if the petition is withdrawn or ultimately dismissed, there never will have been a winding up by the Court. If the petition results in a winding up order, it will be for the liquidator to deal with the matter as he thinks proper.

WRIGHT *v.* BENNETT, (1948) 1 All.E.R. 227 (C.A.).

Practice—Frivolous and vexatious action—Second action for conspiracy based on same facts as in prior action for fraudulent misrepresentation and negligence—Abuse of process—Striking out action—Inherent jurisdiction.

Successive actions in respect of the same set of facts would be an abuse of the process of Court and must be set aside as frivolous and vexatious.

The plaintiff who had purchased some property subsequently sued the vendor and the land agent for damages for fraudulent misrepresentation and negligence respectively. Having failed in the action he again commenced a second action setting up in substance the same story against the defendants but alleging fraudulent conspiracy as the cause of action.

Held, that whether or not a plea of *res judicata* will inevitably succeed, the cause of action as alleged in the two actions strictly speaking being not the same, proceeding with the action will be an abuse of process of Court and the defendant's application for striking out the pleading should succeed.

Re WINGHAM, (1948) P. 138 : (1948) 1 All.E.R. 208 (P.D.A.).

Will—Soldier's will—When privileged—"Actual military service"—If includes training in operational duties.

The testator entered the Royal Air Force in February, 1940. In October 1942, he was sent to Canada for training in operational duties. On March 1, 1943, while stationed at North Battleford, Saskatchewan, he executed a will which did not comply with the provisions of the Wills Act. On August 11, the deceased met his death while flying on duty in Canada in the course of his training for operational duties.

Held, he was not "in actual military service" within the meaning of section 11 of the Wills Act and was not entitled to make a privileged will. What amounts to "actual military service" discussed.

HILL *v.* BUTTERLEY CO., (1948) 1 All.E.R. 233 (C.A.).

Workmen's Compensation—Accident to workman on his way to "clock in" before starting work—If in course of employment—Public allowed to use pathway where accident occurred—Effect.

Before reaching the place of work to which the workman was proceeding for "clocking in" before starting work the workman slipped on the ice in the pathway and was injured. The pathway though private and not a thoroughfare was allowed to be used by the public by employer.

Held, the workman was entitled to compensation as the accident must be deemed to have occurred in the course of his employment. The risk cannot be said to be identical with the risks incurred by members of the public in a public street as in an ordinary street accident.

Re COGHILL, DRURY *v.* BURGESS, (1948) 1 All.E.R. 254.

Will—Construction—Codicil exonerating "all persons from repayment of moneys owing to me at the time of my death"—Only unsecured debts excused thereby.

By a codicil the testatrix declared "I exonerate all people from the repayment of moneys owing to me at the time of my death" The codicil was drawn up without any professional assistance by the testatrix herself. On a construction of the will,

Held the testatrix meant to forgive personal debts and did not mean to give up securities for money. Accordingly secured debts were not forgiven.

HARDING *v.* PRICE, (1948) 1 All.E.R. 283 (K.B.D.).

Crimes—Mens rea—*Failure of motor car driver to report accident of which he had no knowledge—If offence—Road Traffic Act* (1930), *section* 22 (2).

Where the driver of a vehicle to which a trailer was attached did not know that there had been an accident caused by the trailer colliding with another car and so, did not report the accident to a police station as required by the Road Traffic Act, he cannot be held to be guilty of an offence. The offence created by section 22 (2) of the Road Traffic Act, 1930, falls within the general rule that absence of knowledge or state of mind known to lawyers as *mens rea* affords a defence to a criminal charge.

R. *v.* SOANES, (1948) 1 All.E.R. 289 (C.A.).

Crimes—Charge of murder—Plea of guilty of infanticide—Duty of prosecution and Court.

While it is impossible to lay down a hard and fast rule in any class of case as to when a plea for a lesser offence should be accepted by counsel for the Crown—and it must always be in the discretion of the Judge whether he will accept it—where nothing appears on the depositions which can be said to reduce the crime from the more serious offence charged to some lesser offence for which, under statute, a verdict may be returned, the duty of counsel for the Crown would be to present the offence charged in the indictment leaving it as a matter for the jury, if they see fit in the exercise of their undoubted prerogative,

to find the lesser verdict. When there was nothing disclosed in the depositions which would have justified a reduction of the charge (against a woman) from murder to infanticide, the Judge is bound to insist on the prisoner being tried for murder.

NAAMLOOZE VENNOOTSCHAP *v.* BANK OF ENGLAND, (1948) 1 All.E.R. 304 (Ch.D.)

Practice—Plaintiff residing out of jurisdiction—Order for security for costs of defendant—Such defendant also residing out of jurisdiction—If can be ordered to give security for plaintiff's costs.

It cannot be said that where the plaintiff is resident out of jurisdiction and one or more of the defendants are resident out of the jurisdiction, then notwithstanding that the plaintiff could not, in the first place, ask for an order for security for costs against the defendants, yet, if the defendants, apply for an order for security it is only equitable that the plaintiff should himself be given an order against the defendants for security for costs. In the case of a foreign plaintiff, the order is made to give some modicum of protection to the defendant, whether he be resident within or out of jurisdictions in case the action should fail. On the other hand a man should not be compelled to provide security for costs as the price of defending himself and his rights, unless the defendant is in substance in the position of a plaintiff: (1891) 3 Ch. 458, considered.

DENNIS *v.* LONDON PASSENGER TRANSPORT BOARD, (1948) 1 All.E.R. 779 (K.B.D.)

Tort—Tramcar running into ambulance car and injuring an attendant—Claim by injured against owners of tramcar for damages—Amounts paid as pension and sick allowances to plaintiff by his employers—If to be included in the damages.

The plaintiff was employed by the London County Council as an ambulance attendant. A motor ambulance in which he was travelling was run into by a tramcar belonging to the defendants and he was injured as a result of the negligence of the driver of the tramcar. In a claim for damages,

Held, a wrong doer is not to be allowed to reduce damages for loss of wages by the fact that other persons had made up to the plaintiff his wages—his own employer paying pension and sick allowance equal to wages which he was morally bound to repay if he recovered damages.

R. *v.* NOWELL, (1948) 1 All.E.R. 794 (C.C.A.).

Criminal Trial—Driver of motor car charged with being drunk—Consenting to examination by police doctor after being told by him that it may be to his advantage—Evidence of police doctor as to his drunken condition—Admissibility.

The appellant was seen by the police officers to drive his car on the wrong side of the road and without lights at night. He appeared to be drunk and the officers took him to the police station and the person in charge of the station on being told of the charge informed the appellant that a doctor would be sent for to examine him. A police doctor attended and examined the appellant and certified that owing to his consumption of alcohol, he was in an unfit state to drive a motor car and was properly charged with the offence. He allowed himself to be examined after the doctor explained that it might be in his own interest. In a prosecution of the appellant,

Held, the words of the doctor cannot be regarded as an inducement to do something so as to bring into operation the law which excludes confessions made as the result of persuasion, promises or threats. The evidence of the doctor whether he be police surgeon or any one else should be accepted as the evidence of a professional man giving independent expert evidence with no other desire than to assist the Court.

Re Fox, (1948) 1 All.E.R. 849 (Ch.D.).

Bankruptcy—Goods in possession of bankrupt—When available for distribution among creditors on the principle of reputed ownership.

The conditions essential to the operation of the " reputed ownership " section of the Bankruptcy Act are that the true owner of the goods should, by leaving them in the possession, order or disposition of the bankrupt, put him in a position by means of them to obtain false credit. It is not, of course necessary to show that the bankrupt has, in fact, obtained false credit by means of the goods. He will in effect, be presumed to have done so at the expense of the general body of creditors if the circumstances in which he is in possession are such as must necessarily lead persons dealing with him to believe the goods are his. Unless the true owner judged on the footing that knowledge must be imputed to him of the necessary consequences of his acts, can be shown to have been guilty of some remissness in this respect, the section cannot be brought into operation against him. He is not to be deprived of his goods merely because an inference that the bankrupt is the true owner may arise. In such a case any one giving credit to the bankrupt on the footing that the goods were the bankrupt's property would be the victim of his own carelessness in making an unwarranted assumption and not any remissness on the part of the true owner.

(Case-law reviewed).

Brooks *v.* Prescott, (1948) 1 All.E.R. 907 (C.A.).

Practice—Discovery and production of documents—Action against police officer for damages for false imprisonment and assault—Police officer's note book if can be ordered to be produced.

In an action against police officers for damages for assault and false imprisonment the plaintiff is not entitled to have discovery of the note books of the police officers, where such documents related solely to the defendant's own case and not to the case of the plaintiff and did not in any way tend to support the plaintiff's case or impeach the defendant's case.

Case-law reviewed.

R. *v.* Beamon, (1948) 1 All.E.R. 947 (C.C.A.).

Criminal Trial—Detention in Borstal school—Consecutive sentences—Propriety.

It is not the right practice to pass consecutive sentences of Borstal detention. Such consecutive sentences though they may not be bad in law, are undesirable because they make the scheme of Borstal training unworkable.

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THE LATE MR. JUSTICE V. GOVINDARAJACHARI.

It is with very great sorrow that we have to record the death of Mr. Justice Govindarajachari in the early hours of Saturday last. Though he had been known to have been taken rather seriously ill sometime back, none of us ever dreamt that he would be snatched away from our midst so quickly and suddenly. It is really a tragedy that such a gifted Judge should so soon after his elevation to the Bench, and while yet so young, have been removed by the hand of Providence.

After a distinguished career in the Law College, Mr. Govindarajachari underwent his apprenticeship under Mr. Alladi Krishnaswami Aiyar and under the latter's fostering and encouraging training soon made himself fit to make his mark in the profession. He was a very industrious and zealous student of law from the very beginning and after being called to the Bar never spared himself in getting equipped with all the requirements necessary for soon attaining the top ranks in the profession. In fact this overwork began to tell on his health even very early. It was nothing surprising that gifted as he was with great intelligence he acquired a precise and accurate knowledge of law in all its branches and was always ready to handle any case of any magnitude with absolute confidence and competency. He had always a passionate love for the law for its own sake and knew by heart all the classic dicta of the eminent Judges in all the leading cases. He was thorough both in law and facts and his presentation of his cases in Court was always analytical, lucid and forcible. As an advocate, he was much respected by the Judges and lawyers alike. He was an advocate of unimpeachable character and the highest professional integrity. His easy and pleasant manners and ever-ready smile attracted round him a very wide circle of friends and admirers. Indeed, it is very doubtful whether there was any one at all who had anything but the good to say of him.

Though he held the office of the Judge of the High Court only for a short time he had by his judgments shown that he was a worthy occupant of that high office and could take his rightful place along with the former eminent and illustrious Judges for which Madras has been so justly famous. His judgments were always characterised by clarity of reasoning, remarkable analysis of the facts and clear exposition of the law on the relevant subject.. He gave a patient and unruffled hearing to one and all alike and was never known to have uttered a harsh word or rebuke to any one. As at the Bar so on the Bench he had endeared himself to everyone and naturally in his death everyone feels, as it were, a personal loss.

In the death of Mr. Justice Govindarajachari, the Bench has lost one of its brightest ornaments, the Bar one of its staunch friends and well-wishers and the country a most worthy citizen and a fearless and upright Judge. May his soul rest in peace.

We offer our most heartfelt sympathy to the members of his family in their tragic bereavement.

REFERENCE IN THE HIGH COURT ON 4TH OCTOBER.

The Advocate General, Mr. K. Rajah Iyer, made a touching reference to the death of Mr. Justice Govindarajachari before their Lordships the Chief Justice and all the Judges of the High Court and in the course of it said :

"No words of mine can adequately express the poignant sense of grief which I, personally, and the members of the Bar, in general, feel at the tragic death of Mr. Justice Govindarajachari. The news of His Lordship's sudden and serious illness a few days back itself came as a rude shock to us, but we were told and re-assured that by the Grace of Providence, he had miraculously recovered and was making steady progress towards improvement ; and therefore the news of his death last Saturday was one which was least expected. The same Providence, however in His wisdom, has chosen to take him away from us, leaving us infinitely poorer for his loss ; and all that is left to us is to assemble here today as we have done to give expression to the sorrow which overpowers us.

Our loss is truly an irreparable one. He had greatly endeared himself to u while he was in the Bar and in an even greater measure after he was elevated to the Bench. I can say without any exaggeration that there exists no individual, member of the Bar or otherwise, who did not like him, or who had one unkind word to say about him. Everybody, who had occasion to come into contact with him, was charmed by his winning manners, infinite courtesy and friendly word and smile, the one arresting feature about His Lordship being his sweet simplicity and utter lack of pomp. Nature's finest gentleman he was, every inch of him.

He was a great lawyer, a great advocate and a great Judge. It was little wonder that with his equipment and accomplishments, he was able to build up such an extensive practice within a few years, a practice which transcended linguistic limitations. As an advocate he was a master of clear thinking and lucid exposition and with his sound knowledge of law and fundamental legal principles he was able to rise to great heights and leave the imprint of his personality on the Judges before whom he appeared.

His career as a Judge has been unfortunately all too short. But I am uttering only the bare truth when I affirm that he was an ideal Judge from every point of view and judged by every standard. No point of law or fact could elude the grasp of his powerful brain ; the hearing which he gave in every case to both sides was perfect ; his judgments were characterised by depth of learning, nicety of language and appropriateness of idiom ; and without exception again the Bar had nothing but praise and admiration for the manner in which he conducted himself on the Bench and maintained the best traditions and dignity of the Madras High Court.

His Lordship had a brilliant scholastic career, winning medals and prizes with ease. He gained valuable experience as a tutor and lecturer for two years in the Vizianagaram College in 1918. He distinguished himself in his study of law coming out first in the F.L. and third in the Presidency in the B.L. examination. He underwent his apprenticeship under Mr. Alladi Krishnaswami Aiyar, whose absorbing passion for deep and sound knowledge of law in all its various aspects and whose untiring industry in the pursuit of such knowledge he strove successfully to imbibe and follow in later years. Ever since his enrolment in 1921 he took to his work with zeal and earnestness and very early began to make his mark in the profession by his untiring industry, keen insight, persuasive advocacy and scrupulous fairness, and reached the top ranks soon. His appointment as a Judge of this Court was received with universal satisfaction and we believed that for years and

years he would adorn the High Court Bench as one of its brightest ornaments. I shall be failing in doing justice to his memory if I do not refer to his varied and versatile tastes, accomplishments and activities in other fields as well. He was a passionate student of literature, both English and vernacular and an ardent admirer of art; and he never stinted his helping hand to rising artists. In his death, we have lost an ideal judge and good man, an eminent scholar, a useful citizen and a loving friend.

We can but offer our heartfelt sympathy to the bereaved members of his family and pray that the same Providence which has chosen to call him to Eternal Rest will also give them sufficient courage to bear the loss; and may they and we cherish his memory in love and prayer for the peace of his soul."

The Chief Justice associating himself with the sentiments expressed by the Advocate-General said: "Though we knew that Mr. Justice Govindarajachari was very ill from August 22, we were hoping that by the Grace of Providence, he would soon recover and be with us again. It was, therefore, that I received the news of his passing away with a shock. No one expected that he would be taken away from us at this very early age. Many of you present here both on the Bench and at the Bar have known the late Mr. Justice Govindarajachari very well. My acquaintance with him goes back to the days when he was in the Law College. As you have said, after a distinguished academic career, he was enrolled in 1921. In the early years of his professional career, he was associated with the great lawyer, Mr. Alladi Krishnaswami Aiyar. Very soon he acquired a status for himself and rapidly built up a first-rate and lucrative practice. When he was elevated to the Bench in 1946, he was one of the acknowledged leaders of the Bar. I have appeared against him on many occasions and so have many of my brothers and many of you. The greatness of a warrior is best assessed by his adversary and I am sure you will all agree with me when I say that Mr. Govindarajachari always gave a good fight and a clean fight. He was as fair in his presentation as he was thorough in his preparation of the cases. He had great gifts, gifts of clarity of thought and lucidity of expression, amiable manners and forcible advocacy. A juristic approach to every problem of every case was his special charactertistic. As a Judge he was with us for about two years. In this brief period of time, he gained a reputation for judicial qualities of a very high order, patience, courtesy, sobriety, restraint and intellectual insight and impartiality.

Besides law, he had a variety of other interests, literary, social and cultural. As he and I shared many of the interests, we were thrown in together often in many institutions and movements, the latest of which was the preparation of an Encyclopædia in Telugu. In all these community matters, he was helpful, sincere and enthusiastic and at the same time very practical. Above all, he was a good man and a gentleman. I think you can give him the title given to Dharmaraja, "Ajata Satru." Our loss is indeed very great. It will be difficult to replace him for he combined in himself, the highest ability, spotless integrity and finest culture.

Mr. Advocate-General, please convey to the bereaved family the condolences of myself and my brothers. As a mark of respect to his memory and in token of our sorrow, the Courts will be closed to-day."

SUMMARY OF ENGLISH CASES.

Re LUCAS: SHEARD *v.* MELLOR, (1948) 2 All.E.R. 22 (C.A.).

Will—Bequest to charitable institution—Institution closed before testator's death—Cypres.

The testatrix who died on 19th December, 1943, by her will dated 12th October, 1942, made a number of charitable bequests including a legacy of the sum of £500 to the "Crippled Children's Home, Lindley Moor Huddersfield" and a portion of the residuary estate to "The Crippled Children's Home" without repeating

the address, but clearly intending to refer to the same object. The lease of the premises at Lindley Moor expired on 6th April, 1939, and the premises were vacated, the home carried on there closed and no other premises for use as a home was acquired. On the application of the trustees of the charity a scheme was framed providing for the administration of the funds and the income to be applied towards sending poor crippled children to holiday or convalescent homes. On a construction of the will,

Held, the mere fact that the testatrix, when she made the will, was under the impression that the particular home was still being carried on in the premises at Lindley Moor is clearly no indication that she intended to benefit only and exclusively the particular home as distinct from the charity carrying it on.

The gifts ought to be construed as gifts to the trustees of the charity for the general purposes of the charity. The fact that the home had been actually closed before the date of the will and the testatrix's apparent ignorance of that fact cannot alter the meaning of the language which she has used. The gifts constitute valid and effectual charitable bequests and the trustees of the charity are entitled to such bequests by way of addition to the endowments of such charity.

READING *v.* REGEM, (1948) 2 All.E.R. 27 (K.B.D.).

Master and servant—Servant dishonestly making money by virtue of his employment —Sergeant of army in uniform escorting private lorry engaged in transporting some goods —Moneys received for—Right of master to.

R was a sergeant in the Royal Medical Corps stationed at the general hospital in Cairo, where he was in charge of medical stores. He had not had any opportunities in his life as a soldier, of making money, but in March 1944, there was found, standing to his credit at banks in Egypt, several thousands of pounds, and he had more thousands of pounds in notes in his flat. He had also acquired a motor car worth £1,500. The Special Investigation Branch of the army looked into the matter, and he was asked how he came by the moneys. He made a statement, from which it appeared that they were paid to him by *M* in these circumstances. A lorry used to arrive loaded with cases, the contents of which were unknown. Then *R* in full uniform boarded the lorry, and escorted it through Cairo, so that it was able to pass the civilian police without being inspected. When it arrived at the destination, it was unloaded, or the contents were transferred to another lorry. Then *R* saw *M* in a restaurant in Cairo. *M* handed him an envelope which he put in his pocket. On examining it when he arrived home he found that it contained £2,000. Similar amounts were paid for succeeding loads until eventually some £20,000 had gone into the pocket of *R*. The military authorities took possession of the money. *R* claimed the return of the moneys by a petition of right.

In the circumstances, *held*, it is a principle of law that, if a servant takes advantage of his service and violates his duty of honesty and good faith to make a profit for himself, in the sense that the assets of which he has control, the facilities which he enjoys, or the position which he occupies, are the real cause of his obtaining the money as distinct from merely affording the opportunity for getting it, that is to say, if they play the predominant part in his obtaining the money, then he is accountable for it to his master. It matters not that the master has not lost any profit nor suffered any damage, nor does it matter that the master could not have done the act himself. If the servant has unjustly enriched himself by virtue of his service, without his master's sanction, the law says that he ought not to be allowed to keep the money, but it shall be taken from him and given to his master. The use of the facilities provided by the Crown in the shape of the uniform and the use of his position in the army were the only reason why *R* was able to get the moneys and the Crown as master is entitled to the money.

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THEORIES OF MATERNAL AFFILIATION IN ADOPTION.

According to Hindu religious beliefs a son is desired for securing immortality to his father (अमृतत्व) and for perpetuating his lineage (वम्शस्य अविच्छेदः). In the absence therefore of an *aurasa* son to a person, a *pratinidhi* or substitute through the process of adoption is permitted. A text of Atri cited in the Dattaka Mimamsa declares :

अपुत्रेणैव कर्त्तव्यः पुत्रप्रतिनिधिः सदा ।
पिण्डोदक क्रियाहेतोः यस्मात् तस्मात् प्रयत्नतः ॥

The object of adoption is thus twofold : (1) to provide for the offering of *pindas* to the adopter (पिण्डसंस्थापनाय) and (2) to continue his line (नामसङ्कीर्त्तनाय). These ideas are brought out in the text of Manu :

अपुत्रेणैव सुतः कार्यो यादृक् तादृक् प्रयत्नतः ।
पिण्डोदकक्रियाहेतोः नामसङ्कीर्त्तनाय च ॥

From the texts cited two points emerge : (1) the adopted son is a *pratinidhi* for the *aurasa* son and (2) adoption looks to the future and not to the past. The use of the term *pratinidhi* to describe the adopted son is significant. It suggests that even for spiritual purposes the adopted son is not to be equated with the *aurasa* son. Jaimini's conclusion is that " in employing a *pratinidhi* the vedic rite does not yield the full reward of the religious act[1]". Satyashada goes in fact so far as to say that there can be no substitute at all as regards the sacrificer, the wife, the son, etc.[2], prescribed for any rite by the vedic texts. The Sukra Niti bluntly states though for a different reason that the adopted son should never be thought of as one's son —मनसापि नमन्तव्या दत्ताद्याः स्वसुता इति[3]. Manu points out that a secondary son is always only second best[4]. Even as the use of oil is permitted in the place of ghee where it is not available, likewise an adopted son may be sought by one who has no *aurasa* son[5]. At another place the same sage has remarked : " a man desiring to cross beyond the gloom (of hells) through inferior sons (such as the *kshetraja*) secures a result similar to that of a person crossing (a sheet of) water in a leaking boat receives[6]". The inferiority of the adopted son is not confined to spiritual matters only but also to secular rites. This is clear from Vasistha's text providing for a smaller share of the patrimony for the adopted son co-existing with an afterborn *aurasa* son. It is with reference to such ideologies and textual

1. VI. 3, 13, 41.
2. Srauta Sutras, III. 1.
3. II. 31.
4. Manu, IX. 180.
5. Manu, IX. 181.
6. *Ibid.* 161.

background that the position of the adopted son has to be elucidated. Statements like " *adoptio enim naturam imitatur* ", " the adopted son is the reflection of a real son " are only attractive and picturesque figures of speech to bring out some special feature or other of adoption and will hardly justify any attempt to reproduce for the adopted son every one of the features associated with the *aurasa* son. An aid to understanding cannot be converted into an identity enabling one to turn round and work out the connotation thereof. It is salutary to remember right through that the adopted son is after all a son by fiction only. To adapt the words of Lord Truro in *Egerton* v. *Brownlow*[1] uttered in another context, the fiction of adoption constitutes " a very unruly horse and when once you get astride of it you never know where it will carry you." The caution enjoined in *Subramanian Chettiar* v. *Somasundaram Chettiar*[2] that " even a fiction cannot be carried to illogical limits " is too wholesome to be ignored.

There are at least three different theories in regard to maternal affiliation in adoption that have been suggested at some place or other. They are (1) it arises only by relationship of a woman to the adopter as his wife ; (2) it is the result of the wife's co-operation with the husband in the ceremonies of adoption ; (3) it is a necessary consequence of the fiction that adoption constitutes a new birth for the boy in the adoptive family, so much so, he must have a mother in the family if one can be found for him from among the wives of the adopter if he has or had any. Some support is available for each of these views but none of them can, as expressed, be accepted.

Adoption is always to the male whether done by himself or by his wife after his death. The consent of the wife to the adoption is unnecessary and it may be done even against her opposition. Nor is there any text of the Sastras forbidding such adoptions. A passage of the Dattaka Mimamsa expressly states that the wife of the adopter would in such cases become the mother of the adopted boy[3]. The text is: " If the case is thus, (it may be said) the assent of the wife is requisite for the husband also ; for the purpose (of such sanction) would be the same (as that of the husband to the adoption by the wife). This (if alleged) is wrong ; for in consequence of the superiority of the husband, by his mere act of adoption the filiation of the adopted as the son of the wife is complete in the same manner as her property in any other thing accepted by the husband." If filiation is independent of the wife's co-operation, it would follow that any association of hers in the ceremony of adoption, if there is one, can only be by way of a religious formality and can by itself possess no legal significance. It is thus wifehood and not ceremonial participation that would create the maternal affiliation. In *Narain Dat* v. *Gopal Das*[4], it was in fact held that the wife of the adopter becomes the mother of the adopted boy notwithstanding her refusal of consent to the adoption. Logically pursued this train of reasoning would lead to the result that where a person has a plurality of wives all of them would in law become mothers of the boy irrespective of any question of co-operation or participation by them in the ceremony of adoption. Nor would it make any difference if the wife or wives is or are dead at the time of adoption or is or are married by the adopter subsequent to the adoption. There is a text of Manu :

सर्वासाम् एक पत्नीनाम् एका चेत् पुत्रिणी भवेत् ।
सर्वास्ता तेन पुत्रेण पुत्रिण्यो मनुरब्रवीत् ॥

—" If among all the wives of the same man one becomes the mother of a son, Manu says that by that son all of them become mothers of male issue." A text of Sumantu cited in the Smriti Chandrika and the Parasara Madhaviya declares :

पितृपत्न्यः सर्वा मातरः तद्भ्रातरो मातुलाः तद्भगिन्यो मातृस्वसारः तद्दुहितश्च भगिन्यः तदपत्यानि भागिनेयानि । अन्यथा सङ्करकारिणः स्युः ।

1. (1853) 4 H L.C. 1, 196 : 10 E.R. 359.
2. (1937) 1 M.L.J. 60 : I.L.R. 59 Mad. 1064.
3. Dattaka Mimamsa, I—22.
4. (1915) 33 I.C. 361.

—All the wives of the father are mothers, the brothers of these are one's maternal uncles, their sisters are one's mother's sisters, the daughters of these are one's sisters and the children of the latter are one's sisters' children ; otherwise there would be confusion. The principle is regarded by Mayne evidently, to be so complete, at least with reference to maternal affiliation, as to operate in regard to secular rights as well. Thus he states[1] : " The theory of adoption is that it makes the son adopted, to all intents and purposes the son of his father, as completely as if he had begotten him in lawful wedlock. *The lawful son of the father is the son of all his wives* and would, therefore, I presume be the heir to all or any of them. And so it has been laid down that *a son adopted by one wife becomes the son of all and succeeds to the property of all. The same result must follow where the son is adopted not by the wife but by the man himself*" (Italics ours). In *Tiruvengalam* v. *Butchayya*[2], it was observed : " If it (adoption) be merely regarded as a fiction, there must be no difficulty whatever in a person bearing the same relationship to two or more persons." And in *Annapurni Nachiar* v. *Forbes*[3], Jardine, Q.C., seems to have conceded in the course of his arguments (p. 4) : " Where all was fiction it was perhaps not cogent to distinguish the impossibility of there being several such parents in reality." Two remarks fall to be made. In a series of cases it has now been held by courts that more than one wife of the adopter cannot become the mother of the boy for purposes of succession. The principle that in spite of the wife's dissent she would become the mother of the boy by reason of the superiority of the husband and the adoption being to him only is accepted. But a logical working of the principle is not permitted where the adopter has more than one wife. Under the Sastras the theory of maternity arising in favour of all the wives of a person seems to be confined to the spiritual and not to be concerned with the secular results. Manu himself has suggested that where one of the wives of a person has a son the other wives are to be regarded as step-mothers only[4]. It may be argued that this is intelligible, inasmuch as the tie between the genetive mother and the son is both corporeal and spiritual whereas with the co-wives of the father it is spiritual merely, but that in the case of a son by adoption this ground of differentiation is non-existent. It may again be pointed out that an adoption is made for two reasons, one temporal (perpetuation of the lineage) and the other spiritual ; that the former consideration is irrelevant in the case of a married woman as she has no lineage apart from that of the husband to perpetuate, that the adopted son would satisfy all the requirements of all the wives in regard to their obsequies, etc., and therefore at any rate in adoption all the wives of the adopter would become the mothers of the boy. The argument is consistent with Jagannatha's remark[5] that if a son be adopted by a man married to two wives he would have two maternal grandfathers and the two sets of maternal ancestors should be jointly considered as the manes of the ancestors. It also fits in with the statement in the Vyavastha Chandrika[6] that if an adopted son is received by none of the wives either in conjunction with or under the authority of the husband but by the husband alone, the adopted son should perform the *parvana sraddha* in honour of the ancestors of all such wives of the adopter. It is, however, clear that these texts have all been adverting to the spiritual results flowing from an adoption and have not been directed towards the question of secular rights arising from it. To extend the operation of these texts to govern secular rights will give rise to anomalies. To say that in the case of an *aurasa* son the genetive mother alone has the status of a mother and the co-wives the status of step-mothers merely, but that in the case of an adopted son all the wives of the adopter will acquire the status of mother to the boy for all purposes solely by reason of their relation as wives of the adopter would vest rights of inheritance in the adopted son which would not be available

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1. Hindu Law & Usage, 1st Edn., para. 154.
2. (1927) 55 M.L.J. 757 : I.L.R. 52 Mad. 373.
3. (1899) 9 M.L.J. 209 : L.R. 26 I.A. 246 : I.L.R. 23 Mad. 1 (P.C.).
4. Manu, IX. 183.
5. Colebrooke's Hindu Law, 4th Edn., Vol. II, p. 394.
6. Vol. II, p. 147, verse 32.

to an *aurasa* son. A substitute cannot transcend the real son ; nor will such a position be consistent with the text of Vasishtha postulating the inferiority of the adopted son in relation to the *aurasa* son. The proper way therefore of understanding the text of the Dattaka Mimamsa about the wife of the adopter becoming the mother of the adopted boy independently of her volition would be to confine it to matters spiritual.

Golap Chandra Sirkar Sastri has expressed the view that maternal affiliation in adoption arises only where the wife has agreed to the adoption and that she will not become the mother of a son adopted against her wishes and without her co-operation[1]. Sir Francis Macnaghten states a similar rule but in different language. According to him when a son is adopted in conjunction with one of several wives of a person the receiving mother alone would become the mother of the boy[2]. It is possible to regard the observation as stating a rule of preference merely. But it seems to have been understood differently, see *Teen Cowree* v. *Dinonath*[3], *Kasheeshuree Debia* v. *Greesh Chunder Lahoree*[4]. An observation of the Privy Council in *Venkata Narasimha* v. *Parthasarathy*[5] lends some colour to the view that maternal affiliation arises by receipt of the child in adoption by the wife of the adopter. The Privy Council stated : " Only one wife can receive the child in adoption so as to step into the position of being its adoptive mother. This is evident from the cases that establish that the receiving mother acquires in the eye of the law the same position as a natural mother to such an extent that her parents become legally the maternal grandparents of the child. To hold that a child could bear such a relationship to more than one mother would be entirely contrary to settled law and would produce inextricable confusion in the law of inheritance." It is not clear if the Privy Council thought that the receipt of the child by the woman carries with it a symbolical suggestion of the child being born to her. There is no warrant for any such reasoning. Again to so hold would be inconsistent with the position recognised by the Courts that where a person is adopted without the co-operation of the wife she would still become the mother of the boy for all purposes. In *Sham Kuar* v. *Gaya Din*[6], it was recognised by a Full Bench of the Allahabad High Court that an adoption is concerned with securing advantages to the adoptive father only, nevertheless, the association of the wife with him in adoption would make her the mother of the adopted boy. The Full Bench observed : " Looking to the object of the rite of adoption we find it to be to ensure by providing a son the spiritual benefit of the adoptive father and the perpetuation of his family name rather than to obtain any benefit for the adoptive mother whose happiness in a future state is not so dependent on having a son to perform the funeral obsequies and can be otherwise secured, and it is also the fact that the wife has no power to adopt on her own account, the right being absolute in the husband . . . . . But on the other hand we find that the wife is associated in making the adoption with the husband and *its effect is declared to be to make the adopted child the son of the adoptive mother as well as of the adoptive father* " (Italics ours). The only textual authority cited in support of the theory of maternal affiliation arising by reason of ceremonial association is a statement in the Dattaka Mimamsa employing the term *pratigrahitri mata* to refer to the mother of the boy adopted. The passage is as follows :

दत्तकादीनां मातामहा अपिप्रतिग्रहीत्रीयामाता तत्पितर एव पितृन्यायस्य मातामहेष्वपि समानत्वात् ।

—" the forefathers of the adoptive mother only are also the maternal grandsires of the son given and the rest ; for the rule regarding the paternal is equally applicable

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1. T. L. L. for 1888, p. 215.
2. Considerations in Hindu Law, p. 168.
3. (1865) 3 W.R. 49.
4. (1864) W.R. Sup. Vol. 71.
5. (1914) 26 M.L.J. 411 : L.R. 41 I.A. 51 : I.L.R. 37 Mad. 199, 220 (P.C.).
6. (1876) I.L.R. 1 All. 255 (F.B.).

to the maternal grandsires of adopted sons[1]". The Dattaka Chandrika contains a similar statement[2] :

शुद्धदत्तकस्य तु प्रतिग्रहीत्र्या एव मातुः पित्रादि पिण्डदानम्

—" but the absolutely adopted son presents oblations to the father and the other ancestors of his adoptive mother only." The argument based on these texts is that the term *pratigrahitri mata* means " receiving mother " and suggests that motherhood in adoption arises by reason of the actual receipt of the boy by the wife of the adopter, that is, by reason of her ceremonial co-operation. The deduction is open to criticism. For one thing, the context in which the phrase occurs shows that the reference is not to any *actual* receipt of the boy by the wife but to adoptive mother *in general*. The statement is made in discussing the claims of the ancestors of the adoptive mother and natural mother as the maternal ancestors of the adopted son and has nothing to do with the question as to how or which of the wives of the adopter becomes the mother of the boy. The previous verses refer to the other kinds of affiliation of a son such as the *dvyamushyayana*, *kritrima*, etc., and the instant verse to *suddha dattaka*, to draw a contrast between their effects. The object of the verses seems to be to point out that the *dattaka* son is a substitute for the *aurasa* son in this matter. The etymological meaning of *pratigrahitri mata* would thus not be intended. Again even where an adoption is made by a widow, her deceased husband is described similarly. It is thus said that in such cases " the *sakha* of the vedas is that of the adopter only[3]". Obviously the description would be inadmissible if it refers to the actual receipt of he boy. It is noteworthy that the term *prâtigrahitri mata* has always been understood by scholars as referring to an adoptive mother generally and not as carrying its etymological significance[4]. In the notes of arguments of counsel in *Annapurni Nachiar* v. *Forbes*[5], it is stated that when Mr. Jardine, Q.C., mentioned that the etymological meaning of the word translated by Sutherland as " adopting mother " was " receiving mother " Lord Hobhouse remarked : " I do not know whether there is any essential difference between the two." The foregoing considerations show that the texts do not afford any support to the view that maternal affiliation in adoption arises through ceremonial participation, whatever other repercussions such participation may have The judicial decisions have held that ceremonial participation would at any rate constitute a rule of preference in deciding which of the several wives of the adopter will step into the position of the mother of the boy for purposes of inheritance to the boy or by the boy. It is clear that the theory of maternal affiliation resulting through ceremonial participation only is hard to reconcile with the recognition of adoption by bachelors or widowers. Nor will the theory fit in with the conclusion that where a person having an only wife adopts without her co-operation, nevertheless, such wife will become the mother of the boy in the eye of law for secular purposes, as was held in *Narain Dat* v. *Gopal Das*[6]. In *Annapurni Nachiar* v. *Forbes*[5], in rejecting the argument of Mr. Mayne that inasmuch as the adoption was to the male only the association of the wife does not add anything effective to the ceremony and no advantage to the woman could arise by such association, the Privy Council observed : " It seems not to be doubted that a man may authorise a single one of several wives to adopt after his death or that she would on adoption stand in the place of the natural mother. If he can do that, it would be very capricious to deny him the power of selecting a single wife to join with him in his lifetime in adopting a boy with the same effect on her relations with that boy." In *Yamuna Bai* v. *Jamuna Bai*[7], a certain person *M* had two wives Yamuna and Jamuna. He adopted a boy *R* in 1916. It was found that while Yamuna admittedly took part in the ceremony of adoption Jamuna had not been excluded therefrom. *M* died in 1921

1. Dattaka Mimamsa, VI. 50.
2. Dattaka Chandrika, III. 17.
3. Dattaka Mimamsa, VI. 49 ; Dattaka Chandrika, III. 17.
4. Bhattacharya, Hindn Law, Vol. I, p. 357 : Sutherland's Translation cited in I.L.R. 6 Cal. 256.
5. (1899) 9 M.L.J. 209, 212 : L.R. 26 I.A. 246 : I.L.R. 23 Mad. 1 (P.C.).
6 (1915) 33 I.C. 361.
7. A.I.R. 1929 Nag. 211.

and *R* in 1923. On a question of succession to the properties of *R*, it was held that Yamuna alone was to be regarded as a mother in view of her admitted ceremonial association. The same principle was applied by the Calcutta High Court to determine which of the wives of the adopter, a predeceased wife or a wife living at the time of adoption should be regarded as the mother of the adopted boy. In *Gunamani Dasi* v. *Debi Prosanna Chowdry*[1], it was assumed that the living wife had participated in the adoption and therefore should be treated as the mother of the adopted boy in preference to the predeceased wife of the adopter.

Another theory as to maternal affiliation in adoption has been rested on the fiction that the adopted boy should be deemed to be born of the adopter's wife. In *Dattatraya* v. *Gangabai*[2], Macleod, C.J., observed : " It would seem strange if an adopted son having left his natural family were to be considered as the son of his adoptive father only and not of his adoptive mother." This observation becomes intelligible only if adoption operated as civil death in the original family and as re-birth in the adoptive family. In *Uma Sunker Moitra* v. *Kali Komul*[3], such a view was postulated. Romesh Chunder Mitter, J., observed : " The theory of adoption depends upon the principle of a *complete severance* of the child adopted from the family in which he is born both in respect to the paternal and maternal line, and his *complete substitution* into the adopter's family as if he were born in it." This view was based on the text of Manu[4] :

गोत्ररिक्थे जनयितुर्न हरेद् दत्रिमः क्वचित् ।
गोत्ररिक्थानुगः पिण्डो व्वपैति ददतः स्वधा ॥

—" The son given should not take the *gotra* (family name) and the wealth of his natural father; the *pinda* follows the *gotra* and the wealth ; of him who gives (his son in adoption) the *svadha* (obsequial rites) ceases (so far as that son is concerned)." In *Birbhadra* v. *Kalpataru*[5], Mukerji, J., carried the meaning of Manu's text even farther than had been done by Mitter, J., in the earlier case. He observed : "an absolute adoption appears to operate as birth of the boy in the family of adoption and as civil death in the family of birth having regard to the legal consequences that are incidents of such adoption." Likewise in *Ganga Sahai* v. *Lekhraj Singh*[6], Mahmood, J., remarked : "Adoption is itself 'second birth' proceeding upon the fiction of the law that the adopted son is ' born again ' into the adoptive family by the rites of initiation." Some support is afforded to this theory by observations of the Privy Council that the adopted son occupies the *same position* in the family of the adopter as a natural born son except in a few instances which are accurately defined in the Dattaka Chandrika and the Dattaka Mimamsa—see *Padma Kumari* v. *Court of Wards*[7], *Kali Komul Mozumdar* v. *Uma Sunker Moitra*[8]. From this theory of adoption operating as a re-birth in the adoptive family it was not a far cry that the boy should have a mother in the new family and one should therefore be found for him from the living or the dead wife or wives of the adopter, wherever that can be done. It has practically been so put in *Sundaramma* v. *Venkatasubba Aiyar*[9]. Referring to the observation in the *Medur case*[10], that it is only that one among the wives that is associated in adoption that will become the mother of the boy, Phillips, J., said : " This conclusion appears to be based on the theory of adoption, namely, that the adopted son becomes the natural son of the father, and the only way in which he can be deemed to be the natural and legitimate son of his father is by a fiction that he is a son of that father's wife also . . . . . It would be straining the legal fiction of adoption too far to hold that the boy need have no mother at all although this may possibly be necessary in the case of an adoption by a bachelor but that is

1. (1919) 23 Cal.W.N. 1038.
2. (1921) I.L.R. 46 Bom. 541, 559.
3. (1880) I.L.R. 6 Cal. 256 (F.B.).
4. Manu, IX. 142.
5. (1905) 1 Cal. L.J. 388.
6. (1887) I.L.R. 9 All. 253.
7. (1881) L.R. 8 I.A. 229 : I.L.R. 8 Cal. 302 (P.C.).
8. (1883) L.R. 10 I.A. 138 : I.L.R. 10 Cal. 232 (P.C.).
9. (1926) 51 M.L.J. 545 : I.L.R. 49 Mad. 941.
10. (1914) 26 M.L.J. 411 : L.R. 41 I.A. 51 : I.L.R. 37 Mad. 199 (P.C.).

an exceptional case with which we are not concerned now. . . . . Wherever possible, therefore a mother should be found for the boy." Phillips, J., is conscious that the fiction of adoption should not be strained too far, yet he feels no strain when he adds to the fiction of the adopted son being a substitute for a real son the further fiction that he must be deemed to have been born of a wife of the adopter. Phillips, J., fully realises that the theory that the adopted son should have a mother will not work and could not be reconciled with the recognition accorded to a bachelor's adoption, but seeks consolation in the fact that such cases are exceptional. It is difficult to perceive what warrant is available to treat adoptions by bachelors alone as exceptional but not adoptions by widowers or adoptions by one without associating any wife. Madhavan Nair, J., the other learned Judge in the case observed : " To give full effect to the fiction of adoption and to assimilate the fact to an imitation of nature the adopted boy should have a mother." These lines of reasoning commended themselves to a Full Bench in *Sowntharapandian* v. *Periaveeru*[1]. In the course of his judgment in the case Ramesam, J., stated : " The object of adoption is to have a substitute for a natural born son. Accordingly the theory of Hindu lawyers has always been that, apart from the fiction of adoption itself the adopted son should be as complete a substitute for the natural born son in all respects as one can possibly make. In other respects, except for the fact of his birth, he should occupy the position of a natural born son ; there should be nothing extraordinary, peculiar or unnatural about him. One of the most inevitable features about every human being is that he must have two parents, that is, a father and a mother. Similarly every adopted son should have an adoptive father and an adoptive mother ; and if there is no difficulty in pointing to an adoptive mother of the boy one ought to do so unless there is something in the texts or the decisions compelling us to hold that only the person who actually participated in the adoption can be regarded as the mother." With great respect, it may be pointed out that the argument is the result of attributing to a device designed to secure purely spiritual ends all the secular results following on actual birth in the adoptive family. The learned Judge remarks that there should be nothing " extraordinary, peculiar or unnatural " about the position of the adopted son. Is there nothing "extraordinary, peculiar or unnatural " in making a dead woman the mother of the boy adopted by a widower by attributing to her the motherhood of the boy, for instance, where the boy might perhaps have been born long after the death of the woman ? Is there nothing " extraordinary, peculiar or unnatural " in treating a boy of some years of age as having actually been begotten by the adopter's wife at the moment of adoption ? In sooth all these arguments will have no place if there is no real warrant for the theory of adoption operating as a new birth in the adoptive family. So logically has this theory of re-birth in the adoptive family been applied that in one decision, *Subramanian* v. *Muthiah Chettiar*[2], it has been held that where a widower adopted, not merely should the predeceased wife be treated as the mother of the boy but the adoption would be deemed to relate back to the death of such predeceased wife so as to enable the adopted son to recover the property of the woman which on her death had been taken by her stridhana heirs. The only textual authority on which these doctrines are apparently based, namely, that of Manu does not support the theory of adoption operating as a complete severance of the boy from his natural family or as a complete substitution or re-birth in the adoptive family. The Courts have recognised that for purposes of marriage, prohibited degrees of relationship will have to be observed by the adopted son in the natural family also, *Bai Kesarba* v. *Shiv Sanghji*[3], *Basappa* v. *Gurlingawa*[4]. Similarly in regard to property already taken in the natural family prior to the adoption it is held that adoption will not operate as civil death and cause a divestiture of such property, *Venkatanarasimha* v. *Rangayya*[5], *Behari Lal* v. *Kailas Chunder*[6], *Shyama Charan* v. *Sri Charan*[7].

1. (1933) 65 M.L.J. 58 : I.L.R. 56 Mad. 759 (F.B.).
2. (1945) 2 M.L.J. 337 : I.L.R. (1945) Mad. 638.
3. (1932) 34 Bom.L.R. 1332, 1352.
4. (1932) I.L.R. 57 Bom. 74, 81.
5. (1905) 16 M.L.J. 178 : I.L.R. 29 Mad. 437.
6. (1896) 1 Cal. W.N. 121.
7. (1929) I.L.R. 56 Cal. 1135.

And in *Raghuraj Chandra* v. *Subhadra*[1], the Privy Council has affirmed that "as has been more than once observed the expressions 'civilly dead' or 'as if he had never been born in the family' are not for all purposes correct or logically applicable but they are complementary to the term 'new birth'." Again it has been recognised that the theory that the adopted boy should have a mother in the new family cannot always apply, as for instance, in the case of an adoption by a bachelor. The true position would seem to be that the Sastras deal with maternal affiliation only for purposes of securing spiritual services to the wives of the adopter and their ancestors and not from the point of view of evaluating secular rights either of the boy in respect to the wives of the adopter or *vice versa*. Decisions of the Privy Council have anyway provided certain tests to determine who shall be regarded as the adoptive mother of the boy for purposes of inheritance, where there is more than one wife to the adopter. It has been suggested that where the husband has selected one of the wives to associate with him in the ceremony of adoption, as a result of that preference that wife can be regarded as the mother of the boy and the other wives as step-mothers. Similarly if a husband has given a power of adoption to one of his wives but not to others the wife so preferred would on her adopting a boy become the boy's mother. Where there is no such preferment and the husband is dead the senior wife is recognised as having the preferential right to adopt, if she is blameless, with the consent of the sapindas and become the mother of the boy. The same principle is held to govern where the husband has empowered all his wives severally to adopt to him. There is however no decision of the Privy Council dealing with the question of maternal affiliation for purposes of rights of inheritance in the case of an adoption by a widower. Nor have the following cases fell to be judicially tackled : (*i*) where a bachelor adopts, (*ii*) where a man having more than one wife adopts a son without associating any of them with him, (*iii*) where a widower adopts a boy and later marries again, (*iv*) where there were more than one wife to a widower who adopts after the death of all of them. So far as spiritual purposes are concerned, according to the Sastras maternal affiliation will extend to any or all the wives of the adopter as the case may be, living, dead or married subsequently ; but for rights of inheritance no such relationship could be reckoned. Under the decisions the position is somewhat confused. Thus in the case of a bachelor it may be that, on the theory that wherever possible a mother should be found for the adopted boy, any wife taken by the bachelor subsequent to the adoption or the first of such wives could be regarded as the mother of the boy and her ancestors his maternal ancestors. But that would mean that the emergence of a mother for the boy would depend on a future uncertain event. In the case of a man having many wives and adopting a son without associating any of them, the senior wife would probably be regarded as the mother of the boy. In the case of an adoption by a widower who subsequently marries again the pre-deceased wife alone is likely to be regarded as the boy's mother inasmuch as the re-marriage was an uncertain event at the time of the adoption. As regards the last of the problems, the answer seems to be that that wife of the widower who died last should be regarded as the mother of the adopted boy and her ancestors as the maternal ancestors of the boy. Where a person has more than one wife, in the absence of a preference in favour of any one of them by the husband for purposes of adoption the law casts the preference in favour of the senior wife, that is, that wife who was married first, for doing religious acts, *Rakhmabai* v. *Radhabai*[2], *Padajirav* v. *Ramrav*[3], *Amava* v. *Mahadgauda*[4], *Narayanaswami* v. *Mangamma*[5], *Kakerla Chukkamma* v. *Kakerla Punnamma*[6], *Raja Venkatappa* v. *Ranga Rao*[7], *Muthusami* v. *Pulavartal*[8]. The same principle is applied where power of adoption has been given to all the wives severally, *Bijoy Krishna Karmakar* v. *Ranjit Lal Karmakar*[9], *Sarodu Prasad Pal* v. *Ram Pati Pal*[10].

1. (1928) 55 M.L.J. 778 : L.R. 55 I.A. 139 : I.L.R. 3 Luck. 76 (P.C.).
2. (1868) 5 Bom.H.C.R. A.C.J. 181.
3. (1888) I.L.R. 13 Bom. 160.
4. (1896) I.L.R. 22 Bom. 416.
5. (1905) 15 M.L.J. 143 : I.L.R. 28 Mad. 315.
6. (1914) 28 M.L.J. 72.
7. (1915) 29 M.L.J. 18: I.L.R. 39 Mad. 772.
8. (1923) 42 M.L.J. 101 : I.L.R. 45 Mad. 266.
9. (1911) I.L.R. 38 Cal. 694 ; s. c. on appeal (1912) I.L.R. 39 Cal. 582.
10. (1912) 17 Cal.W.N. 319.

But it is apparent that this rule of preference of the senior wife can apply only as between the *living* wives of a person and not for elucidating the rights of wives dead prior to the adoption. It will be fantastic, for instance, to import the rule to hold that as between two predeceased wives of a widower the first married woman alone becomes the mother of the boy adopted by him even where she had died earlier than the other wife of her husband. It will involve more than one fiction : (*i*) by adoption the boy became a son of the widower, (*ii*) by reason of wifehood to the adopter the predeceased wife became his mother, and (*iii*) that the relationship would always date back to the date of the first marriage of the adopter.

Examining the textual law, it is clear that the association of the wife in performing rites is essential from the religious standpoint. Apararka observes[1] : " A man is not fit for *karma*, Oh King, without a wife, whether he is Brahmin, Kshatriya, Vaisya or Sudra. The wife is the chief factor in the attainment of *dharma, artha*, and *kama*." Apastamba lays down that the husband and wife have to perform religious rites together :

जायापत्योर्नैवि भागो विद्यते । पाणिग्रहणाद्धि सहत्वं कर्मसु[2].

It was because of this principle that Rama is said to have performed sacrifices with a golden image of Sita—काञ्चनीं मम पत्नींच[3]. The Taittiriya Brahmana declares[4] :

अर्धो वा एतस्य यज्ञस्य मीयते यस्य प्रत्येऽहन् पत्न्यनालम्भुका भवति ॥

—" half of the sacrifice is destroyed in the case of that sacrificer whose wife is (in her monthly courses and therefore) unavailable on the sacrificial day." It is however only a wife who is a patni that has this ceremonial competency. Panini states : पत्युर्नो यज्ञ संयोगे[5], and the particle *ni* is added to *pati* to signify one who partakes in the holy sacrifices. The status of *patni* arises in favour of a wife if she is married in the dharmic forms. In discussing the meaning of the term *patni* in Yajnavalkya's text declaring the heirs to a deceased person, the Mitakshara points out that *patni* is she who is so made by marriage and the singular number indicates the class, so much so all the wives married in the approved forms become patnis—see *Raja Venkatappa* v. *Ranga Rao*[6]. The Viramitrodaya states[7] : " First of all the *patni* or the lawfully wedded wife takes the estate. The term *patni* itself signifies a woman espoused in the prescribed form of marriage. Agreeably to the aphorism of Panini the term *pati* (husband) is changed into *patni* (meaning the correlative) implying the relation through a sacrifice. The singular number in the term *patni* in Yogiswara's text implies the class." A text of Baudhayana makes it clear that a wife married in the unapproved forms does not acquire the status of a *patni* but becomes a *dasi*. The passage is[8] :

अथाप्युदाहरन्ति । क्रीताद्रव्येणया नारी सा न पत्नी विधीयते । सा न दैव न सा पित्र्ये दासीं तां कश्यपोब्रवीत् ।

—" a woman who is purchased with wealth is not declared to be a *patni* ; she is not to be associated in rites for the gods or manes and Kasyapa declares that she is a *dasi*." The test of *patnihood* for religious purposes thus turns upon the form of marriage, dharmic or non-dharmic, and not on whether the woman is the senior wife or the junior wife. This is intelligible because a second wife is permissible according to the Sastras even while the first wife is alive, in certain cases, as for instance where the first wife is not fit for *dharma* or has no progeny or is disqualified

1. Anandashrama Series, Vol. 48, p. 72.
2. Apastamba, II. 6, 13, 16-17.
3. Ramayana, VII. 91, 25.
4. III. 7, 1.
5. IV. 1, 33.
6. (1915) 29 M.L.J. 18: I.L.R. 39 Mad. 772.
7. Cited in I.L.R. 9 Cal. 580, 583.
8. I. 11, 20.

for other reasons[1]. And the Sastras expressly direct the taking of a second wife and the association of a junior wife, for instance, when the first wife is dead, because the first wife would be cremated with the sacred fires and sacrificial utensils of the husband if she predeceased him[2]. The Mitakshara in commenting on Yajnavalkya's text[3] observes : " having burnt with agnihotra fire . . . his dead wife . . . the husband should take again another wife and another fire according to laws, provided that he has not yet begot any son or has not completed his sacrifices or is not entitled to enter another order of life." The Ghobila Smriti[4] states :

मृतायामपि भार्यायां वैदिकाग्नि न हित्यजेत् ।
उपाधिनापि तत्कर्म यावज्जीवं समापयेत् ॥

—" When a householder's wife dies he should not give up his vedic fires, but that agnihotra should be performed till one's life by means of an *upadhi*" (*i.e.*, by marrying another savarna wife or by associating with himself an asavarna wife). It is in this background that the description of the senior wife as *dharma patni* will have to be understood. A sloka cited in Colebrooke's Digest[5] states that the first is the wife married from a sense of duty and it is she whom acts of duty concern. This does not mean that the other wives are incompetent for acts of dharma ; it only means that the eldest wife is to be preferred for such acts and should not without just cause be superseded. She is *primus inter pares*. The decisions have held that if the husband himself ignored this consideration the efficacy of the act done by him with a junior wife will not in any way be nullified, however sinful such an act may be from the religious aspect. The sastraic preference of the senior wife is now in practice subject to the husband's control. Again under the Sastras this preference of the senior wife arises only in a case of competition among living wives. Katyayana states[6] : " Let him who *has* many wives employ one of equal class in the case of sacrificial fire and in attendance on himself, but *if there be many such let him employ the eldest in these duties provided she be blameless.*" The language shows that the senior wife's right to be associated in only a rule of preference and not a denial of the competency of the other wives in regard to acts of dharma. The term " blameless " will otherwise have no significance. The language also contemplates the presence of a number of wives and a choice from among them. Yajnavalkya has a similar rule. He says[7] : " When there is a wife of an equal class *present* (सत्यम्) never do acts of religion with the wives of any other class. When there is more than one wife of the same class as yourself, in matters of religion never employ any but the eldest." The Mitakshara in commenting on the text lays down : " When there is a wife of equal class never do acts of religion with wives of any other class. When there are several wives of the same class in matters of religion do not pass over the eldest wife and do not employ either the second or the third." The text of Yajnavalkya taken with the comment of the Mitakshara shows that its object is to prohibit unjust supersession of the senior wife by a junior wife and not to declare the ceremonial incompetency of the latter. Also that the rule is to be applied in the case of competition between living wives. To the same effect is a text of Vishnu[8] :

सवर्णासु बहुभार्यासु विद्यामानासु ज्येष्टया सह धर्मकार्यं कुर्यात् । मिश्रासु च कनिष्टयापिसमानवर्णया । समानवर्णया अभावे त्वनन्तरयैवा पदि च । नत्वेव द्विजः शूद्रया ॥

—" If all the wives are of the same caste, then the wife whose marriage took place first was to be associated with the husband in all religious acts ; if a man had wives

1. Manu, V. 80-81 ; Yajnavalkya, I. 80.
2. Manu, V. 167-168 ; Yajnavalkya, I. 89.
3. Yajnavalkya, I. 89 (S.B.E. series, Vol. 21, p. 178).
4. III. 9 cited in Kane, History of Dharmasastras, Vol. 2, Part I, p. 64.
5. Book. IV, Ch. I, sloka 51.
6. Cited in *Muthuswami* v. *Pularartal*, (1923) 42 M.L.J. 101 : I.L.R. 45 Mad. 266.
7. II. 84.
8. Vishnu D.S., 26, 1-4.

of different varnas the wife of the same varna with the husband had precedence though her marriage might have been later in date. If there is no wife of the same varna as himself, the husband may associate with himself in religious rites even a wife of the varna immediately next his own but a dvija should never associate a Sudra wife with himself in religious ceremonies." The foregoing citations show : (*i*) every wife married in the approved form is ceremonially competent and can take part in acts of dharma, (*ii*) when there are many wives of the same class, other things being equal, the senior wife has precedence and is to be associated in acts of religion, (*iii*) where such a wife is dead or becomes disqualified the next senior wife should be selected, and (*iv*) these rules regulate precedence as between living wives. To apply the rule for determining as to which of two predeceased wives of the adopter—where the adoption is by a widower—becomes the mother of the boy is not justifiable. For it does not give effect to the rule that when the first wife dies the next wife becomes the dharma patni and in fact a wife has to be taken in order that acts of religion may be done properly. So if at all maternal affiliation can be retrospective it could arise only with reference to the wife who died last whether the wives had been married each after the death of the other or even during the lifetime of an existing wife. There is absolutely no justification to carry the maternal affiliation to any point of time earlier than the date of the death of the wife who died last. It is also noteworthy that present trends are against any retrospective maternal affiliation. The Hindu Law of Inheritance (Amendment) Act, 1929, states in section 2 : " Provided that a sister's son shall not include a son adopted after the sister's death." In *Subramanian* v. *Muthia Chettiar*[1] it was observed : " It is contended that the fiction that the adoption should be considered to have taken place in the lifetime of the adoptive father should be confined only to adoptions by a Hindu widow after her husband's death and not to cases of adoption made by a widower so as to make the adopted son the son of his deceased wife. It is true that there are no authorities on the point. But then that is no reason why this distinction should be made ". The learned Judges overlook that the importation of the doctrine will result in this anomaly, namely, that with reference to the adopter the son is fictionally born in his family on the date of the actual adoption but with reference to the wife he should be deemed to have come into existence on the date of her death, a *different date* ; so much so, the son comes into existence not at the same time as regards both parents but at one time with reference to his father and at another time with reference to his mother. Adoption ceases to be an imitation of nature but a mockery of it. One other point falls to be noted. In the above decision the learned Judges guarded themselves against the application of the principle to a case where there had been more than one predeceased wife of the adopter. The Judges noted : " In the case before us, no complication arises from the fact that Subramanian had more than one wife." In the result, the answer to the fourth question would be that assuming that in the case of an adoption by a widower the predeceased wife can be regarded as mother of the boy for purpose of inheritance rights to and through her, a conclusion which is open to challenge, yet where there is more than one predeceased wife, maternal affiliation can be attributed only to that wife of the adopter who died last and it is her ancestors that will become the maternal ancestors of the boy.

S. VENKATARAMAN.

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1. (1945) 2 M.L.J. 337 : I.L.R. (1945) Mad. 638.

SUMMARY OF ENGLISH CASES.

DENNANT *v.* SKINNER, (1948) 2 All.E.R. 29 (K.B.D.).

Contract—Auction—Property in goods when passes—Subsequent arrangement that property should not pass till cheque is honoured—Effect.

Prima facie in an auction sale property passes to the bidder on the fall of the hammer. However the passing of property and the right to possession are two different things. Though property had passed the auctioneer has a right to retain possession of the goods until payment was made. If when he was ready to deliver the goods, payment was not made, he can sue for the price or exercise powers of re-sale or he can secure himself by way of lien on the goods for the price. But once he chose, for reasons, good, bad or indifferent, as a result of statements fraudulent or honest, to part with possession of the goods by giving delivery of it, he then lost his seller's lien and has no longer a right to possession of the goods. The auctioneer cannot claim the goods when the cheque for its price is not honoured though there might have been such an arrangement before delivery is taken.

ASKEY *v.* GOLDEN WINE CO., LTD., (1948) 2 All.E.R. 35 (K.B.D.)..

Damages—Wholesaler fined in criminal proceedings for selling contaminated cocktails and also refunding to retailers the cost of all bottles returned by them—If entitled to damages from his suppliers.

In 1944, there appeared in the market a quantity of so-called cocktails which contained methylated spirit and on that account were unfit for human consumption. The principal participators were convicted in the Criminal Courts. *A*, the wholesale merchant marketing that mixture, sued the manufacturers who supplied him for damages. The manufacturers made the liquid and bottled it. *A* supplied the labels which described the contents as "Red lady" or "Paradise" cocktails and the proprietors as "Gordon products" under which name the plaintiff was trading. *A* had no warehouse of his own. He used to collect the cases of bottles from the defendants' factory and deliver it direct to the retailers to whom he sold it. The manufacturers were charged and convicted for not paying customs and also for possessing and selling contaminated wine. Two of them were sentenced to imprisonment and fine and the third who was sentenced to fine only remained out and carried on the business. *A* was himself summoned in January, 1945, for offences under the Food and Drugs Act in respect of the sale of the wine containing methylated spirits and was fined in all £316-15-0 and £83 costs. In consequence of this all the bottles with the retailers were returned to him and he had to refund £1,735-17-8, the amount they had paid him. *A* sued the manufacturers claiming as damages all those amounts.

Held, although *A* was not a party to the conspiracy, he was guilty of gross negligence in not taking steps to see that the liquid was fit for sale and he cannot recover any of the amounts claimed by him from the defendants.

The punishment inflicted by a Criminal Court is personal to the offender and the Civil Courts will not entertain an action by the offender to recover an indemnity against the consequences of that punishment. The punishment is fixed having regard to the personal responsibility of the offender in respect of the offence, to the necessity for deterring him and others from doing the same thing again, to reform him, and, in cases such as the present to make him and others more careful in their dealings, to make him choose with more discrimination his suppliers or his servants and to make him more exact and scrupulous in his supervision of the matters for which he is responsible. All these objects would be nullified if the offender could recover the amount of the fine and costs from another by process of the Civil Courts. Nor is he entitled to indemnity for the amounts refunded to the retailers.

Public policy requires that no right of indemnity or contribution or damages should be enforced in respect of expenses which the plaintiff has incurred by reason of being compelled to make reparation for his own crime. The money which the plaintiff had to repay the retailers was reparation for his own crime of selling contaminated liquor without lawful excuse.

[The defendants also will not get any assistance. So they were not allowed any costs.]

SQUIRE *v.* SQUIRE, (1948) 2 All.E.R. 51 (C.A.).

Divorce—Wife's nagging and preventing her husband going to sleep—If "cruelty"—Conduct of wife caused by her ill-health—Effect.

Motive is not a necessary element in cruelty. Where it is found that a wife systematically for nights on end prevented her husband from sleeping demanding that he read to or conversed with her and if he showed signs of going to sleep she unreasonably demanded that he should perform various menial services for her and/or stripped the clothes from his bed and/or moved furniture about the room and/or switched electric lights on in the room whereby the husband was deprived of sleep and suffered in health, the acts amount to cruelty though such conduct was due to the wife's illness and did not consist of malignant acts done with the intention of injuring the husband. The husband is entitled to a decree for divorce *nisi* on the ground of the wife's cruelty.

(1947) 2 All.E.R. 529, reversed.

Per *Hudson, J.*—Looking at the established acts of the wife against the background of the special facts of this case including what is surely not an uncommon feature of married life, *viz.*, one ailing spouse making exacting and unreasonable demands on the other partner—demands which deprived the other of sleep from time to time—it cannot be said that by such acts cruelty has been established.

BETTELEY, LTD. *v.* SINGTON, (1948) 2 All.E.R. 81 (K.B.D.).

Defence Regulations—Provision for minimum fine to be such that offender "derives no benefit from the offence" (selling at above controlled price)—Income-tax and Excess Profits tax paid if to be considered in fixing the fine.

In assessing the amount which "in the opinion of the Court, shall secure that the offender derives no benefit from the offence" (selling goods at above the controlled price) it is impossible to shut out the tax which has been suffered by the offender. An offender who should be given a minimum penalty should only pay that amount by which he was in fact better off that is after deducting the taxes on the profits derived.

SAYCELL *v.* BOOL, (1948) 2 All.E.R. 83 (K.B.D.).

Road Traffic Act (1930), *section* 7 (4)—*Person disqualified from holding driving licence—Steering lorry down a hill into his garage without starting engine—If guilty of "driving."*

A lorry owned by *X* a person disqualified from holding a driving licence was standing at the head of an incline. There was no petrol in the tank and *X* having released the brake, set the lorry in motion by pushing it, got into the driving seat and let the lorry go down the hill so as to get into his garage.

Held: It cannot be said that he was not "driving" the lorry for the purposes of the Road Traffic Act. [As however the order disqualifying *X* from holding a licence was set aside on appeal the Court intimated to the justices that only a technical offence was committed and that special reasons do exist for not disqualifying *X* for holding a licence by reason of his conviction for the technical offence.]

ALEXANDER'S WILL TRUST, *Re*, (1948) 2 All.E.R. 111 (Ch.D.).

Will—Construction—Bequest of " my diamond bracelet " to a beneficiary and by subsequent clause bequest of " my diamond chain bracelet " to another beneficiary—Only one bracelet in existence—Latent ambiguity—Extrinsic evidence—Admissibility—Rights of beneficiaries.

By clause 3 of her will the testatrix made a number of bequests including specific bequests of jewellery. All the bequests in the clause were numbered and No. 19 was in the following terms : " To *X* my long pearl earrings—my best presentation bag—dressing case with its fittings—my five row diamond bracelet and my black coat with lamb fur collar."

By No. 31 of the list she gave " To *Y* my diamond chain bracelet." The testatrix possessed only one diamond bracelet accurately described as a chain bracelet, but containing eight and not five rows of diamonds. On a construction of the will,

Held : On the whole there is a latent ambiguity as to the bracelet and evidence is admissible as to what was intended to be bequeathed. The evidence established that the testatrix used to call this bracelet " five row diamond bracelet " and " diamond chain bracelet." In both items 19 and 31 the testatrix was referring to the same article. As the bracelet was divisible each legatee was entitled to a moiety. Where the same thing is given to two different persons in different parts of the same instrument each may take a moiety.

JEFFREY, *Re*, (1948) 2 All.E.R. 131 (Ch.D.).

Will—Construction—Gift of residue to "my brothers R *and* A *also* G *and* E"—G *and* E *children of deceased brother—Beneficiaries to take* per capita *and not* per stirpes.

The testatrix after providing for al ife estate bequeathed her residuary estate to " my brothers *R* and *A* also *G* and *E* equally." *G* and *E* were children of a deceased brother of the testatrix. On a construction of the will,

Held : The division is to be *per capita*—as the gift is to the four persons *nominatim*.

GRIMES *v.* GRIMES, (1948) 2 All.E.R. 147 (P.D.).

Husband and wife—Practice of coitus interruptus *by husband against the wishes of the wife—If wilful refusal to consummate.*

Where a husband against the wishes of the wife persists in practicing *coitus interruptus*, the marriage must be held to have not been consummated so as to entitle the wife to a decree of nullity.

(1947) A.C. 274, distinguished.

WHITE *v.* WHITE, (1948) 2 All.E.R. 151 (P.D.).

Husband and wife—Practice of coitus interruptus *against the wishes of the wife—If wilful refusal to consummate marriage entitling wife to decree of nullity or cruelty entitling wife to decree for dissolution.*

Even though the husband always practiced *coitus interruptus* it cannot be said that the marriage had not been consummated so as to entitle the wife to a decree of nullity of marriage. But when such conduct of the husband was undermining the health of the wife it constitutes cruelty in law sufficient to entitle the wife to a decree for dissolution of marriage.

(1948) A.C. 274, applied.

(1948) 2 All.E.R. 147, not followed.

FISH *v.* KAPUR, (1948) 2 All.E.R. 176 (K.B.D.).

Tort—Negligence—Dentist extracting tooth—Fracture of jaw and leaving a root of the tooth—If evidence of negligence on the part of the dentist.

The fact that fracture of the jaw was caused in the process of extraction of a tooth or a root of the tooth was left in is in itself no evidence of negligence on the part of the dentist. The doctrine of *res ipsa loquitor* has no application to such a case.

MEDITERRANEAN AND EASTERN EXPORT CO. *v.* FORTRESS FABRICS, (1948) 2 All.E.R. 186 (K.B.D.).

Arbitration—Contract in respect of textile goods—Arbitration by person with experience in the trade—Claim for price of goods—Award of damages for buyers refusing to take goods—Validity—Arbitrator—If bound to take evidence.

Many trades have their own tribunals of arbitration and it is open to an arbitrator skilled in the trade to use his own knowledge and experience on many matters, such as quality, without having witnesses called before him. One of the reasons why commercial men like to go to arbitration before arbitrators of this description is because it saves the expense of calling witnesses and having the conflicting views of experts thrashed out and decided on. The parties are content and intend to accept the judgment of a man in their own trade on whose judgment they know they can rely. The same principle applies to the question of damages for breach of contract (of sale of textiles) as to a question of quality.

Where the claim by sellers is for the price but the arbitrator finds that property has not passed, an award of damages to the sellers is clearly within the jurisdiction of the arbitrator. Because the sellers put forward a claim on a wrong basis, it cannot be said that the arbitrator is not entitled to award compensation on the true basis, *i.e.*, damages instead of price.

STEELE WILL'S TRUSTS'S, *Re*, (1948) 2 All.E.R. 193 (Ch.D.).

Will—Construction—Bequest of family jewel to be held by the successive eldest sons of the testatrix's descendants as heirloom—Right of beneficiaries.

The testatrix provided by a clause in her will " I give my diamond necklace to my son Charles Steele to go and be held as an heirloom by him and by his eldest son on his decease and to go and descend to the eldest son of such eldest son and so on to the eldest son of the descendants as far as the rules of law and equity will permit and I request my said son to do all in his power by his will or otherwise to give effect to this my wish." Charles Steele the son died leaving a will providing " I give my diamond necklace to my trustees epon trust for my son *S* during his lifetime and after his death to his eldest son absolutely." *S* had a son *D* who had a son born after the death of the testatrix. On a construction of the will,

Held : The rule in *Shelly's case* (6 Equity 540) applied to the construction of the testatrix's will. The necklace should have been held by Charles Steele for life thereafter to his son *S* for life and thereafter to his son *D* for life and after the death of the survivor of them in trust for the son or grandson of *D* absolutely.

MORGAN AND SON, LTD. *v.* MARTIN JHONSON & CO., LTD., (1948) 1 All.R. 196 (C.A.).

Practice—Summary suit—Defendant admitting claim but claiming an equitable set-off and counter-claim—Leave to defend.

An action was brought under Rules of Supreme Court, Order 14 by the plaintiff against the defendant claiming £353-3*s.* being charges for open storage accommodation provided by them for defendant's vehicles and some telephone charges. The defendant while admitting the claim alleged that the plaintiffs in breach of the terms of the contract and in breach of their duty as bailee . . . . . either delivered up a vehicle to some one without the authority of the defendant or alternatively kept so ineffective a watch on the said vehicle that it was stolen and claimed

that he was entitled to set-off and counter-claim the value of that vehicle £375. In the circumstances,

Held: Strictly speaking the defendant should have unconditional leave to defend (though he will be protected sufficiently by an order that there should be a judgment for the plaintiff with a stay of execution). Effect must be given to the defence of equitable set-off. Equity would deal with the matter by deducting from the claim of the plaintiff all that ought to be deducted in respect of the failure, if failure be proved, to deliver the vehicle that plaintiff received from the defendant.

CHARLES OXFORD *v.* GONSHAW, (1948) 2 All.E.R. 229 (C.A.).

Practice—Striking out defence—When proper—Non-compliance with order for inspection of goods—If ground for striking out—R.S.C., Order 31, rule 21—If applicable.

The defendants who were ordered to give inspection of the goods (clothing) referred to in the defence failed to give inspection and the plaintiff obtained an order striking out the defence, under R.S.C., Order 31, rule 21 which provided for striking out defence if a defendant fails to comply with an order for discovery and inspection of documents. On appeal,

Held: If in the order for inspection it had been provided that in default the plaintiff should have liberty to sign judgment such judgment can be signed. In the absence of such a provision, the failure to comply with the order for giving inspection of the goods, does not fall within the phrase " discovery or inspection of documents " in Order 31, rule 21 of the R.S.C. Although the lower Court was purporting to exercise a different jurisdiction (*i.e.*, under Order 31, rule 21) that does not prevent the appellate Court from giving relief on the ground that the defence is vexatious and oppressive if that is the proper course to take.

The specific sentences in the defence dealing with the cloth and the garments of which inspection ought to have been given must be struck out as vexatious and oppressive.

The effect of striking out parts of the defence would be to leave the rest of the defence in tact for what it is worth, and if it is sufficient to prevent the plaintiffs obtaining summary judgment they will have to go to trial in the ordinary way and have to prove their case.

PEARSON *v.* COLEMAN BROTHERS, (1948) 2 All.E.R. 274 (C.A.).

Tort—Child visiting circus—Unauthorised entry into " zoo " attached to circus—Liability of owners of circus for injury caused by lion to the child—Child, if invitee.

The infant plaintiff, being then of the age of 7 years went with her sister aged 12, to visit a travelling circus owned by the defendants. There was a gate entrance to the field in which the circus tent was pitched and a " zoo " laid out. From that entrance gate there was a way leading to the circus tent. The circus proprietors did not insist on small children being accompanied by adults ; but in the ordinary way of the circus business the admission of small children without adults would be perfectly a proper thing. The "zoo" was a rough and ready enclosure made up of a sort of lager, in which the waggons belonging to the show were put round, the intervals between them being filled by canvas strips. There was a definite entrance to the zoo enclosure but access to the enclosure was possible by persons agile enough to crawl under the canvas or under the caravans and waggons. But the " entrance " was the only authorised one. The plaintiff crawled in and obtained access near the lion's cage (not by the regular entrance) where she was mauled by the lion putting out its claws under the bars. The plaintiff went round seeking a quite corner where she could retire to relieve herself (no lavatories had been provided by the defendants) and crawled into the zoo where she was injured. Considering the peculiar circumstances,

Held, that the defendants were liable in damages to the plaintiff who must be regarded as an invitee.

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ADOPTION AND CIVIL DEATH IN GENETIVE FAMILY.

Saunaka described the adopted son as the reflection of a son. Out of the description was evolved the fiction of the adoptee being procreated on the mother of the boy by the adopter through niyoga etc., according to Nandapandita and through the possibility of marriage according to Sutherland. Another fiction to develop was that adoption is rebirth in the adoptive family. The date of rebirth is the date of adoption. Where the adoption was by a woman after her husband's death, the rebirth was to be antedated to the date of the death of the woman's husband. And this, even if the adoptee had not been physically existent at that time. Yet another fiction to follow was that the adoptee is to be deemed not merely as born to the adopter but born to him through his wife. So much so, where the adoption is by a widower it will relate back to the death of the predeceased wife of the adopter.

Adoption is rebirth in the adoptive family. Consequently it must be civil death in the genetive family. In *Birbhadra* v. *Kalpataru*[1], Mukherji, J., observed : " an absolute adoption appears to operate as birth of the boy in the family of adoption and as civil death in the family of birth having regard to the legal consequences that are incidents of such adoption." One may pause to comment that far from the theory of civil death being a deduction from the legal consequences, it has, at any rate, in later times become the apex for evaluating the results of adoption by applying the theory of civil death in the natural family and rebirth in the adoptive family. In *Ganga Sahai* v. *Lekhraj Singh*[2], Mahmood, J., remarked : " Adoption is itself ' second birth ' proceeding upon the fiction of law that the adopted son is ' born again ' into the adoptive family by the rites of initiation." In regard to the nature of such civil death and rebirth, in *Uma Sunkar Moitro* v. *Kali Komul Muzumdar*[3], it was stated : " The theory of adoption depends upon the principle of a *complete severance* of the child adopted from the family in which he is born both in respect to the paternal and maternal line and his *complete substitution* into the adopter's family as if he were born in it." The position was, however, more guardedly stated by the Privy Council in *Pratapsingji* v. *Agarsingji*[4], where it was observed : " Now it is an explicit principle of the Hindu law that an adopted son becomes for all purposes the son of his father . . . . . Again, it is to be remembered that an adopted son is the continuator of his adoptive father's line exactly as an aurasa son, and that an adoption, so far as the continuity of the line is concerned, has a retrospective effect ; whenever the adoption may be made there is no hiatus of the continuity of the line." This would suggest that it is only for a limited purpose, namely, the continuity of the line of the adopter and for matters associated with it, that adoption operates as a rebirth. A wider scope was, however, given to the doctrine of rebirth in the adoptive family and civil death in the natural family, by Scott, C.J., in *Ramchandra* v. *Manubai*[5], where he held that the adopted son is to be treated as having been from his very birth in the family of his adoptive father and he cannot for any purpose be regarded as having

1. (1905) 1 Cal.L.J. 388.
2. (1887) I.L.R. 9 All. 253.
3. (1881) I.L.R. 6 Cal. 256 (F.B.).
4. (1918) 36 M.L.J. 511 : L.R. 46 I.A. 97 : I.L.R. 43 Bom. 778 (P.C.).
5. (1918) I.L.R. 43 Bom. 774.

existed in the natural family. According to him the fiction is that the adopted son is non-existent in the natural family all the time and has been always existent in the adoptive family only. That the doctrine of " civil death " and " rebirth " will have to be applied with caution and not as universally true is incidentally brought out in *Raghuraj Chandra* v. *Subhadra Kunwar*[1] by the Privy Council. In that case, Lord Sumner observed : " It is quite true that for certain purposes the blood relationship of an adopted Hindu remains real and binding after the adoption. For example, his born sister is within the prohibited degrees of affinity. It is true also that authoritative texts of the writings in which the Mitakshara law was originally expressed, dwell on the matter of inheritance and succession in connection with adoption in a way that leaves some of the consequences of adoption unexpressed. They define the rights of the person adopted as a member of his adoptive family, but they do not in terms complete the matter by prescribing his entire expulsion from his original family . . . . . It is not true to say that by Hindu law the adoptee only loses his consanguinity for purposes of succession. Adoption has been spoken of as ' new birth ' in many cases, a term sanctioned by the theory of Hindu Law. Nor is the expression a mere figure of speech. The theory itself involves the principle ' of a complete severance of the child adopted from the family in which he is born . . . . and complete substitution into the adoptive family as if he were born in it.' *Nagindas* v. *Bachoo*[2]. ' The fundamental idea is that the boy given in adoption gives up the natural family and everything connected with the family,' *Dattatraya* v. *Govind*[3] . . . . . As has been more than once observed the expressions ' civilly dead ' or ' as if he had never been born in the family ' are not for all purposes correct or logically applicable but they are complementary to the term ' new birth '." These observations suggest that (*i*) the expression " civil death " in the natural family, though more than a mere figure of speech is not to be literally understood or applied, (*ii*) adoption means more than the loss of consanguinity for purposes of succession in the natural family but does not imply an entire expulsion from it, (*iii*) the incidents of civil death in the natural family are always complementary to the incidents recognised as attaching to the new birth in the adoptive family.

The chief textual authority with reference to which the scope of the doctrine of civil death in the natural family is generally sought to be expounded is a text of Manu :

गोत्ररिक्थे जनयितुर्न हरेत् दत्रिमः सुतः ।
गोत्ररिक्थानुगः पिण्डोव्यपैतिददतः स्वधा[4] ॥

In some versions the term क्वचित occurs instead of सुतः and भजेत् instead of हरेत् . There are also differences in the English renderings of the texts. Two which are typical may be cited. Sir Willima Jones' version is :

> " A given son must never *claim* the family and estate of his natural father ; the funeral cake follows the family and estate ; but of him who has given away the son, the funeral oblation is extinct."

Mr. Golap Chandra Sarkar Sastri's translation of Manu's text is :

> " The adopted son is not to *take away* (with him when he is passing from the family of his birth to that of adoption) the *gotra* and *riktha* of the progenitor ; the *pinda* is follower of the *gotra* and the *riktha* ; the *swadha* (or spritual food) goes away absolutely from the giver."

The term हरेत् has been rendered as " claim "[5], " take "[6], and " take away " and भजेत् as " share ". It is matter of great importance as to how हरेत् is to

1. (1928) 55 M.L.J. 778 : L.R. 55 I.A. 139 : I.L.R. 3 Luck. 76 (P.C.).
2. (1915) I.L.R. 40 Bom. 270 (P.C.).
3. (1916) I.L.R. 40 Bom. 429.
4. Manu, IX. 142.
5. Stokes, Hindu Law, 65.
6. Buhler, Sacred Books of the East, Vol. 25, p. 355.

be construed. If it signifies " take away ", it would *prima facie* appear that adoption precludes the carrying into the new family by the adopted son of whatever property he has already obtained in the natural family by succession to his father or at a partition of the paternal estate. The meaning of the word would, however, have to be determined in conjunction with *janaitu riktham* in the text of Manu.

Before considering, however, the meaning of *janaitu riktham*, it would be well to assess the manner in which Manu's text has been applied by the commentaries. According to these latter what is extinguished on adoption is not the blood relationship with the members of the natural family but only the connection through the *pinda*[1]. The Dattaka Mimamsa cites a text of Brihat Manu : " Sons given, purchased and the rest retain the relation of *sapinda* to the natural father as extending to the 5th or 7th degrees : like this general family (which is) also that of their adopter." Pollution and mourning will have to be observed in connection with the natural parents. The Vaidyanatha Dikshitiyam provides[2] that if the adopted son dies, both the natural and adoptive fathers should observe impurity and *vice versa*. The Sarasvati Vilasa states[3] that the adopted son should according to a text of Vishnu perform *sraddha* and offer oblations to the natural father, that is, in the absence of other issue of the natural father. The adopted son for purposes of marriage is reckoned as a member of the original *gotra* also and will have to avoid girls there within the prohibited degrees of relationship. The rulings in *Bai Kesarba* v. *Shivsangji*[4] and *Basappa* v. *Gurlingappa*[5] have recognised these factors. The Dattaka Chandrika provides that adoption does not cancel or in any way affect the efficacy of *samskaras* performed already in the natural family[6]. Also where the adoptee is a married person with children—as it might well be in the Bombay Presidency—adoption would carry the adoptee and his wife alone into the new family and the children already born to them would continue to be members of the original family. The theory of the adoptee being regarded as having been from his birth a member of the adoptive family and as having never been in the natural family is rejected, *Manikbai* v. *Gokuldas*[7], *Bai Kesarba* v. *Shivsangji*[4]. The theory of civil death in the natural family and rebirth in the adoptive family is thus not fully accepted but only for certain purposes. The effect of adoption is not to efface the past but to invest the son with a new status for the future and mainly with reference to matters spritual *vis a vis* the adoptive father directly and with reference to others incidentally only. Manu's text has been applied by the commentaries only in that way.

In regard to secular rights, it falls to be noted that the text of Manu adverts to the estate of the natural father only and precludes the taking of interest therein. All the High Courts excepting the Bombay High Court have generally taken the view that it is only future succession that is barred and there is no forfeiture of property already taken by succession or at partition prior to the adoption. According to the Bombay High Court even such property would be forfeited. It will be convenient to examine how the Commentaries have in this respect applied the text of Manu. The Dattaka Mimamsa states[8] :

" The son given must never claim his natural father's family and estate. Thus the ' obsequies '—that is, the *sapindikarana etc.* (which would have been) performed by the son given fails of him who has given away his son."

" The author of the Chandrika thus explains, ' By this it is declared that by the act alone, creating the filial relation, property of the son given in the estate of the adopter is established and connection to him as belonging to the same family ensues. But through extinction of the filial relation from the mere gift, the pro-

1. Dattaka Chandrika, III. 18 & 24; Dattaka Mimamsa, VI. 9, 10 & 21.
2. Collection of Hindu Law Books on Inheritance, Setlur, II. 578.
3. *Ibid.* I. 162.
4. (1931) I.L.R. 56 Bom. 619.
5. (1932) I.L.R. 57 Bom. 74.
6. II. 20.
7. (1924) I.L.R. 49 Bom. 520.
8. VI. 7 & 8.

perty of the son given in the estate of the giver is extinguished and connection to the family of the giver annulled'."

The Dattaka Chandrika cites Manu's text and states[1]: "It is declared by this, that through the extinction of the filial relation from gift alone the property of the son given in the estate of the giver ceases; and his relation to the family of that person is annulled." In explaining Manu's text, the Vyavahara Mayukha lays down[2]: ". . . . . even so, in this place having merely exemplified the acts connected with the obligation of the funeral oblation for the natural father and the rest, by the terms, 'family', 'estate', 'funeral oblation' and 'obsequies' the cessation of them is declared. From this also results, the establishment of the cessation of the family connection with the father's whole brother and the rest." On the basis of these passages two arguments have been advanced in support of the contention that on adoption even property of the father taken by succession or at partition by the adoptee prior to his adoption would be lost to him, and his heir in the natural family at the time of the adoption would succeed to such property. One of the arguments is that the terms *gotra* and *riktha* are inextricably linked in a *dvandva* in Manu's text and it must necessarily follow that if the *gotra* is lost on adoption the property also should be lost and the adoptee cannot lose the one and retain the other. The other argument is that to talk of cessation of property rights would have no meaning unless such rights had already vested prior to the adoption. It was on such considerations the Bombay High Court had held that under Manu's text there would be a forfeiture of the father's property taken by the son even prior to his being given in adoption, *Dattatraya* v. *Govind*[3], *Manikbai* v. *Gokuldas*[4], *Bai Kesarba* v. *Shivsangji*[5]. A similar view seems to have commended itself to one of the Judges in *Birbhadra* v. *Kalpataru*[6]. In the first of these cases, adverting to Manu's text, Shah, J., remarked: "The text generally prohibits the taking by the adopted son and does not restrict the taking to that which would devolve on him after the adoption. It lays down that the adopted son shall never take or claim the estate of his natural father. The words are wide enough to include the estate vested in him at the time of adoption provided it is the estate of his natural father. In my opinion, the text should be so read as to give effect to the fundamental idea underlying an adoption, *viz.*, that the boy given in adoption gives up the natural family and every thing connected with the family and takes his place in the adoptive family as if he had been born there as far as possible." One may pause to note that even according to the Bombay High Court property taken at a family partition prior to the adoption could not be regarded as property of the father within the meaning of the above rule, *Mahableshwar* v. *Subramania*[7]. The view of Shah, J., overlooks that the sastras do not ordain anything like an 'entire expulsion' or complete civil death in the natural family or a complete rebirth in the adoptive family. The argument based on the *dvandva* character of *gotra-riktha* does not solve what in the context is '*riktha*'. The other argument that cessation of rights will be unintelligible unless there had been a prior acquisition does not allow for the fact that property already taken by the boy by succession or partition would no longer be the property of the father and cannot be so described. There are a number of weighty considerations which suggest that the prohibition ordained by Manu's text is of future rights only. (*i*) Forfeiture cannot be worked by implication or analogy. To declare forfeited the property taken by an infant on his father's death or at a family partition by the conduct of some one else, say his mother, in giving him in adoption—conduct over which he has no control—is to say the least unreasonable, *Behari Lal* v. *Kailas Chander*[8], see also *Rallia Ram* v. *Mt. Sodhan*[9]. (*ii*) Even according to sastraic literature there is no theory of complete extinction in the natural family on adoption so as to compel an extinction of everything connected with it, *Sri Raja Venkata Narasimha Appa Rao* v. *Sri Raja Rangayya Appa Rao*[10]. (*iii*) It is a

1. II. 19.
2. Ch.V. 22 & 23.
3. (1916) I.L.R. 40 Bom. 429.
4. (1924) I.L.R. 49 Bom. 520.
5. (1931) I.L.R. 56 Bom. 619.
6. (1905) 1 Cal.L.J. 388.
7. (1922) I.L.R. 47 Bom. 542.
8. (1896) 1 Cal.W.N. 121.
9. A.I.R. 1930 Lah. 470.
10. (1905) I.L.R. 29 Mad. 437.

principle of interpretation that what is *ex facie* a single *vakya* should not be construed as containing two co-ordinate ideas so as to render it in effect into two *vakyas*. If Manu's text is understood as ordaining that on adoption the boy would not take not only his natural father's property but also of what had already become his own by cessation or extinguishment of the father's interest therein there would arise *vakya bheda dosha*. (*iv*) A harmonius construction of the verse of Manu in question with the verse immediately prior to it requires that the prohibition should be held to relate to the taking of rights in the natural family subsequent to the adoption. The earlier verse[1] declares : "Of the man who has an adopted son possessing all good qualities, that same (son) shall take the inheritance (हरेत् तद् धिक्थं) though brought from another family." The text deals with a right to arise on or after adoption and would be complementary to any loss of rights in the natural family on or after the adoption. (*v*) Manu's text prohibits the taking of *janaitu riktham* on adoption and it is clear from other texts of Manu that the term relates to that alone which at the time of the adoption could be predicated as the property of the natural father. Thus according to one text[2] : " After the death of the father and of the mother, the brothers being assembled may divide among themselves the paternal estate—*Paitrikam riktham*—for they have no power (*anisa*) over it while the parents are alive." In the next verse,[3] it is stated : " Or the eldest brother alone may take the whole of the paternal estate—*pitram dhanam*—and the others shall live under him just as under their father." In yet another verse[4] Manu lays down : " But a son born after partition shall alone take the property of his father (*paitram dhanam*) or if any (of the other sons) be reunited (with the father) he shall share with him." Verse 115 expressly recognises inheritance and partition among the sources of acquisition of property. It would therefore follow that expressions like *paitrikam dhanam* refer to property over which the father has absolute power and the sons are *anisa*. Likewise *janaitu riktham* will also connote property of which the father is the owner and the son is *anisa* which can only be where the father's property has not already passed by way of succession to his son or has not been taken by the son at a partition. The text prohibiting the taking of the father's estate in the natural family after adoption cannot therefore operate in regard to property obtained by the son prior to his adoption either by way of succession to his father or at partition. This conclusion has been reached by the Calcutta High Court in *Rakhalraj* v. *Debendra Nath*[5] and is fully in accord both with the textual law as sell as of precedents.

S. VENKATARAMAN.

SUMMARY OF ENGLISH CASES.

HICKMAN'S WILL TRUSTS, (1948) 2 All.E.R. 303 (Ch.D.).

Will—Construction—Gift of necklace to daughter-in-law X *for life and then the " wife of my grandson* Y "—Y *unmarried when testatrix died—*Y *married twice thereafter—Second marriage with* D *after dissolution of first marriage with* L *both after the death of testatrix and before the death of* X—*Person entitled to necklace as " wife of grandson."*

A testatrix provided by a codicil " . . . . . I bequeath my pearl necklace to my daughter-in-law *X* so that she may have the use and enjoyment thereof for her life and at her death I bequeath the same to the *wife of my grandson Y* absolutely or in the event of my said grandson not marrying then in that case I bequeath the same to my grand-daughter *Z*." When the testatrix died in 1914 *Y* was unmarried. *X* was the holder of the necklace until her death on October, 1946, but in the meanwhile *Y* married twice, first on January 16, 1919, *L* (and that marriage was dissolved) and again in 1940 *D*. *Y* himself survived *X* and died on March 11, 1947. In a contest between *L* the first wife and *D* the widow of *Y* who claimed the necklace,

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1. Manu, IX. 141.
2. Manu, IX. 104.
3. *Ibid*, 105.
4. *Ibid*, 216.
5. (1948) 52 Cal.W.N. 771.

Held, that on a proper construction of the will the necklace was a gift to *L* who, was the first person to answer to the description " wife of my grandson."

DIPLOCK'S ESTATE, *Re*, (1948) 2 All.E.R. 318 (C.A.).

Equity—Money paid under invalid bequests—Right to recover—Tracing.

Pursuant to a direction in a will to the executors to apply the residuary estate for such charitable institutions or objects as they in their absolute discretion should select the executors had by 1939 paid over £ 200,000 to 139 charitable institutions. On the next of kin challenging the direction, the executors in October 18, 1939, intimated the challenge to the institutions calling on them not to deal with the money paid till they heard further from them. The House of Lords ultimately held in 1944 that the residuary bequest was void for uncertainty. The next of kin claimed the money paid from the various institutions.

Held: The next of kin were entitled to recover in equity though the money had been paid under mistake of law by the executors to the institutions. If it was possible to identify or disentangle the money where it had been mixed with the assets of the recipients the next of kin can trace the money.

SMITH'S POTATO ESTATES, LTD. *v.* BOLLAND, (1948) 2 All.E.R. 367 (H.L.).
RUSHDEN HEEL CO. *v.* KEENE, (1948) 2 All.E.R. 378 (H.L.).

Income-tax and Excess Profits Tax—Costs of litigation—Legal and accountancy charges for ascertaining amount of tax payable—If deductible item of expense in computing tax.

In computing the profits for income-tax and excess profits tax purposes the assessee is not entitled to deduct the legal and accountancy expenses incurred in prosecuting an appeal to the Board of Referees against a decision of the Commissioners of Inland Revenue on a question as to excess profits tax. It cannot be said that such expenses were " wholly and exclusively " laid out or expended or the purposes of the trade.

HAMPS *v.* DARBY, (1948) 2 All.E.R. 474 (C.A.).

Tort—Owner of field shooting and killing homing pigeons marauding on peas growing on the field—Right of owner of pigeons to sue for damages.

The owner of tamed or reclaimed pigeons continues to have property in and possession of his birds after they have flown from his dovecote, so long as the birds retain in fact an *animus revertendi* to his control and he is entitled to maintain an action for damages in respect of their destruction and wounding by the owner of a field by shooting them. Where the owner of the field claims to have shot the pigeons to prevent their feeding on the peas growing in his land, the onus is on him to justify the preventive measure of shooting and he has also to prove that in fact there was no other practical means of stopping and preventing the renewal of such pigeons eating his peas.

(1948) K.B. 241, applied.

(As there was evidence on which the County Court Judge found that the defendant had failed to prove that there was no other practical means of stopping the birds, and as he was the final Judge on questions of fact the Court of appeal did not interfere with the finding and affirmed the judgment for plaintiff.)

HILL, *Re*, (1948) 2 All.E.R. 489 (P.D.A.).

Evidence—Proof by solicitor's clerk who died before action—Solicitor propounding will Statements in the proof—Admissibility.

A partner in a firm of solicitors was propounding a will. A clerk of the firm who in anticipation of proceedings had prepared a proof of his evidence as to the validity of the will had died.

Held: The statement is admissible in evidence as it cannot be said that the clerk was a " person interested " in making such statement (Tests as to " interest " discussed).

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APPOINTMENT OF MR. A. V. VISWANATHA SASTRI AS JUDGE OF THE HIGH COURT.

It is a matter of great pleasure to us that once again, one who has been long associated with our Journal has been chosen to fill the High office of the Judge of our High Court. The appointment of Mr. A. V. Viswanatha Sastri, we are sure, would be received with universal approbation.

Mr. A. V. Viswanatha Sastri is from all points of view fully qualified to occupy the exalted office of a Judge of the High Court. Gifted with great intelligence and remarkable powers of analysis he has by great industry acquired a thorough and sound knowledge of the different branches of law. Early in his career at the bar he got the unique opportunity of being associated in the handling of one of the biggest cases in recent times—The Tanjore Palace case—and acquitted himself with great credit. He has since then by his own unaided efforts gradually built up for himself a lucrative practice. He is well known for his thorough preparation of his cases and their presentation in Court with great clarity and force. With all these qualifications, there can be no doubt, that he would easily prove himself to be one of our best Judges.

We have great pleasure in offering Mr. A. V. Viswanatha Sastri our sincere felicitations on his well deserved elevation to the Bench.

BOOK REVIEWS.

THE BOMBAY TENANCY ACT, 1939, by A. G. Padhye, B.A., LL.B., Advocate, Published by Chandrakant Chimanlal Vora, Law Publishers, Gandhi Road, Ahmedabad. Pp. 94. Price Rs. 4 nett.

Tenancy legislation has to be fully understood before the landlord and tenant can avail themselves of their respective rights and discharge their respective obligations. The commentary on the Bombay Tenancy Act, 1939, would go a long way in explaining the law on the subject to the ordinary reader and lawyer alike. There is not yet any great growth of case-law on the subject and so the author has had to explain and elucidate the various sections fully. The Rules made under the Act together with the forms are sure to be appreciated.

THE BOMBAY INDUSTRIAL RELATIONS ACT (Bombay Act XI of 1947), by P. B. Patwari, B.A., LL.B., Advocate, High Court, Bombay. Published by Tarachand M. Rowani, Bharti Sahitya Sangh, Ltd., Mumraj Building, Kalbadevi Road, Bombay 2. Vols. 1 and 2, price Rs. 14.

Industrial disputes seem to be present everywhere nowadays. The probelm of labour and how to conciliate it and harness its energies to productive activities is engaging the attention of statesmen all the world over. The Bombay Industrial Relations Act sets up a machinery for the settlement of industrial disputes. It is a subject on which both the employer and the employee are vitally interested. The author of the Book under review has written a very useful and clear commentary on the Act which is sure to be of great help to the capitalist, labourer and trade unionist alike. A reading of the brief hints to employers and employees gives a connected account of their respective rights and obligations. It is a very useful publication both to labour and industrial organisations.

THE BOMBAY AGRICULTURAL DEBTOR'S RELIEF ACT, 1947, by K. A. Joshi, B.A., LL.B., Pleader. Published by Chandrakant Chimanlal Vora, Law Publishers and Law Booksellers, Gandhi Road, Ahmedabad. Pp. 484. Price Rs. 11.

The book under review is a commentary on the Bombay Agricultural Debtor's Relief Act, 1947 and contains apart from the rules made under the Act useful information regarding the Act, 1939. The exhaustive introduction gives to the reader a proper perspective to appreciate the legislation fully from the point of view of both the creditor and debtor. The commentary is clear and lucid and is dealt with under different topical heads. A copious index enhances the value and usefulness of the book.

THE MYSORE HOUSE RENT CONTROL ACT, by V. L. Narasimha Moorthy, B.A., (Hons.) LL.B., Advocate, High Court of Mysore, Bangalore. Published by the Hosali Press, 1-A, South Parade, Bangalore, Pp. 58.

This small booklet apart from giving a commentary on the Mysore House Rent Control Order, 1945, gives in the appendix, the previous control orders as also certain relevant notifications, and an important ruling of the Mysore High Court as a supplement. It is a handy pamphlet giving useful information.

THE LAW OF DEFAMATION BY ABDUL HALIM, B.A., LL.B., Pleader, second edition. Published by S. L. Kharbanda & Co., Law Booksellers and Publishers, 22, Kutchery Road, Lucknow. Pp. 198, Price Rs. 5.

The law of defamation is comparatively in its infancy in India and an ordinary citizen is not as conscious of his rights as the citizen in Europe or in America. But in the days ahead of us, the law of defamation is likely to be more often referred to than in the past. The book under review would give a fairly good idea of the law on the subject and the relevant case law. Though it can by no means be called an exhaustive treatise on the subject, yet is quite enough for giving one a general knowledge of the subject.

BOOK REVIEWS.

MEDICAL JURISPRUDENCE, by M. A. Kamath, M.B.C.M. Fifth edition, 1948. Published by the Madras Law Journal Office, Madras. Price Rs. 10.

This is the fifth edition of the work, the first edition having come out as early as 1923. This fact by itself is proof of the usefulness of the publication to students in the medical profession and young practitioners in the legal field. Dr. Kamath has incorporated into this edition much new material and has added many more illustrative cases to explain his propositions. Written in easy and non-pedantic language, the book is bound to prove helpful for beginners in the Indian Medical Jurisprudence.

N. Chandrasekara Iyer.

LABOUR CODE, Vol. I, containing The Bombay Industrial Relations Act and The Industrial Disputes Act (Central) by Bhatt and Vyas, Pleaders. Published by Chandrakant Chimanlal Vora, Law Publishers, Gandhi Road, Ahmedabad. Pages 198.

The publishers have an ambitious scheme for the publication of all the relevant legislation in regard to labour and the book under review is Vol. I of the series and deals mainly with the Bombay Industrial Relations Act. The commentaries to the various sections are analytical and full while the implications made by the various changes in the Act have been clearly brought out. We await with interest the further volumes of this useful publication.

GUIDE TO THE LAW OF COURT-FEES IN MADRAS, by K. Krishnamurthi, Court-fee Examiner, High Court, Madras and R. Mathrubutham, Advocate, High Court, Madras. Published by P. Varadachary & Co., 8 Linghi Chetti Street, Madras. Second Edition, 1948. Pages 194. Price Rs. 4.

The Court-fee payable by a litigant has been dealt with under the main headings of suits, appeals, applications and on miscellaneous documents. There is a detailed and analytical classification of the different kinds of suits together with an explanation as to their nature and the principles in regard to their valuation. While all relevant Madras decisions have been noticed, decisions of other High Courts have also been referred to where a discussion of the law is found necessary. As a practical guide to the ascertainment of the proper Court-fee payable, the book is invaluable. The method adopted in the treatment of the subject is so simple and direct as to enable anyone to ascertain what has to be paid as Court-fee in any particular matter. The Court-fees Act and the Suits Valuation Act have also been given in the Appendix. The usefulness of the book would, we are sure, be appreciated by everyone who takes an opportunity to refer to it.

THE CONSTITUTION OF THE DOMINION OF INDIA, by P. N. Murthy, B.A., LL.B., Registrar, Federal Court of India and K. V. Padmanabhan, M.A., LL.B., Under-Secretary, Constituent Assembly of India. Published by B. Vira Gupta for Metropolitan Book Company, 1 Faiz Bazar, Delhi. Pages 328. Price Rs. 6-12-0.

The Book under review is a very useful collection of all the relevant statutory material of the Constitution of India soon after the passing of the Indian Independence Act. The introduction to the book gives a short and general idea as to the constitution both before and after 1935 as also a reference to the theory and practice of Dominion Autonomy as developed in recent times. Naturally enough, there is a comparison of the Statute of Westminster and the Indian Independence Act followed by a detailed consideration of the provisions of the latter Act.

FEDERAL COURT PRACTICE AND PROCEDURE, by K. V. Padmanabhan, M.A., LL.B., Under-Secretary, Constituent Assembly of India, published by B. Vira Gupta for the Metropolitan Book Company 1 Faiz Bazar, Delhi. Pages 152.

With the prospect of increase in the work of the Federal Court, the necessity for a comprehensive collection of the Federal Court Rules is obvious. Apart from

a valuable introduction and the text of the rules of the Federal Court, the relevant statutory provisions have also been given in a separate part of the book. The book under review supplies a really longfelt want and has to be welcomed as a useful and timely publication.

A TEXT BOOK OF EQUITY, by D. Bose, M.A., B.L. Published by P. K. Basu, Second edition, 1948. Pages 354. Price Rs. 6.

As the author mentions in the preface to the second edition, the book under review might well have been named "Equity in England and India". While explaining the principles of equity as understood and applied in England, the corresponding law in regard to India is given side by side in the footnotes. It enables the reader to acquire a comparative and comprehensive knowledge of the subject. The whole subject has been dealt with under well recognised headings and in a clear and analytical manner. The twelve maxims of equity one or other of which practically underlies every doctrine of equity are fully explained in an early chapter. Trusts are dealt with exhaustively and the chapters in equitable reliefs and remedies give all the necessary information on the subject.

LAW OF DEFAMATION AND MALICIOUS PROSECUTION, by Dhirendra Nath Guha, M.A., B.L. Published by S. K. Guha, Eastern Law House, Ltd., P. 13, Ganesh Chandra Avenue, Calcutta, Second Edition, 1948. Pages 269. Price Rs. 4.

Two special classes of torts are dealt with in the book under review fully and exhaustively. After explaining the general principles, slander and libel are dealt with separately and the facts to be proved by a plaintiff have been clearly analysed in a separate chapter as also the defences to the action for libel like justification, privilege and fair comment and cases of qualified privilege, and the remedies available. Malicious prosecution has been dealt with in the same systematic manner. It is a useful book elucidating the salient principles governing the law on the two subjects concerned.

THE INDIAN CONTRACT ACT, Vol. II, by G. N. Sinha, B.A., B.L., Advocate, High Court, Patna. Published by the author, 31, D. R. N. C. Chatterjee Road, Bhagalpur. Pages 772. Price Rs. 20.

The second volume of this very useful and exhaustive publication is sure to be welcomed by everyone who has had any occasion to refer to the earlier volume. The volume under review deals with sections 51 to 75 of the Act and the commentary and review of the relevant case law is both lucid and analytical. All the features which we noticed with reference to the first volume are maintained and we are sure that the with the publication of the last volume, the whole work will take an honoured place in the library of every lawyer.

THE FACTORIES ACT, by M. L. Kharbanda, B. COM., LL.B., 1948. Published by the Law Publishing House, 33, Sheo Charan Lal Road, Allahabad. Pages 111. Price Rs. 5.

This small and handy book contains not only the commentary on the Factories Act but also the Boilers Act, Payment of Wages Act, Children (Pledging of Labour) Act, Employers Liability Act and Employment of Children Act with Short Notes. In fact it contains all the relevant factory legislation and is bound to be useful to both the employer and employee. The explanatory notes are clear and concise.

THE WORKMEN'S COMPENSATION ACT, by M. L. Kharbanda, B. COM., LL.B. Published by the Law Publishing House, 33 Sheo Charan Lal Road, Allahabad. Pages 67. Price Rs. 3.

In these days when labour is becoming conscious of its rights, the subject of Workmen's Compensation becomes important and the Act together with a com-

mentary will always be found useful for ready reference. The cases bearing on the subject though not voluminous, have been noticed in their appropriate places and enhances the value of the book.

SUCCESSION CERTIFICATES, PRINCIPLES AND PRECEDENTS, by Y. Ch. Rama Sarma, B.A., B.L. Published by the author. Pages 142. Price Rs. 3.

The law relating to Succession Certificates has been dealt with in the book under review under clear and understandable topical headings and in the beginning of each chapter a synopsis of the different topics dealt with in it is given. One is able to know at a glance the scope and contents of the particular heading. The principles are clearly set out and relevant statutory provisions noticed. The appendix contains not only parts VIII, X and XI of the Succession Act but also the Rules from the Civil Rules of Practice bearing on the subject and the forms.

THE BOMBAY RENTS, HOTELS AND LODGING HOUSE RATES CONTROL ACT, by R. E. Audhyarujina, B.A., LL.B., Advocate, Bombay, 1948. Published by the New Book Company, 188/190, Hornby Road. Pages 224. Price Rs. 8-8.

Ever since and during the last war the acute shortage in housing accommodation has made it necessary for the various Provincial Legislatures to enact measures for the control of rents and the prevention of ejectment. The tenant and landlord have each to know his own rights and obligations under the law. The book under review contains the law in regard to rent and ejectment suits, though it is to be found in the shape of a commentary to the various sections of the Act. As remarked in the foreword by Mr. Justice Bhagwati the commentaries "contain a lucid and comprehensive exposition of the provisions of the Act and the principles underlying the same amply illustrated by the case law on the subject."
